

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P3247/2005
PERMIT APPLICATION NO. 788/2005

CATCHWORDS

S 82 Planning and Environment Act 1987 – Port Phillip Planning Scheme – Business 1 zone – Tavern – Impacts on residential amenity – noise – sleep disturbance – change to smoking laws.

APPLICANT	Ann Ryan
RESPONSIBLE AUTHORITY	Port Phillip City Council
RESPONDENT	E & B K Pty Ltd
SUBJECT LAND	175 & 177 Barkly Street ST KILDA VIC 3182
WHERE HELD	55 King Street, Melbourne
BEFORE	Helen Gibson, Deputy President S. R. Cimino, Member
HEARING TYPE	Hearing
DATE OF HEARING	19 May and 26 July 2006
DATE OF ORDER	19 September 2006
CITATION	Ryan v Port Phillip CC [2006] VCAT 1923

ORDER

The decision of the responsible authority is varied. A permit is granted for alterations to the existing building; to use the land for the purpose of a tavern and with an on-premises licence, and waiving of car parking generally in accordance with the endorsed plans at 175-177 Barkly Street St Kilda. The permit must contain the following conditions:

- 1 Before the use and development starts, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When endorsed, the plans will form part of the permit. The plans must be generally in accordance with the plans submitted with the permit application but modified to show:
 - (i) The provision of a “smoking well” designed to meet the requirements for outdoor smoking areas and SEPP – N2.
 - (ii) Details of noise attenuation works to be undertaken.

- 2 The layout of the tavern as shown on the endorsed plans must not be altered except with the written consent of the Responsible Authority.
- 3 The tavern use must only be open to the public between the hours of 7pm and 1.00am the following day, everyday.
- 4 The Permit Operator must ensure that the upstairs windows of the premises are closed from 11.00pm onwards till closing hours to limit the escape of music and patron noise from the premises.
- 5 Noise levels must not exceed the permissible noise levels stipulated in State and Environment Protection Policy N-1 (Control of Noise from Industrial Commercial and Trade Premises within the Melbourne Metropolitan Area) and State Environment Protection Policy N-2 (Control of Music Noise from Public Premises).
- 6 Prior to commencement of the use, the Permit Operator must install and maintain a Noise Limiter ("the Device"), set at a level by a qualified acoustic engineer, to ensure the escape of amplified music does not exceed the requirements of SEPP N-2, to the satisfaction of the Responsible Authority.
- 7 (a) Within 14 days of the installation of the noise limiter a report to the satisfaction of the Responsible Authority prepared by a suitably qualified Acoustic Consultant must be submitted to the responsible authority and shall confirm that a Noise Monitor and Limiter ("the Device") is operating and has each and every of the following characteristics which are also operating:
 - (i) The Device limits internal noise levels so as to ensure compliance with the music noise limits according to State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2).
 - (ii) The Device is a stereo multi-band limiter such as a Sontec programmable noise monitor;
 - (iii) The Device monitors noise levels at frequencies between 50Hz and 100Hz and is wired so as to ensure that the limiter governs all power points potentially accessible for amplification;
 - (iv) The Device controls are in a locked metal case that is not accessible by personnel other than a qualified acoustic engineer or technician nominated by the licensee or occupier of the land and notified to the Responsible Authority;
 - (v) The Device is installed to control all amplification equipment;
 - (vi) The Device is set in such a way that the power to the amplification equipment is disconnected for 15 seconds if the sound level generated by the amplification equipment exceeds for one second the maximum sound level for which the monitor is set;

