

CLAUSE 4.6 WRITTEN REQUEST

Shoalhaven LEP 2014

MODIFICATION APPLICATION (No. 18)
PROJECT APPROVAL MP06_0228
SHOALHAVEN STARCHES EXPANSION PROJECT

**RELOCATION OF APPROVED GAS FIRED BOILER
AND OTHER ASSOCIATED WORKS
TO FACILITATE PRODUCTION OF
'HAND SANITISER' ALCOHOL**

SHOALHAVEN STARCHES
BOLONG ROAD, BOMADERRY

Prepared for
Shoalhaven Starches Pty Ltd
May 2020

Clause 4.6 Written Request

Shoalhaven LEP 2014

Project	Modification Application (No. 18) Project Approval Mp06_0228 Shoalhaven Starches Expansion Project
Address	Shoalhaven Starches Bolong Road, Bomaderry
Our ref:	20/12
Prepared by	Stephen Richardson
Draft	15 May 2020
Final	

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Town Planning, Agricultural & Environmental Consultants

Stephen Richardson, M.App.Sc., BTP, Grad. Dip. Env. Mgt, RPIA
Stuart Dixon, B. Urb. & Reg. Plan., RPIA

Associates: Peter Cowman, B.Sc.Agr., MAIA
Angela Jones, BA Hons, MSc, MSSA
Toni Wearne, BA (Hist.), Grad. Dip. Urb. & Reg. Plan.



Planning
Institute
Australia



Nowra: 31 Kinghorne Street, Nowra NSW 2541 (02) 4423 6198
Wollongong: 166 Keira Street, Wollongong NSW 2500 (02) 4208 2205
Email: info@cowmanstoddart.com.au

PO Box 738, Nowra NSW 2541
Fax: (02) 4423 1569
www.cowmanstoddart.com.au

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1.0 INTRODUCTION

The Federal Government's Department of Industry Sciences and Energy has requested that Shoalhaven Starches produce more hand sanitiser alcohol in response to the current Coronavirus COVID 19 crisis.

One of the means available to reduce the spread of Coronavirus COVID 19 is practicing good hygiene, and in particular by washing hands often with soap and water. Where soap and water is not available the Federal Department of Health recommends the use alcohol-based hand sanitisers. Alcohol-free hand rubs have not been shown to be effective against viruses like COVID-19, and the Federal Department of Health recommend against using them. As a result, there has been an increased demand for alcohol-based hand rubs which has resulted in a shortage of supply. This has led to the Federal Government seeking to increase the supply of these products.

Shoalhaven Starches have the ability to meet the Federal Government's request in their existing ethanol distillery located at their Bomaderry factory site without exceeding the approved production limit of 300 ML per annum under MP 06_0228. Shoalhaven Starches will be able to achieve this by rearranging the mix of grades they manufacture. However, in order to readjust their production processes to produce the higher grade quality hand sanitizer alcohol they will need to ensure a stable supply of steam to ensure the higher quality of alcohol required for hand sanitizer, as well as additional storage to accommodate this specific product. Shoalhaven Starches intend to produce 120 ML per annum of hand sanitizer grade alcohol, out of the overall 300 ML per annum approved production limit imposed by Project Approval MP 06_0228.

Under MP 06_0288, Shoalhaven Starches have planning approval for a new gas fired boiler to be located at the boiler house, however this gas fired boiler has not yet been installed. The original intent of this approved gas fired boiler was to ensure a stable supply of steam for the production processes at the site.

Shoalhaven Starches propose to relocate this approved gas fired boiler from its approved location adjacent to the boiler house, to an alternative location to the east of the site to better service the distillery to ensure a stable supply of steam necessary to enable production of the higher grade hand sanitizer alcohol as requested by the Federal Government.

In addition to relocating the approved gas fired boiler, this proposal will also require:

- The extension of existing gantries to carry pipework between the proposed relocated gas fired boiler and the distillery;
- The installation of an additional two storage tanks to store the hand sanitizer alcohol.

- An undercover storage area for the hand sanitizer alcohol.

Modification 18 will not involve changes to the size, scale or intensity of the existing Shoalhaven Starches operations. The modification proposal will not result in any increases in production rates from the site, nor will it involve any significant changes in level of impacts arising from that originally envisaged by the original approved development.

The plant outlined above are at heights which exceed the building height limit of 11 m imposed by Clause 4.3(2A) of the Shoalhaven LEP 2014 .

