

Clause 4.6 Variation Statement

Alterations & Additions to an existing CO2 Plant

PREPARED FOR

Supagas Pty Ltd

SITE ADDRESS

220 Bolong Road Bomaderry (Lot 143 DP 1069758)

DATE

18/06/2025

PROJECT REFERENCE

131401

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TABLE OF CONTENTS

1.0 - Introduction.....	7
2.0 - Site and proposed development	10
2.1 - site description	10
2.2 Proposed Development	15
3.0 - The development standard & nature of non-compliance	18
3.1 Clause 4.6 of shoalhaven LEP 2014	18
3.2 Clause 4.6 and its use	19
3.3 Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 18	21
3.4 Department of Planning and Environment Guidelines	24
3.5 Development Standard Being Varied & Non-Compliance Nature	26
4.0 - justification for the proposed variation.....	28
4.1 Clause 4.6(1)(a) provide an appropriate degree of flexibility in applying certain development standards to particular development	30
4.2 Clause 4.6(3)(b) - Environmental planning grounds to justify contravening the development standard	36
4.2.2 Zone objectives	38
4.2.3 Site-specific environmental grounds	39
5.0 - Conculsion.....	42

Table of Revisions.

Initial.	Rev	Date	Details
SR	0	27/03/2025	Original issue to client for review
SR	o	18/06/2025	For submission

1.0 – INTRODUCTION

This Clause 4.6 Statement has been prepared by Allen Price & 220 Bolong Road Bomaderry (“the subject land”). It is submitted to the Department of Planning, Housing & Infrastructure (“the Department”) and relates to the proposed variation of the Maximum Height of Building development standard that applies to the land pursuant to Clause 4.3(2A) of the Shoalhaven Local Environmental Plan (LEP) 2014.

Supagas have established a CO₂ Plant on the subject land which forms part of the Shoalhaven Starches factory operations in accordance with Modification approvals 15 and 20 as part of the Shoalhaven Starches Expansion Project Approval. This facility takes CO₂ from the Shoalhaven Starches operations and processes this gas to food grade quality for the food and beverage market. CO₂ taken directly from Shoalhaven Starches operations under these existing approvals reduce emissions from their operations at present by up to 90 tonnes per day (TPD) under these approvals.

The existing plant was approved in two stages, i.e. initially 50 TPD and then this was increased to the present day 90 TPD. Supagas propose to undertake alterations and additions to this existing carbon dioxide plant to process an additional 75 TPD of carbon dioxide bringing the total capacity of the plant at the site up to 165 TPD.

The proposal includes the installation of two CO₂ storage vessels that will have a height above ground level of 22.915 metres, which exceeds the maximum 11 metre development standard by 11.915 metres which is a percentage variation of 108.3%. In this regard it should be noted that the existing CO₂ Plant contains two CO₂ Storage vessels with a height of 17.35 metres above ground level.

Clause 4.6 of the Shoalhaven LEP 2014 enables Council as the consent authority to grant consent for development even though the development contravenes a development standard. Clause 4.6 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

The consent authority's satisfaction in respect of those matters must be informed by the objectives of Clause 4.6, which are to provide an appropriate degree of flexibility in the application of the relevant controls and to achieve better outcomes for and from the development in question by allowing flexibility in particular circumstances.

While it is held that a written request pursuant to Clause 4.6 of a standard instrument local environmental plan is not required for the contravention of a development standard arising as a result of a modification application per *SDHA Pty Ltd v Waverley Council* [2015] NSWLEC 65 at [34] – [35], the following Clause 4.6 variation request serves to justify the contravention of a development standard and assess the impacts of the proposed variation to the maximum height of building control under Shoalhaven LEP 2014.

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 in relation to variations lodged under the former State Environmental Planning Policy 1 – Development Standards (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*).

While these cases referred to SEPP 1, the analysis remains relevant to the application of Clause 4.6(3)(a) of the Shoalhaven LEP 2014. Further guidance on Clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;

- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;
and
- Moskovich v Waverley Council [2016] NSWLEC 1015.

Clause 4.3(2A) is contained in Part 4 of the Shoalhaven LEP 2014 . This part of the LEP is titled “Principal Development Standards”. This clause is therefore a development standard and open to a written request made pursuant to Clause 4.6.

This written request provides justification that the 11 m building height limit development standard detailed in the provisions of Clause 4.3(2A) may be contravened by the grant of development consent because strict compliance with the provisions of this clause under the specific circumstances associated with this case would be unreasonable and unnecessary; that there are environmental planning grounds to justify the contravention of this development standard; and that the proposal is in the public interest.

This Clause 4.6 variation has been prepared in accordance with the Department of Planning & Environment (DPE) “Guide to Varying Development Standards” (November 2023). This request should be read in conjunction with the Modification Report and other supporting documentation submitted with this Modification Application.

2.0 – SITE AND PROPOSED DEVELOPMENT

2.1 – SITE DESCRIPTION

The works associated with this modification application are all located at 220 Bolong Road, Bomaderry (Lot 143 DP1069758) on the former Dairy Farmers' factory site. This parcel of land comprises an area of 5.777 ha.

The subject site contains a factory complex previously occupied by the Dairy Farmers dairy factory. The subject site is now owned by the Manildra Group of Companies, which includes Shoalhaven Starches. The factory building has subsequently been used as a meat works by Argyle Meats, although this use has subsequently ceased operations.

The existing CO₂ Plant has been established in accordance with Mod 15 adjacent to the former Dairy Farmers' factory on a patch of land located between the eastern property boundary and the paved truck circulation area which adjoins the eastern side of the meat processing plant.

The subject site has access to Bolong Road. The existing access driveway for 220 Bolong Road, on which the CO₂ Plant will be located, comprises separate ingress and egress driveways with a central median. The driveway provides access to the factory site, and a car park located to the front of the existing factory complex.

The western portion of 220 Bolong Road comprises a wastewater treatment plant associated with the former dairy factory consisting of treatment plant, storage dams and tanks. Further to the west of this site is the Shoalhaven Starches factory site.

The town of Bomaderry is located within 1 km to the west of the subject lots, and Nowra urban area is situated approximately 2 km to the south-west.

Figure 1 shows a site locality plan.

Located to the north of the 'subject site is the Shoalhaven Starches Environmental Farm.

To the east of the subject site is another industrial site, Boweld Constructions, a heavy engineering factory site. Further afield to the east is farmland and the former Paper Mill site (now also owned by the Manildra Group of Companies).

The Shoalhaven River is located to the south of the site across an existing private railway line.

Aerial photographs of the area and the site, along with key components of the proposal are shown in **Figures 2 and 3**.

