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EXISTING USE RIGHTS AND RESOURCE CONSENTS

THE DIFFERENCES BETWEEN SECTION 9 AND SECTION 10 OF THE RMA

For regulatory planners, the relationship between activities provided for under sections 9 and 10 of the Resource Management Act 1991 is a complex one. In particular, it is often difficult to determine if an established activity relies on s9(1)(a) or s10 for its continued existence. The Town and Country Planning Act (TCPA) had quite different provisions to the Resource Management Act 1991 (the Act) relating to the two different forms of establishment of activity. This discussion looks at the difference between the two Acts and focuses in particular on how an assessment under s10 may potentially be required when considering an activity authorised under s9. Some consideration is also given to how an assessment should be made in respect of determining whether a resource consent is still valid or not.

The history of the relationship between existing use rights and resource consents under previous legislation:

The current provisions of the Act differ to the previous sections of the TCPA that controlled the duration of consent(s). Section 90(1)(c) of the TCPA dealt with existing use rights, and unlike section 10 of the Resource Management Act 1991, expressly referred to uses established pursuant to applications granted under that Act. Under section 90(2), the use of land authorised by way of a consent granted under the TCPA, lapsed if it was discontinued for a period of 6 months.

In plain terms, this meant that if an activity for which a resource consent had been granted ceased to operate for a period of more than 6 months, the resource consent then lapsed, and a new resource consent would be required.

The relationship between existing use rights and resource consent under the Resource Management Act 1991:

Section 9 of the Act provides that:

(1) No person may use any land in a manner that contravenes a rule in a district plan or proposed district plan unless the activity is:

(a) expressly allowed by a resource consent granted by the territorial authority responsible for the plan; or

(b) an existing use allowed by section 10.

Section 10 of the Act provides that:

Land may be used in a manner that contravenes a rule in a district plan or proposed district plan if- (a) *Either-* (i) *The use was lawfully established before the rule became operative or the proposed plan was notified; and (ii) The effects of the use are the same or similar in character, intensity, and scale to those which existed before the rule became operative or the proposed plan was notified....*

The crucial part of the relationship is identified in section 9(1)(a) of the Act, whereby section 10 does not apply where an activity is expressly allowed by a resource consent. In these cases the right to continue the use authorised by the resource consent, the duration of the resource consent and any discontinuance of an activity authorised by the resource consent is administered and assessed under sections 123, 125 and 126.

The sections of the Act that are relevant to the duration of resource consents are:

(1) Section 123, which establishes the duration of resource consents. Land use consents and subdivision consents are granted for an unlimited time unless otherwise specified in the consent. There was no equivalent to this section in previous legislation; and

(2) Section 125, which provides that a resource consent will lapse on the expiry of two years after the date of the commencement of the consent if it is not given effect to within that time. Section 70 was the equivalent section in the TCPA 1977; and

(3) Section 126, which allows a Council to cancel a consent that has been exercised, but has not been exercised for a period of 2 years since it was put into effect. There was no equivalent to this section in previous legislation.

The key tests for determining whether an activity can continue to enjoy existing use rights under s10 of the Act can be summarised as:

(1) The activity/use has to have been lawfully established.

(2) The effects of the activity/use have to be the same or similar in character, intensity and

scale to those which existed before the rule which it infringes became operative or the proposed plan was notified.

(3) The activity/use must not have been discontinued for a continuous period of more than 12 months.

(4) In relation to a building, the building must not be altered in a manner which increases the degree to which that building fails to comply with any rule in the district plan/proposed plan.

Section 10 only becomes relevant if there has been a change to the plan after resource consent was granted which alters to status of all or part of the activity. For example, if resource consent was granted for a retail activity, as a controlled activity the retail activity will have existing use rights if a plan change is subsequently introduced which changes the status of the retail activity to a discretionary activity.