- (vii) The monitor level component of the Device includes a calibratable frequency discriminating sound analyser with an internal microphone incorporated in its own tamper-proof enclosure (beyond the normal reach of a person). Such a sound analyser will indicate by green, amber and red illuminated halogen lamps the approach and exceeding of the set maximum noise level. The lamps must be in the clear view of the staff and any disc jockey in the room;
 - (viii) The Device must prevent a relevant noise level referred to in these conditions being exceeded.
 - (b) The report must demonstrate compliance with the State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2) noise limits.
- 8 Amplified music is not permitted to be played other than through the Permanently Installed Sound System and when the Device is installed and operating to ensure compliance with State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2 (SEPP N-2).
- 9 All staff on the premises engaged in the service of alcohol must undertake a "Responsible Serving of Alcohol" course.
- 10 Any external lights shall be suitably baffled so as not to cause nuisance or annoyance to nearby residential properties.
- 11 When live entertainment and/or recorded amplified music is being played, the Licensee shall ensure that crowd controllers licensed under the Private Agents Act are to be employed at a ratio of 2 crowd controllers for the first 100 patrons and 1 crowd controller for each additional 100 patrons or part thereof. One crowd controller is to be present outside the premises to monitor patrons arriving and departing the premises. Crowd controllers are to be present from 30 minutes before the start of the entertainment being provided and 30 minutes after closure.
- 12 Prior to the commencement of the use, a Management Plan to the satisfaction must be prepared and submitted to and approved by the Responsible Authority. When approved, the management Plan will be endorsed and form part of this permit. All activities must comply with the endorsed Management Plan. The management Plan must provide that staff will:
- (i) Ensure that the maximum number of patrons on the premises does not exceed 190.
 - (ii) Not facilitate in any manner and positively discourage any patron or potential patron to wait, queue, stand, or smoke in Belford Street or on the east side of Barkly Street.
 - (iii) Not to provide any table, chair, heater or other comfort that may encourage the congregation of patrons in the street.

- (iv) Not to issue patrons with a pass out on any occasion upon which a charge for admission is made.
 - (v) Not to admit or re-admit on the premises any person who has been seen or is known to have created a disturbance in the vicinity of the premises.
 - (vi) Encourage patrons leaving the premises to do so quietly so as to not create disturbance.
 - (vii) Whenever patrons are restricted from free or immediate entry to the premises, or at all times when the premises are open after 11.00pm, or at all times when more than 100 patrons are present on the premises, appropriate supervision will be exercised over patrons waiting to enter the premises to ensure that a clear path for pedestrians is maintained and counsel patrons against creating any disturbance.
- 13 Prior to the commencement of the use, a sign must be installed inside the premises requesting that patrons leave the premises in a quiet and orderly manner and remain so at all times when nearby. The sign must be clearly visible and legible to patrons leaving the premises.
- 14 Without the further written consent of the Responsible Authority no more than 190 patrons shall occupy the premises.
- 15 Provision shall be made for the storage and disposal of garbage to the satisfaction of the Responsible Authority. All garbage storage areas must be screened from public view.
- 16 The amenity of the area must not be detrimentally affected by the use or development through the:
- (i) Transport of materials, goods or commodities to or from the land.
 - (ii) Emission of noise, artificial light, vibration, smells, waste products.
- 17 Bottles must be stored and kept inside the building while the tavern is open to the public and must not be emptied into the external refuse bins between the hours of 11pm and 8am.
- 18 This permit expires if one of the following circumstances applies:
- (a) The use is not started within 2 years of the date of this permit.
- The Responsible Authority may extend the periods referred to if a request is made in writing before the permit expires or within three months afterwards.

Helen Gibson
Deputy President

S. R. Cimino
Member

APPEARANCES:

For the Applicant	Ms Maureen Jackson, town planner, of Davis Langdon
For the Responsible Authority	Mr Phillip Beard, town planner
For E & B K Pty Ltd	Mr Peter O'Farrell of counsel, by direct brief
For Director of Liquor Licensing	Mr Stuart Devlin, solicitor

