

Item 8: Development

8.1 ME0022/2024 (DA0087/2022) - Section 4.55(1A) Modification to Conditions of Consent - Demolition of Dwelling and Construction of Food and Drink Premises (KFC) - 33-35 Horatio Street, Mudgee

REPORT BY THE PLANNING COORDINATOR AND MANAGER PLANNING
TO 20 MARCH 2024 ORDINARY MEETING
GOV400105, DA0087/2022

RECOMMENDATION

That Council:

- A. receive the report by the Planning Coordinator and Manager Planning on ME0022/2024 Section 4.55(1A) to conditions of DA0087/2022 - Demolition of Dwelling and Construction of Food and Drink Premises (KFC) - 33-35 Horatio Street, Mudgee; and
 - B. refuse ME0022/2024 Section 4.55(1A) to conditions of DA0087/2022 - Demolition of Dwelling and Construction of Food and Drink Premises (KFC) - 33-35 Horatio Street, Mudgee based on the following statement of reasons:
 - The amendment of condition 30 (relating to the Transport for NSW requirements for a WAD to be obtained and road upgrades in Horatio Street be completed prior to issue of a Construction Certificate for the KFC building) is not supported by Transport for NSW or Councils Development Engineering Department as the intent of the condition is to reduce the impact of construction traffic on the existing classified (State) road network and reduce conflict for road users entering and exiting the site; and
 - The amendment of condition 31c) (relating to the requirement to construct a 2.5m wide pedestrian pathway at a length of approximately 98m along Horatio Street) to either reduce the width to 1.2m for the full 98m or reduce the total length of the 2.5m pathway to the frontage of the site only is not supported by Council's Development Engineering Department as the site will be a significant generator of pedestrian traffic and given the sites location with respect to the nearest existing footpath, it is considered that a suitable pedestrian linkage must be provided, at the current shared pathway standard of 2.5m wide.
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Executive summary

OWNER/S:	Diamond 7 Pty Ltd
APPLICANT:	Diamond 7 Pty Ltd
PROPERTY DESCRIPTION:	33-35 Horatio Street, Mudgee
PROPOSED DEVELOPMENT:	Modification to conditions of consent for DA0087/2022 Demolition of dwelling and construction of food and drink premises (KFC)
ESTIMATED COST OF DEVELOPMENT:	\$1.8 Million
REASON FOR REPORTING TO COUNCIL:	Original DA0087/2022 was determined by Council on the 16 August 2023
PUBLIC SUBMISSIONS:	Nil

Council is in receipt of a Section 4.55(1A) Modification Application (ME0022/2024) to DA0087/2022.

DA0087/2022 was approved with conditions of consent by Council at the 16 August 2023 meeting enabling the demolition of a dwelling and outbuildings, and the construction of a Food and Drink Premises (KFC), at 33-35 Horatio Street MUDGEES NSW 2850, legally described as Lot 2 and Lot 3 DP 743615.

The modification application submitted seeks to amend two (2) conditions imposed by Council:

1. Condition 30 - road upgrades within Horatio Street prior to a construction certificate being issued; and
2. Condition 31c) - the requirement for a 2.5m wide and 98m long pathway, connecting to the existing pathway within Horatio Street.

The applicant has provided written justification for the proposed amendments which is included in **Attachment 1**.

The modification application was referred to Transport for NSW (TfNSW), specifically owing to condition 30 being included within their letter of concurrence provided under DA0087/2022. TfNSW provided a letter to Council dated 21 February 2024 which states that the amendment to condition 30 proposed by the Applicant is not supported. This referral response is further discussed later in this report.

The modification application was also referred to Council's Development Engineering Department who also do not support the amendments proposed to condition 30 and 31c). This referral response is further discussed later in this report.

The modification application was also neighbour notified, in accordance with Mid-Western Regional Community Participation Plan 2019, for a period of 14 days, ending 30 January 2024. No formal submissions were received during the notification period.

Owing to objections raised by TfNSW, and Council's Development Engineering Department the application is recommended for refusal.

Disclosure of Interest

Nil

Detailed report

The Modification application ME0022/2024 proposes amendments to conditions 30 and 31c) of DA0087/2022 approved by Council on the 16 August 2023. The current conditions imposed are detailed below, along with the proposed amendments sought by the applicant. Justification provided by the applicant is included in **Attachment 1**.

