

Subject: PES - Use of Public Wharf for Passenger Ferry Service and Charter Boat
Tours - Marine Parade, Tea Gardens
Index: DA 384/2009 and PK25005
Author: Senior Development Assessment Officer - Alan Bawden

DETAILS:

Date Received: 25 February 2009
Applicant: Nelson Bay Charters P/L
Owner: Great Lakes Council trustee to NSW Department of Lands
Land: Public Wharf including floating pontoon (Permissive Occupancy licence 315116) adjoining foreshore Reserve (Lot 7010 DP1060384; Marine Drive, Tea Gardens (opposite Maxwell Street)
Area: Unknown
Prop Key: PK 25005 (Permissive Occupancy Licence 315116)
Zoning: Un-zoned land adjoining 6(a) Open space, GLLEP 1996

SUMMARY OF REPORT:

- Use of public wharf for commercial operations
- Existing users
- Council's Commercial Use of Reserves policy
- Public submissions
- Compliance with legislation, plans, policies and guidelines

SUMMARY OF RECOMMENDATION:

- That the application be refused.
- That the applicant cease use of the public wharf
- That Port Stephens Ferry Service be directed to lodge a development application

FINANCIAL/RESOURCE IMPLICATION:

A decision for approval subject to conditions or refusal may lead to an appeal to the Land and Environment Court with inherent cost implications.

POLICY IMPLICATIONS:

Compliance with Council policies.

LEGAL IMPLICATIONS:

A decision for approval subject to conditions or refusal may lead to an appeal to the Land and Environment Court requiring legal representation.

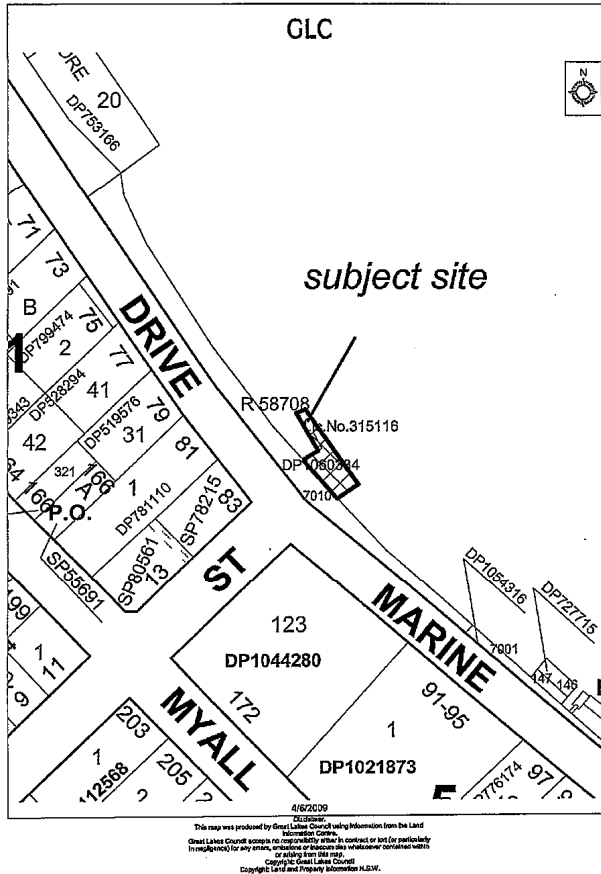
LIST OF ANNEXURES:

A: Photograph of wharf, pontoon and ferry boats

ATTACHMENTS:

Nil

SUBJECT SITE



REPORT:

BACKGROUND

Nelson Bay Charters is operating a passenger ferry service between Tea Gardens and Nelson Bay. The ferry service previously used the private wharf at Tea Gardens boat shed to load and unload passengers before continuing up the Myall River on a river cruise.

The current owner/operator of Nelson Bay Charters has indicated the passenger ferry service and river cruises have operated within Great Lakes LGA prior to 1980's. Council records have no evidence of any formal development approvals for the activity.

Nelson Bay charters changed ownership in early 2000 and the current owner has commenced using the public wharf at Tea Gardens to load and unload passengers for the passenger ferry service and river cruises.

The operator of Port Stephens Ferry Service lodged a compliant with Council about the use of the Tea Gardens public wharf by Nelson Bay Charters without Council development consent. Issues of concern are based on conflicting timetables, dangerous loading and unloading practices at the public wharf and the use of the floating pontoon.

