

EXISTING USE RIGHTS - FURTHER AMENDMENTS

On 29 March 2006 the New South Wales State Government introduced amendments to the Environmental Planning & Assessment Regulation 2000 ("EP&A Regulation") imposing restrictions on Existing Use Rights.

Those amendments potentially have wide implications for owners of properties enjoying Existing Use Rights. In particular the amendments impacted upon the ability to change from one prohibited use to another prohibited use and, as a consequence, to take advantage of commercial opportunities.



"Existing Use Rights"

Section 106 of the Environmental Planning & Assessment Act 1979 ("EP&A Act") defines existing use of a building, work or land as a use that is lawfully commenced but subsequently becomes a prohibited use after a change to an Environmental Planning Instrument ("EPI").

Prior to the amendments of March 2006, where a use either is lawful before changes to an EPI (because it is not prohibited) or becomes lawful prior to those changes (because of, for instance, a development consent being obtained), that use was protected under the provisions of sections 106 to 109 of the EP&A Act. Further, such uses could be modified or changed to other prohibited uses or altered and extended or expanded and intensified. The retrospective changes made last year, adversely impact upon the benefits enjoyed by properties which had existing use rights by providing that:

- (i) an existing use could no longer be changed to another prohibited use (unless the zoning is also changed to permit that use);

- (ii) an existing use could only be changed to another use provided the proposed use is permissible.

Further Amendments

The State Government has made further amendments to the provisions of the EP&A Regulation which it considers to be minor in nature. The changes are required to clarify and provide greater flexibility to the Existing Use Rights provisions under the Regulations. There are two main areas of clarification.

Implementation of Consents

As a result of developers not being able to change an existing use to another prohibited use, developers have found that they have been prevented from making an application to implement consents (such as subdivisions or in respect of staged consents for building that relied on Existing Use Rights). Similar issues have arisen in respect of applications for fitouts and the like to give effect to a consent that relied on Existing Use Rights established as a result of the transitional provisions introduced in March 2006.

These unintentional results of the amendments to the legislation now require further transitional provisions. This is to allow development applications to be lodged even if the application is for a prohibited use where the application is essentially to implement a consent which had already been issued as a result of the 29 March 2006 amendments.

The effect of these further transitional provisions is that where an application for development consent in respect of an existing use is:

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- (a) made before the amending Regulation; or
- (b) made on or after 29 March 2006 that relates to:
 - (i) a use of a building, work or land which is as a consequence of a development consent for subdivision; or
 - (ii) the internal fit out, landscaping or other related development of a building, work or land also consequent upon a development consent relating to the building, work or land that was granted;

such applications are unaffected by the March 2006 amendments.

Minor Alterations and Additions

Developers have also found that development applications were being rejected in respect of commercial premises where there are changes in tenants and the proposed new use is not identical with the previous use. It appears that even in the event of minimal or no environmental impacts of such changes, applications are being rejected as such applications have been considered to be a change in use rather than alteration to an existing prohibited use.

The EP&A Regulation will allow owners of certain commercial or light industrial premises that enjoy existing non-conforming uses to change the use to another non-conforming use provided that:

- (i) The change in use involves only minor alterations or additions and will not increase the existing floor space by more than 10% or involve a significant intensification of the existing use or rebuilding of the premises; and
- (ii) It relates only to premises with a floor space less than 1,000 square metres.

The Regulation defines "commercial use" to mean the use of the building, work or land for the purposes of office premises, business premises or retail premises (as those terms are defined within the Standard Instrument (Local Environment Plans) Order 2006). "Light Industrial" means the use of a building work on land for the purpose of light industry as defined in the same Order.

Effective Date

The further amendments to the Environmental Planning & Assessment Amendment (Existing Use) Regulation 2007 were gazetted on 9 February 2007.

Impact of the Further Changes

The anomalies identified and dealt with by the further amendments have addressed some of the primary concerns that have been raised. It is likely that further anomalies will be discovered in the course of time by developers. In any event the full impact of the amendments have not yet been fully explored.

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