

USE AND CHARACTERISATION

The first matter that must be established by all parties in relation to a development about use is the correct identification of any proposed use and then often the nature and extent of any existing use. We explore the current legislation and case law dealing with these matters below.

Use

A fundamental concept in town planning law is the concept of a “use” of land. It is important to understand this concept because it is integral to the understanding of:

- Lawful use: s 9, *Sustainable Planning Act 2009* ('SPA')
- Material change of use: s 10, SPA

The term ‘use’, in relation to premises, includes any use incidental to and necessarily associated with the use of the premises¹.

Under s.9 of the SPA, a use of premises is a **lawful use** of the premises if:

- (a) the use is a natural and ordinary consequence of making a material change of use of the premises; and
- (b) the making of the material change of use was in compliance with this Act.

A “lawful use” is protected.

A **material change of use** of premises continues reliance on the term “use”, and is a defined element of “development”. A material change of use includes:

- (a) the start of a new use of the premises (e.g. extension of a service station to include motor vehicle repairs); or
- (b) the re-establishment on the premises of a use that has been abandoned (e.g. there needs to be a prolonged abandonment of a use and not just cessation of a use due to difficult market conditions); or
- (c) a material increase in the intensity or scale of the use of the premises (e.g. a ‘material’ change in a use of premises, material must relate to town planning impacts of the change).

Under s. 682 of SPA, existing lawful use rights ensure that land uses that were lawful under a repealed planning instrument are not rendered unlawful by amendments made to current planning instruments. That is, the use of premises that was lawful at the time it commenced continues to be lawful despite any changes brought about by the introduction of a new or amended planning scheme. However, if development is proposed, for example a change in the use of the land or an increase in the intensity or scale of the current use of premises, that development will need to be assessed against the planning scheme in force at that time.

Standard planning scheme provisions, also known as the QPP

The Queensland State Government has developed a suite of standard planning scheme provisions (otherwise known as the Queensland Planning Provisions ('QPP') which provide consistency throughout the State when local governments prepare their planning schemes². The QPP includes standard use definitions to include in local government planning schemes.

Importantly, the QPP prevail to the extent of an inconsistency with a local planning instrument: s 53 SPA. Any planning scheme use definitions should therefore be consistent with the definitions in the QPP and to the extent of any inconsistency, the QPP provisions prevail.

An exception applies in relation to planning schemes made under the repealed IPA and in force before 18 December 2009. SPA confirms that the QPP do not prevail to the extent of the inconsistency with that local planning instrument: s 777 SPA.

¹Schedule 3, SPA

²The latest version of the QPP can be accessed at < <http://www.dilgp.qld.gov.au/planning/state-planning-instruments/queensland-planning-provisions.html> >



Characterisation of a use is a fundamental starting point.

Often, determining which definition of 'use' is applicable involves reviewing the particular purpose for which land is to be used.

In *Shire of Perth v O'Keefe* 110 CLR 529, the Court was required to determine whether an existing lawful use of land was "pottery making" or "light industry" in accordance with a by law. The Court decided that the land could lawfully be used for "pottery making" as this was the term that more closely described what was occurring on the land.

Kitto J at 535 of that case set out the following useful reasoning:

"The application of the by-law in a particular case has therefore not to be approached through a meticulous examination of the details of processes or activities or through a precise cataloguing of individual items of goods dealt in but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date."

A good example of where a meticulous examination of a planning use definition was not warranted is the case of *Allen & Anor v Cairns Regional Council* [2015] QPEC 28, where we successfully represented the Council. In the case, a nursery owner sought declarations of the lawfulness of a wholesale nursery use.

There was dispute as to whether the use was classified as "Rural Industry" or "Agriculture" under the planning scheme in force at the time the use commenced and consequently whether there was an existing lawful use of the premises. The submitter sought to rely upon a strained application of the definition of "Rural Industry" and argued that the propagation of dracaena canes after being cut from the in ground mother stock to enable their future transport and sale involved an industrial operation to produce the wholesale product. The Court disagreed and found that the primary purpose for which the land was used was for growing in ground stock for canes and potted canes for marketable dracaenas and the subsequent production of potted canes was not industrial but was "Agriculture".

Other principles relevant to characterisation include:

- As a general rule, a use should be construed broadly. It should not be construed in an overly narrow way, and in an attempt to confine the user to a precise activity. It is worthwhile looking for the appropriate genus (i.e. group, type, class) which best describes the activities in question³ ;
- Do not use a 'best fit' approach to characterise a use, or use this reasoning to justify a decision on characterisation of a use as it is not a legally valid test of construction⁴ ;
- When construing planning schemes, the Court has recognised a number of principles which confirm that planning documents need to be read in a way which is practical but that statutory construction principles also apply⁵ ;
- Planning documents and accompanying use definitions can be imprecise and somewhat confusing but when interpreting and applying the principles contained within them, it is well recognised that a common sense approach backed by sound, but not overly technical reasoning, ought be utilised.

³ *ACR Trading, North Sydney Municipal Council v Boyts Radio and Electrical Pty Ltd* (1989) 16 NSWLR 50 at 59 Kirby

⁴ see *AAD Design Pty Ltd v Brisbane City Council* (2012) 186 LGERA 390, Chesterman JA at 45-49 and Philippides J at 73 and 88

⁵ see *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* (2014) 201 LGERA 82, paras 51-58

"Incidental and necessarily associated with"

Sometimes a 'use' will have a principal use and another use, which is separate, incidental and necessarily associated with the use. There must be a strong connection between the uses. For a use to be 'necessarily associated with' another, it must be 'unavoidably' or 'inevitably' involved, connected and associated with the principle activity⁶.

