

Wentworth Amendment No 5

Proposal Title : **Wentworth Amendment No 5**

Proposal Summary : **It is proposed to rezone 490ha of RU1 land (held in two non-contiguous holdings) to RU4 Primary Production Small Lots with lot sizes of 5-10 ha enabling the creation of 49 lots. The two lots are located in the Pomona district, an agricultural irrigation area approximately 12 km north of Wentworth. The applicant has submitted that they also own 4,997ha of RU1 land west of the subject sites and that they would "surrender" the "dwelling entitlements" on the land and "transfer" the dwelling entitlements to the rezoned land.**

PP Number : **PP_2014_WENTW_001_00**

Dop File No : **14/05587**

Proposal Details

Date Planning
Proposal Received : **13-Mar-2014**

LGA covered : **Wentworth**

Region : **Western**

RPA : **Wentworth Shire Council**

State Electorate : **MURRAY DARLING**

Section of the Act : **55 - Planning Proposal**

LEP Type : **Spot Rezoning**

Location Details

Street : **Pomona Road**

Suburb : **Wentworth**

City : **Wentworth**

Postcode : **2648**

Land Parcel : **Lot 2 DP 134929; Lot 4 DP1015663; Lot 5 DP756964 & Lot 2 DP1165816**

DoP Planning Officer Contact Details

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DoP Project Manager Contact Details

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Land Release Data

Growth Centre :	Release Area Name :
Regional / Sub Regional Strategy :	Consistent with Strategy :
MDP Number :	Date of Release :
Area of Release (Ha) :	Type of Release (eg Residential / Employment land) :
No. of Lots : 0	No. of Dwellings (where relevant) : 0
Gross Floor Area : 0	No of Jobs Created : 0

The NSW Government
Lobbyists Code of
Conduct has been
complied with : **Yes**

If No, comment : **There is no advice to the contrary.**

Have there been
meetings or
communications with
registered lobbyists? : **No**

If Yes, comment : **As above.**

Supporting notes

Internal Supporting
Notes : **The proposal is not considered justified on strategic, legal or demand/supply grounds. The proposal is at odds with the RU4 Primary Production Small Holdings zone, due to the MLS and the intended use of the land, which is rural lifestyle. The applicant's justification of the 'transfer' of 'existing' development consents is considered illegal under the EPA Act.**

There is oversupply of residential and rural lifestyle development in an area with low historical demand.

The proposal has been rejected by Council on numerous occasions in the past 9 years. The applicant has finally sought Council support, however Council staff is clear in their lack of support for the proposal. The applicant has been asked to provide further justification for the use of the RU4 zone and has not been provided this to date. There is no strategic justification for the proposal, with the applicant providing insufficient reasons for inconsistencies with policy.

Wentworth Shire Council is currently preparing a rural land use strategy and staff has recommended that the sites be included in this Strategy. However, the applicant has requested Council support the proposal and not include it in the Rural Lands Strategy, to which Council has acceded on the premise of the 'urgency' of the matter.

The preferred subdivision layout provided with the PP shows 49 x 5 ha lots zoned RU4 Primary Production Small Holdings, all located with direct narrow frontage to the Darling River. However, the applicant has not demonstrated a primary production purpose for the rezoning and subdivision, instead supplying 49 lifestyle lots. There is no related discussion of demand or supply, rural land use conflict or impacts on the environment to support the PP.

Two amendments to the Wentworth LEP 1993 in 2011 upzoned land to R5 and RU5 prior to the notification of the SI LEP 2011. These two amendments WLEP 27 (23/08/11) and 28 (30/09/11) amounted to a total of 2166 lots being made available for R5 development (165ha) and industrial (61ha) in Buronga Gol-Gol and Pittman Avenue (267 lots).

