

Existing Use Rights

Presentation to EDAP

11 April 2024

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Introduction

- What are existing use rights
- Recent cases relating to existing use rights
- Practical considerations

Concept of existing use rights

Section 4.65 of the *EPA Act* defines an 'existing use' to mean:

*In this Division, **existing use** means—*

(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use, and

(b) the use of a building, work or land—

(i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and

(ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse

Management of existing use rights

- Operative provision is contained within s 4.66(1) of the EPA Act which states:

4.66 Continuance of and limitations on existing use

(cf previous s 107)

(1) Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.

Limitations - s 4.66(2)

- Continuation of an existing use does not encompass the circumstances listed in s 4.66(2) of the EPA Act.
- These provide limitations on the use post the date of the prohibition.
- Existing use rights are “frozen” at two dates:
 - When planning control first prohibited such use (either absolutely or subject to consent); and
 - Their scope/intensity when the EPA Act was amended to require consent with respect to extension or enlargement

Recent cases

- [Blues Points Hotel Property Pty Ltd v North Sydney Council \[2021\] NSWLEC 27](#)

- The facts in this case concerned a pub/hotel which had operated since 1938. The use of the building as a pub/hotel was prohibited by the North Sydney Planning Ordinance in April 1963, triggering existing use rights for the premises from that time onwards.
- In 2017, Council issued a Development Control Order ordering the Applicants to cease operations on an “outdoor terrace.” The Applicants argued that the existing use rights applied to the outdoor terrace.
- Case related to s 4.66(2)(b) of the EPA Act which states:
 - Nothing in subsection 1 authorises*
 - (b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned,*
- Justice Duggan held that the Applicant’s must establish that the outdoor terrace was actually physically and lawfully used for more than a roof.

Recent cases

- [Blues Points Hotel Property Pty Ltd v North Sydney Council \[2021\] NSWLEC 27](#)
- Her Honour held that the evidence demonstrated that the outdoor terrace was intended to be accessible, this was evidenced by the provision of a door and covering of the door by an awning. Outdoor terrace was also enclosed by a parapet, which could prevent people accidentally falling from the area.
- These physical elements together with the plan reference of the area “or Sun Deck” indicated the area was lawfully able to be used for the purpose of a sundeck.
- However merely because there was such a capacity of use did not amount to that area of the building actually physically being used.
- In summary, this case demonstrates the importance of providing evidence of actual, physical use when asserting existing use rights.

Recent cases

- [Agostino v Penrith City Council \[2022\] NSWLEC 1258](#)

- This case concerned a development application for alterations and additions to a fruit and vegetable store as well as the use of an existing shed for storage. The store operated under existing use rights (arising from a number of consents), as fruit and vegetable stores were a prohibited use on the land.
- The Council objected to the use of the existing farm shed and argued that this would constitute an impermissible enlargement or expansion of the existing use.
- The central issue was whether the development application satisfied cl 41 and cl 42 of the *EPA Regulation* which provide that development can only be carried out on the land on which the existing use was carried out immediately before the relevant date. Therefore, the Court had to determine the precise land covered by the existing use rights.
- The Applicant submitted that the unit of land included the entire site **[at 56]**. Council argued that the unit of land was only part of the site, which had been subject to earlier development consents and did not include the shed **[at 60 - 65]**.

Recent cases

- [Agostino v Penrith City Council \[2022\] NSWLEC 1258](#)

- Clause 42 of Regulation – development consent required for enlargement, expansion and intensification of existing use
- Clause 43 of Regulation – development consent required for alteration or extension of building and works
- As there was a consent in this case, the relevant date (for the purposes of the definition in clause 39) was when the building was first erected/used.

Recent cases

[Agostino v Penrith City Council \[2022\] NSWLEC 1258](#)

- Ultimately, the Court found that the existing use rights did not apply to the entire site. Gray C held that the fact that the whole of the deposited plan allotment had been referred to in the determination of earlier consents did not establish that the entire site was land to which the existing use applied **[at 71]**. Notably, earlier consents for a farm shed authorised use of the shed itself and not a fruit or vegetable store. Likewise, use of the dwelling house and other horticultural facilities were separate uses **[72-73]**. The development consent was partially granted and the use of the shed for storage was refused.
- This decision further highlights the importance of accurately identifying the land covered by existing use rights and serves as an example of their application in cases involving historical development consents.

Practical considerations

- Compliance related matters where alleged unauthorised use
- Submission of applications to the Council where reliance by Applicant on EUR
- Onus is on applicant to demonstrate EUR
- Council can request further information or contend in LEC proceedings insufficient information to be satisfied EUR exists.

QUESTIONS

