

Low Rise Housing Diversity Code - Consultation Outcomes

File No: X030568

Summary

The Low Rise Housing Diversity Code (Code) commenced in the City of Sydney Local Government Area on 1 July 2020. In Rosebery's R2 - Low Density Residential land use zone, which encompasses the Rosebery Estate, the Code enables development of dual occupancies via a complying development pathway, bypassing local development application processes and overriding some planning controls set out in Sydney Local Environmental Plan 2012 (Sydney LEP) and Sydney Development Control Plan 2012 (Sydney DCP).

Advice given to Council regarding commencement of the Code, and its potential impacts on the low density residential area of Rosebery, was reported in March 2020.

The Lord Mayor wrote to the Minister for Planning and Public Spaces to request the Rosebery special character area be recognised and exempted from the new Code. The Minister replied on 3 June 2020, confirming the Code would come into effect on 1 July 2020 and that no exemption would be granted.

The Lord Mayor also wrote to Rosebery residents on 26 May 2020 about commencement of the new Code, the City's concerns and the request to have Rosebery exempted. The letter invited residents to learn more about the Code and make a submission on the City of Sydney website. The letter and the website referenced the options to mitigate the impacts of the introduction of the Code and asked for community feedback.

In total, 71 residents made submissions about the Code. While opposition to the Code was clear, comprising 59 of the 71 submissions, only 16 submissions called for the existing permissibility of dual occupancy development to be removed, and a similar number expressed support for dual occupancies. Most submissions referenced strong support for advocating special character area status to the NSW Government to prevent the Code applying to the Rosebery Estate area.

This report details the outcomes of consultation and recommends the Lord Mayor write to the Minister, asking the outcomes of the consultation be noted and again requesting the Rosebery special character area be exempted from the Code.

Recommendation

It is resolved that:

- (A) Council note the Low Rise Housing Diversity Code came into effect on 1 July 2020;
- (B) Council receive and note the subject report; and
- (C) the Lord Mayor be requested to write to the Minister for Planning and Public Spaces, asking the outcomes of the consultation be noted and again requesting the Rosebery special character area identified in Sydney Local Environmental Plan 2012 be exempted from the Low Rise Housing Diversity Code.

Attachments

Attachment A. Summary of Community Consultation

Background

1. The Low Rise Housing Diversity Code (Code) commenced in the City of Sydney local government area on 1 July 2020. The Code was previously known as the Low Rise Medium Density Housing Code until recently renamed by the NSW Government. In Rosebery's R2 - Low Density Residential land use zone, which encompasses the Rosebery Estate, the Code enables development of dual occupancies via a complying development pathway, bypassing local development application processes and overriding the planning controls set out in Sydney Local Environmental Plan 2012 (Sydney LEP) and Sydney Development Control Plan 2012 (Sydney DCP).
2. Council resolved on 9 March 2020 for the City to consult with residents in Rosebery's R2 zone about the introduction of the Code. It was also resolved the Lord Mayor should write to the Minister for Planning and Public Spaces requesting Rosebery Estate, which is recognised in the City's planning controls as a special character area, be exempted from the Code.
3. The Lord Mayor wrote to the Minister in March 2020 to explain the special character area status of Rosebery Estate and request its exemption from application of the Code.
4. The Minister replied to the Lord Mayor on 3 June 2020 confirming the Code would come into force on 1 July 2020. While the letter is in response to the request to recognise Rosebery as a special character area, it does not directly address the request.
5. The Lord Mayor also wrote to Rosebery residents on 26 May 2020 to advise them about commencement of the Code, the City's concerns about its operation and the request to the Minister for exemption. The letter invited residents to make a submission via the City of Sydney website.
6. This report details the outcomes of consultation and provides supporting information for options to move forward. The submissions received are summarised at Attachment A.

The Low Rise Medium Density Housing Code

7. State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (the SEPP) includes a series of codes for low impact development that can be undertaken without a development application being lodged. This includes a Housing Code, which permits the building of single occupancy, detached, one or two storey dwellings with a Complying Development Certificate issued by a Principal Certifier authorising the development.
8. The SEPP was expanded to include the Code in April 2018 for commencement on 6 July 2018, however following representations temporary exemption was granted for several councils until 1 July 2019, then 31 October 2019, and finally 1 July 2020. The Code has now commenced operation in the local government area.

