



Clause 4.6 Variation

Clause 6.13 of the Canterbury Bankstown LEP

2 and 2A Bullecourt Avenue, Milperra

Prepared for Mirvac Residential Pty Ltd

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Contents

- 1.0 Introduction4
- 2.0 The Development Site.....5
- 3.0 The Proposed Development.....6
- 4.0 The Proposed Variation8
- 5.0 Justification for Contravention of the Development Standard9
 - 5.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary9
 - 5.2 Clause 4.6(3)(b): Sufficient environmental planning grounds to justify the contravention of the development standard 10
- 6.0 Conclusion12

1.0 Introduction

Clause 4.6 of the Canterbury Bankstown LEP 2023 enables the consent authority to grant consent for development even though it contravenes a development standard. Its objectives are to provide an appropriate degree of flexibility in applying certain development standards and to achieve better outcomes for developments by allowing flexibility in particular circumstances.

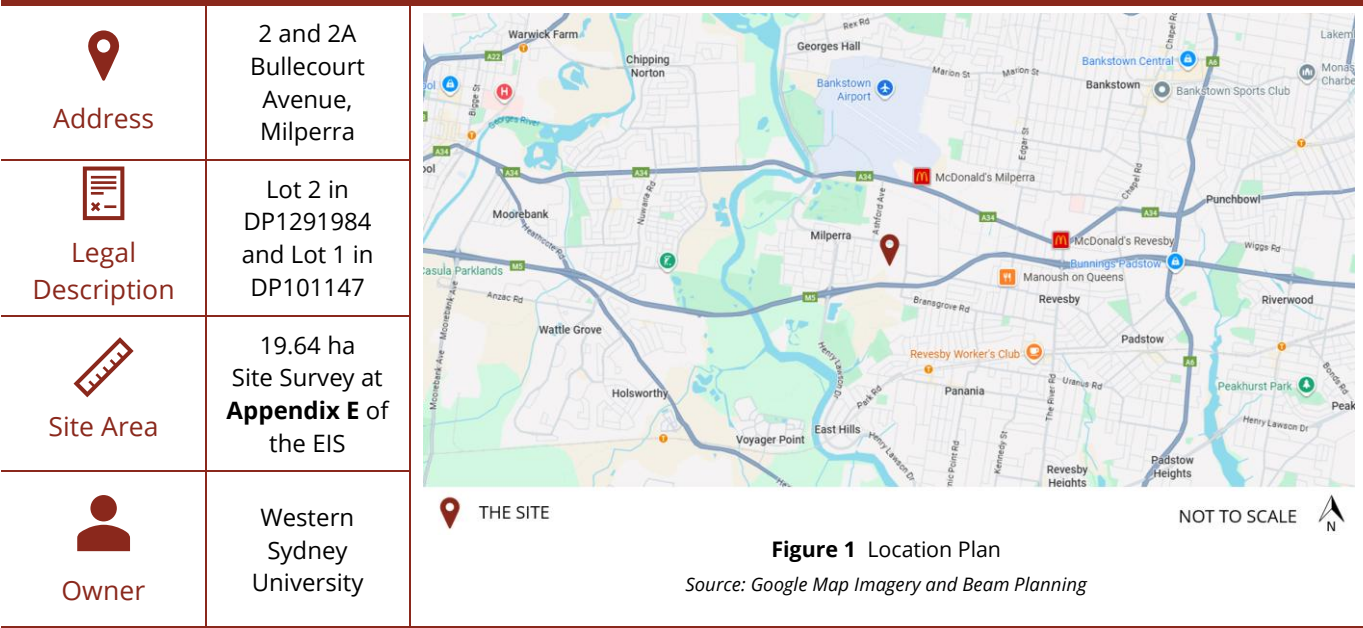
Clauses 4.6(3) requires that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances, and
- There are sufficient environmental planning grounds to justify the contravention of the development standard.

The table below provides a summary of the key matters required in a Clause 4.6 Variation set out in the Department of Planning and Environments *Guide to Varying Development Standards November 2023*.

