

> Existing Use Rights

Fact Sheet

When putting together an application for a planning permit, you may realise your property is being used in a way that is not permitted according to the current zoning that applies to your area. For example, there are many pubs located in areas zoned residential which prohibits some licensed venues.

In most cases, this is legal because the property has existed prior to the current Planning Scheme (having existing use rights). This means that the use of the property can continue even though the current zoning prohibits it.

This fact sheet aims to provide a clear and simple overview of existing use rights, and their implications for your land.

WHAT ARE 'EXISTING USE RIGHTS'?

Existing use rights are when a business opens and operates without the need for a planning permit, but then the zone changes, meaning a permit is required or the use is prohibited.

This business has 'existing use rights'.

This means that businesses aren't forced to close when planning zones change.

HOW DO I KNOW IF MY PROPERTY HAS EXISTING USE RIGHTS?

Existing use rights apply to the land, not the owner, and it is up to owner of the property to prove that they apply.

It is important to note that any works to properties with existing use rights require a planning permit and must comply with current planning requirements.

1991

A butcher shop opens in a residential neighbourhood and does not need a planning permit to open.



2021

The owner sells the shop, after 30 years of operating continuously.



2016

The land is changed to become the "General Residential Zone". A planning permit is now required for a shop.



2022

A new owner buys the shop, and wants to open a flower shop.



They apply to the Council to confirm they have 'existing use rights'.

According to the planning schemes, an existing use may be established in one of the following ways:

- The use was lawfully carried out before the new planning provisions took effect.
- A permit for the use had been granted immediately before the new planning provisions took effect and the use commences before the permit expires
- Proof of continuous use for 15 years is established – the use cannot have ceased for a period of two years during this time.

It is important to note that existing use rights apply to the specific use of the land but not the development (buildings etc).

HOW DO I PROVE EXISTING USE RIGHTS?

Often the easiest way to claim existing use rights is by proving that the use has been continuous for 15 years. This will involve producing a combination of historical information, such as:

- Permits (including endorsed plans) that have been issued for the land
- Utility and/or insurance records
- Records from old editions of the white or yellow pages
- Photographs (including aerial photography)
- Observations made by Council staff (photographs)

CAN I LOSE EXISTING USE RIGHTS?

Yes. The protection of existing use rights is lost if the use of the land has stopped for:

- A continuous period of two years.
- Two or more periods which together total two years in any period of three years.
- In the case of seasonal use, two years in succession.

If the land is being used for the same purpose, but the activity on the land has decreased, the use is taken to be still occurring.

You can also lose existing use rights if you change the purpose for which the land is used (unless the new use is additional to and related to the existing use).

For example, referring to the earlier nightclub example, if you were to build a small ancillary office next to the club for use in association with the club, you would retain your existing use rights. However, if you were to turn the whole club into an office block, then you would lose the existing use rights for a nightclub as you have changed the entire use of the site.

WHAT IS THE EXTENT OF THE EXISTING USE RIGHTS?

How you use the land is limited to how the use has historically operated, including any implied restriction on the hours, intensity and location of the use. This is contained in Clause 63.02 of the planning schemes.

For instance, a bar which has never operated outdoors does not have existing use rights to expand into a courtyard, or move to a 24-hour operation. Similarly, a bar cannot transform into a nightclub using existing use rights.

ALTERNATIVE USE

Under Clause 63.08 of all planning schemes, if land is used for a prohibited use of a zone for which an existing use right is established, a permit may be granted to use the land for an alternative use which does not comply with this scheme. The Council must be satisfied that the use of the land for the alternative use will be less detrimental to the amenity of the locality.

OBTAINING ADVICE

Proving existing use can sometimes be difficult because it will depend on what information is available. You may wish to seek advice from a planning consultant or lawyer who practices in property and planning when existing use rights issues are relevant to a property.

HOW DO I CONFIRM EXISTING RIGHTS USE?

You should apply to Council for a Certificate of Compliance under section 97N of the Planning and Environment Act 1987.

Contact your council for information on how to apply.