Also, there was 138ha of R5 land added to the Wentworth LEP 2011 post-exhibition through an amendment to the mapping. This also resulted in an additional 41 lots for rural residential uses when the plan was notified on 16/12/11. There is land around Buronga-Gol Gol zoned RU1 with a 10ha minimum lot size for a dwelling. Other RU1 zoned land has a 10000ha minimum lot size.*

Since then, Wentworth Shire Council has asked the Department to support a PP to release more land known as the Gol Gol tip (20ha) which would result in an additional 54 residential lots. Council has withdrawn this PP and is awaiting the outcomes of the rural land use strategy before proceeding.

To date, there has been nominal demand (33 dwellings average pa) for dwellings in the entire Wentworth LGA. The supply of over 2484 lots against expressed demand means there is 82 years supply.

*NOTE: Council's Rural Land Use Strategy is in the preliminary stages of preparation. There are 'pockets' of land in current and former irrigation areas that are zoned RU1 with a 10ha MLS, such as Pomona and near Buronga Gol Gol. These areas support remaining irrigated intensive plant agriculture, with grapes and citrus crops.

Throughout the Wentworth LEP 2011 preparation process, the Department of Primary Industries have made it very clear that the 10ha MLS standard in Wentworth is inappropriate as the MLS does not encourage viable agriculture, encourages fragmentation and increases land use conflict. Council gave DPI an undertaking to review the 10ha standard in light of the fact that the Federal government was buying back water entitlements on lots less than 15ha in size because they were considered unsuitable for agricultural production.

The intention of the 10ha MLS provision is to allow the creation of lots for the purposes of irrigated agriculture/horticulture with an associated dwelling. Therefore clearly, the draft PP reinforces a poor development standard that will be difficult to change in the future. The DPI has encouraged Council to undertake a strategic review of rural land and to clearly differentiate between the use of agricultural land for agricultural purposes and the use of land for lifestyle purposes.

Council has not adequately considered the DPI submission but rather has stated that the issues raised by DPI will be considered in the rural land study that will be undertaken in the future. As noted above, this process has just commenced.

It is widely recognised that 10ha is an unviable/unsustainable lot size for intensive plant agriculture in the Wentworth context. In fact the DPI (Agriculture) objected to the retention of the 10ha MLS in the Wentworth LEP 2011. The objection was only removed when DPI was made aware that Council was maintaining the MLS as per the provisions of the SEPP Rural Lands and that Council had agreed to prepare a Rural Lands Study to review the MLS.

It should be noted that the proposal includes the concept of the 'transfer' of 'dwelling entitlements' from other land owned by the applicant, with the claim that therefore there would be no more fragmentation of rural land. The transfer of development rights is not possible under the EPA Act. Further, there is no evidence that the titles contain or have a dwelling or a development consent, which the applicant states can be 'relinquished' to enable the 'clustering' of dwellings on the subject sites, thus not creating any more new dwellings. Finally, a search of the 49 titles owned by the applicant shows that 8 do not exist.

External Supporting
Notes :

Adequacy Assessment

Statement of the objectives - s55(2)(a)

Is a statement of the objectives provided? **Yes**

Comment :

The Statement of Objectives state that the purpose of the PP is to:

***Enable dwellings on lot sizes of a minimum of 5 to 10 ha in two locations adjacent to the irrigation district of Pomona; and
*Relinquish existing rural lot dwelling approvals and entitlements based on lot history on the other Grand Junction lots, so no additional dwellings are located but the dwellings are consolidated into a smaller area.**

The applicant states that "The Planning Proposal is broken into two sites, South Pomona and North Pomona, both adjacent to the existing rural residential community of Pomona. Dwelling approvals exist already for these sites so the effect of the PP is to see rural dwellings currently allowed over an area of 4,997ha consolidated into a much smaller area of 490ha that is already being developed for purposes of rural dwellings".