Where is the development site?	2 and 2A Bullecourt Avenue, Milperra
What is proposed development?	SSDA 1 seeks consent for the delivery of a residential community, specifically the creation of residential lots, remaining super lots, and includes the construction of 62 houses, three new public parks, new roads through the site, car parking to service the existing child care centre, and other ancillary works such as drainage and civil works.
What is the variation?	The proposed development seeks consent for the variation of clause 6.13 of the Canterbury Bankstown LEP 2023: Clause 6.13 Special provisions for centre-based child care facilities <i>Development consent must not be granted for the purposes of centre-based child care facilities on land identified as “Area 1” on the Clause Application Map if the vehicular access to the land is from—</i> <i>(a) a classified road, or</i> <i>(b) a cul-de-sac road or a road where the carriageway between kerbs is less than 10m.</i>
Why is compliance with the building height development standard is unreasonable and unnecessary in the circumstances of the case?	While a clear objective is not identified within Clause 6.3, the intention of the clause is still maintained in the updated design, as demonstrated through the environmental planning grounds which justify the variation. The objectives of the R1 zone are also still achieved, despite the non-compliance.
What are the sufficient environmental planning grounds to justify contravention of the development standard?	The environmental planning grounds to justify contravention of clause 6.13 of the Canterbury Bankstown LEP are: • Contravention of the standard will allow for the retention of a significant Cumberland Plain Woodland species, in accordance with the principle of avoidance under the Biodiversity Conservation Act. • The variation will not compromise traffic flow along the access road to the child care centre, impact access to the centre or significantly impact on-street parking. • Safe access to and from parking facilities associated with the childcare centre has been maintained, and the variation does not have any impact on the future use of the site for the purposes of a childcare centre. In light of the above that the consent authority can be satisfied that there are sufficient grounds to support the proposed variation.

2.0 The Development Site



As shown in **Figure 2**, the site is bound by the M5 Motorway to the south, Ashford Avenue / existing residential dwellings to the west, Bullecourt Avenue / existing industrial development to the north, and Horsley Road / existing industrial development to the east. Mount St Joseph Catholic College adjoins the site at the southeastern boundary.



3.0 The Proposed Development

The project will be delivered in stages and across two (2) separate SSDAs. Upon completion of the project, the development will comprise the construction of up to 430 dwellings, three (3) public parks, new roads and shared paths, civil infrastructure, an expanded childcare centre, a car park, and the management of conservation land.

SSDA 1, the subject of this clause 4.6 variation request, seeks consent for:

- Tree removal;
- Site remediation (excluding works carried out as category 2 remediation works);
- Construction of bulk earthworks, public roads and landscaping, and services;
- Augmentation of existing services and road infrastructure;
- Construction of three (3) public parks;
- Construction of up to 430 dwellings including houses, dual occupancies and attached dwellings;
- Construction of a carpark to service the existing childcare centre and E1 Local Centre zoned land;
- Subdivision resulting in up to 430 residential lots, infrastructure lots, remaining residential superlots, and the creation of a community title lot for land zoned C2 Environmental Conservation and E1 Local Centre; and
- Conservation works including the management of >2Ha Cumberland Plain Woodland Species.

An Illustrative Masterplan of the proposed development prepared by Urbis is shown at **Figure 3**.



Figure 3 Illustrative Masterplan of the Proposed Development

Source: Urbis

The proposed development specifically comprises all civil works across the entirety of the site as well as the construction of all 62 dwellings in “Stage 1” and “Stage 2” only. A description of the proposed staging of works across the development sought within this SSDA is as follows:

- Stage 1 – Tree removal (where proposed) and remediation of contaminated lands across the site, creation of two (2) super lots and 22 residential lots, and construction of 22 dwelling houses fronting Ashford Avenue. This will be the first stage to be delivered and will connect into the existing infrastructure that located within Ashford Avenue.
- Stage 2 – Creation of four (4) super lots, a new lot (Lot 25) across the RE1 Public Recreation zoned land, and 40 residential lots. This stage also involves the construction of 40 dwelling houses within Stage 2, and the construction of new roads and the new public park referred to in the Civil Plans as the ‘Central Park’.
- Stage 3a – Creation of a new super lot, and the construction of perimeter roads surrounding the existing childcare centre (which will cease operation during Stage 3 works), construction of a new carpark to service the childcare centre and E1 Local Centre zoned land. It is proposed all associated civil works required to enable the operation of the existing childcare centre will be delivered under this stage. The new traffic intersections at both Bullecourt Avenue and Horsley Road will be constructed.
- Stage 3b – Creation of three (3) lots to be delivered under a Community Title Scheme for the E1 Local Centre zoned land.
- Stage 4 – Creation of eight (8) super lots, a new lot (Lot 50) across the RE1 Public Recreation zoned land, and a new lot (Lot 49) across the SP2 Infrastructure zoned land. This stage also involves the construction of new roads, the stormwater infrastructure Basin 1 and Basin 2, and the new public park referred to in the Civil Plans as the ‘Southern Park’, all to be dedicated to the Council.
- Stage 5 – Creation of six (6) super lots and construction of new roads and civil works.
- Stage 6 – Creation of nine (9) super lots and a new lot (70) across the RE1 Public Recreation zoned land. This stage also involves the construction of new roads and civil works, and the new public park referred to in the Civil Plans as the ‘Northern Park’, all to be dedicated to Council.
- Stage 7 – Creation of six (6) super lots and construction of road and civil works.

SSDA 2 (the subject of SSD-109921491) will seek consent for all outstanding works in stages 3 to 7, which are as follows:

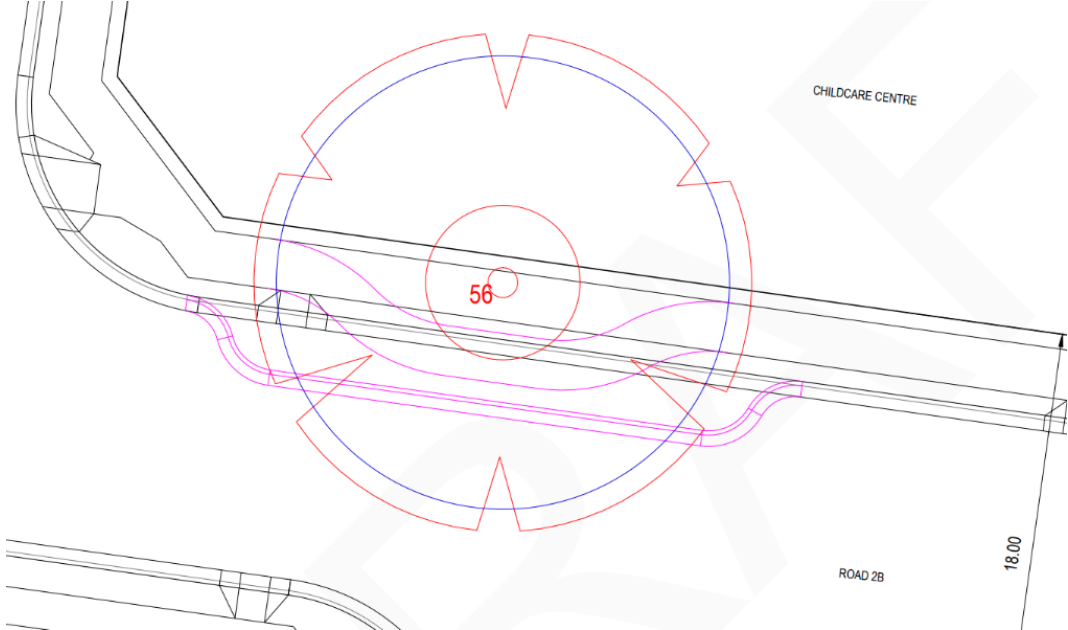
- Stage 3 – Construction of the childcare alterations and additions and construction of a permanent structure for commercial use.
- Stage 4 – Creation of the subsequent subdivision into 107 residential lots and construction of dwellings.
- Stage 5 – Creation of the subsequent subdivision into 65 residential lots and construction of dwellings.
- Stage 6 – Creation of the subsequent subdivision into 92 residential lots and construction of dwellings.
- Stage 7 – Creation of the subsequent subdivision into 59 residential lots and construction of dwellings.