Clause 4.6 of Shoalhaven LEP 2014 makes provision for exceptions to development standards and enables a consent authority to consent to development even though it may be inconsistent with a development standard. The provisions of Clause 4.6 require that a written request accompany a proposal that seeks to justify the contravention of a development standard.

Clause 4.3(2A) of the SLEP 2014 is contained in Part 4 of the SLEP 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 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.

2.0 THE SITE

The Shoalhaven Starches factory complex is situated upon various allotments of land along Bolong Road, Bomaderry, within the Shoalhaven local government area. The factory site is located on the southern side of Bolong Road on the northern bank of the Shoalhaven River with some operations located on the northern side of Bolong Road. The Shoalhaven Starches site (excluding the former Dairy Farmers and former Paper Mill sites) has an area of approximately 12.5 hectares.

The works associated with this modification proposal are situated on the following parcels of land:

- Lot 1 DP 1838753
- Part Lot 241 DP 1130535
- Lot 143 DP 11069758

Figure 1 is a site locality plan.

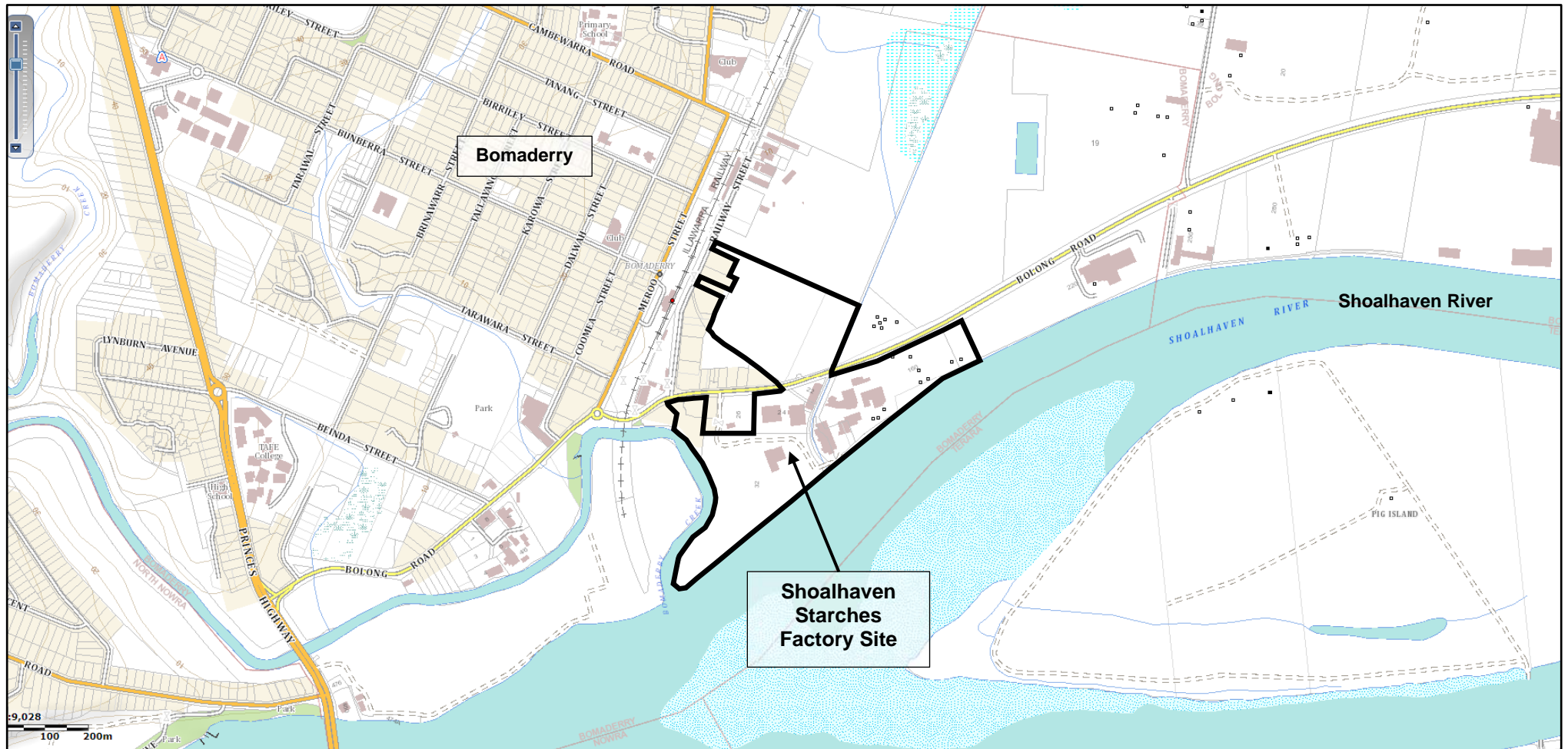


Figure 1: Site Locality Plan.

