

6.5 PROHIBITION ON SMOKING LOCAL LAW

Submitting Councillor: Geoff Lake

NOTICE OF MOTION

That Council:

- 1) *notes that Local Law No.4 – Prohibition on Smoking (**the current Local Law**) commenced in 1 October 2011 and will sunset on 30 September 2021;*
- 2) *notes that since the commencement of the current Local Law, the Tobacco Act 1987 (Vic) (**the Act**) has undergone a series of amendments that have significantly expanded no smoking areas to the extent that parts of the Local Law may now be inoperative;*
- 3) *directs officers to draft a new Local Law that retains relevant provisions of the current Local Law and which enables Council to prescribe smoke-free areas in the municipality from time to time;*
- 4) *notes an intention, which is subject to further community and stakeholder consultation, that should the new Local Law be made, Council will use the new Local Law to remove smoking in outdoor public spaces in its activity centres;*
- 5) *directs officers to present a Community Impact Statement and draft Local Law to the January 2021 Council meeting;*
- 6) *directs officers to review and update its Footpath Trading and Access Policy (**the Policy**), including amending the guidelines for assessment and determination, to clarify that Council, in making these public areas available for trade, intends to require that food must be made available for consumption at all times when these areas are in use. For the avoidance of doubt, this change would have the effect of requiring all outdoor public dining areas to be smoke free and prevents a potential loophole following the adoption of a new Local Law whereby smoking is banned in all other public spaces in activity centres but is possible in outdoor dining areas which are designated as outdoor drinking areas; and*
- 7) *notes that, subject to community consultation and Council's further consideration, it is the current intention of Council that any changes will be implemented on 1 July 2021.*

INTRODUCTION

Smoking in outdoor areas is a critical public health issue for Victoria and the Monash community.

Creating smoke-free environments is important to reduce the harms associated with tobacco, preventing chronic disease and achieving greater health outcomes for Victorian communities.

Monash Council has proudly been a strong sector leader in actively developing initiatives aimed at reducing the incidence of smoking and smoking related harm in the community. One such initiative is Local Law No.4 – Prohibition on Smoking (**the current Local Law**) which commenced on 1 October 2011 and sunsets on 30 September 2021.

Council cannot make or enforce local laws that are inconsistent with state laws. If a local law is inconsistent with state law, the local control is deemed inoperative. Since the current Local Law was made there have been a number of significant changes to the *Tobacco Act 1987* (Vic) (**the Act**) that now take precedence over some of its provisions. Given this, and the fact that the current Local Law will sunset next year, it is timely for Council to review its approach to smoking within densely populated public areas and to reaffirm its commitment to public health by making a new local law that enables Council to prescribe smoke free-areas where appropriate.

DISCUSSION

The current Local Law

At its meeting on 30 August 2011, Council adopted the current Local Law which prohibits smoking:

- a) inside or within 10 metres of buildings on Council land;
- b) within 10 meters of a building on a reserve located on council land;
- c) on Council land which includes playgrounds; and
- d) at Council run or sponsored events.

This decision was the culmination of an extensive public consultation process to determine which Council-owned public spaces were supported by the wider Monash community to become smoke-free.

If a place is specified in the Act as a 'no smoking area', Council cannot also seek to regulate smoking in that place inconsistently with the Act by way of a local law. Since the current Local Law was made, many provisions in the

current Local Law are now likely to be inoperative due to being inconsistent with changes introduced to the Act.

For example, the current Local Law bans smoking at the Brine Street Childcare Centre, however the Act now includes provisions that specifically prohibit smoking in and around premises that deliver education and care services. Another example is the Civic Centre where smoking is banned under the current Local Law whereas the Act now prohibits smoking in 'enclosed workspaces' and therefore takes precedence.

Whilst the Act now covers many matters previously controlled by the current Local Law it remains open for Council to prohibit smoking where it is a matter of local concern and providing this is not inconsistent with the Act. This is the approach which has been taken by a number of councils which have created smoke-free environments in their areas. The City of Melbourne is one notable example which has done this and is currently consulting on making the entire CBD smoke-free.

