

File ref: WPS-COR-23010 | 22 November 2023

James Consadine

Authorised Delegate for the Developer

**DA 0087/2022, KFC Development 33 Horatio St, Mudgee
Planning and Engineering Review of Consent Conditions for Road Reserve Works**

Dear James,

As requested, we offer the following commentary on DA 0087/2022 consent conditions, in relation to works proposed or required within the road reserve, which would be implemented under a TfNSW Works Authorisation Deed (WAD) and potential Council Roads Act Section 138 approvals.

Background

On the 25th of August 2023, Mid Western Regional Council granted development consent DA 0087/2022 for development of a new fast food retail premises (KFC) at 33 Horatio St Mudgee (Lots 2 and 3 DP 743615).

The DA consent included various 'template' and project-specific conditions in relation to the road-related aspects of the development, and two are highlighted for discussion here (**emphasis added**).

30. *A channelised right turn lane (CHR) on the eastbound approach of Horatio Street... 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.

In summary of the key **first issue** (condition 30 above) which we discuss in this letter, this condition requires the developer to execute a WAD with TfNSW prior to commencing construction, and also construct those WAD works prior to any Construction Certificate (**CC**) being issued for the development (noting that onsite building works cannot commence until a CC is obtained, due to consent condition 3).

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:

...

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).

...

In summary of the key **second issue** (condition 31c above), the consent requires 2.5m wide footpath works extending west for a substantial distance beyond the property frontage.

Ways forward

The developer may request a formal review of aspects of the DA determination by Council under [Division 8.2](#) of the *Environmental Planning & Assessment Act 1979*, provided such a review request is formally made (in the form Council requires) within 6 months of the DA date of determination. Alternatively:

- Under Division 8.3 an appeal to the Land and Environment Court may be made within 6 months of the DA determination (or Div 8.2 Review of Determination) by Council, or
- The developer may lodge a DA modification at any time in the future, provided the consent has not lapsed.

WPS staff consulted with Council and TfNSW development assessment and engineering staff in meetings between 25th September and early October to compile a list of relevant considerations that may be needed to support any review of these consent conditions, and this letter discusses (in summary form) our professional judgement on land use planning and traffic engineering grounds with respect to the DA.

Overview of relevant NSW planning principles

For the Court to uphold a DA consent condition if appealed, we understand the Court may consider (among other things) the principles of *Newbury District Council v Secretary of State for the Environment [1981] AC 578*, known as the 'Newbury Test' as discussed in this NSW Planning Departmental guidance: <https://www.planning.nsw.gov.au/sites/default/files/2023-03/guide-to-writing-conditions-of-consent.pdf>

In summary the Departmental guidance states that the Newbury Test requires all of the following: a consent condition must be imposed for a planning purpose (not an ulterior one), must fairly and reasonably relate to the development, and must not be so unreasonable that no planning authority would have imposed the condition.

The Newbury Test neatly summarises other existing planning principles under common law and equity that require any conditions specified by authorities to have a direct nexus (connection) to the potential impacts that would arise from the development.

Fairness and reasonableness are both broad criteria, but for the current DA conditions 30 and 31c above to meet this test, in our view it should be shown that:

- the conditions are proposed in response to a possible *likelihood* of undesirable impacts arising from the development, and
- that the burden of compliance (expense and delay) is proportional and justifiable to mitigate and manage the possible *consequences* of those impacts if they do occur.

First issue - Condition 30 WAD works completion prior to Construction Certificate

The WAD works required under the DA to provide access to the proposed KFC premises include a dedicated eastbound channelised right turn lane, within the central area of the existing road carriageway, and movement of the existing through traffic lanes to pass either side of the turning lane. The turning lane is understood to be required as a result of likely peak hourly traffic volumes once the fast food retail premises commence trading, which are much higher than the temporary construction traffic volumes.

It is understood that Condition 30 seeks to delay commencement of construction until the WAD works are physically constructed and reopened to traffic. The intended benefit of such a condition may be to reduce perceived safety risks arising from onsite construction traffic (for the building works) accessing the site, by first requiring provision of the dedicated right turn lane to shelter vehicles attempting to turn into the site.