3.0 THE PROPOSAL

The Modification Application involves the following aspects which are relevant to this Clause 4.6 submission. Plans and elevation details of these proposed modifications are included in Annexure 1 of the SEE that supports the Modification Application.

3.1 THE RELOCATION OF THE APPROVED GAS FIRED BOILER

Under Major Project Approval MP 06_0266 a gas fired boiler was proposed to be constructed to the north and adjacent to the existing boiler house situated within the main factory site on the south side of Bolong Road. To date this gas fired boiler has not been constructed.

The approved gas fired boiler could produce up to 100 t/h steam and was originally intended to be used as a standby system should any coal-fired units fail or to supplement the steam supply should the coal-fired boilers not meet demand.

To produce the high grade alcohol required for hand sanitiser there is a need for a constant stable supply of steam to the distillery. It is proposed to therefore relocate the approved gas fired boiler from the location that it was originally approved adjacent to the boiler house to a position adjacent to the approved ISO container storage area located to the east of the site.

The proposed gas fired boiler will be a 30 MW gas fired D type Water Tube boiler. The boiler will have a reduced steam production capacity compared to the gas fired boiler that was originally approved. The proposed gas fired boiler will produce up to 45 t/h of steam saturated at 10Bar.

The need to relocate the gas fired boiler has arisen due to:

- Following detailed design of the gas fired boiler it is evident that the footprint of the boiler is larger than that which was identified by the original Project Approval.
- As a result of the larger footprint the gas fired boiler could not be sited in the approved location due to the presence of other structures in this location and would interfere with safe passage of train and forklift movements which also occur within this area.

Under these circumstances an alternative location for siting the gas-fired boiler was required to be identified. Due to the constrained nature of the Shoalhaven Starches factory site, particularly that part of the factory site on the southern side of Bolong Road, it has been decided to relocate the gas-fired boiler to a location adjacent and to the south of the approved ISO container storage area to the east of the site. This alternative location will be situated between the ISO Container storage area, and the train lines that run along

the southern boundary of the site and adjacent to the banks of the Shoalhaven River. The gas fired boiler will be set back 23 metres from the banks of the Shoalhaven River.

The proposed gas fired boiler will have a footprint of 25 m by 15 m. It will sit within a compound structure with a height above ground level of 11 metres, with an emissions stack with a height of 24.5 metres.

Annexure 1 to the SEE includes plan and elevation details of the proposal including the gas fired boiler.

3.2 ADDITIONAL STORAGE TANKS

The hand sanitiser alcohol that is produced will need to be stored in storage tanks separate to the other grades of ethanol produced at the site. As a result, it is proposed to erect two 236,000 litre storage tanks for the storage of the hand sanitiser adjacent to and immediately to the south of existing ethanol tank farm.

The tanks will be constructed from 304 L stainless steel and are fixed roof. The two tanks will be 236 m³ each, have a 4.5 m diameter and a height of 18 metres above ground level, matching the height of the existing adjacent tanks..

The tanks will be located within the existing day tank bund (ex-Ethanol recovery area bund).

Details of the storage tanks and their location are detailed in the drawing set included as **Annexure 1** to the SEE.

4.0 **CLAUSE 4.6 OF SHOALHAVEN LEP 2014**

Clause 4.6 of SLEP 2014 stipulates:

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 for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless—*
 - (a) the consent authority is satisfied that—*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Secretary must consider—*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (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 environment protection zone,*
 - (bb) clause 4.2B,*
 - (c) clause 5.4,*
 - (ca) clause 6.1 or 6.2,*
 - (cb) clause 7.25,*
 - (cc) clause 4.1H.*

4.1 CLAUSE 4.6 AND ITS USE

Clause 4.6 of the SLEP 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 that there are sufficient environmental planning grounds to justify contravening the development standard; and that the development proposed is in the public interest.

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 SLEP 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 -

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

Having regard to the definition of "development standard", including paragraph (c) it is considered that Clause 4.3(2A) of the SLEP 2014 contains a development standard.

Clause 4.3(2A) prescribes a maximum height of 11 m upon which a consent authority is able to approve the erection of a building on the subject site. 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(2A) is contained in Part 4 of the Shoalhaven LEP 2014, containing the “*Primary Development Standards*” of the LEP. This reinforces the contention that the provisions of Clauses 4.3 are development standards.

