

Taupo District Council

72 Lake Terrace, Taupo

Existing Use Rights Extension and Resource Consent Assessment

19286
31 May 2019

Taupo District Council

72 Lake Terrace, Taupo

Existing Use Rights Extension and Resource Consent Assessment

Prepared by:



.....
Catriona Eagles
Senior Planner, Taupo Planning Team Leader

Reviewed by:



.....
Ella Tennant
Senior Planner, Rotorua Planning Team Leader

Date: 31 May 2019
Reference: 19286
Status: Final
Revision: NA
Previous Revision Date: NA

This document is the property of Cheal Consultants Limited. Any unauthorised employment or reproduction, in full or part is forbidden.

This document has been prepared for a specific purpose for the above client and shall not be used for any other unauthorised purpose. Cheal Consultants Limited does not acknowledge any duty of care or responsibility to any other party.

© Cheal Consultants Limited

1. INTRODUCTION

You have requested Cheal Consultants to undertake the following:

1. a peer review of the provided memorandum and summary prepared by Mitchell Daysh Limited dated 21 November 2018,
2. provide a likely timeline to undertake S10(2) extension and an assessment of risk associated with that extension, and
3. if required provide a likely timeline to undertake the alternate process of resource consent at 72 Lake Terrace based on an existing use rights baseline and an assessment of risk associated with that.

2. PEER REVIEW

The Mitchell Daysh memorandum concludes as follows:

- *Section 10(1) would enable a new office building to be built on the 72 Lake Terrace site provided that its effects were the "same or similar in character, intensity and scale" to that which existed on the site prior to 2007 and an extension for the use of the land under section 10(2) of the RMA has been obtained within two years of the original use being discontinued.*
- *Determining exactly what "same or similar in character, intensity and scale" requires a subjective assessment and there is a threshold as to what was "lawfully established". The status can only be confirmed absolutely by legal proceedings. As such, it would be susceptible to legal challenge.*
- *Land use consent RM110078 only authorises a minor extension to the building that existed on the site prior to 2011 and does not authorise the building as a whole. It is therefore of only minor relevance to any rebuilding proposal.*
- *An alternative to relying on existing use provisions would be to seek a resource consent for any rebuilding on the site, using the section 10 existing use provisions and land use consent RM110078 as a baseline against which any new effects can be benchmarked.*

I concur with this assessment as it relates to the existing use rights process outlined in the Resource Management Act and an alternate resource consent process. I also concur with the key RMA challenges for an existing use rights application and/or extension.

In addition I note the following:

The provision of *same or similar in character, intensity and scale* does require a subjective assessment and a detailed assessment of the evolution of Council's occupation at 72 Lake Terrace since 1966. I note that Mitchell Daysh suggest the process of a declaration from the Environment Court to confirm this. I concur with this recommended process.

Further to this, the phrase "*same or similar*" makes it clear that an existing use is not limited to having effects that are exactly the same as those of the original lawfully established use. This phrase allows scope for recognition of the often occurring reality that uses (especially activities) may vary through time and that some reasonable evolution can occur. Having said that, the caselaw also includes instances where the expansion of activities has gone beyond what may properly be considered to be "similar". It is important to recognise that this assessment is an assessment of the building scale and

of the scale and intensity of the building's use. This use assessment would likely involve an assessment of (but not limited to) the change in staff numbers, change in frequency and number of council meetings, associated traffic and parking numbers etc.

The alternative proposed by Mitchell Daysh of a resource consent for a rebuild is suggested with the support of an "existing use" "baseline" argument. For this to occur the section 10 existing use rights must still exist. As outlined in the memorandum, the occupation of 72 Lake Terrace by Council ceased in September 2017 which means the use has been "*discontinued for a continuous period of more than 12 months*". Hence I consider there is a limited ability in a resource consent to use the previous occupation of the site as an "authorised baseline" as stated in Mitchell Daysh memorandum.

3. SECTION 10(2) EXTENSION

This section assesses the likely timeline to undertake an extension of existing use rights application and an assessment of risk associated with that.