Nelson Bay Charters were advised to lodge a development application to seek consent for the continued use of the ferry service.

Port Stephens Ferry Service lodged development application [DA 317/1996] on 10 April 1996, to operate a public ferry service from the public wharf. The application was deferred by Council at its meeting 10 June 1997, until a Foreshore Management Plan and Tea Gardens Foreshore DCP was prepared. Council records indicate 'no decision' was ever made on the development application.

Great Lakes Council lodged a development application [DA 230/2000] for the construction of a jetty and pontoon. This application was for the addition of the floating pontoon and gangway attached to the existing public wharf. The estimated cost was \$30,000, with Council contribution \$15,000 and NSW Waterways contribution \$15,000. The application was approved and the floating pontoon was constructed.

Port Stephens Ferry Service offered to contribute \$7,500 to the construction of the pontoon, in return for certain usage rights. In a letter to Council in June 1999, Port Stephens Ferry Service acknowledges that it is a public facility and that all vessels can use the pontoon. Council accepted the contribution in return for allowing Port Stephens Ferry Service the use of the wharf and pontoon.

THE PROPOSAL

The development application was lodged on 25 February 2009 however owners consent [NSW Lands] was not received until 29 April 2009.

The proposal is to use the existing Tea Gardens public wharf and floating pontoon fronting Council foreshore reserve at Maine Parade Tea Gardens, for the loading and unloading of passengers associated with a ferry service from Nelson Bay and for private charter boat cruises within the Myall River and lake system.

The vessel is registered by NSW Maritime Authority to carry 49 persons plus 2 crew. The vessel has the necessary permits from both NSW National Parks & Wildlife Service [NPWS] and Port Stephens Great Lakes Marine Park [PSGLMP].

The application is accompanied with a brochure, which identifies ferry and river cruising timetable, but the application requests Council not to regulate the times, as it would be against 'restriction of trade' laws.

The application states that a purpose built gangway will be used to access the vessel from the wharf hardstand area.

The vessel has a toilet and holding tanks which are pumped when required into MidCoast Water boat pumping station at Tea Gardens.

Putrescible waste is collected in containers and disposed in commercial bins provided by Port Stephens Council at the Nelson Bay wharf.

A photograph of the wharf, pontoon and ferry boats is contained in Annexure "A".

SITE DESCRIPTION

The site is an existing public wharf attached to the Tea Gardens foreshore reserve opposite Maxwell Street Tea Gardens. Council is the trustee for the public use of the wharf, however NSW Lands are the owner of the land the wharf is located on. The wharf is erected over the Myall River extending from the foreshore reserve. The Myall River is within the PSGMLP.

The wharf is a timber structure, with a fixed deck extending approximately 6 metres over the Myall River. The wharf structure presents problems in loading and unloading passengers and goods during low tide events. Attached to the northern end of the wharf is a gangway and floating pontoon. The pontoon allows for safe loading and unloading at any tide event.

The wharf is used by the public for boating, fishing and recreation purposes. Council also has a commercial licence in-place with the Port Stephens Ferry Service for the use of the wharf for commercial purposes. No development approval records exist for this ferry service. Council records indicate that Port Stephens Ferry Service made a \$7,500.00 monetary contribution for the installation of the floating pontoon and gangway in 1998. Council and NSW Lands also contributed to the floating pontoon and gangway.

Public on-street parallel and 90 degree car parking is available along the Marine Drive road reserve. The wharf is located opposite the Tea Gardens commercial precinct.

REPORT

Marine Parks Act 1997

The proposed ferry and charter service operates within the PSGMLP. The operator has provided Council with a current licence to operate in the Marine Park waters.

Any approval for the development application requires concurrence under clause 19 of the Marine Parks Act. PSGMLPA have no objection to the proposal.

NSW Commercial Vessels Act 1979

The application included a 'Certificate of Survey' issued by NSW Maritime under the said Act.

The following matters as listed under Section 79C of the Environmental Planning and Assessment Act, 1979, are relevant in considering this application:

a. **The provisions of any environmental planning instrument that is or was on public exhibition and which has been notified to the consent authority; any development control plan; and any matters prescribed by the regulations that apply to the Development Application on the subject land.**

Hunter Regional Environmental Plan 1989

The Plan provides the broad planning objectives for both tourism and the provision of public open space. The proposal is considered to be consistent with the relevant objectives of the Plan.

