

**SECTION 4.55(2) MODIFICATION APPLICATION ASSESSMENT REPORT
MODDA017/25 SEEKING MODIFICATION OF DA245/13**

Application No.	MODDA017/25 (PAN-539192)
Subject Site	17G Great Western Highway, Marrangaroo Lot 72 in DP1282868 Property number 598842
Proposal	Amend condition 56 of DA245/13
Zoning	R2 – Low Density Residential
Applicant	Heinz Beckers
Owner	Brayton Investments Pty Ltd (ACN 682 060 573)
Public exhibition and neighbour notification	14 days from 01/08/2025 to 15/08/2025
Submissions	12 submissions were received objecting to the modification application
Variations	N/A
Site Inspection	N/A
Responsible Officer	Sandra Politi
Date	10 September 2025
Recommendation	Refuse the modification application

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1. Objective of report

This report assesses and recommends determination of a section 4.55(2) modification application MODDA017/25 of DA245/13.

Recommendation is for **refusal** of the modification application.

2. Summary

Council is in receipt of a modification application (MODDA017/25) to amend condition 56 of development consent DA245/13 as follows:

Current condition 56	That the bridge and intersection construction is to be completed and signed off by a Structure Engineer, Council, John Holland Rail Pty Ltd and the Roads and Maritime Services prior to a Construction certificate being issued relating to the proposed subdivision. <i>(NB – The issue of the construction certificate for subdivision works cannot occur until the bridge and intersections are completed in accordance with this condition).</i>
Proposed condition 56	That the bridge and intersection construction is to be completed and signed off by a qualified Civil Engineer, and where appropriate, Council, UGL Regional Links and Transport for NSW prior to a Subdivision Certificate being issued relating to the proposed land subdivision.

The reason provided by the applicant for the amendment of condition 56 is as follows:

“The bridge works and subdivision works are not physically interdependent on one another, and each requires the engagement of specialist contractors.

The applicant has the benefit of alternate access to enable all subdivision works to be carried out via an existing Right of Carriageway. No machinery or equipment needs to be brought onto the subdivision site via Girraween Drive and Bundara Close.

Construction and completion of the bridge works is subject to Rail Track Access Time which is unpredictable. It may take up to 12 months to complete the bridge works.

There is no risk to Council in granting the Modification sought.”

3. Details of current approval – DA245/13

Development consent DA245/13 was approved with conditions by Council on 2 March 2015 following referral to a number of external agencies including John Holland Rail Pty Ltd (now UGL), Roads and Maritime Services (now Transport for NSW) and Rural Fire Services.

A modification application (MODDA002/21) was approved on 26 March 2021 and a further modification application (MODDA052/22) was approved on 25 September 2023.

The development consent (as modified) conditionally authorises a subdivision of land currently described as Lot 72 in DP1282868 into 65 residential lots as shown on the plan below.



Conditions imposed on the consent include inter alia a requirement that the developer construct a bridge parallel to the existing single lane bridge (at the entrance to Girraween Drive) and intersection works before a construction certificate (now known as a subdivision works certificate) issues in relation to the proposed subdivision.

Conditions pertinent to the bridge and intersection works are 8, 17, 47 to 55, 56, 61, 62 and conditions 84-88, 95-108 and 108a and 108b of the consent provide the approval requirements of Roads and Maritime Services, John Holland Rail and Transfer for NSW.

4. Access to the development site

The property owner and its representatives presently gain access to the site via Girraween Drive, Bundara Place, then across Council land (Lot 68 in DP813538) pursuant to an access agreement.

The image on the following page shows in red the present access route to the site.



5. Effect of amending condition 56 as proposed

The effect of amending condition 56 as proposed is:

- the requirement for the bridge and intersection works to be completed and certified prior to subdivision works will be removed;
- an application for a subdivision works certificate (previously known as a construction certificate) can be made to Council;
- if a subdivision works certificate issues, the subdivision works can commence;
- access and egress to the site for subdivision works (construction of roads, water and sewer infrastructure, and other services) would need to occur via the existing single lane bridge (at the entrance to Girraween Drive) OR over a portion of Crown road and across the railway level crossing to the south of the site;
- the bridge and intersection work would need to be constructed and certified prior to registration of the subdivision plan.

6. Assessment under the Environmental Planning and Assessment Act 1979

The proposed modification application was submitted under section 4.55(1A) of the *Environmental Planning and Assessment Act 1979 (EPA Act)*. However, section 4.55(1A) requires that Council be satisfied that the modification is of no or minimal environmental impact. Council is not satisfied that there would be no environmental impact if the modification application were approved.

Therefore, the modification application is assessed under section 4.55(2) of the EPA Act.