3.1 Timeline

Mitchell Daysh outline that the occupation at 72 Lake Terrace is likely to have been an existing use under Section 10(1) of the RMA and that the use has been discontinued as the building ceased to be used in September 2017 and was demolished in early 2018. They outlined that a Section 10(2) extension could be applied for to retain these existing use rights. This section outlines the timeline associated with an extension application.

With relevance to timeframes, Section 10(2) states

...a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—

- (a) an application has been made to the territorial authority within 2 years of the activity first being discontinued; and*
- (b) the territorial authority has granted an extension upon being satisfied that—*
 - (i) the effect of the extension will not be contrary to the objectives and policies of the district plan; and*
 - (ii) the applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.*

Therefore an application to the territorial authority must be made within 2 years of the activity first being discontinued ie prior to September 2019. It is unclear in the Resource Management Act as to the timeframe that the territorial authority has to make the decision on the extension application.

The content of such an application must provide information to confirm that the use was lawfully established, outline that the effects of the extension of the use will not be contrary to the objectives and policies of the district plan, and include written approval from affected parties to the extension.

Such an application would require detailed assessment of the history of occupation at 72 Lake Terrace by Council(s) since 1966 through each District Plan including the built form and scale of occupation.

A detailed policy assessment would be required, and written approvals obtained. Such an application would require a minimum of 4-6 weeks to be researched and written. Obtaining written approvals could take some additional time.

The territorial authority is required to process such an application with 20 working days excluding any requested for further information.

Hence the critical timeline for an application in this situation is that it must be lodged prior to September 2019 for existing use rights to continue.

3.2 Risk

This section outlines risks associated with a Section 10(2) extension application.

With relevance to the required assessment, Section 10(2) states

...a use of land that contravenes a rule in a district plan or a proposed district plan has been discontinued for a continuous period of more than 12 months after the rule in the plan became operative or the proposed plan was notified unless—

- (a) an application has been made to the territorial authority within 2 years of the activity first being discontinued; and*
- (b) the territorial authority has granted an extension upon being satisfied that—*
 - (i) the effect of the extension will not be contrary to the objectives and policies of the district plan;*
and
 - (ii) the applicant has obtained approval from every person who may be adversely affected by the granting of the extension, unless in the authority's opinion it is unreasonable in all the circumstances to require the obtaining of every such approval.*

3.2.1 Adequacy of Information

The content of such an application must provide information to confirm that the use was lawfully established. Such an application would require detailed assessment of the history of occupation at 72 Lake Terrace by Council(s) since 1966 through each District Plan including the built form and scale of occupation. There is a risk that existing use rights commensurate to the proposed scale cannot be proven. Significant research and adequate records are required to provide adequate evidence of being lawfully established at the scale proposed. The built form evolution and changes are likely to be more easily established than the scale of activity changes.

3.2.2 Objectives and Policies of the District Plan

Section 10(2)(b)(i) requires the territorial authority make an assessment of the effect of the existing use rights extension against objectives and policies of the district plan. The Resource Management Act via Section 10 provides for activities to continue *in a manner that contravenes a rule in the district plan if it was lawfully established before the rule became operative*. This provision is key in allowing activities certainty to continue without need for new consents each time a District Plan is reviewed. This provision exists as long as that activity is not discontinued. Once discontinued, the Section 10(2)(b)

provision allows the territorial authority an assessment as to the appropriateness of the ongoing use as assessed against the current District Plan policies.

In the case of the Taupo District Plan, the adoption of Plan Changes 28-30 in 2015 altered the District Plan to reflect the intent of the Taupo Urban Commercial and Industrial Structure Plan. Overall in relation to office uses, these plan changes tightened related rules and policies in the Industrial and Residential Environments, expanded the Taupo Town Centre Environment, relaxed rules and policies in the Taupo Town Centre Environment and added a new chapter of Taupo Business Distribution (Section 3r).