Lot numbers are indicative only and will be determined prior to the submission of SSDA 2.

4.0 The Proposed Variation

This section outlines the relevant environmental planning instrument (EPI), the development standard to be varied and proposed variation.

Table 1 Planning instrument, development standard and proposed variation

Matter	Comment
Environmental planning instrument (EPI) sought to be varied	<i>Canterbury Bankstown Local Environmental Plan 2023</i>
The site's zoning	R1 General Residential The objectives of this land use zone are: • To provide for the housing needs of the community. • To provide for a variety of housing types and densities. • To enable other land uses that provide facilities or services to meet the day to day needs of residents. • To allow development that is of a scale and nature that provides an appropriate transition to adjoining land uses.
Development standard sought to be varied	Clause 6.13 Special provisions for centre-based child care facilities Development consent must not be granted for the purposes of centre-based child care facilities on land identified as "Area 1" on the Clause Application Map if the vehicular access to the land is from— (a) a classified road, or (b) a cul-de-sac road or a road where the carriageway between kerbs is less than 10m.
The proposed variation	The road carriageway width is proposed to be 8.5m for 20m along the proposed road 2B, which provides access to car park for the existing centre-based childcare facility. The proposed variation is in response to the Department's request during the Response to Submissions stage of SSDA 1 to investigate further measures to retain additional CPW across the site, and specifically outside of the C2 zone. The investigations identified an opportunity make a minor adjustment to the carriageway of Road 2B to retain Tree 56, a Grey Box species part of the Cumberland Plane Woodland community, that was previously proposed to be removed. The originally proposed road design had a carriageway width of 11m, complying with the minimum width requirement of 10m pursuant to Clause 6.13 of the LEP. The amended design has removed the 2.5m parking lane from the 11m carriageway, reducing its width to 8.5m in this location. This represents a variation of the 10m minimum requirement of 1.5m (15%). The variation is illustrated in Figure 4 below.  Figure 4 The proposed kerb blister (shown in pink) Source: Beveridge Williams

5.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Canterbury Bankstown LEP 2023 provides that:

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

These key considerations are considered in their respective sections below.

5.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary

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, i.e. there may be additional ways. Further, that it is not necessary for an applicant to establish each of the methods.

The five methods 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).

This Clause 4.6 Variation Request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the standard are achieved and accordingly justifies the variation to the car parking control pursuant to the **First Method** outlined in *Wehbe*.

In the judgement for *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, the Chief Judge upheld the Commissioner's approval of large variations to height and FSR controls on appeal. He noted that under Clause 4.6, the consent authority (in that case, the Court) did not have to be directly satisfied that compliance with the development standard was unreasonable or unnecessary but that the applicant's written request adequately addresses (our emphasis) the matters in clause 4.6(3)(a) that compliance with each development standard is unreasonable or unnecessary.

The following section addresses the matters in clause 4.6(3)(a), and in particular how the objectives of the zone and principles of the clause are achieved notwithstanding the non-compliance with the numerical control.

5.1.1 First Method: The underlying objectives or purposes of the development standard

This Clause 4.6 Variation Request establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the proposed development because the objectives of the zone are still achieved. There are no clear objectives of the clause itself, however due to the specific reference to the child care centre, aspects of pedestrian safety, access and parking have been addressed below under **Section 5.2**.

Objective 4.4(1)(a) To provide for the housing needs of the community.

The proposed variation does not impede upon the provision of housing, as it only relates to the design of road 2B located at the frontage of the childcare centre. The proposed redesign will not have any impact on the design or access of any housing.

Objective 4.4(1)(a) To provide for a variety of housing types and densities.

As above, the proposed variation to the carriageway width will not have any impact on the provision of housing across the site including the proposed mix of dwelling typologies.

Objective 4.4(1)(a) To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The variation is proposed to allow for additional CPW vegetation to be retained whilst delivering the intended residential community across the site, including a childcare centre which supports the community. The introduction of a kerb blister to protect the tree will not impact the delivery of the proposed land uses across the site, including the childcare centre which the clause intends to facilitate. In this regard, the proposed variation does not impact on the use of the facility, including with respect to safe access and adequate provision of services to support the use, as demonstrated in **Section 5.2**.