Section 4.55 of EPA Act – Modifications of consents - generally

4.55(2) - Other modifications

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*

<p>Council comment: The proposed modification seeks to amend a condition of consent only. There is no proposed change to the layout, design or intensity of the development, and accordingly the development is substantially the same development that was approved under DA245/13.</p>

- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body*

and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and

Council comment: Council has consulted with relevant public authorities and approval bodies, including Transport for NSW (formerly RMS), Rural Fire Service NSW, UGL (formerly John Holland Rail Pty Ltd), Water NSW, Crown Lands dept, in accordance with clause 109(2) of the *Environmental Planning and Assessment Regulation 2021 (EPA Regulation)*.

Additional, the modification application was referred to Council’s Infrastructure Dept for consideration and comment.

The following responses have been received:

Date	Agency	Comments
06/08/2025	Water NSW	No change in the stormwater/wastewater of the approved layout proposed, as such no impact on water quality is anticipated. NSW's concurrence is therefore not required for this modification.
14/08/2025	Transport for NSW	Condition 56 requires the developer to complete construction of a new bridge and road roads works prior to the issue of a Subdivision Works Certificate for the 65-lot subdivision. The modification proposes to amend condition 56 to enable completion of the bridge and road works prior to the issue of a Subdivision Certificate for the 65-lot subdivision. TfNSW has reviewed the information and has concerns with the proposed request to change the existing conditions. TfNSW highlights that access to the proposed subdivision is a key concern and that traffic intensification of the existing single lane bridge may have safety implications to the state road network. Having the bridge built prior to the issue of a Subdivision Works Certificate will ensure that construction traffic for the project doesn’t impact the safety and traffic of the state road network.
20/08/2025	UGL	UGLRL is not supportive of changing the condition of the developer to construct and complete the bridge during construction certificate to a subdivision certificate. The reason being that there is no other public crossing nearby that can take the impact of the subdivision works and the traffic generated from this development. The point number 2 you mentioned is a private level crossing. Transport NSW is not of the opinion of creating any new level crossings.
11/09/2025	Crown Lands Dept	The department offers no objection provided the Crown road from the highway and over the railway line is transferred to Council.

	Rural Fire Service NSW	Response is imminent. Council may determine the application notwithstanding that a written response has not been received.
01/09/2025	Development and Compliance Engineer – Lithgow City Council	Alternative access is using an unsuitable constructed Crown Road to the rail crossing and Council wouldn't be interested in accepting transfer from Crown Lands just for temporary construction access measure. - Alternative access is not a Council road and Council will not take responsibility of the road as it crosses the rail line and would require Mr Beckers to take out a rail interface agreement. - Alternative access is a ROW in favour of a further property and not a legal road from rail crossing to the property boundary hence a formalised legal agreement would be required.

(c) *it has notified the application in accordance with—*

- (i) *the regulations, if the regulations so require, or*
- (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*

Council comment: The modification application has been notified in the same way the original development application DA245/13 was notified, in accordance with clause 107(2) of the EPA Regulation.

(d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

Council comment: During the public exhibition period Council received 12 submissions in total, all objecting to the modification application.

A list of the concerns raised in the submissions is provided below:

- Safety concerns already exist with the one lane bridge for traffic entering and exiting the Great Western Highway, near misses and accidents.
- The existing bridge is inadequate for additional vehicles and would not cope with construction vehicles.
- If the existing single lane bridge is damaged, residents would not be able to enter or exit the estate.
- Use of the railway level crossing for construction vehicles is unacceptable and an obvious danger as there are no traffic lights at the level crossing; the railway line has constant coal and passenger trains passing all day and night.
- The amendment would allow the subdivision to be completed and land sold without construction of the bridge and intersection being upgraded.
- Concerns that the amended condition suggests a civil engineer approve the bridge rather than a structural engineer.
- A civil engineer has nowhere near the same experience or qualification as a structure engineer.
- Concerns that the developer wants to avoid intersection sign off by UGL and TfNSW.

- The possibility of the development proceeding to any level with only one existing bridge, current resident traffic, golf club traffic, the proposed heavy vehicle construction traffic/equipment is out of the question and should not be considered.
- Concerns about major increase in heavy vehicle movement across an already deteriorating bridge.
- Approval of the modification would compromise the health, well being and safety of current and future residents.
- Concerns that if the developer is allowed to undertake subdivision work before completing the second bridge, the bridge will never be built.
- Condition 56 was imposed to ensure the bridge and intersection were constructed and certified before subdivision works were commenced, as this was essential to providing safe and adequate access for construction vehicles and future residents, avoid exacerbating existing road safety and congestion issues, ensure the developer delivered critical infrastructure as a precondition to commencing subdivision works.
- The attempt to now postpone the bridge and intersection works until the very end of the subdivision process undermines the original basis of approval and the intent of the condition.
- Presently the one lane bridge is dangerous. The exit lane on the highway into Girraween Drive can be congested and is dangerous when cars are travelling at 100kmh along Great Western Highway.
- The proposal is creating a great deal of anxiety and frustration among residents when being told that bridgework will commence and then being notified of attempts to alter DA245/13.