Great Lakes Local Environmental Plan 1996

The waterway is un-zoned under Great Lakes LEP 1996.

Clause 26 'Development of un-zoned land' requires Council consent to be granted for any development in un-zoned lands.

Planning Comment:

The application involves the use of Council's public wharf for a commercial business. As such development consent is required for the proposed use.

Clause 25 Waterways states:

Objective of Provision

To protect the amenity and environment of foreshore areas and waterways and to control development within flood prone areas.

Development below mean high water mark

(1) Despite any other provision of this plan, the consent of the Council is required for development below mean high water mark other than development which, in the opinion of the Council, constitutes minor works. Development does not constitute minor works where, in the opinion of the Council, there is likely to be an adverse impact from carrying out the development:

- (a) on the existing water quality, or
- (b) on the scenic value of the area, or
- (c) on the amenity of the waterway through obstructing or restricting navigation, or
- (d) on recreational or professional fishing or other recreational activities, or
- (e) on important habitat areas.

Planning Comment:

The application is for the use of the public wharf for an existing ferry boat service and river cruises. The public wharf has limited vessel boarding potential due to its design. A floating pontoon attached to the wharf only has the capacity for one vessel to be moored at a time.

Maintenance dredging

(1A) Notwithstanding subclause (1), the consent of the Council is required for development for the purpose of dredging, for maintenance of oyster leases or otherwise, of the bed of any river or lake where more than 1,000m³ of material is to be removed.

Planning Comment:

The application proposed no dredging work.

Foreshore building line

(2) The Council may, by resolution, fix a line (called a foreshore building line) in respect of any land fronting any bay, river, creek, lake, lagoon, harbour or ocean.

(3) A foreshore building line so fixed has effect for the purposes of this clause only if it is indicated by a broken black line and identified by the words "Foreshore Building Line" on a map.

(4) Despite any other provision of this plan, development is prohibited between the foreshore building line and mean high water mark, except development for the purpose of the following, which requires development consent:

- a) a wharf, jetty or pontoon,
- b) a slipway,
- c) a single storey boatshed,
- d) works to enable pedestrian access,
- e) retaining walls,
- f) swimming pools,
- g) other structures or works which, in the opinion of the Council, are visually unobtrusive and unlikely to prejudice the function of the foreshore area as a passive recreational resource.

Planning Comment:

The application is for use of the existing public wharf.

Flood-labile land

(5) Despite any other provision of this plan, a person must not erect a building or carry out a work (other than buildings or works which, in the opinion of the Council, are unlikely to significantly affect flood behaviour) on flood-labile land without the consent of the Council.

(6) The Council must not consent to the erection of a building or the carrying out of a work on flood-labile land unless the provisions of the Council's Flood Management Policy that relate to the proposed development have been taken into consideration. Copies of the Flood Management Policy are available for inspection at the Council's Office.

(7) The Council may refuse consent to an application to carry out any development which in its opinion will significantly:

- a) adversely affect flood behaviour, including the flood peak at any point upstream or downstream of the proposed development and the flow of floodwater on adjoining lands, or
- b) increase the flood hazard or flood damage to property, or
- c) cause erosion, siltation or destruction of riverbank vegetation in the locality, or
- d) affect the water table on any adjoining land, or
- e) affect riverbank stability, or
- f) affect the safety of the proposed development in time of flood, or
- g) restrict the capacity of the floodway, or
- h) require the Council, the State Emergency Service or any other Government agency to increase its provision of emergency equipment, personnel, welfare facilities or other resources associated with an evacuation resulting from flooding, or
- i) increase the risk to life and personal safety of emergency services and rescue personnel.

Planning Comment:

The subject site is flood liable. The application proposes the use of an existing public wharf and no additions are proposed.

State Environmental Planning Policy No. 71 – Coastal Protection

The proposed development is considered to achieve the aims of the Policy having regard to the matters for consideration listed in clause 8 of the Policy.

The proposal is to utilise an existing wharf that does not restrict public access to the Myall River. However the use of the wharf by two ferry operators at similar times would restrict the boating public access to the wharf.

NSW Coastal Policy 1997

The 1997 NSW Coastal Policy is a Government Policy, which is a prescribed matter pursuant to Section 79C of the Environmental Planning and Assessment Act, 1979. This requires Council to consider the relevant strategic actions of the Policy when assessing development applications.