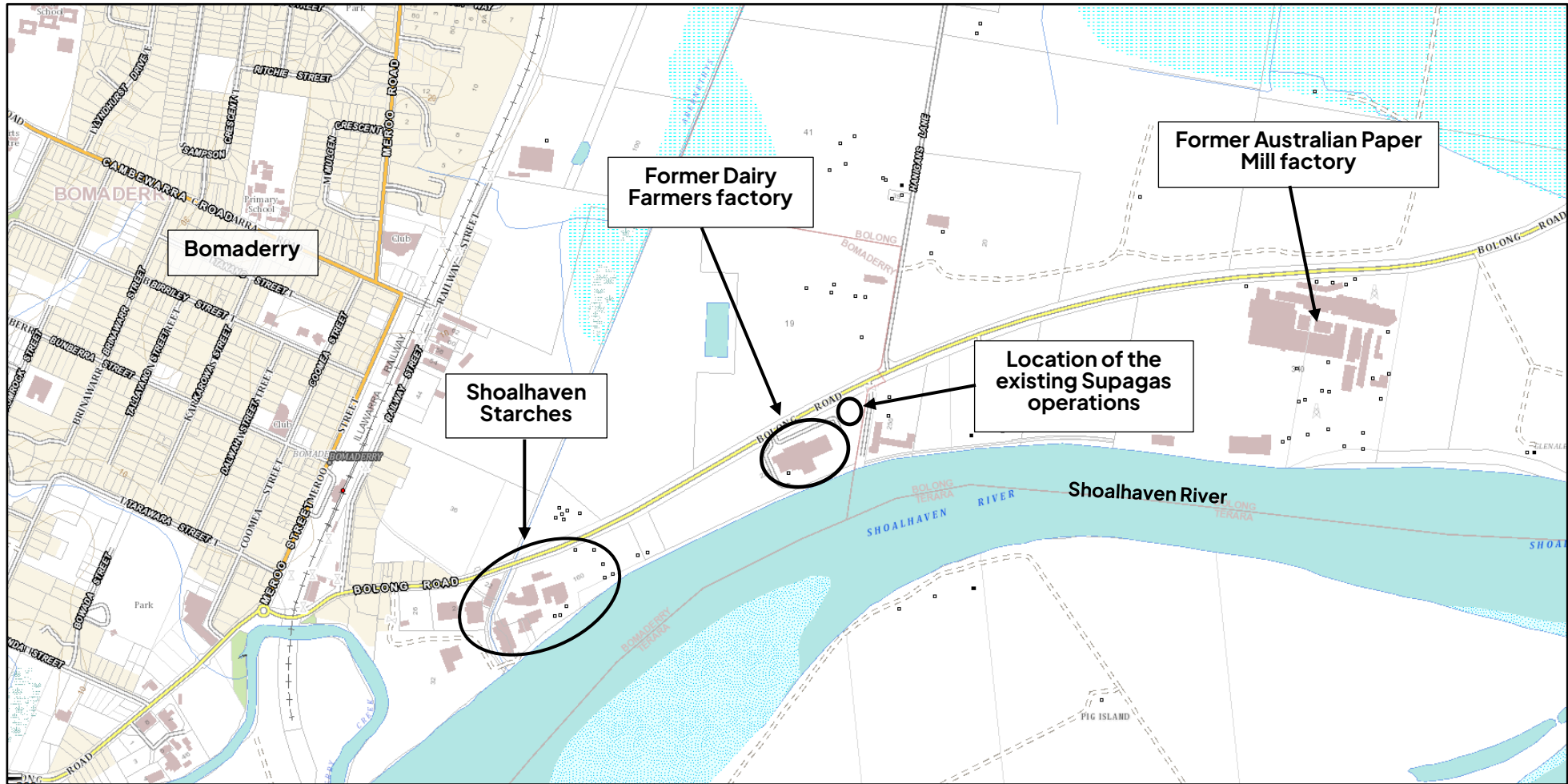


Figure 1: Site locality plan.

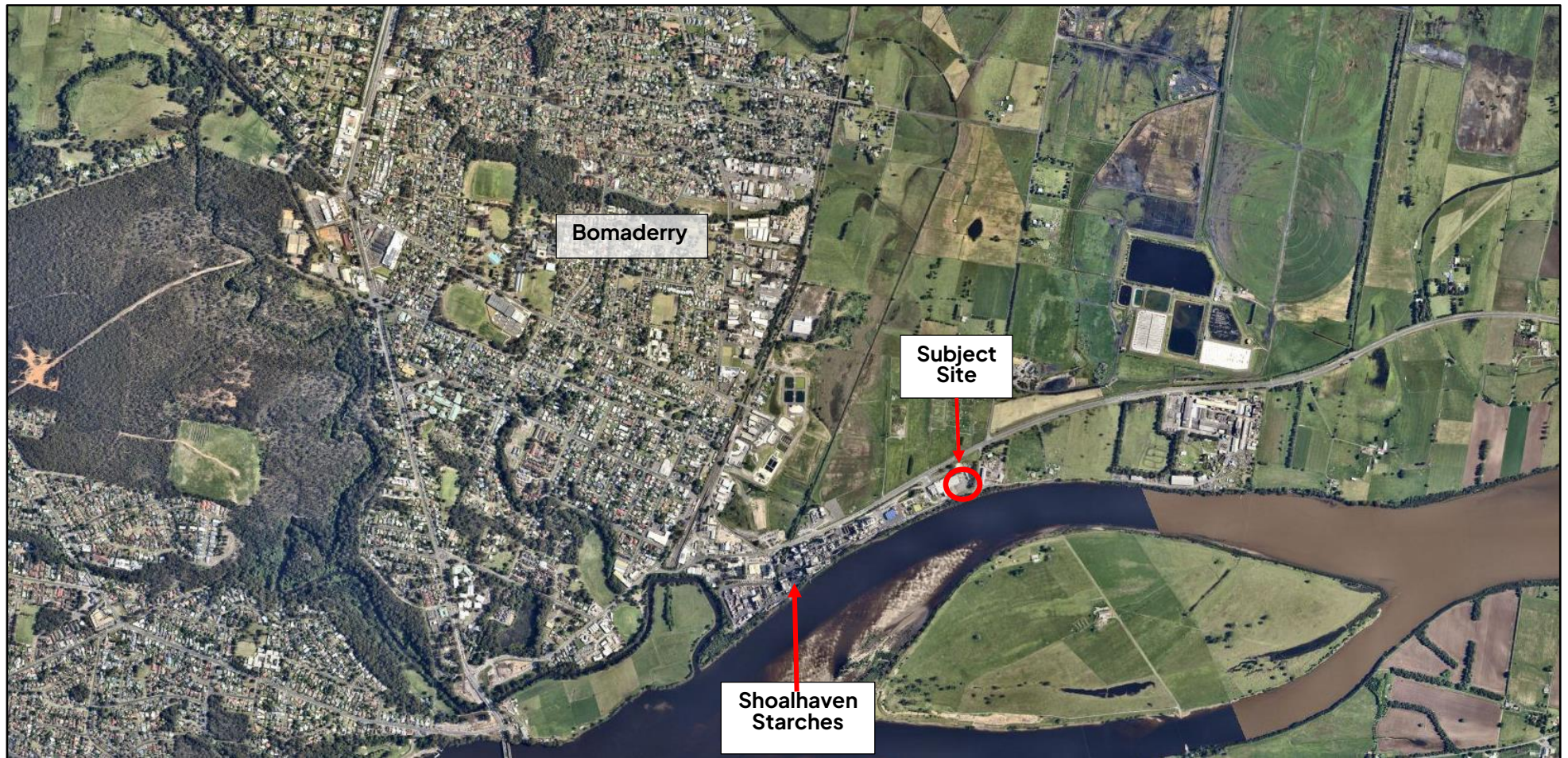


Figure 2: Aerial photograph of the locality.

