

# **CLAUSE 4.6 OBJECTION TO DEVELOPMENT STANDARD (HEIGHT OF BUILDING)**

## **MACARTHUR MEMORIAL PARK**

**URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:**

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# 1. INTRODUCTION

This written request has been prepared in accordance with the provisions of clause 4.6 of the *Campbelltown Local Environmental Plan 2015* (CLEP 2015) – Exceptions to Development Standards. This request seeks a variation to the Height of Building development standard adopted under clause 4.3 of the CLEP 2015, applying to 166-176 St Andrews Road, Varroville (the site).

This statement supports a Development Application (DA) for the development of the site as a cemetery and public parklands. The proposal seeks consent for works across the entire site, including landscaping, built form, earthworks, and construction associated with the land uses and all necessary supporting infrastructure.

This objection should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Urbis and the Architectural Plans prepared by FJMT at **Appendix H**.

Clause 4.6(3) of the CLEP 2015 outlines the key requirements of the objection, which must demonstrate the following:

- 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.*

This objection has been prepared with regard to the following considerations:

- Clause 4.6 and clause 4.3 of the CLEP 2015;
- The considerations for assessing standards set out by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and furthered in *Four2FivePty Ltd v Ashfield Council* [2015] NSWLEC 90.

# 2. PROPOSED VARIATION

This statement seeks a variation to the maximum building height of 9m, which applies to the site under the CLEP 2015. The proposed variation relates to the Chapel, which is located in the western portion of the site, as identified in the Landscape Masterplan at **Figure 1** below. All other proposed buildings and structures are compliant with the CLEP 2015 height of buildings control.

The height non-compliance relates to the roof form of the Chapel. The roof incorporates a wave design, which results in a breach height of buildings control through the centre peak, as illustrated in the height plane diagram below at **Figure 2**. The maximum of height of the Chapel is 11.596m. The proposed variation is summarised in **Table 1** below.

Whilst it is considered that the proposed non compliance is an architectural roof feature in accordance with clause 5.3 of the CLEP 2015, this objection has been prepared to demonstrate that the proposal's capability to otherwise be approved if the non compliance is not considered to be an architectural roof feature.

Figure 1 – Proposed Landscape Masterplan



Source: FJLA

Figure 2 – Chapel height plane diagram



Source: FJMT

Table 1 – Height summary

Height of Buildings Standard	Proposed maximum height (m)	Proposed variation in metres
9m	11.596m	2.596m

## 3. PRINCIPLES OF EXCEPTIONS TO DEVELOPMENT STANDARDS

### 3.1. CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

Clause 4.6 of CLEP 2015 provides flexibility in the application of development standards, allowing the consent authority to grant development consent for developments that do not comply with identified development standard, where it can be shown that flexibility in the application of the standard would achieve better outcomes for and from the development.

This assessment demonstrates the planning merits of the development which includes the variation of the development standard.

The objectives of Clause 4.6 of the CLEP 2015 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6(3)(a) and (b) of CLEP 2015 requires the variation request to demonstrate:

- (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.*

The consent authority when considering a request to vary a development standard must be satisfied that the proposed development will be in the public interest and that the proposed development is consistent with the objectives of the particular standard and the objectives of the zone in which the development is proposed to be carried out.

### 3.2. NSW LAND AND ENVIRONMENTAL COURT: CASE LAW

#### 3.2.1. **Wehbe v Pittwater Council [2007] NSWLEC 827**

The decision of Justice Preston in *Wehbe v Pittwater Council* [2007] expanded the findings of *Winten v North Sydney Council* [2001] and established a five (5) part test for consent authorities to consider when assessing an application to vary a development standard in order to determine whether non-compliance with the development standard is well founded.

The five (5) different ways in which an objection may be well founded are as follows:

- *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- *The underlying objective or purpose of the standard not relevant to the development and therefore compliance is unnecessary;*
- *The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

- *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 reasonable;*
- *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.*

### 3.2.2. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90

More recently, *Four2Five v Ashfield Council* was initially heard by Commissioner Pearson, and upheld on appeal by Justice Pain in the Court of Appeal. Commissioner Pearson's decision in this case (and Justice Pain's endorsement of the reasoning) requires an application to vary a development standard to go beyond the five (5) part test of *Wehbe v Pittwater Council* [2007] to demonstrate the following:

- *Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP;*
- *The development standard is unreasonable or unnecessary on grounds other than the development achieved the objectives of the development standard and/or land use zone.*
- *There are sufficient environmental planning grounds particular to the circumstances of the proposed development that do not apply to any similar development on the site or in the vicinity.*

## 4. CONSISTENCY WITH THE OBJECTIVES OF THE HEIGHT OF BUILDINGS STANDARD

Clause 4.6(4)(a)(ii) establishes that it should be demonstrated that the proposed development is in the public interest as it is consistent with the objectives of the particular standard. **Table 2** assesses the consistency of the proposal against the objective of clause 4.3 of the CLEP 2015.