The need for action

It is well past time for Monash Council to act to create smoke-free environments in our popular and high-foot traffic activity centres. Monash Council is no longer a leader in reducing the public health impacts of passive smoke with many other councils having taken strong and decisive action to remove smoking from popular public outdoor spaces.

In my view, Council has an urgent and pressing responsibility to act in the interests of public health to protect the community from the harmful impacts of passive smoking. This is not about discouraging smoking or limiting the right of adults to choose to smoke. What this report is instead directed to, and unapologetically so, is protecting public health.

One person's legal right to smoke does not extend to a right to harm the health of others as a result of that choice. There is no intention to ban smoking in general outdoor public areas where there is sufficient space for appropriate physical distancing such as on most footpaths across the municipality and in parks and gardens. In these spaces, the impacts of passive smoke can be mitigated by a smoker taking steps to distance themselves from others, or in the case where a smoker does not do this, it is reasonably feasible for a person impacted to move from an affected area without being too disadvantaged.

However, that same ability does not exist in high-pedestrian traffic areas or popular activity spaces where the effects of passive smoke are lingering and typically impossible to escape without avoiding these areas altogether. This is true in the case of both the pedestrian moving through these areas and also for the diner eating at a table. It is no longer tolerable that many people

in our community are being forced to avoid these otherwise vibrant and popular community public spaces because of the prevalence of passive smoke.

The expectation of most people in the Monash community for Council to take action to address these impacts has been evident for at least the past five years. It is clear that the overwhelming majority of our community (including many smokers) desperately want Council to do something to address these impacts.

With initiatives currently being rolled out to increase the provision of public space for outdoor dining in response to managing the coronavirus global pandemic, now is a particularly compelling time to act. Council has received \$500,000 from the State Government to create more outdoor dining spaces for traders throughout the municipality to offset some of the impacts of COVID-19 restrictions on indoor dining numbers. With these enhanced outdoor dining opportunities, families and the community generally are being encouraged to dine outside in ever greater numbers. This is expected to be the new 'COVID-normal' situation for, most likely, at least the next 12 months given the logistics involved with distributing worldwide vaccine programs. It makes sense to ensure that this enhanced outdoor dining experience is not only safe from a Coronavirus point of view, but from a public health and wellbeing point of view as well, so people are not confronted with passive smoke health impacts as they shift in greater numbers to outdoor public spaces.

There is a reason to act from a legal perspective as well. Having long been aware and concerned about the prevalence of passive smoke in some areas and the evidence of the health impacts associated with passive smoke, Council is exposed to the risk of legal action being taken against it from members of the public whose health has been impacted as a result of frequenting these spaces.

Just as relevantly, Council is aware anecdotally of many people who refuse to visit areas like Eaton Mall because of the ubiquitous presence of passive smoke. It is no longer acceptable that these people and families are restricted in being able to enjoy and frequent public spaces in their community and which Council invests millions of dollars of rates to improve and maintain, because of harmful impacts on their health.

The health impacts of passive smoke

Passive smoke poses a significant health risk to non-smokers. The World Health Organisation has declared that there is no safe level of second-hand smoke. This assessment is reaffirmed by the Australian Government's Department of Health which has noted that being exposed to tobacco smoke

for just a moment can cause harm and unborn babies, children and people with breathing problems are most at risk.

According to the Victorian Government's *Better Health Channel*, tobacco smoke contains around 7,000 chemicals of which over 70 are known to cause cancer. It advises that second-hand smoke has been confirmed as a cause of lung cancer in humans by several leading health authorities and it describes how compounds such as ammonia, sulphur and formaldehyde irritate the eyes, nose, throat and lungs. These compounds are especially harmful to people with respiratory conditions such as bronchitis or asthma. Exposure to second-hand smoke can trigger or worsen symptoms.

Because of these risks, as well as the basic human right of people to not be impacted by the choices of others who choose to smoke, Council has been a long-term advocate for smoking reform.

