

## Clause 4.6 Variation to Development Standard Floor Space Ratio



**Hill Road, Wentworth Point**  
Civil Works and GFA Distribution  
Submitted to Auburn City Council  
On Behalf of UrbanGrowth NSW

January 2016 ■ 14075

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## 1.0 Request to Vary a Development Standard

This variation under Clause 4.6 of the *Auburn Local Environmental Plan 2010* (ALEP 2015) has been prepared by JBA on behalf of UrbanGrowth NSW. It is submitted to Auburn City Council (Council) in support of a Staged Development Application (DA) for civil works including the distribution of Gross Floor Area across the master development lots approved under DA 274/2014 at Hill Road, Wentworth Point.

This variation request made under Clause 4.6 has been prepared following post lodgement comments received from Council regarding variations to the floor space ratio development standard.

Clause 4.6 of the ALEP 2015 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The Clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe).

These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments. Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

An additional principle was established in the recent decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five), which was upheld by Pain J on appeal.

This Clause 4.6 variation request should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by JBA dated February 2015 in relation to the proposed GFA distribution and civil works at Hill Road, Wentworth Point. It should also be read in relation to the revised allocation of GFA across the site.

It relates to the development standard detailed in Clause 4.4 Floor Space Ratio under ALEP2010 and has been prepared in light of Council's assessment report submitted to the Joint Regional Planning Panel in November 2015 and subsequent verbal advice received from Council.

## 1.1 Background

### 1.1.1 Floor Space Variation

Council are of the opinion that the proposed gross floor area exceeds the maximum permissible under ALEP2010, when the proposed GFA to be distributed to each individual development lot is cumulatively calculated. More specifically, that the total proposed GFA having regard to the total site area of the development lots equates to an FSR in the order of 3:1 (the applicable FSR development standards applying to the site under ALEP2010 are 1.25:1 and 2.6:1).

In our opinion the proposed GFA distribution is consistent with the FSR development standard and no additional GFA is proposed over the maximum Floor Space Ratio (FSR) stipulated for the total site under the ALEP 2010. Despite the proposal not contravening the FSR development standard when calculated across the whole site, this Clause 4.6 variation request is provided to account for Council's interpretation.

## 1.2 Development Standard to be Varied

### 1.2.1 Floor Space Ratio

Clause 4.4 Floor Space Ratio of ALEP 2010 establishes the maximum floor space ratio (FSR) permitted for all development. Under the ALEP 2010 the site is afforded two different maximum FSR development standards, being 1.25:1 and 2.6:1 – refer to **Figure 1**.

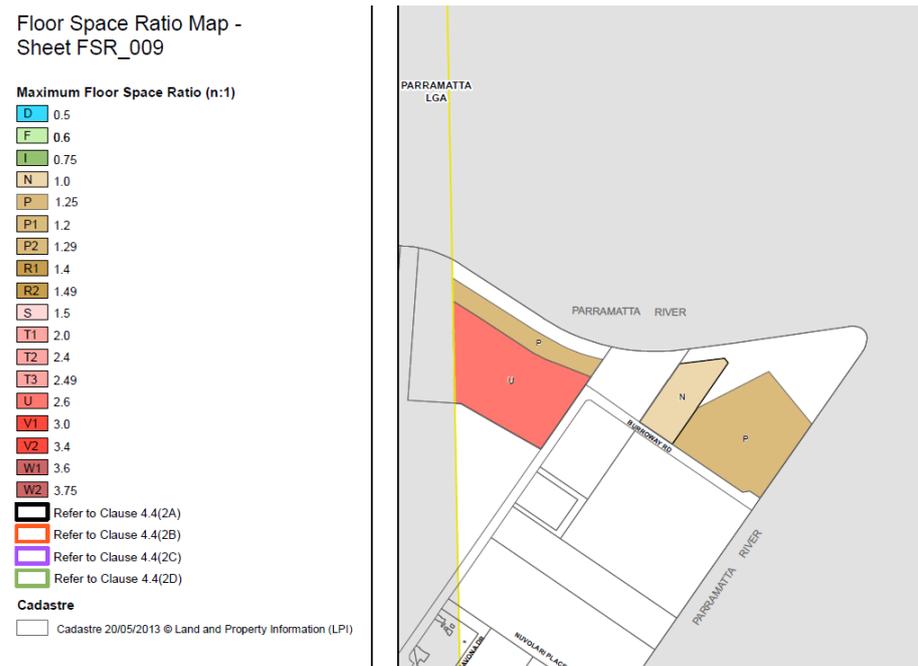


Figure 1 – Auburn LEP FSR Map Extract (part)

