A GUIDE TO EXISTING USE RIGHTS

What is an 'existing use'?

The purpose of "existing use" provisions in town planning legislation is to allow the continuation of a use of land which was permitted immediately prior to the passing of a new town planning instrument whose effect is to prohibit that use either wholly, partly or upon conditions.

The rationale of the saving provisions pertaining to existing use is the prevention of an unjust result where enforced compliance with a new prohibiting instrument would deprive a land-owner of the right to use his land for an purpose which was lawful prior to the change. Under this broad concept, not all prior uses affected by newly enacted town planning instruments will necessarily be deemed to be an 'existing use' and the courts, in conjunction with town planning legislation, have laid the framework for determining what constitutes an existing use.

(McHugh JA, *Royal Agricultural Society of NSW v Sydney City Council* (1987) 61 LGRA 305).

Statutory definition of existing use

Existing uses are described in section 106 of the *Environmental Planning and Assessment Act* 1979 (**the Act**) as uses of buildings, works or land which are lawfully commenced, but, by reason of an Environmental Planning Instrument (**EPI**) coming into force, are thereafter prohibited and rendered unlawful.

Existing use rights include those uses for which development consent was granted prior to the EPI coming into force, and have been carried out within a year of its commencement "to such extent as to ensure (apart from that provision) that the consent would not lapse" (s 106(b)).

In other words, if there has been a continuing lawful use of the building, works or land prior to the operation of the new EPI, the owner of the affected land need not make a Development Application in order to 'legitimize' the continuation of that use in some sort of *ex post facto* process.

This situation may be different if the owner of the affected land wishes to effect *substantial* changes to the building, works or land (for example, to carry out alterations or extensions). In such cases, this will require Development Consent on the basis that the use is permissible by reason of the existing use.

Other types of existing use

In addition to 'existing use' rights, the Act also recognizes 'continuous lawful uses' as another species of existing use – these are described in s 109 of the Act as uses of buildings, works or land that have been lawfully commenced *without a consent* but by reason of a subsequent EPI coming into force, *require a consent to be obtained* in order to continue that use. The use must have been in effect immediately before the new EPI came into force.

What rights attach to an existing use?

Theoretically, where existing use rights arise the owner of the affected land may apply for that use to be "enlarged, expanded or intensified" (s 108(1)(c) of the Act; cls 41 and 42 of the *Environmental Planning and Assessment Regulation* 2000). However, as authorities demonstrate, such enlargement, expansion or intensification must not result in a change of the particular (and specific) use being asserted.

See, for example, *Botany Bay City Council v Parangool Pty Ltd* [2009] NSWLEC 198, discussed in '**Characterizing an Existing Use – Case Authorities**' below.

Basic examples of an existing use

The following is a simple example of an existing use right:

> In 1990, development consent was granted in respect of a lot for a childcare centre under the *Rockdale Local Environmental Plan* 2000, in a B4 mixed use zone. Historical records show that the land was used as a childcare centre continuously since consent was granted.
>
> In 2016 the new *Rockdale Local Environmental Plan* 2016 came into force, having the effect of rezoning the land IN2 light industrial. Under the permissible uses in zone IN2, child care centres are prohibited.
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> Prior to the new LEP coming into force, the owners of the childcare centre had planned to expand the childcare centre building and for which Development Consent must be sought.
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> Notwithstanding the prohibition in the new LEP, the childcare centre was an existing use within the meaning of s 106 of the EPA Act, therefore Development Consent can still be sought to expand the centre in these circumstances.
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> The key to determining whether a use is an 'existing use' under the Act is to establish whether or not the use is legally valid. Legal validity of the use arises from the Development Consent which granted the use, or by a lawful existing use right established through other historical records.

Can an existing use be lost or forfeited?

The answer is yes. Under s 107 of the Act, an existing use will presumed to be abandoned if it "ceases to be actually so used for a continuous period of 12 months."

In such cases, the party usually responsible for making the allegation that a use has been abandoned will be the Local Council, most commonly when it receives a Development Application which asserts an existing use right, or in response to a complaint received from a third party (eg. neighbours or environmental groups).

Given the legislative presumption in s 107 of the Act, the onus is on the person asserting the existing use right to prove that the use has not been abandoned. This is where historical records play a vital role in ensuring that an existing use can be

maintained where a doubt arises as to its continuous use for the mandated time period.

Applicants wishing to assert an existing use right typically resort to landowner or business operator records which demonstrate that there has been no break in the continuity of the use for 12 months or more immediately prior to the new EPI. In some cases this in itself will be a difficult task, particularly where the applicant is an incoming purchaser who was previously unaware of any potential issue of this kind.

