



PLANNING SYSTEM

Act and Regulation changes

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| Circular | PS 06-007 |
| Issued | 31 March 2006 |
| Related | |

Changes to existing use rights

This circular is to advise of changes to the Environmental Planning and Assessment Regulation 2000 regarding existing use rights.

Introduction

On Wednesday, 29 March 2006, the NSW Government gazetted the Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006, which changes existing use rights regarding the ongoing development and use of land.

What is meant by 'existing use'

An existing use (defined in section 106 of the *Environmental Planning and Assessment Act 1979*) (EP&A Act) is a use that is lawfully commenced but subsequently becomes a prohibited use under a new local environmental plan (LEP) or other environmental planning instrument (EPI). The EP&A Act and the EP&A Regulation 2000 makes provisions for the continuance of existing uses.

Purpose of existing use rights

The existing use provisions aim to balance the potential hardship and dislocation that could result if landowners or occupiers were required to discontinue uses no longer permitted under current planning controls, against the need to transition to the new and preferred planning regime for the area.

For example: an existing factory is permitted to continue operating (and, if appropriate, expand its operation) even though the site and surrounding areas may have been rezoned for residential purposes only under a new LEP.

Existing use rights provide for the continuation of previous rights to operate the same use on the parcel of land.

Purpose of the amendment

With councils now being required to review their LEPs within the next five years consistent with the Standard Instrument for LEPs, it is expected that throughout NSW the number of developments

with existing use rights will grow as the overall number of zones are reduced and zoning provisions are updated. This could potentially undermine the benefits from the planning system reforms if the EP&A Regulation continued to permit existing uses to be changed to other prohibited uses.

The EP&A Amendment (Existing Uses) Regulation 2006 amends the EP&A Regulation so that:

- an existing use can no longer be changed to another prohibited use (unless the zoning is also changed to permit that use)
- an existing use can be changed to a use that is permissible.

Transitional arrangements

The savings and transitional provisions in the amending Regulation provide that the amendment applies to existing uses regardless of when they commenced, i.e. whether or not the existing use existed before or after the Regulation change. The savings and transitional provisions also provide that the amendment does not affect applications for development consent in respect of an existing use that were made before the commencement of the Regulation (or any subsequent certification required for those proposals).

Guidelines

The Department will be issuing guidelines shortly on the consideration of existing use when developing new LEP provisions, and for the assessment and approval of proposals with existing use rights.

Where feasible, councils will be encouraged to identify development that would have existing use rights and include 'permitted additional uses' on that land in their LEP, so that the land use is no longer prohibited (in effect, remove existing use rights).

Further information

Attached is a copy of the Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006 as gazetted.

Copies of the relevant legislation, including the Environmental Planning and Assessment Regulation 2000 (as amended) and the *Environmental Planning and Assessment Act 1979* are available on the Parliamentary Counsel Office's website at www.legislation.nsw.gov.au (see 'Browse A to Z in force').

Note: This and other Planning Circulars issued by the Department are published on the web at www.planning.nsw.gov.au/planningsystem/practicenotes.asp.

Authorised by:

Sam Haddad
Director General

Important note

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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SPECIAL SUPPLEMENT



New South Wales

Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006

under the

Environmental Planning and Assessment Act 1979

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Environmental Planning and Assessment Act 1979*.

FRANK SARTOR, M.P.,
Minister for Planning

Explanatory note

The object of this Regulation is to amend the *Environmental Planning and Assessment Regulation 2000*:

- (a) to enable an existing use, as defined by section 106 of the *Environmental Planning and Assessment Act 1979*, to be changed only to a use that may be carried out with or without development consent under the Act and not also to a prohibited use, and
- (b) to remove a provision that takes a use to which an existing use is changed to be itself an existing use for the purposes of the Act.

The amendments apply to an existing use regardless of whether the use was existing before the commencement of the amendments or not. However, they do not affect applications for development consent in respect of an existing use that have been made before that commencement.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 108 and 157 (the general regulation-making power).

Clause 1 Environmental Planning and Assessment Amendment (Existing Uses)
 Regulation 2006

Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006

under the

Environmental Planning and Assessment Act 1979

1 Name of Regulation

This Regulation is the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006*.

2 Amendment of Environmental Planning and Assessment Regulation 2000

The *Environmental Planning and Assessment Regulation 2000* is amended as set out in Schedule 1.

Environmental Planning and Assessment Amendment (Existing Uses)
Regulation 2006

Amendments

Schedule 1

Schedule 1 Amendments

(Clause 3)

[1] Clause 39 Definitions

Omit the definition of *changed existing use*.

[2] Clause 41 Certain development allowed

Omit “including a use that would otherwise be prohibited” from clause 41 (1).

Insert instead “but only if that other use is a use that may be carried out with or without development consent”.

[3] Clause 41 (2)

Omit the subclause.

[4] Clauses 42, 43 and 44

Omit “, or for a changed existing use, but” wherever occurring.

Insert instead “and”.

[5] Clause 286D

Insert after clause 286C:

286D Savings and transitional provisions: existing uses

- (1) Subject to subclause (2), the amendments to this Regulation made by the amending Regulation extend to and in respect of an existing use that was an existing use before the commencement of the amending Regulation (including a use that was taken to be an existing use for the purposes of the Act).

Note. Before the commencement of the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006* clause 41 of this Regulation enabled an existing use to be changed to, among other uses, a use that would otherwise be prohibited under the Act and provided that a use to which an existing use was changed was itself taken to be an existing use.

- (2) The amendments to this Regulation made by the amending Regulation do not affect any:
- (a) application for development consent in respect of an existing use made before the commencement of the amending Regulation, or
 - (b) a development consent or complying development certificate arising from an application referred to in paragraph (a), or

Environmental Planning and Assessment Amendment (Existing Uses)
Regulation 2006

Schedule 1 Amendments

- (c) an application for a construction certificate or occupation certificate that is made in relation to a development carried out under the authority of a development consent or complying development certificate arising from an application referred to in paragraph (a).
- (3) In this clause, **amending Regulation** means the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006*.