9. The effective change for Rosebery is dual occupancy development such as semi-detached dwellings will be able to be built according to the Code's standards instead of those in the local planning controls. For example, while the local planning controls stipulate that dual occupancies should have a single storey street presence and appear as a single dwelling house, the Code will enable one and two storey dual occupancies of various designs and appearances.
10. The Code includes a series of design standards, including height, floor space, front, side and rear setbacks and parking requirements. A developer following these minimum standards can apply for a Complying Development Certificate from a Principal Certifier (usually a private certifier) and is not required to obtain development consent from the City or follow the requirements in the LEP or DCP.
11. The process is the same as the existing Housing Code, which enables development of detached single dwelling houses through the Complying Development pathway. The Housing Code has been used by landowners in Rosebery to build one or two storey single dwelling houses since 2008.
12. The Sydney LEP and DCP contain specific controls for the Rosebery Estate, establishing its status as a special character area and seeking to protect those elements that make the area unique. These area-specific controls draw from existing special controls in the former South Sydney planning instruments, and from a heritage study of the area undertaken in 2007.
13. Dual occupancy development is permissible in the R2 - Low Density Residential zone, subject to specific criteria set out in the DCP. These additional criteria balance the advantages of dual occupancy development for landowners with the protection of Rosebery's unique built form and streetscape.
14. In bypassing council development assessment and imposing its own development standards, the Code overrides existing controls for Rosebery. The complying development process does not include assessment against the criteria in the DCP and includes neighbour notification but not consultation.

Mitigation options

15. A report was presented to Council in March 2020 that discussed options to respond to the commencement of the Code, to prevent its application or mitigate the potential impacts. These options are summarised below.
16. The preferred option was for Rosebery Estate to be made exempt from the Code on the grounds it is an identified special character area in the City's planning controls. This option is consistent with the Department of Planning, Industry and Environment's undertaking to work with councils to identify areas of exceptional local character to be exempt from application of the Code. It would allow dual occupancies to continue being delivered with proper council development assessment and community consultation, delivering the benefits of dual occupancies while protecting local character.
17. As discussed above, the exemption of Rosebery Estate from the Code has not been supported by the Minister.

18. A further option explored was to remove dual occupancies from the R2 - Low Density Residential land use table in the Sydney LEP. This would largely remove the application of the Code from the local area. However, this would make dual occupancies prohibited development, and not permissible even with a development application.
19. Another option explored was to increase development capacity within the controls in the LEP to meet or exceed those available under the Code. The objective of such an approach would be to increase the incentive for using a development application planning pathway. This would entail “up zoning” the 603 identified sites to have increased maximum height and FSR controls, removing some of the incentive of the Code. However, this would not remove the complying development option for landowners, who may still pursue the option for (real or perceived) time and money savings.

Community consultation

20. The Lord Mayor sent a letter to 1,675 properties in Rosebery on 26 May 2020. The Rosebery Residents Action Group were sent an email with the letter. The letter explained what the new Code means, advised when it came into force and detailed some of Council's concerns. The letter explained a request had been put to the Minister to recognise Rosebery as a special character area and be exempted from the Code and discussed making dual occupancy prohibited development as a way for the Code to not apply. The letter directed residents to the Sydney Your Say website to learn more and make a submission.
21. On 25 May 2020, information about the Code was published on the Sydney Your Say website. The website explained the new Code, and the City's concerns about its potential impacts on Rosebery. It discussed Rosebery Estate's status as a special character area and the request to the Minister for Planning and Public Spaces for this to be recognised for the Code to not apply. It also discussed the option to make dual occupancies a prohibited development in the R2 - Low Density Residential zone as a way of preventing application of the Code, should the Minister not agree to recognise Rosebery as a special character area.
22. The website included a link to the March Council report, which detailed the differences in height and floor space ratio controls between the LEP and the Code and the possibility of aligning them. It also included a link to the Department's website which contains additional information about the Code.
23. During the consultation period residents made 71 submissions in total. The Rosebery Residents Action Group convened a video meeting on 4 June 2020 to discuss the issue, which was attended by Councillors and City staff. Consultation ended on 19 June 2020.

Matters raised in consultation

Opposition to the Low Rise Medium Density Housing Code

24. 59 of the 71 submissions were opposed to the Low Rise Medium Density Housing Code. They expressed support for the Lord Mayor requesting the Rosebery area be recognised as a special character area by the Minister for Planning and Public Spaces and for the Code to not apply.

25. About 20 per cent of submissions (16) expressed support for making dual occupancy prohibited development. A small number expressed support for dual occupancies to continue being permissible with development consent, while opposing the Code. Most submissions opposing the Code did not reference the permissibility of dual occupancy development.