Objective 3r.2.1 seeks to *promote sustainable and on-going economic development to occur through encouraging business activities in appropriate locations throughout the district with policies that seek to establish consolidated and convenient business areas...which meets the economic needs of business, provides community with convenient access to good and services.*

Objective 3r.2.2 outlines a *distribution, scale and form of business activity which specifically in clause (b) is able to provide for the efficient use of buildings, land and infrastructure in business areas; and (d) avoids establishing retail and office activity outside town centre environment where this will create dispersed commercial activity to the detriment of the efficient operation, function, viability and sustainability of the District's town centre, especially the Taupo Town Centre.* Associated policies under this objective further emphasise the need to consolidate commercial activities within the town centre and strengthen the Taupo Town Centre's function as the primary commercial, retail, recreational, cultural and entertainment centre of the District.

The Residential Environment Objective 3a.2.1 seeks *the maintenance and enhancement of the character and amenity of the Residential Environment with policies which enable small scale home based employment opportunities and some slightly larger office activities within the KTHD area to the east of the Taupō Town Centre Environment.* Additionally the objectives and policies seek to *ensure activities are consistent with a residential scale of development, including an appropriate density and level of environmental effects,* whereby the built scale and activity scale would be assessed.

It is my opinion that a detailed assessment is likely to conclude that an extension of the existing use rights for a 2100m²+ office in the High Density Residential Environment would be contrary to the Business Distribution and Residential Environment objectives and policies of the District Plan, and on that basis the extension application may not be granted.

3.2.3 Affected Parties

Section 10(2)(b)(ii) requires that written approval is obtained from every person who may be adversely affected by the granting of the extension. Persons could be considered to be adversely affected by the extension as it continues to allow a use that is now not a permitted activity under the District Plan. Such persons are likely to be those property owners and occupiers of property adjoining 72 Lake Terrace as noted in orange in Image 1. Additionally other parties such as Town Centre Taupo might be included as adversely affected. Should written approvals not be obtained from all parties adversely affected, the territorial authority may not grant the extension.



Image 1 : 72 Lake Terrace, Taupo (source: TDC Mapi)

3.2.4 Conclusion

An application for extension of existing use rights requires a detailed application confirming the basis of the lawful establishment of the offices at 72 Lake Terrace, that the proposal is similar in character, scale and intensity to that lawfully established prior to 2007, and an assessment of the relevant objectives and policies of the District Plan.

A decision on the extension of existing use rights must conclude that use was lawfully established as detailed in the application. There is a risk that adequate information cannot be provided to establish that the use was lawfully established at the scale desired. The appropriate test to apply when determining whether a use was lawfully established is the balance of probabilities: *Holliday v Waimairi DC* (1984) 10 NZTPA 281 (HC), relied on in *Dunedin Electricity Ltd v Dunedin CC* C049/94 (PT).

It is my opinion that a detailed assessment is likely to conclude that an extension of the existing use rights for a 2100m²+ office in the High Density Residential Environment would be contrary to the Business Distribution and Residential Environment objectives and policies of the District Plan, and on that basis the extension application may not be granted.

Written approvals are likely to be required to the extension application from adjoining landowners and occupiers, and possibly other parties such as Towncentre Taupo. Should written approvals not be obtained from all parties adversely affected, the territorial authority may not grant the extension.

4. RESOURCE CONSENT APPLICATION

This section assesses the likely timeline to undertake the alternate process of resource consent at 72 Lake Terrace (with a historical use background) and an assessment of risk associated with that.

As noted above in Section 2, as the Council occupation at 72 Lake Terrace has been discontinued for more than 12 months I consider there is a limited ability in a resource consent to use the previous occupation of the site as an "authorised baseline" as stated in Mitchell Daysh memorandum. However a consent application can provide detailed background as to the historical use of the site for Council purposes.

This assessment assumes that a building of similar scale is proposed and that such an application would require a Discretionary Activity resource consent due to non-compliance with office activity rules within the High Density Residential Environment. A Discretionary Activity resource consent is subject to the requirements of Section 104 and Section 104B of the Resource Management Act.