In relation to this development application, Table 2 clause 1.3.12 addressing Vessel sewage pump-out facilities is relevant. Disposal of sewage from the vessel at a licenced MidCoast Water pump-out facility is available at Tea Gardens.

Tea Gardens Foreshore DCP 29

The site is within the public wharf zone of the DCP. The DCP map indicates that a future pontoon can be provided to link the two public wharfs in this locality. Clause 2.4 'Development of land below high water mark' of the DCP states:

2.4.1 Objectives

- Provide the use of the public wharf for the loading and unloading of commercial vessels, with limited courtesy mooring for visiting craft.

The proposal satisfies the specific objective of the DCP.

Commercial Use of Reserves Policy

This policy relates to all reserves within the Great Lakes Local Government Area under the care and control of Council including beaches, adjoining parks, foreshore reserves, neighbourhood parks and sporting fields.

The Policy establishes guidelines for activities, as well as identifying areas of operation and operating requirements. The policy and procedure focus on water-based commercial activities and commercial activities that utilise beaches under Council's care and control.

Council's Manager of Parks and Gardens provides the following comment:

"In reference to the above mentioned Development Application and the proposal to conduct a commercial operation from the public pontoon.

This request and the historic use of this site has been the subject of many Council reports, correspondence and a deferred DA.

Basically, Council holds the lease over the pontoon at Tea Gardens. Currently two ferry operators operate from the public wharf. In July 2008 I wrote to both operators requesting information on their current operations and copies of their consent to operate. The applicant provided a dialogue on their historical use of the site however failed to provide a formal approval to operate.

On review of the background material it became apparent that there was a history of ferry operations from this wharf but not by the applicant. In fact, correspondence from the former Manager of Parks and Recreation, Janne Yardy, acknowledges the other ferry operations use of the site and financial participation in the development of the floating pontoon. This information was also contained in a council report dated 27 April 1999. Within this correspondence the allocation of operating times was also given, those being 10am, 2.30pm and 4.30pm.

Due to concerns with operating procedures of the Nelson Bay Charters vessel, direction was given on the 7 January 2009 to only take and set down passengers from the floating pontoon. Previous passenger set down and pick up was being undertaken from the "hard stand" area and was considered dangerous.

It appears neither operator has Development Consent to operate however the other ferry operator has recorded historic use and has acknowledgement of operations through a council report and subsequent correspondence.

In regards to the current application to operate, submitted by Nelson Bay Charters, it is felt that the current pontoon does not cater for two commercial operations and allow free time for casual use. In addition, during the past six months requests have been made to Nelson Bay Charters to alter actions to preserve safe operating procedures however these requests have been met with resistance and at times refusal.

It is appreciated that any commercial use of this area will assist the business operations and tourism of Tea Gardens / Hawks Nest, however it is believed the current facility has a limited commercial carrying capacity. If and once expansion of the floating pontoons occur, then additional commercial use could be considered.

Recommendation

It is recommended that the DA for Nelson Bay Charters be refused due to insufficient space to operate on the existing infrastructure."

Planning Comment

Based on the above comments, the existing public wharf and attached floating pontoon does not have the capacity to support 2 passenger ferry services that operate a similar timetable. Further it is acknowledged that neither ferry service, according to Council records has development consent for the use of the wharf. It is acknowledged that Port Stephens Ferry Service contributed to the upgrading of the wharf [1998] and that they currently hold a commercial licence with Council for the use of the public wharf for commercial purposes.

Car Parking Policy

Council car parking policy does not provide car parking rates for marina's or commercial wharfs.

The RTA guidelines for Traffic Generating Development identifies car parking rates for marinas only.

Council has previously applied the following car parking rates for other similar development applications involving the commercial use of public wharfs:

1 car parking space per 4 'seats' in a vessel. This is based on 2 persons walking to the wharf and 2 person sharing a motor vehicle and parking.

The ferry is licensed for a total of 49 passengers plus 2 crew.

A total of 13 car parking spaces are required. As no private land is available to provide the space, a monetary contribution under section 94 is required. Council current car parking contribution fee for Tea Gardens is \$15,120.20 per space.

b. The likely impacts of development including environmental impacts on both natural and built environments and social/economic impacts in the locality.

Access, Servicing and Parking

The current road system has sufficient capacity to support any expected increase in traffic generated by the development and access to and from each site is considered safe and efficient.

