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Existing Use Rights: What do they mean?

Janette Campbell

What are existing use rights?

- Right to continue activity despite new rule
- “The same or similar” character, intensity and scale effects
- Land use rules and regional rules

Why are existing use rights protected?

- Economic not environmental reasons
- Certainty
- Protect investment

Land use rules: Existing use rights

- Lawfully established?
- No expiry
- Benchmarked
- Use it or lose it
- Building consents: s 10B
- Weird building exception: s 10(3)

Dam example



Dam example

- Crossed bed of river but also land
- Occupation of river bed authorised by resource consent
- No RMA authorisation on land

Dam example (cont)

- Rural zone
- Established by statute
- Wanted to change structure
- Brought s 10(3) into play

Regional Plan rules: Existing use rights

- Lawfully established?
- Benchmarked
- Will expire
- Proposed rule with legal effect
- Operative rule

(Not quite) Regional Plan rules: Surface of water in rivers & lakes

- S 10A
- Like regional rule framework except:
- Land use rule's 12 month expiration applies

Benchmarking is tricky

- “Same or similar” character, intensity and scale effects of use
- Activity may fluctuate over time and across plans
- Existing use rights certificate not necessarily the answer

How do existing use rights affect enforcement?

- Defence against contravention of district rules, regional rules and NES
- Frequently asserted
- Can be difficult to disprove

Multiple dwellings example



- DP allows 2, on conditions
- Had 3 (rating history)
- Then 4
- Lawfully established?

Who proves or disproves existing use rights?

- Criminal/civil
- Reverse onus: s 67(8) of the Summary of Proceedings Act 1957

Who proves or disproves (cont)

- No equivalent in Criminal Procedure Act 2011
- Not a “core element” of the offence, so must be raised by defence

What does the defence need to do?

establish that there is evidence providing a “*credible or plausible narrative*” that “*raises the issue*”, puts the defence “*in play*”, or gives it “*an air of reality*”. “*A defence will be in play whenever a properly instructed jury could reasonably, on account of that evidence, conclude in favour of the accused*”: *R v Fontaine* [2004] 1 SCR 702 at [74].

What does the prosecution need to do?

- If raised, onus is on prosecution
- Beyond reasonable doubt
- Defence will succeed if it seems “reasonably possible”: *R v Nepia* [1983] NZLR 754
- Consider enforcement order

Tips

- Old district plans - keep them
- Lawfully established?
- Ever discontinued for a year when reliant on existing use rights?
- Does benchmarking at notification of new rules help?

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