As development standards, consideration of these clauses is therefore open to written requests made pursuant to Clause 4.6.

A consent authority must also be satisfied of three matters before it may agree with the written request made pursuant to clause 4.6.

Firstly, the request is to be in writing [Clause 4.6(3)]; demonstrate that the compliance with that development standard is unreasonable or unnecessary in the circumstances of the case [Clause 4.6(3)(a)] and that there are sufficient environmental planning grounds to justify contravening the development standard [Clause 4.6(3)(b)].

Secondly, the consent authority must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [Clause 4.6(4)(a)(ii)].

Finally, the consent authority can only grant development consent for a development that contravenes a development standard if the concurrence of the Secretary (formerly Director General) of Planning, Industry and Environment (“the Department”) has been obtained [Clause 4.6(4)(b)].

The Secretary in deciding whether to grant concurrence must consider pursuant to Clause 4.6(5):

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

In this instance, as will be described in Section 4.3 below, the concurrence of the Secretary of the Department is not required in relation to this Clause 4.6 written request.

Clause 4.6(6) states:

- 4.6(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 E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 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.*

As this matter does not involve the subdivision of land zoned *Zone RU2 Rural Landscape, and E2 Environmental Conservation*, Clause 4.6(6) is not applicable to this proposal.

This submission has been prepared having regard to the above relevant matters.

4.2 INITIAL ACTION PTY LTD V WOOLLAHRA MUNICIPAL COUNCIL [2018] NSWLEC 118

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 SLEP 2014 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. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under Clause 4.6(4)(a)(i) that the written request has adequately addressed this matter.

The second option of satisfaction, in Clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second option of satisfaction under Clause 4.6(4)(a)(ii) differs from the first option of satisfaction under Clause 4.6(4)(a)(i) in that the consent authority must be directly satisfied about the matter in Clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in Clause 4.6(4)(a)(ii).

Preston CJ points out that the matter in Clause 4.6(4)(a)(ii), with which the consent authority must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest *because* it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority cannot be satisfied that the development will be in the public interest for the purposes of Clause 4.6(4)(a)(ii).

4.3 DEPARTMENT OF PLANNING INDUSTRY AND ENVIRONMENT GUIDELINES

The Department of Planning, Industry and Environment has published Planning System Circular PS-18-003 "*Variations to Development Standards*" dated 21 February 2018. This document updates a document entitled "*Varying Development Standards – A Guide*" dated August 2011. This document also revokes two long standing circulations of significance; a 2008 circular (PS08-003 'Variations to Development Standards') and a 1989 circular (Circular B1) which applied to *State Environmental Planning Policy No. 1 (SEPP No. 1) – Development Standards* to include the relevant matters applying under Clause 4.6 where the Standard Instrument LEP has been adopted.

The circular advises consent authorities of arrangements for when the Secretary's concurrence to vary development standards may be assumed; and clarifies requirements around reporting and record keeping where that concurrence has been assumed.

Pursuant to the Planning Circular PS18-003 consent authorities can assume the Secretary's concurrence except for the following circumstances:

- The Secretary's concurrence may not be assumed for a development standard relating to the minimum lot size required for erection of a dwelling house on land in

one of the following land use zones, if the lot is less than 90% of the required minimum lot size:

RU1 Primary Production;
RU2 Rural Landscape;
RU3 Forestry;
RU4 Primary Production Small Lots;
RU6 Transition;
R5 Large Lot Residential;
E2 Environmental Conservation;
E3 Environmental Management;
E4 Environmental Living; or

a land use zone that is equivalent to one of the above land use zones.

Comment

The Modification Application does not seek development consent for the erection of a dwelling house nor is it located within any of the zones listed above. As such this provision is not relevant to this Clause 4.6 written request.

- The Secretary's concurrence may not be assumed by a delegate of Council if:
 - the development contravenes a numerical standard by greater than 10%; or
 - the variation is to a non-numerical standard.

Comment

It is noted that under Planning Circular PS18-003 concurrence is not necessary for state significant development or for development for which the Minister is the consent authority. The concurrence of the Secretary of the Department of Planning, Industry and Environment is therefore not required for this proposal.

5.0 WRITTEN REQUEST – CLAUSE 4.3(2A)

This written request seeks to justify the contravention of the 11 metre maximum building height development standard imposed by Clause 4.3(2A) of the SLEP 2014 as it applies to the development proposed by this development application.

5.1 NON-COMPLIANCE WITH CLAUSE 4.3 OF SLEP 2014

Clause 4.3 states:

4.3 Height of buildings

(1) The objectives of this clause are as follows—

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (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.*

(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.

