

ITEM NO: 19

SUBJECT: LEP 2015 DRAFT AMENDMENT 13 (LOW RISE CODE EXEMPTION)

FILE NO: F13620 - 21/94805

Delivery Program Link

Principal Activity: Using Land

Service: Land Use Management

Recommendations:

1. *That the Council acknowledges receipt of the letter from the Department of Planning, Industry and Environment dated 20 April 2021 (Attachment 1), which denies the Council an exemption from the Low Rise Medium Density Housing Code, despite acknowledgement from the Minister of Planning and Public Spaces at the meeting of 30 July 2020, that the Council had made a compelling case for such an exemption;*
 2. *That the Council acknowledges the advice provided by the Local Planning Panel on the Draft Planning Proposal, in support of Amendment 13 to Blue Mountains Local Environmental Plan 2015 (Attachment 2);*
 3. *That the Council endorses the Draft Planning Proposal, Amendment 13 to Blue Mountains Local Environmental Plan 2015 (Enclosure 1) prepared in accordance with the provisions of Section 3.33 of the Environmental Planning and Assessment Act 1979;*
 4. *That the Council refers the Draft Planning Proposal to the Department of Planning, Industry and Environment requesting a Gateway Determination in accordance with the Environmental Planning and Assessment Act 1979;*
 5. *That the Council processes the Planning Proposal in accordance with a Gateway Determination issued under the provisions of Section 3.34 of the Environmental Planning and Assessment Act 1979;*
 6. *That the Council receives a report, subject to Gateway determination, at the conclusion of the public exhibition period to enable consideration of submissions made to Blue Mountains Local Environmental Plan 2015 Amendment 13; and*
 7. *That the Council delegates to the CEO or her delegate the authority to make minor amendments to the adopted Draft Blue Mountains Local Environmental Plan 2015 (Amendment 13) that may arise after the formal endorsement by the Council of this Planning Proposal, subject to such amendments maintaining the policy intent of the draft proposal.*
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Report by Director Environment & Planning Services:**Reason for report**

The purpose of this report is to seek endorsement, to submit for Gateway determination, a Draft Planning Proposal (Enclosure 1) for amendment 13 to Blue Mountains Local Environmental Plan (LEP) 2015, to exclude the application of the Low Rise Housing Diversity Code in the Blue Mountains.

Background

A Draft Planning Proposal for amendment 13 to Blue Mountains LEP 2015 has been prepared to exclude the Blue Mountains LGA from the application of the Low Rise Housing Diversity Code (Low Rise Code) in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008.

This Planning Proposal is the result of a long running effort to pursue an exemption from the Low Rise Housing Diversity Code through ongoing discussions and correspondence between Council, the Minister for Planning and Public Spaces and the Department of Planning Industry and Environment.

Since it was proposed in 2018, Council has pursued an exemption from the Low Rise Code to ensure the environmental and character values of the Blue Mountains Local Government Area and the surrounding World Heritage National Park are maintained, and not eroded by a one-size-fits-all state government policy.

Previously referred to as the Medium Density Housing Code, the Low Rise Code puts these values at risk by overriding critical local planning provisions. Key among these are local requirements for limited site coverage and increased pervious area under LEP 2015 and Blue Mountains Development Control Plan (DCP) 2015. The controls under the Low Rise Code are significantly weaker, allowing larger building footprints and far greater impervious areas, thereby significantly increasing stormwater runoff into the fragile receiving environment of the World Heritage National Park. This issue is further exacerbated by a lack of controls in the Low Rise Code to manage stormwater quantity or quality.

Beyond the environmental matters, the Low Rise Code also puts at risk the significant local residential character provisions contained in Blue Mountains LEP 2015 and DCP 2015, including the requirement for increased setbacks, detailed design controls and significant landscaping.

Excluding the Blue Mountains LGA from the application of the Low Rise Code will ensure that strong local planning provisions prevail for all medium density development, to protect the environmental values of the World Heritage Area and the established character of the City's urban areas.

The importance of this exemption to the protection of local character and environmental values is recognised in *Blue Mountains 2040: Living Sustainably*, Council's Local Strategic Planning Statement (LSPS). Two actions in the LSPS, endorsed by the Greater Sydney Commission, identify the need to seek an exemption from the Low Rise Code to ensure local environmental and character provisions prevail for all medium density development.