For example, in *Witmack Industrial Pty Ltd v Toowoomba Regional Council* [2015] QPEC 7, the Court found that a proposed takeaway/restaurant (KFC) was not an "ancillary" use to the primary use of a Service Station. Factors which pointed to the KFC not being ancillary to the primary use included physical attributes, occupation, custom, operations, traffic generation, the ratio of space occupied in relation to the whole of the site and that the KFC would co-exist with the Service Station in an independent and dominant way.

Existing lawful use rights

Existing lawful use rights should be considered in relation to alleged breaches of the planning scheme.

If there is no record of a development approval for a use, it is essential to consider whether the existing use of land may continue, despite being inconsistent with the current and previous planning schemes.

S. 682 of SPA protects existing lawful use rights that were lawful before 18 December 2009. Similar, but not identical provisions, existed under the *Integrated Planning Act 1997* ('IPA') in section 1.4.1.

A use with the benefit of lawful pre-existing rights may lose its protection by:

- A change in the intensity or scale of the use on or after 30 March 1998 (which was when IPA introduced the test of material change of use) (explored below); and
- Abandonment of the use (explored below)

If the use continues in substantially the same form then it continues to be protected, despite changes in the law.

"Material increase in the intensity or scale of the use of the premises"

As IPA introduced the test of material change of use when it came into force on 30 March 1998⁷, any intensification of a use prior to 30 March 1998 was not a change of use.

There must be a "material" change or intensification, as explained in the explanatory notes to IPA at page 12 which state:

It should be noted that whether a change in the character, intensity or scale of a use is "material" must be considered in the context of the use. Some uses involve regular or irregular changes which are considered to be a normal feature of the use. For example, the use of holiday accommodation may vary considerably according to seasons and holiday periods. Such variations which are normal and expected would not constitute a material change of use.

Whether a change in the intensity or scale of a use will constitute a material change of use is a question of fact and degree, assessing the overall impact of the scale and intensity of the current use compared to the previous use and whether there has been a 'material change': *Maroochy Shire Council v Barnes* [2001] QPELR 47

Evidence of impacts on the amenity of others will not be determinative of whether there has been a material change of use.

⁶ *Boral Resources v Cairns City Council* [1997] 2 Qd R 31, *Brisbane City Council v Bemcove* (1998) 104 LGERA 1

⁷ Note that material change of use was initially defined as "a material change in the character, intensity or scale of the use of the premises" under s 1.3.5 of IPA

"Material increase in the intensity or scale of the use of the premises" (continued)

In *Herston Kelvin Grove Residents Action Group Inc v Brisbane City Council & Ors* [2001] QPELR 382 the Court considered a change of use from a nursing home for elderly residents to an accommodation place for mentally handicapped persons and short-term accommodation of immigrants. Fear and perception of local residents, whilst valid concerns of amenity, were not in the Court's opinion, sufficient to support a finding that there had been a material change of use. It was also relevant that there had been a decrease in intensity and scale of operation in relation to noise from visiting vehicles including ambulances, staff and visitors, despite intensification in relation to mobility of residents and their contact with the community.

In assessing whether there had been intensification of a wholesale nursery use, the Court in *Allen*, in support of its finding that, on the facts of that case, there had not been a material intensification of the use, had regard to whether –

- the proportion of land used increased or remained roughly the same;
- the quantity of stock produced from the land increased markedly;
- the rate of deliveries made to the premises, such as for trade, changed or had stayed roughly the same;
- staff numbers had increased; and
- there had been a material increase in vehicles or equipment used on the land.

Affidavit evidence provided by the nursery owner informed the Court on the operation of the wholesale nursery over time.

"Abandonment"

An existing lawful use may be abandoned.

If an existing use is abandoned, any re-establishment of the use would constitute a material change of use: s 10 SPA.

The test establishes a 'high bar' in order to prove that a former use has been abandoned and requires evidence of an intention to abandon the use. For example, it will not be sufficient to merely prove that a shop or factory which remains vacant for a lengthy period of time due to difficult market conditions has been abandoned. Instead, there must be clear and undisputed evidence of abandonment and lack of an intention to continue the existing use (not to be confused with an intention to preserve a use right).

In *Allen*, it was argued that a statement made to a Senior Inspector of Workplace Health and Safety (Qld) to the effect that the "*business was not running ...need material change of use ...have a worker who is keeping clean..*" Although such a verbal statement could be construed as creating doubt about continuation of a use, it was rejected by the Court as being inconsistent with the affidavit evidence before the Court provided by the owner of an intent to continue the use.

"Conundrum"

Here is a question for you to ponder. If a use is abandoned what use does the land have for the purpose of the planning scheme? There is no definition of "no use".

⁸ See *Benter Pty Ltd v Brisbane City Council* [2006] QPELR 451, [4],[5],[7],[8],[18] for a summary of the relevant principles to the issue of abandonment

**'If you would like more information on any of the above'
Freecall 1300 303 866 and speak to one our specialist team**

