

CLAUSE 4.6 WRITTEN REQUEST SHOALHAVEN LEP 2014

SHOALHAVEN STARCHES EXPANSION PROJECT PROJECT APPROVAL MP06_0228 MODIFICATION APPLICATION (No. 20)

PROPOSED ALTERATIONS AND ADDITIONS TO EXISTING CO₂ PLANT

**SUPAGAS
BOLONG ROAD, BOMADERRY**

Prepared for

Supagas

August 2021

Clause 4.6 Written Request

Shoalhaven LEP 2014

Project	Shoalhaven Starches Expansion Project – Project Approval MP 06_0228 – Modification No. 20 (Mod 20) – Proposed Alterations and Additions to Existing CO ₂ Plant
Address	220 Bolong Road, Bomaderry
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1.0 INTRODUCTION

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.

Project Approval MP06_0228 was granted by the Minister for Planning on the 28th January 2009 for the Shoalhaven Starches Expansion Project. This approval also encapsulated previous approvals for the site into one overall approval for the site (at that time).

The Shoalhaven Starches Expansion Project 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 Project Approval.

On the 7th August 2018, the Independent Planning Commission granted a Modification Approval (Mod 15) to Project Approval MP-06_0228 enabling Supagas to construct a Carbon Dioxide (CO₂) Plant adjacent to the former Dairy Farmers factory site that now belongs to the Manildra Group of companies and which forms part of the Shoalhaven Starches operations. The site is located at 220 Bolong Road Bomaderry (Lot 143 DP 1069758).

Supagas have now established the CO₂ Plant on the subject land in accordance with Mod 15. 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 when the plant is fully operational.

Supagas now wish to install additional storage vessels and associated plant on the site to increase storage capability to enable:

1. Improved storage volume capacity of liquid CO₂ product during planned and unplanned outages.
2. Better batching/quarantining of product and quality control.
3. Better availability of product during high demand periods.

The site is zoned IN1 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.

This Modification Application will not involve changes to the size, scale or intensity of the existing Shoalhaven Starches operations. The modification proposal will however result in structures that will exceed the 11 m building height limit under Clause 4.3(2A) as follows. The proposal includes the erection of two 150 tonne Cryogenic tanks that when erected will have a height above ground level of 17.376 metres.

These storage tanks will therefore have 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 made pursuant to Clause 4.6 of the Shoalhaven LEP 2014 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 DESCRIPTION OF SITE AND SURROUNDS

The works associated with this modification application are all located at 220 Bolong Road, Bomaderry (Lot 143 DP 1069758) 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 land is owned by the Manildra Group of Companies. 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 to the site on which the CO₂ Plant is located comprises separate ingress and egress driveways with a central median. The driveway provides access to the factory site, and 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 farm land 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 locality and the site, along with key components of the proposal are shown in **Figures 2 and 3**.

