

Subject <b>Incidental Buildings on Public Land (Interim)</b>		Procedures <b>PL 3.05.01 PM 10.03.01</b>	
Compiled by - Branch <b>Lands &amp; Waters Ontario Parks</b>	Section <b>Land Management Planning &amp; Research</b>	Date Issued <b>October 4, 2006</b>	
Replaces Directive Title <b>n/a</b>	Number <b>n/a</b>	Dated <b>n/a</b>	Page <b>1 of 5</b>

## 1.0 Introduction

This procedure provides direction to Ministry staff on the consistent implementation of the PL 3.05.01 and PM 10.03 Incidental Buildings on Public Land (Interim) policy. This procedure may also be shared with other persons and organizations, in order to assist them in understanding how the Ministry seeks to consistently apply the policy.

This procedure shall be applied in situations where: 1) a work permit application for an incidental building has been received; or 2) where an Aboriginal person or community has inquired about the possibility of constructing an incidental building, but has not used the work permit application.

This procedure will also serve as a basis for the development of an alternative process (i.e. consensus arrangement) with an interested Aboriginal community, as provided in Section 3.3 of the policy.

Other proposed uses (e.g. institutional use, commercial venture) of public land by an Aboriginal person or community beyond an incidental building, will be reviewed by the Ministry on a case by case basis, consistent with other Public Lands Act directives (e.g. PL 4.02.01 Application Review and Land Disposition Process Policy and Procedure) and relevant Ontario provincial park and conservation reserve policies, procedures and management planning documents, where the proposed other uses of public land are situated within a provincial park or conservation reserve.

## 2.0 Procedure

The following steps are to be followed by Ministry staff when reviewing a proposal for an incidental building:

1. determine an interested party's eligibility to construct an incidental building;
2. consider criteria for the location approval including natural resource conservation, safety and other public interests or land management and protected area objectives; and
3. select conditions that should apply to the construction and location of the building, via the issuance of a work permit.

### 2.1 Step 1 – Pre-Screening to Determine Eligibility to Construct an Incidental Building:

Prior to requesting that an Aboriginal person or community submit a work permit application, Ministry staff will request the following information from the person to assess the eligibility of the person to construct an incidental building on public land:

- intended use and location of the proposed building;

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## **2.1 Step 1 – Pre-Screening to Determine Eligibility to Construct an Incidental Building (Cont’d):**

- evidence that the Aboriginal community engaged in “expeditionary” or other activities (e.g. hunting, fishing, gathering) requiring a shelter within the area where the applicant proposes to construct the incidental building;
- explanation of the relationship between the proposed incidental building and the person’s Aboriginal or treaty rights; and
- support from the Aboriginal community with which the applicant may be affiliated (e.g. Band Council resolution).

Given that the consideration of such eligibility may be a complex matter requiring a broader awareness and knowledge of Aboriginal and treaty rights and case law, Ministry field staff should consult with the Ministry’s Aboriginal Affairs Unit and/or Legal Services Branch when reviewing such proposals.

If the interested party is eligible to construct an incidental building, refer to Section 2.2 of this procedure. If it is determined that the interested party is not eligible to construct an incidental cabin, the Ministry will inform the interested party in writing.

The same process should also be adhered to when considering the eligibility of an Aboriginal person to occupy an existing structure as an incidental building – refer to Section 3.0 of this procedure.

## **2.2 Step 2 – Consideration of the Criteria for Location Approval**

If the Ministry is satisfied that the person’s proposed building is reasonably incidental to the exercise of an Aboriginal or treaty right, the proposed location must be reviewed. In order to do so, the person will then be asked to submit an application for a work permit.

The proposed location is reviewed to determine if there are any concerns for natural resource conservation, public safety, other public interests or land management objectives. These locational criteria also apply in situations where Ministry staff must determine whether an existing building can qualify as an incidental building – refer to Section 3.0 of this procedure.

This locational review for an incidental building is not subject to the provisions of the Ministry’s Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (RSFD) and the Class Environmental Assessment for Provincial Parks and Conservation Reserves (PCCR), as no disposition of Crown resources is being made.

Roads, water crossings and dock construction in association with an incidental building require authorization via a separate work permit. These activities are subject to the Class EA RSFD or PCCR and related Public Lands (e.g. PL 3.03.04 – Public Lands Act Work Permits – Section 14), Ontario provincial parks and conservation reserve policy.

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## Natural Resource Conservation

Sites in close proximity to habitats critical to the survival of special concern, threatened or endangered species, or the sustainability of any fish or wildlife populations (e.g. spawning shoals) would not normally be considered suitable locations for buildings on public land. In each case however, the specific characteristics of the site must be examined before a determination can be made.