(2A) If the Height of Buildings Map does not show a maximum height for any land, the height of a building on the land is not to exceed 11 metres.

Clause 4.3(2A) has been highlighted in bold above and has the effect that development consent must not be granted for the erection of a building on land that is not mapped on the Height of Buildings Map that supports the SLEP 2014, unless the building has a maximum height of 11 m or less.

The subject land is not mapped on the Height of Buildings Map. As such under Clause 4.3(2A) any building on the subject land must have a maximum height of 11 m.

The modification proposal will result in plant and buildings that will have heights in excess of 11 metres in height:

- The relocated gas fired boiler will have a stack that will have a height above ground level of 24.5 m (an exceedance of the 11 m building height limit by 13.5 m);
- The proposed storage tanks will have a height above ground level of 18 m (an exceedance of the 11 m building height limit by 7 m); and

the heights of the plant outlined above are in excess of the maximum 11 m building height limit as outlined in Clause 4.3(2A) of the Shoalhaven LEP 2014. The modification proposal therefore seeks to depart from this development standard.

Clause 4.6 of SLEP 2014 makes provision for exceptions to development standards and enables a consent authority to consent to development that may be inconsistent with a development standard. The provisions of Clause 4.6 require that a written request accompany a proposal that justifies the contravention of a development standard.

This written request has therefore been prepared pursuant to Clause 4.6 and provides justification that the development standard outlined in Clause 4.3(2A) of the Shoalhaven LEP 2014 may be contravened by the grant of development consent because strict compliance with these provisions under the specific circumstances of this case would be: unreasonable and unnecessary; and because there are sufficient environmental planning grounds to justify contravening the development standard. Furthermore, this written request demonstrates the proposal is in the public interest.

5.2 OBJECTIVES OF STANDARD

As detailed in Section 5.1 above the objectives of Clause 4.3 are:

- (1) *The objectives of this clause are as follows—*
 - (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
 - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
 - (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.*

5.3 OBJECTIVES OF IN1 ZONE

The subject land is zoned IN1 General Industrial under the provisions of the Shoalhaven Local Environmental Plan 2014.

The objectives of the IN1 General Industrial are:

- *To provide a wide range of industrial and warehouse land uses.*
- *To encourage employment opportunities.*
- *To minimise any adverse effect of industry on other land uses.*
- *To support and protect industrial land for industrial uses.*
- *To allow a diversity of activities that do not significantly conflict with the operation of existing or proposed development.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*

5.4 JUSTIFICATION OF DEPARTURE TO CLAUSE 4.3(2A)

This written request seeks to justify the departure to the provisions of Clause 4.3(2A) of the SLEP 2014. Clause 4.3(2A) effectively imposes a maximum building height limit of 11 m on the subject site. The proposed modifications to Project Approval MP06_0228 under this Modification Application involves buildings and structures that will exceed this maximum building height as detailed in Section 5.1 by between 7 m to 13.5 m.

This written request demonstrates that strict compliance with Clause 4.3(2A) of SLEP 2014 under the specific circumstances of this case would be: unreasonable and unnecessary; that there are sufficient environmental planning grounds to justify contravention of this restriction; and that the proposal is in the public interest.

5.4.1 Compliance with Standard Unreasonable or Unnecessary

Having regard to Clause 4.6(3)(a) it is my view that there is sufficient justification for contravention of the 11 m maximum building height limit development standard outlined under Clause 4.3(2A) of the SLEP 2014 as it would be unnecessary under the specific circumstances of this case as the proposal is consistent with the stated objectives of Clause 4.3 (as detailed in Section 5.1), as:

- The proposed works will not be dissimilar to existing structures within the existing Shoalhaven Starches complex. 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, ie. it is industrial development within an industrial setting.
- The subject site is zoned IN1 general industrial and the proposed development meets the current and desired future character of the locality in which it is sited.
- The proposed development will have a limited visual impact. The bulk and scale of the structures associated with this modification application will not be dissimilar to that of other industrial type development associated with the existing factory site. Furthermore, the proposed works will be sited within proximity of similar structures of a similar nature. The works will be sited in the midst of the existing factory complex and will be viewed within this context. As such this development will not diminish the views of existing development.
- 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.

- 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
- The proposed development will have a limited visual impact. Whilst the proposal does involve installation of plant that will be visible, the bulk and scale of these structures will not be dissimilar to that of other industrial type development associated with the existing factory site. The main vantage points from where the development could potentially be visible would be from Bolong Road. However, the proposed relocated gas fired boiler and storage tanks will be sited such that they will be partially screened by existing development and will be within the overall visual “silhouette” of the existing factory complex and individual structures will not be visually prominent. These structures will not extend past the existing skyline created by the existing factory. The works will be sited in the midst of the existing factory complex and will be viewed within this context.