However, delaying commencement of onsite construction until WAD works are completed is an unusual requirement in our experience in that it is only rarely seen to be used on the highest-risk category of developments that would pose a serious traffic safety risk and best-practice temporary construction traffic management measures (traffic management plans) might not acceptably reduce the risk.

The present DA does not fit this category of risk. It is a comparatively standard single-building development in an urban speed zone, of which at least several thousand comparable projects are undertaken annually in NSW. Requiring the WAD works to complete prior to CC being issued will result in a substantial, unnecessary delay to completion of the overall development

of at least 2 years and probably longer, with no safety benefits compared with other less costly temporary management options and is therefore unreasonable.

Speaking generally of projects in NSW, to obtain a WAD approval from Transport for NSW, a developer is required to undertake detailed and extensive planning and engineering works which include: making a formal application including delays in processing of each response round, negotiation and execution of a legal Deed, potential site geotechnical and subsurface utilities investigations, development of documentation (numerous management plans and reports) to address the consent conditions and TfNSW standard risk and quality management requirements, and obtaining approval of concept engineering designs and then subsequently detailed engineering designs.

For a project such as this one which is likely to involve (among other things) pavement reconstruction works with a staged traffic management approach due to the live traffic and constrained carriageway, we are aware of numerous comparable development projects being examples of the WAD process taking generally a minimum of 6-12 months from first applying to the date of obtaining 'shovel-ready' approval to construct, and often greater than 12-18 months due to unforeseen design and negotiation complexities, although Transport for NSW has in recent years thrown substantial resourcing toward improving WAD timeframes for the development industry.

Once the WAD is approved, to bring about delivery of the WAD works, contractors need to be competitively procured. Early pre-contract engagement reduces this delay as much as possible but several months or more may still be likely for many projects to reach final agreement and for the construction resources (e.g. plant, labour and materials) to become available in the preferred contractor's schedule. Once the selected contractor commences onsite, with the aforementioned complexity of traffic staging and pavement works, a construction duration of several months at least may occur and probably longer to manage competing construction activities around each other and the community's expectations regarding scheduling and inconvenience.

Finally after a potential 1-3 years elapsing for WAD approval and construction, once a practical completion inspection for the WAD works is deemed accepted in writing by TfNSW, such project developers would possess evidence to satisfy the building certifier that a CC can be issued as the condition is met. Building works may then progress and might for a typical commercial build be expected to take anywhere from 6 months to 24 months, and typically just under a year. The total project duration could therefore be up to 4-5 years, all the while accruing interest, contractor progress claims and other holding costs. Such delays could render many projects unviable and realising little actual benefits in terms of safety and inconvenience for the community.

Proposed amendment to Condition 30

Instead of a sequential approach to WAD works being completed and then internal site building works, it is common practice in NSW for most comparable DAs to require the two (onsite and offsite) parts of the project to occur in parallel, with tied milestones to ensure key planning- and design-related project risks are 'locked down' before major construction expenses start being incurred, generally being:

- Developer to secure a WAD and detailed design approval so the WAD works are 'shovel ready', prior to a CC being issued for the shovel-ready internal site works, and

- WAD works having to be practically completed prior to an Occupation Certificate being issued.

The effect of this change would likely reduce a comparable project's timeline down to, say, a much more reasonable and feasible 1-2 years, possibly removing the WAD works from the project's critical (minimum timeframe) path, plus or minus project-specific considerations and delays.

We suggest the previously bolded text in Condition 30 be amended to reflect this approach which is acceptable for the vast majority of developers and consent authorities and the communities they serve. Further justification is offered below.