The construction and use of buildings can damage the natural environment, if not responsibly planned and performed. Buildings may have to be set back from lakes and rivers consistent with Ministry of the Environment or local Health Unit standards, to minimize nutrient loading impacts to water quality from septic systems.

## Safety

In reviewing the proposed location of incidental buildings, the following are examples of areas that should be avoided in order to provide for safety of the applicant and subsequent users: areas of mine or industrial hazards, areas of extreme forest fire risk (e.g. blow down) and areas subject to soil or slope instability and flooding.

## Other Public Interests or Land Management Objectives

An application to construct a building incidental to the exercise of an Aboriginal or treaty right must be considered in the context of existing land and resource uses. There is potential for conflicts with incompatible land use designation or uses such as forestry operations, mining operations, remote tourism sites (e.g. outpost camps), cultural heritage sites, public access points, protected areas and existing Crown tenancies.

The existence of other users of public land does not, in itself, preclude the location of a shelter incidental to the exercise of an Aboriginal or treaty right. Ministry staff should work with the applicant, the community supporting the application and other users, to determine whether locational issues can be mitigated and/or work with the applicant to identify an alternative location for the structure.

Where a alternate location cannot be identified or where the locational conflict cannot be mitigated, the Ministry must provide a rationale in writing of its intention to deny the application, including notice of the applicant's right to appeal as per Subsection 4(2)-(8) of Regulation 975 and as per provisions to be established under the Provincial Parks and Conservation Reserves Act.

### 2.3 Step 3 – Selection of Conditions and Issuance of Work Permit

The work permit for an incidental building must be consistent with the applicant's right to use public land for that purpose. Conditions may be developed in consultation with the applicant and the Aboriginal community and should be sensitive to the Aboriginal perspective on their rights. The work permit issued may include conditions with respect to the timing of construction so that known potential hazards (e.g. high risk of fire, intensive forestry activity) may be avoided.

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Ministry field staff should review proposed work permit conditions with their Regional Lands Specialist or Ontario Park zone office specialists in advance of work permit issuance.

The work permit may be issued for a term of up to five years. Construction or placement of a building on public land should occur during that period. If that has not occurred, applicants must reapply for a permit and that application will be considered on the basis of case law and Crown land management policy in effect at that time.

### **3.0 Evaluation of Existing Structures as Incidental Buildings**

Ministry staff should review the specific circumstances of the occupation to confirm eligibility where an Aboriginal person occupies an existing structure, claiming the right to do so as incidental to a treaty or Aboriginal right. The same eligibility considerations apply in this situation, as would apply if that person was considering building a new structure in the same area (refer to Section 2.1). The location of the existing building must be similarly evaluated with the criteria cited in Section 2.2.

If the building is found to not qualify as an incidental building (i.e. person does not meet the eligibility criteria) and or the location is found to be inappropriate, Ministry staff should use PL 3.03.02 Unauthorized Occupations of Public Land Policy and Procedure, relevant Ontario provincial parks or conservation reserves policy provisions for resolution of the matter.

### **4.0 Consensus Arrangements**

The negotiation of consensus arrangements (i.e. local agreements with Aboriginal communities) on the implementation of this policy is a preferred approach. These arrangements may deal with the screening of applications, the determination of the number of required and eligible buildings for a given community, or other matters pertaining to the exercise of the right to construct incidental buildings.

### **5.0 Records Retention**

The deliberations, consultation and decision making must all be documented. This documentation must be retained per the Ministry applicable record retention direction. Incidental buildings are assumed to be long term occupations of public land. They may involve use by several generations of the person's family, clan or community.

The location of sites approved for construction of incidental buildings, as well as those of existing buildings with incidental status must be maintained in Ministry records in order to help protect the sites during emergency situations (e.g. forest fire hazards) and from encroachment during authorized activities (e.g. forestry or mineral exploration operations) on surrounding public lands.

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## **6.0 References**

### **6.1 Statutory References**

- Environmental Assessment Act RSO 1990
- Public Lands Act RSO 1990
  - O. Regulation 975, as amended
  - O. Regulation 453/96, as amended by O. Reg. 335/00
- Provincial Parks and Conservation Reserves Act (S.O. 2006)

### **6.2 Case Law**

- R. v Sundown

### **6.3 Directive Cross References**

- PL 3.03.02 Unauthorized Occupations of Public Land Policy and Procedure
- PL 3.03.04 Public Lands Act Work Permits – Section 14 Policy and Procedure
- PL 3.05.01 and PM 10.03 Incidental Buildings on Public Land Policy (Interim)
- PL 4.02.01 Application Review and Land Disposition Process Policy and Procedure
- Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects, Ministry of Natural Resources (2003)
- Class Environmental Assessment for Provincial Parks and Conservation Reserves, Ministry of Natural Resources (2004)