In addition to being endorsed by the Greater Sydney Commission, Council's case for an exemption from the Low Rise Code has also been supported on a number of occasions by the independent Local Planning Panel (LPP). Most recently, the LPP supported draft Amendment 13 to LEP 2015 (the subject of this report), to establish an exemption from the Low Rise Code. Notwithstanding this support, the LPP maintained that this Planning Proposal should not be required and that the preferred approach would be for an exemption for the Blue Mountains LGA to be included in the state environmental planning policy itself. In the absence of such an exclusion, an amendment to the Council's LEP 2015 is seemingly the only way forward.

Council's case for exemption from the Code, including a letter of support from the Local Planning Panel, was presented to the Minister for Planning and Public Spaces at a meeting on 30 July 2020. The outcome of positive discussions with the Minister at this meeting was that the Department would work with Council to investigate options for an exemption from the

Code. Council took the Department's commitment to investigate an avenue for exclusion from the Low Rise Code in good faith. However, no appropriate planning solution has been forthcoming.

A key element of Council's case for an exemption is the sound strategic planning work completed at a local level to ensure Council is planning for the housing needs of our community. The Blue Mountains Local Housing Strategy (LHS) 2020 was prepared and adopted in March 2020 alongside the Local Strategic Planning Statement. The LHS demonstrated that the Blue Mountains is on track to meet the current 5 year housing target set by the State Government, and provided detailed analysis on local housing need to nominate a 6-10 year housing target. The LHS, including the 6-10 year housing target of 550 dwellings over the 5 year period, was approved by the Department on 10 May 2021, being one of the first four Local Housing Strategies to be approved across the 33 Councils within Greater Sydney.

This robust strategic planning work prepared by Council in consultation with the community, and approved by the State Government, clearly demonstrates that the Low Rise Code is not needed to meet local housing needs. However, despite previous statements by the Minister for Planning that should Councils have their 'strategic house in order', state planning policies such as the Code would not be required, an exemption for the Blue Mountains has not been progressed.

Most recently, the Blue Mountains' case for an exemption from the Code was the subject of questions at the Budget Estimates public hearing on 9 March 2021. The Minister for Planning and Public Spaces agreed that a compelling argument had been put forward as to the unique circumstances of the Blue Mountains. However, it was noted at that hearing that the Department was waiting on Council to submit a Planning Proposal to progress the matter.

A Planning Proposal had previously been prepared and reported to the Local Planning Panel on 27 July 2020. This proposal sought to amend minimum lot sizes for multi-unit housing and dual occupancies under the Blue Mountains LEP 2015 and was prepared as a last resort. It was not the Council's preferred outcome as the result would be a reduction in diverse housing opportunities. It would require the Council to remove the current sliding scale of medium density permissibility linked to lot size, in order to limit the impact of the Code. This issue was raised at the meeting with the Minister on 30 July 2020, with the Minister confirming that the Council has made a compelling case as to why an exemption should be investigated, rather than this Planning Proposal progressed. It was therefore Council's expectation that the Department would progress an exemption for the Blue Mountains and for this reason, the Planning Proposal prepared at that time was put on hold.

As outlined, no exemption has been progressed by the Department. It is in this context that an alternate approach is being pursued for an exemption from the Code. This Planning Proposal seeks to amend clause 1.9(2) of Blue Mountains LEP 2015, to list the Low Rise Housing Diversity Code as a state environmental planning policy that does not apply to land to which the LEP applies. While it is acknowledged that SEPPs prevail over LEPs in the case of any inconsistency, in the absence of any additional response from the Department, this is considered an appropriate way forward to progress the case for a Blue Mountains exemption from the Low Rise Code.

The mechanism proposed in the Planning Proposal is to remove the application of the Low Rise Code to all land to which Blue Mountains LEP 2015 applies. This is proposed to be achieved by amending clause 1.9 Application of SEPPs - to list the Low Rise Code in subclause (2), shown in bold below.