**Table 1** provides an overview of the applicable maximum FSR controls that apply to the site. **Table 2** provides a summary of the maximum GFA permissible across each development lot and proposed road, the proposed allocation of GFA across each development lot and proposed road, the resulting FSR and whether a development lot/proposed road complies or exceeds the FSR control. **Table 3** provides a summary of the maximum permissible GFA across each FSR band, details the proposed GFA and difference and the resulting FSR.

**Table 1 – Maximum GFA permitted under LEP 2010**

Zone	FSR	Area	Maximum permissible GFA
Hill Road			
R4	2.6:1	64,526 m <sup>2</sup>	167,768 m <sup>2</sup>
R4	1.25:1	16,826 m <sup>2</sup>	21,032 m <sup>2</sup>
RE1	0:1	13,228 m <sup>2</sup>	0m <sup>2</sup>
<b>Total</b>		<b>94,580 m<sup>2</sup></b>	<b>188,800m<sup>2</sup></b>

**Table 2 – Maximum permissible and proposed GFA**

Proposed Lot	Max FSR	Area m <sup>2</sup>	Max GFA m <sup>2</sup>	Proposed GFA m <sup>2</sup>	Proposed FSR	Difference m <sup>2</sup>
101	2.6:1	11,290	29,354	45,348	4.02:1	+15,994
102	2.6:1	10,735	27,911	35,267	3.29:1	+7,356
103	2.6:1	10,167	26,434	19,627	1.93:1	-6,807
104	1.25:1	2,901	3,626	4,131	1.42:1	-505
	2.6:1	10,062	26,161	24,353	2.42:1	-1,808
105	1.25:1	2,171	2,714	3,017	1.39:1	+303
	2.6:1	5,238	13,618	24,124	4.6:1	+10,505
106	1.25:1	4,636	5,795	4,539	0.98:1	-1,256
	2.6:1	3,141	8,166	21,290	6.78:1	+13,123
107	1.25:1	4,466	5,583	5,008	1.12:1	-575
	2.6:1	1,295	3,367	2,096	1.62:1	-1,271
Proposed Road	1.25:1	2,652	3,315	0	0:1	-3,315
	2.6:1	12,598	32,755	0	0:1	-32,755
RE1 land	0:0	13,228	0	0	0:1	-
<b>Total</b>		<b>94,580 m<sup>2</sup></b>	<b>188,800m<sup>2</sup></b>	<b>188,800 m<sup>2</sup></b>	<b>1.99:1</b>	<b>0</b>

**Table 3 – Summary maximum and proposed GFA and FSR**

Zone	FSR	Area m <sup>2</sup>	Max permissible GFA m <sup>2</sup>	Proposed GFA m <sup>2</sup>	Difference m <sup>2</sup>	Proposed FSR
Hill Road						
R4	2.6:1	64,526	167,768	172,105	+4,338	2.667:1
R4	1.25:1	16,826	21,032	16,695	-4,338	0.99:1
RE1	0:1	13,228	0	0	-	0:1
<b>Total</b>		<b>94,580</b>	<b>188,800</b>	<b>188,800</b>	<b>0</b>	<b>1.99:1</b>

As evident from **Table 2**, there are some development lots that technically exceed the FSR control, however overall/cumulatively the proposed total GFA the whole site complies with the maximum permissible floor space.

**Table 3** also demonstrates that whilst more GFA is proposed to be allocated and distributed across the 2.6:1 FSR band portion of the site (approx. 2.6% variation), there is an equal under provision of GFA within the 1.25:1 FSR band portion of the site – with the net result being that the overall proposed amount of GFA cumulatively complies with the development standards.

## 2.0 Is the Planning Control in Question a Development Standard?

Development Standard is defined under Section 4(1) of the EP&A Act as follows:

*“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:*

*...*

*(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...”*

The Floor Space Ratio standard prescribed under 4.4 of the ALEP 2010 is clearly and unambiguously a development standard and has continually been applied in this manner by the consent authority.

