Subdivision and Existing and Continuing Use Rights under *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (REP 2005).


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Introduction

1. This paper deals with the permissibility of subdivision of waterways affected by *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* ("REP 2005"). It is intended to assist applicants for development consent to demonstrate that a subdivision of particular land is permissible with consent by explaining the matters that must be included in a development application. It also discusses the concept of subdivision for lease purposes and the role of existing use rights under the *Environmental Planning and Assessment Act 1979* ("EP&A Act") in the context of SREP 2005. The application of existing use rights will be illustrated in a case study of the Rose Bay Marina.

2. SREP 2005 is an “environmental planning instrument” made under Part 3 of the EP&A Act. It commenced on 28 September 2005 and on commencement repealed *Sydney Regional Environmental Plan No 23—Sydney and Middle Harbours* and *Sydney Regional Environmental Plan No 22—Parramatta River*. Both of those former instruments commenced on 13 July 1990. The commencement dates of these instruments are important for existing use rights purposes, as will become apparent later in this paper.

3. SREP 2005 and the instruments repealed by it establish a conventional scheme of zoning control over the bed and foreshores of Sydney Harbour by dividing the Harbour and foreshore into zones and imposing development controls for each zone and generally within the harbour and foreshore area. SREP 2005 also establishes planning principles that must be “considered and where possible achieved” in the preparation of environmental planning instruments and development control plans under Part 3 of the Act, and in the preparation of environmental studies and master plans for the purposes of the Act.1 All land affected by SREP 2005 is located within one of 9 zones as shown on the zoning map accompanying the instrument.

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1 SREP 2005 Part 2
The Concept of Subdivision for Lease Purposes

4. Most leases of Harbour and foreshore land engage the concept of subdivision for lease purposes. It is necessary to understand the concept of subdivision for lease purposes in order to understand why the leasing of waterway land involves approval under the EP&A Act. For the reasons set out below, in my view a lease of land for a period, including the period of any option to renew, of more than 5 years, regardless of whether that lease is registered in the office of the Registrar General, is subdivision and therefore development for the purposes of the EP&A Act.

5. Subdivision is a form of development within the meaning of that expression under section 4(1) of the EP&A Act. Subdivision is defined in section 4B of the EP&A Act as, among other things, “the division of land into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition [and which is] effected ... by any agreement ... rendering different parts of the land available for separate occupation, use or disposition”. A division of land effected by means of a transaction referred to in section 23G of the Conveyancing Act 1919, meaning a lease for a period that, including the period of any option to renew, does not exceed 5 years, is expressly excluded from the definition of subdivision. A lease of a building or part of a building is also expressly excluded.

6. A lease is an agreement for the exclusive occupation of land. A lease that applies to part of a lot results in the division of the land into two or more parts and entitles the lessee to exclusive occupation of that part. A lease of part of a lot is therefore, on a literal reading of section 4B of the EP&A Act, an agreement that results in the constituent parts being obviously adapted for separate occupation, use or disposition. All leases of Harbour and foreshore land involve lease of part of a lot.

7. The issue has not been squarely considered by the Courts, as far as I am aware. It has been indirectly considered in cases where the issue in dispute has been whether, from a contract law perspective, a lease that involves a breach of the EP&A Act is void. The authorities are not consistent and seem to focus on contract law principles rather than the meaning of subdivision under the EP&A Act. If anything, the cases appear to assume for the purposes of argument that a lease for a period of more than 5 years is development that may require development consent or be prohibited under the EP&A Act.

8. In any event, there is no doubt that a lease for a period of more than 5 years that is registered in the office of the Registrar-General is development for the purposes of the EP&A Act. Subdivision in section 4B(2)(b) of the EP&A Act includes “the procuring of the registration in the office of the Registrar-General of ... a plan of subdivision within the meaning of section 195 of the Conveyancing Act 1919.” The expression “plan of subdivision” in section 195 of the Conveyancing Act 1919 includes “any plan that shows the division of land”.

