

Land Use Existing Use Rights

1. Background

This fact sheet has been prepared to assist landowners or business operators that are potentially affected by land zoning changes in the new Lismore Local Environment Plan (LEP) to understand existing use rights and how they can be properly managed.

2. What are existing use rights?

The provisions of the *Environmental Planning and Assessment Act 1979* acknowledge that there will be circumstances where land uses have commenced lawfully, and a subsequent change in planning legislation has the potential to restrict how that use may be conducted into the future. These provisions will generally fall into one of the following categories:

“existing uses” where a use is lawfully commenced and a subsequent law (e.g. LEP, SEPP) makes that use prohibited; or

“continuing use” where a use is lawfully commenced without consent and a subsequent law (e.g. LEP, SEPP) requires consent to be obtained for that use.

The provisions of the *Environmental Planning and Assessment Act 1979* allow existing/continuing uses to continue operating without the need for further approval to be obtained from Council, provided that the nature of the use remains the same as that which existed at the date the new LEP comes into effect.

If a person is conducting an existing/continuing use on a property, and wishes to undertake:

- (a) any alteration or extension to or rebuilding of a building or work; or
- (b) increase the area of the use; or
- (c) any enlargement or expansion or intensification of the use;

then prior development consent from Council will be required. Obtaining approvals in these circumstances can become complicated, and it is recommended that you obtain advice from Council or a consultant to ensure that you are properly prepared.

3. Can existing/continuing use rights lapse?

If a person ceases undertaking an existing/continuing use on affected land for more than 12 months, it is generally considered that the specific use has been abandoned, and the existing/continuing use rights would no longer apply to the land concerned. There are records that should be kept by landowners or business operators that intend relying on existing/continuing use rights in order to respond to any allegation or assertion that existing/continuing use rights applying to particular have been abandoned. Examples of such records would include:

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- Receipts relating to operations on the affected lands;
- Diary or written records of activities undertaken on, or in relation to, the affected property;
- Details of employees/contractors who have been engaged in activities on, or in relation to the land;
- Notes of discussions with neighbours regarding the historical use of the property.

If a landowner asserts in response to an allegation that uses have been abandoned

In responding to any allegation that existing/continuing land uses have been abandoned or no longer apply to particular land, the onus is upon the owner of the land concerned to establish relevant facts demonstrating that particular uses have not been abandoned, including documentary evidence referred to above, to enable resolution of the matter.

In the event of any dispute regarding existing/continuing land use arising, prior to taking any enforcement action, the onus would be upon Council to obtain evidence to support any assumption that the use has been abandoned.

4. How does Council deal with existing/continuing uses?

Council will generally only become involved in existing/continuing use rights matters where it receives a complaint regarding unlawful use, or a development application is lodged with Council for expansion as per item 2 above.

What Council will do	What Council will not do
<ul style="list-style-type: none"> • Investigate complaints about unlawful activity and assess DAs lodged with Council where existing/continuing use rights apply in accordance with the law. 	<ul style="list-style-type: none"> • Undertake routine/random/pre-arranged inspections of land likely to be subject to existing/ continuing use rights, unless we receive a complaint or DA, or there is an auditing program for the specific industry concerned (egg. quarries, poultry farms, manufacturing industries)
<ul style="list-style-type: none"> • If it is alleged that existing/ continuing use rights have been abandoned on affected lands, Council will provide you with an opportunity to respond prior to considering taking any formal action. 	<ul style="list-style-type: none"> • Take enforcement action to stop an existing/continuing use without providing an opportunity to demonstrate what activities have been undertaken in relation to the affected land.
<ul style="list-style-type: none"> • Retain records received relating to existing/continuing use rights for future reference purposes by any party. 	<ul style="list-style-type: none"> • Take enforcement action where there is a lack of evidence or facts to support an assertion that the historical use has been abandoned.
<ul style="list-style-type: none"> • Consider DAs lodged for expansion, intensification of existing/continuing on individual merit and in accordance with the relevant legislation and any assessment guidelines. 	

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5. As a landowner or business operator, what should I be doing?

Keeping records of activity relating to land that relies on existing/continuing use rights is the best way of being able to rebut any claim regarding the historical use of the land and preserve such rights.

6. Examples

Example 1

Development consent was issued for a vehicle repair station under Lismore LEP 2000 in a 2(f) Residential Flood Liable zone. The land is now zoned R2 Low Density Residential in Lismore LEP 2012, where vehicle repair stations are prohibited. Development consent can be sought to expand the vehicle repair station despite it being a prohibited use.

Example 2

In the Lismore LEP 2012, agriculture is prohibited in some zones and in particular the E2 Environmental Conservation Zone. However if the land is being utilised for an agricultural use (e.g. the grazing of livestock) prior to the making of the new LEP, and that use was permitted without consent or had development consent under the Lismore LEP 2000, then the farmer has a right to continue grazing without the need for a development application and approval. Development consent can also be sought to expand the grazing activity into other parts of the E2 zoned property that have not been used for that purpose before.

Example 3

Recreational boardwalks are defined as environmental facilities under Lismore LEP 2000 and such a use is permissible without consent in the 6(a) and 6(b) recreation zones. Under the New LEP development consent is required for environmental facilities in all zones except RU3 Forestry. Development consent is not required for the continued use of the boardwalk. Development Consent would be required though to extend the boardwalk except in RU3 zones.

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7. Frequently Asked Questions

- Q. *Does a farmer that operates under existing use rights in the E2 zone require development consent to increase the number of cattle from 20 to 30?*
- A. No. Fluctuations in the number of stock is considered normal agricultural practice e.g. a farmer may sell 10 calves annually from a breeding herd of approximately 20 cows.
- Q. *Are existing use rights abandoned in the E2 zone if a farmer destocks a paddock for a period in excess of 12 months?*
- A. A farmer may “spell a paddock” for well in excess of 12 months as part of normal agricultural use e.g. pasture improvement, destock due to drought, flood, and contamination etc. In addition, grazing land use involves much more than just stocking a paddock. Fencing, slashing, fertilising, weed management, maintenance of farm shed, machinery, farm dam, water pumps and irrigation lines are all ancillary activities associated with grazing that support an intention to retain existing use rights. Again, it is recommended that a landowner keep documentary evidence of these types of ancillary grazing activities, especially if the paddock is destocked, in the unlikely event that an issue is ever raised.

Cropping land may also be left fallow for more than 12 months for various reasons e.g. pathogen control, rotation cycle, flood and drought etc. The ancillary activities associated with cropping are similar to those linked with grazing, and records should be kept in the unlikely event that an issue is ever raised

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