4.1 Timeline

For a proposal of this scale, the following timeline is likely

- Application Development 4-10 weeks
(following receipt of architectural plans and visual montages)
Engineering Services Report
Assessment of Environmental Effects
Obtaining Written Approvals
- Lodgement and Territorial Authority Processing 4 weeks
(Non- Notified)
Excluding further information requests 2-4 weeks
- Lodgement and Territorial Authority Processing
(Limited Notified)
 - Preparation of and notification period 6 weeks
 - Hearing 9 weeks
 - Decision 3 weeks
 - Appeal Period 3 weeks
- Lodgement and Territorial Authority Processing
(Notified)
 - Preparation of and notification period 6 weeks
 - Hearing 15 weeks
 - Decision 3 weeks
 - Appeal Period 3 weeks

Therefore if

- non-notified 10 – 18 weeks
- limited notified 28 – 39 weeks
- notified 34 – 45 weeks

4.2 Risk

The risks associated with a Discretionary Activity resource consent application are that this application is publicly notified thus incurring additional delays, that it may be declined by hearings commissioners or if approved that it may be appealed by a submitter.

4.2.1 Notification

Under the Resource Management Act, this activity is not excluded from public notification. Therefore I consider there is a medium to strong possibility that an assessment of the effects would determine that the activity will have or is likely to have adverse effects on the environment that are more than minor (S95A(8)(b)) therefore public notified.

An assessment of environment effects would need to assess the effects of proposed building and scale of activity against that anticipated for the High Density Residential Environment. Such an assessment could acknowledge the historical scale of use however would also need to assess the proposal against the permitted baseline as set out in the District Plan for the High Density Residential Environment. Effects to adjoining neighbours and the wider streetscape need to be addressed. Additionally effects on roading, transport and infrastructure are required to be assessed as the building will not meet the parking and vehicle movements requirements. No guidance can undertake here without possible development plans however it is likely to be possible to design a building close to the bulk and location District Plan requirements.

The assessment would also need to address the effect of the office moving out of the Taupo Town Centre thus addressing matters of vitality, viability efficiency, economic wellbeing, lack of consolidation of business activities, increase in travel between businesses and similar matters. It is possible that these effects (based on 200 staff and frequency of Council meetings) could be determined as more than minor on the vitality and viability of the Taupo Town Centre thus public notification could occur.

4.2.2 Decision

Under S104 and S104B of the Resource Management Act, commissioners are required to consider

(a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard;

(ii) other regulations;

(iii) a national policy statement;

(iv) a New Zealand coastal policy statement;

(v) a regional policy statement or proposed regional policy statement;

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application

Effects

As detailed prior an assessment of environment effects would need to assess the effects of proposed building and scale of activity against that anticipated for the High Density Residential Environment. Effects to adjoining neighbours and the wider streetscape need to be addressed. It is not possible to undertake this assessment without possible development plans.

The assessment would also need to address the effects of Council moving out of the Taupo Town Centre thus addressing matters of vitality, viability efficiency, economic wellbeing, lack of consolidation of business activities, increase in travel between businesses and similar matters. Additionally effects on roading, transport and infrastructure are required to be assessed based on the proposal's parking provision and vehicle movements. The level of this effect is required to be assessed in the final decision.

Objectives

Essentially I consider that the assessment of the objectives and policies of the District Plan would likely result in a similar conclusion as that outlines in Section 3.2.1 above ie that a 2100m²+ office in the High Density Residential Environment would not be consistent (or may even be contrary to) with the Business Distribution and Residential Environment objectives and policies of the District Plan.

Alternatives

If it is likely that the activity will result in significant adverse effects, the application is required to detail alternative locations for the proposal. The commissioners may consider this as a relevant other matter to be considered.

4.2.3 Appeal

If the proposal is publicly notified, full appeal rights are provided to all submitters. If approved there is therefore a possibility that a submitter (individual or group) would appeal the decision.