What classes of evidence can be used to discharge the s 107 onus?

Records capable of demonstrating the applicant's assertion that has been no break in the continuity of the use for 12 months or more immediately prior to the new EPI are relevant, however independent records – particularly business records – are especially helpful in discharging the s 107 onus. The key to relevance in relation to such records is to consider whether or not the record in question is capable of showing the kinds of activities that were undertaken in respect of the affected land.

Some examples include:

- Past Development Applications and Consents in respect of the affected land
- Business records such as tax returns, payroll records, employee records, etc in respect of the business undertaken on the affected land
- Journal or appointment book entries from the business during the relevant time periods
- Invoices and receipts associated with the activity undertaken on the affected land during the relevant time periods
- Photographs, advertisements, correspondence illustrating the activity undertaken on the affected land during the relevant time periods
- Witness statements from prior and current proprietors and employees, and neighbouring business owners or residents who are capable of giving evidence about the activity undertaken on the affected land during the relevant time periods

Material dates

Establishing the material dates is crucial when considering the classes of evidence that may be available to an applicant when discharging the s 107 onus. So, what exactly are the material dates? These will include:

- The date at which an original Development Consent was given allowing the use (existing use) and
- The date at which the new EPI prohibiting the use came into effect (existing use)

- The date at which a lawful use commenced without consent (continuous existing use) and
- The date at which the new EPI prohibiting the use without consent came into effect (continuous existing use)

- The dates and duration of any known breaks in the continuity of the use since its original commencement

Characterising an existing use – key authorities

There are many authorities which deal with the question of the existing of an existing use in New South Wales. There are, however, certain key cases which clearly define statements of principal on the method of determining whether or not there is an existing use, and whether or not it ought continue to apply.

Royal Agricultural Society of NSW v Sydney City Council (1987) 61 LGRA 305

FACTS: In the Land and Environment Court, the Council of the City of Sydney successfully brought an application restraining the Royal Agricultural Society from holding open air amplified music concerts at Sydney Showground. His Honour Cripps J found that the applicable City of Sydney Planning Ordinance designated the use of the affected land as a 'showground' only - thus the use sought by the Society was not a lawful purpose to which existing use rights could attach. The Society appealed this decision.

In the Court of Appeal, McHugh J set out the principles applicable to the proper test of characterizing the purpose of the asserted existing use when that use is unclear or blurred due to the variety of activities carried out in conformity with the use.

McHugh J at 310:

> "Because "existing use" provisions are incompatible with the main objects of the legislation of which they form part, the courts have developed principles which reconcile the right of owners to have the full benefit of the existing use of land with the right of the local authority to enforce the conflicting objectives of town planning legislation.
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> The courts have done so by refusing to categorise an "existing use" so narrowly that natural changes in the method of using the land or carrying on a business or industry will render an existing use right valueless. At the same time, the courts have been concerned not to categorise the purpose of an existing use so widely that the land or premises could be used for a prohibited purpose which was not part of its use at the commencement of the legislation. Accordingly, a test has been devised which requires the purpose of the use of land to be described ***only at that level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on at the relevant date***.
>
> Thus the test is not so narrow that it requires characterisation of purpose in terms of the detailed activities, transactions or processes which have taken place. But it is not so general that the characterisation can embrace activities, transactions or processes which differ *in kind* from the use which the activities etc as a class have made of the land."

In determining the Society's appeal, the Court of Appeal found that the evidence did not show that there had been, at the relevant time, a history of regular use of the Showground for public entertainment in all its forms. That being so, consent to use the Showground for an open air amplified music concert required consent. Accordingly, the appeal against the original decision was unsuccessful.

Grace & Anor v Thomas Street Café Pty Ltd & Ors [2007] NSWCA 359

In determining whether or not a category of use exists at the certain point in time, the court balance the historical evolution of the particular method of operation associated with a category of use, as well as town planning purposes in respect of the affected land.

FACTS:

At first instance, Lloyd J of the Land and Environment Court dismissed Grace's application to restrain the owners of the Thomas Street Café in McMahon's Point from operating the premises as a café. The designated lawful use of the premises was as a "refreshment room" and the activities undertaken prior to the material date were use of the premises as a corner shop/milk bar which sold take away food. His Honour made findings that, at the material date, the manner of use had developed over time into a take away food business/café, such use being within the acceptable range of activities of a "refreshment room". (His Honour alternatively found that, even if there was no such single or dual use existing at the material date, a later Development Consent granted in respect of the Café amounted to a consent in respect of the use in any event).

