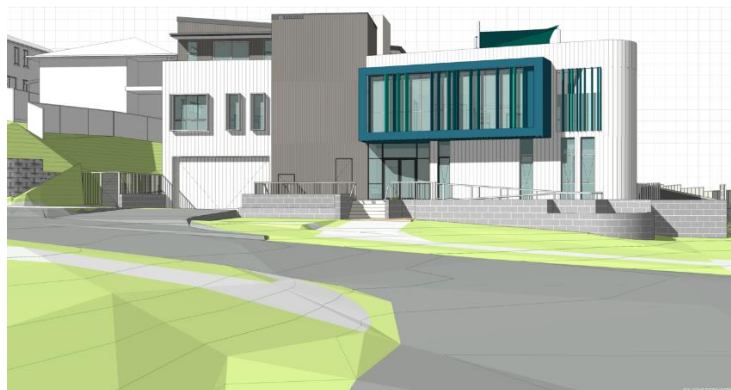




## Section 4.6 Exceptions to Development Standards Written Request – Height of Buildings

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Demolition of existing structures and construction of a mixed-use development comprising a permanent group home, respite care and centre-based child care facility with associated basement car parking, roadworks, landscaping and tree removal.



39 Princes Highway (85 Midgley Street), Corrimal  
Lot 6 DP 29329

Revision: B

Prepared for: Thrive Early Learning Centres

CPS Project No: E998

Date: June 2023

### Document Control

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If this document has not been signed for review and approval then it is deemed a preliminary draft.

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## Section 4.6 Written Request to Vary a Development Standard

### Wollongong Local Environmental Plan 2009

|  |  |
|--|--|
| <b>Applicant's name</b>                  | Thrive Early Learning Centres  |
| <b>Site address</b>                      | 39 Princes Highway (Lot 6 in DP 29329)   |
| <b>Proposal</b>                          | Demolition of existing structures and construction of a mixed-use development comprising a permanent group home, respite day care and centre based child care facility with associated basement parking, road works, landscaping and tree removal. |
| <b>Environmental Planning Instrument</b> | <i>Wollongong Local Environmental Plan 2009</i>  |
| <b>Development standard to be varied</b> | Section 4.3 – Height of buildings  |

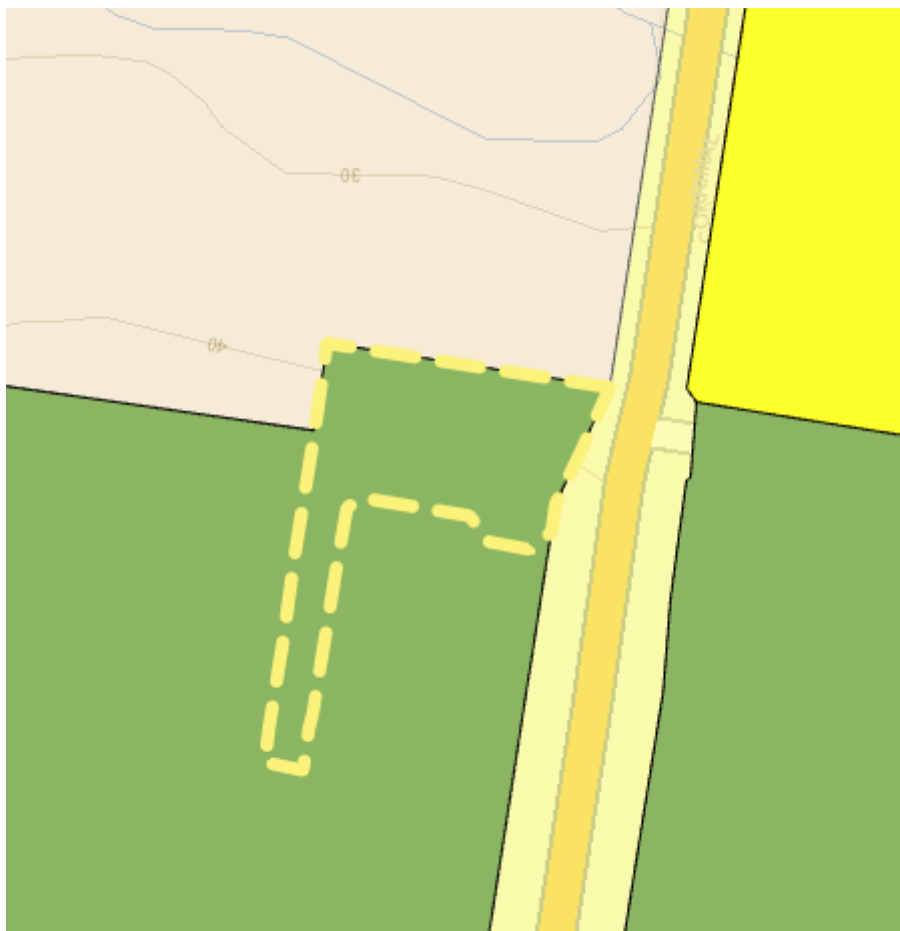
This document contains a written request relating to the proposed variation to section 4.3 (Height of buildings) of *Wollongong Local Environmental Plan 2009* (WLEP 2009) in accordance with the provisions of section 4.6 (Exceptions to development standards) of WLEP 2009.