9. Additionally, the Registrar-General will not register a lease for more than 5 years unless the lease area is shown on a “current plan”. A current plan cannot be registered unless it is

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2 EP&A Act s4B(3)(d)
3 EP&A Act s4B(3)(a)
5 Conveyancing Act 1919, s23F(2)(a) and s23G(d)(i)
authorised by a subdivision certificate issued under the EP&A Act. A subdivision certificate cannot be issued unless a prior development consent authorising the subdivision has been obtained. The effect of that combination of controls is that development consent under the EP&A Act is required for registration of a lease of land for more than 5 years.

10. The consequences of a lease of land being classified as development for the purposes of the EP&A Act is that the controls in Part 4 of the Act, and in particular sections 76A, 76B and 79C apply to the agreement. Section 76A provides that where an environmental planning instrument identifies development that may not be carried out except with development consent, a person must not carry the development out unless a development consent is obtained. Section 76B provides that where an environmental planning instrument identifies development that is prohibited a person must not carry out the development. Part 4 of the EP&A Act and Regulations then set out the process by which development consent is obtained, including relevant matters for consideration in section 79C.

11. SREP 2005 is an environmental planning instrument and the controls on subdivision contained in it apply to a lease for a period of 5 or more years. Clause 18A of the SREP 2005 is such a control. The implication of clause 18A of SREP 2005 for leases of 5 or more years is discussed below.

**Clause 18A SREP 2005**

12. Clause 18A of SREP 2005 applies to all land to which SREP 2005 applies, except land within zone 8(a) National Parks. Subclause 18A(2) provides that “subdivision of land to which this clause applies is prohibited, except as provided by this clause”. The reference to “subdivision” in that clause, for the reasons explained above, includes a reference to a lease of land for a period of more than 5 years including the period of any option to renew.

13. Subclause 18A(3) of SREP 2005 then provides the circumstances in which consent may be granted for subdivision. Those circumstances are limited to subdivision to enable the creation of a lot that is, or is to be, used only for the following purposes:

- development the subject of an existing development consent or a project approval under Part 3A of the Act or an approval under Part 5.1 of the Act to carry out State significant infrastructure,
- development the subject of a right conferred by Division 10 (Existing uses) of Part 4 of the Act,
- exempt development or development or an activity that may be carried out without development consent,
- any other development that is authorised under an Act of the Commonwealth.

14. Subdivision, which includes a lease for a period of 5 or more years, is only permissible if the subdivision satisfies one of these four categories of subdivision. All other subdivision is prohibited.

15. The first category of permitted subdivision in clause 18A(3) is subdivision for the purposes of an existing development consent or a project approval under Part 3A of the Act or an approval under Part 5.1 of the Act to carry out State significant infrastructure. An existing development consent means a prior approval under Part 4 of the EP&A Act to carry out development. A prior approval will only exist if the use is permitted with development consent under clause 18 of

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6 *Conveyancing Act 1919, s195C(1)(e)*
7 EP&A Act, s109J
SREP 2005. Part 3A of the Act was repealed in October 2011 and there would be few approvals under that Part yet to commence. Similarly, Part 5.1 of the EP&A Act is reserved for large public infrastructure projects.

16. The third category of subdivision in clause 18A(3) is limited to those minor forms of development listed in the zoning matrix in clause 18 of SREP 2005 and in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 that may be carried out without development consent. These include development such as aids to navigation, demolition, flora and fauna enclosures, naval activities and single mooring (other than associated with a commercial marina or a boating industry facility).

17. The fourth category of subdivision in clause 18A(3), development that is authorised under an Act of the Commonwealth, is likely to be limited to development by the Crown in the right of the Commonwealth or Commonwealth Agencies.

18. The second category of subdivision in clause 18A(3), development the subject of a right conferred by Division 10 (existing uses) of Part 4 of the EP&A Act will include those leases of existing structures in the Harbour and foreshore that are presently prohibited under SREP 2005. Perusal of the zoning matrix in clause 18 of SREP 2005 reveals that this will include structures like private boat sheds in all zones except W6, boat lifts in all zones, commercial marinas in zones W2 & W3 and private marinas in all zones except W6. A large number of existing structures in Sydney Harbour and its foreshore would fall within this category of subdivision.