Current conditions of DA0087/2022:

30. *A channelised right turn lane (CHR) on the eastbound approach of Horatio Street generally in accordance with drawing titled Intersection Design Plan, numbered C3.00 Issue A, prepared by Triaxial Consulting (dated 30 August 2021) is to be constructed to TfNSW satisfaction and completed prior to the commencement of any construction works.*

As road works are required on Horatio Street, road works will be subject to the developer entering into the Works Authorisation Deed (WAD) with TfNSW prior to the commencement of any construction. TfNSW will exercise the function of the road authority under Section 64 of the Roads Act 1993, in addition to its concurrence with respect to a classified road.

Note: Conditions of Consent do not guarantee TfNSW's final consent to the specific road work, traffic control facilities and other structures or works, for which it is responsible, on the road network. TfNSW must provide a final consent for each specific change to the classified (State) road network prior to the commencement of any work. The WAD process, including acceptance of design documentation and construction, can take time. The developer should be aware of this and allow sufficient lead time within the project development program to accommodate this process. It is therefore suggested that the developer work through this process as soon as possible with the TfNSW.

All road works under the WAD shall be completed prior to issue of any Construction Certificate associated with the approved development.

All works associated with the subject development shall be undertaken at full cost to the developer and at no cost to TfNSW or Council.

The access driveway and layback are to be constructed in accordance with Mid-Western Regional Council Engineering standards, match existing road levels and must not adversely interfere with existing road drainage.

31. *A detailed engineering design is to be submitted to and approved by Council prior to the issue of a S.138 Roads Act Approval and prior to the issue of any Construction Certificate for the Development. The engineering design is to comply with Council's Development Control Plan and the Standards referenced within Appendix B and D.*

A S.138 Roads Act Approval is required for but not limited to the following civil works:

- a) *Commercial vehicular crossings / driveways in accordance with Council's Access to Properties Policy.*
- b) *Removal of any redundant vehicle crossings, laybacks and subsequent rectification works.*
- c) *Construction of a 2.5m wide reinforced concrete shared path from the eastern boundary of Lot 2 DP 743615 to the kerb return in Lawson Street (a distance of approximately 98 metres).*
- d) *Relocation and replacement of any affected street trees or services.*

- e) *Reinstatement and turfing of all disturbed footway areas.*

Note: no works can commence prior to the issue of the S138 Roads Act Approval.

Proposed amendments:

The applicant and owner of the site seeks to amend condition 30 outlined above to enable the Construction Certificate to be issued, and resultant onsite building works to commence, whilst concurrently progressing the Horatio Street detailed design for the road upgrades under the WAD process with TfNSW.

This proposed amendment would result in onsite construction works proceeding any road upgrades within Horatio Street being completed. The road works would unlikely be completed until prior to an Occupation Certificate being obtained. The applicants' consultant suggests that this amendment would reduce the projects timeline down to 1-2 years with all construction traffic being managed by a future 'Construction Traffic Management Plan' prepared by the appointed civil and/or building contractor.

Both the TfNSW and Development Engineering referral responses do not support an amendment to Condition 30 *as the intent of the condition is consistent with appropriate risk mitigation measures to ensure safe and efficient operation of the highway, a classified (State) road.* Further, stating that *the works (including the construction of a channelized right turn lane (CHR) on the eastbound approach of Horatio Street) are required to be completed prior to the commencement of any construction works to reduce impact of construction traffic on the existing road network and reduce conflict for road users entering and exiting the site.*

A full copy of the TfNSW response is included as **Attachment 2**.

It should also be noted that when considering the matters raised in submissions received during the assessment of DA0087/2022, traffic, access and parking conflicts in this location were a significant concern raised.

As a result of the above, amendment to condition 30 is not support by staff.

In addition to condition 30, the applicant also seeks to amend Condition 31c) to either of the following options, as the applicant contends that *that the full cost being borne by the developer is unreasonable:*

- *Require the developer to construct a 1.2m wide path for the full distance of 98m along the site frontage and westwards connecting to Lawson Street (with 1.2m being an acceptable minimum Council standard width for pedestrian use likely to be generated by the development). Future widening to 2.5m may be achieved under subsequent DAs with a nexus to the intensification of foot traffic, or*
- *Require the developer to construct a 2.5m wide path along the site's frontage (approximately 49m) only.*

Councils Development Engineering Department have reviewed this request and advised of the following:

The site will be a significant generator of pedestrian traffic and given the sites location with respect to the nearest existing footpath, it is considered that a suitable pedestrian linkage must be provided and further that sufficient nexus exists to allow for the imposition of such a condition.

The site is also identified as a key pedestrian linkage in the Mudgee Walking and Cycling Plan currently being prepared. This combined with the proposed location of a KFC restaurant that will generate a significant number of pedestrian movements, further reinforces the need

for an appropriately dimensioned pedestrian path as well as the existence of sufficient nexus to impose such a requirement.

