

1.7 SMOKE FREE AREAS LOCAL LAW

Responsible Director: Peter Panagakos

RECOMMENDATION*That Council:**Part A*

1. *Notes that at its meeting of 15 December 2020 Council directed officers to draft a new Local Law that retains relevant provisions of the current Local Law (which sunsets on 30 September 2021 and as a result of a series of amendments to the Tobacco Act 1987 that have significantly expanded no smoking areas to the extent that parts of the Local Law may now be inoperative) and which enables Council to prescribe smoke-free areas in the municipality from time to time.*
2. *Receives the proposed Smoke Free Areas Local Law (2021) (proposed Local Law) and associated Community Impact Statement.*
3. *Gives notice, in accordance with sections 119(1) and 223 of the Local Government Act 1989, in the Victoria Government Gazette and in a newspaper circulating generally in Council's municipal district:*
 - 3.1 *stating the purpose and general purport of the proposed Local Law;*
 - 3.2 *stating that a copy of the proposed Local Law can be obtained from Council's website;*
 - 3.3 *inviting submissions, in accordance with section 223 of the Local Government Act 1989, within 28 days from the date of publication of the notice; and*
 - 3.4 *stating that a person making a submission is entitled to request to be heard in support of their submission.*
4. *Authorises Council's Chief Executive Officer or her delegate to undertake the administrative procedures necessary to enable Council to carry out its functions under Section 223 of the Act in respect of the proposal.*
5. *Appoint a Committee of Council comprising of all Councillors to hear any submitters requesting to be heard and consider any submissions received under Section 223 of the Act on a date and time to be fixed.*

6. *Consider a report of the Committee of Council's proceedings, including a summary of the hearings, on section 223 process on the proposal at the Ordinary Meeting of Council on a date and time to be fixed.*
7. *Authorises the Chief Executive Officer to take such steps as are necessary to give effect to this Resolution.*

Part B

1. *Notes that at its meeting of 15 December 2020 Council directed 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, requires that food must be made available for consumption at all times when these areas are in use.*
2. *Notes that a review of the Footpath Trading and Access Policy 2016 has been conducted in accordance with Council's resolution of 15 December 2020.*
3. *Receives the Revised Footpath Trading and Access Policy 2020 and releases the revised Policy for public consultation concurrent with the consultation process associated with the draft Smoke Free Areas Local Law 2020.*

Part C

1. *Allocates \$30,000 for consultation and legal costs required to implement the recommendations in Parts A & B of this recommendation.*

INTRODUCTION

This report presents a draft Smoke Free Areas Local Law and the Revised Footpath Trading and Access Policy 2020 for Council's consideration and describes the process required to bring them into operation.

BACKGROUND

At its meeting on 15 December 2020, Council noted that Local Law No.4 - Prohibition on Smoking (the current Local Law, Attachment One) will sunset on 30 September 2021 and that since its commencement 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 or have been superseded by amendments to the Act.

Council directed officers to draft a new Local Law that retains relevant provisions of the current Local Law which deal mainly with smoking in proximity to Council buildings and at Council events, but which also enables Council to prescribe smoke-free areas in the municipality from time to time.

At its meeting of 15 December 2020 Council also noted an intention, which is to be 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 high-activity public spaces in its activity centres.

Whilst acknowledging that a new Local Law would not apply to any areas that are expressly regulated by the Act, such as permitted outdoor drinking areas, Council also directed officers to review and update its Footpath Trading and Access Policy (the Policy) to clarify that Council, in making public areas available for trade, requires that food must be made available for consumption at all times when these areas are in use. Consistent with the Act, as long as food is commercially available, smoking will be prohibited.

A review of the Policy has been conducted and the Revised Footpath Trading and Access Policy 2020 has been prepared for Council's consideration.

DISCUSSION

Smoke-free Areas Local Law

A new Local Law titled City of Monash Smoke Free Areas Local Law (2021) (Attachment Two) has been drafted for Council's consideration.

The proposed Smoke Free Areas Local Law will revoke the current Local Law and provide mechanisms for Council to prescribe areas within the municipality to be smoke-free.