19. Clause 18A of SREP 2005 effectively prohibits a lease for a period of more than 5 years for such structures unless the lessee can establish that “the development the subject of a right conferred by Division 10 (Existing uses) of Part 4 of the Act”. How a lessee might go about establishing such a right is discussed below.

**Establishing Existing or Continuing Use Rights**

20. Existing use rights under the EP&A Act is often misunderstood. Not all existing uses have existing use rights. Only those uses that satisfy the description of existing use in section 106 of the EP&A Act have existing use rights. An existing use is “the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for Division 4 of Part 4 of the EP&A Act, have the effect of prohibiting that use.”

21. A continuing use right is the same an existing use right except it is created by the coming into force of an environmental planning instrument which would have the effect of requiring development consent for the use. The EP&A Act enable a continuing use to continue without the need to obtain a fresh development consent.

22. Various provisions of the EP&A Act permit the continuance of an existing use and the making of regulations enabling the enlargement, expansion and intensification of an existing use. The key concept of existing use rights under the EP&A Act is that the continuance of existing use is not prohibited by anything in the Act or an environmental planning instrument.

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8 EP&A Act s106(a)
9 EP&A Act s109(1)
10 EP&A Regulation clauses 39 to 46
11 EP&A Act s107(1)
23. There are numerous judgements of the Land and Environment Court and the NSW Court of Appeal that establish principles that govern the determination of existing use rights. A good summary of these judgements and principles is the decision of Justice Biscoe of the Land and Environment Court in *Warlam Pty Ltd v Marrickville Council* [2009] NSWLEC 23. An example of an existing use rights case in the context of land within Sydney Harbour and foreshore is the decision of former Chief Justice Pearlman in *Rose Bay Marina Pty Ltd v Minister for Urban Affairs and Planning* [2002] NSWLEC 123.

24. There are a number of steps that must be taken in order to establish an existing use right, as follows:

a) identify the environmental planning instrument that has the effect of prohibiting the use

b) identify the purpose of the use and the boundaries of the area used when that instrument commenced

c) determine whether that purpose was lawfully commenced and was lawful (in the sense of not prohibited under planning law) immediately before the instrument commenced

d) determine whether the use for that lawful purpose has continued to the present.

25. The onus for establishing an existing or continuing use right rests on the person asserting the right, which will usually be the applicant for development consent. An existing or continuing use right is presumed to be abandoned if, unless the contrary is established, it ceases to be actually so used for a continuous period of 12 months. The onus for establishing abandonment rests on the person asserting the abandonment, which would usually be the consent authority of third party challenger.

26. The general principles applying to an analysis of existing use as summarised in *Warlam* are as follows:

a) Existing use provisions in planning legislation are designed to permit continuation of a use of land for the purpose for which it was used immediately before later regulation that prohibited it wholly or partly or upon conditions. The rationale is that it is unjust to deprive an owner of the right to use land for an existing purpose.

b) Existing use provisions should be as liberally construed as the language in its context allows.

c) The purpose of the [existing use is] to be described only at that level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on at the relevant date. The test is not so narrow that it requires characterisation of purpose in terms of the detailed activities, transactions or processes which have taken place. The test is not so general that the characterisation can embrace activities, transactions or processes which differ in kind from the use which the activities etc, as a class have made of the land.

d) A statement of the purpose for which land is being used is a description or characterisation of what is being done with or upon the land, not an account of the motives of the persons involved in that activity.

e) If activities, processes or transactions are capable of being treated as all or the majority of the species of a genus, then the genus may properly be regarded as describing the purpose.

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12 *Penrith Waste Services Pty Ltd v Penrith CC* (1998) 101 LGERA 98
13 *Jeblon Pty Ltd v North Sydney MC* (1982) 48 LGRA 113
of the use. If they are not, then the only conclusion may be that the land has been used for more than one purpose.

f) The task is always to categorise the purpose (or each purpose) to which premises have been put according to ordinary terminology. A useful criterion to apply is that which would appeal to practical minds as appropriate in the context of town planning legislation.

g) The purpose of the use is more determinative of its use than the design or form of a building.

h) A use can naturally evolve over time and changes in the method of operation of a particular category of use will not deny existing use rights.