The proposed modification of Condition 31 (c) is therefore not supported from an engineering perspective.

It should be noted that the approved plans for the KFC development also included allocation of 'bike parking' within the site, therefore encouraging cycling as a mode of transport to the premises. As result, it is considered that the imposition of a 2.5m shared pathway, connecting to the existing pathway, has been adequately considered in the context of the proposed development, and the need to provide a suitable and safe pedestrian connection in this location.

As a result of the above, amendment to condition 31c) is not supported by staff.

Community Plan implications

Theme	Protecting Our Natural Environment
Goal	Protect and enhance our natural environment
Strategy	Ensure land use planning and management enhances and protects biodiversity and natural heritage

Strategic implications

Council Strategies

Comprehensive Land Use Strategy
Mudgee Town Structure Plan
Mid-Western Local Strategic Planning Statement

Council Policies

Mid-Western Regional Development Control Plan 2013
Mid-Western Regional Contributions Plan 2019
Mid-Western Regional Community Participation Plan 2019
Mid-Western Regional Developer Servicing Plan 2008

Legislation

Environmental Planning & Assessment Act 1979
Environmental Planning & Assessment Regulation 2000
Mid-Western Regional Local Environmental Plan 2012
Roads Act 1993

Financial implications

Should the applicant seek to appeal the decision of Council to the Land and Environment Court, the costs associated with an appeal will be required to be funded by Council.

Further, in the event that Council support an amendment to condition 31c) relating to the pedestrian pathway not being funded in full by the developer, Council may also need to allocate a future budget to upgrade and / or install a 2.5m wide shared pedestrian pathway, connecting to the development site.

Associated Risks

Should Council refuse the application, the applicant may seek a further review of this decision or appeal through the Land and Environment Court.

KAYLA ROBSON
PLANNING COORDINATOR

ALINA AZAR
DIRECTOR DEVELOPMENT

4 March 2024

Attachments: 1. Attachment 1 - Modification Application Justification Letter.
2. Attachment 2 - Transport for NSW Letter Response.

APPROVED FOR SUBMISSION:

BRAD CAM
GENERAL MANAGER



Pre-Lodgement Application Form

Portal Application number: PAN-397680

Applicant contact details

Title	Mr
First given name	Peter
Other given name/s	
Family name	Consadine
Contact number	0401258904
Email	fair@hwy.com.au
Address	6 AVISFORD COURT MUDGEE 2850
Application on behalf of a company, business or body corporate	Yes
ABN	86641313591
ACN	641313591
Name	DIAMOND 7 PTY LTD
Trading name	DIAMOND 7 PTY LTD
Is the nominated company the applicant for this application	No

Owner/s of the development site

Owner/s of the development site	A company, business, government entity or other similar body owns the development site
Owner #	1
Company, business or body corporate name	DIAMOND 7 PTY LTD
ABN / ACN	86 641 313 591

I declare that I have shown this document, including all attached drawings, to the owner(s) of the land, and that I have obtained their consent to submit this application. - Yes

Note: It is an offence under Section 10.6 of the Environmental Planning and Assessment Act 1979 to provide false or misleading information in relation to this application.

Site access details

Are there any security or site conditions which may impact the person undertaking the inspection? For example, locked gates, animals etc.	No
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Developer details

ABN	86 641 313 591
ACN	641 313 591
Name	DIAMOND 7 PTY LTD
Trading name	DIAMOND 7 PTY LTD
Address	6 AVISFORD COURT MUDGEE 2850
Email Address	fair@hwy.com.au

Development details

Application type	Modification Application
On what date was the development application to be notified determined	16/08/2023
Type of modification requested	S4.55(1A) - Modification involving minimal environmental impact, where the development will remain substantially the same as the development that was originally approved

Development Application number of the consent to be modified	
Description of the proposed modification	I am seeking a review of the imposition of conditions 30 and 31.c). An attached document from Western Project Services (WPS) on the portal provides additional reasoning and new information regarding traffic volumes, relevant standards and management measures in an effort to remove risks for the consent authority.
Was the DA applied for via the NSW Planning Portal?	Yes
Please provide portal application number (PAN)	PAN-141138
Site address #	1
Street address	33 HORATIO STREET MUDGEES 2850
Local government area	MID-WESTERN REGIONAL
Lot / Section Number / Plan	2/-/DP743615 <input checked="" type="checkbox"/> 3/-/DP743615 <input checked="" type="checkbox"/>
Primary address?	Yes
Planning controls affecting property	Land Application LEP Mid-Western Regional Local Environmental Plan 2012 Land Zoning SP3: Tourist Height of Building NA Floor Space Ratio (n:1) NA Minimum Lot Size NA Heritage Mudgee Significance: Local Land Reservation Acquisition NA Foreshore Building Line NA Groundwater Vulnerability Groundwater Vulnerable Local Provisions Former LEP Boundaries Map