## 3.0 Justification for Contravention of the Development Standard

### 3.1 Clause 4.6 of the Auburn LEP and applicable case law

Clause 4.6(3) of the Auburn LEP provides that:

#### 4.6 *Exceptions to development standards*

...

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, clause 4.6(4)(a) of the Auburn LEP provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court and the NSW Court of Appeal in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the Auburn LEP, with respect to clause 4.4 of the Auburn LEP, are each addressed below, including with regard to these decisions.

### 3.2 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Auburn LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request.

The five ways outlined in *Wehbe* include:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method.

#### 3.2.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in clause 4.4 of the Auburn LEP are:

- (a) to establish a maximum floor space ratio to enable appropriate development density to be achieved, and
- (b) to ensure that development intensity reflects its locality

### 3.2.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

#### Objective (a):

This objective of the FSR standard is to ensure that an appropriate density and quantum of development is achieved for the land.

Wentworth Point, following its announcement by the NSW Government in 2013 as an Urban Activation Precinct (now referred to as a Priority Precinct), has been the subject of a detailed precinct planning and master planning exercise, culminating in a site specific rezoning of the precinct – gazetted in Auburn LEP 2010 in July 2014. The overarching objective of the UAP/PP rezoning process is to increase housing choice and affordability by delivering increased housing supply in an environmentally, socially and economically sustainable manner.

The framework for future development across the land is provided for in a combination including the LEP provisions (e.g. height and FSR) and the accompanying site specific Wentworth Point Development Control Plan.

The FSR bands applying across the land were intentionally not intended to correspond with the Auburn LEP's Height of Buildings Map. This approach was adopted in order to provide flexibility and enable innovation in the future detailed design phase. In this regard, blanket FSR bands/areas were created across the entirety of the land, including future areas that will become parks/plazas and roads.

Furthermore, we note that Section 2.3 of the Wentworth Point Precinct DCP states that the subdivision development applications for each site should “confirm how development will be distributed across the neighbourhood consistent with the floor space ratio controls identified in Auburn LEP, by allocating a **maximum allowable floor space for each development lot**”. (our emphasis)

Accordingly, a total maximum expected development yield and density was established across the entirety of the site through the rezoning process, with details around the exact distribution and location of future development to be specified within future applications.

Accordingly, the proposed FSR's for each development lot are consistent with the objective and strict compliance with the FSR development standard would not appropriately reflect the State Government's vision and expected development capacity of this particular site.

The subject DA seeks consent to maximise development density on which future development applications will be based by establishing a maximum GFA for each development lot. Whilst technically the proposed allocation across some development lots exceeds the FSR development standard, the overall GFA permitted across the entire site is not exceeded.

Furthermore, whilst the GFA allocation does result in the minor exceedance of the 2.6:1 FSR band (proposed FSR of 2.66:1), there is an equal under provision of GFA allocation within the 1.25:1 FSR band (proposed FSR of 0.99:1). This arrangement of GFA across the site has been informed by CM+ and is based on the design approach detailed within the UAP rezoning process whereby:

- Built form is kept lower at the northern front of the site adjoining the foreshore – providing an improved relationship with the foreshore and harbour and providing increased view and solar access opportunities for development to the south; and
- The built form within the centre of the site avoids uniform and less articulated heights, and adopts a mixed lower scale and tower form approach.

**Objective (b):**

This objective seeks to ensure that the resulting yield and intensity of development is compatible with its surrounding locality.

Wentworth Point is an area of Auburn that has over the past decade undergone considerable change and growth, with historic industrial land uses making way for new high density residential precincts and neighbourhoods. This urban renewal has over the years moved northwards, where the subject site represents one of the last remaining large parcels of land to undergo redevelopment. The proposed GFA allocation will therefore ensure that the expected density outcomes for the site secured through the UAP rezoning process will be achieved.

Accordingly, whilst some individual development lots will exceed the applicable FSR development standard, it does not lead to a development intensity that is not reflective of the broader Wentworth Point locality. This in particular is achieved through compliance with the overall maximum allowable GFA generated across the entire site. The proposed allocation of GFA also results in a superior outcome in terms of an improved relationship with the Sydney Harbour foreshore.

