

Existing Use Rights and Previously Permissible Land Uses

This Guideline aims to help landowners, business operators and other community stakeholders understand how existing residential, business or other uses may continue, despite the changes to land uses as a result of the Aerotropolis SEPP. The guideline explains existing use and previous permitted uses.

Introduction

The Western Sydney Aerotropolis will become a thriving economic centre for Western Sydney. Land within the Aerotropolis will gradually transition from mostly rural to urban uses under the new zones. These zones, contained in the *State Environmental Planning Policy (Western Sydney Aerotropolis) 2020 (Aerotropolis SEPP)* will support new jobs across aerospace and defence, border operations, manufacturing, healthcare, freight and logistics, agribusiness, education and research industries.

More information can be found on the Department of Planning, Industry and Environment's website at: <https://www.planning.nsw.gov.au/Plans-for-your-area/Priority-Growth-Areas-and-Precincts/Western-Sydney-Aerotropolis>

Purpose of this Guideline

This Guide has been prepared as part of the NSW Government's commitment to implement the recommendations of Independent Community Commissioner, Professor Roberta Ryan.

Recommendations 15 and 16 sought to:

- inform and educate landowners on their existing use rights and permissible land uses under the Aerotropolis SEPP; and
- allow some previously permitted land uses to be carried out with development consent to enable landowners to continue residential and other low impact uses for land (for example an additional dwelling storey, a shed etc.) even if these uses may be prohibited under the new zonings. These transitional uses must consider relevant controls in the Aerotropolis SEPP and the consent authority must be satisfied that the development will not impact future airport operations.

What is an 'existing use'?

The definition of existing use rights can be found in clause 4.65 of the *Environmental Planning and Assessment Act 1979*. It is the use of a building, work or land (previous development) that was lawfully commenced under previous planning instruments, such as a Local Environmental Plan, but is now prohibited by another planning instrument, such as the Aerotropolis SEPP. Any previous development that had lawfully commenced prior to the *Aerotropolis SEPP* coming into force on 1 October 2020 can continue, and in some circumstances, be modified, subject to the determination of a development application. The explanation of these circumstances is described below.

Why do we have existing use rights?

Existing use rights provide certain protections to landowners from changes to planning laws that apply to their land. They allow people to continue to live in their homes for example or operate their businesses as they did before the change, until they decide they no longer wish to do so.

How to find out what the new planning controls are

There are a number of ways to find out permissible uses applying to a parcel of land. Three suggested ways include:

1. Visit the Department's online mapping tool at <https://www.planningportal.nsw.gov.au/spatialviewer/> where you can search by address or Lot and DP information, or
2. Visit the NSW Government's legislation website (www.legislation.nsw.gov.au) for the Aerotropolis SEPP and maps.
3. Talk to your local Council.

How to modify an existing use

If your current land use is now prohibited under the Aerotropolis SEPP but was lawfully commenced prior to the Aerotropolis SEPP commencing, you will have existing use rights allowing you to continue this use. If you want to make changes to your existing use, a Development Application (DA) is required.

The *Environmental Planning and Assessment Regulation 2000* contains provisions which allow an existing use to be enlarged, expanded, or altered, subject to certain limitations. These limitations include requirements that any changes to existing uses must be minor in nature, cannot involve a more than 10 per cent increase in floor space, or involve a significant intensification of that existing use.

An existing use cannot be amended through the exempt or complying development pathways. Amending an existing use right can only occur through the development application process.

Speak to your local Council if you intend to lodge a development application. Council can then advise you of any historical information, if known, or direct you to undertake a request through Council to get access to historical information regarding your property that is available on local Council's records. Examples of the type of historical information that may be required include the original approval of the use or subsequent modifications, and other records that may demonstrate the continued use of the property.

Does existing use apply if I have not yet started the use on the site?

Existing use rights only apply to uses that have been lawfully commenced on the site prior to the use being prohibited. Existing use rights do not apply to a use that was previously permitted with consent but for which no action had been taken to gain an approval, such as a Development Application lodged with Council. In these instances, where a land use is no longer permissible on your land and 'existing use' rights do not apply, the re-introduction of previous permitted uses may help.

Can an existing use expire?

Yes. An existing use is presumed to have expired or been ‘abandoned’ if it ceases to be used for a continuous period of 12 months. However, the Department understands some people may find it difficult to continue to operate during the COVID-19 pandemic as their businesses have needed to shut down, or their properties may have been vacant during this time. In response, the period after which an existing or other lawful use is considered abandoned has been temporarily extended from 12 months, to three years. This came into effect from 25 March 2020, and the period after which the existing use is considered to have expired will revert to 12 months on 25 March 2022. For more information, please visit <https://www.planning.nsw.gov.au/Policy-and-Legislation/COVID19-response/COVID19-changes-explained/Changes-to-support-businesses-and-landowners>.

What happens to the existing use rights if I sell my land?

Existing use rights stay with the land and not the owner of land. As long as the use continues as described above, the new owner can continue to live or operate a business where the existing use right has been lawfully established.

