

PLANNING AND SUSTAINABILITY COMMITTEE**25 AUGUST 2012****2**

APPLICATION FOR A DESIGNATED OUTDOOR SMOKING AREA ON THE FOOTPATH ADJACENT TO THE CENTRAL HOTEL, MACROSSAN STREET, PORT DOUGLAS - DIVISION 10

Paul Hoyer 1/11/3-03: 3666055

RECOMMENDATION:

- A. That Council defers a decision on the application by Hilrok Hotel Group to use part of a Council controlled footpath area for smoking, whilst a review is undertaken throughout the Regional Council area as part of the future review of Local Laws; and**
- B. That the applicant be advised that the area outside the Central Hotel be required to comply with the terms and conditions of the current Permit to Place Tables and Seating on a Footpath; issued in 2001 and subsequently approved as a no smoking area from the commencement of the 2008/2009 financial year.**

EXECUTIVE SUMMARY

Hilrok Hotel Group owners of the Central Hotel, Port Douglas, have applied to Council to use part of a Council controlled footpath area designated for dining, in Macrossan Street, Port Douglas, for the purposes of smoking.

The Central Hotel is located on four (4) separate parcels of land, comprising a total land area of 4048 square metres. It is the assessment of Council Officers that the business has adequate area to operate outdoor smoking areas on their own land, without requiring the use of the Council controlled footpath area, which has been specifically designated for dining purposes under the Permit to Place Tables and Seating on a Footpath, which was issued to the hotel in 2001 and the No Smoking conditions placed on that permit in 2008/2009.

The Queensland Government passed new smoking legislation in 2004 via the *Tobacco and Other Smoking Products Act 1998* (TOSP). The legislation resulted in a staged introduction of smoking laws throughout Queensland. From 1st July 2006, smoking was not permitted in the enclosed areas of licensed premises nor in non-enclosed eating and drinking places where food and drink is provided as part of the business. Hotels were able to set aside Designated Outdoor Smoking Areas (DOSAs) where drinking and smoking can occur.

Local Law No. 59 (Commercial Use of Roads) 2002 provides the approval process and the relevant criteria to be used in considering applications for the commercial use of footpath dining on local government controlled roads. It is the opinion of Council Officers that this application would not comply with the criteria for approval. Footpath smoking in Permit areas has not been permitted in Port Douglas since July 2008. To approve the use of a footpath area outside the Central Hotel, as a DOSA, sets a precedent which would allow other restaurants and hotels to apply to Council and gain approval for the same use. In the opinion of Council Officers, allowing this Council controlled area to be used for the creation of a DOSA would place the Council at risk and also contravene the Councils own No Smoking Policy in dining areas.

It is accepted that arrangements differ across Cairns Regional Council regarding this issue. Therefore one of the options available to Council is to defer this decision until a comprehensive assessment of the current situation across the region can be carried out and the results communicated back to Councillors.

INTRODUCTION:

The Hilrok Hotel Group have applied to use part of a Council controlled footpath area designated for dining, in Macrossan Street, Port Douglas, for the purposes of smoking. The hotel was purchased by the current owners in 2006.

BACKGROUND:

During 1998 the Central hotel was granted a permit by Douglas Shire Council (DSC) to allow the consumption of alcohol on the footpath area under the veranda of the Central Hotel located in Macrossan Street, Port Douglas. A Permit to Place Tables and Seating on a Footpath, was issued to the hotel in 2001, under Local Law 59 and continued for a number of years and DSC subsequently allowed the installation of six (6) fold down wooden tables and associated seating to be used by patrons of the hotel.

In 2007 the Central Hotel sought approval to undertake works on the footpath area including the installation of new, permanent tables. An inspection of the existing permit area for Footpath Dining was conducted in September 2007. The inspection revealed that the permit area was being used as a smoking and drinking area and not being used for the purposes of footpath dining, with food consumption not being allowed in the area. The Central Hotel was advised that the new tables would be permitted, but only for the purposes of dining and that the existing permit area would only have approval as a "no smoking" area from the commencement of the 2008/2009 financial year.

An audit of footpath dining areas in Port Douglas and Mossman was carried out in July 2008 and Hilrok (Central Hotel) were again sent correspondence to advise that smoking had been observed occurring at the footpath tables and were reminded that previous correspondence had been sent to the effect that "smoking at tables with footpath dining permits would not be allowed after July 1, 2008." Smoking in the area then ceased until August 2011.