REASONS

INTRODUCTION

- 1 New tobacco laws come into operation on 1 July 2007.¹ From this date all enclosed licensed premises must be smoke free.² Smoking will only be permitted in an outdoor area such as balcony, verandah, courtyard, roof top or street or footpath area. The concern is that by forcing smokers to congregate in outdoor areas to smoke, this will give rise to potentially adverse off-site environmental amenity impacts through noise, unruly behaviour, odour and butt litter.
- 2 The issue that arises, and which is highlighted by this case, is whether in a planning context the operators of licensed premises should be responsible for these amenity impacts. Should licensed premises be required to provide an outdoor smoking area for patrons, and if so where? Or can operators of licensed premises take the view that so long as the premises are smoke free, it is not their business where patrons wishing to smoke may go to do so. If patrons choose to smoke on the footpath outside, that's their business.
- 3 We have taken the view that the legislative and policy context operating in Victoria make the effects of using land for licensed premises the responsibility of the operators, which includes managing the likely effects of patron behaviour and regulatory compliance. As a general principle, adverse effects should be dealt with on-site and ameliorated, so they do not cause detriment to the amenity of an area or the environment.
- 4 One of the costs of the new tobacco laws is that licensed premises will need to make provision for patrons to smoke outdoors but in such a way that noise in particular does not interfere with sleep at night for nearby residents. If premises cannot provide suitably designed and located outdoor areas on-site, or in limited circumstances off-site, it may mean that the premises are not suitable to be used as licensed premises, and this needs to be recognised as one of the costs.

BACKGROUND

- 5 The wider potential implications of the new tobacco laws in terms of amenity impacts have been highlighted in this case, which is an objector's application for review of the council's decision to grant a planning permit to use the first floor level of an existing building in Barkly Street, St Kilda for the purpose of a tavern.
- 6 The case was heard by Member Cimino who found that the proposal is entirely acceptable except for the potential off-site amenity impacts that may arise once the new tobacco laws come into effect. He published an

¹ *Tobacco (Amendment) Act 2006*

² Enclosed will mean an area, room or premises that is or are substantially enclosed by a roof and walls, regardless of whether the roof or walls or any part of them are permanent or temporary; open or closed.

interim decision and invited further submissions from the parties. However, they were concerned primarily with this case and it became apparent there were broader issues of a state-wide nature relating to how impacts on amenity and the environment would be managed as a consequence of making licensed premises smoke free. For this reason, it was decided to reconstitute the Tribunal to include a presidential member and to invite submissions from a broader group of stakeholders regarding potential impacts and measures to address them. In determining how this case should be decided, there is merit in developing some principles that may guide the consideration of future planning permit applications in order to ensure a consistency of approach.

- 7 Responses were invited from the Minister for Planning, the Minister for Health, the Director of Liquor Licensing, the Municipal Association of Victoria (MAV) and the Australian Hotels and Hospitality Association (AHA), as well as the parties.³

NATURE OF THE PROBLEM

- 8 We are satisfied there is statistical evidence to support the assumption that a proportion of people attending licensed premises will want to smoke irrespective of their smoke free nature. The proportion will depend on the type of venue and the way in which it operates.
- 9 Legislation requiring workplaces and restaurants to be smoke free have been in existence for some time. By and large significant amenity impacts have not been experienced as a consequence. Smokers have tended to use footpath areas but adverse effects have not been noticeable due to the relatively few number of people involved and the hours when this occurs. Different impacts are likely to arise when licensed premises such as hotels, bars, taverns and nightclubs are required to be smoke free for a number of reasons.
 - A higher percentage of people in the 18 – 29 age group are smokers (23%) compared with the rest of the population (16.6%). Licensed venues, particularly ones that offer live or amplified music, are more likely to attract persons in the age group 18 – 29.
 - The consumption of alcohol tends to lessen inhibitions. There is likely to be less voluntary restraint on behaviour thus resulting in higher levels of noise from talking and laughter, and more exuberant, unruly or antisocial behaviour.

³ Substantive responses were received from the Director of Liquor Licensing, MAV, AHA and Yarra City Council. A response on behalf of the Minister for Planning indicated that no amendment has been made or is currently proposed to the Victoria Planning Provisions in relation to the tobacco laws requiring premises to be smoke free, and it is not envisaged that tobacco legislation changes will prevent the continuation of the use of a licensed premises established under an existing planning permit.

