



PROPOSED STATUTORY AMENDMENTS

# Rosebery Estate 2 year temporary exclusion from the Housing Code and the Low Rise Housing Diversity Code

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Explanation of Intended Effect

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## Introduction

This Explanation of Intended Effect (EIE) has been prepared under section 3.30 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). It recommends a temporary exclusion of the Rosebery Estate within the City of Sydney local government area from the Housing Code and Low Rise Housing Diversity Code.

The temporary exclusion will be achieved by including the Rosebery Estate area as identified on the Rosebery Estate Complying Development Land Map in Schedule 5 to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP) for a period of two years.

A copy of the Rosebery Estate Complying Development Land Map is attached to this paper.

This EIE is presented in two parts.

### **Part 1 – Background and context**

This part provides an overview of the suburb of Rosebery and an explanation of the covenant which applies to this small suburb located in the City of Sydney local government area. -

### **Part 2 – Temporary inclusion of the Rosebery Estate in Schedule 5 of the Codes SEPP**

This part explains the justification on the proposed temporary exclusion of the Rosebery Estate from the Housing Code and the Low Rise Housing Diversity Code.

# Part 1 – Background and context

## 1.1 The suburb of Rosebery

Rosebery is a garden suburb located in the City of Sydney local government area (see Figure 1). It was established in 1912 and retains its distinct subdivision and predominately single storey scale. Despite some unsympathetic alterations, Rosebery features a generally consistent built form and scale comprising mostly Federation, Californian Bungalow and other Inter-War housing styles.

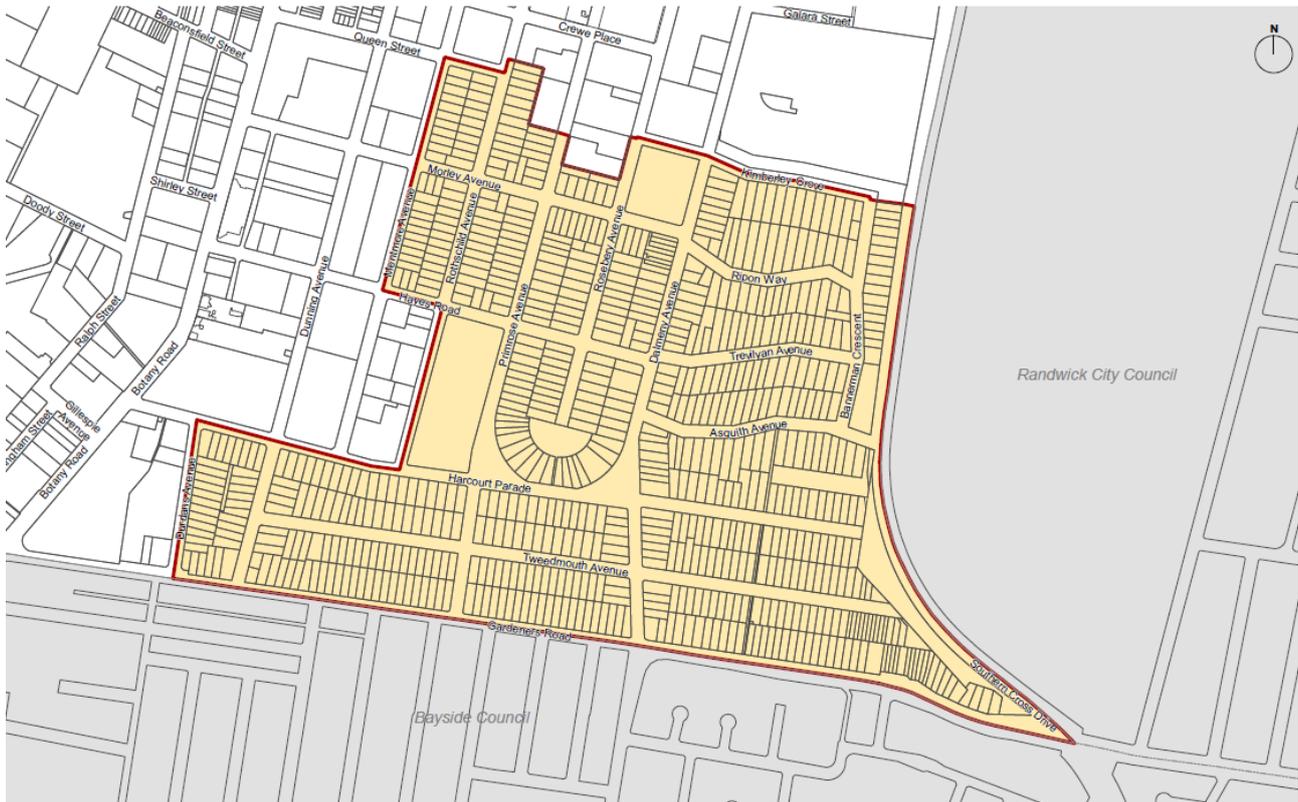


Figure 1: Map of the Rosebery Estate

In May 2008, the City of Sydney Council resolved that the Rosebery Estate area was not suitable for a heritage conservation area listing based on the findings of a heritage study prepared by Council. The report found that Rosebery was too highly modified to constitute a conservation area.