The Applicant's statement that "dwelling approvals exist" is based on the view that the titles were created in the 1800's for the purpose of a dwelling and therefore the 'right' to a dwelling on the lots can be transferred to another area. The applicant maintains that the 'benefits' of the consolidation of rural dwellings into a smaller area will be:

- "- less clearing of native vegetation**
- Effluent from shearing shed moved away from Darling river**
- Economic development to make the 'village' of Pomona and town of Wentworth sustainable**
- Additional ratepayers for Wentworth Shire**
- Lower cost of infrastructure provision to rural dwellings, and**
- Create appealing lots, which will attract people to live in the Wentworth/Pomona area."**

None of these benefits are considered valid in the circumstances; as the proposal will result in the creation of undersized rural lots along the river which will potentially have the effect of increased pressure on the riverine ecosystem including tree clearing; result in 49 dwellings with on-site effluent disposal risks to the river, create demand for infrastructure provision and create potential for rural land use conflict with active commercial agricultural enterprises in the locality. The woolshed is a substantial piece of rural infrastructure and there is no guarantee of its closure and rehabilitation.

Explanation of provisions provided - s55(2)(b)

Is an explanation of provisions provided? **Yes**

Comment :

The Applicant has provided a copy of the Balranald LEP 2010 RU4 Land Use Table, as part of the Planning Proposal without explanation. It appears the Council had requested the Applicant reconsider the use of the RU4 zone, on account of the intention of the PP being 'rural residential' and not primary production small holdings. Accordingly, the applicant has not provided the appropriate justification for the use of the RU4 zone, instead just describing the subject sites as having road access and not being flood affected.

The applicant describes the amendment to the Lot Size Map as changing the MLS from 10,000ha to 5 to 10ha.

The applicant then states how "development consents" for dwellings on the lots listed in Appendix H" will be "surrendered" with [the owner] Grand Junction providing "a written undertaking to Council that it will withdraw or not make application for consents on the lots...the effect will be...to reposition 49 dwellings that would otherwise be built over a much broader area".

This concept is considered to be invalid in that there is no development consent for dwellings on the subject, unrelated 49 lots, and further, it is not possible or legal to transfer 'development rights' as suggested by the applicant.

Justification - s55 (2)(c)

a) Has Council's strategy been agreed to by the Director General? **No**

b) S.117 directions identified by RPA :

* May need the Director General's agreement

1.5 Rural Lands

2.1 Environment Protection Zones

2.3 Heritage Conservation

2.4 Recreation Vehicle Areas

4.4 Planning for Bushfire Protection

5.1 Implementation of Regional Strategies

6.1 Approval and Referral Requirements

6.3 Site Specific Provisions

Is the Director General's agreement required? **Yes**

c) Consistent with Standard Instrument (LEPs) Order 2006 : **Yes**

d) Which SEPPs have the RPA identified?

SEPP (Rural Lands) 2008

e) List any other matters that need to be considered :

The upzoning of rural land for residential purposes needs to be justified by an endorsed strategy. The matter is not one of minor significance and cannot be deemed consistent for this reason. The applicant has stated consistency with the Rural Lands SEPP; however the PP raises questions of inconsistency with Clause 8 of the RLSEPP in terms of the potential land use conflict with other rural uses, the fragmentation that would eventuate, the nature of the subject and surrounding land and the oversupply of rural residential opportunities in the Wentworth LGA.

The PP is for residential uses in a rural area; however the applicant has simply implied that the RU4 zone is the best fit and therefore this forms the the justification for the rezoning. This is considered inadequate justification.

The concept of transferable development rights has been the subject of Internal agency legal advice dated 2006 (attached). In short, the EPA Act does not provide directly referable statutory power supporting the operation of TDR practices. The EPAA does not create a statutory right but only establishes an entitlement to subdivide rural land in certain circumstances. Similarly, this entitlement does not create a proprietary right amounting an interest that can be recorded on the title to land.

Whilst the actual creation of an allotment gives rise to a proprietary interest, that interest could not be transferred to a different location under general real property law. This entitlement also does not create a personal property right (being a 'chose in action' such as a debt) that could be claimed or enforced through legal action. (NB: 'Chose in Action': The right to bring a lawsuit to recover chattels, money, or a debt). The entitlement is also not an equitable right (such as a beneficiary's right under a trust) that is inherently capable of assignment under the general law.