Under the provisions of the Resource Management Act 1991, a resource consent will only terminate if it lapses prior to it being put into effect pursuant to section 125, or if the Council cancels the consent under section 126. What this effectively means is that once a resource consent has been given effect to under section 125 of the Act, there are no provisions for a discontinuance of that consent, even if it ceases operating for 3 years or so, and then starts up again.

There is a proviso however on the consent being recommenced, which is that the activity must be carried out in accordance with the parameters of the approved consent. Therefore, careful investigation always needs to be given to all information submitted with the original consent, the description of the activity, and any conditions of consent to ascertain if the current exercise of the consent is within the parameters of the consent that was granted.

This is important as even where a resource consent does not specifically refer to the plans attached, a resource consent is still restricted by the activities identified in the original application. Therefore, in the example of a restaurant that was granted a resource consent, even if the consent was granted in wide terms with no specific condition on numbers for example, it still would be limited to the matters specified in the original application. If there was an increase in the number of patrons or any other essential element of the application, then that may be grounds to require the resource consent holder to seek a further resource consent for those activities.

RELEVANT CASE HISTORY

The operation of section 125 was discussed in *Wairoa Coolstores (1994) Ltd v Western Bay of Plenty District Council*, Environment Court, A16/98. In that case, the Court was required to consider whether the use in question, being fruit packing, had been discontinued from 1990 to 1996 and the consequences of the discontinuance. Resource consent for the fruit packing activity had originally been granted in 1984.

In assessing and analysing the situation, the Court considered whether the use was allowed to continue in 2 different parts:

- (1) in the period the TCPA was in force; and
- (2) in the period the RMA was in force.

The Court found that in the period the TCPA was in force the use had not been discontinued for a period of six months and therefore that the consent had not lapsed under section 90(2) of the TCPA. Accordingly the consent was clearly shown to have remained in effect up until 30 September 1991 when the RMA came into force.

The Court then considered whether the consent had lapsed after 1 October 1991 by applying the test in section 125 of the RMA. The Court found that because the consent was given effect to before the end of the two year period (which it considered was the period 1 October 1991 to 1 October 1993) that the consent had not lapsed. There was no consideration given to the time period subsequent to 1 October 1993, as it was found that the consent had been given effect to.

Therefore, the only way for the activity to be discontinued would be for the Council to cancel the consent (should it have been found that the activity had ceased for over 2 years) or for the consent holder to surrender the consent under section 126. The Court did not apply section 10 in assessing whether the consent had lapsed.

The decision is slightly confusing in that the Court considered the date of the commencement of the consent was 1 October 1991 rather than the date in 1984 when the activity actually commenced. The Court appears to have considered that as a result of the transitional provisions in the RMA, permissions granted under the TCPA were deemed to have been granted on 1 October 1991 and therefore 1 October is the applicable date for the purposes of assessing section 125. While this interpretation is confusing in that respect, there is support for the Court's view in other case law.

There was also discussion in the *Wairoa Coolstores* case about the extent of the original consent. The original consent was very broad in its terms and the Court had to consider whether there were any limitations placed on the consent. The Court found that the resource consent was limited by the original application that had been submitted to Council. In that case the resource consent issued referred to the resource consent being carried out in accordance with the plans attached.

CONCLUSION

There is a distinct difference between activities provided for under Section 9 and Section 10 of the Act, which needs to be clearly identified and investigated when reviewing the history of an activity on a site. What may be presumed to enjoy existing use rights may in fact be reliant on a resource consent which has the right to operate in perpetuity.

Gina McDonald is a Senior Specialist Planner at Auckland City Environments, the Regulatory Unit of Auckland City Council. The above discussion forms part of a document prepared in conjunction with the Legal Services Team at Auckland City Environments on the key principles of existing use rights analysis. Content has been drawn from various legal opinions, case law and Brookers. The author would like to thank Tania Richmond, Principal Planner, for comments on the content of the article and the Legal Services Team for their assistance and guidance.

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