Objective 4.4(1)(a) To allow development that is of a scale and nature that provides an appropriate transition to adjoining land uses.

The proposed variation does not impact the scale of the proposed development.

5.2 Clause 4.6(3)(b): Sufficient environmental planning grounds to justify the contravention of the development standard

Clause 4.6(3)(b) of the LEP requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify the contravention. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole.

Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action at [24]*). In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 Variation Request must be particular to the circumstances of the proposed development on that site at [60].

In this instance, the following reasons, as described in further detail below, are sufficient environmental planning grounds to justify this contravention.

5.2.1 Retention of additional Cumberland Plan Woodland

The purpose of the proposed road redesign is to facilitate the retention of additional CPW in accordance with the avoidance principles of the Biodiversity Conservation Act and to maximise biodiversity avoidance outcomes across the site.

Tree 56, which is proposed to be retained, is a Grey Box (*Eucalyptus moluccana*), a species associated with the Cumberland Plain Woodland (CPW) ecological community. The tree is in good health and structural condition and has been assessed as having high arboricultural retention value and landscape significance. Tree 56 was originally proposed for removal to facilitate compliance with clause 6.13. However, in response to the request to investigate further opportunities to retain CPW vegetation, it was identified that a variation to the development standard would enable the construction of a kerb blister, thereby allowing Tree 56 to be retained.

Given the positive biodiversity outcome associated with retaining a high-value CPW tree, without adversely impacting safe access to the childcare facility, the proposed variation is considered justified. The variation achieves a superior overall project outcome by balancing the relevant objectives with the broader environmental and biodiversity outcomes sought for the site.

5.2.2 Sufficient Carriageway Width and Car Parking

As demonstrated in the amended Civil Plans at **Appendix B** of the ToA Response, the proposed Road 2B varies the 10m minimum requirement through the removal of a section of one parking lane. As shown in **Figure 5**, in place of the parking lane on the northern side of Road 2B, for a stretch of approximately 20m, a kerb blister is proposed which will allow for the retention of the additional CPW tree.