History of the Structure/Use

27. Whether a site enjoys existing/continuing use rights will depend on its own historical facts. The history of a structure or site must be investigated, as well as the historical planning controls applying to the land, in order to properly demonstrate the elements of existing use in section 106 of the EP&A Act. This factual analysis should accompany the development application. Most of the history of a site can be obtained from Roads and Maritime Services or the local Council by an application under the Government Information (Public Access) Act 2009. Historical aerial photography is also a means of determining the location and physical features of a structure to which existing use rights might apply.

Investigating Historical Planning Controls

28. The planning controls affecting the land on which the structure is located dating back to the date on which the structure was first constructed or the land first used must be identified and documented. Such an investigation is necessary firstly to identify the date on which the structure/use became prohibited. The date on which the structure/use became prohibited is the relevant date for existing use rights purposes. The relevant date is important because the character, nature and extent of the existing use is to be determined as at that date.

29. The relevant date for most existing uses in Sydney Harbour will be either 28 September 2005 when SREP 2005 commenced or 13 July 1990 when Sydney Regional Environmental Plan No 23—Sydney and Middle Harbours and Sydney Regional Environmental Plan No 22—Parramatta River both commenced. As the names suggest, SREP 22 and SREP 23 applied to Sydney Harbour and the Parramatta River, but not the Lane Cove River. These instruments were the first planning controls to apply to the waterways contained in the Harbour and Parramatta River. SREP 2005 applies to the area to which the former instruments applied plus the Lane Cove River. Accordingly the relevant date for existing use rights for land in the Lane Cove River is 28 September 2005. The relevant date for land in the Parramatta River and Sydney Harbour will be either 13 July 2005 or 28 September 2005 depending on which of those instrument had the effect of prohibiting the current development on the land.

30. An analysis of planning controls is also required in order to determine whether planning or building approval was required when the structure/use commenced, in order to demonstrate that the use was lawfully commenced. If approval was required it will be necessary to obtain a copy the approval or, if no record can be found, other documents may be required to establish a presumption that the approval was obtained. It is necessary to establish that the structure or use was lawfully commenced in order to satisfy that element of existing use under section 106 of
the EP&A Act that requires the use to be for a lawful purpose immediately prior to the commencement of the prohibition.

31. Prior to the commencement of SREP 22 and 23 a form of defacto planning control was exercised by the Maritime Services Authority under the Maritime Services Act 1935, which required the permission of the Authority prior to the placement of any structures in the Harbour and Parramatta and Lane Cove Rivers. Prior to the 1935 Act the land below mean high water mark in Sydney Harbour was vested in the Sydney Harbour Trust Commissioners on trust created under the Sydney Harbour Trust Act 1900. Under section 33 of that Act the Commissioners had exclusive control of the Port of Sydney including the power to control “docks”, “landing stages” and “slips”. The Act also conferred power on the Commissioners to grant a lease or licence of any part of the Harbour (ss 40 and 56) and the power to construct or authorise the construction of any structure including a “dock”, “landing stage” or “slip” (s46).

32. The Sydney Harbour Trust Act prevented any person from erecting any building or work “in or upon the bed or shore of the port”, without a licence from the Commissioners (s53). The Sydney Harbour Trust Act 1990 was a form of planning control and a copy of a licence under section 53 of that Act (or documents sufficient to establish the presumption that a licence was issued) should be obtained in order to establish lawful commencement/continuation.

33. Planning controls applying above mean high water mark may also be relevant to analysis of existing use rights. Prior to the commencement of SREP 22 and 23 planning controls applied indirectly by operation of section 15 of the Local Government Act 1919 and section 205 of the Local Government Act 1993 which have the effect of extending in certain circumstances the local government boundary and associated planning controls below the mean high water mark.