- Late night hours of operation. Bars, clubs and taverns tend to operate much later than restaurants, with many not closing until 3am, 5am or later.
 - Venues which offer live music will experience surges of people wanting to smoke between sets compared to other venues, which are likely to experience a more steady exodus of smokers.
- 10 Where licensed premises interface with residential premises noise is a particular problem. Many planning permits require noise attenuation measures to contain noise from music or other sources from licensed premises. Such measures are proposed as part of this proposed tavern. The layout of premises and the areas to which patrons may have access are also frequently of concern and form the subject of conditions in permits. As a matter of general principle, it is important that any outdoor areas where smokers may congregate are shielded from residential uses to avoid disturbing residents' amenity, particularly when they are trying to sleep.
 - 11 We were told that many existing licensed premises are undertaking alterations, additions and renovations to make available a balcony, a courtyard, rooftop or other similar area which will meet the legislative requirements of an outdoor area that will not need to be smoke free once the new tobacco laws come into operation. However, we note that in the education material being provided by the Government and the AHA about the new tobacco laws and what sort of outdoor dining and drinking areas will comply with the legislation, there is no emphasis on the need to ensure that such outdoor areas can be used for smoking without detrimentally affecting off-site amenity. No attention is drawn to the importance of where such areas should be located or the possible need for noise attenuation.
 - 12 We do not consider it is wise or appropriate having regard to the legislative and policy context in Victoria to adopt a head-in-the-sand approach to what will happen when people can no longer smoke in licensed premises. Some patrons may choose not to smoke at all, but there will be a proportion of others who will still wish to smoke and who will go outside to do so, either outside on the premises or onto the footpath. It is not socially responsible to make premises smoke free and then ignore where patrons go to smoke and the effects of their behaviour on other people.
 - 13 Whether people use outdoor areas provided on the premises or smoke on the footpath, there will be potential consequences for other people. Those consequences should be acknowledged now. Measures should be adopted to deal with them before the tobacco laws come into effect rather than waiting for problems to occur which are then passed on to other people – residents and local councils – to deal with.

IMPACTS ON PUBLIC HEALTH AND PLANNING POLICY

- 14 The tobacco laws requiring licensed premises to be smoke free are a response to an occupational and public health problem. It is important that when implementing the law to address one problem, the measures introduced do not indirectly cause other problems, including detrimentally affecting amenity due to sleep disturbance.
- 15 Planning policies in recent years have encouraged greater residential use in activity centres. It is recognised that people living in or abutting activity centres and business zones cannot expect to enjoy the same residential amenity as people living in a purely residential environment. However, this is not to say that such people are not entitled to a reasonable level of amenity especially in terms of getting a good nights sleep. Hence State Environment Protection Policies regarding noise – SEPP-N1 (Control of Noise from Commerce, Industry and Trade) and SEPP-N2 (Control of Music Noise from Public Premises) – both deal with noise sensitive areas, which include residential buildings, hospital wards, hotels and motels, and both aim to protect normal domestic and recreational activities. In the case of each SEPP, sleep at night is included as an important beneficial use to be protected.
- 16 Key objectives of planning in Victoria set out in the *Planning and Environment Act 1987* include securing a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria.⁴ The objectives of the planning framework established by the Act include ensuring that effects on the environment are considered and there is explicit consideration of social effects when decisions are made about the use and development of land.⁵ Effect on amenity is always a major consideration in the decision whether to grant or refuse a planning permit under the Act.
- 17 The objects of the *Liquor Control Reform Act 1998* include ensuring as far as practicable that the supply of liquor contributes to, and does not detract from the amenity of community life.⁶ The issue of amenity is specifically addressed in the *Liquor Control Reform Act 1998*. For the purposes of this Act, the amenity of an area is the quality that the area has of being pleasant and agreeable.⁷ Factors that may be taken into account in determining whether the grant, variation or relocation of the licence would detract from or be detrimental to the amenity of an area include noise levels and the possibility of nuisance or vandalism.⁸
- 18 One of the grounds on which the Director of Liquor Licensing may refuse a liquor licence application is that the granting of the application would

⁴ Section 4(1)(c) *Planning and Environment Act 1987*.