Table 2 – Height of buildings Objectives

Objective	Compliance
<i>To nominate a range of building heights that will provide a transition in built form and land use intensity across all zones.</i>	The proposed built form on the site does not contravene the low density nature and scale of development in the Varroville locality. The proposed height of the Chapel will not impact the intensity of development on the site. The height variation relates to the roof feature only and does not include gross floor area.
<i>To ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities.</i>	The Chapel is two storeys in height and is consistent with the prevailing rural character of the locality and is consistent with buildings on heights on surrounding sites. The Chapel has been sited to sit within the slope and reads as a single storey building when viewed from the west, and as two storeys when view from the east.
<i>To provide for built form that is compatible with the hierarchy and role of centres</i>	The proposed height of the Chapel is entirely consistent with the desirable scale of development within rural setting.
<i>To assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to</i>	The proposed variation of 2.596m, has a negligible impact on the visual appearance and scale of Chapel in the context of the site topography, specifically, the visual backdrop and scale of the escarpment behind the building. This has been confirmed in the



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Objective	Compliance
<p><i>existing and future development and to the public domain.</i></p>	<p>Visual Impact Assessment undertaken for the site and attached as <b>Appendix HH</b> of the SEE.</p> <p>The Chapel has been sited and designed to respond the topography of the site and the visual qualities of the Scenic Hills.</p> <p>The Chapel has been sited to minimise the buildings' visibility when viewed from the Campbelltown urban area and Varroville Homestead. The Chapel has been sited below the prominent escarpment line which runs along the northern portion of the site. Furthermore, the building has also been sited within a small gully of the south easterly running slope to further reduce visual prominence within the site and surrounding areas.</p> <p>The proposal result has no associated privacy or solar access impacts.</p>

## 5. CONSISTENCY WITH THE OBJECTIVES OF THE E3 ENVIRONMENTAL MANAGEMENT ZONE

Clause 4.6(4)(a)(ii) establishes that it should be demonstrated that the proposed development is in the public interest as it is consistent with the objectives of the zone. The Chapel is located within the portion of the site zoned E3 Environmental Management. **Table 2** assesses the consistency of the proposal against the objective of the E3 Environmental Management Zone under the CLEP 2015.

Table 3 – Assessment against the E3 Environmental Management Zone Objectives

Objective	Compliance
<p><i>To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.</i></p>	<p>The proposed cemetery and recreation area will protect and manage the ecological and historical values of the site. The proposal has been informed by a detailed Flora and Fauna Assessment (<b>Appendix AA</b>), Aboriginal Archaeological Impact Assessment (<b>Appendix Y</b>) and Heritage Impact Assessment (<b>Appendix X</b>) to ensure the protection and ongoing management and restoration of ecology and cultural and historical significance across the site.</p> <p>The proposal is accompanied by a Vegetation Management Plan (<b>Appendix EE</b>) and Conservation Management Plan (<b>Appendix W</b>), which will guide ongoing site management for the life of the development.</p> <p>The conclusions reached by these various specialist reports demonstrate that the proposed height variation does not derogate from the proposal's ability to otherwise satisfy this zone objective.</p>
<p><i>To provide for a limited range of development that does not have an adverse effect on those values.</i></p>	<p>New built form has been sited and designed to minimise any impacts on all ecological, cultural and aesthetic values of the site. All new buildings are sited within the northern portion of the site, which achieves the following:</p>