### Details of development standard sought to be varied

Section 4.3 of WLEP 2009 prescribes a maximum building height for land to which the plan applies. The relevant provisions of section 4.3 are reproduced below:

- (1) *The objectives of this clause are as follows—*
  - (a) *to establish the maximum height limit which buildings can be designed and floor space can be achieved,*
  - (b) *to permit building heights that encourage high quality urban form,*
  - (c) *to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The height of building map (**Figure 1**) prescribes a maximum building height of 9m to the subject site.



**Figure 1:** An extract of WLEP 2009 Height of Buildings map. The subject site is outlined by the yellow border.

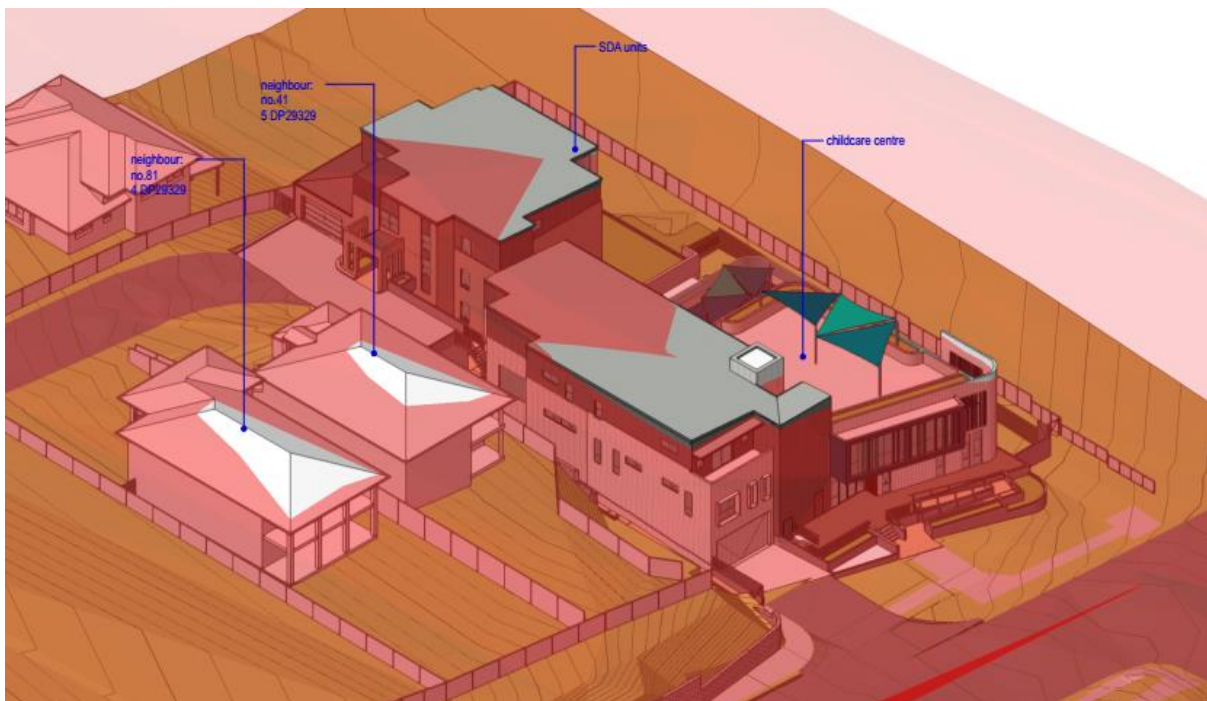
Source: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au)