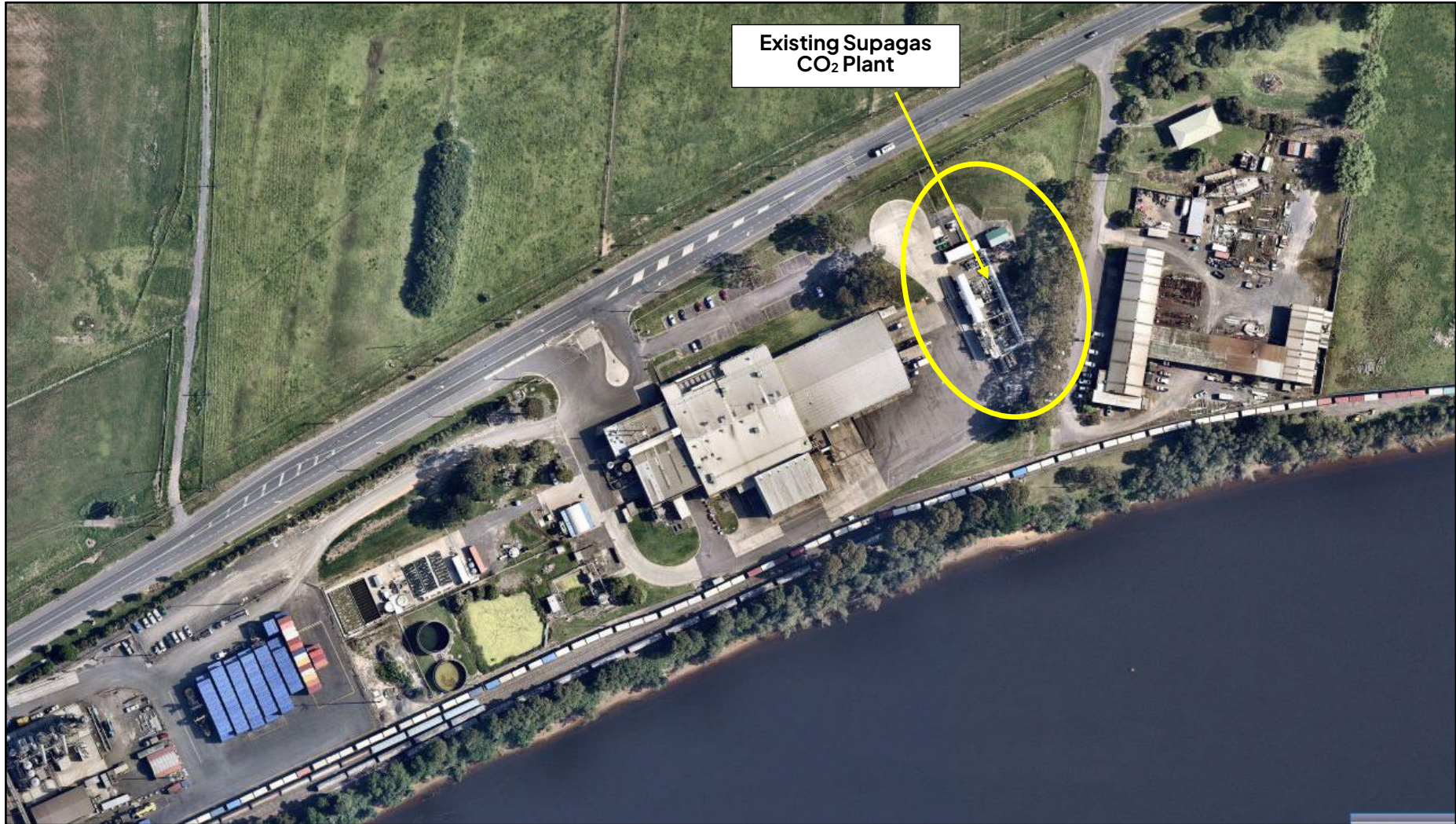


Figure 3 : Aerial photograph of site.

2.2 PROPOSED DEVELOPMENT

Supagas wish to undertake further alterations and additions to their existing CO₂ plant, including:

Under the existing approvals for this project, it was envisaged that the site would process up to 50 TPD of CO₂ initially for Stage 1 increasing to 100 TPD at maximum processing capacity.. To date Supagas’s operations process up to 90 TPD at the site. . **Figure 4** below details the site layout as envisaged under the original approvals for the site:

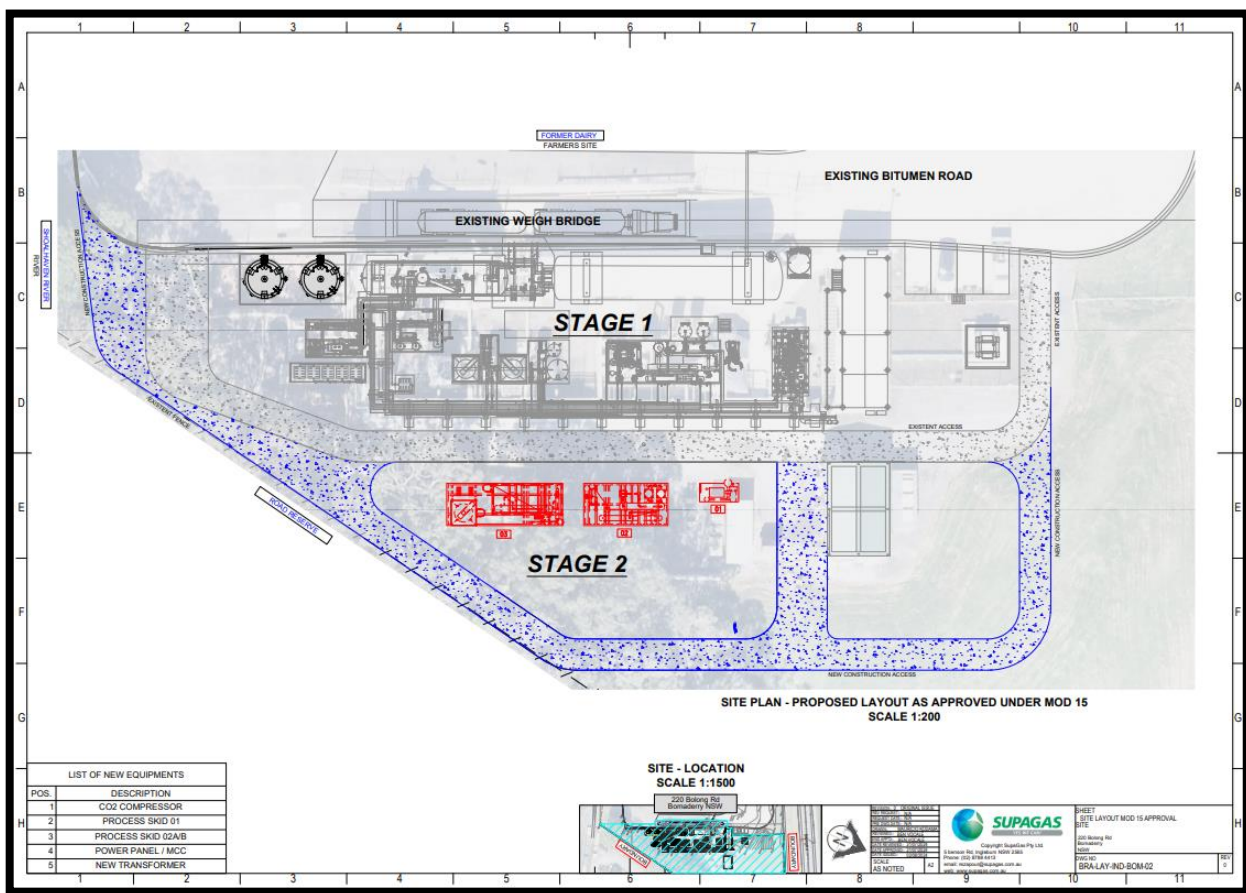


Figure 4 : Existing Approval Layout

Supagas have now established the CO₂ Plant on the subject land in accordance with Mods 15 and 20. This facility takes CO₂ from the Shoalhaven Starches operations and processes this gas to food grade quality for the food and beverage market. CO₂ taken directly from Shoalhaven Starches operations under these existing approvals reduce emissions from their operations at present by up to 90 tonnes per day (TPD) under these approvals.