POLICY IMPLICATIONS

Monash has earned a reputation as an outdoor dining destination and this is especially so because of the Glen Waverley and Oakleigh activity centres. This needs to be protected by ensuring that outdoor public spaces are safe and protected from the significant health impacts caused by passive smoke. This Notice of Motion attempts to do that and put protections in place as soon as possible, subject to appropriate further consultation. Ensuring these spaces are smoke-free is consistent with the State Government's amendments to the Act in 2017 to ban smoking in all outdoor dining areas across Victoria.

To ensure that passive smoke is removed entirely from these areas, it is proposed that officers be directed to update and amend Council's *Footpath Access and Trading Policy (the Policy)*, including amending the guidelines for assessment and determination to clarify that Council, in making these public areas available for trade, does so on the condition that food must be made available for consumption at all times when they are in use. The service of food and the provision of outdoor dining is the reason that Council has invested in and permitted the commercial use of these publicly owned spaces by traders. That is their purpose. Consistent with the intent of the 2017 amendments to the Act, Council's intention in the interests of public health should be to remove all passive smoke from popular high activity areas where outdoor dining is the focus.

The result of the changes proposed in this Notice of Motion would be that all outdoor trading areas on Council controlled public land would have to be operated as outdoor dining areas. This would achieve a consistency in use that accords with Council's vision for outdoor hospitality and, most importantly, for safe and inclusive public spaces. It is understood that the

City of Melbourne has adopted a similar approach to achieve the same outcome in its municipality. Additionally, with the proposed power to declare other areas beyond outdoor trading areas specifically to be smoke-free (as intended by the proposed new Local Law), Council will have the ability to, for example, restrict smoking in public areas such as pavements and walkways adjoining outdoor dining areas. This is fundamentally important because without such measures, passive smoke will not be able to be kept out of popular outdoor dining areas in high activity spaces since people can smoke in immediately adjacent areas and passive smoke will continue to encroach into these outdoor dining areas.

It is envisaged that declaring areas beyond outdoor trading spaces smoke-free will be limited to appropriate areas where there is a particular intensity of passive smoke impacts arising. This will be subject to public consultation and can be applied flexibly over time so Council can respond to emerging and changing patterns of behaviour. As stated above, this approach is consistent with the objectives of the recent amendments to the Act to ensure smoke-free and safe outdoor dining.

CONSULTATION

The process for consultation for both the making of the new Local Law and updating the Policy will be outlined in further reports presented by officers in response to this Notice of Motion if passed.

We already know however, that 75% of the Monash community support a ban on smoking and this is consistent with the 2014 Cancer Council Victoria survey which found that 73% of Victorian adults disapprove if smoking in outdoor dining and drinking areas.

A key area of focus in the coming months will be consulting and engaging with traders to address any concerns which they have about the changes proposed. Council will do this with an open mind. And this is particularly important in the current COVID-19 environment where their businesses have been significantly affected in 2020. However, with any changes not being proposed to be implemented before 1 July 2021, and this timing being when hospitality trade is generally at its quietest period in the annual calendar, these changes are being considered with plenty of lead-time. There has also been significant consultation by Council in the past in relation to these matters.

Contrary to the concerns of some, I believe removing passive smoke from key dining areas in Monash will lead to a positive impact on trade as many residents and families who have been driven out of these areas because of the impact of passive smoke, will return. Regardless though, the primary consideration ought to be on protecting public health from passive smoke

and ensuring smoke-free outdoor dining spaces consistent with the recent amendments to the Act, rather than on commercial considerations.

CONCLUSION

The prohibition on smoking contained in the current Local Law will soon sunset and has become largely inoperable given changes to the Act over time.

It is time that Council acts to ensure a smoke-free environment in its outdoor dining areas and to reaffirm its commitment to the fair and equal enjoyment of public spaces by establishing a new local law that enables it to prescribe smoke-free areas in appropriate locations. Most importantly, it is time for Council to meet its statutory obligations to protect public health.