Should it be declined, and as the applicant Council wishes to appeal the decision, this could lead to an Environment Court case of Taupo District Council v Taupo District Council.

4.2.4 Conclusion

As a Discretionary Activity under the Resource Management Act, this activity is not excluded from public notification. Therefore I consider there is a medium to strong possibility that an assessment of the effects would determine that the activity will have or is likely to have adverse effects on the environment that are more than minor (S95A(8)(b)) thus public notification could occur incurring delays.

Matters commissioners need to consider in a decision are the level of effects on the immediate and wider environment including the Taupo Town Centre, and the proposal's consistency with the Taupo District Plan Business Distribution and Residential Environment objectives and policies. Additionally alternative locations for such a use would be considered.

Public notification allows submitters rights of appeal. If approved there is therefore a possibility that a submitter (individual or group) would appeal the decision.

If the proposal was determined to be a Non-Complying Activity resource consent which is subject to the requirements of Section 104 and Section 104D of the Resource Management Act, the matter of precedent, public confidence and integrity of the Taupo District Plan is one that must be considered by the commissioners. As a Discretionary Activity precedent (in a legal sense) is a matter which may be considered by commissioners in a decision where the applicant is looking to undertake a proposal out of keeping with the publicly supported policy framework.

5. SUMMARY

I concur with the assessment from Mitchell Daysh as it relates to the existing use rights process outlined in the Resource Management Act and an alternate resource consent process. I also concur with the key RMA challenges for an existing use rights application and/or extension.

I however consider there is a limited ability in a resource consent to use the previous occupation of the site as an "authorised baseline" as stated in Mitchell Daysh memorandum as for this to occur Section 10 existing use rights must still exist. These existing use rights expired 12 months after September 2017.

There is an ability under Section 10(2) to apply for an extension to retain these existing use rights. An extension application would need to be lodged by September 2019. Such an application would need to first establish that the occupation was lawful, requiring detailed assessment of the history of occupation at 72 Lake Terrace by Council(s) since 1966 through each District Plan including the built form and scale of occupation. Secondly it would need to determine that the extension will not be contrary to the objectives and policies of the district plan. Finally it would need to include approvals from adversely affected parties.

There is a risk that existing use rights commensurate to the proposed scale cannot be proven. It is my opinion that a detailed assessment is likely to conclude that an extension of the existing use rights for a 2100m²+ office in the High Density Residential Environment would be contrary to the Business Distribution and Residential Environment objectives and policies of the District Plan, and on that basis the extension application may not be granted. Should written approvals not be obtained from all parties adversely affected, the territorial authority may not grant the extension.

A resource consent for a new building at 72 Lake Terrace can be applied for and include detailed background as to the historical use of the site for Council purposes. Such an application would be considered a Discretionary Activity due to non-compliance with office activity rules within the High Density Residential Environment.

As an office activity, the application is not excluded from public notification. Although I cannot assess physical effects of a new building on the site, the effects of Council moving out of the Taupo Town Centre ie vitality, viability efficiency of the Taupo Town Centre, economic wellbeing, lack of consolidation of business activities, increase in travel between businesses and similar matters I can summarise that these effects (based on 200 staff and frequency of Council meetings) could be determined as more than minor thus public notification could occur.

Commissioners are requiring to consider effects of the building, to neighbours, the wider streetscape and on the Taupo Town Centre in their decision. Similarly objectives and policies must be assessed. I consider that at the scale required the proposal would not be consistent (or may even be contrary to) with the Business Distribution and Residential Environment objectives and policies of the District Plan. Alternative locations are also likely to be considered.

If approved, there is therefore a possibility that a submitter (individual or group) would appeal the decision. Should it be declined, and as the applicant Council wishes to appeal the decision, this could lead to an Environment Court case of Taupo District Council v Taupo District Council.

The matter of precedent and integrity of the Taupo District Plan may be considered by commissioners in a decision where the applicant is looking to undertake a proposal out of keeping with the publicly supported policy framework.

Catriona Eagles
CHEAL CONSULTANTS LIMITED
31 May 2019