The proposed development seeks consent for demolition of existing structures and construction of a mixed-use development comprising a permanent group home, respite day care and centre based child care facility with associated basement parking, road works, landscaping and tree removal.

A breakdown of the variation to the development standard is provided within the table below. It is evident that the breach to the development standard reflects a percentage variation of 18.7% for the roof overrun, and 13.1% for all other elements.

**Table 1 – Proposed height variations to Section 4.3 of WLEP 2009**

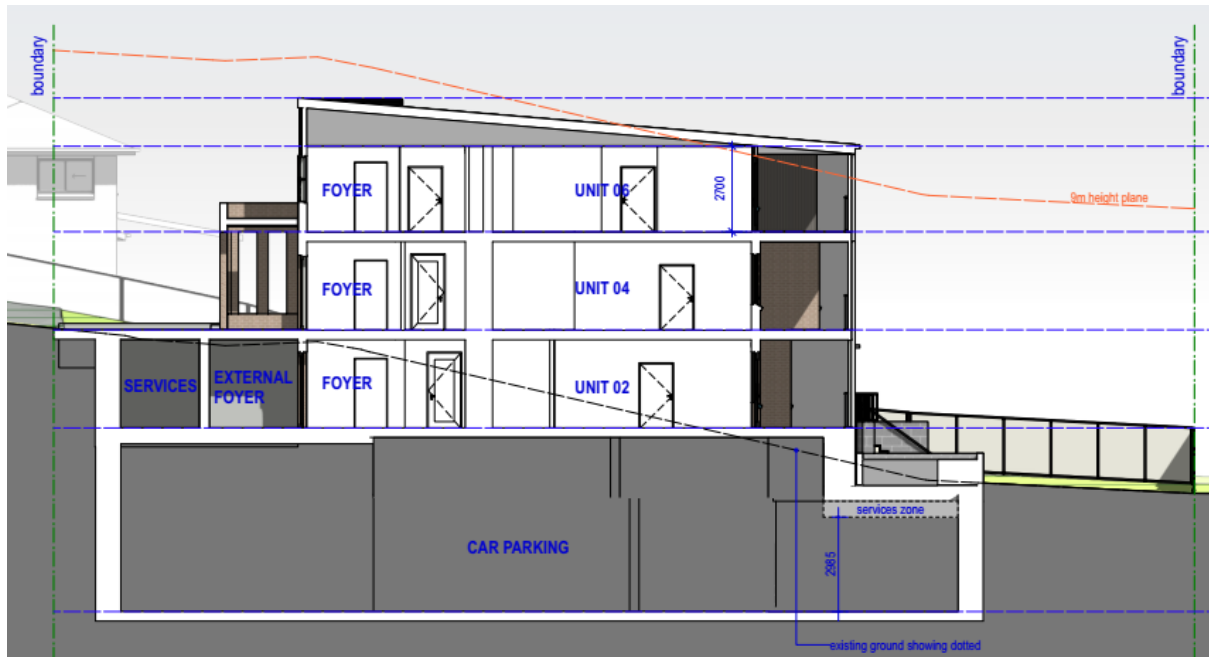
| LEP building height standard | Location of height breach                                  | Proposed Height | Percentage (%) of Variation to Section 4.3 |
|------------------------------|--|-----------------|--|
| 9m                           | Ridge height of child care / respite day care              | 10.2m           | 1.2m or 13.1%                              |
|                              | Ridge height of group home                                 | 9.8m            | 0.8m or 8.4%                               |
|                              | Lift overrun associated with child care / respite day care | 10.7m           | 1.7m or 18.7%                              |



