



IRF22/1842

Gateway determination report – PP-2022-1167

Prohibition of Residential Flat Buildings in the R3 Zone
– North Sydney LGA

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Acknowledgment of Country

The Department of Planning and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.

Contents

1	Planning proposal.....	1
1.1	Overview.....	1
1.2	Objective of planning proposal.....	1
1.3	Explanation of provisions.....	1
1.4	Mapping.....	2
1.5	Site description and surrounding area.....	2
1.6	Background	2
1.6.1	Historical permissibility of RFBs	2
1.6.2	Implementation of North Sydney LEP 2013 – reliance on existing use rights	2
1.6.3	Amendment 30 (June 2021) – inclusion of RFBs as a permissible use in the R3 zone....	3
1.6.3	Review of RFB permissibility in R3 zone	3
1.6.3	Emerging legal position	3
2	Need for the planning proposal	4
3	Strategic assessment	5
3.1	Region Plan	5
3.2	District Plan	5
3.3	Local Strategy / Plan.....	6
3.3.1	North Sydney Local Strategic Planning Statement (LSPS).....	6
3.3.2	North Sydney Local Housing Strategy (LHS).....	6
3.4	Local planning panel (LPP) recommendation.....	7
3.5	Section 9.1 Ministerial Directions	7
3.6	State environmental planning policies (SEPPs)	8
4	Site-specific assessment	8
5	Consultation.....	8
5.1	Community	8
5.2	Agencies.....	8
6	Timeframe	8
7	Local plan-making authority	8
8	Assessment summary	8
9	Recommendation.....	9

Table 1 Reports and plans supporting the proposal

Relevant reports and plans
Attachment A – Planning Proposal
A1.1 – Planning Proposal Report (dated September 2021)
A1.2 – Amended Planning Proposal Report (dated 18 May 2022)
A2 – Letter Requesting Gateway Determination (dated 1 April 2022)
A3 – Site Identification Map
A4 – Council Resolution and Report (dated 28 March 2022)
A5 – North Sydney Local Planning Panel Minutes and Report (9 March 2022)
Attachment B – DPE Request for Information (dated 13 May 2022)

1 Planning proposal

1.1 Overview

Table 2 Planning proposal details

LGA	North Sydney
PPA	North Sydney Council
NAME	Prohibition of Residential Flat Buildings (RFBs) in the R3 Medium Density Residential Zone
NUMBER	PP-2022-1167
LEP TO BE AMENDED	North Sydney LEP 2013
ADDRESS/LOT DESCRIPTION	All lots zoned R3 Medium Density Residential under the North Sydney LEP 2013 (refer to section 1.5 of this report)
RECEIVED	1/04/2022
FILE NO.	IRF22/1842
POLITICAL DONATIONS	There are no donations or gifts to disclose and a political donation disclosure is not required
LOBBYIST CODE OF CONDUCT	There have been no meetings or communications with registered lobbyists with respect to this proposal

1.2 Objective of planning proposal

The primary objective of the planning proposal is to prohibit residential flat buildings (RFBs) within the R3 – Medium Density Residential zone and revert back to the adopted zoning regime that existed prior to North Sydney LEP 2013 (Amendment 30) that came into force in June 2021. This is in response to the Land and Environment Court's recent interpretation of matters relevant for consideration when considering existing use rights.

The objective of this planning proposal is generally considered to be clear and adequate.

Further discussion on the context leading to the proposal is provided at section 1.6 of this report.

1.3 Explanation of provisions

The planning proposal seeks to amend the Land Use Table for the R3 Medium Density Residential zone under North Sydney LEP 2013 as follows (~~red strike through~~ represents deletion, blue underline represents an addition):

Zone R3 Medium Density Residential

1 Objectives of zone

- *To provide for the housing needs of the community within a medium density residential environment.*

- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To encourage the development of sites for medium density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.
- To provide for a suitable visual transition between high density residential areas and lower density residential areas.
- To ensure that a high level of residential amenity is achieved and maintained.

2 Permitted without consent

Environment protection works

3 Permitted with consent

*Attached dwellings; Boarding houses; Centre-based child care facilities; Community facilities; Dual occupancies (attached); Dwelling houses; Group homes; Home-based child care; Hostels; Information and education facilities; Multi dwelling housing; Neighbourhood shops; Oyster aquaculture; Places of public worship; Recreation areas; **Residential flat buildings**; Respite day care centres; Roads; Semi-detached dwellings; Seniors housing; Tank-based aquaculture*

4 Prohibited

Any other development not specified in item 2 or 3

The planning proposal contains an explanation of provisions that adequately explains how the objectives of the proposal will be achieved.