Section 4.55(3)

In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

Section 4.15 of the EPA Act – Evaluation

(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

(a) the provisions of—

- (i) any environmental planning instrument, and*
- (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
- (iii) any development control plan, and*
- (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
- (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*
- (v) (Repealed)*

that apply to the land to which the development application relates,

- (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.*

Council's consideration of 4.15(1)(a) to (e) above	
(a)(i)	<p>Clause 7.10(e) of the Lithgow Local Environmental Plan 2014 (Lithgow LEP) requires suitable vehicle access must be available or that adequate arrangements have been made to make them available when required.</p> <p>It is essential that suitable vehicle access is available at every stage of the development, including the subdivision works stage. Suitable vehicle access was considered extensively during assessment of DA245/13 as demonstrated by conditions 8, 17, 47 to 55, 56, 61, 62 and conditions 84-88, 95-108 and 108a and 108b imposed on DA245/13.</p> <p>Suitable vehicle access is not available and accordingly the modification application does not comply with condition 7.10(e) of Lithgow LEP.</p>
(a)(ii)	Not applicable.
(a)(iii)	Not applicable.
(a)(iiia)	Not applicable.
(a)(iv)	<p>Council has complied with the following requirements of the EPA Regulation:</p> <ul style="list-style-type: none"> - Clause 107(2) of the EPA Regulation requires a modification application to be notified or advertised (a) for the minimum period specified in the Act, Schedule 1, clause 10, and (b) otherwise in the same way as the original development application was notified or advertised. - Clause 109(2) of the EPA Regulation requires that as soon as practicable after a modification application under the Act, section 4.55(2) is lodged with a consent authority, the consent authority must give a copy of the application to each concurrence authority and approval body for the development to which the application relates.
(a)(v)	Not applicable.
(b)	No information has been provided with the modification application to address the environmental, social and economic impacts in the locality in relation to the modification application.

(c)	Not applicable.
(d)	A list of concerns raised in submissions is provided earlier in this report. All submissions have been considered.
(e)	<p>Conditions imposed on DA245/13 demonstrate that the bridge and intersection works are essential to the subdivision development. It is the assessor's interpretation that DA245/13 would not have been approved but for the requirement to construct a second bridge and intersection works prior to the application of a construction certificate (now known as a subdivision works certificate).</p> <p>For the following reasons, the modification application is contrary to the public interest:</p> <ul style="list-style-type: none"> - If access to and egress from the site by construction vehicles is gained via the existing single lane bridge, it would increase the risk of damage to the single lane bridge and thus expose residents of Girraween Drive and Bundara Place, and patrons of the Lithgow Golf Club to an increased risk of basic access to their homes. - If access to and egress from the site by construction vehicles is gained via the Crown road and railway level crossing route it would increase the risk to nearby landowners who gain access to their homes via this route, and pose a risk to construction workers. - If the bridge and intersection works are permitted to be completed post subdivision works, there is an increased risk that the bridge and intersection work will not be completed. Prospective purchasers may have entered contracts to purchase individual lots on the assumption that there would be suitable vehicle access to the land, but the amendment to condition 56 diminishes this certainty.

Council comment regarding consideration of reasons given by the consent authority for the grant of the consent that is sought to be modified

The consent that is sought to be modified is DA245/13. The reasons for conditions imposed on that consent are:

1. To ensure compliance with the terms of the relevant Planning Instruments.
2. To ensure no injury is caused to the existing and likely future amenity of the neighbourhood.
3. Due to the circumstances of the case and the public interest.
4. To ensure that adequate road and drainage works are provided.
5. To ensure access, parking and loading arrangements will be made to satisfy the demands created by the development.
6. To protect the environment.
7. To prevent, minimise, and/or offset adverse environmental impacts.
8. To ensure lots are adequately serviced.
9. To ensure there is no unacceptable impact on the water quality.
10. To ensure compliance with the requirements of the Rural Fire Services.
11. To ensure adequate soil conservation and protect against movement of soil and sediments.

The proposed amendment to condition 56 of DA245/13 conflicts with the reasons for conditions imposed on the development consent.

Recommendation

THAT Modification Application MODDA017/25 is **REFUSED**.



Report Prepared By: _____

Sandra Politi
Development Manager