Mitigating reasons supporting amendment of Condition 30

We submit the following points for consideration in support of amendment:

- a) The construction traffic volumes would be made up of the WAD works construction crew, and the onsite construction crews (building works and related carparking area and services). The WAD works constructor (civil contractor) will be directly responsible for implementing a Construction Traffic Management Plan (**CTMP**) to safely move public traffic through and around the site, as well as cater for safety of its own crews, as a standard requirement for WAD works. A CTMP may include many possible mitigation and management measures subject to consultation and approval with both TfNSW and Council, to reduce risks for construction traffic and the travelling public such as (but not limited to) traffic lane deviations, route detours, temporary safety barriers, phasing of works in low traffic volume and night works hours, banning of right turn movements (requiring them to be made at other locations that are safe such as nearby roundabouts and major urban collector roads) and temporary speed zone reductions to manage both the likelihood and consequence of possible collisions.
- b) Meanwhile, access to the site by the internal site building works crews can and should be provided simultaneously under the same CTMP, and public traffic will be aware of the changed traffic conditions and controls in place to avoid the risk of collisions arising from movements in and out of site by building works crews.
- c) Even in the event the onsite building works are proceeding without an external roadworks CTMP in place, the lead building contractor has flexibility to implement a similar CTMP with road authorities' approvals, which may or may not include traffic control and the risk of collisions are readily minimised by the already low levels of likely construction traffic.
- d) For a fast food retail build, the number of light vehicles and few light commercial trucks accessing the site in a given peak hourly period may be expected to fall within the range of 20-30 vehicle movements on a particularly busy day. This peak might normally only occur at the start of the workday for site ingress movements, which represent the largest potential risk due to their decelerating within the main road travel lanes. The majority of construction shift workers typically commence between 6-7am, allowing time for pre-start meetings and site preparation in compliance with any DA conditions for noise management etc. This site traffic commuter peak does not coincide with the main road AM traffic peak period, typically 7-9am, reducing the risk of collisions.

- e) In the afternoon peak period, if workers depart the site en masse around 3pm, they would be required to yield to main road traffic and choose a safe gap. In any case the presence of the sheltered right turn lane to be completed under WAD condition 30 would not substantially benefit safety for these movements. No right turn (out from site) prohibitions can also be enforced under site-specific CTMP if required for safety and this will be evaluated by the principal contractor/s in due course as per standard process, as they are responsible for managing the risks.
- f) For comparison, we understand the requirement for a channelised right turn lane was triggered based on approximately 85 or more peak hourly vehicle movements being forecast at the site in the likely worst-case scenario, once the fast food retail operations commence (Triaxial 2021, and McLaren 2022 Traffic Impact Assessment reports), with reference to the Austroads Guide to Traffic Management Part 6 (AGTM06) recommended warrants for turning lane treatments and other considerations. These volumes are well above the relatively minor building works construction traffic peak hourly volumes discussed above. Under the same Austroads guidance, a Basic Left or Basic Right (shoulder widening) treatment may be indicated to cater for decelerating vehicles, and the existing road shoulder facilities already meet the geometry requirements to effectively provide for cars to safely decelerate outside the through lane if needed.

As such any residual risks to the community or road owners can and should appropriately be managed by the principal contractor(s), through the usual traffic management and risk assessment processes which are already enforced by the standard DA conditions and at law. The DA condition 30 should be amended, and no additional DA conditions are required.

It is understood that concurrence or advice may need to be obtained from TfNSW also in regard to this proposed amendment.

Second issue - Condition 31c Footpath Works

The condition as worded requires the developer to fund and construct a 2.5m wide footpath for the full frontage of the development site along Horatio Street (approximately 49m), as well as a further extension westward fronting two neighbouring allotments and connecting to Lawson Street (approximately an additional 49m). The total footpath would thus be some 98m in length and with a surface area on public land up to 250 m². The cost of this work at current industry rates is not insignificant, given construction price inflation / escalation in recent years, even relative to the total budget for a high-spec commercial build project including WAD roadworks, and we submit that the full cost being borne by the developer is unreasonable.

Proposed amendment to Condition 31c

We note 2.5m is the minimum width suggested by Austroads guides for off-road paths if they are to potentially serve both pedestrian and cyclist users, and can be readily designated as shared cycleway paths, so is often applied to new developments in areas of higher foot traffic across the state. This requirement of itself does not give rise to objection.