1.4 Mapping

The planning proposal does not propose amendments to any of the maps in the North Sydney LEP 2013.

1.5 Site description and surrounding area

The planning proposal applies to all land zoned R3 Medium Density Residential under North Sydney LEP 2013. Refer to **Attachment A3**.

1.6 Background

1.6.1 Historical permissibility of RFBs

RFBs were permissible throughout the North Sydney LGA up until the implementation of North Sydney LEP 1989. Consequently, there are many such developments that exist throughout the LGA, including within areas that were historically in lower density residential zones.

Council dealt with existing use rights of RFBs in lower density residential zones by making 'alterations and additions' to RFBs a permissible land use type under North Sydney LEP 1989. A local clause within the LEP was included to control built form and amenity outcomes.

1.6.2 Implementation of North Sydney LEP 2013 – reliance on existing use rights

With the introduction of the Standard Instrument LEP, the ability to retain the permissibility of 'additions and alterations' to RFBs in lower density residential zones, was removed.

Therefore, existing use rights under the *Environmental Planning and Assessment Act 1979* (the Act) and *Regulations* were relied on by landowners for works on their RFBs within the lower

density zones where this use was prohibited. These existing use rights provisions enabled applicants to ignore applicable LEP built form controls applying to the land, relying solely on a merit assessment.

Consequently, Council has two DA's for RFB's in the R3 zone that remain undetermined. These include 115-119 Holt Avenue, Cremorne and 1 Warung Street, McMahon's Point. Council has indicated that the DA for 1 Warung Street, McMahon's Point, would have been permissible under the existing use rights provisions of the Act.

1.6.3 Amendment 30 (June 2021) – inclusion of RFBs as a permissible use in the R3 zone

In order to address this issue, Council resolved in 2019 to include RFBs as a permissible use within the R3 zone. Council had considered alternative options, including rezoning the subject RFB sites to R4, and including RFBs as an additional permitted use.

This specific amendment was pursued as part of a comprehensive amendment to the North Sydney LEP 2013. This amendment (Amendment 30) came into effect in June 2021.

Amendment 30, in effect, removed existing use rights for existing RFBs within the R3 zone, and any proposed development would be subject to the controls of the North Sydney LEP 2013 and DCP 2013. Council notes that the amendment was pursued noting that the same built form controls for RFBs within the R3 zone would apply as they had done for medium density development that was already permissible within the zone.

1.6.3 Review of RFB permissibility in R3 zone

During the finalisation of the planning proposal giving effect to Amendment 30, Council resolved to review the outcomes of the permissibility of RFBs in the R3 zone after one (1) year of operation. This came about in response to a recommendation in Council's Local Housing Strategy and concerns raised by submitters.

The timeframe for this review was expedited in January 2022 when Council resolved to urgently begin the process to amend the North Sydney LEP 2013 to remove the addition of RFBs as a permissible use in the R3 zone.

This urgency arose in response to community opposition to a number of DAs for RFBs in the R3 zone that were being submitted.

1.6.3 Emerging legal position

Since the commencement of Amendment 30, Council notes that the Land and Environment Court has recently revised its position in relation to the interpretation of the extent to which development standards and development controls provisions may be taken into account as relevant matters for consideration, such as controls within a DCP. Council references *Saffioti v Kiama Council [2019] NSWLEC 57* as a precedent representing the Court's position.

The proposal notes that this has removed the need to rely on permitting RFBs in the R3 zone in addressing the issues relating to existing use rights. In particular, there has been a move towards greater weight being given to the application of development standards applying to land to which existing use rights apply.

Comment: The proposal does not address how undetermined DAs for RFBs in an R3 zone are dealt with should the LEP be amended as proposed by this planning proposal. This includes DAs that have yet to have been lodged with Council but are lodged prior to the amendment of the LEP.

The planning proposal notes that 2 development applications (DAs) for RFBs in the R3 zone lodged since Amendment 30 in June 2021 have yet to be determined. The proposal also notes that one of the DAs would have been permissible under the existing use right provisions under the Act notwithstanding Amendment 30.

A Gateway condition requiring the planning proposal to be updated to include a savings provision for DAs lodged prior to the proposed amendment of the LEP is recommended.