⁵ Section 4(2)(d) *Planning and Environment Act 1987*.

⁶ Section 4(a)(ii) *Liquor Control Reform Act 1998*

⁷ Section 3A(1) *Liquor Control Reform Act 1998*

⁸ Sections 3A(2)(c) and (d) *Liquor Control Reform Act 1998*

detract from or be detrimental to the amenity of the area in which the premises to which the application relates are situated.⁹ It is a condition of every liquor licence that:

The licensee shall not allow or permit undue detriment to the amenity of the area to arise out of or in connection with the use of the premises to which the licence relates during or immediately after the trading hours authorised under this licence.

- 19 It is therefore clear that in complying with the new tobacco laws, licensees cannot ignore the need to protect the amenity of surrounding areas, in particular from noise that may interfere with sleep at night. Failure to address this issue will also create conflict with other government policies, which aim to encourage higher density housing in and around activity centres¹⁰, by making such locations unsuited or unattractive for residential use.

WHERE MAY PEOPLE SMOKE?

Outdoor areas on the site

- 20 In referring to outdoor areas where smoking may be permitted on the same site as licensed premises, there are two scenarios:
- Outdoor dining and drinking areas that are within the approved licensed area [defined by a red line on the plan attached to the liquor licence] where alcohol may be consumed; and
 - Outdoor areas that are not within the approved licensed [or red line] area where no alcohol may be consumed.
- 21 We recognise that the potential for noise is likely to be greater when the outdoor smoking area is within the approved licensed area. People are likely to linger in these areas longer because they can drink and smoke at the same time. Proprietors are likely to make these places attractive for patrons by the provision of seating and heating. By contrast, outdoor areas which are not within an approved licensed area are likely to be less attractive. People are likely to go there only for a smoke and then return to the licensed area. The time they spend there is likely to be less, but this is no guarantee that talking and laughter will not occur and that the noise may not cause detriment to off-site amenity.
- 22 Opening up outdoor areas may also lessen the effectiveness of noise attenuation measures designed to control internal noise or music. This may occur by means of frequent opening and closing of doors, or by creating new openings through which sound may escape.
- 23 In our consideration of the principles that should apply to the way in which licensed premises cater for smokers, we have not drawn any distinction

⁹ Section 44(2)(b)(i) and section 47(2) *Liquor Control Reform Act* 1998

¹⁰ For example, see clause 12.01-2 of the State Planning Policy Framework in all planning schemes

between outdoor areas provided on the site which are within the approved licensed area and those which are not. We consider that both types of outdoor area have the potential to cause detriment to amenity.

Footpath areas

- 24 Where licensed premises do not provide outdoor areas for smoking on-site, patrons are likely to temporarily leave the premises and congregate in proximity on the street.
- 25 Potential impacts associated with patrons smoking on the footpath include street obstruction and patron behaviour issues; noise nuisance from people congregating outside the premises; and increased litter from cigarette butts. The extent of these impacts will be influenced by the scale of the premises, their target market and the nature of the use of the premises, for example whether it offers live music.
- 26 If people use the footpath to smoke, control over patron behaviour becomes more difficult. It is not an enclosed space and there is nothing to prevent people from wandering away from the immediate vicinity of the venue whilst they have a smoke. Patrons must also share the space with other users of the street. Crowding and lack of free movement for passers-by may be an issue.
- 27 Cigarette butts also create environmental problems. Apart from litter on footpaths, which must be swept up, there is a risk that increased numbers of butts will enter the stormwater system contributing to pollution of waterways and bays.