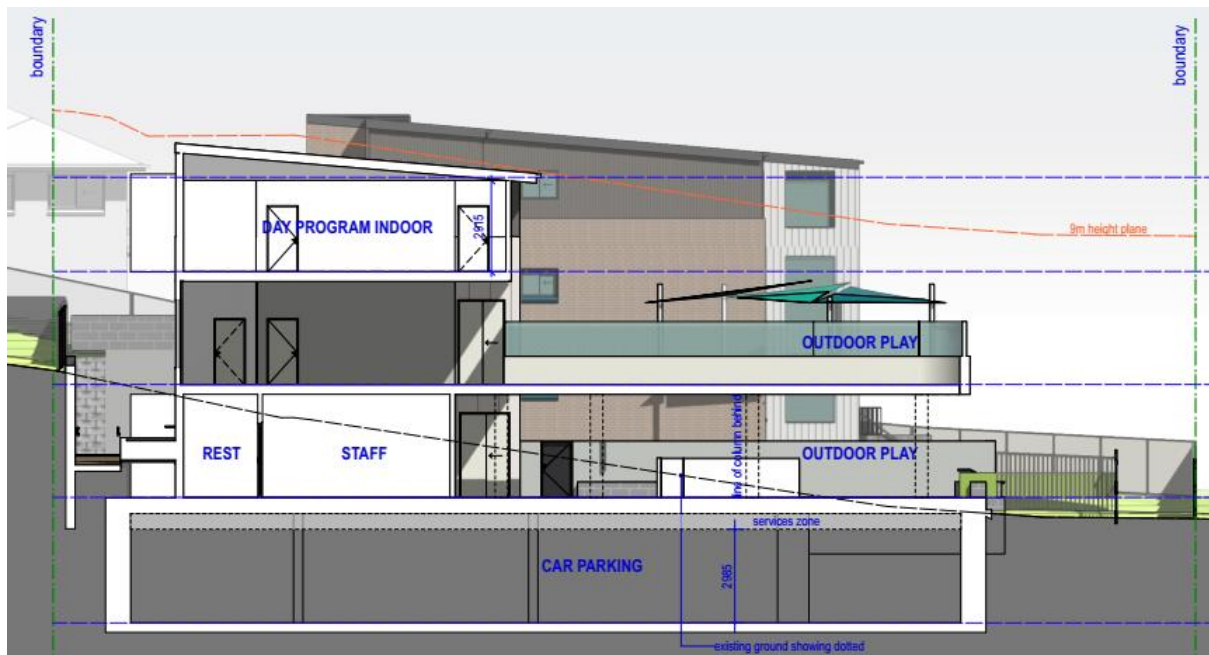
**Figure 2:** Extract of LEP Height Plane Drawing looking towards the from the south-east. The non-compliant portions of the building generally are associated with the fall of the land to the east and north.

Source: Kennedy Associates Architects

The site is located on the low northern side of the existing access road within a topography that falls to the east and north and the non-compliances, with site levels varying from RL32.8 at the north-eastern corner to the RL46.24 at the south-western corner. There is a varying cross fall from south to north. Centrally, the site falls from the southern boundary being RL39.99 to the northern boundary at RL34.60. At the front of the site, relative to the eastern façade of the existing building, the site falls from RL36.55 at the southern boundary to the northern boundary at RL34.0. Section plans submitted with the application provide an indicative depiction of the extent of the height non-compliances.



**Figure 3** Section plan viewing the site from the east, with the 9m height plan depicted in orange.  
Source: Kennedy Associates Architects



**Figure 4** Section plan viewing the site from the west, with the 9m height plan depicted in orange.  
Source: Kennedy Associates Architects

### The statutory obligations of the applicant and Council

The authority established within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, provides that a section 4.6 variation need not establish that a development containing a variation provides a better or even neutral outcome for a development site compared with that which would be provided by a compliant development.

In light of this judgement, it is also necessary to distinguish between the obligations of the applicant, and the obligations of Council. The applicant is required only to address the matters required by section 4.6(3). Note however that for completeness and to assist Council in its assessment, this variation request has addressed section 4.6(3) and section 4.6(4). However, given the inevitable overlap between these matters, this request should be read in its entirety as generally fulfilling the applicant's obligations as they are prescribed by section 4.6(3).