It is our view that the proposed modifications 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. Under the above circumstances, and having regard to the first ‘test’ set by the “Wehbe” case and which Preston CJ references in *Initial Action*, the objectives detailed in Clause 4.3 which underpin the development standard outlined in Clause 4.3(2A) will be achieved notwithstanding non-compliance with this development standard, and hence strict compliance with this development standard is unnecessary. Given these circumstances, it is considered that strict compliance with Clause 4.3(2A) is unnecessary under the circumstances of this case.

Furthermore, 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, which dates back to the early 1970s, and more recent development approvals, the majority of buildings and structures situated on the land exceed a height limit of 11 m. Many of the structures on this industrial site exceed a height limit of 30 metres. In effect, and having regard to the fourth test set by the *Wehbe* case, the maximum building height limit has in effect been abandoned on this industrial site. Under these circumstances, strict compliance with this development standard under the circumstances of this case would be unreasonable.

5.4.2 Environmental Planning Grounds that Justify Contravention of Standard

Having regard to Clause 4.6(3)(b), it is my view that there are sufficient environmental planning grounds to justify contravening the 11 m maximum height development standard of Clause 4.3(2A) of the SLEP 2014 under the specific circumstances of this case.

5.4.2.1 Consistency with Planning Strategies and Plans

As outlined in Section 4.2 the term ‘environmental planning grounds’ is not defined by the SLEP 2014. As Preston CJ in *Initial Action* notes such grounds would include consideration of the Objects of the EP&A Act outlined in Section 1.3 of the Act.

As detailed in Section 1.3, the Objects of the Act include:

- (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 property 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 above Objects are in my view manifested in the aims and objectives that underpin State, regional and local planning strategies, plans and policies.

In my view the 11 metre maximum height development standard imposed by Clause 4.3(2A) seeks in part to achieve objects detailed in the Illawarra-Shoalhaven Regional Plan and the Shoalhaven LEP 2014.

Illawarra-Shoalhaven Regional Plan (ISRP) 2015

The ISRP provides the strategic policy, planning and decision-making framework to guide the region to sustainable growth over the next 20 years.

In summary the plan sets out five main goals, however in my mind the following goal has relevance to this submission

A Prosperous Illawarra Shoalhaven

The ISRP notes in 2013, the Illawarra-Shoalhaven region generated \$16.2 billion in Gross Regional Product (GRP), making it the third-largest economic contributor to regional growth in NSW. Manufacturing was the largest contributor to regional output, contributing \$1.9 billion and employing nearly 10 per cent of local jobs. While the region continues to transition to a knowledge-based economy, its manufacturing activities remain a critical industry sector.

The Plan aims to:

- *grow the national competitiveness of Metro Wollongong to provide jobs and housing;*
- *grow the capacity of the port of Port Kembla as an international trade gateway;*
- *drive diversity and innovation in the economy through growth in priority growth sectors;*
- *grow strategic assets in key locations to help drive economic growth across the region;*
- *support new and expanded industrial activity by providing well-located and well-serviced supplies of industrial land; and*
- *strengthen the economic self-determination of Aboriginal communities.*

It builds on the NSW Government's five goals for regional economic development:

- promote key regional sectors and regional competitiveness;
- drive regional employment and regional business growth;
- invest in economic infrastructure and connectivity;
- maximize government efficiency and enhance regional governance; and
- improve information sharing and build the evidence-base.

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 located on Bolong Road, Bomaderry 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 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.

This modification arises from direct requested made by the Federal Government's Department of Industry Sciences and Energy request to Shoalhaven Starches produce more hand sanitizer alcohol in response to the current Coronavirus COVID 19 crisis. Clearly such a proposal has broader National strategic importance given the current COVID 19 crisis.

The Objectives of the Shoalhaven Local Environmental Plan 2014 and the IN1 zone

The objectives of the SLEP 2014 and the zone that applies to the subject site also provide context within which to consider the environmental planning grounds that underpin the development standard in question.