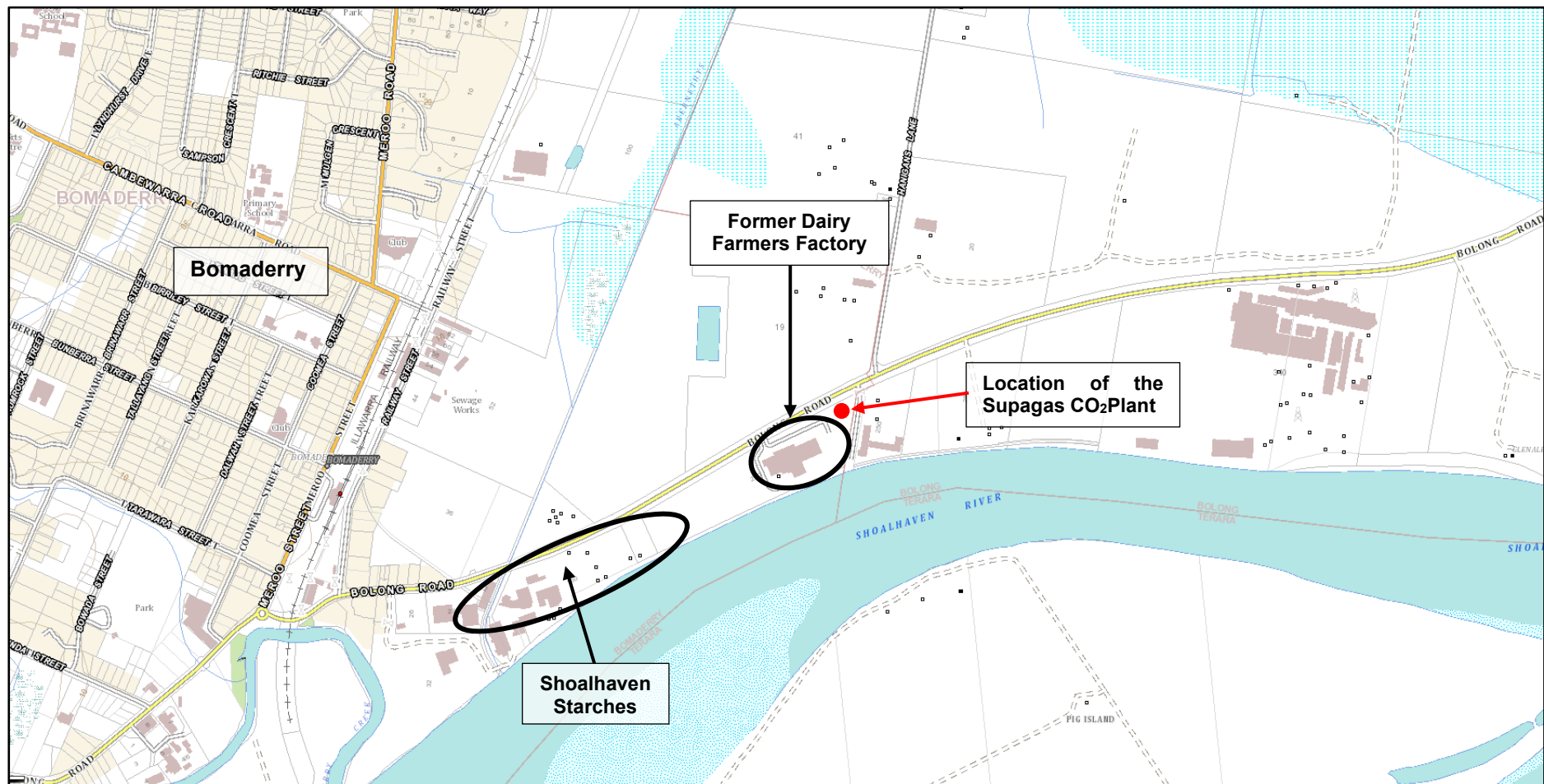


Figure 1: Site locality plan.



Figure 2: Aerial photograph of the locality.



Figure 3: Aerial photograph of site.

3.0 THE PROPOSAL

Supagas seek approval to modify the existing CO₂ Plant located on the subject site so as to install additional storage vessels and associated plant on the site to increase storage capability.

The Modification proposal will involve the following additional storage vessels and plant:

1. Installation of two (2) 150 tonne capacity Liquid CO₂ storage vessels. Each vessel is 17,200 mm high x 3,800 mm diameter each.
2. Installation of the above Liquid CO₂ storage vessels will require the relocation of a set of existing ambient vaporisers.
3. Installation of an additional NO_x removal bed to accommodate the expected longer running period of the plant. Vessel dimensions are 2,400 mm high x 920 mm diameter.
4. Interconnecting pipework from the process to the new equipment.
5. Concrete bases for the above equipment items. This will include piling due to the substandard grade of the existing soil.

The following are the primary objectives of the proposed works:

Under the Mod 15 approval, the Supagas operation was envisaged to produce up to 100 tonnes per day of liquid CO₂ product. At present, production is within the order of 35 to 40 tonnes per day. The proposed works will enable improved efficiencies to operations from the site but will not result in operations exceeding the approved production rates from the subject site envisaged under Mod 15.

The CO₂ Plant approved under Mod 15 will eventually be able to process up to 100 tonnes of CO₂ per day. The current CO₂ Plant that has been established on the subject site comprises only part of the overall plant originally envisaged by Mod 15, and at present is able to process up to 50 tonnes of CO₂ per day. This Modification Proposal will not result in any increase in production capacity from the existing CO₂ Plant above that which is presently occurring.

Plans of the works associated with this Modification are included in Annexure 2 to the SEE in support of this Modification Application.

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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 building 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 an 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 be 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 a structure that will have heights in excess of 11 metres in height. The proposed two 150 tonne Cryogenic tanks will have heights of 17.376 metres each respectively which will exceed the 11 m height limit by 6.376 metres.

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 structures, ie. two storage vessels, that will exceed this maximum building height as detailed in Section 5.1 by 6.376 metres.