Support for the Code

26. About 13 per cent of submissions received supported the introduction of the Code.
27. These submissions expressed support for dual occupancy as a redevelopment option available to them as landowners. Some of these submissions specifically referenced support for the new Code itself, saying there should be no difference between Rosebery and other similar suburbs around Sydney that will be able to use the Code.
28. Submissions in support of the Code and dual occupancy development discussed the financial opportunities, the practical benefit of bequeathing multiple dwellings to multiple children, and the potential for Rosebery to see redevelopment given its large block sizes and updating of older housing stock. Some of these submissions challenged the view that Rosebery has special character or heritage value.

Heritage value and special character

29. Most submissions strongly defended the special character of Rosebery, with reference to its inter-war housing stock (most notably Californian bungalows), consistent setbacks and single storey appearance, detached housing typology and generous landscaping. About one-third of submissions referenced unsympathetic two storey dwellings delivered under the Housing Code as evidence the new Code will also result in out-of-character development.
30. In 2007, the City commissioned the Rosebery Heritage Review. The review was to investigate whether the area should be listed as a heritage conservation area and identify any individual properties for heritage listing.
31. The review looked at the entire Rosebery Estate area and found “while individual properties in the Morley Avenue group are good examples of the key period of development in the suburb, collectively the properties do not demonstrate a coherent or uniform streetscape setting that display key elements that contribute to the identified values of the area.” Further, less than 50 per cent of buildings in the Rosebery Estate area were considered contributory, which is a key factor in listing a heritage conservation area. Only one property, 5 Dalmeny Avenue, was heritage listed as a result of the study.
32. The review however did identify the attributes that make Rosebery a unique area with special character, and recommended area-specific planning controls to maintain and protect this character.
33. The review was exhibited for community consultation and reported along with the outcomes of consultation to Council and the Central Sydney Planning Committee in 2008. The outcome of this process was support for special controls for the Rosebery area to ensure sympathetic development, but not for heritage conservation listing or demolition controls.

34. The 8 May 2008 Central Sydney Planning Committee and 12 May 2008 Council resolutions supported area-specific controls to maintain the single story character and existing subdivision pattern of Rosebery without making it a heritage conservation area, and specified that any new controls should not prohibit demolition or detached dual occupancy development. These area-specific controls for Rosebery were included in Sydney LEP 2012 and Sydney DCP 2012.

Rosebery Estate covenants

35. Many submissions reference restrictive covenants that were applied on properties in Rosebery, dating back to 1912 and 1927. These covenants have been reviewed as part of the consultation process and appear to restrict development to single storey dwellings and impose other criteria. On the face of the covenant reviewed, it appears the covenant was imposed by the developers at the time the Rosebery Estate subdivision took place. .
36. The submissions received refer to the existence of these covenants as a way to avoid application of the new Code. Further, the submissions say existing two storey development in the Rosebery area which has been permitted under the Housing Code is in breach of the covenants.
37. Clause 1.20 of the Codes SEPP states that covenants restricting development to which the Codes SEPP applies, have no effect. However, under the clause, covenants continue to apply to where they are imposed by a council and consistent with or not dealt with by the SEPP, or they are imposed by an owner or former owner of land.
38. By contrast, Clause 1.9A of Sydney LEP 2012 overrides any covenant (regardless of the reason for imposition), such that development applications lodged with the City do not need to be consistent with a covenant. The City's adopted planning controls allow for development greater than the one storey set by the covenant.
39. On the face of the Rosebery Estate covenant reviewed, it appears that it may have been imposed by a former landowner and therefore arguably may continue to apply. In this interpretation, any development under the Codes SEPP would also need to be consistent with an applicable covenant.
40. However, given the existing Housing Code has been used to deliver two storey dwellings in Rosebery since 2008, it appears that Principal Certifying Authorities are not aware of or consistently ensuring compliance with this interpretation of the historic covenants. It also indicates most neighbours and other residents are unaware of the covenants or are unwilling to challenge complying development that breaches the covenants, despite the potential ability to do so.
41. As these covenants have not been consistently applied or enforced over time, their significance and relevance has been eroded in any case. Whilst technically the covenants may be able to be relied upon as a reason to challenge certification under the Codes SEPP, it appears unlikely that landowners will challenge complying development they believe breaches the provisions of the covenants if they applied.