Therefore, the legality of TDR transaction is highly questionable, noting that the entitlement to an allotment cannot be properly regarded as a 'right' which can be assigned to another person or transferred to a different location.

Other issues about the practice of TDR, is that it is an informal system that has implications for ongoing administration, such as the issue of 'double dipping'. Also, the applicant has suggested that development consents for a dwelling (which do not exist) will be 'relinquished' with the rezoning of other land through Section 111 of the EPA Act.

TDR schemes may have cumulative unforeseen adverse environmental and amenity impacts if they are conducted without the benefit of a supporting environmental and landuse study. Conducting such studies to support the implementation of these practices may be inefficient as these environmental and strategic studies would be prepared at the time that Council prepares its LEP.

The Applicant has advised that he is seeking legal advice to support his notion of transfer of 'development consents', however, internal advice from Legal Services

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Branch clearly shows that the concept of transferring rights is not supported by the EPA Act.

Have inconsistencies with items a), b) and d) being adequately justified? No

If No, explain :

As above: The applicant has not provided adequate or suitable justification for the rezoning and it is not supported by a strategic study or report. The applicant states that "consolidation of Grand Junction rural dwellings into the South and North Pomona sites was first suggested to Wentworth Council 9 years ago. At that time, the Grand Junction rural dwellings were not approved, but now Grand Junction has since obtained numerous approvals for rural dwellings and has rural dwelling development applications pending which follow the same precedent as the approved rural dwellings".

It should be noted, the above quote refers to "numerous approvals for rural dwellings", which is not the case, this in fact refers to the applicant's belief that each lot in the land held away from the subject land has approvals for dwellings. This is the core basis for justification of the PP.

The applicant goes on to state that "The relinquishment of current Development Consents ensure that the same number of dwellings can be constructed in a more sustainable way with less clearing of native vegetation and lower infrastructure requirements".

This justification is considered to be unsatisfactory: The proposal would increase fragmentation of rural land for residential purposes; it will increase the risk of land clearing and will also increase the need for infrastructure to be extended to the subdivided and developed land.

Mapping Provided - s55(2)(d)

Is mapping provided? Yes

Comment :

Community consultation - s55(2)(e)

Has community consultation been proposed? Yes

Comment : A 28 day consultation period is suggested.

Additional Director General's requirements

Are there any additional Director General's requirements? Unknown

If Yes, reasons :

If the PP is supported, it is suggested that the work is resubmitted after considering the policy surrounding rural land use. In particular, the DG's consent will be required as the proposal is not of minor significance.

Overall adequacy of the proposal

Does the proposal meet the adequacy criteria? No

If No, comment :

There is a lack of consideration against government policy; There is no viable justification for the proposal; There is no consideration against a strategic framework; the proposal is inadequate and does not consider existing demand and supply, instead presenting the concept of transfer of development rights. The stated benefits of the proposal presume that there will be take up of the newly created lots and establishment of dwellings, and hence increase in Council rates. The arguments presented do not at this time justify the proposal.

Proposal Assessment

Principal LEP:

Due Date : December 2011

Comments in
relation to Principal
LEP :

Two amendments to the Wentworth LEP 1993 in 2011 upzoned large amounts of land around Pittman Avenue and Buronga-Gol-Gol for residential and large lot purposes (2423 lots). Recent and current PPs will add 61 additional lots (Pooncarie Road and Buronga Gol-Gol), making the total available land for residential/large lot residential uses in the order of 2484 lots. The current expressed demand is 30 dwellings pa, resulting in 82 years supply.

Assessment Criteria

Need for planning
proposal :

The applicant states there will be net community benefit as a result of the PP. The basis for this claim is that there will be 'better management of the area' from an agricultural perspective, as sheep grazing is "less viable" now due to dog attacks. This benefit is overstated. Further the PP states that "use of the sites for small rural holdings will introduce up to to \$14,000,000 of investment in the district and bring in 49 families, which is a better use of land". It is unclear where this figure has been drawn from.