What is a previously permissible land use?

As mentioned above, Recommendation 15 sought to include additional land uses to enable landowners to continue residential and other low impact uses. The commencement of the Aerotropolis SEPP meant that some land uses that were previously permitted with development consent were no longer permissible and therefore the number of potential uses on a site were reduced.

Previously permitted uses are uses that were permissible, subject to development consent, prior to the commencement of the Aerotropolis SEPP. “Previously permitted uses” is the same as “transitional uses” referred to in the Commissioner’s recommendation. A different term has been used to avoid confusion with other legislation. During October, the Department is exhibiting an amendment to Aerotropolis SEPP which will re-introduce a number of previously permitted uses to allow a gradual transition of the land use to achieve the future vision for the Aerotropolis, while minimising the impact on small landowners. This will be an added protection further to any existing use rights.

A list of indicative land uses is provided at this end of this guide.

Will all previously permissible land uses be reintroduced?

It is not possible for all previously permitted land uses to be reintroduced as some land uses have the potential to stop the transition of the area. Of particular importance is the need to maintain controls to protect the community from the 24/7-hour operation of the Western Sydney Airport. Through an amendment to the Aerotropolis SEPP, it is proposed that previously permitted uses will be re-introduced, but these will be subject to considerations such as:

- Whether the development will lead to additional lots being created – for example one lot of land in Agribusiness being subdivided and developed for several single dwellings will not be supported. Subdivision of land for single dwellings is not consistent with the future vision for

the Aerotropolis. The inclusion of dwellings as a previous permitted use is to allow for instances where there was an intention to erect a house on an existing lot, not for a residential subdivision creating multiple dwellings.

- Whether the proposed development would result in a substantial increase in the intensification of the land use that would be incompatible with the vision for Aerotropolis or surrounding land uses – for example, developing a number of additional single dwellings in an area now zoned Mixed Use. The vision for some locations in the Aerotropolis is medium to high density housing to create vibrant centres while focusing on the provision of land for jobs.
- Whether the land surrounding the development has already been developed under the Aerotropolis SEPP land use zone – for example building a single dwelling when all surrounding land has been developed as industrial in an Enterprise zone.
- Whether the development is inconsistent with airport safeguarding provisions – for example the development of additional noise sensitive developments such as houses in the future noise affected areas will not be supported.
- The flooding provisions of the Aerotropolis SEPP will apply.

The inclusion of previously permitted uses will also mean that certain uses will not necessarily need to rely on existing use rights. Instead, a development application can be lodged for an extension or alteration to an existing development under the permitted uses.

What type of land uses will be introduced as ‘previously permitted uses’?

Table 1 over outlines additional indicative land uses which will become permissible subject to lodgement of a development application, assessment and approval. The provisions of the Aerotropolis SEPP will apply to the assessment of development applications for these uses, including controls relating to flooding, noise, and safe airport operation.

Table 1. Indicative additional land uses

Proposed additional land uses (indicative) Which will become permissible subject to lodgement of a DA, assessment and approval.	Enterprise and Mixed Use Zone	Agribusiness Zone	Environment and Recreation Zone
<u>Dual occupancies</u>	✓	✓	✓
Dwelling houses	✓	✓	✓
Rural workers dwellings	✓* *not where the previous zone was: - RU4 Primary Production or - RU2 Rural Landscape as rural worker's dwellings were not previously a permissible use	✓* not where the previous zone was: - RU4 Primary Production or - RU2 Rural Landscape as rural worker's dwellings were not previously a permissible use	✓* *not where the previous zone was: - RU2 Rural Landscape or - RU1 Primary Production, or - RU4 Primary Production Small Lots or - RU5 Village in the Penrith Council area as rural worker's dwellings were not previously a permissible use

Proposed additional land uses (indicative) Which will become permissible subject to lodgement of a DA, assessment and approval.	Enterprise and Mixed Use Zone	Agribusiness Zone	Environment and Recreation Zone
Secondary dwellings	<p style="text-align: center;">✓*</p> <p>* not where the previous zone was:</p> <ul style="list-style-type: none"> - RU2 Rural Landscape <p>in Liverpool Council area as it was not previously a permissible use</p>	<p style="text-align: center;">✓*</p> <p>* not where the previous zone was:</p> <ul style="list-style-type: none"> - RU2 Rural Landscape, or - R5 Large Lot residential <p>in Liverpool Council area as it was not previously a permissible use.</p>	<p style="text-align: center;">✓*</p> <p>* not where the previous zone was:</p> <ul style="list-style-type: none"> - RU2 Rural Landscape <p>in Liverpool Council area as it was not previously a permissible use.</p>
Rural industries	<p style="text-align: center;">✓*</p> <p>*not where the previous zone was:</p> <ul style="list-style-type: none"> - RU2 Rural Landscape under the Liverpool LEP or - RU1 Primary Production Zone, or - RU2 Rural Landscape, or - RU4 Primary Production Small Lots in the Penrith LEP <p>as rural industries were not previously a permissible use</p>	Already permissible with consent in the Agribusiness zone.	<p style="text-align: center;">✓*</p> <p>*not where the previous zone was:</p> <ul style="list-style-type: none"> - RU2 Rural Landscape in the Liverpool Council area or - RU1 Primary Production, or -RU2 Rural Landscape, or - RU4 Primary Production Small Lots or - RU5 Village in the Penrith Council area <p>as rural industries were not previously a permissible use</p>