Waste Management

The vessel will generate minimal levels of putrescible waste. The waste is to be stored in sealed containers and disposed at the waste management bins provided at Nelson Bay.

Effluent Disposal

Effluent disposal will be required in accordance with the requirements of the Commercial Vessels Branch of the NSW Maritime. Pump-out facilities are available at Tea Gardens.

Cumulative Impacts

The wharf is for general public use, including temporary boat mooring and recreation. The existing wharf is unsafe for passenger ferry services at certain tides.

The existing Port Stephens Ferry Service contributed in the cost of purchasing and installation of the floating pontoon attached to the wharf. The floating pontoon is for both public and commercial uses. The floating pontoon only has the capability for one boat usage at a time.

The existing pontoon does not have sufficient capacity to provide a loading and unloading service for two ferry boats, especially if they operate at similar times. Hence, why conflict and complaints have drawn this matter to Council's attention.

c. The Suitability of site for the development.

The site is located a fronting Council public reserve and adjoining the main Myall River navigation channel. Daylight operations of the charter boat business will have no increased adverse impacts on the adjacent commercial precinct.

NSW Maritime, NSW Fisheries and PSGLMP have no objection to the proposal.

d. Any submissions made in accordance with the Act or regulations.

The application was advertised and notified in accordance with Council's Policy and one submission was received. The submission [from the other ferry operator] objecting to the proposal is contained on Council's DA file and refers to the following issues:

1. Acknowledges the Nelson Bay ferry service has operated for years from the Tea Gardens Boatshed private wharf.

Comment: Council has no records to substantiate this comment.

2. The operator has two private wharfs located within 115 metres south of the public wharf. The operator should be using his private wharfs.

Comment: The application is for the use of Council public wharf.

3. Clashing of Ferries timetables, poaching customers and undercutting prices.

Comment: The application is for the use of a Council public wharf. The issue such as operating times can be controlled under development approval and Council's commercial use of reserves policy. Fare structures are controlled by the market forces.

4. Unsafe working practices:- loading and unloading of passengers.

Comment: The issue can be resolved if approval is granted to use the wharf and attached floating pontoon.

5. Parking availability

Comment: Car parking has been discussed previously in this report.

e. The public interest

The public interest is best served by the adoption and application of legislation, plans, policies and guidelines. The public interest is also served by notify the public of a development application.

In this instance the public's use of public facilities is a priority over commercial interests. However, the ferry services provide a public good, by providing a transport service for local and tourist alike. The tourism component then flows on to an economic benefit for commercial premises along Tea Gardens foreshore.

CONCLUSION

The proposal is to use Council's public wharf for a commercial business, namely a passenger ferry service and charter boat operations on the Myall River.

Issues of concern relate to current users and the capability of the wharf [including floating pontoon] and street car parking to accommodate a second ferry service.

Council's Manager of Parks and Gardens has stated that the current wharf facilities cannot adequately and safely cater for 2 passenger ferry operations. The additional use would further restrict public boating and recreational access to the mooring facilities.

The proposal will not have an adverse impact on the adjoining commercial precinct and is in-keeping with the commercial, nautical character of the locality. Car parking remains an issue for these types of operations.

Until such time that the current wharf facilities can be extended to cater for this additional passenger ferry service and charter boat operations, the proposal cannot be supported.

The other ferry service, Port Stephens Ferry Service, has no development consent to operate, however, advice from Council's Manager Parks and Gardens indicates a recorded historic use and has acknowledgement of operations and has previously made a \$7,500.00 monetary contribution for the installation of the floating pontoon and gangway in 1998. However, this ferry service should also be directed to lodge a development application to seek formal consent for the use of the public wharf.

RECOMMENDATION:

- A. It is recommended that DA 384/2009 for the use of Tea Gardens Public Wharf and floating pontoon for a public passenger ferry service and charter boat [River Cruise] business be refused for the following reasons:
 - 1. The current wharf facilities cannot adequately and safely cater for the loading and unloading from two [2] passenger ferry services.
 - 2. Insufficient car parking available for the passenger ferry service.
 - 3. The proposal is not in the public interest.
- B. The operator of the ferry Service, Nelson Bay Charters be directed to immediately cease use of the public wharf for public passenger and charter boat operations.
- C. Port Stephens Ferry Service be directed to lodge a development application within two [2] months to seek consent for the use of the public wharf for a public passenger ferry service.

ANNEXURES:

A: Photograph of wharf, pontoon and ferry boats