Proposed development

Selected common application types	Demolition Erection of a new structure
Selected development types	Food and drink premise
Description of development	Proposed demolition of existing dwelling Proposed demolition of existing dwelling and development of a 'food and drink premises' being a 40 seat fast food store and development of a 'food and drink premises' being a 40 seat fast food store.
Provide the proposed hours of operation	
Proposed to operate 24 hours on Monday	No
Monday	10:30 AM - 10:00 PM
Proposed to operate 24 hours on Tuesday	No
Tuesday	10:30 AM - 10:00 PM
Proposed to operate 24 hours on Wednesday	No
Wednesday	10:30 AM - 10:00 PM
Proposed to operate 24 hours on Thursday	No
Thursday	10:30 AM - 10:00 PM
Proposed to operate 24 hours on Friday	No
Friday	10:30 AM - 10:00 PM
Proposed to operate 24 hours on Saturday	No

Saturday	10:30 AM - 10:00 PM
Proposed to operate 24 hours on Sunday	No
Sunday	10:30 AM - 10:00 PM
Dwelling count details	
Number of dwellings / units proposed	
Number of storeys proposed	
Number of pre-existing dwellings on site	
Number of dwellings to be demolished	
Number of proposed occupants	1
Existing gross floor area (m2)	
Proposed gross floor area (m2)	273
Total site area (m2)	
Total net lettable area (m2)	
Cost of development	
Estimated cost of work / development (including GST)	\$1,800,000.00
Capital Investment Value (CIV)	\$150,000.00
Do you have one or more BASIX certificates?	
Climate Zone	
What climate zone/s is the development in?	Climate zone 6 - mild temperate
Has the climate zone impacted the design of the development?	No
Subdivision	
Number of existing lots	
Proposed operating details	
Number of additional jobs that are proposed to be generated through the operation of the development	
Number of staff/employees on the site	8

Number of parking spaces

Category of development	Car parking spaces	Motorcycle spaces	Bicycle spaces
Commercial including business premises and retail premises	23	0	0
Total	23	0	0

Number of loading bays	
Is a new road proposed?	No
Concept development	
Is the development to be staged?	No, this application is not for concept or staged development.
Crown development	
Is this a proposed Crown development?	No

Related planning information

Is the application for integrated development?	No
Is your proposal categorised as designated development?	No
Is your proposal likely to significantly impact	

on threatened species, populations, ecological communities or their habitats, or is it located on land identified as critical habitat?	No
Is this application for biodiversity compliant development?	No
Does the application propose a variation to a development standard in an environmental planning instrument (eg LEP or SEPP)?	No
Is the application accompanied by a Planning Agreement ?	No
Section 68 of the Local Government Act	
Is approval under s68 of the Local Government Act 1993 required?	No
10.7 Certificate	
Have you already obtained a 10.7 certificate?	No
Tree works	
Is tree removal and/or pruning work proposed?	Yes
Please provide a description of the proposed tree removal and/or pruning work	Council planted trees to be either transplanted to new location or new mature trees planted where affected by the entrance/ exit.
Number of trees to be impacted by the proposed work	2
Land area to be impacted by the proposed work	
Units	
Approximate area of canopy REQUESTED to be removed	10
Units	Square metres
Local heritage	
Does the development site include an item of environmental heritage or sit within a heritage conservation area.	Yes
Are works proposed to any heritage listed buildings?	No
Is heritage tree removal proposed?	No
Affiliations and Pecuniary interests	
Is the applicant or owner a staff member or councillor of the council assessing the application?	No
Does the applicant or owner have a relationship with any staff or councillor of the council assessing the application?	No
Political Donations	
Are you aware of any person who has financial interest in the application who has made a political donation or gift in the last two years?	No
Please provide details of each donation/gift which has been made within the last 2 years	

Sustainable Buildings

Is the development exempt from the State Environmental Policy (Sustainable Buildings) 2022 Chapter 3, relating to non-residential buildings?	Yes
Provide reason for exemption. Is the	A modification or a review to a development application, or a review of determination, where the

development any of the following:	original application was submitted on the NSW Planning Portal before 1 October 2023.
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Payer details

Provide the details of the person / entity that will make the fee payment for the assessment.