### Section 4.6(3) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify contravening the development standard

Reasons why compliance with the development standard is unreasonable or unnecessary, and the environmental planning grounds for the variation, can be grouped into broad categories as discussed within the following:

#### Site specific

- The site measures to be approximately 3,168m<sup>2</sup>, and is a substantial landholding within an R2 Low Density Residential zone. The buildable area of the site (i.e., excluding the access handle) is also over 35m in width, and over 40m at its eastern extent. The non-compliant portions of the development are therefore able to be well confined within the site. The site is more than double the width and size of other nearby residential properties (and, in many instances, more than triple).
- In this instance, the site is located at the northern edge of the R2 zone with land to the north lying within the RU1 zone. Given the fall of the land, the impacts of the height non-compliance would be most readily perceived on the RU1 land. However, the site that immediately adjoins to the north is not only within the RU1 land, but it is also part of an extremely large landholding used for the purposes of a colliery. The land to the north, especially the land within the visual catchment, is very rarely frequented by people, and the site is well positioned such that height non-compliances are not readily perceived. In addition, all outdoor spaces are oriented towards the north, meaning that excellent solar access is available and that all acoustic and visual privacy impacts are oriented towards a property not highly frequented by people.
- The site is also situated on an arterial road and diagonally opposite land within the E4 zone. The area is unlikely to be highly frequented by pedestrians, and the assembly or congregation of people in this context is unlikely. Any perceived visual impacts associated with the height non-compliance will not be experienced for long periods by any casual observers.



- The site is unusually large and is provided with two vehicular access points. It is therefore highly suitable for multiple land uses outside of those commonly expected in the R2 zone, such as dwelling houses and dual occupancies. The size of the site improves the economies of scale for providing a community development that would be unlikely to be viable on a landholding of a size.
- Despite the height non-compliance, as the site falls away to the north, the maximum RLs of the development is lower than the RLs of neighbouring buildings. The maximum RL of the development which immediately adjoins to the south is RL 48.93, which is over 1.5m higher than the maximum RL of the subject development, being RL 47.37. The height non-compliance will not be perceived from any nearby residential properties.

#### Land use specific

Given the site specific reasons described above, the development is well positioned to provide three land uses that are traditionally opposed when located centrally within an R2 zone. The three uses are community uses that provide a wider social planning benefit; despite that, the inevitable acoustic, traffic, and management impacts are often problematic for these land uses. However, the acoustic and visual and traffic impacts are all either oriented towards the north, away from the residential zone, and rarely frequented by any people, or to the east, along an arterial road. The subject site provides an excellent opportunity to deliver community infrastructure.

The child care and respite day care land uses both require larger areas of outdoor space that are well connected to large areas of indoor space. The large balconies that are proposed are very typical of these land uses. Furthermore, the land uses also have specific access needs, meaning that lifts are required. The non-compliance is largely associated with the overall size of the building, which is directly derived from the need for large indoor and outdoor areas, as well as the need for a lift and lift overrun. Non-compliant lift overruns should not be unexpected in a zone which permits residential flat buildings, but limits their height to 9m.

In addition, these land uses also require very high numbers of parking spaces, meaning that a basement is required. This limits the opportunities for further reducing the height of the development, especially on a site with a significant slope. It should also be noted that other land uses permissible in the zone, such as multi dwelling housing, typically provide at grade car parking, which increases the overall size of the building. In this instance, the bulk and scale associated with parking and manoeuvring is able to be hidden within the basement. The basement is only viable (both from an economic and an engineering perspective), especially considering the slope of the site, if it serves a development of this size.

Further, the provision of a basement requires that the level above be flat. There are no realistic opportunities to provide stepped level developments, responding to the fall of the land, above a basement, especially a single storey basement. Above the basement, only three floors are proposed. Given a 9m height limit applies (whereby buildings of 3 storeys would be expected) and the variety of other site specific and land use specific reasons given for the non-compliance, the provision of a three storey building on the site is a reasonable and efficient use of the subject land.