34. Between 27 June 1951 and 13 July 1990 the County of Cumberland Planning Scheme Ordinance applied to development above the mean high water mark in Sydney Harbour. If the structure or use the subject of an application was constructed or first used between those dates then planning approval for the structure or use was probably required and either a copy of that approval or documents sufficient to establish the presumption of regularity should be obtained.

35. Between 27 June 1951 and 12 July 1946 town planning was regulated by interim development under Division 7 of Pt XIA of the Local Government Act 1919 and Ordinance 105. Under Ordinance 105, alterations to existing buildings were permissible without consent; all other development required the permission of the council of the local government area as the interim development authority. No development was prohibited. These controls were deemed to apply to land below mean high water mark by reason of the extended boundary provisions referred to above.

The Rose Bay Marina Case

36. The Rose Bay Marina case (Rose Bay Marina Pty Ltd v Minister for Urban Affairs and Planning [2002] NSWLEC 123) is an example of existing use rights in the context of land within Sydney Harbour and its foreshore. In that case the owner of the Rose Bay Marina sought a declaration in the Land and Environment Court that the marina enjoyed existing use rights for the purposes of a large marina as defined in SREP 23. The Court held that the marina did enjoy those existing use rights. Following is a summary of the evidence and the Court’s analysis of existing use.

37. On the commencement of SREP 23 on 13 July 1990 the Rose Bay Marina comprised 29 fixed berths and 72 swing moorings as well as a restaurant, an office, a residential flat and a milk bar. The activities on the site included the repair of boats, the sale of fuel, the sale of boats, tender
services and slipway services. SREP 23 defined the use as a large marina, which was a prohibited development on the land.

38. The Court found on the evidence that the marina dated back to at least 1924 when Woollahra Council gave building approval for alterations and additions to the boatshed on the site. In 1958 there was at least a shop, a wharf and a marina shed on the site. In 1961 an application was made both to Woollahra Council and the Maritime Services Board (MSB) for extensions to the restaurant, then known as ‘Doyles’. Existing on the site at that time was a wharf, a boatshed, a shop, a restaurant and a deck. The activities on the site included moorings, slipping, painting and repairs, hiring of launches and skiffs, sale of fishing tackle and bait.

39. The evidence indicated continued use in 1962 to 1974. In 1974 most of the old marina shed was demolished and new construction was carried out which involved new decking, new workshops, offices and chandlery. A small slipway at the back of the building was constructed. Further additions and alterations occurred in 1983 and 1984.

40. The Court found that the following planning controls applied to the site:

- until 1972 no development on any part of the site was prohibited; extensions and alterations to existing buildings did not require the consent of the council; and any other development was permissible with council consent. This conclusion follows from the absence of planning controls before 1946, and the provisions of Ordinance 105 and the CCPSO thereafter.

- in 1972 the Woollahra Planning Scheme Ordinance came into force and use of part of the site for the purpose of a marina was prohibited. However, as at that date, the whole of the site, including that part which fell within the Woollahra local government area, was used for the purpose of a marina. That use was preserved and could continue.

- from 1924 through to 1990, building approvals and approvals from the MSB were granted from time to time in such a way that all parts of the marina use were subject to regulatory scrutiny.

41. The Court made the following observations about the lawfulness generally about the marina between 1924 and 1990:

“It is a reasonable inference that what was being carried on from time to time was regarded by the regulators as lawful. From the fact that Woollahra Council complained about the unauthorised iron rails in 1983, it is reasonable to infer that, had the council had a concern about illegality, it would have said so when building applications were lodged from time to time. That, combined with the documentary and oral evidence, supports a finding that the site was lawfully being used for the purpose of a large marina at the relevant date.”

42. On that basis the Court held that the owner of the marina was entitled to a declaration that it has the benefit of existing use rights in relation to the site.