The evidence as to the historical use of the premises upon which his Honour relied was primarily provided by former owners and residents of the area who deposed to their personal memories which seemed to indicate an evolution of use over time from a corner shop/milk bar, to a take away food business/café. Lloyd J found that the take away food component had been a significant use of the premises over time, and that the change in emphasis from a milk bar to a café was a natural change in the method of carrying on the business which did not ultimately disturb the continuity of the existing use as a "refreshment room".

The appellants argued that the evidence did not support any of these findings as to existing use/uses and that his Honour erred in his alternative finding that the Development Consent given in respect of the premises was an unlawful change of use.

As its starting point, the Court of Appeal cited the balancing exercise set out in *Royal Agricultural Society of NSW v Sydney City Council* (at 310) as the proper test to be applied when characterizing the use of affected land at a particular point in time.

Taking into account additional authorities, the Court of Appeal distilled the following principles:

- **Genus test:** Where the affected land is used for a multiplicity of activities and transactions of widely differing kinds, the task is to ascertain whether or not those activities belong to a particular genus or type which could properly be regarded as describing the purpose of the land. If no such genus or type can be determined, the affected land must be regarded as having multiple purposes, each of which must be characterized in accordance with the balancing exercise as a genus in its own right (at [60]).
- **Dominant / ancillary uses:** In the case of multiple purposes, the fact that one purpose may be dominant (or more significant) than another does not automatically lead to a conclusion that the less significant purpose loses its character as a distinct use – whether or not this results is a question of fact and degree taking into account all the circumstances of the case (at [78-79]).
- **Natural evolution of lawful use over time:** Where changes in the method (or manner) of operation of a particular use occur over time, this will not necessarily mean that there has been a change of use such that existing use

rights are lost. Such a conclusion will depend on the particular (as opposed to general) purpose for which the premises was being used at the material date as a factual matter (at [61]-[69]; [90]). For example, a particular purpose would be 'an office or shop', whereas a general purpose (for which planning law) is provided would be 'industry or light industry.'

- **Town planning purposes:** In determining whether a change in the manner of use constitutes a change of use entirely or merely a "development", town planning purposes are relevant to the characterization of the use such that environmental, community and social impacts relevant to town planning purposes are relevant considerations (at [91]).

On the characterization of use, the Court of Appeal found that the use of the premises as a milk bar with take away food was an entirely different use to that of a café, such that Lloyd J's characterization of both activities as falling within the classification of the use as a "refreshment room" was erroneous (at [92]). As an extension of this finding, the Court also found that the later Development Application was itself defective because it relied on presumed existing use rights which did not ultimately exist. The Development Consent granted was therefore not capable of changing the use of the premises as a "refreshment room" (at [124]). The Court of Appeal remitted the matter back to the Land & Environment Court.

Botany Bay City Council v Parangool Pty Ltd [2009] NSWLEC 198

Any development application in respect of an existing use ought be carefully worded to conform with the terms of the existing use, as particularly set out in the development consent which granted it. This case demonstrates how even a slight change in wording might have the effect of seeking a change of use rather than a continuance of the existing one.

FACTS:

This was an appeal heard by Lloyd J in the Land and Environmetn Court, brought by Botany Bay City Council in respect of a first instance decision by Commissioner Murrell to grant consent to Parangool Pty Ltd's Development Application for "occupation of existing warehouse building for general warehouse use." In the zone in which the premises stood, the use of the premises as a warehouse was prohibited and therefore Parangool relied on its alleged existing use rights as the basis for its application. Commissioner Murrell found that the premises had been lawfully used as a warehouse at a time when the Environmental Planning Instrument applicable to the affected land permitted the use as a warehouse or distribution centre. Of significance was the wording of the original consent which described the use of the existing warehouse as "for the warehousing/storage and distribution of alcoholic goods." That use was prohibited following the later rezoning of the affected land. The Council argued that the present Development Application describing the use of the premises as a general warehouse constituted a different use and therefore the Commissioner's decision to grant Development Consent on the basis of an existing use argument was erroneous in law.

On appeal, the respondent contended that the Commissioner had characterized the existing use as warehouse/storage of goods, and that the genus of that use was not limited specifically to alcoholic goods. Being a finding of fact, no error of law – as contended by the applicant – arose. In support of these contentions, the respondent relied upon the Court of Appeal's characterization of a "church" as a place of public worship rather than a premises specific to a particular religion by way of analogy to

the facts of the present case (*House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498).

In determining the appeal, Lloyd J did not accept the respondent's submission that characterization of the use of the premises belonged to a genus more general that was stated in the terms of the original Development Consent, which his Honour found formed the entire basis for the existing use now claimed by the respondent. His Honour relied on the decision of Court of Appeal in *Botany Bay City Council v Workmate Abrasives Pty Ltd* (2004) 138 LGERA 120 which held that the "genus" test was only relevant to characterization where no Consent had been granted in respect of the existing use. That being so, the work of s 106 of the Act was to protect the particular rights of use granted by the terms of a Development Consent which were words of limitation.