WAYS OF HANDLING THE ISSUES

- 28 Various approaches will be required to handle the issues arising from the new tobacco laws, including education, enforcement, regulation and management involving local councils, the Director of Liquor Licensing and the police.
- 29 The Director of Liquor Licensing will have a major responsibility in terms of granting and renewing liquor licences. As noted earlier, all licences contain an amenity condition. Consequently, there is an obligation on licensees not to permit undue detriment to the amenity of surrounding areas.
- 30 However, local councils will bear much of the responsibility for granting permits, handling complaints and enforcement. Our concern is with actions that may reasonably be taken within the planning context to make owners and operators of licensed premises responsible for dealing with potential adverse off-site amenity and environmental effects arising from the tobacco laws requiring venues to be smoke-free.
- 31 There will be varying opportunities on the part of councils to regulate the behaviour of patrons who smoke within either outdoor areas of licensed premises, or in relation to smokers on the footpath or street in the vicinity of

a licensed premises. It is envisaged that the four main scenarios (or combinations thereof) that may present to a council are as follows:

- The use of the licensed premises requires a planning permit – an area on-site may or may not be provided for patrons who smoke.
- Permission is required for buildings and works to create an outdoor area (including for smokers).
- No permission is required – a premises either has existing use rights or an existing permit.
- A footpath trading licence is applied for to allow the placement of tables and chairs on the footpath to cater for patrons including smokers.

32 There are a range of planning measures available to address off-site amenity impacts associated with the need for people to smoke outdoors once licensed premises become smoke free.

- **Design of Premises** – outdoor smoking areas are designed and located to avoid noise and patron behaviour impacting adversely on adjoining or nearby noise sensitive locations (including residential uses).
- **Conditions in permits** – conditions can specify development requirements (eg noise attenuation) or control use (eg hours of operation).
- **Management Plans** – management plans are a means of controlling patron behaviour in outdoor areas either on-site (whether part of the approved licensed area or otherwise) or within the public realm (on the footpath or in other public areas). Management plans can require staff from the licensed premises to control noise, crowd behaviour and litter removal.

33 We consider the most effective means of avoiding adverse off-site amenity effects is in the design of premises. If outdoor areas are designed and located to avoid problems this will be more effective than attempting to control behaviour through management plans. Management plans are a less effective option and should only be accepted as a solution when there is no other alternative. They work best as a back-up to other measures. Their effectiveness will depend upon the responsiveness of people responsible for implementing and monitoring them, and there is always the risk that problems will arise before they are brought under control by action under the management plan.

34 Conditions in permits relating to development can overcome some problems associated with poor design although they are no substitute for a design which locates outdoor areas away from noise sensitive locations in the first place. Conditions relating to use, such as limiting hours of operation, are effective when they can be legitimately imposed. The greatest uncertainty arises when a permit is only required for buildings and

works, but those buildings or works may be used as an outdoor area for smokers. The question that often arises is whether this use can be restricted or controlled by conditions on a development permit.

PRINCIPLES TO APPLY

Use of the public realm

- 35 It is a fundamental planning principle that uses and developments should preferably handle amenity impacts and regulatory compliance on the site. Impacts and compliance measures should not be moved off-site onto other land or into the public realm.
- 36 The footpath is part of the public realm. There appears to be a commonly held assumption that if the footpath is the only option where people may smoke once licensed premises become smoke free, then that is where they should go. However, this begs the question as to whether, as a matter of public policy, it is reasonable to use the public realm to cater for an integral aspect of the use of adjoining land. In other words, should a licensed premises, which is required by law to be smoke free, be able to rely upon the public realm to cater for patrons who want to smoke but cannot do so within the venue?
- 37 In recent years there has been a dramatic change in the use of the public realm as an adjunct to use of other premises. For example, the relaxation of liquor licence laws mean that it is commonplace for cafes and restaurants to have a licensed outdoor area on the footpath which is used for eating and drinking. Legislation requiring shops, workplaces, theatres etc, to be smoke free has also meant that people from these venues who wish to smoke now congregate on footpaths for this purpose. A direct consequence of the new tobacco laws will be an increase in this change of use of the public realm. The question is to what extent this should be permitted or encouraged.
- 38 We consider that in line with changed community attitudes towards use of the public realm it is reasonable that footpath areas which are already part of approved licensed premises may be used as an outdoor area for smoking. It is also reasonable that in some other circumstances footpaths can be used in conjunction with small scale venues subject to a suitable management plan because the effects will be limited and within acceptable bounds. But it is not reasonable to expect that, in general, the public realm will be available as the primary place to accommodate patrons attending licensed venues who wish to smoke but are unable to do so within the premises themselves. This reflects the principle that a use should handle its effects on-site.