Proposed additional land uses (indicative) Which will become permissible subject to lodgement of a DA, assessment and approval.	Enterprise and Mixed Use Zone	Agribusiness Zone	Environment and Recreation Zone
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Examples of Home-Based Uses that are already permissible with consent under the Aerotropolis SEPP

Home businesses	✓	✓	✓
Home industries	✓	✓	✓
Home based childcare	✓	✓	✓

More information

If you would like more information, please contact the Department at <https://www.planning.nsw.gov.au/Contact-Us> or your local Council.

Glossary of Land Uses

Land Use	Definition
Dual Occupancy	<p>dual occupancy means a dual occupancy (attached) or a dual occupancy (detached).</p> <p>dual occupancy (attached) means 2 dwellings on one lot of land that are attached to each other, but does not include a secondary dwelling.</p> <p>dual occupancy (detached) means 2 detached dwellings on one lot of land, but does not include a secondary dwelling</p>
Dwelling	<p>means a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.</p>
Home- based childcare	<p>means a family day care residence (within the meaning of the Children (Education and Care Services) National Law (NSW)) at which the education and care service is provided at any one time to no more than 7 children (including any child of the person providing the service) all of whom are under the age of 13 years and no more than 4 of whom are children who do not ordinarily attend school.</p> <p>Note—</p> <p>A family day care residence is a residence at which a family day care educator educates and cares for children as part of a family day care service—see the Children (Education and Care Services) National Law (NSW).</p>
Home Business	<p>means a business, whether or not involving the sale of items online, carried on in a dwelling, or in a building ancillary to a dwelling, by 1 or more permanent residents of the dwelling and not involving the following—</p> <ul style="list-style-type: none"> (a) the employment of more than 2 persons other than the residents, (b) interference with the amenity of the neighbourhood because of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, traffic generation or otherwise, (c) the exposure to view, from adjacent premises or from a public place, of unsightly matter, (d) the exhibition of signage, other than a business identification sign, (e) the retail sale of, or the exposure or offer for retail sale of, items, whether goods or materials, not produced at the dwelling or building, other than by online retailing, <p>but does not include bed and breakfast accommodation, home occupation (sex services) or sex services premises.</p>

<p>Home Industry</p>	<p>means an industrial activity, whether or not involving the sale of items online, carried on in a dwelling, or in a building ancillary to a dwelling, by 1 or more permanent residents of the dwelling and not involving the following—</p> <ul style="list-style-type: none"> (a) the employment of more than 2 persons other than the residents, (b) interference with the amenity of the neighbourhood because of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, traffic generation or otherwise, (c) the exposure to view, from adjacent premises or from a public place, of unsightly matter, (d) the exhibition of signage, other than a business identification sign, (e) the retail sale of, or the exposure or offer for retail sale of, items, whether goods or materials, not produced at the dwelling or building, other than by online retailing, <p>but does not include bed and breakfast accommodation or sex services premises.</p>
<p>Home Occupation</p>	<p>means an occupation that is carried on in a dwelling, or in a building ancillary to a dwelling, by one or more permanent residents of the dwelling and that does not involve—</p> <ul style="list-style-type: none"> (a) the employment of persons other than those residents, or (b) interference with the amenity of the neighbourhood by reason of the emission of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, traffic generation or otherwise, or (c) the display of goods, whether in a window or otherwise, or (d) the exhibition of any signage (other than a business identification sign), or (e) the sale of items (whether goods or materials), or the exposure or offer for sale of items, by retail, <p>but does not include bed and breakfast accommodation, home occupation (sex services) or sex services premises.</p>
<p>Rural Industries</p>	<p>means the handling, treating, production, processing, storage or packing of animal or plant agricultural products for commercial purposes, and includes any of the following—</p> <ul style="list-style-type: none"> (a) agricultural produce industries, (b) livestock processing industries, (c) composting facilities and works (including the production of mushroom substrate), (d) sawmill or log processing works, (e) stock and sale yards,

	(f) the regular servicing or repairing of plant or equipment used for the purposes of a rural enterprise.
Rural Workers Dwelling	means a building or place that is additional to a dwelling house on the same lot and that is used predominantly as a place of residence by persons employed, whether on a long-term or short-term basis, for the purpose of agriculture or a rural industry on that land.
Secondary Dwelling	means a self-contained dwelling that— (a) is established in conjunction with another dwelling (the principal dwelling), and (b) is on the same lot of land as the principal dwelling, and (c) is located within, or is attached to, or is separate from, the principal dwelling.

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