1.9 Application of SEPPs

- (1) This Plan is subject to the provisions of any State environmental planning policy that prevails over this Plan as provided by section 3.28 of the Act.
- (2) The following State environmental planning policies (or provisions) do not apply to the land to which this Plan applies—

State Environmental Planning Policy No 1—Development Standards

State Environmental Planning Policy (exempt and Complying Development Codes) 2008 - Part 3B Low Rise Housing Diversity Code

As outlined above, the Draft Planning Proposal has been referred to the Local Planning Panel for their advice as required by Section 9.1 of the Environmental Planning and Assessment Act 1979. The Local Planning Panel unanimously reiterated their support for Council's case for an exemption the Draft Planning Proposal for Amendment 13 to LEP 2015. The LPP's advice is provided in Attachment 2.

Sustainability Assessment

Effects	Positive	Negative
Environmental	A Planning Proposal seeking an exemption from the Low Rise Code would ensure that local planning controls continue to protect the environmental values of the Blue Mountains.	Nil
Social	The Planning Proposal seeks to retain local control over planning decisions in the Blue Mountains, particularly in relation to development density, environment and character. This is a positive social outcome.	Nil
Economic	Nil	Nil
Governance	The retention of local planning controls, responding to the unique characteristics of the Blue Mountains, are essential for good local governance. The recommendations of this report support this.	Nil

Financial implications for the Council

All costs including staff time and resources required in the processing of this LEP amendment are accommodated within existing operational budgets.

Legal and risk management issues for the Council

There are no legal or risk management issues resulting from this report. The Draft Planning Proposal ongoing advocacy for an exemption from the Low Rise Code address risks to the environmental and character values of the Blue Mountains as a result of one-size-fits-all State planning policy.

External consultation

External consultation has not yet been conducted, however it will be undertaken as prescribed in the Gateway Determination issued by the Department.

Conclusion

An exemption from the Low Rise Code is being pursued to ensure the environmental and character values of the Blue Mountains Local Government Area and the surrounding World Heritage National Park are maintained and not eroded by a one-size-fits-all state government policy.

Despite positive discussions and commitments made at the meeting of 30 July 2020 with the Minister for Planning and Public Spaces, an appropriate planning solution has not been provided by the NSW Department of Planning, Industry and the Environment. It is in this context that this draft Planning Proposal has been prepared to progress the matter through an amendment to LEP 2015.

It is recommended that Council endorse the Planning Proposal for this draft LEP amendment to be submitted to the Department of Planning, Industry and Environment for Gateway Review under Section 3.34 of the Environmental Planning and Assessment Act, 1979.

A Gateway Determination is required for this Draft Planning Proposal to proceed to public exhibition. As outlined in this report, State agency consultation and public exhibition will be conducted in line with the requirements of the Gateway Determination and Council's Community Participation Plan. Following which a report will be brought back to Council detailing the outcomes of this consultation and seeking adoption of the finalised Planning Proposal.

ATTACHMENTS/ENCLOSURES

1	Planning Proposal - Draft Amendment 13 to LEP 2015 (Amendment to Clause 1.9)	21/106787	Enclosure
2	Response from Department of Planning, Industry & Environment - 20 April 2021	21/106738	Attachment
3	Extract of Minutes of Blue Mountains Local Planning Panel LPP - 19 April 2021	21/99176	Attachment

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Attachment 2 - Response from Department of Planning, Industry & Environment - 20 April 2021



**Planning,
Industry &
Environment**

MDPE21/356

Dr Rosemary Dillon
Chief Executive Officer
and
Cr Mark Greenhill OAM
Mayor
Blue Mountains City Council
Locked Bag 1005
KATOOMBA NSW 2780

Via email: council@bmcc.nsw.gov.au

Dear Dr Dillon and Cr Greenhill

Thank you for your correspondence to the Hon. Rob Stokes MP, Minister for Planning and Public Spaces, regarding the proposed local character overlay and the application of the Low Rise Housing Diversity Code (Code) in the Blue Mountains local government area. The Minister asked me to respond on his behalf.

I thank you for your comments and acknowledge the matters you have raised regarding the recently exhibited proposed Local Character Provision. The exhibition period for the Explanation of Intended Effect (EIE) outlining a framework for the identification and consideration of local character in the planning system has closed. I note that the Council made a submission during the exhibition period.

Submissions to the EIE expressed a broad range of views and suggested changes concerning the implementation of local character planning controls and the associated framework. All submissions are currently being reviewed ahead of a recommended way forward being prepared for the Minister's consideration.