Supagas propose to now undertake alterations and additions to this existing carbon dioxide plant to process and additional 75 TPD of carbon dioxide bringing the total capacity of the plant at the site up to 165 TPD.

With this in mind Supagas seek to modify their approval to reflect this refined footprint to accommodate this increase in processing capability. The alterations and additions are shown in **Figure 5** below and will include the following:

- Low Pressure / Ammonia Section
- CO₂ Compressor
- Guard Carbon Bed
- CATOX unit
- Dryer
- Refrigerant Compressor
- CO₂ Liquefaction
- Ammonia Receiver
- NOX Trap
- CO₂ Liquid pump
- Power panel / MCC
- KO Drum
- CO₂ Blower
- Transformer
- Cooling Towers
- Two (2) additional storage vessels each with a volume of 200 KL, height above ground level of at least 20 metres, diameter of 4.01 metres and a combined volume of 400 KI
- CO₂ vaporisers – A C CO₂ vaporisers exchanges heat through a water-circulating and heating system that converts CO₂ liquid into gas.

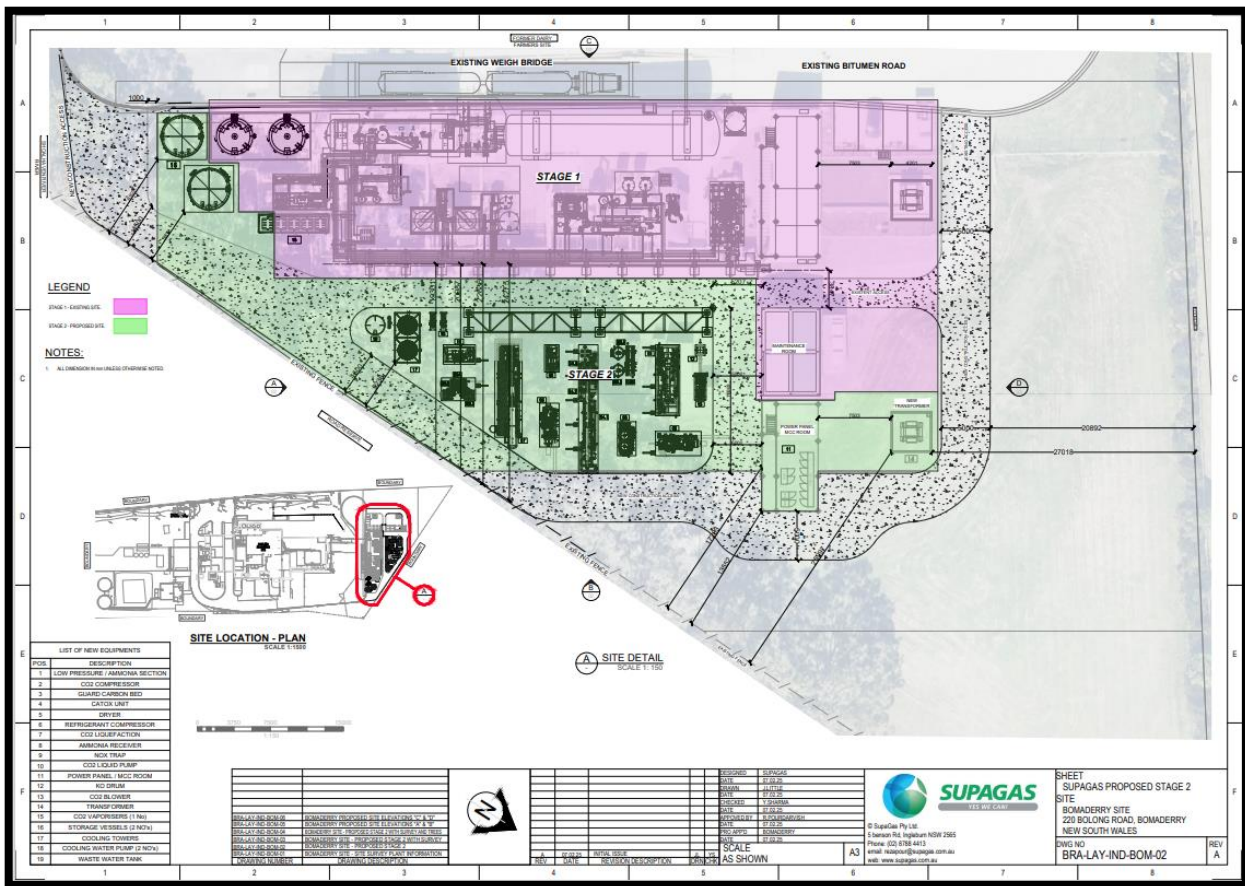


Figure 5: Proposed Modified CO₂ Plant Stage 2 Layout

The Modification Application and this Clause 4.6 Written Request are supported by plans prepared by Supagas.

3.0 – THE DEVELOPMENT STANDARD & NATURE OF NON-COMPLIANCE

3.1 CLAUSE 4.6 OF SHOALHAVEN LEP 2014

Clause 4.6 of the Shoalhaven LEP 2014 states:

4.6 Exceptions to development standards

(1) *The objectives of this clause 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.*

(2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(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, and*
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.*

Note—

The [Environmental Planning and Assessment Regulation 2021](#) requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

(4) *The consent authority must keep a record of its assessment carried out under subclause (3).*

(5) *(Repealed)*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note.

When this Plan was made it did not include all of these zones.

(7) (Repealed)

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which [State Environmental Planning Policy \(Building Sustainability Index: BASIX\) 2004](#) applies or for the land on which such a building is situated,

(ba) clause 4.1E, to the extent that it applies to land in a rural or conservation zone,

(bb) clause 4.2B,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 6.2,

(cb) clause 7.25,

(cc) clause 4.1H.

3.2 CLAUSE 4.6 AND ITS USE

Clause 4.6 of the Shoalhaven LEP 2014 provides for an appropriate degree of flexibility in applying certain development standards and aims to achieve better outcomes to and from development by allowing flexibility where strict compliance can be shown to be

unreasonable or unnecessary in the circumstances of the case; and where there are sufficient environmental planning grounds to justify contravening the development standard.

Before applying the discretionary power of Clause 4.6 the consent authority must be satisfied that the standard for which the departure is sought is a "development standard" and not a matter which would prohibit the proposal.

Part 4 of the Shoalhaven LEP 2014 contains the *Primary Development Standards* of the LEP.

A development standard is defined within Section 1.4 of the EP&A Act.