**3.2.3 Consistency with aims of the Auburn LEP 2010**

Compliance with the FSR development standard across each development lot is also considered to be unreasonable in these circumstances given that the proposed development supports the achievement of a number of the Auburn LEP aims.

Auburn LEP Aim	Consistency
(a) to establish planning standards that are clear, specific and flexible in their application,	The proposed allocation of GFA embraces the concept of flexibility in the application of the FSR development standard.
(b) to foster integrated, sustainable development that contributes to Auburn's environmental, social and physical well-being,	The proposed development supports contemporary high density sustainable living.
(c) to protect areas from inappropriate development,	The proposed development ensures that the allocation of GFA is located to areas of the site that are appropriate from an environmental perspective. For example, GFA is allocated adjoining the future foreshore that supports lower scale development – thereby ensuring an appropriate relationship and form of development is achieved.
(d) to minimise risk to the community by restricting development in sensitive areas,	The proposed allocation of GFA ensures that the expected density to be delivered on the site by the NSW Government is achieved. In maximising development on suitably zoned and unconstrained land, it ensures the protection of more sensitive areas from development pressure.
(e) to integrate principles of ecologically sustainable development into land use controls,	<p>ESD principles form a core part of the vision for Wentworth Point. This is reflected within the development principles of the Wentworth Point DCP which apply to future development:</p> <ul style="list-style-type: none"> <li>– strengthen the role of Wentworth Point as an integral part of the broader Sydney Olympic Park Specialised Precinct</li> <li>– create a network of unique, memorable and high quality places</li> <li>– respond to and enhance its unique natural setting on the Parramatta River</li> <li>– provide a peninsula park that maximises amenity for the local community</li> <li>– create a compact, walkable urban community</li> <li>– provide high density, medium to high rise housing to increase housing choice</li> <li>– incorporate a network of publicly accessible open spaces</li> <li>– incorporate a primary school that serves the wider Wentworth Point community</li> <li>– provide public view corridors to and from the Millennium Marker, Parramatta River and Sydney Olympic Park, Parklands</li> </ul>

Auburn LEP Aim	Consistency
	<ul style="list-style-type: none"> <li>- create a complete, largely self-contained community</li> <li>- comprise a diverse and innovative built form that provides a high quality living environment</li> <li>- be resilient to climate change and sea level rise, and</li> <li>- incorporate sustainability measures that reduce its impact on the natural environment</li> </ul>
(f) to protect, maintain and enhance the natural ecosystems, including watercourses, wetlands and riparian land,	The proposed DA supports the protection of these important environmental features.
(g) to facilitate economic growth and employment opportunities within Auburn,	The proposal makes a significant contribution to providing high quality housing for Sydney's diverse and growing population.
(h) to identify and conserve the natural, built and cultural heritage	Not applicable
(i) to provide recreational land, community facilities and land for public purposes.	The proposed development and its allocation of GFA carefully balances the need to deliver an appropriate density together with providing essential recreational land.

### 3.1 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

The proposed GFA allocation and the resulting technical variation to the FSR development standard across some of the development lots is considered to be justified based on the following sound environmental planning grounds:

- The bulk and scale of the resulting GFA allocation generally aligns with the scale of development envisaged within the Wentworth Point UAP rezoning process and also the DCP. In particular, the urban design principle of lower scale development along the northern frontage of the site, with low-medium scale development across the remaining area of the site accentuated with towers.
- Once the Stage 1 DA is approved, the development of each individual development parcel/super lot would then be the subject of a subsequent future development application for the detailed design of buildings. The approved floor space within each development parcel would represent the maximum 'compliant' amount of floor space able to be accommodated. Council through its assessment of the future detailed building DAs would assess the development against the Stage 1 DA (in terms of GFA allocation consistency), Auburn LEP 2010, SEPP 65 and importantly the Wentworth Point DCP – ensuring that an appropriate built form outcome is able to be achieved and that it is not pre-determined as a result of approving the Stage 1 DA (GFA allocation).
- The proposed GFA allocated across the development lots has been modelled by CM+ and complies with the corresponding building height development standard.
- The allocation of GFA and consequential road layout of the site supports improved accessibility to the Sydney Harbour for the general public.

## 3.2 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

### 3.2.1 Consistency with objectives of the development standard

Refer to Section 3.2.2.