It is noted that under section 4.15(1)(ii) of the *Environmental Planning and Assessment Act 1979*, any proposed instrument that has been subject to public consultation under the Act is a matter for consideration for a consent authority in determining a DA.

Clause 1.8A of North Sydney LEP 2013 also provides a savings provision relating to DA's lodged prior to its commencement:

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

2 Need for the planning proposal

The proposal states that the planning proposal is a result of addressing Council's Local Strategic Planning Statement (LSPS) in relation to managing the impacts of any existing use rights applications, and Local Housing Strategy (LHS) in regard to monitoring DAs for RFBs in the R3 zone and their built form outcomes.

The proposal states that the planning proposal is the preferred way of achieving the objectives and intended outcomes. The planning proposal notes that Council had considered other alternatives prior to the adoption of Amendment 30 to address the existing use rights issue, including:

- Introduce new land use terms within the Dictionary to the LEP and permit these land uses within the R2 and R3 zones – this was considered to be inconsistent with the Department's directives for preparing an LEP in the Standard Instrument format.
- Rezone the land on which existing RFBs are prohibited under the LEP to R4 High Density Residential – this option was considered to potentially alter the desired future character of an established lower density area by introducing additional permitted uses under the zone.
- Include clauses within Schedule 1 – Additional Permitted Uses to the LEP to enable existing RFBs to be permissible with consent on land where they are currently prohibited – this would involve the addition of almost 800 entries into Schedule 1 and was considered to significantly reduce the clarity as to what uses are permissible on a subject site, through sheer volume.
- Permit RFBs within the R3 zone under the LEP, and include a local provision to further control the redevelopment of RFBs where they are permissible – this option was adopted as part of Amendment 30, though it is noted that the intent of this planning proposal is to reverse this in response to the Land and Environment Court's recent interpretation of matters relevant for consideration when considering existing use rights.

Comment: The Department notes the alternatives considered by Council as detailed above and agrees that based on the options considered; the planning proposal is the best means of achieving the objectives and intended outcomes outlined in Section 1.2 of this report.

Assessment of the planning proposal's consistency with the Council's LSPS and LHS are provided in Section 3.3 of this report.

3 Strategic assessment

3.1 Region Plan

The following table provides an assessment of the planning proposal against relevant aspects of the Greater Sydney Region Plan.

Table 3 Region Plan assessment

Region Plan Objectives	Justification
Objective 10 – Greater housing supply	<p>The planning proposal's intention is to revert back to the adopted zoning regime that existed prior to Amendment which came into force in June 2021. Landowners of existing RFBs in the R3 zone will still have the ability to exercise their existing use rights under the Act and Regulations.</p> <p>It is noted that the proposal does not impact the delivery of housing in North Sydney in accordance with the LHS. This is discussed in further detail in section 3.3 of this Report.</p>
Objective 11 – Housing is more diverse and affordable	<p>RFBs remain a permissible use across the North Sydney LGA in the R4 High Density Residential and B4 Mixed Use zones which includes approximately 2,500 sites.</p> <p>The Department considers the proposal to be not inconsistent with the Greater Sydney Region Plan.</p>

3.2 District Plan

The site is within the North District and the Greater Sydney Commission released the North District Plan on 18 March 2018. The plan contains planning priorities and actions to guide the growth of the district while improving its social, economic and environmental assets.

The planning proposal is not inconsistent with the priorities for infrastructure and collaboration, liveability, productivity, and sustainability in the plan as outlined below.

The Department is satisfied the planning proposal gives effect to the District Plan in accordance with section 3.8 of the *Environmental Planning and Assessment Act 1979*. The following table includes an assessment of the planning proposal against relevant directions and actions.

Table 4 District Plan assessment

District Plan Priorities	Justification
Planning Priority N5 – Providing housing supply, choice and affordability with access to jobs, services and public transport	<p>As discussed in section 3.3 of this Report, the proposal does not impact the delivery or implementation of Council's LHS. Landowners of existing RFBs in the R3 zone will still have the ability to exercise their existing use rights under the Act and Regulations.</p> <p>RFBs remain a permissible use in R4 High Density Residential and B4 Mixed Use zones which are generally more suitable locations to concentrate housing density due to their proximity to existing and proposed public transport, services and facilities.</p> <p>The proposal is considered to be not inconsistent with this Planning Priority.</p>

3.3 Local Strategy / Plan

The proposal states that it is consistent with the following local plans and endorsed strategies:

3.3.1 North Sydney Local Strategic Planning Statement (LSPS)

The North Sydney LSPS was endorsed by the Greater Sydney Commission on 20 March 2020. The LSPS sets the 20-year direction for housing, employment, transport, recreation, environment and infrastructure for the North Sydney LGA.