Outdoor smoking area to be provided on site

- 39 In general, we consider that a suitably designed and located outdoor area for smoking should be provided, on the site of the licensed premises. By 'suitably designed and located,' we mean that the outdoor area meets the

appropriate criteria in the tobacco laws and that its use will not give rise to any adverse off-site amenity impacts relating to noise, odour or patron behaviour.

- 40 This may mean with respect to new uses requiring a planning permit that if a suitably designed and located outdoor area cannot be provided on-site, the use should not be permitted. Whilst this may seem harsh, it is a consequence of the tobacco laws designed to protect occupational and public health by making licensed premises smoke free. There will be costs associated with such measures. Those costs cannot be avoided simply by pushing the attendant effects off-site and permitting smoking to occur in locations where noise will interfere with people's sleep at night or other adverse effects will be experienced.
- 41 We consider that a similar approach should also apply to existing uses, although we recognise that it may not always be possible to implement this approach through the planning system. It will be up to the Director of Liquor Licensing as to what conditions should be imposed when licenses are renewed or varied.
- 42 It may be argued that a requirement to provide an on-site outdoor smoking area undermines the tobacco laws requiring licensed premises to be smoke-free. We disagree. The new tobacco laws do not ban smoking *per se*. They only ban it within enclosed areas because of the risks to health associated with people being in a smokey atmosphere. Smoking will still be permitted in outdoor areas.
- 43 As we said earlier, we are satisfied that a proportion of patrons attending licensed premises will want to smoke. We consider that licensed premises should therefore cater for these patrons on-site.¹¹ If they can't, then this is indicative that the premises are unsuitable to be used as licensed premises, under this new regulatory regime.

SPECIFIC REQUIREMENTS

Use of licensed premises requires a permit

- 44 Use of licensed premises may require a planning permit under zone provisions or under clause 52.27.
- 45 Clause 52.27 is a broad provision that requires a permit to use land to sell or consume liquor if a new licence is required; an existing licence is changed; or hours of trading under any licence are to be extended. There is no limitation in the ambit of the words or the permission required which would imply that conditions cannot relate to any aspect of the use of land to sell or consume liquor.

¹¹ Unless the premises is only of a small scale or has access to an off-site (footpath) area which is part of the licensed premises.

- 46 In *Bomvic Pty Ltd v Yarra CC*¹² the Tribunal held that the purpose of clause 52.27 is to consider the whole use of the land to sell or consume liquor not just a limited aspect of the use. Under the provisions of clause 52.27 a permit is required to use land to sell or consume liquor – it is not a permit to extend hours of operation or a permit for a change in licence. In other words, the permit is not required for the triggering event but for the wider, more general use of land to sell or consume liquor. Therefore conditions must fairly and reasonably relate to this wider, more general use; they need not just relate to the triggering event. This means that there is considerable discretion available to impose conditions, or indeed to refuse a permit if a suitably designed and located outdoor area for smokers is not provided, when a permit under clause 52.27 is required.
- 47 As a general rule, we consider that where a use for a licensed premises requires a planning permit, patrons wishing to smoke must be provided for by one of the following means:
- In the case of small scale venues¹³, the footpath or other area of the public realm may be used as an outdoor area to smoke subject to an appropriate management plan.
 - There is an existing approved licensed area either on the site or off-site (on the footpath or otherwise in the public realm) that meets the criteria for being an outdoor area where people may smoke, subject to an appropriate management plan.
 - In all other cases, a suitably designed and located outdoor area must be provided on the site where people may smoke. A management plan may or may not be needed depending on the circumstances. The outdoor area may or may not be within the approved licensed area; it doesn't matter.