The subject site is zoned IN1. The objectives of the IN1 zone are:

- *To provide a wide range of industrial and warehouse land uses.*
- *To encourage employment opportunities.*
- *To minimise any adverse effect of industry on other land uses.*
- *To support and protect industrial land for industrial uses.*
- *To allow a diversity of activities that do not significantly conflict with the operation of existing or proposed development.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*

It is our view that the proposal is consistent with these objectives as:

- the proposal involves modifications to an existing industrial facility.
- The proposal will facilitate the continued sustainable operation of the site enabling continued employment opportunities at this major employer within the Shoalhaven.
- The proposal has been designed and incorporates measures to minimise impacts to surrounding land uses.

The Objects of Clause 4.3(2A)

The objects of Clause 4.3(2A) also inform the basis for understanding the environmental planning grounds that underpin this clause. For the reasons spelt out in Section 5.4.1 above, the proposal will still achieve the objectives that underpin Clause 4.3(2A) notwithstanding non-compliance with the 11 m maximum building height limit imposed under this clause.

5.4.3 Is the Proposed Development in the Public Interest?

Preston CJ in *Initial Action* (at paragraph 27) states:

27. *The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).*

With respect to Clause 4.6(4)(a)(ii) Preston CJ details that a consent authority must be satisfied that a written request is in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is to be carried out.

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served) and would therefore be in the “public interest”.

As outlined in Section 5.4.1 above, the objectives underpinning the development standard in Clause 4.3(2A) are set out in Clause 4.3 and are as follows:

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*

- (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.*

For the reasons detailed in Section 5.4.1 this written request demonstrates that the proposal will be consistent with the above objectives.

Section 5.4.1.2 above details the objectives for the IN1 zone.

For the reasons outlined in Section 5.4.1.2 above this written request demonstrates that the proposal is consistent with the above IN1 zone objectives notwithstanding strict non-compliance with the 11 m maximum building height limit under Clause 4.3(2A).

Importantly this modification arises from direct request made by the Federal Government's Department of Industry Sciences and Energy to Shoalhaven Starches to produce more hand sanitizer alcohol in response to the current Coronavirus COVID 19 crisis. Clearly such a proposal has broader public interest of a National strategic importance in response to current COVID 19 crisis.

Given these circumstances, as demonstrated by this written request, the proposed development will be both consistent with the objectives of Clause 4.2A(3)(a) and the IN1 zone that applies to the land. The written request therefore demonstrates the proposed development is in the public interest because it is consistent with the objectives of the development standard and the objectives for the zone within which the development is to be carried out.

5.4.4 Clause 4.6(5) Matters for Consideration by Director-General

Clause 4.6(5) sets out the matters that the Secretary must take into consideration when deciding whether to grant concurrence to a written request made pursuant to Clause 4.6, as follows:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

With respect to the above matters for consideration the following comments are made:

- The proposal does not raise any issues of significance from State or regional environmental planning perspective.

Section 8.1.1 of the original SEE that supports the development application addresses the provisions of relevant State Environmental Planning Policies (SEPPs). The

proposal does not raise any issues of significance having regard to the matters raised by these SEPPs.

The proposal is consistent with the goals outlined in the Illawarra-Shoalhaven Regional Plan (ISRP) 2015 as detailed in Section 5.4.2.1 of this written request.

- 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.

- The proposed works will not be dissimilar to existing structures within the existing Shoalhaven Starches complex. 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.
- The subject site is zoned IN1 general industrial and the proposed development meets the current and desired future character of the locality in which it is sited.
- The proposed development will have a limited visual impact. The bulk and scale of the structures associated with this modification application will not be dissimilar to that of other industrial type development associated with the existing factory site. Furthermore, the proposed works will be sited within proximity of similar structures of a similar nature. The works will be sited in the midst of the existing factory complex and will be viewed within this context. As such this development will not diminish the views of existing development.
- 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.
- The proposed development site is not subject to a heritage listing under the provisions of SLEP 2014 nor is it sited within the in the vicinity of a heritage item.
- This proposal arises from a direct request made by the Federal Government’s Department of Industry Sciences and Energy to Shoalhaven Starches to produce

more hand sanitizer alcohol in response to the current Coronavirus COVID 19 crisis. Clearly such a proposal has broader public interest of National importance given the current COVID 19 crisis.

- The proposed development will have a limited visual impact. Whilst the proposal does involve installation of plant that will be visible, the bulk and scale of these structures will not be dissimilar to that of other industrial type development associated with the existing factory site. The main vantage points from where the development could potentially be visible would be from Bolong Road. However, the proposed works will be sited within the overall “silhouette” of the existing factory complex and individual structures will not be visually prominent. These structures will not extend past the existing skyline created by the existing factory. The works will be sited in the midst of the existing factory complex and will be viewed within this context.