The key Local Planning Priority and Actions of the LSPS relevant to the planning proposal are:

Local Planning Priority N5

Providing housing supply, choice and affordability with access to jobs, services and public transport.

Action L1.1

Implement the North Sydney Local Housing Strategy (2019) to achieve the housing directions, objectives and actions of the GSC's Regional and North District Plans and deliver 0-5 and 6-10 year housing supply targets.

Action L1.6

Amend NSLEP 2013 and NSDCP 2013 to manage the impacts of any existing use rights application and minimise increases in density away from transport and services. (short term)

The planning proposal is considered to be consistent with the LSPS as it does not impact the delivery or implementation of Council's LHS, and discourages RFBs in the R3 zone, which generally do not have the same level of accessibility to transport and services as areas zoned R4 or B4.

3.3.2 North Sydney Local Housing Strategy (LHS)

The North Sydney LHS, adopted by Council on 25 November 2019 and endorsed by the Department on 10 May 2021, sets out the strategic direction for housing in the North Sydney LGA to 2036.

The relevant action of the LHS is to amend the LEP to enable RFBs as a permissible use in the R3 zone to address the existing use rights issue in accordance with Council's resolution. The action included a 'monitoring indicator' to *monitor the number of DAs received and built form outcomes of approved DAs for RFBs in the R3 zone in the LGA annually.*

The proposal notes that this indicator was included to determine if the policy change was working in terms of built form outcomes and the impact it would have on increased dwelling numbers.

The planning proposal responds to the Land and Environment Court's recent interpretation of matters relevant for consideration when considering existing use rights. Council considers that recent case law clarifies the extent of local provisions (which were previously interpreted to have been extinguished by existing use rights under the Act and Regulations) that could be applied in assessing and determining a DA that relies on existing use rights for permissibility. The proposal notes that this interpretation by the Court reduces the need to include RFBs as a permissible use in the R3 zone and therefore avoiding potential issues that could result with future RFB developments in the zone, such as amenity impacts and compatibility with local character.

Comment: It is noted that the housing potential identified in the LHS does not include potential additional dwellings that could be achieved in the redevelopment of RFBs in the R3 zone. Landowners of existing RFBs in the R3 zone will still have the ability to exercise their existing use rights under the Act and Regulations.

It is recommended that the proposal be updated to contain a savings provision to allow the proper assessment of active development applications of RFB's.

The Department therefore considers the proposal to be consistent with the LHS.

The Department also notes that the planning proposal does not provide enough detail regarding its concerns regarding built form outcomes resulting from DAs for RFBs in the R3 zone in accordance with the monitoring indicator for the relevant LHS action described above. A Gateway condition has been recommended to address this prior to public exhibition.

3.4 Local planning panel (LPP) recommendation

The planning proposal was considered by the North Sydney Local Planning Panel on 9 March 2022 (**Attachment A5**) where it was unanimously supported for the following reasons:

The Council Officer's Report is endorsed by the Panel and the Planning Proposal should proceed to Gateway Determination to allow public exhibition. The Panel notes it would appear in the light of community concerns, that Council resolved that the recent amendment in June 2021 to the LEP made residential flat buildings an additional permissible use in the R3 Zone. This Planning Proposal would have the effect of deleting this. The Panel also notes that when the June 2021 amendment was made that Council resolved to review this provision.

3.5 Section 9.1 Ministerial Directions

The planning proposal's consistency with relevant section 9.1 Directions is discussed below:

Table 6 9.1 Ministerial Direction assessment

Directions	Consistent	Reasons for Consistency or Inconsistency
5.1 Integrating Land Use & Transport	Yes	The proposal is considered consistent with this direction as it discourages the further development of RFBs in the R3 zone, which generally do not have the same level of accessibility to transport and services as areas zoned R4 or B4.
6.1 Residential Zones	Justifiably inconsistent	<p>Under Direction 6.1 (1)(a), <i>a planning proposal must include provisions that encourage provision of housing that will.... broaden the choice of building types and locations available in the housing market....</i></p> <p>Although the proposal seeks to prohibit RFBs in the R3 zone which is contrary to (1)(a), the Department considers the inconsistency with this Direction to be of minor significance and justified as:</p> <ul style="list-style-type: none"> The proposal merely reverts back to the adopted zoning regime that existed prior to North Sydney LEP 2013 (Amendment 30). Landowners of existing RFBs in the R3 zone will still have the ability to exercise their existing use rights under the Act and Regulations. Council is required to update the proposal to have a savings provision for DAs lodged prior to the proposed amendment of the LEP. This has also been recommended as a Gateway condition. RFBs remain a permissible use across the North Sydney LGA in the R4 High Density Residential and B4 Mixed Use zones which includes approximately 2,500 sites and are better located in terms of access to public transport and services. The proposal is consistent with the LSPS and does not impact the delivery or implementation of Council's LHS.