Buildings or works require a permit

- 48 Situations may arise where a permit is required to construct a deck, or balcony or the like that may be used as an outdoor area for smokers but no use permit is required under clause 52.27 or otherwise under the zone provisions because it is not intended to be part of the approved licensed premises.
- 49 In these circumstances we consider the design and location should be assessed in terms of whether its use by smokers will cause any adverse off-site amenity effects. If no effects are likely, there is no reason why it could not be used by smokers. If there may be adverse off-site effects, then a condition in the permit should specify that it must not be accessed or used by patrons of the licensed premises whether to smoke or for other purposes.

¹² [2004] VCAT 1961; 18 VPR 65

¹³ We have not attempted to define what is 'small scale'. This will depend on the circumstances of the case and we believe what is 'small scale' will become apparent with experience over time.

No permission is required – existing uses and permits

- 50 The main sources of complaint about patrons using outdoor areas to smoke are likely to arise with existing licensed premises where people simply go outside into existing areas (such as backyards) where no new development is required to accommodate them and no new use permit is required.
- 51 Where there is an existing permit, there may be a condition that specifies that the use or development must be in accordance with endorsed plans and must not be altered without the consent of the responsible authority. Depending on the endorsed plans, this may provide a council with control over the use of outdoor areas.
- 52 Where premises have existing use rights, then the amenity condition in the liquor licence will influence the way in which outdoor areas are used by patrons wishing to smoke. As we have previously noted, the Director of Liquor Licensing will have an important role to play in managing the implications of the new tobacco laws.

Footpath trading licences

- 53 Both Yarra City Council and the Australian Hotels and Hospitality Association identified the likely increase in *al fresco* permissions that will be sought from local government either complimentary to outdoor smoking areas on the licensed premises or as an option where no such licensed area opportunity is available.¹⁴ We believe that councils should consider carefully the implications of noise, patron behaviour and litter that may arise from the increased use of licensed footpath areas by smokers when deciding whether to grant licenses or permits for footpath trading under local laws. Hours of operation, cleaning and appropriate management are usual requirements of such local laws.

SHOULD A PERMIT BE GRANTED IN THIS CASE

- 54 Our conclusion is that the subject site in the present case is appropriate for the use applied for provided a suitably designed and located outdoor area for smokers on-site can be provided.
- 55 The permit applicant has suggested that an outdoor area in the form of a “smoking well” could be provided if required. Although the permit application did not seek permission for buildings and works, the council has advised that it does not have any concerns with the provision of a “smoking well” provided that appropriate acoustic treatments are put in place. We agree with the council’s position that the works associated with the provision of a smoking well would be relatively minor and it would be appropriate to amend the permit application to provide for such an area. This can be shown on amended plans. We also agree with the council’s

¹⁴ Pursuant to section 3B of the *Liquor Control Reform Act* 1998, no additional liquor licensing conditions are required if a general licence is held, provided the sale of liquored (the appropriation of the goods to the order) occurs within the area subject to the general licence.

position that this area will need to be positioned and designed so as to minimise noise impacts. This is a matter that can be considered by the council when the applicant submits amended plans.

- 56 A permit will be granted requiring an amendment to the plans before they are endorsed to show this. If such an area cannot be provided to the satisfaction of the responsible authority in a way that the amenity of surrounding residents will not be adversely affected at night when they are trying to sleep, then the use will not be able to proceed. The other conditions on the permit remain largely in the form that they were imposed by the council on the Notice of Decision. However, we have made some changes in light of issues raised at the hearing and the further submissions presented by the parties.

Helen Gibson
Deputy President

S. R. Cimino
Member