On the presumption that the land will be fully developed and occupied, the applicant has suggested that the PP will "provide a growth opportunity for future rural residential development", "generate additional rates", "increase the viability of Pomona school", "reduce the cost of infrastructure /asset provision and maintenance, which would be much lower having dwellings located close together".

The applicant has assumed there will be 100% occupancy and development of the proposed 49 lot subdivision. However, given the large supply of zoned land and the low demand, it is highly unlikely that all these sites will be developed.

The Department's population projections for Wentworth (based on 2011 Census) which suggest an increase in population of 200 from 6800 to 7000 in 2031, 11 persons per annum. The population profile for Wentworth show declines in the under 15 year and 15-64 age categories and 89% increase in the over 64 age groups. The key drivers of population loss are the fertility rate, net internal population loss and the existing age profile.

Also, the applicant has selected the RU4 zone for the 'rural residential' zone and subdivision of the subject land. This is considered inappropriate as the lot sizes are undersized and have no agricultural use.

Throughout the LEP 2011 preparation process, the Department of Primary Industries have made it very clear that the 10ha MLS standard in Wentworth LEP is inappropriate as the MLS does not encourage viable agriculture, encourages fragmentation and increases land use conflict. Council gave DPI an undertaking to review the 10ha standard in light of the fact that the Federal Government was buying back water entitlements on lots less than 15ha in size because they were considered unsuitable for agricultural production. The intention of the 10ha MLS provision is to allow the creation of lots for the purposes of irrigated agriculture/horticulture with an associated dwelling. The draft PP reinforces a poor development standard that will be difficult to change in the future. The DPI has encouraged Council to undertake a strategic review of rural land and to clearly differentiate between the use of agricultural land for agricultural purposes and the use of land for lifestyle purposes.

Council has not adequately addressed the DPI submission as part of the Comprehensive LEP process but rather have stated that the issues raised by the DPI will be considered in the rural land study that will be undertaken in the future. This process has just commenced (December 2013).

It is the view of Primary Industries that 10ha is an unsustainable lot size for intensive plant agriculture in the Wentworth context. The DPI Agriculture objected to the retention of the 10ha MLS in the Wentworth LEP 2011. The objection was only removed when DPI was

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Consistency with strategic planning framework :

made aware that Council was maintaining the MLS as per the provision of the SEPP Rural Lands (that is, no dwelling) and that Council had agreed to prepare a Rural Lands Study to review the MLS.

The proposal is inconsistent with the current strategic planning framework. In the preparation of the Comprehensive LEP, Council has considered the subject land and regarded it as unnecessary for future needs. Council has embarked on a rural lands strategy and the subject land could and should be considered in this strategic process. This process should be completed by the end of 2014.

Further, the applicant has not considered the differentiation between 'lifestyle' and agriculture in suggesting the RU4 land use zone. The RU4 zone is not suitable for application to a rural lifestyle development as the objectives of the zone relate to primary production.

Environmental social economic impacts :

The applicant suggests that the proposal will result in less rural land fragmentation and minimise land clearing. It is also suggested that the PP will result in the removal of a woolshed that will "reduce large amounts of stock effluent from directly entering the river system". It is difficult to draw a direct link between these outcomes and the PP.

The PP will instead increase the fragmentation of land through the creation of an additional 49 lots to the cadastre. This is contrary to the applicant's claim there will be a 'reorganisation' of the lots (the 'justification' for the PP).

Increased fragmentation will lead to impacts on biodiversity through the clearing of land for subdivision and dwellings, including the Darling River frontage, where it would be reasonably expected that dwellings would be located. In this location, the riverine vegetation is often the remnant vegetation in existence and has the significant role of maintaining the integrity of the river bank, reducing erosion, providing habitat and mitigating flood volume and velocity.

Further impacts can be expected from on site effluent disposal and increased water extraction from surface and groundwater. Management issues such as weeds, stray animals and expectations of amenity may result in increased rural land conflict with surrounding rural enterprises, including the Pomona district which is a historic horticultural area.