Presumption of Regularity

43. The presumption of regularity is a rule of evidence that applies when an act is done which can be done legally only after the performance of some prior act. In those circumstances it is presumed the prior act was duly and lawfully performed. The presumption is rebuttable by evidence to the contrary.
44. The presumption has been considered by the Land and Environment Court in existing use rights cases where the lawfulness of the existing use depended on a planning approval that could not be located. In *Dosan Pty Ltd v Rockdale City Council* [2001] NSWLEC 252 the Court held that in cases involving existing use rights the presumption was limited to “cases where there is no direct evidence of a consent having been granted and a public official or public authority has subsequently done an act or exercised a power which depended for its validity upon a prior consent having been granted.”

45. An example of where the presumption might arise is when a consent authority has granted a modification to an existing development consent and the existing consent cannot be located. The power of modification cannot be exercised under the EP&A Act unless there is an original development consent to modify. The existence of the original development consent is a precondition of the power to modify, therefore it will presumed to have been granted if years after the modification was issued the original consent cannot be located.

46. The circumstances in which a presumption might arise are not closed. Other circumstances accepted by the Courts as giving rise to the presumption include:

   a. the existence of a lease imposing an obligation to erect a club premises “in accordance with plans and specifications approved by the lessor” where the lessor was also the planning consent authority (*Australian Posters Pty Ltd v Leichhardt Council* [2000] NSWLEC 195);

   b. previous consideration of development applications approved on the basis of existing use rights (*Australian Posters Pty Ltd*);

   c. the approval of working drawings by a State Agency and correspondence between the Agency and Council prior to commencement and following completion of the work (*Manicaland Pty Ltd v Strathfield Council* [1997] NSWLEC 196)

**Abandoning an Existing Use**

47. Once it is established that land enjoys the benefit of existing use and there is some evidence that the use has continue to the present, the use may still be lost by the concept of abandonment. As explained earlier in this paper, the onus of proving abandonment rests with the person asserting the abandonment, which will usually be the consent authority.

48. In the absence of evidence to the contrary, the use is presumed to be abandoned if it ceases for a continuous period of 12 months. The presumption is rebuttable by evidence that there owner of the existing use site held an intention to continue the existing use despite the period of non-use. In the circumstances of a clear subjective intention supported by objective actions, the Court is prepared to find that an existing use has not been abandoned. An existing use may also be held to be abandoned if it ceases to be used for a period of less than 12 months if it is clear the use has ceased permanently, for example by the removal of underground petrol tanks from a service station site.

49. The Courts have held that an unauthorised change of use will have the effect of abandoning an existing use. For example a change from the approved use of “used car sales yard purposes” to

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14 ss107(3) and 109(3) EP&A Act
15 *Mirandraft Pty Ltd v Rockdale MC*(1980) 46 LGRA 163
the display and sale of trucks was held to be an abandonment of an existing use for a car sales yard.\textsuperscript{16}

**Conclusion**

50. Anyone who seeks to lease waterway land for a period of more than 5 years must obtain development consent for subdivision of the lease area under Part 4 of the *Environmental Planning and Assessment Act 1979*. The subdivision does not effect a permanent division of the land, rather it is as a subdivision for lease purposes.

51. Because a subdivision for lease purposes engages the *Environmental Planning and Assessment Act 1979*, the subdivision must be identified under SREP 2005 as permissible with consent before a development application can be made and consent obtained. Subdivision is permitted under SREP 2005 only in those circumstances listed in clause 18A of SREP 2005.

52. In most cases involving a proposed lease of a private boat shed, a development consent for the subdivision is only available where the applicant for the consent can demonstrate that the land enjoys existing or continuing use rights under the EP&A Act. Existing/continuing use rights have been a feature of planning law in NSW since the 1950s and there is a wealth of case law on the topic. Existing use rights are designed to permit continuation of a use of land for the purpose for which it was used immediately before later regulation that prohibited it wholly or partly or upon conditions. The rationale for existing use rights is that it is unjust to deprive an owner of the right to use land for an existing purpose.

53. There is a process that must be followed to properly establish that land enjoys an existing use right. The onus of that proof rests with the person asserting the right, which will normally be the applicant for development consent.

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\textsuperscript{16} *Parramatta CC v RA Motors Pty Ltd* (1986) 59 LGRA 121

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