Assessment of options

Prohibition of dual occupancy development

42. To remove application of the Code from the Rosebery Estate, Council could resolve to prepare a planning proposal to amend the R2 - Low Density Residential zone so that dual occupancies are a prohibited land use in the zone.
43. Dual occupancies have been permissible in the R2 zone since the South Sydney Local Environmental Plan was introduced in 1998. Dual occupancy development is a suitable use in the zone because of the relatively large lot sizes, and they contribute to housing diversity in the local area. Dual occupancies, similar to terrace or semi-detached houses, are very common throughout the City of Sydney. The use supports the zone objective to provide for the housing needs of the community within a low density residential environment. When built according to the DCP, dual occupancies can fit well with the local character of Rosebery and have minimal impacts on neighbours.
44. The option to prohibit dual occupancies could be seen to work against the objectives of the R2 zone. It would also be inconsistent with the Ministerial Direction for residential zones, which says a planning proposal must broaden the choice of housing types and not reduce residential density. The change would also perversely incentivise the large two storey single dwellings that can currently be constructed under the Housing Code without a development application resulting in a less diverse use of land for housing.
45. Prohibition of dual occupancies would also have a material impact on all landowners in the area who would no longer be able to redevelop their land for this purpose. Dual occupancy development can yield higher returns than a single dwelling and provide more flexibility for residents wishing to age in place or bequeath multiple dwellings to multiple children. As an existing development right, removing the permissibility of dual occupancies may have impacts on financial planning decisions.
46. Dual occupancy development is also described in one of the shortlisted proposals as part of the City's Alternative Housing Challenge - "The Rightsize Service". This proposal includes renovating existing dwellings to accommodate multiple families, building secondary dwellings and subdividing existing blocks to produce two dwellings as ways to provide more diverse and affordable housing stock. Making dual occupancy prohibited would limit the options available under this proposal in Rosebery.
47. A planning proposal could only proceed if it received Gateway approval from the Department of Planning, Industry and Environment, and would need to demonstrate alignment with Section 9.1 Ministerial Directions, the Greater Sydney Region Plan, the Eastern City District Plan and the City's Local Strategic Planning Statement. These plans have actions about increasing housing diversity, so it is conceivable a planning proposal would be unable to receive Gateway approval.
48. However, as the Code substantially weakens the ability of the City to uphold the area-specific planning controls that make dual occupancies compatible with the character of Rosebery, there may be some justification for their removal from the zoning land use table.

Harmonising planning controls

49. To address the imbalance in development potential between the Code and the LEP, Council could resolve to prepare a planning proposal to increase the maximum height and floor space ratio to match those available under the Code.

50. This option would involve a major change to the prevailing planning controls for the area, would result in bigger development, thereby impacting on the existing special character of Rosebery. Moreover, it would not guarantee that development would not be undertaken under the Code.
51. It is clear from consultation that opposition to the Code is based in a desire to retain the single storey appearance of Rosebery. The City's development assessment can better mitigate some of the impacts associated with dual occupancy development but increasing the planning controls could result in greater impacts.
52. For the above reasons this report does not recommend this option be further considered.

Continued advocacy to the NSW Government

53. Consultation with the Rosebery community ended on 19 June 2020, after the Lord Mayor's letter to the Minister and the Minister's reply.
54. To communicate the views and outcomes of consultation, this report recommends the Lord Mayor again write to the Minister. As the Minister's letter did not specifically address Rosebery, community views in support of exemption from the Code will lend further support to recognition of its special character status.

Key Implications

Strategic Alignment - Sustainable Sydney 2030

55. City Plan 2036 sets out a 20-year land use planning vision, balancing the need for housing and economic activities while protecting and enhancing local character, heritage, public places and spaces. This report is aligned with the following actions:
 - (a) Action L3.2 – Increase the mix of dwelling types, tenures and sizes to support a diverse community - Low and medium density housing serves social and cultural needs of specific groups, delivering much needed diversity and choice of housing. Dual occupancy development is a way to more efficiently use land and deliver detached and attached housing in existing residential areas. The retention of standalone housing also contributes to housing diversity in the local area.
 - (b) Action L3.3 – Work with the NSW Government to facilitate medium density housing that is designed and built to respect the established local character or an area and the amenity of future residents and the existing community through a process in which the community is consulted.

Relevant Legislation

- 56. Environmental Planning and Assessment Act 1979.
- 57. State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

Options

- 58. Council may resolve to prepare a planning proposal to make dual occupancies a prohibited use in the R2 - Low Density Residential zone in the Sydney Local Environmental Plan 2012.

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