

# Limitations of existing use rights: The Blues Point Hotel case

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If a property is used lawfully for a purpose which, because of a change in an environmental planning instrument, becomes prohibited under that planning instrument, existing use rights may provide some protection.

This article draws on the recent decision in *Blues Point Hotel Property Pty Ltd v North Sydney Council* [2021] NSWLEC 27 (the 'Blues Point Hotel case') to illustrate some of the challenges involved in establishing existing use rights.

## What are existing use rights?

An "existing use" is the use of a building, work or land for a lawful purpose, immediately before the commencement of a provision of an environmental planning instrument which makes that use prohibited.

For example, a property is lawfully used for the purposes of a hotel, before a change in the local environmental plan results in hotels being prohibited in the zone. If the property is lawfully used for the purpose of a hotel immediately before the rezoning, this may qualify as an existing use.

An environmental planning instrument cannot prevent the continuation of an "existing use".

## How do you characterise an existing use?

Difficulties arise with the identification and characterisation of an existing use.

In the recent Blues Point Hotel case, Justice Duggan of the Land and Environment Court described the process as involving three key steps:

1. Identifying what, as a matter of fact was happening at the building, with the work or on the land at the date immediately prior to the commencement of the provision of the environmental planning instrument prohibiting the use (the '**Relevant Date**').
2. Ascertaining the object or purpose for those activities.
3. Characterising that purpose.

The characterisation must be at the level of generality sufficient to cover the activities, transactions and processes at the Relevant Date, but it must not be so general so as to embrace activities, transactions or processes which differ in kind: see *Royal Agricultural Society v Sydney City Council* (1987) 61 LGRA 30. Consideration should also be given to whether the existing use is best characterised as one use or multiple separate, independent uses.

Overall, the exercise must be founded in identifying the use from a town planning perspective: see *Grace & Anor v Thomas Street Café Pty Ltd & Ors* [2007] NSWCA 359 (the ‘**Thomas Street Café case**’).

For example, in the Thomas Street Café case, the Court of Appeal identified the use of the building at the Relevant Date as a milk bar which served takeaway food. The Court considered that, from a town planning perspective, a milk bar with take away food is quite different from a cafe. As such, the Court found that the existing use did not extend to a café, which was prohibited.

In contrast, in the Blues Point Hotel case, North Sydney Council argued that the use of the building at the Relevant Date was for two distinct purposes: part of the building was used for a hotel and part was used for accommodation. The Court rejected this argument, finding that the existing use of the whole building was best characterised as being for the purpose of a hotel. The Court found that the accommodation use was so tied to the hotel use that it was incapable of being sensibly separated.

## What are the limitations of existing use rights?

While s 4.66(1) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* protects the continuation of an existing use, there are limits to that protection.

For example, under s 4.66(2)(c) existing use rights cannot be enlarged, expanded or intensified, unless there is a development consent for that enlargement, expansion or intensification, and under s 4.66(2)(e) these rights no longer apply where they have been abandoned (in general, where the use has ceased for a period of 12 months or longer).

The focus of the Blues Point Hotel case was on s 4.66(2)(b) of the EP&A Act which does not protect “any increase in the area of the use made of a building, work or land from the area actually *physically and lawfully* used” at the Relevant Date.

In that case, North Sydney Council argued that an outdoor terrace was being unlawfully used for the purpose of a hotel. The Hotel argued that it had existing use rights to use the outdoor terrace as part of the hotel. While hotels were prohibited on the land under the North Sydney Local Environment Plan, the building had been used as a hotel since 1938, a time when the use was lawful.

The Court found that existing use rights applied to the use of the whole building for the purpose of a hotel. But, the Court found that the use of the outdoor terrace for that purpose amounted to an “increase in the area of the use” in contravention of s 4.66(2)(b) of the EP&A Act. This is because at the Relevant Date the outdoor terrace area was not being used as a terrace, but rather merely as a roof enclosing the ground floor dining and kitchen areas of the hotel. While it was capable of being used as an outdoor terrace as part of the hotel, since it was accessible via a door, factually it was not physically used for that purpose at that time. As such, the Court found that the use of the outdoor terrace for serving food and drink as part of the hotel was unlawful.

While it was not necessary to determine in the case, the Court observed that the use of the outdoor terrace for a hotel purpose amounted to an enlargement or intensification of the existing use in contravention of s 4.66(2)(c) of the EP&A Act. It would not have been a contravention if development consent for that enlargement or intensification had been sought under Part 5 of the *Environmental Planning and Assessment Regulation 2000*.

## What can you do to protect existing use rights?

If you are intending to rely on existing use rights, you should gather all relevant records relating to the use and seek legal advice on whether the use is authorised and whether development consent is required for any enlargement or

intensification of an existing use.

Despite s 4.66(2) of the EP&A Act, Part 5 of the *Environmental Planning and Assessment Regulation 2000* enables a development application to be lodged for changes to an existing use such as the enlargement, expansion, intensification, extension or alteration of that use. If development consent is granted, it will protect the enlargement, expansion, intensification, extension or alteration of the existing use.

## Your Key Contacts



**Christina Renner**

Partner, Sydney

D +61 2 9931 4701

[christina.renner@dentons.com](mailto:christina.renner@dentons.com)



**Jodie Wauchope**

Partner, Sydney

D +61 2 9931 4778

[jodie.wauchope@dentons.com](mailto:jodie.wauchope@dentons.com)



**Stephanie Vatala**

Managing Associate, Sydney

D +61 2 9035 7686

[stephanie.vatala@dentons.com](mailto:stephanie.vatala@dentons.com)



**Alicia Chrysochoides**

Senior Associate, Sydney

D +61 2 9035 7650

[alicia.chrysochoides@dentons.com](mailto:alicia.chrysochoides@dentons.com)