

Replacement Report

REPORTS THROUGH THE GENERAL MANAGER

REPORTS FROM THE DIRECTOR PLANNING AND REGULATION

8 [PR-CM] Non-Motorised Water Recreation Businesses and Tweed Local Environmental Plan 2014/Tweed City Centres Local Environmental Plan 2012

SUBMITTED BY: Development Assessment and Compliance

Valid



Civic Leadership

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

1	Civic Leadership
1.2	Improve decision making by engaging stakeholders and taking into account community input
1.2.1	Council will be underpinned by good governance and transparency in its decision making process

SUMMARY OF REPORT:

With the adoption of Tweed Local Environmental Plan (TLEP) 2014 and zoning of the waterways, legal advice provided in the confidential attachments was requested seeking clarification on water recreation businesses' requirement for consent and permissibility. Upon receiving the legal advice dated 26 September 2014 and 30 October 2014, a review has been undertaken regarding how to administer and regulate the commercial use of waterways and public space regarding recreation involving non-motorised watercraft.

Based on the legal advice received on the topic:

- The exchange of money is not a trigger for Development Consent i.e. the commercial activity (hiring or tours) associated with the recreation is not the trigger for a Development Application.
- The trigger for Development Consent is rather, which proposals constitute 'development' as defined by the EP&A Act and as interpreted by the Courts. What constitutes 'development' has been determined by the 'scale and degree of the use of the land' and whether the proposed use is deemed 'sufficiently regular'.
- If the use is deemed to constitute 'development' and requires development consent, characterisation is as per the attached Table A.

Given the eventful history of proposals of this nature, the recent adoption of new LEPs, introduction of zoning of the waterways and regular enquiries to both Council's Development Assessment Unit and Recreational Services Unit, a unified approach to handling this matter is requested. Accordingly it is recommended that a draft Policy be placed on public

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exhibition for 28 days seeking public comment on the proposed thresholds for non motorised water recreation businesses.

RECOMMENDATION:

That:

1. **ATTACHMENT 1 and 2 are CONFIDENTIAL in accordance with Section 10A(2) of the Local Government Act 1993, because they contain:-**
 - (g) **advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.**
2. **The draft policy provided in the attachments be placed on public exhibition for 28 days and invites public submissions up to 42 days.**
3. **Following the public exhibition period a report be prepared for Council's consideration of the submissions and any amendments to the draft if required.**

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REPORT:

With the adoption of TLEP 2014 and zoning of the waterways, legal advice provided in the confidential attachments was requested seeking clarification on water recreation businesses' requirement for consent and permissibility. Upon receiving the legal advice dated 26 September 2014 and 30 October 2014, a review has been undertaken regarding how to administer and regulate the commercial use of waterways and public space regarding recreation involving non-motorised watercraft.

There is an argument that regulation of the waterway could be considered to draw parallels with roads in that the TLEP regulates development within the area but does not trigger consent for the driving of vehicles on the road associated with commercial activity. Further, the vehicles/vessels/craft require licensing for operation through NSW Roads and Maritime Services and not Council.

Also, there is an argument that the Tweed Local Environmental Plan 2014 or Tweed City Centre Local Environmental Plan 2012 does not provide definitions to cater for development outside buildings, structures or places.

The main points to consider are:

- What triggers Development Consent?
- How is the use of the Waterway (Crown land) regulated?
- How is the use of Council owned/managed parks regulated?
- If Development Consent is triggered, what is the characterisation and extent of the assessment under TLEP 2014 or TCCLEP 2012?

Based on the legal advice received on the topic:

- The exchange of money is not a trigger for Development Consent i.e. the commercial activity (hiring or tours) associated with the recreation is not the trigger for a Development Application.
- The trigger for Development Consent is rather, which proposals constitute 'development' as defined by the EP&A Act and as interpreted by the Courts. What constitutes 'development' has been determined by the 'scale and degree of the use of the land' and whether the proposed use is deemed 'sufficiently regular'.
- If the use is deemed to constitute 'development' and requires development consent, characterisation is as per the attached Table A.