"Development standard" means provisions of an environmental planning instrument 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 -

- (1) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or works, or the distance of any land, building or work from any specified point;*
- (2) the proportion or percentage of the area of a site which a building or work may occupy;*
- (3) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work;*
- (4) the cubic content or floor space of a building;*
- (5) the intensity or density of the use of any land, building or work;*
- (6) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment;*
- (7) the provision of facilities for the standing, movement, parking, servicing manoeuvring, loading or unloading of vehicles;*
- (8) the volume, nature and type of traffic generated by the development;*
- (9) road patterns;*
- (10) drainage;*
- (11) the carrying out of earthworks;*

- (12) the effects of the development on patterns of wind, sunlight, daylight or shadows;
- (13) the provision of services, facilities and amenities demanded by the development;
- (14) the emission of pollution and means for its prevention or control or mitigation; and
- (15) such other matters as may be prescribed.

Clause 4.3(2a) prescribes a maximum building height of 11 m upon land where the Height of Buildings Map that supports the Shoalhaven LEP 2014 does not identify a maximum height limit. Such would comprise a development standard having regard to paragraph (c) above as it applies to the “height” of a building.

Furthermore, Clause 4.3 is contained in Part 4 of the Shoalhaven LEP 2014 Part 4 of the Shoalhaven LEP 2014 outlines the “*Primary Development Standards*” of the Shoalhaven LEP 2014 This reinforces the contention that Clauses 4.3(2A) is a development standard.

As a development standard, consideration of this clause is therefore open to a written requests made pursuant to Clause 4.6.

Further, prior to issuing development consent to a development that contravenes a development standard pursuant to Clause 4.6, a consent authority must also be satisfied that an Applicant has demonstrated:

- that compliance with that development standard is unreasonable or unnecessary in the circumstances [Clause 4.6(3)(a)]; and
- that there are sufficient environmental planning grounds to justify contravening the development standard [Clause 4.6(3)(b)].

3.3 INITIAL ACTION PTY LTD V WOOLLAHRA MUNICIPAL COUNCIL [2018] NSWLEC 18

Preston CJ in *Initial Action Pty Ltd v Woollahara Municipal Council [2018] NSWLEC 118* (“*Initial Action*”) provides an informative instruction with the approach to making a written request under Clause 4.6 for the grant of development consent in contravention of a development standard.

As outlined in Section 4.1 above Clause 4.6(4)(a)(i) requires the written request to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by Clause 4.6(3). The written request must demonstrate the following matters:

- firstly, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a)); and
- secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

As to the first matter, Clause 4.6(3)(a), Preston CJ in “*Initial Action*” summarises common ways an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary by referencing his findings in *Wehbe v Pittwater Council* [2007] NSWLEC827 (“*Wehbe*”). Although the decision in *Wehbe* was in the context of an objection under *State Environmental Planning Policy No. 1 – Development Standards* to compliance with a development standard, according to Preston CJ the discussion is equally applicable to a written request under Clause 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

In *Wehbe*, Preston provided a “five-part test” for consent authorities to consider when assessing a proposal that seeks to vary a development standard as follows:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard.
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.
3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.
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.

5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

Preston CJ notes that the above five tests are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. Preston CJ states “*An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*”

The second leg of Clause 4.6(3)(b) requires that there are sufficient environmental planning grounds to justify contravening the development standard. Preston CJ in *Initial Action* notes that ‘environmental grounds’ are not defined but would “*refer to ground that relate to the subject matter, scope and purpose of the EP & A Act, including the objects in S.1.3 of the Act.*” Environmental grounds would, by inference, include the Aims of the ELEP 2012 outlined in Clause 1.2(2).

According to Preston CJ (at par 24 in *Initial Action*) the environmental planning grounds relied on in the written request under Clause 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of Clause 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole.

3.4 DEPARTMENT OF PLANNING AND ENVIRONMENT GUIDELINES

The Department of Planning & Environment (DPE) have prepared a “*Guide to Varying Development Standards*” (November 2023) (“the Guide”). Part A of the Guide clarifies requirements for preparing, assessing and determining requests to vary development standards. It aims to:

- explain the tests in clause 4.6 of the Standard Instrument LEP;
- clarify how to prepare and assess a variation request, including applying the tests;
- identify the circumstances in which clause 4.6 does and does not apply.

Section 3 of the Guide addresses how to prepare a Variation Request that would satisfy the requirements of Clause 4.6.

Clause 35B of the EP&A Regulation explicitly requires a development application to be accompanied by a document (the written request) that sets out the grounds on which an applicant seeks to demonstrate that:

- compliance with the development standard is unreasonable or unnecessary in the circumstances.
- there are sufficient environmental planning grounds to justify the contravention of the development standard.

The written request is a standalone document lodged with the DA. In summary the Guide specifies that the written request should:

- identify the development site.
- describe the proposed development.
- note the relevant environmental planning instrument and zoning of the site.
- identify the development standard that the applicant is seeking to vary.
- identify aspects of the proposed development that contravene the development standard (including where there is more than one aspect of a development that contravenes the development standard), including:

- where these aspects occur or are located within the site
- the extent of variation associated with each.
- include an assessment of the proposed variation against the relevant tests in clause 4.6(3)(a) and (b).

This Written Request made pursuant to Clause 4.6 has been prepared having regard to the contents of the Guide.

3.5 Development Standard Being Varied & Non-Compliance Nature

The relevant Local Environmental Plan sought to be varied is the Shoalhaven LEP 2014

The site is zoned E4 General Industrial under the Shoalhaven LEP 2014 (**Figure 7**, below) and the proposed works are permissible in the E4 zone.

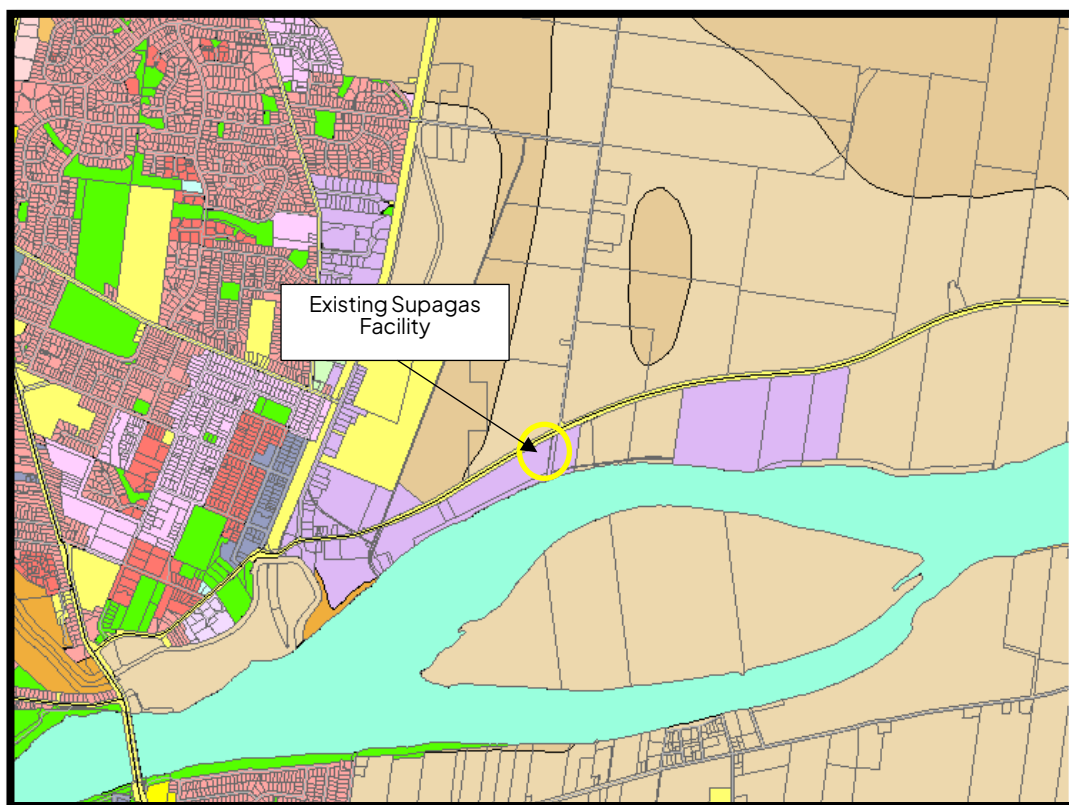


Figure 4 : Land Zone Map (Source: Shoalhaven LEP 2014 Mapping).

