



Fact Sheet 3 - E Zones

Existing Use Rights

Overview

- Existing use rights are safeguarded under legislation.
- Development consent is not required to continue a lawful use that existed prior to the new planning controls coming into force, which now prohibit that use.
- Consent can be sought to expand an existing use even though it may be prohibited under a new local environmental plan zone.

Purpose of existing use rights

When planning controls change, land owners are often concerned it may affect their rights to use their land in the same manner that they always have. To ensure that landowners are protected, existing use rights are legislated under the *Environmental Planning and Assessment Act 1979* (EPA Act). The existing use right provisions aim to eliminate the potential hardship and dislocation that could result if landowners or occupiers were required to stop uses no longer permitted under new planning controls.

What is an “existing use”?

An existing use (defined in section 106 of the EPA Act) is a use that has been lawfully commenced but subsequently becomes a prohibited use under a new local environmental plan (LEP). The EPA Act and Regulation make provisions for the continuance of existing uses by allowing such uses to continue operating without the need to obtain further approval 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.

Will existing use rights always apply?

Not always. An existing use right only applies if the relevant land use was one that was lawfully commenced with consent (if consent was required under the previous LEP) or it was a lawful use which did not require consent under the previous

planning provisions. This means that a land use, which did not comply with the previous planning provisions at the time the new LEP provisions prohibiting the use came into force, would not be protected as an ‘existing use’.

If my land is rezoned and my current use is now prohibited, what should I do?

You don’t need to do anything. If the current use has been legally permitted through an existing development consent or is a lawful existing use right, the use may continue even though it is no longer permitted under the new LEP. That is, the new planning controls cannot prevent the existing use from continuing into the future.

What happens if I stop the use for a period of 12 months or more?

Should the use stop for a continuous period of 12 months or more the existing use rights are lost, or said to be “abandoned”. However, where there has been a necessary break in the physical use of the land for a period of 12 months or more, this does not mean the use has been abandoned. For example, where a farm has been left fallow or de-stocked due to drought for a period of 12 months or more, it does not mean the agricultural use has been abandoned if the property was then re-worked or restocked following rains.

There may be other circumstances where a break in the physical use of the land for more than 12 months is required. If there is any confusion about your existing use rights, you should obtain advice from Council or a planning consultant.

Example of Existing Use Rights

In the proposed *E2 Environmental Conservation Zone*, extensive agricultural activities are permitted with consent. However, if the land is currently being utilised for an agriculture use (e.g. the grazing of livestock) prior to the land being rezoned as E2, and that use was permitted without consent or had existing development consent

under the *Byron LEP 1988*, then the farmer has a right to continue that use without the need for approval. Development consent can also be sought to expand the grazing activity onto other parts of the property zoned as E2, even if those parts had not previously been used for grazing.

Existing Use Rights FAQ's

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. 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 such as 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.

Further information

For further information on E Zones within Byron Shire, please refer to Council's website: www.byron.nsw.gov.au/environmental-zones

