

## Christchurch City – Existing Use Rights and the Draft Central City Plan

The Draft Central City Plan contains proposals for significant re-zonings throughout the CBD, which will affect a large number of property and business owners and their ability to re-establish businesses and rebuild buildings on their existing sites.

This memo provides a brief overview of existing use rights as provided by section 10 of the RMA.

### Section 10

Section 10 governs the right to commence and continue to carry on lawfully established activities which are not consistent with a current Plan. In order to do so, an owner must show two things:

- a. That the original use was lawfully established (for instance, it was lawfully established under the old City Plan); and
- b. That the new activity is of the same or similar character, intensity and scale to the activity which was legally established.

There is extensive case law on how character, scale and intensity should be assessed. In essence, the Court will look at the character, scale and intensity of the original, lawfully established use, and then compares it to the character, scale and intensity of the current use, and its effects to see whether they are the same or similar to that which was originally established.

For example, it was held in *Re Mullaly's Auto Centre Limited* that two lawfully established retail shops, while used for a commercial use, did not have the same character as a car sales yard, for which the existing use right was sought. The Court pointed to the different traffic patterns and the different types of purchasers which would be generated by the car yard as compared to the original shops.

### Extinguishment of Existing Use Rights

Existing use rights may be extinguished, if the original use has been discontinued for a continuous period of more than 12 months after the new Plan becomes operative. In order to avoid this, property owners may apply to the Council for an extension. This application must be made within two years of the use first being discontinued. In granting the application, the Council will consider:

- a. Whether the effects of the extension will be contrary to the objectives and policies of the district plan; and
- b. Whether the applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless the Council considers it to be unreasonable in all the circumstances to require the obtaining of every such approval.

### Steps to be taken by CBD Property Owners

If your property has been rezoned under the Draft Central City Plan, and the use which was established there is no longer allowed under the Plan, you may be able to rely on existing use rights to continue to use your property in the same or similar way. In order to do so, there are several things you need to do.

Firstly, if you are unable to occupy your building, it is advisable to apply to the Council for an extension to the discontinuance rule within 2 years of it first being discontinued. The effect of the earthquakes and subsequent earthquake legislation on existing use rights is unknown; however it would be prudent to take this step.

Secondly, if you intend to rely on existing use rights, you must be able to show that the original existing use was lawfully established. You must then be able to show the Council that the use you are seeking to protect is the same or similar in character, scale and intensity, both in terms of the use itself and the effects of the use. The onus of proof to establish an existing use right falls to the property owner, and the Council must be satisfied that the effects of the use are no more than what was originally consented.

#### **Existing use rights and the Canterbury Earthquake Recovery Act 2011**

The Canterbury Earthquake Recovery Act gives extensive powers to the Earthquake Minister and Chief Executive to facilitate, coordinate and direct the planning, rebuilding and recovery of Christchurch. Included in this power is the ability of the Earthquake minister to override existing use rights and to compulsorily purchase a site.

While the Council has stated that it has not asked for this to happen and that as far as it understands existing use rights will remain, the power to extinguish is available, and there has been little guidance given as to how or when such an action may be taken.

If you have questions about this matter please do not hesitate to contact us:

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