The development standard sought to be varied is Clause 4.3(2A) of the Shoalhaven LEP 2014. Clause 4.3(2A) imposes a maximum building height of 11 metres on land where the Height of Buildings Map that supports the Shoalhaven LEP 2014 does not identify a maximum building height (**Figure 8**, below). As is evident from Figure 5 below, the Height of Buildings Map that supports the Shoalhaven LEP 2014 does not identify a maximum building height for the subject land.

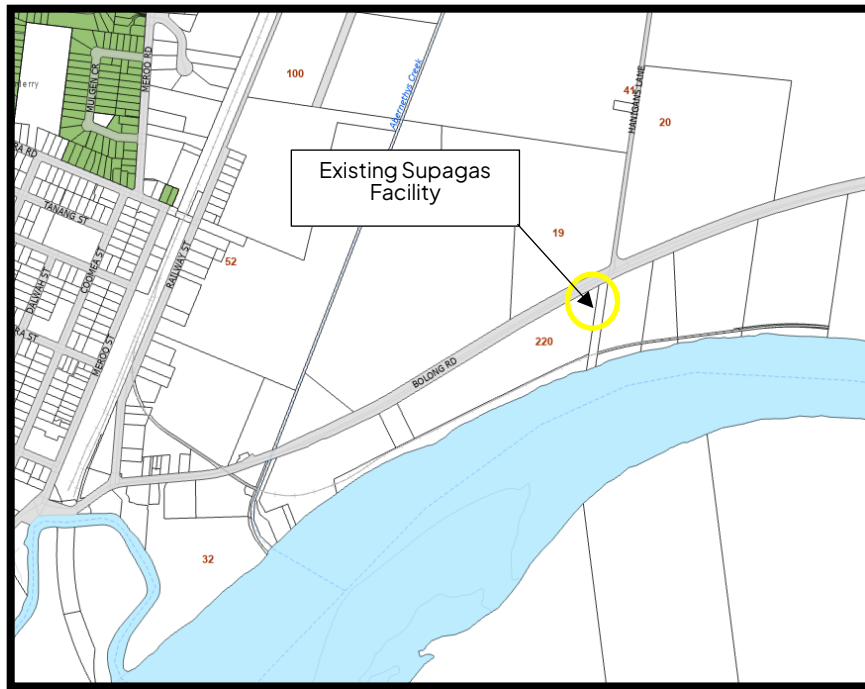


Figure 5: LEP Mapping (Source: Shoalhaven LEP 2014 Mapping).

The proposal includes the installation of two CO₂ storage vessels that will have a height above ground level of 22.915 metres, which exceeds the maximum 11 metre development standard by 11.915 metres which is a percentage variation of 108.3 % (refer **Figure 9**).

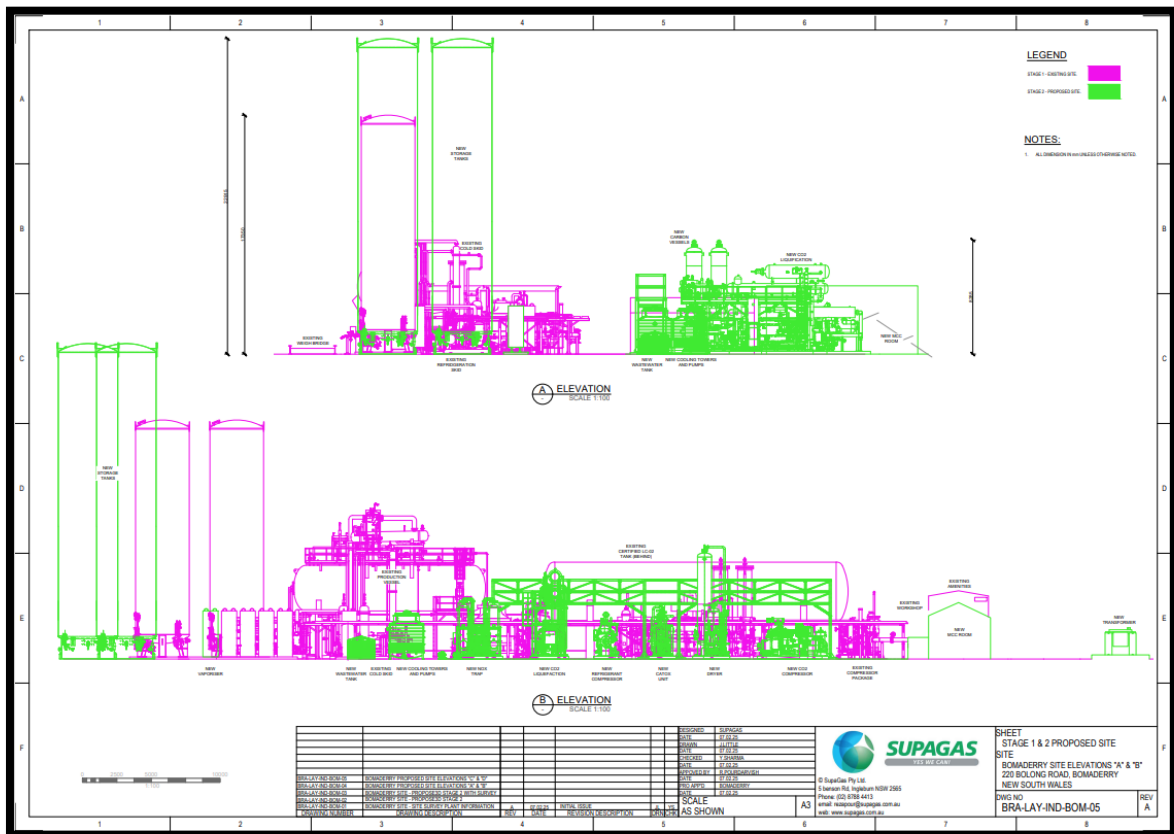


Figure 6 : Proposed elevations showing height limited exceedance – (Source: Supagas)

4.0 – JUSTIFICATION FOR THE PROPOSED VARIATION

Clause 4.6 of the Shoalhaven LEP 2014 provides a consent authority with the flexibility to assess and determine DAs which do not strictly comply with development standards.

Section 1.4 of the Environmental Planning and Assessment Act 1979 (EP&A Act) lists the items (not limited to) that are considered to be development standards and are listed below.