Moreover, there is no public benefit in maintaining a 11 m building height limit of the subject land given the majority of buildings and structures on the land already exceed this height limit by a considerable degree. Clearly the 11 m maximum building limit has no relevance to the subject site and strict adherence to this standard on this site would have no public benefit under these circumstances.

For the reasons outlined in Section 5.4.2.1 this written request demonstrates the proposed development will be both consistent with the objectives of Clause 4.3(2A) as well as the IN1 zone that applies to this site. The written request therefore demonstrates the proposed development is in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is to be carried out. Furthermore, this proposal arises in response to a request from the Federal Government’s to produce more hand sanitizer alcohol in response to the current Coronavirus COVID 19 crisis. Clearly such a proposal has broader public interest of National importance given the current COVID 19 crisis

Given these circumstances there would be no broader public benefit in maintaining the development standard given the particular circumstances of this case.

This request therefore demonstrates that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

- It is considered that all matters required to be taken into account by the Secretary before granting concurrence have been adequately addressed as part of this Clause 4.6 variation request to vary Clause 4.3(2A) of the SLEP 2014.

6.0 CONCLUSION

The Federal Government's Department of Industry Sciences and Energy has requested that Shoalhaven Starches produce more hand sanitizer alcohol in response to the current Coronavirus COVID 19 crisis.

One of the means available to reduce the spread of Coronavirus COVID 19 is practicing good hygiene, and in particular by washing hands often with soap and water. Where soap and water is not available the Federal Department of Health recommends the use alcohol-based hand sanitisers. Alcohol-free hand rubs have not been shown to be effective against viruses like COVID-19, and the Federal Department of Health recommend against using them. As a result, there has been an increased demand for alcohol-based hand rubs which has resulted in a shortage of supply. This has led to the Federal Government seeking to increase the supply of these products.

Shoalhaven Starches have the ability to meet the Federal Government's request in their existing ethanol distillery located at their Bomaderry factory site without exceeding the approved production limit of 300 ML per annum under MP 06_0228. Shoalhaven Starches will be able to achieve this by rearranging the mix of grades they manufacture. However, in order to readjust their production processes to produce the higher grade quality hand sanitizer alcohol they will need to ensure a stable supply of steam to ensure the higher quality of alcohol required for hand sanitizer, as well as additional storage to accommodate this specific product. Shoalhaven Starches intend to produce 120 ML per annum of hand sanitizer grade alcohol, out of the overall 300 ML per annum approved production limit imposed by Project Approval MP 06_0228.

Under MP 06_0288, Shoalhaven Starches have planning approval for a new gas fired boiler to be located at the boiler house, however this gas fired boiler has not yet been installed. The original intent of this approved gas fired boiler was to ensure a stable supply of steam for the production processes at the site.

Shoalhaven Starches propose to relocate this approved gas fired boiler from its approved location adjacent to the boiler house, to an alternative location to the east of the site to better service the distillery to ensure a stable supply of steam necessary to enable production of the higher grade hand sanitizer alcohol as requested by the Federal Government.

In addition to relocating the approved gas fired boiler, this proposal will also require:

- The extension of existing gantries to carry pipework between the proposed relocated gas fired boiler and the distillery;
- The installation of an additional two storage tanks to store the hand sanitizer alcohol.
- An undercover storage area for the hand sanitizer alcohol.

Modification 18 will not involve changes to the size, scale or intensity of the existing Shoalhaven Starches operations. The modification proposal will not result in any increases in production rates from the site, nor will it involve any significant changes in level of impacts arising from that originally envisaged by the original approved development.

The plant outlined above are at heights which exceed the building height limit of 11 m imposed by Clause 4.3(2A) of the Shoalhaven LEP 2014 .

Clause 4.6 of Shoalhaven LEP 2014 makes provision for exceptions to development standards and enables a consent authority to consent to development even though it may be inconsistent with a development standard. The provisions of Clause 4.6 require that a written request accompany a proposal that seeks to justify the contravention of a development standard.

Clause 4.3(2A) of the SLEP 2014 is contained in Part 4 of the SLEP 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 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 written request made pursuant to Clause 4.6 of the Shoalhaven LEP 2014 demonstrates that strict compliance with the maximum 11 m building height limit development standard detailed in Clause 4.3(2A) under the specific circumstances of 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.

The written request therefore requests that the consent authority exercise its authority empowered in Clause 4.6 of the Shoalhaven LEP 2014 and approved this proposal notwithstanding the proposal does not strictly comply with the 11 m building height limit imposed by Clause 4.3(2A).

Stephen Richardson
TOWN PLANNER RPIA