3.6 State environmental planning policies (SEPPs)

There are no specific SEPPs that directly relate to the planning proposal. It is considered the planning proposal is not inconsistent with the aims and objectives of the current SEPPs in force.

4 Site-specific assessment

The planning proposal proposes to prohibit RFBs within the R3 Medium Density Residential zone and revert back to the adopted zoning regime that existed prior to Amendment 30 of North Sydney LEP 2013. Given the planning proposal does not seek to include additional permissible uses or amend the principal controls relating to land zoning, FSR or maximum building height, it is not considered to have any significant environmental impact to the areas zoned R3 or the context in which they are located within.

As stated above, Council is required to expand upon its concern with the potential development of RFB's in the R3 zone. This includes an assessment on how possible developments may negatively impact the existing character of the R3 zones throughout the LGA. This is recommended as a condition on the Gateway determination.

5 Consultation

5.1 Community

Council does not specify the number of days proposed for community consultation.

The exhibition period is to be 20 working days in accordance with the Department's Local Environmental Plan Making Guidelines for standard planning proposals and forms the conditions of the Gateway determination.

5.2 Agencies

Given the nature of the proposal, no agency consultation is considered necessary during the public exhibition period.

6 Timeframe

Council proposes a 6 month time frame to complete the LEP.

The Department recommends a time frame of 9 months to ensure it is completed in line with its commitment to reduce processing times, and to allow for Council to update the proposal based on the pre-exhibition conditions that have been recommended throughout this report.

A condition to the above effect is recommended in the Gateway determination.

7 Local plan-making authority

Council has advised that it would like to exercise its functions as a Local Plan-Making authority.

Given the contentious nature of the planning proposal, and representations from Proponents of active development applications, the Department recommends that Council not be authorised to be the local plan-making authority for this proposal.

8 Assessment summary

The planning proposal is supported to proceed with conditions for the following reasons:

- It is the best means of achieving the objectives and intended outcomes;
- It is not inconsistent with the Greater Sydney Region Plan and North District Plan;
- It is consistent with Council's Local Strategic Planning Statement and Local Housing Strategy;
- It is consistent with all relevant Section 9.1 Direction 5.1 Integrating Land Use and Transport and is considered justifiably inconsistent with Direction 6.1 Residential Zones;
- It is not inconsistent with any SEPPs currently in force;
- Existing development applications will be able to continue to be assessed as the proposal will contain the introduction of a savings provision; and
- Landowners of existing RFBs in the R3 zone will still have the ability to exercise their existing use rights under the Act and Regulations.

Based on the assessment outlined in this report, the proposal is to be updated before consultation to:

- Require a savings provision for DAs lodged prior to the proposed amendment of the LEP;
- Provide detail of any concerns of built form outcomes resulting from DAs for RFBs in the R3 zone in accordance with the 'monitoring indicator' of the relevant LHS action; and
- Include an updated project timeline.

9 Recommendation

It is recommended the delegate of the Secretary:

- Agree that any inconsistencies with section 9.1 Direction 6.1 Residential Zones are minor or justified.

It is recommended the delegate of the Minister determine that the planning proposal should proceed subject to the following conditions:

1. Prior to public exhibition, the planning proposal is to be updated to:
 - Require a savings provision for DAs lodged prior to the proposed amendment of the LEP.
 - Provide detail of any concerns of built form outcomes resulting from DAs for RFBs in the R3 zone in accordance with the 'monitoring indicator' of the relevant LHS action.
 - Include an updated project timeline.
2. The planning proposal should be made available for community consultation for a minimum of 20 working days.
3. The timeframe for completing the LEP is to be 9 months from the date of the Gateway determination.
4. Given the nature of the proposal, Council should not be authorised to be the local plan-making authority.



11.07.2022

(Signature)

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10 August 2022
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