The Rosebery Estate has been identified as a special character area in the City of Sydney's planning controls since the South Sydney Development Control Plan 1997 and continues to be recognised in the Sydney Local Environmental Plan 2012. The locality statement for the Rosebery Estate in the Sydney Development Control Plan 2012 identifies the special nature of Rosebery's subdivision pattern, setbacks and built form character and scale. Development applications received by Council within the Rosebery Estate are assessed against this locality statement to ensure new additions are sensitive and to protect the character of the area.

## 1.2 The Rosebery Covenant

The Rosebery Covenant was imposed at the time of subdivision by the Town Planning Company of Australia, the former owner of the land, in 1914 and describes the type of housing that can be built within the Estate. This includes limiting the materials of the front façade to brick or stone, limiting the number of dwellings on a lot and requiring a dwelling to be limited to a single storey height.

Instances in the Rosebery Estate where the covenant has not been upheld have caused a degree of uncertainty about its continued application; this is because a covenant is valid until it ceases to be enforced.

Covenants can affect the planning system, but sit outside of the planning system, and can involve complex legal property law issues. To provide time to resolve issues with the application of the Rosebery Covenant and local character, a two year temporary exclusion from both the Housing Code and the Low Rise Housing Code is proposed for the Estate.

## Part 2 – Temporary exclusion of the Rosebery Estate from the Housing Code and Low Rise Housing Code

An amendment to Schedule 5 to the Code SEPP (Land excluded from the Housing Code, Inland Code or Low Rise Housing Diversity Code) is proposed for the temporary exclusion of the Rosebery Estate from both the Housing Code and the Low Rise Housing Diversity Code for a period of two years.

Both the Housing Code and the Low Rise Housing Diversity Code sit within the Codes SEPP and allow two storey dwellings to be approved by a complying development certificate provided they meet all the planning controls in the Codes SEPP.

### 2.1 Justification on the proposed temporary exclusion

A two year temporary exclusion from the Housing Code and the Low Rise Housing Diversity Code will provide time for the inconsistent application of the covenant to be resolved. During this period, the Department will investigate the wording and impacts of clauses in environmental planning instruments that work to suspend covenants. The Department will also develop an education program for all stakeholders on the application of covenants in regard to complying development certificates.

Determining the validity of the Rosebery Covenant falls to the beneficiaries of the covenant, in this case it is the landowners in the Rosebery Estate.

#### Codes SEPP

Clause 1.20 of the Codes SEPP (Suspension of covenants, agreements and instruments) generally allows for covenants to be suspended, meaning that the covenant would no longer apply to a particular lot and development under the Codes SEPP may be carried out.

However, this does not apply in the case of a covenant imposed by an owner or former owner of the land (clause 1.20(2)(c)).

## Sydney Local Environmental Plan 2012

In the Rosebery Estate, clause 1.9A of the Sydney Local Environmental Plan 2012 turns off the covenant. This means that a homeowner can develop a two storey house in the Rosebery Estate via a development application with regard to development controls that reference the built form characteristics of the area and the built form principles of the covenant. There has been differing opinions on whether this clause also turns off the covenant for a complying development certificate.

The Council has previously requested an exemption for the Rosebery Estate from the Codes SEPP citing that development permitted under the Codes SEPP is unsympathetic and detrimental to the character of the Rosebery Estate. Council has indicated that residents in Rosebery have expressed their concern about housing being delivered through private certification and the impacts on the area.

Since the Low Rise Housing Diversity Code commenced in Council's local government area on 1 July 2020, six complying development certificates have been issued in the Rosebery Estate. Council have reported that there are at least 11 two storey developments that have been previously completed as complying development. This demonstrates the covenant is not being applied consistently, which has resulted in a high level of uncertainty amongst residents in the Rosebery Estate.

It is also considered that the Low Rise Housing Diversity Code will increase demand for two storey development in the form of dual occupancies and make future breaches of the covenant more likely. As the covenant is imposed by a former owner of the land, legal action around enforcement of the covenant must be undertaken by residents, not Council, which is both time consuming and costly.

A two year temporary exclusion of the Rosebery Estate from the Housing Code and the Low Rise Housing Diversity Code would provide certainty for land owners while the validity of the covenant is determined. It also provides time for the Department to review how covenants interact with environmental planning instruments, and develop education materials for certifiers, landowners and the community.

## Saving and transitional provisions

It is proposed that an application for a complying development certificate that has been made but not finally determined before the commencement of this Policy must be determined as if this Policy had not commenced.