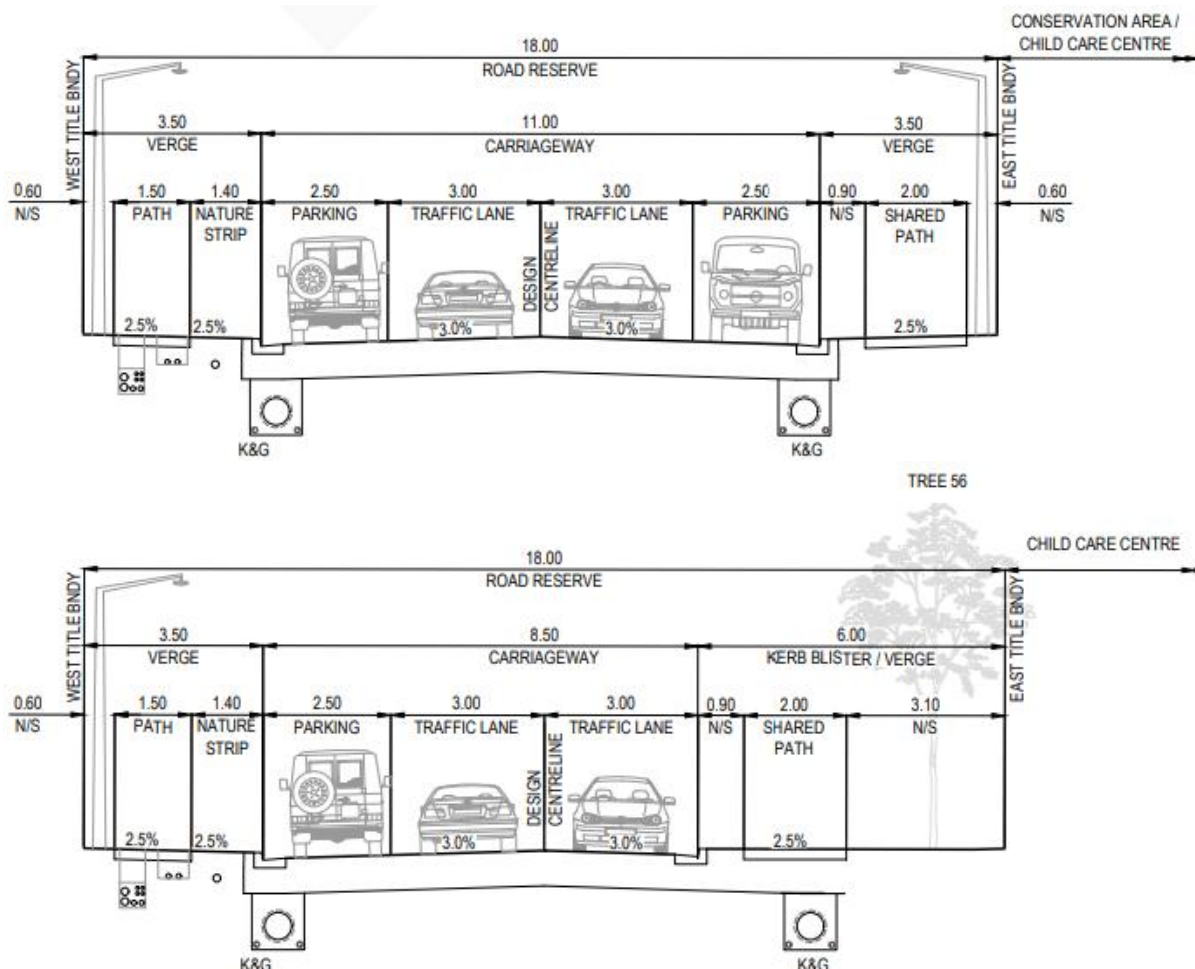


Figure 5 Carriageway design (originally proposed versus amended proposal)

Source: Beveridge Williams

The redesign does not have any impact upon traffic flows in either direction of this road as the lane widths are proposed to match those in the original proposal, comprising an 11m wide carriageway. This requires the removal of only two (2) on street car parking spaces.

The SSDA proposes the construction of a car park connected to the existing centre-based child care facility with a paved walkway. The proposed car park provides 17 spaces for purposes of the centre-based childcare centre, in line with the minimum requirement specified in the Canterbury Bankstown DCP. As part of the Stage 2 SSDA, internal alterations are proposed to allow for the capacity to increase to 95 children (subject to SSDA 2), and in compliance with car parking requirements under the Canterbury Bankstown DCP 2023, a minimum additional 7 spaces will be required and delivered. As there is sufficient space to incorporate adequate childcare parking, there is no need to rely on on-street parking, and the reduction of 3 on-street car parking spaces is expected to have no impact. In the instance where additional on-street car parking is required, the proposed variation only applies to a 20m stretch of road and therefore does not impact the provision of it elsewhere as originally proposed on Road 2B.

5.2.3 Maintenance of Safe Access to the Centre-based Childcare Facility

As noted above, a standalone car park is proposed to service the existing centre-based child care facility, and the proposed alterations and additions to the child care centre will be accompanied by a compliant number of on-site parking spaces. Accordingly, there is no evidence to suggest that additional on-street parking will be required to offset any parking shortfall. Importantly, the proposed variation does not affect the availability or adequacy of parking provision associated with the development. The proposed variation has no impact on the footpath from the car park to the child care centre.

6.0 Conclusion

This Clause 4.6 Variation Request has been prepared to demonstrate that compliance with clause 6.13 of the Canterbury Bankstown LEP 2023 is unreasonable and unnecessary, and that there are sufficient environmental planning grounds to justify the contravention. The proposed retention of Tree 56 demonstrates appropriate avoidance of tree removal outside of the C2 zone, and increases amenity in the delivery of the new residential community at 2 and 2A Bullecourt Avenue, Milperra for future residents. As there are sufficient environmental grounds to justify the variation to clause 6.13, including with respect to ecological benefits, adequate road and parking infrastructure, and maintenance of safe access to the childcare centre, the variation is proposed for the betterment of the overarching project.