



PLANNING SYSTEM

Act and regulation changes

Circular	PS 07-004
Issued	12 February 2007
Related	PS 06-007

Minor amendments to existing use rights

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

Introduction

On 9 February 2007, the NSW Government gazetted the Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007, which clarifies the way existing use rights are dealt with in response to some issues that have arisen.

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 or other environmental planning instrument. The EP&A Act and the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) make provision 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.

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

Purpose of the amendment

Amendments were made to the existing use provisions in the EP&A Regulation on 29 March 2006 so that it was no longer possible to change from one prohibited use to another prohibited use without a rezoning. Transitional provisions provided for development applications (DAs) lodged prior to 29 March 2006 to continue to be processed.

Minor changes are now required to clarify and provide greater flexibility to the existing use rights provisions in the EP&A Regulation as a result of two issues.

Issue one

An issue has arisen where applicants have been prevented from lodging further applications to implement a subdivision consent or for the subsequent stages of a staged consent for a building that relied on the existing use rights established as a result of an approval granted prior to 29 March 2006. A similar issue has arisen where applicants have been prevented from lodging applications for fit-outs and detailed design to implement a consent that relied on existing use rights established as a result of the transitional provisions. Where a subdivision or development was approved prior to 29 March 2006 under the existing use rules at that date, it was not intended to prevent the proponent from completing that development.

As a result transitional provisions have been introduced to apply in these types of situations, to allow for a subsequent DA to be lodged even if this DA is for a prohibited use, where it is clear that the subsequent DA is required to implement a

consent issued prior to 29 March 2006. For example, where a subsequent DA is required for:

- the use of land and construction of buildings associated with a subdivision approved before 29 March 2006; or
- fit-outs or other works to implement a development approval issued before 29 March 2006 (whether required or not in the initial DA).

Issue two

Another issue has arisen for property owners of commercial premises with existing use rights (but where office, business or retail uses are now a prohibited use). Property owners reported that DAs were not being considered for fit-outs where there was a change of tenants and the proposed new use was not identical to the previous use.

Such changes were considered to be a change in use (prohibited under clause 41(d) of the EP&A Regulation) rather than an alteration to an existing prohibited use (permitted under clause 41(b) of the EP&A Regulation). This happened even if the change to the fit-out was minimal and there was little or no environmental impacts.

As a result an amendment has been made to clause 41 of the EP&A Regulation to allow owners of certain existing non-conforming uses to change uses to another non-conforming use but only where:

- the change of use involves only minor alterations and additions and does not increase the existing floor space by more than 10% or involve the enlargement, expansion or rebuilding of the premises; and

- it is a:
 - commercial use being changed to another commercial use (including a commercial use that would otherwise be prohibited under the EP&A Act); or
 - light industrial use being changed to another light industrial use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the EP&A Act).

For the purposes of the EP&A Regulation 'commercial use' means the use of a building, work or land for the purpose of office premises, business premises or retail premises (as those terms are defined in the Standard Instrument (Local Environmental Plans) Order 2006).

Further information

Attached is a copy of the Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007 as gazetted.

An updated copy of the Environmental Planning and Assessment Regulation 2000 is 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.

© State of New South Wales through the Department of Planning
www.planning.nsw.gov.au

Disclaimer: While every reasonable effort has been made to ensure that this document is correct at the time of publication, the State of New South Wales, its agencies and employees, disclaim any and all liability to any person in respect of anything or the consequences of anything done or omitted to be done in reliance upon the whole or any part of this document.

Regulations



New South Wales

Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007

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

This Regulation makes further amendments consequential to the amendments made by the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2006 (the 2006 amending Regulation)*.

The objects of this Regulation are:

- (a) to enable an existing use, as defined by section 106 of the *Environmental Planning and Assessment Act 1979 (the Act)*, to be changed:
 - (i) if it is a commercial use—to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or
 - (ii) if it is a light industrial use—to another light industrial use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the Act), and
- (b) to modify the savings and transitional arrangements relating to the amendments made by the 2006 amending Regulation.

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 2007

Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007

under the

Environmental Planning and Assessment Act 1979

1 Name of Regulation

This Regulation is the *Environmental Planning and Assessment Amendment (Existing Uses) Regulation 2007*.

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 2007

Amendments

Schedule 1

Schedule 1 Amendments

(Clause 2)

[1] Clause 41 Certain development allowed

Insert at the end of clause 41 (1) (d):

, or

- (e) if it is a commercial use—be changed to another commercial use (including a commercial use that would otherwise be prohibited under the Act), or
- (f) if it is a light industrial use—be changed to another light industrial use or a commercial use (including a light industrial use or commercial use that would otherwise be prohibited under the Act).

[2] Clause 41 (2) and (3)

Insert after clause 41 (1):

- (2) However, an existing use must not be changed under subclause (1) (e) or (f) unless that change:
 - (a) involves only alterations or additions that are minor in nature, and
 - (b) does not involve an increase of more than 10% in the floor space of the premises associated with the existing use, and
 - (c) does not involve the rebuilding of the premises associated with the existing use, and
 - (d) does not involve a significant intensification of that existing use, and
 - (e) relates only to premises that have a floor space of less than 1,000 square metres.
- (3) In this clause:

commercial use means the use of a building, work or land for the purpose of office premises, business premises or retail premises (as those terms are defined in the *Standard Instrument (Local Environmental Plans) Order 2006*).

light industrial use means the use of a building, work or land for the purpose of light industry (within the meaning of the *Standard Instrument (Local Environmental Plans) Order 2006*).

Environmental Planning and Assessment Amendment (Existing Uses)
Regulation 2007

Schedule 1 Amendments

[3] Clause 286D Savings and transitional provisions: existing uses

Omit clause 286D (2) (a). Insert instead:

- (a) application for development consent in respect of an existing use:
 - (i) made before the commencement of the amending Regulation, or
 - (ii) made on or after the commencement of the amending Regulation that relates to:
 - (A) the use of a building, work or land if that application arises from, or is consequential to, a development consent for subdivision that was granted before the commencement of the amending Regulation (or after that commencement by virtue of the operation of this clause), or
 - (B) the internal fitout, landscaping or other related development of a building, work or land if that application arises from, or is consequential to, a development consent relating to the building, work or land that was granted before the commencement of the amending Regulation (or after that commencement by virtue of the operation of this clause), or