### 3.2.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the R4 – High Density Residential zone as follows:

#### ***Objective 1 - To provide for the housing needs of the community within a high density residential environment***

The proposed variation to the FSR standards for some development lots and the 2.6:1 FSR band ensures that the site is developed in the future at a capacity that supports a high density residential environment. With the proposed variation therefore, it enables the site to support housing at an intensity required to meet the needs of the Auburn and broader Sydney community and at an intensity envisaged by the ALEP 2010 for the site.

Should the GFA not be allocated as proposed, it will result in a substantial underutilisation of the site, and would undermine the State Government's vision and plan for the land.

#### ***Objective 2 - To provide a variety of housing types within a high density residential environment***

The distribution of floor space facilitates the provision of housing to meet the varying and growing housing needs of Auburn and greater Sydney. Should the GFA not be allocated as proposed, it will result in substantially less housing diversity across the site (i.e. less one bedroom, 2 bedroom, and 3 bedroom apartments).

The proposed development is consistent with the envisaged future surrounding built form and will directly increase housing diversity within the area compared to the historic use of the land for industrial purposes.

#### ***Objective 3 - To enable other land uses that provide facilities or services to meet the day to day needs of residents***

The proposed development is in close proximity to existing and future local centres and Rhodes railway station. Subsequently, future residents will be serviced by the mix of existing retailers as well as encourage the establishment of new businesses. The proposal's delivery of new residents into the locality will ensure a greater opportunity for other compatible land uses to be provided.

#### ***Objective 4 - To encourage high density residential development in close proximity to bus service nodes and railway stations.***

The variation to the FSR standard is being proposed on a site that is more than capable of accommodating the GFA, especially given the site's future level of accessibility. The variation sought is not to the overall permitted quantum (taken as a single development site) but how that floor space is massed around the site.

Wentworth Point itself is also planned to be a largely self contained community, with access to day to day needs and a future local school.

### 3.3 Director-General's Concurrence

It is understood that the Director-General's concurrence under Clause 4.6(5) of the ALEP 2010 has been delegated to Council. The following section provides a response to those matters set out in Clause 4.6(5) which must be considered by Council under its delegated authority:

***Whether contravention of the development standard raises any matter of significance for the State or Regional environmental planning***

The proposal demonstrates that a variation to the Floor Space Ratio development standards is acceptable in terms of significance for State and Regional planning matters. The variance of the development standards will not contravene any overarching State or regional objectives or standards, or have any effect outside the sites immediate area.

As noted, the proposed allocation of GFA does not result in an exceedance to the overall site's maximum permitted GFA.

It is noted that the Wentworth Point UAP is identified as a model for urban renewal under the Plan for Growing Sydney, and this DA is a key first step to realising this commitment of the State Government.

***The public benefit of maintaining the development standard***

Maintaining the development standard would not result in any public benefit in this situation. Reducing floor space would be at odds with the UAP rezoning process undertaken by the State Government.

Further, the development as a whole will deliver a number of public benefits to the area, including:

- additional housing to contribute to overcoming the shortfall of housing in Sydney;
- providing new and improved access to the Sydney Harbour foreshore;
- providing clear and linear links through the site that support future buildings and parks/plazas;
- providing a development that sympathises with the landscape character of the area; and
- promoting ecological sustainability and sustainable practices.

***Any other matters required to be taken into consideration by the Director-General before granting concurrence***

No other matters require consideration by the Director-General.

## 4.0 Conclusion

This clause 4.6 variation has been prepared in response to Council recommendations and following a revision to the proposed allocation of GFA across the site.

The assessment above demonstrates that compliance with the Floor Space Ratio development standard contained in clause 4.4 of the Auburn LEP 2010 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the FSR development standard, the proposed development:

- Facilitates the development yield and density as anticipated through the Wentworth Point UAP rezoning process;
- Remains consistent with the overall maximum GFA permitted across the entire site;
- Ensures a development outcome on the site that is compatible and reflective of the scale of other development within the Wentworth Point locality;
- Is consistent with the aims of the Auburn LEP;
- Is consistent with the objectives of the FSR development standard;
- Is consistent with the underlying zone objectives; and
- Will continue to ensure an appropriate built form outcome is achieved, with building heights under the LEP, SEPP 65 and the Wentworth Point DCP continuing to apply to future development proposals.

As such, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under clause 4.6 of the Auburn LEP 2010.