In addition, the Local Law includes and maintains the intent of the current Local Law with regard to smoking in proximity to Council buildings and at Council events. Given that over time, with amendments to the Act, some of these provisions have become non-operational the wording in the Local Law has been simplified (making it all encompassing) and clarification has been added that with regard to these specific aspects that the Local Law applies to the extent that it is not inconsistent with any other applicable Act or regulation or the Monash Planning Scheme.

With regard to prescribing areas within the municipality to be smoke-free, the draft Local Law provides that when determining a Smoke Free Area Council must have regard to the following factors:

- the size of the proposed Smoke Free Area;

- the proximity of the proposed Smoke Free Area to a public place, part or all of which is not in a Smoke Free Area;
- the views of any person who is the owner or occupier of any part of the proposed Smoke Free Area;
- the extent and outcome of any community engagement on the proposal to prescribe the Smoke Free Area;
- any benefits to the community which would be achieved by Council prescribing the proposed Smoke Free Area; and
- any detriment to the community which would be caused by Council prescribing the proposed Smoke Free Area.

The proposed process accounts for a range of considerations that will assist decision making in terms of both community and stakeholder interests and procedural fairness. Put simply, should Council ultimately determine to adopt the draft Local Law, the process, inclusive of consultation outlined above, will need to be followed before prescribing any area a Smoke Free Area. This is largely consistent with the current process under the current Local Law and the Policy.

The proposed Local Law creates three offences (clauses 9.1, 9.2 & 9.4) attracting a maximum penalty of 5 penalty units, with an infringement penalty of 2 penalty units as set out below:

9. NO SMOKING IN SMOKE FREE AREAS

- 9.1 A person must not smoke a Tobacco Product or an E-Cigarette in a Smoke Free Area.

Penalty: 5 Penalty Units

- 9.2 A person who is the owner or occupier of land in a Smoke Free Area must not suffer or permit, whether personally or by their employees, contractors or agents, a person to smoke a Tobacco Product or an E-Cigarette on that land.

Penalty: 5 Penalty Units

- 9.3 Where an Authorised Officer believes on reasonable grounds that a person is contravening or has contravened clause 9.1, the Authorised Officer may direct the person to:

- 9.3.1 in the case of a Tobacco Product, extinguish and then dispose of the Tobacco Product; or
- 9.3.2 in the case of an E-Cigarette, cease using the device.
- 9.4 A person to whom a direction is given under clause 9.3 must comply with that direction.

Penalty: 5 Penalty Units
(1 Penalty Unit = \$100)

Whilst there are enforcement options available, it is anticipated that the draft Local Law will be self-enforcing with wilful compliance being achieved through community education and expectations that de-normalise smoking in declared smoke-free areas.

Revised Footpath Trading and Access Policy

A Revised Footpath Trading and Access (Attachment Three) has been prepared for Council's consideration in the same terms as a revised Policy which was presented to Council at its meeting of 27 March 2018. Council consulted on the revised Policy thereafter and at its meeting of 26 June 2018 Council noted the results of consultation and the matter did not progress any further.

Dedicating footpath trading areas for the sole purpose of consuming drinks and packaged snacks was never envisaged by Council. Instead Council has always sought to ensure that outdoor dining adds to the vibrancy and attractiveness of an area with a welcoming family friendly feel. That vision has been articulated in the revised Policy as follows:

Councils vision for footpath trading areas

Council wishes to foster the development and continued improvement of vibrant and welcoming communities within its municipal district. It encourages the use of outdoor trading areas by local businesses for this purpose. It is Council's intention that outdoor trading areas will be utilised to attract visitors and create welcoming family environments.

Where a local business wants to make use of an outdoor trading area, Council, in assessing these requests, will ensure that traders contribute to the local atmosphere and vitality and engage in uses that are complimentary to the existing use being made of nearby outdoor trading areas.

For example, where an outdoor trading area is in an area predominantly used for al fresco dining, Council will require a trader

to make food available for consumption in such areas at all times. For the avoidance of doubt, this will have the effect of requiring all outdoor public dining areas to be smoke free.

Where the Policy is specific to Eaton Mall, Oakleigh the revised Policy states:

Council's vision for Eaton Mall

Eaton Mall is locally and internationally renowned as a food destination, providing predominantly Greek cuisine in an al fresco environment. The atmosphere and vitality of Eaton Mall is entirely unique in Melbourne and Council is dedicated to retaining that character.