### Design Response

- The roof pitch falls with the site of the land to reduce the extent of the overall non-compliance.
- Services areas have been relocated away from the roof so as to minimise the extent of the non-compliance.
- The siting of the proposal has been influenced by the requirement for tree retention along the northern boundary, as a result the height non-compliance is partly attributed to the sensitive siting of the building. The siting of access is determined by the requirement to provide a deceleration lane from Princes Highway to enable safe and efficient access to the site which does not result in impacts upon traffic flows. As a result of this design response, the proposal provides for an increased height and three storeys above the driveway entrance to the site adjacent, to the southern side boundary. The land to the south is much higher than the majority of the subject site, the selected building siting is not to the detriment of those properties.
- The proposal complies with the FSR development standard for the site. The proposed height variation is thereby associated with a built form which is below the permitted FSR.
- The proposed height, combined with the proposed setbacks and building massing, including recessed elements, with good articulation of the façade, ensures that the bulk and scale of the development will be compatible in the streetscape and will preserve the visual amenity to neighbouring properties and the streetscape.
- The proposal represents a contemporary and desirable built form that will have a positive impact on the subject site and surrounding streetscape. The proposed height, bulk and scale of the development is not considered to be visually dominant in the streetscape and is considered appropriate for the character of the local area. On this basis, the proposed height variation does not generate any inconsistency with the desired future character contemplated by the suite of controls, including the height standard.
- The development uses high quality architectural design that is responsive to the site constraints and provides for an innovative design response to the site's mixed-use development.
- The development is well articulated with varied setbacks, provision of two separate built forms to minimise the massing of the development, and a variety of materials and finishes used within each elevation. The proposed height is responsive to the site and the stepping of the built form, and maintains the rhythm of the building heights along Princes Highway.

### Absence of Impacts

- The proposed height variation will have no adverse or unreasonable impacts on the amenity of surrounding sites and the public domain. The site is located on the low side of the surrounding residential properties. As a result, despite being located to the north, the proposal does not result in any adverse additional overshadowing to neighbouring properties and maintains compliant solar

access. The building elements associated with the non-compliant height will not generate adverse overshadowing.

- In terms of view impacts, the proposed height variation will not adversely affect views from private or public land.
- The proposed height non-compliance will not result in adverse privacy impacts. The proposed development has been designed and sited to ensure adequate visual and acoustic privacy between the subject development and the adjoining properties. The proposal has considered the location of the development on the site, the internal layout and the positioning of the outdoor play spaces.
- The design and height of the proposed development ensures that the proposal is compatible with the existing and anticipated future character of the area and provides for excellent internal amenity whilst also preserving external amenity to surrounding properties in a reasonable manner.
- A reduction of the proposed building height would provide for a negligible benefit to the streetscape and would significantly reduce the amenity of the development, as further floor space would be required to be located adjacent to the northern side boundary.

For the reasons outlined above, it is evident that there are substantive environmental planning grounds which demonstrate why strict application of the development standard is not appropriate for this proposal.

**Section 4.6 4(a)(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.**

In the judgement within *Initial Action*, Preston CJ indicated that a consent authority only needs to be satisfied that an applicant has adequately addressed the matters within section 4.6(3), and that, pursuant to 4.6(4)(a)(ii), the development is consistent with the objectives of the standard and consistent with the objectives of the zone. Although not strictly required, this variation has addressed the reasons that the development satisfies 4.6(4)(a)(ii).

The objectives of the height of buildings development standard under section 4.3 of WLEP 2009 are provided below, and followed by a response on how that objective is achieved notwithstanding noncompliance with the standard:

***(a) to establish the maximum height limit which buildings can be designed and floor space can be achieved,***

**CPS response:** Despite the contravention of the height standard, the proposed development achieves compliance with Clause 4.4 Floor Space Ratio, resulting in a FSR 0.5:1 and satisfies the development standard. The additional height is associated with the roof forms and occurs as a result of the

topography of the land and not by additional floor space. The development is consistent with this objective.

***(b) to permit building heights that encourage high quality urban form***

**CPS response:** The proposal has been designed in response to the site's topography and consideration of constraints. The proposal provides for an increased 6m side setback from the northern boundary in order to enable tree retention and planting, which contribute to the established landscape character. The siting of the building and utilisation of varying setbacks and modulation of the built form results in an appropriate visual massing of the built form despite the height exceedance.