- a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,
- b) the proportion or percentage of the area of a site which a building or work may occupy,
- c) the character, location, siting, bulk, scale, shape, size, **height**, density, design or external appearance **of a building or work**,

- d) *the cubic content or floor space of a building,*
- e) *the intensity or density of the use of any land, building or work,*
- f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- g) *the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- h) *the volume, nature and type of traffic generated by the development,*
- i) *road patterns,*
- j) *drainage,*
- k) *the carrying out of earthworks,*
- l) *the effects of development on patterns of wind, sunlight, daylight or shadows,*
- m) *the provision of services, facilities and amenities demanded by development,*
- n) *the emission of pollution and means for its prevention or control or mitigation, and*
- o) *such other matters as may be prescribed.*

As Clause 4.3 relates to the height of buildings, it is considered to be a development standard specifically identified above. Accordingly, we set out below the justification for a departure to the 11 m maximum height of building control below.

Clause 4.6 of SELEP 2014 provides for a variation to a development standard under certain circumstances. The objectives of Clause 4.6 (1) are:

- (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.*

These elements which must be satisfied under Clause 4.6 are jurisdictional, that is if a proposal does not meet all of these requirements, development consent cannot be granted by the consent authority. This report demonstrates that both these prerequisite elements are demonstrated by this report and consent can be granted by the consent authority.

4.1 **CLAUSE 4.6(1)(A) PROVIDE AN APPROPRIATE DEGREE OF FLEXIBILITY IN APPLYING CERTAIN DEVELOPMENT STANDARDS TO PARTICULAR DEVELOPMENT**

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a DA that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 (3) requires that the consent authority consider a written request from the Applicant, which demonstrates 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.*

Note—

The [Environmental Planning and Assessment Regulation 2021](#) requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

This Written Request seeks to justify the encroachment of the building height limit imposed by Clause 4.3(2A) setting out the grounds on which to demonstrate that the matters outlined in paragraphs (a) and (b) are met.

In *Wehbe v Pittwater Council* [2007] NSW LEC 827 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, ie. the grounds on which an applicant could justify that paragraph (a) are met. 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 SLEP 2014 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 methods outlined in *Wehbe* include:

- 1) *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*
- 2) *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*
- 3) *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.*
- 4) *The development standard has been virtually abandoned or destroyed by the Council's of actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*

- 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.*

Of particular assistance in this matter in establishing that compliance with a development standard is unreasonable or unnecessary is 'Method 1', with 'Method 4' also worth noting.

4.1.1 Assessment of Proposed Variation to Maximum Height Of Building Under 'Method 1'

Method 1 identifies that "*The objectives of the standard are achieved notwithstanding non-compliance with the standard*".

The proposed industrial development is to the type of development existing on site and anticipated for the proposed use of the site. **Table 1** below addresses how the proposal meets the objectives of Clause 4.3 control.

Table 1:

Objectives Height of Buildings – Clause 4.3(1)

Objective	Response
4.3 Height of Buildings	
<p>(a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,</p>	<p>Height The proposed development is compatible with the height of development within the immediate locality, with the approved and ongoing use of the site necessitating development of such height and design.</p> <p>Bulk and Scale The building forms, heights, shapes and characteristics are also similar to those that presently exist on the site and will conform to the visual character of the site, i.e. it is industrial development within an industrial setting (refer Figures 10 and 11). The proposed development will have a limited visual impact. Whilst the proposal does involve installation of structures that will be visible, the bulk and scale of this structure will not be dissimilar to that of other industrial type development associated with the existing factory site.</p> <p>Existing and Desired Character It is our view that the proposed modification will not be inconsistent with the prevailing character of this locality; or the envisaged character of the area given the planning provisions applying to the land. The land is zoned industrial and the character of the proposed works is consistent with the nature of industrial structures on the subject site and those within the vicinity of the land.</p>
<p>(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.</p>	<p>Views The proposed works will be sited within proximity of similar structures of a similar nature. The proposed works will be sited in the midst of the existing factory complexes and will be viewed within this context. As such this development will not diminish the views of existing development. In this regard established boundary plantings along the Bolong Road frontage assist in softening the visual impact of both the existing and proposed new structures (refer Figure 12).</p> <p>Loss of Privacy No loss of privacy is caused by the proposed height exceedance. The development is not a habitable development nor is the development adjacent to any sensitive uses that would be impacted by the proposed development.</p> <p>Solar Access The development will not lead to excessive overshadowing of foreshore areas given the existing shadows cast by existing development and the nature of the foreshore in this locality.</p>
<p>(c) to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.</p>	<p>The proposed development site is not subject to a heritage listing under the provisions of SLEP 2014 nor is it sited within the vicinity of a heritage item or within a heritage conservation area.</p>



Figure 7 : View of the existing Supagas Plant.
Proposed Storage vessels to be situated to rear of existing vessels visible in this view.



Figure 8: View of existing former Dairy Farmers factory development adjacent to Supagas site. Shoalhaven Starches ethanol plant and fermenters visible further along Bolong Road.



Figure 9: View of existing boundary landscape screening that softens the view of the existing Supagas site from Bolong Road

4.1.2 Assessment of Proposed Variation to Maximum Height of Building under ‘Method 4’

Method 4 states that, “*The development standard has been virtually abandoned or destroyed by consent authority actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable*”.

The height of building control in the area, within the broader Shoalhaven Starches site, has been varied previously, to achieve similar outcomes. It is our view that the 11 m maximum building height limit has been abandoned for the Shoalhaven Starches factory site as a result of historic development on the Shoalhaven Starches factory site. The majority of buildings and structures situated on the overall Shoalhaven Starches factory operations exceed a height limit of 11 m, with many of the structures on this industrial site exceeding a height limit of 30 metres. These have been approved under consents back to the early 1970s, and under more recent development approvals. The maximum height of existing development located on the Supagas site is 17.35 m (see **Figures 9, 10 and 12**) which already exceeds the 11 m building height limit.

4.2 CLAUSE 4.6(3)(B) - ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

4.2.1 *Objects of the Act*

There are sufficient environmental planning grounds to justify a flexible approach to the application of the maximum height of buildings control as it applies to the site. Environmental planning grounds are matters that relate to the subject matter, scope and purpose of the EP&A Act including the Act's objects (per *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 n 3) at [23]).

The objects of the EP&A Act are as follows—

- (a) *to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,*
- (b) *to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) *to promote the orderly and economic use and development of land,*
- (d) *to promote the delivery and maintenance of affordable housing,*
- (e) *to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) *to promote good design and amenity of the built environment,*
- (h) *to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*

- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The variation to the development control relates to the height exceedance of a number of industrial structures located within an existing industrial site. The height variation is necessitated by inherent function and use of the development.

Shoalhaven Starches is a member of the Manildra Group of companies. The Manildra Group is a wholly Australian owned business and the largest processor of wheat in Australia. It manufactures a wide range of wheat-based products for food and industrial markets both locally and internationally. The Shoalhaven Starches factory produces a range of products for the food, beverage, confectionary, paper and motor transport industries including starch, gluten, glucose and ethanol and is a significant local employer in the Shoalhaven region.

The Shoalhaven Starches Expansion Project, approved by the Minister for Planning on the 28th January 2009, sought to increase ethanol production at the Bomaderry plant in a staged manner from 126 million litres per year to 300 million litres per year. To accomplish the increase in ethanol production, this project required a series of plant upgrades and increase in the throughput of raw materials, principally flour and grain. Following the Minister's determination Shoalhaven Starches have been implementing and commissioning works in accordance with this approval.

Supagas established a CO₂ Plant on the subject land which forms part of the Shoalhaven Starches factory operations in accordance with Modification approvals 15 and 20 as part of the Shoalhaven Starches Expansion Project Approval. This facility takes CO₂ from the Shoalhaven Starches operations and processes this gas to food grade quality for the food and beverage market. CO₂ taken directly from

Shoalhaven Starches operations will eventually reduce emissions from their operations by up to 100 tonnes per day under these approvals.