Objective	Compliance
	<ul style="list-style-type: none"> <li>• Minimum visibility when viewed from surrounding sites and the Campbelltown urban area;</li> <li>• Considerable separation from areas and adjacent sites of heritage significance; and</li> <li>• Protection and retention significant landscape features and watercourses.</li> </ul>
<p><i>To enable development for purposes other than rural-residential only if that development is compatible and complementary, in terms of design, size and scale, with the character of land in the zone.</i></p>	<p>The memorial park is entirely compatible and complementary to the semi-rural character of the Varroville Locality. The proposal primarily involves the landscape treatment of the site for a memorial park and parklands. The proposed new built form on the site will support the cemetery and parklands uses and is of a scale which is entirely consistent with the design, size and scale of development in the locality.</p>
<p><i>To allow cellar door premises, restaurants and cafes only where they are directly associated with the agricultural use of the land.</i></p>	<p>Not applicable.</p>
<p><i>To protect, and maintain the environmental, ecological and visual amenity of, the Scenic Hills, the Wedderburn Plateau and environmentally sensitive lands in the vicinity of the Georges River from inappropriate development.</i></p>	<p>The proposal ensures the protection and maintenance of the environmental, ecological and visual amenity of the scenic Hills. The proposed Landscape Master Plan (<b>Appendix B</b>) has been informed by comprehensive environmental, ecological and visual studies to ensure the protection of these qualities (as addressed in Section 5 of the SEE). The ongoing maintenance of the site will be guided by a variety of management plans (as addressed in Section 5 of the SEE).</p>
<p><i>To preserve the rural heritage landscape character of the Scenic Hills.</i></p>	<p>As confirmed in the Heritage Impact Assessment (<b>Appendix X</b>), the proposal preserves the rural heritage landscape character of the site. The ongoing preservation of the rural heritage landscape will be undertaken in accordance with Conservation Management Plan (<b>Appendix W</b>).</p>
<p><i>To protect and enhance areas of scenic value and the visual amenity of prominent ridgelines.</i></p>	<p>The proposed chapel has been sighted well below the visually ridgelines and not within the acknowledged “no build area”.</p> <p>The scenic value and prominence of the Bunbury Curran Ridgeline will be protected and enhanced. Development along the Bunbury Curran Ridgeline is limited to public walking tracks and the lookout to be located at Bunbury Curran Hill. The proposal also includes the removal of African Olive, a noxious weed which is present across the site.</p>
<p><i>To protect bushland, wildlife corridors and natural habitat, including waterways and riparian lands.</i></p>	<p>Bushlands, natural habits, waterways and riparian corridors will be protected as per the Vegetation Management Plan (<b>Appendix EE</b>) and the Watercourse Management Assessment (<b>Appendix BB</b>).</p>
<p><i>To ensure the preservation and maintenance of environmentally</i></p>	<p>Areas of the site of environmental significance have been identified within the Flora and Fauna Assessment at <b>Appendix</b></p>



Objective	Compliance
<i>significant and environmentally sensitive land.</i>	<b>AA</b> , which has informed the Landscape Masterplan ( <b>Appendix B</b> ). The preservation and maintenance of environmentally significant areas will be undertaken in accordance with the Vegetation Management Plan ( <b>Appendix EE</b> ).

## 6. ASSESSMENT

The following provides an assessment of the variation proposed.

### IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

In applying the principles established in the NSW Land and Environment Court judgements outlined in Section 3, compliance with the height of building development standard is considered unreasonable or unnecessary as:

- Compliance of the with height of building standard is considered unnecessary as the proposed variation will have a negligible and insignificant impact when viewed within the landscape of the broader sites.
- The height non-compliance relates to the roof form of the Chapel only. Specifically, the height non-compliance occurs at the “peak” of the waved roof form. The height non-compliance does not relate to floor area and is not capable of being converted to floor area in the future.
- The Chapel has been sited and designed to respond to the scenic qualities of the site. Architecturally, the building is highly refined and is of an acceptable bulk and scale, particularly when compared to the scale of other permitted uses that exist in proximity to the site
- The waved roof of the Chapel is considered an architectural roof feature under clause 5.6 of the CLEP 2015. The waved roof is a key element of the overall architectural design of the Chapel building. The proposed roof form has been design to emulate the topography of the site, specifically, the visually prominent escarpment which sits above the Chapel.
- The proposal is consistent with the objectives of the development standard and objectives of the E3 Environmental Management zone.

### ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD?

The proposed variation does not result in any adverse environmental impacts. There are sufficient environmental planning grounds for varying the development standard, for the reasons outlined below:

- There are no adverse amenity impacts such as overshadowing or view loss associated with the proposed variation to the height of buildings control, when considering the site context and the proposed cemetery use.
- There are no adverse visual impacts associated with the height of the roof form. The proposed siting of all new built form on the site has been carefully considered to ensure that all significant landscape elements and water bodies remain visually prominent. The Chapel has been sited below the prominent Bunbury Curran Ridgeline and is located within a naturally gully, to further conceal new built form when view from surrounding sites, St Andrews Road and the Campbelltown Urban Area.

## **WILL THE PROPOSED DEVELOPMENT 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 proposed variation to the height of buildings standard satisfies the objectives of the standard and the E3 Environmental Management zone objectives. The proposed development is in the public interest for the following reasons:

- Macarthur Memorial Park will be a key piece of public infrastructure. The Memorial Park and Chapel will cater for the burial needs of the local community and broader region. Macarthur Memorial Park will assist in meeting the growing demand for burial space across the broader Sydney Metropolitan Region.
- The proposal is for memorial park and publicly accessible parklands which are entirely consistent with the landscape character and scale of development in the semi-rural Varroville locality.
- The waved roof of the Chapel is a key architectural feature which contributes to the visual interest of the building. The roof form is of a high architectural quality and has been designed to emulate the topography of the landscape.