In light of the received legal advice, a suggested way of regulating this matter involves focusing on what triggers development consent, which is by determining if the activity constitutes 'development' and consequently setting standards or tests that Council considers to be the *threshold*.

A proposed test for whether the commercial recreational activity is above the threshold, (and therefore constitutes 'development') involves consideration of the following factors:

- Frequency of the activity at a certain site.
- Duration of the activity.

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- The site area nominated for the activity.

The proposed thresholds for constituting 'development' are as follows:

- Business delivery or pick up of equipment and craft - maximum 30 minutes per visit, maximum 2 visits per day per site.
- Guided tours, instruction or transport - maximum 3 hours per visit, maximum 3 visits per week per site. Parking is required to be lawful and offsite.

If the threshold is not exceeded, land owner consent (and associated licensing) is required particularly if on Council owned/managed land.

If the threshold is exceeded, the proposal requires development consent and therefore will require landowner's consent for the lodgement of a Development Application with the proposal characterised as per the attached Table A. The assessment of the Development Application will involve the areas (i.e. land and/or waterway) involved in the 'development'.

Provision of Council landowner's consent (and potential subsequent licensing) is dependent on advice from Council's Recreation Services Unit on a site by site basis and directed by any Plans of Management in place. Owners consent from the Crown will be required if Crown land is involved.

It should be noted that *recreation facility (outdoor)* and *recreation areas* are prohibited development in waterways zoned W1, W3 and SP2, as displayed in Table A.

Given the eventful history of proposals of this nature, the recent adoption of new LEPs, introduction of zoning of the waterways and regular enquiries to both Council's Development Assessment Unit and Recreational Services Unit, a unified approach to handling this matter is requested.

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Use	Is 'development' and therefore Development Consent required?	If consent is required, characterisation under Standard Instrument	If development consent is required, permissibility under TLEP 2014 or TCCLP 2012									
			RE1 Public Recreation	W1 Natural Waterways	W2- Recreational Waterways	W3 Working Waterways	SP2 Water Supply System	RU1 Primary Production	RU2 - Rural Landscape	RU5 Village		
Members of public using land or waterways (on privately owned or commercially hired craft)	No	-	-	-	-	-	-	-	-	-	-	-
Hiring of craft on public park	Yes, only if the activity is above the threshold	Retail Premises	Prohibited	-	-	-	-	Prohibited	Prohibited	Prohibited	Prohibited	Permitted with Consent
Depositing or collecting craft in public parks		Retail Premises	Prohibited	-	-	-	-	Prohibited	Prohibited	Prohibited	Prohibited	Permitted with Consent
Lessons and guided tours on waterways		Recreation area or recreation facility (outdoor)	Permitted with Consent	Prohibited	Permitted with Consent	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited	Permitted with Consent	Permitted with Consent

Table A - Example proposals for the commercial use of public land and waterways for water recreation businesses. Please note that some Tweed Shire public boat ramps or jetties are located within road reserve which is zoned RU1, RU2 or RU5.

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OPTIONS:

That Council:

1. Adopts the thresholds and places the Draft Policy on exhibition, identified in this report;
or
2. Adopts some other course of action.

CONCLUSION:

The proposed thresholds provide a defined position to manage waterway based recreation uses.

COUNCIL IMPLICATIONS:

a. Policy:

It is recommended to place the draft Policy on public exhibition.

b. Budget/Long Term Financial Plan:

Not Applicable

c. Legal:

Yes, legal advice has been received and is attached.

d. Communication/Engagement:

Inform - We will keep you informed.

UNDER SEPARATE COVER/FURTHER INFORMATION:

(Confidential) Attachment 1. Confidential Attachment Legal advice from Lindsay Taylor Lawyers dated 26 September 2014 (ECM 3523885)

(Confidential) Attachment 2. Confidential Attachment Further legal advice from Lindsay Taylor Lawyers dated 30 October 2014 (ECM 3523918)

Attachment 3. Draft Policy for Non Motorised Water Recreation Businesses and the interpretation of the Tweed Local Environmental Plan 2014 and the Tweed City Local Environmental 2012 (ECM 3531186)