This modification involves plant essential to the efficient running of the Supagas and as a result the overall Shoalhaven Starches operations. This modification therefore is consistent with the objects of the act to *promote the social and economic welfare of the community and to promote the orderly and economic use and development of land.*

4.2.2 ZONE OBJECTIVES

In achieving the *promote the social and economic welfare of the community and to promote the orderly and economic use and development of land*, it is noted that the development will meet the objectives of Clause 4.3, but also of the E4 zone in which the site is situated.

Section 4.0 of this submission demonstrates that the proposal will be able to satisfy the objectives of the development standard as enunciated within Clause 4.3 notwithstanding contravention of the 11 metre height restriction. The following demonstrates that the objectives of the E4 General Industrial zone are still met and are not compromised by varying of the maximum height of buildings standard.

Table 2 addresses this further:

Table 2
Objectives of the E4 General Industrial zone

Objective	Response
E4 General Industrial	
To provide a range of industrial, warehouse, logistics and related land uses.	The proposed modification is to an existing approved industrial development and is a permissible use within the E4 zone.
To ensure the efficient and viable use of land for industrial uses.	The proposed modification seeks to increase the production capacity at the site from the original approved capacity of 100 tonnes (Stage 2) up to 170 tonnes per day.. The modification will ensure the efficient ongoing operations of the site.
To minimise any adverse effect of industry on other land uses.	The proposed modification will not result in any unacceptable impacts as assessed in the supporting planning report and supporting documents.
To encourage employment opportunities.	The proposal will facilitate the continued sustainable operation of the site enabling continued employment opportunities at this major employer within the Shoalhaven.

Objective	Response
To enable limited non-industrial land uses that provide facilities and services to meet the needs of businesses and workers.	The proposal has been designed and incorporates measures to minimise impacts to surrounding land uses.
To allow a diversity of activities that do not significantly conflict with the operation of existing or proposed development.	The proposed modification will not significantly conflict with surrounding uses or the existing operations of the site.

The E4 zoned land is intended for general industrial development. Works associated with this Modification Proposal are in keeping with the desired and future character of the area given the inherent zoning that applies to the site and the nature of existing development on the overall site. Arguably any construction on this land for an industrial purpose such as that undertaken by Shoalhaven Starches and Supagas, would result in an exceedance to the 11 m height control of some degree due to the inherent industrial nature of the development and functionality of the site.

4.2.3 SITE-SPECIFIC ENVIRONMENTAL GROUNDS

The following site-specific environmental grounds justify the proposed variation to the maximum height of buildings standard:

- The proposed variation to the height control will not generate any unacceptable adverse environmental impacts in respect of overshadowing, view loss or privacy impacts;
- Notwithstanding the proposed height variation, the proposal continues to satisfy the objectives of the relevant objectives of the maximum height of buildings control applying to the site;
- There is no public benefit in maintaining the development standard given the specific circumstances of this case. Pursuant to *Ex Gratia P/L v Dungog Council* (NSWLEC 148), the question that needs to be answered is “whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”. There is no public benefit in maintaining strict

compliance with the development standard given that there are no unreasonable impacts that will result from the departure to the maximum 11 m building height limit in this case and development across the site already exceeds this height control;

- The proposed works will not be dissimilar to existing structures within the existing Shoalhaven Starches complex. The building form, height, shape and characteristic is also similar to those that presently existing on the site and will conform to the visual character of the site, i.e. it is industrial development within an industrial setting;
- The proposed development site is not subject to a heritage listing under the provisions of SLEP 2014 nor is it sited within the vicinity of a heritage item;
- The modified development will not lead to excessive overshadowing of foreshore areas given the existing shadows cast by existing development and the nature of the foreshore in this locality;
- The proposed development will have a limited visual impact. Whilst the proposal does involve structures that will be visible, the bulk and scale of the structure will not be dissimilar to that which was originally approved under the Project Approval, and which this proposal seeks to replace; or of other industrial type development associated with the existing factory site. The main vantage points from where the development could potentially be visible will unlikely be adversely impacts given the modification proposal will be generally sited within the overall “silhouette” of the existing factory complex and individual structures will not be visually prominent. The proposal will be sited in the midst of the existing factory complex and will be viewed within this context;
- The proposed variation will not result in a development which is out of character with that envisioned for the local area.

The variation to the maximum height control will not result in unsatisfactory planning outcomes, including setting an undesirable precedent (compared with the

precedents already set), and the purpose of the variation of the development control is consistent with the objects of the Act to facilitate the orderly and economic development of the land.

In light of the above, there are no environmental planning grounds that warrant maintaining and/or enforcing the maximum height of buildings control in this instance. Rather, there are clear and justifiable environmental planning merits that validate the flexible application of the maximum height of buildings control allowed by Clause 4.6 of the Shoalhaven LEP 2014.

5.0 – CONCLUSION

Supagas have established a CO₂ Plant on the subject land which forms part of the Shoalhaven Starches factory operations in accordance with Modification approvals 15 and 20 as part of the Shoalhaven Starches Expansion Project Approval. This facility takes CO₂ from the Shoalhaven Starches operations and processes this gas to food grade quality for the food and beverage market. CO₂ taken directly from Shoalhaven Starches operations presently reduces emissions from their operations by up to 90 tonnes per day under these approvals.

The existing plant was approved in two stages, i.e. initially 50 TPD and then this was increased to the present day 90 TPD. Supagas propose to undertake alterations and additions to this existing carbon dioxide plant to process and additional 75 TPD of carbon dioxide bringing the total capacity of the plant at the site up to 165 TPD.

The proposal includes the installation of two CO₂ storage vessels that will have a height above ground level of 22.915 metres, which exceeds the maximum 11 metre development standard by 11.915 metres which is a percentage variation of 108.3% . In this regard it should be noted that the existing CO₂ Plant contains two CO₂ Storage vessels with a height of 17.35 metres above ground level.

The site is zoned E4 General Industrial under the provisions of Shoalhaven Local Environmental Plan (LEP) 2014. There are no specific maximum height provisions specified for the subject site under this LEP. Clause 4.3(2A) of the Shoalhaven LEP 2014 however stipulates that if no height limit is specified for a site, then a maximum building height of 11 metres applies.

The proposal includes the installation of two CO₂ storage vessels that will have a height above ground level of 22.915 metres, which exceeds the maximum 11 metre development standard by 11.915 metres which is a percentage variation of 108.3 %

While it is held that a written request pursuant to Clause 4.6 of a standard instrument local environmental plan is not required for the contravention of a development standard

arising as a result of a modification application per *SDHA Pty Ltd v Waverley Council [2015] NSWLEC 65* at [34] – [35], this Clause 4.6 variation request serves to assess the impacts of the proposed variation to the maximum height of building control under Shoalhaven LEP 2014 per Section 4.15 of the Act.

While the height of the proposed storage vessels exceed the maximum control of 11 m, the variation to a development standard is appropriate in the circumstances as the impacts will be negligible as assessed in the supporting planning assessment report and expert analyses, the objectives of the standard are achieved notwithstanding the variation to the height control and the development is in keeping with the established and future character of development on the site.

For these reasons, this submission pursuant to Clause 4.6 requests that the consent authority exercise the discretionary power and support this Modification Proposal of Project Approval MP06_0228.



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