The appeal was upheld and costs were ordered against the respondent, Parangool.

City of Sydney v Wilson Parking Australia Pty Ltd [2015] NSWLEC 42

There may be situations where establishing an existing lawful use under s 109 at the time of an EPI requiring consent, in turn requires reliance on an existing use right under s 106.

FACTS:
Since September 2008, Wilson Parking had operated a fee-paying carpark for up to 15 cars on premises at the rear of 4-6 York St. The City of Sydney Council brought Class 4 proceedings in the Land and Environment Court seeking a declaration that the use of the premises as a carpark was unlawful, and an injunction preventing the continuation of the use of the land as a paid carpark.

Prior to the application, two successive Local Environmental Plans had prohibited its use as a carpark, the latter (2012 LEP) prohibited such use without consent. The Council argued that, since no such consent had been granted*, the use by Wilson of the premies as a car park was unlawful.

* This was despite Wilson Parking's two attempts to obtain consent in Class 1 proceedings prior to the Council's application. (A further issue – not summarized here - dealt with the Court's ability to enforce an undertaking given by Wilson Parking to the Council in the Class 1 proceedings).

In its defence, Wilson Parking asserted that its use of the premises as a car park was in fact an existing lawful purpose which was in effect immediately prior to the 2012 LEP requiring consent (s 109). The lawfulness of that purpose was itself established by an existing use of the premises as a carpark which, Wilson contended, stretched as far back as 1932 (a time prior to the introduction of planning controls). Therefore, the s109 lawful existing use was predicated on a s 107 existing use right. Or so the argument ran.

The onus was therefore upon to demonstrate that from 1932, the premises had been continuously used as a car park. The Court noted that "continuence of use" took into account interruptions or breaks, as opposed to a use which is freshly instituted during the relevant period or which is terminated or abandoned during the relevant period (at [90]).

In determining the proper characterisation of the relevant use of the premises as 'paid carparking', his Honour Beech-Jones set out the following five broad principles established by the authorities in respect of characterization (at [175]-[180]):

1. The process of characterization involves an enquiry into what, according to ordinary terminology, is the appropriate characterization of the purpose of the use and not by a meticulous examination of the details of processes or activities undertaken on the land.

2. The use referred to is not simply the activities undertaken on the land, but the purpose served by those activities.

3. Use is characterized liberally and is not confined to the precise activity on the land; rather, the test requires determining the *genus* and not the *species*. In making this determination, the purpose of an existing use should only be described at the level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on at the relevant date, but not so narrow that it requires characterization of purpose in terms of the detailed activities, transactions or processes that have taken place.

4. The use should not be described with reference to the relevant planning instrument, however attention should be given to the town planning purpose for which the planning instrument was made so that the impact of the use, on the neighbourhood can be taken into account.

5. The land may have more than one purpose, separately characterized. However is one purpose is subservient to (ie. dependent on, or ancilliary to) the other/s, then it is to be disregarded for characterization purposes.

The council submitted that the proper characterisation of the use of the premises was "paid carparking". Wilson contended that it was the more general "carparking".

The problem with each of these contentions was that in the pre-planning instrument use of the premises (1934 to 1942) there existed no requirement to draw any distinction of categories of car parking. With the introduction of planning instructions applicable to the premises in the following periods, however, carparking was defined in terms of various distinctions, such as tenanted car parking, public car parking, etc. Therefore the distinction was necessary in the present characterization of the use of the premises.

Ultimately, the court found that the premises has been used as non-dedicated car park which, after the 2012 LEP came into force, was unlawful. No existing use rights existed immediately prior to the 2012 LEP, since the whole of the area eventually used by Wilson for parking was in fact a combination of two separate premises (making use of the roof of the adjoining building) to which Wilson had no unregulated entitlement of use.

Wilson's defence therefore failed to convince the court and orders were made restraining the use and advertisement of the site as a car park.

Conclusion

So, what is the moral of this story?

Given the development of authorities in relation to the characterization of existing uses, it seems clear that where the original expression of an existing use in terms particular to the activity to be undertaken in respect of that use (for example, in a Development Consent in which it was granted), there is little prospect of the court taking a too liberal approach to its characterization in order to allow the applicant to apply the use in a way which is more general than originally expressed. For this reason, the utility of existing use rights is necessarily limited, unless the applicant has been fortunate in obtaining a Development Consent which grants a use in broad or general terms.

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August 2016