The massing and scale of the development has been responded to by providing for two separate built forms which are linked through the provision of lower ground and upper ground pathways and ramps that surround the buildings along the southern boundary. The group home element is recessed in the north-western corner of the site and is sited behind the southern elevation of the child care and respite day care centre element which presents to the Princes Highway.

The proposed child care and respite day care centre element, which presents to the Princes Highway and is located at the low point of the site, has been designed to create a two storey form at the north-eastern low point of the site and steps to an increase height at the southern high point. The configuration of this element presents with a varied massing and provision of existing significant vegetation along the northern boundary to achieve a high quality urban form when viewed from the streetscape.

The proposal, despite the height contravention, achieves compliance with the development standard for FSR. The density of the development is what is anticipated by the WLEP 2009. The shape of the built form has been designed to create a north-western aspect to outdoor play spaces to provide the greatest separation from surrounding residential properties for increased visual and acoustic privacy. The development also achieves compliance with the required landscape areas (in aggregate terms) and deep soil zones. The proposal provides the deep soil zones at the south-eastern corner where the greatest height can be perceived from the streetscape and along the northern boundary.

***(c) to ensure buildings and public areas continue to have views of the sky and receive exposure to sunlight***

**CPS response:** The height of the development does not adversely affect the views of the sky from surrounding properties and public areas. The proposed setbacks, siting of the proposed buildings and the subject site, being positioned lower than surrounding residential properties, ensures the visibility of the sky is maintained to neighbouring properties and public areas.

The existing topography which falls from south to north, means the properties to the south are located to the high side of the proposed development. The development therefore results in limited additional shadow impact to neighbouring properties, and not more than would be expected for a compliant development on level land. The adjoining property to the south, No. 83 Midgley Street (also known as 41 Princes Hwy) is two storeys in scale with the single storey garage located at the north-western corner

of the site. The windows within the northern facade of this dwellings, are continued to be provided with sunlight throughout the day, both at ground and first floor levels. Reference should be made to the submitted shadow diagrams and view from the sun diagrams demonstrating the available sunlight. The adjoining properties are maintained with compliant solar access. Similarly, the adjoining property to the west, No. 87 Midgley Street is maintained with solar access throughout the day to the north facing windows and private open space areas.

The objectives of the R2 Low Density Residential zone under WLEP 2009 are as follows:

- *To provide for the housing needs of the community within a low density residential area*

**CPS Response:** The proposed development will provide for the housing needs of the community, specifically those who are disabled through the provision of a group home. The development complies with the FSR standard of 0.5:1 and maintains the low density residential character of the area.

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

**CPS Response:** The provision of a childcare facility and day program facilities provides for services to meet the day to day needs of residents. The childcare provides care services for young children whilst parents are unable to look after them providing for assistance to local surrounding residents. The day program provides activities for groups of people with disability. These activities include recreation and development of general skills. The proposed development meets this particular of the zone, better than the majority of other permitted land uses.

## **Conclusion**

This assessment confirms that the proposal is both in harmony and compatible with the existing and desired future character of the surrounding mixed use development, and will not result in significant or unreasonable physical impacts to surrounding sites; the proposal is therefore considered to be acceptable.

Despite the proposed contraventions of the building height standard, the development results in a built form that exhibits quality design and appropriately responds to the site's topography and constraints. Aside from presenting a suitable appearance to surrounding areas that is compatible with the existing and desired character of the area, the proposed development will provide for higher levels of amenity within the subject site, without causing significant and unreasonable impacts on surrounding sites and the public domain, in terms of view loss, visual privacy, acoustic privacy, solar access and/or visual amenity.

As a result, the development achieves the objectives of the standard and requiring compliance with the building height development standard would be unnecessary in the specific circumstances of this proposal, as the objectives are achieved anyways. There are sufficient environmental planning grounds to justify contravention of the building height development standard. Given the above, the applicant's statutory requirements pursuant to section 4.6 of WLEP 2009 are satisfied, and the variation to the building height development standard can be approved.