The preferred solution for this DA should be to amend the condition to either of the following to suit Council's objectives for the area, as both options appear at this stage to be approximately equivalent in terms of cost and may substantially meet Council's aims:

- 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.

Mitigating reasons supporting amendment of Condition 31c

We understand the rationale for the current condition 31c includes an identified need for improvement of pedestrian and off-road cyclist connectivity along this arterial road precinct, which is zoned for *SP3: Tourist* uses, though the approved fast food premises represent one of the first such recent developments in the zone. The connection to the west would prioritise a link between the site and the Mudgee town centre where no paving currently exists and where the greatest demand (close to the site) is likely to be experienced. The identified infrastructure need is well-founded but the cost imposition on one developer is not considered reasonable.

Councils commonly specify 'frontage works' which cater for uplift in demand (of foot traffic etc.), beyond the specific demand generated by the development itself, in order to meet identified need for provision of improved streetscape and facilities as the broader area develops. We understand that the rationale for such 'frontage works' for public-benefit infrastructure having a nexus to the DA, and not solely being an issue for Council to fund and manage (as distinct from infrastructure which is required purely to cater for the development such as services connections), can be summarised in terms of two counter-balanced considerations:

- Individual developments will intensify demand (of foot traffic etc.) by a comparatively small incremental amount across the surrounding locality, not just the site frontage, and should be required to contribute proportionately across the whole area as a result of that broader intensification.
- Reciprocally, surrounding developments will generate demand across the development site's frontage. The large number of surrounding sites (near and distant) represent the lion's share of likely traffic passing the site and the developer should only be required to contribute public-benefit infrastructure along their site frontage proportionately to their small share of the problem.

The net effect of these considerations can in most cases be considered to result in a 'frontage works' condition being reasonable ensuring the developer contributes in proportion to their share of the problem. As each surrounding site develops and completes their frontage, the desired network uplift outcome is achieved. Any interim period that it takes for this to occur, where sections of the ultimate streetscape might lay incomplete, is a relatively temporary inconvenience which Councils should address with subsequent DAs or opt to undertake proactive or in-fill projects (for sections of footpath etc.) and are not an issue for any one developer to resolve.

In the case of this development, as discussed above, the peak hourly vehicle demand was not forecast to exceed 100 vehicles per hour. Developments such as fast food retail are predominantly accessed by users in vehicles. The share of pedestrians is usually much lower

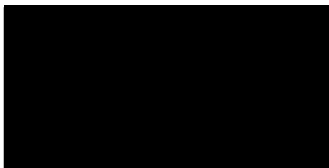
especially in low density regional residential areas (country towns) and conventional traffic planning guidance suggests may in this case be expected in the range of 1-10% of total hourly patrons, or a worst-case of 1-10 persons during the very highest foot-traffic hourly periods (evening mealtimes on one or two days of the week). These development-related users represent a tiny portion of the overall pedestrian traffic expected to use the off-road path in Horatio Street on an hourly basis (averaged over the day), both currently and as the precinct develops.

As such the developer should only be required to complete the equivalent of the full shared path width (2.5m) works along the property's full frontage to Horatio Street. Alternatively Council may prefer (for equivalent cost) to achieve a 1.2m wide link for twice the distance that caters for pedestrians including vulnerable persons and those with a disability or mobility needs. Other users that would benefit from a 2.5m width ultimately (to be provided by other developments or Council), such as cyclists and passing pedestrians, may not be significantly inconvenienced by the need to traverse grass for short sections in the comparatively rare event they encounter oncoming foot traffic.

It is suggested this is a local pedestrian traffic management request arising from land uses surrounding the State Road, with no impact on traffic operations for the State Road, and as such further TfNSW concurrence or advice is not required for this second matter under NSW planning laws if Council is satisfied as to the proposed condition amendment.

If you'd like to discuss or require additional information, please contact Bevan Crofts on 0491 134 428 in the first instance.

Yours sincerely



Bevan Crofts
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