Economic impacts can be expected through an increased demand for infrastructure to service the land, extension and improvement of roads, provision of garbage and mail services, telecommunications, school bus etc Research has found that in most instances, these services are heavily subsidised by the wider community and not the benefactors, particularly road construction and maintenance.

Assessment Process

Proposal type :	Inconsistent	Community Consultation Period :	28 Days
Timeframe to make LEP :	0 months	Delegation :	Nil
Public Authority Consultation - 56(2) (d) :			

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Is Public Hearing by the PAC required? **No**

(2)(a) Should the matter proceed? **No**

If no, provide reasons : **The proposal is not considered justified on strategic, legal or demand/supply grounds. The proposal is at odds with the RU4 Primary Production Small Holdings zone, on grounds of the MLS and the intended use of the land, which is rural lifestyle. The applicant's justification of the 'transfer' of 'existing' development consents is considered illegal under the EPA Act. There is oversupply of residential and rural lifestyle development in an area with low historical demand.**

Resubmission - s56(2)(b) **No**

If Yes, reasons : **It is suggested that the applicant and Council be advised that the PP is not supported at this time and the proposal be considered under the Council's rural lands strategy process.**

Identify any additional studies, if required :

If Other, provide reasons :

Identify any internal consultations, if required :

No internal consultation required

Is the provision and funding of state infrastructure relevant to this plan? **No**

If Yes, reasons :

Documents

Document File Name	DocumentType Name	Is Public
Legal Advice on Wellington Shire Councils TDR Practices 280806.doc	Study	No
Cover Letter - Planning Proposal- Wentworth LEP 2011 - Amendment No. 5.pdf.pdf	Proposal Covering Letter	Yes
Applicant document tabled at Planning Liaison Meeting.pdf	Study	No
Grand Junction Letter Regarding Land Use Strategy.pdf	Study	No
Grand Junction Letter Regarding Proposed Zone.pdf	Study	No
Minutes - Ordinary Council 22 January 2014.pdf	Study	No
Minutes - Planning Liaison Committee 8 November 2013.pdf	Study	No
Minutes - Planning Liaison Committee 18 December 2013.pdf	Study	No
Modified Response Planning Liaison Committee Report 8 November 2013 by Warrick Fisher - 11 November 2013.pdf	Study	No
Planning Liaison Committee Recommendation 08 November 2013.pdf	Study	No
Planning Liaison Committee Recommendation - 18 December 2013 - Ordinary Council 22 Janu....pdf	Study	No
Preliminary Response Planning Liaison Committee Report 8 November 2013 by Warrick Fisher - 8 November 2013.pdf	Study	No
Grand Junction Planning Proposal.pdf	Proposal	Yes

Planning Team Recommendation

Preparation of the planning proposal supported at this stage : **Not Recommended**

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S.117 directions:

1.5 Rural Lands
2.1 Environment Protection Zones
2.3 Heritage Conservation
2.4 Recreation Vehicle Areas
4.4 Planning for Bushfire Protection
5.1 Implementation of Regional Strategies
6.1 Approval and Referral Requirements
6.3 Site Specific Provisions

Additional Information :

It is recommended that the PP not proceed at this time and the applicant be advised that the Wentworth Shire Council should consider the subject land in the Draft Rural Lands Strategy.

Supporting Reasons :

The proposal is for the creation of an additional 49 rural lifestyle lots. There is current oversupply of land zoned for residential and rural lifestyle purposes in Wentworth shire. The proposal does not adequately address the strategic planning framework or government policy. The proposal is inconsistent with government policy. The proposal inappropriately uses the RU4 zone for rural lifestyle development and does not address the concerns of government agencies regarding minimum lot size. The proposal would result in the unnecessary fragmentation of rural land. The proposal would have adverse impacts on the environment, local economy and contribute to a lack of investment in property development due to oversupply. The proposal is predicated on the illegal basis of 'transfer' of development rights.

Signature:

Azania Dobson

Printed Name:

Azania Dobson

Date:

24/3/2014