



Procedure for Assessing Development Applications Against the Minimisation Objective

for private, waterside structures in the
W6 and W7 zones –
Sydney Harbour and its tributaries

NSW | MARITIME


1. What is the purpose of this procedure?

- 1.1 The purpose of this procedure is to assist NSW Maritime officers in assessing certain development applications for water-based development under the *Environmental Planning and Assessment Act 1979* (EP&A Act), the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (SREP 2005) and the *Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005* (DCP 2005).
- 1.2 Specifically, it is to guide the assessment of applications for waterside structures which are, pursuant to the SREP 2005, in the W6 Scenic Waters: Active Use and W7 Scenic Waters: Casual Use zones.
- 1.3 One objective of the W6 & W7 zones is to minimise the number and extent of waterside structures through mechanisms such as sharing between adjoining waterfront property owners (the minimisation objective).
- 1.4 The purpose of this procedure is to ensure that development applications for waterside structures in the W6 & W7 zones conform with the minimisation objective.
- 1.5 The procedure accords with independent legal advice which indicates that the consent authority may achieve the minimisation objective by approving proposals which are neutral or, at the very least, do not work against the objective to minimise the number and extent of structures, and provided the proposals meet all other relevant assessment criteria. The sharing of structures is not necessarily required to achieve the minimisation objective.
- 1.6 This procedure is not intended to impinge on the development assessment process in respect of any other relevant zone objectives.
- 1.6 This procedure takes effect from 3 August 2007 and replaces any previous procedures or directives on this issue.

2. Who should apply this procedure?

2.1 This procedure should be applied by officers of the Maritime Property Division when, as delegate of the Minister for Ports and Waterways, they are considering the “minimisation objective’ in the assessment of development applications for new structures and modifications to existing structures in the W6 and W7 zones.

3. What is considered when assessing development applications?

3.1 In determining a development application, the consent authority must consider each case on its merits and must comply with the requirements set out in the EP&A Act and Regulation.

3.2 Under s79C(1) of the EP&A Act, a consent authority must take into account, amongst other things, the provisions of the SREP 2005 and the DCP 2005.

3.3 Clause 17(2) of the SREP 2005 relevantly provides:

“Except as otherwise provided by this plan, the consent authority must not grant development consent to any development unless satisfied that it is consistent with the aims of this plan and the objectives of the zone in which it is proposed to be carried out.”

3.4 Clause 18(2) of the SREP 2005 relevantly provides:

“(2) Despite subclause (1), development not referred to in the Table to this clause may be carried out with development consent, but only if the consent authority is satisfied that the development:

(a) is not inconsistent with ... the objectives of the zone in which it is proposed to be carried out....”

3.5 Clause 4.2 of the DCP 2005 relevantly provides that, amongst other things, the following objectives and requirements should be considered for development:

- *“... the extent of development is kept to the absolute minimum necessary to provide access to the waterway;*
- *shared usage is encouraged to minimise the number of structures and their cumulative impact on the environment...”*

3.6 Additionally, the consent authority must take into account the likely impacts of the proposal, the suitability of the site for the proposed development and the public interest (Section 79C(1)(b), (c) & (e) of the EP&A Act).

3.7 In considering the “public interest”, the Land and Environment Court (see: *Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472*) established that the consent authority may take into account relevant government codes and policies, particularly those which have been properly prepared and exhibited. As a result, it would appear to be appropriate for NSW Maritime to also take into account the provisions of relevant Government policies such as the Sharing Sydney Harbour Access Plan and the Boat Storage Policy for Sydney Harbour.

4. What are the relevant aims of the SREP 2005 and its zone objectives?

4.1 As set out above, NSW Maritime must not grant development consent to any development unless it is satisfied that it is consistent with the aims of the SREP 2005 and the objectives of the zone.

4.2 The W6 and W7 zone objective of the SREP 2005 which is of relevance to this procedure is as follows:

“... to minimise the number and extent of structures over waters in this zone through mechanisms such as the sharing of structures between adjoining waterfront property owners; ...”. (ie. the minimisation objective).

4.3 The extent to which this objective can be achieved and the mechanisms for achieving it must depend on its underlying aims. A consideration of the totality of the SREP 2005 and the guidelines published by the Department of Planning at the time of its introduction indicate the following underlying aims of the minimisation objective:

- to ensure maritime safety by minimising hazards to navigation;
- to minimise obstacles to foreshore access in appropriate locations;
- to minimise impacts on aquatic vegetation;
- to ensure appropriate visual outcomes;
- to permit structures where they meet a demonstrable demand;

- to ensure that new development in the W6 zone is minimal, appropriate to the landscape setting and does not conflict with other water users; and
- to ensure development in the W7 zone that comprises of unobtrusive private waterside structures of a scale and location that does not dominate the landscape setting to meet casual boating needs.

5. Interpretation

5.1 In November 2006 planning law consultants Lindsay Taylor Lawyers provided advice based on the legislation and case law, to assist in developing a procedure to properly determine development applications on behalf of the Minister, in the W6 and W7 zones.

5.2 The advice indicates that unless a consent authority is satisfied that development is consistent with the relevant zone objective, it may not grant consent.

5.3 To ensure consistency with the relevant zone objective the consent authority must be satisfied of the compatibility of any development proposal with the minimisation objective, that is, it would not tend to work against achieving the objective, is neutral, or does not have an effect on the objective. The proposal should be considered in its context, relative to such factors as the number of existing structures in the locality and the number of structures which may otherwise result.

5.4 The advice also indicates that while the sharing of waterside structures is one method of achieving the zone objective to minimise the number and extent of structures, there may be other strategies which will achieve the objective and its underlying principles. Some examples are set out in section 6 below.

6. What strategies and options may meet the relevant zone objective?

6.1 As the objective relates to both the number and extent of structures, depending on the circumstances of each case, the following strategies may be acceptable for achieving the minimisation objective, either singly or in combination:

- structures are the minimum size required for function;
- structures are shared between adjoining waterfront property owners who agree to share;
- structures are retractable onto land above mean high water mark;
- single structures serve several functions, thereby avoiding the need for separate single purpose structures (eg a wing decked pontoon eliminates the need for a separate skid);
- shared piles, where the piles are located at the division-of-waterway;
- dry storage of vessel on private land (eg in a boatshed) with a slipway located on public land;
- replacement of existing structures with those occupying a similar or smaller footprint;
- repair of existing structures;
- rationalisation of existing structures, or parts thereof, such that a net increase in the number and extent of structures does not occur; and
- other options in respect of which the applicant is able to demonstrate to the consent authority that the minimisation objective can be met.

6.2 When considering these strategies and options, the zone objective may be met when the proposed development will lead to an outcome which is considered to be neutral or better in achieving the minimisation objective, or which does not work against the minimisation objective.

7. When is the consent authority required to refuse the development application?

7.1 The SREP 2005 requires that the consent authority considers all zone objectives. Where the consent authority considers that one or more zone objectives have not been met, it must refuse the application.

7.2 Where the proposal is deemed to work against the zone objective to minimise the number and extent of structures in the W6 and W7 zones, the consent authority must refuse the development application.

7.3 There will be circumstances where the consent authority considers that the minimisation objective is satisfied but that the other zone objectives cannot be met and in these cases the development application must be refused, irrespective of the fact the minimisation objective has been met.

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www.maritime.nsw.gov.au

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