Council's vision for Eaton Mall is to protect, and continue to improve on, its renown. It will do so by ensuring that traders in Eaton Mall continue to contribute to its atmosphere and vitality, particularly by making food available for consumption in al fresco areas at all times. For the avoidance of doubt, this will have the effect of requiring all outdoor public dining areas to be smoke free.

If the revised Policy is adopted by Council, following the consultation process and Council's consideration of any feedback received, footpath trading permit conditions would be used to implement the vision described above.

A permit condition may be as follows:

At all times the permit area is in use, the permit holder must make food available for consumption on a commercial basis, whether that food is provided by the permit holder or somebody else. A snack (i.e. pre-packaged shelf-stable food or piece of fruit) does not constitute 'food' for the purposes of this condition.

The effect of the condition will be that a trader will be required to make food commercially available at all times that an outdoor dining area is in use. Consistent with the Act, as long as food is commercially available, smoking will be prohibited.

POLICY IMPLICATIONS

The Monash Health and Wellbeing Plan 2017-2021 aims to reduce harms from smoking and undertakes these actions:

- *Promote and advocate to minimise harm from smoking.*
- *Facilitate opportunities for the community to better understand how to prevent and/or minimise harm from alcohol, smoking and other drugs.*

The recommendations in this report are also relevant to the following Council Plan objectives:

A Liveable & Sustainable City:

We value our natural environment and want to preserve and enhance the leafy and green character of our city. Monash's desirability as a place to live, learn, work and play needs to be protected.

Inviting Open & Urban Spaces:

We will continue to improve our public infrastructure, meeting places and open spaces, providing inclusive, safe and inviting places for community use.

An Inclusive Community:

Our people and our communities are healthy, connected and engage.

SOCIAL IMPLICATIONS

The benefits of smoke-free areas are broadly considered to outweigh any perceived or demonstrated social implications. Smoking is legal and it is an individual's choice to smoke but smoking is already prohibited in many public places and smoke-free areas declared by Council will simply be an extension of these.

Whilst the implementation of a revised Footpath Trading and Access Policy will mean that traders cannot operate outdoor drinking areas where people may smoke, there are broader social and economic benefits in delivering Council's vision of attracting visitors and creating family friendly al fresco areas.

HUMAN RIGHTS CONSIDERATIONS

The implications of the Smoke-free Areas Local Law have been assessed as compatible with the requirements of the Charter of Human Rights and Responsibilities Act 2006.

CONSULTATION

The *Local Government Act 1989* requires that a Community Impact Statement (Attachment Four) be prepared whenever local laws are proposed to be made. It is a review document that intends to provide the reader with an accessible explanation and justification for Council's decision to exhibit a new local law related to smoke free areas. This document also forms the start of the formal consultation process.

Prior to making a local law Council must give notice of its intention to make a local law in the Government Gazette and a public notice (newspaper) inviting submissions.

It is proposed to place notices in the Government Gazette, The Age newspaper and Council's website. The draft Local Law, along with the Community Impact Statement, will be made available at the Civic Centre, Oakleigh Service Centre, libraries and on Council's website.

The statutory period for making submissions is no less than 28 days after the date on which the public notice is published and submitters will have the opportunity to make written submissions. Any person making a submission is entitled to request (in the submission itself) to be heard in support of their submission by appearing before a Council meeting.

It is proposed that consultation on the Revised Footpath Trading & Access Policy occur concurrently with the above-mentioned process and that a consultation plan be prepared in order to do this.

FINANCIAL IMPLICATIONS

For the most part the outcomes arising from the recommendations in this report can be delivered within existing budget however there will be unbudgeted costs associated with consultation processes and the need to obtain additional legal advice.

These costs cannot be met within the budget currently allocated to the responsible departments and a \$30k needs to be allocated for these purposes.

CONCLUSION

Consistent with a resolution of Council a Smoke Free Areas Local Law has been drafted for Council's consideration. The draft Local Law will revoke Local Law No.4 - Prohibition on Smoking and will give Council the ability to declare smoke-free areas within the municipality from time to time.

Furthermore, the Revised Footpath Trading & Access Policy 2021 has been prepared for Council's consideration.

It is recommended that Council gives notice of its intention to make the Smoke Free Areas Local Law (2021) and releases the Revised Footpath Trading & Access Policy 2021 for public consultation.