I note your suggestion that the Metropolitan Rural Area in the Blue Mountains local government area could form a basis for an exclusion from the Code, similar to the exemption in *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*. At this time the Department does not intend to base exclusions from the Code on the Metropolitan Rural Area.

If you have any more questions, please contact Meagan Kanaley, Director, Codes and Design, Planning Policy, at the Department on 9274 6134.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Marcus Ray', written over a blue horizontal line.

Marcus Ray
Group Deputy Secretary
Planning and Assessment

20/04/2021

Attachment 3 - Extract of Minutes of Blue Mountains Local Planning Panel LPP - 19 April 2021

Reference: F13700
Determination

Blue Mountains Local Planning Panel (LPP) 19 April 2021

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3. PLANNING PROPOSAL FOR DRAFT LEP 2015 AMENDMENT TO CLAUSE 1.9 (EXCLUSION OF LOW RISE HOUSING DIVERSITY CODE)

Panel Advice

The Panel unanimously provides the following advice:

1. The Blue Mountains Planning Panel continues to support Blue Mountains City Council's position in relation to exemption from the Low Rise Housing Diversity Code in SEPP (Exempt & Complying Development Codes) 2008.
2. The panel notes that positive discussions and commitment were made for such exemption by Planning Minister Stokes in a meeting with the Mayor and Planning Director of BMCC on 30 July 2020.
3. Whilst the Council expected an amendment would be proposed to the code SEPP to implement this exemption, a senior DPIE representative at a recent meeting (Budget Estimates Committee) indicated that a Planning Proposal was expected from the Council to effect this outcome.
4. The draft Planning Proposal has now been presented to the BMCC Local Planning Panel which again supports the principle of exemption. The Panel reiterates its original concerns:
 - a. The Code has the potential to undermine the continued listing of the Blue Mountains as a World Heritage area. The Greater Blue Mountains World Heritage Area is a million hectares of national park and wilderness and it is a significant factor that it is one of only two cities in the world that exist within a World Heritage area [the other being Banff in Canada]. Sites which are protected under the UNESCO World Heritage List are defined as having '*cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of importance.. for all humanity*'.
 - b. Council's ability to manage the urban area of the Blue Mountains, and all three levels of government being able to establish that there was an appropriate planning framework in place, is fundamental to the World Heritage listing of the Blue Mountains National Park. A key concern was the ability to manage the urban development area in the middle of the world heritage listed national park. This was central to the formulation of the Local Environmental Plan and Development Control Plan.
 - c. The Blue Mountains Planning Panel is of a view that the Low Rise Housing Diversity Code will not only result in outcomes that are inconsistent with the significant character of urban areas of the Blue Mountains, but also result in potential environmental impacts that could compromise the integrity of the World Heritage listing. Specifically, the code does not:
 - i. adequately respond to the unique environmental conditions of the local government area, particularly in relation to environmental impact or the management of stormwater on the **fourteen threatened and endangered communities identified in the World Heritage listing**. It does not provide the required level of controls on stormwater management from development sites nor the required controls on clearing;

Reference: F13700
Determination

Blue Mountains Local Planning Panel (LPP) 19 April 2021

- ii. appropriately consider, respond or enable assessment of the bushfire risk within this local government area;
 - iii. provide guidelines which are appropriate to an urban area within a World Heritage listed landscape setting. The Low Rise Housing Diversity Design Guide does not provide the required design standards that will ensure new residential development appropriately responds to the unique residential character and heritage of the area, including the landscape setting, and
 - iv. Built Form and Landscape development standards contained within the code will result in higher density residential forms which are out of character with the landscape settings of the villages of the Blue Mountains.
5. The panel supports exemption via amendment of the Blue Mountains LEP 2015 on the understanding Department of Planning, Industry & Environment (DPIE) has recommended this as the means of giving effect to the exemption. The panel is concerned that exemption via the LEP may not be apparent to private certifiers implementing the SEPP. The Panel recommends that DPIE amend the SEPP for the purpose of ensuring clarity and providing certainty regarding the legal status of this exemption.
 6. The Panel recommends a copy of their advice is sent to the Minister for Planning & Public Spaces.

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