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 proposal will not be dissimilar to existing structures within the existing overall Shoalhaven Starches industrial 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. Detailed plans of the proposed development are attached as Annexure 2 to the SEE.
- 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 structure associated with this modification application will not be dissimilar to that other structures in this general location and more broadly within the Shoalhaven Starches complex. The two storage vessels will comprise a similar structure to other industrial type development associated with the overall Shoalhaven Starches operations. Furthermore, the proposed storage vessels will be sited within proximity of similar structures of a similar nature. The proposal 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 visual impact of the modification proposal is discussed in Section 7.2.5 of the SEE.

- 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 heritage conservation area.
- 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 these structure will not be dissimilar to that of other industrial type development associated with the overall Shoalhaven Starches operations. The main vantage points from where the development could potentially be visible would be from Bolong Road, the southern banks of the Shoalhaven River and Nowra Bridge. However, the proposal would be sited within the overall “silhouette” of the existing factory complex and the structure will not be visually prominent. This structure will generally not extend past the existing skyline created by the existing factory. The work 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 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. 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 overall Shoalhaven Starches operations. 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 associated with the overall factory complex 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 for this industrial complex. 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;
- maximise 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 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.

Following the Minister's determination Shoalhaven Starches have been implementing and commissioning works in accordance with this Project Approval.

On the 7th August 2018, the Independent Planning Commission granted a Modification Approval (Mod 15) to Project Approval MP-06_0228 enabling Supagas to construct a Carbon Dioxide (CO₂) Plant adjacent to the former Dairy Farmers factory site that now belongs to the Manildra Group of companies and which forms part of the Shoalhaven Starches operations. The site is located at 220 Bolong Road Bomaderry (Lot 143 DP 1069758).

Supagas have now established the CO₂ Plant on the subject land in accordance with Mod 15. 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 when the plant is fully operational.

The proposed additional storage vessels and associated plant seek to enable:

- Improved storage volume capacity of liquid CO₂ product during planned and unplanned outages.
- Better batching/quarantining of product and quality control.
- Better availability of product during high demand periods.

Overall, the Modification Proposal seeks to improve the efficiency of the existing CO₂ Plant operations consistent with the thrust of the NSW Governments goals for regional economic development as listed above.

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 a modification to an existing industrial facility.
- The proposal will facilitate the continued sustainable operation of the site enabling continued employment opportunities.
- 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 5.4.2.1 above details the objectives for the IN1 zone.

For the reasons outlined in Section 5.4.2.1 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).

Given these circumstances, as demonstrated by this written request, the proposal 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 7.1.1 of the 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 proposal will not be dissimilar to existing structures within the existing overall Shoalhaven Starches complex. The building form, height, shape and characteristic is 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 structure associated with this modification application will not be dissimilar to that of other industrial type development associated with the existing factory site. Furthermore, the proposal 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 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 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
- The proposed development will have a limited visual impact. Whilst the proposal does involve a structure that will be visible, the bulk and scale of the structure will not be dissimilar to that which was approved under the original Project Approval; 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.

Moreover, there is no public benefit in maintaining a 11 m building height limit under these circumstances, given the majority of buildings and structures within the overall Shoalhaven Starches operations 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. 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

On the 7th August 2018 the Independent Planning Commission granted a Modification Approval (Mod 15) to Project Approval MP-06_0228 enabling Supagas to construct a Carbon Dioxide (CO₂) Plant adjacent to the former Dairy Farmers factory site that now belongs to the Manildra Group of companies and which forms part of the Shoalhaven Starches operations. The site is located at 220 Bolong Road Bomaderry (Lot 143 DP 1069758).

Supagas have now established the CO₂ Plant on the subject land in accordance with Mod 15. 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 when the plant is fully operational.

Supagas now wish to install additional storage vessels and associated plant on the site to increase storage capability to enable:

- Improved storage volume capacity of liquid CO₂ product during planned and unplanned outages.
- Better batching/quarantining of product and quality control.
- Better availability of product during high demand periods.

The site is zoned IN1 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.

This Modification Application will not involve changes to the size, scale or intensity of the existing Shoalhaven Starches operations. The modification proposal will result in structures that will exceed the 11 m building height limit under Clause 4.3(2A) as follows. The proposal includes the erection of two 150 tonne Cryogenic tanks that when erected will have a height above ground level of 17.376 metres.

These storage tanks will therefore have heights which exceed the building height limit of 11 m imposed by Clause 4.3(2A) of the Shoalhaven LEP 2014 by 6.376 metres.

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 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).



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