The *Environmental Planning and Assessment Regulation 2021* and Council's adopted fees and charges establish how to calculate the fee payable for your development application. For development that involves building or other works, the fee for your application is based on the estimated cost of the development.

If your application is for integrated development or requires concurrence from a state agency, additional fees will be required. Other charges may be payable based on the Council's adopted fees and charges. If your development needs to be advertised, the Council may charge additional advertising fees. Once this application form is completed, it and the supporting documents will be submitted to the Council for lodgement, at which time the fees will be calculated. The Council will contact you to obtain payment. Note: When submitting documents via the NSW Planning Portal, credit card information should not be displayed on documents attached to your development application. The relevant consent authority will contact you to seek payment.

The application may be cancelled if the fees are not paid:

First name	Peter
Other given name(s)	
Family name	Consadine
Contact number	0401258904
Email address	fair@hwy.com.au
Billing address	6 AVISFORD COURT MUDGEE 2850

Application documents

The following documents support the application.

Document type	Document file name
Cost estimate report	KFC Development team costing unit model_PAN-141138_PAN-392715
Heritage impact statement	STAMPED APPROVED HIS - DA0087-2022 - Mudgee KFC - Horatio Street, Mudgee_PAN-141138 (2)_PAN-392715
Other	Section 4.55 Request review of imposition of conditions 2023 11 22 WPS-COR-23010 - Mudgee KFC DA 0087_2022 - 33 Horatio St - Review of Conditions (1)_PAN-392715 (1)
Site Plans	STAMPED APPROVED FINAL PLANS - DA0087_2022 - PAN-141138 Proposed KFC - Commercial @ 33-35 Horatio Street MUDGEE NSW 2850_PAN-141
Statement of environmental effects	STAMPED APPROVED SEE and Reports DA0087_2022 - PAN-141138 Proposed KFC - Commercial @ 33-35 Horatio Street MUDGEE NSW 2850_PAN-14

Applicant declarations

I declare that all the information in my application and accompanying documents is, to the best of my knowledge, true and correct.	Yes
I understand that the development application and the accompanying information will be provided to the appropriate consent authority for the purposes of the assessment and determination of this development application.	Yes
I understand that if incomplete, the consent authority may request more information, which will result in delays to the application.	Yes
I understand that the consent authority may use the information and materials provided for notification and advertising purposes, and materials provided may be made available to the public for inspection at its Offices and on its website and/or the NSW Planning Portal	Yes
I acknowledge that copies of this application and supporting documentation may be provided to interested persons in accordance with the Government Information (Public Access) 2009 (NSW) (GIPA Act) under which it may be required to release information which you provide to it.	Yes
I agree to appropriately delegated assessment officers attending the site for the purpose of inspection.	Yes

I agree to pay any required NSW Planning Portal Service Fee/s specified under Schedule 4 of the Environmental Planning and Assessment Regulation 2021 to the Department of Planning and Environment.	Yes
I have read and agree to the collection and use of my personal information as outlined in the Privacy Notice	Yes
I confirm that the change(s) entered is/are made with appropriate authority from the applicant(s).	

Transport for NSW



21 February 2024

TfNSW reference: WST20/00084/11| SF2022/092150

Your reference: ME0022/2024 (CNR-63889)

General Manager
Mid-Western Regional Council
By Email: council@midwestern.nsw.gov.au

Attention: Kayla Robson

ME0022/2024 – Modification to Amend Condition 30 imposed on approved food and drink premises (KFC) – Lots: 2 & 3 DP743615 – 33 Horatio Street, Mudgee

Dear Kayla,

Transport for NSW (TfNSW) is responding to the abovementioned modification (4.55) application referred on 18 December 2023.

TfNSW has reviewed the information and understands the application seeks to modify multiple conditions of DA0087/2022 including Condition 30 which refers to road works within the road corridor to be implemented under a Works Authorisation Deed (WAD). The works (including the construction of a channelized right turn lane (CHR) on the eastbound approach of Horatio Street) are required to be completed prior to the commencement of any construction works to reduce impact of construction traffic on the existing road network and reduce conflict for road users entering and exiting the site.

TfNSW does not support the proposed modification to Condition 30 as the intent of the condition is consistent with appropriate risk mitigation measures to ensure safe and efficient operation of the highway, a classified (State) road.

If you have any questions, please contact Brendan Croft, Development Services Case Officer, on 1300 019 680 or email development.west@transport.nsw.gov.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "Andrew McIntyre".

Andrew McIntyre
Manager Development Services (West)
Community & Place
Regional and Outer Metropolitan

OFFICIAL