## **WHETHER OR NOT NON-COMPLIANCE WITH THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING**

The non-compliance will not raise any matters of significance for State or regional environmental planning.

## **PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD**

No public benefit will be achieved by strictly applying the height control. The increase in building height will result in an improved design outcome, which is more visually responsive to the scenic qualities of site and Scenic Hills and the specific landscape within which the building sits.

As discussed within the SEE, the redevelopment of the site will result in a variety of public benefits, including the provision of essential cemetery infrastructure and the preservation of the environmentally significant land and areas of Aboriginal and European heritage significance.

## **CONSIDERATIONS ARISING FROM WEHBE AND FOUR2FIVE**

The five part test established by Preston J in *Wehbe v Pittwater Council* [2007] NSWLEC 827 and furthered in *Four2FivePty Ltd v Ashfield Council* [2015] NSWLEC 90 are considered in **Table 4** and **Table 5**.

Table 4 – Wehbe Five Part Test

<b>Question</b>	<b>Comment</b>
<i>Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives?</i>	Yes, the proposal is consistent with the objectives of the Height of Buildings control and E3 Environmental Management zone.
<i>Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary?</i>	No, the underlying objectives of the standard are relevant to the development. As demonstrated in this statement, the proposal satisfies the objectives of the standard.

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<b>Question</b>	<b>Comment</b>
<i>Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable?</i>	If strict numerical compliance were required, a flat roof form would be required. A flat roof form would significantly compromise the design intent of the Chapel, which has been designed to emulate the Bunbury Curran Ridgeline. A flat roof would result in greater visual prominence of the building which compromises the architectural intent.
<i>Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that departs from the standard, making compliance with the development standard by others both unnecessary and unreasonable?</i>	It is not considered that Campbelltown Council has abandoned the development standard.
<i>Is the “zoning of particular land” unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently compliance with that development standard is unnecessary and unreasonable?</i>	No, the E3 Environmental Management zone is appropriate. Compliance with the standard is unreasonable and unnecessary for the reasons outlined in above.

Table 5 – Additional considerations arising from *Four2Five Pty Ltd*

<b>Question</b>	<b>Comment</b>
<i>Compliance with the particular requirements of Clause 4.6, with particular regard to the provisions of subclauses (3) and (4) of the LEP.</i>	As addressed above, the proposed variation satisfies with the considerations of clause 4.6 of CLEP 2015.
<i>That there are sufficient environment planning grounds, particular to the circumstances of the proposed development (as opposed to general planning grounds that may apply to any similar development occurring on the site or within its vicinity).</i>	<p>The planning grounds specific to the site and development have been considered, these include:</p> <ul style="list-style-type: none"> <li>• The proposed roof form is visually interesting and results in a quality design outcome and enhance the overall experience of the space to which the roof form relates</li> <li>• The Chapel is entirely consistent with the landscape character and scale of development in the semi-rural Varroville locality.</li> <li>• The location and design of the Chapel has been carefully considered to ensure that the building is visually subordinate when viewed within the landscape.</li> </ul>

## 7. CONCLUSION

The proposed mixed-use development is entirely consistent with the objectives of both the height of buildings standard and the E3 Environmental Management zone. The proposed variation to the height of buildings standard is considered appropriate for the following key reasons:

- The waved roof of the Chapel is a key architectural feature which contributes to the visual interest of the building. The roof form is visually sympathetic to the rural qualities of the site and has been designed to emulate the topography of the landscape.
- There are no adverse visual impacts associated with the height of the roof form. The proposed siting of all new built form on the site has been carefully considered to ensure that all significant landscape elements and water bodies remain visually prominent. The Chapel has been sited below the prominent Bunbury Curran Ridgeline and is located within a naturally gully, to further conceal new built form when viewed from surrounding sites, St Andrews Road and the Campbelltown Urban Area.
- The proposal is for memorial park and publicly accessible parklands which are entirely consistent with the landscape character and scale of development in the semi-rural Varroville locality.
- Macarthur Memorial Park will assist in meeting the growing demand for burial space across the broader Sydney Metropolitan Region. Macarthur Memorial Park will be a key piece of public cemetery infrastructure. The Memorial Park and Chapel will be multid denominational facilities which will cater for the burial needs of the local community and broader region.

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