Following correspondence between Council officers and representatives for the Central Hotel, including on site meetings, the Hotel owners have made an application to Council to use the part of the footpath area as a DOSA. The application proposes that the area only be used for smoking at certain times. The proposed operational arrangements are shown in the in the application attached.

COMMENT:

The area for which the smoking application has been made is approximately 21square metres, being 1.2 metres wide and extending for approximately 18 metres along the footpath, on the roadside, in front of the Hotel. Seven (7) tables are located along the subject area and all pedestrians walking along the footpath must pass through the 2 metre wide pedestrian thoroughfare adjacent to the tables. Pedestrians cannot cross out of the area once they have entered unless they enter the hotel or exit backwards or forwards along the footpath.

Section 5 of the subordinate Local Law 59, contains the relevant criteria to be used in assessing applications. There are nine (9) relevant criteria to be considered under the subordinate local law and details of each are contained in the attached appendix. In relation to the current application the relevant criteria that specifically relate to the use of the area for the purposes of smoking and drinking, and the Officer's opinion is given below:-

(f) the activity will not constitute a nuisance to any person;

The area applied for and the adjacent footpath thoroughfare is public land (road) for the use of the travelling public and the public has the right to use that land, for the purpose for which it has been designed. It is considered that the use of the area does result in some pedestrians being affected by smoke and suffering reduced enjoyment of the public land as a consequence. The majority of this loss or impact is likely to be whilst walking through the area but the ability of cigarette smoke to permeate clothing and hair should also be considered.

(g) the activity will not constitute a danger to any person or property;

The use of the area for the purpose of smoking constitutes a danger to persons. Any persons using or in the vicinity of area are put at danger from passive smoking. Pedestrians are largely confined to street pavements and as a result are directly placed in a position in which they are in direct danger from tobacco smoke pollution originating from the pavement smoking area.

(i) the activity will not have an adverse effect on the amenity of the area.

Whilst the area can be kept clear of cigarette butts and litter by hotel staff, a DOSA could be offensive to members of the public and staff due to the visual and odour impacts.

Former Cairns City Council Area

Footpath activities in the former Cairns City Council area were previously regulated by Local Law 22 (Activities on Roads). Since January 2012, footpath dining activities on roads (footpaths) have been regulated by Local Law 59 (Commercial Use of Roads) 2002, the same local law as used in the former Douglas Shire area. At the time of writing a number of hotels in the former Cairns City Council area had permits to use footpath areas for the purposes of smoking, with or without alcohol consumption. No restrictions have previously been placed on these establishments by either the Cairns City or Cairns Regional Councils. It is proposed that a review be carried out to determine the number of businesses that use the footpath as DOSA's and to what extent the footpath is used for this purpose. The results of this review will be submitted to Councillors to inform decision making.

Summary

The owners of the Central Hotel carry out a commercial business which includes the sale of food, alcohol and cigarettes and usage of a road (sections of the footpath area) for the consumption of these products. To allow areas to operate as DOSA's would be in direct contravention of the intent of the Local Law. Doing so does not satisfy the relevant criteria for approving the Permit to Place Tables and Seating on a Footpath, specifically for dining purposes and instructions communicated to the Central Hotel regarding this issue in 2008. Similarly it is totally at odds with the intent of the *Tobacco and Other Smoking Products Act 1998*.

The primary purpose of footpaths is to allow for the movement of pedestrians, footpath dining and other commercial uses are secondary to the primary use. Pedestrians have a right to expect that in using a footpath that they are not put in danger and are not inconvenienced. Local Law 59 has been developed and adopted by Council to ensure that applications for the use of Council Controlled footpaths and areas consider relevant criteria in the decision making process.

CONSIDERATIONS:

Corporate and Operational Plans:

Statutory:

Local Law No. 59 (Commercial Use of Roads) 2002 provides the approval process and the relevant criteria to be used in considering applications for the commercial use of footpath dining on local government controlled roads.

The Tobacco and Other Smoking Products Act 1998 regulates smoking in various scenarios throughout Queensland. The Act prohibits smoking anywhere inside pubs, clubs, restaurants, workplaces and in commercial outdoor eating and drinking areas. Under the tobacco laws, liquor licensed premises that hold a commercial hotel, community club or commercial special facility license can designate an outdoor area where smoking and drinking, but not eating, can occur. Such areas are known as DOSAs. The DOSA must have a buffer on its perimeter, wherever it is next to other parts of the outdoor area that are ordinarily accessed by patrons. In relation to the subject area the “buffer” is footpath area along which pedestrians travel. Pedestrians are therefore forced to travel through an area highly likely to contain tobacco smoke pollution (TSP).

Financial and Risk:

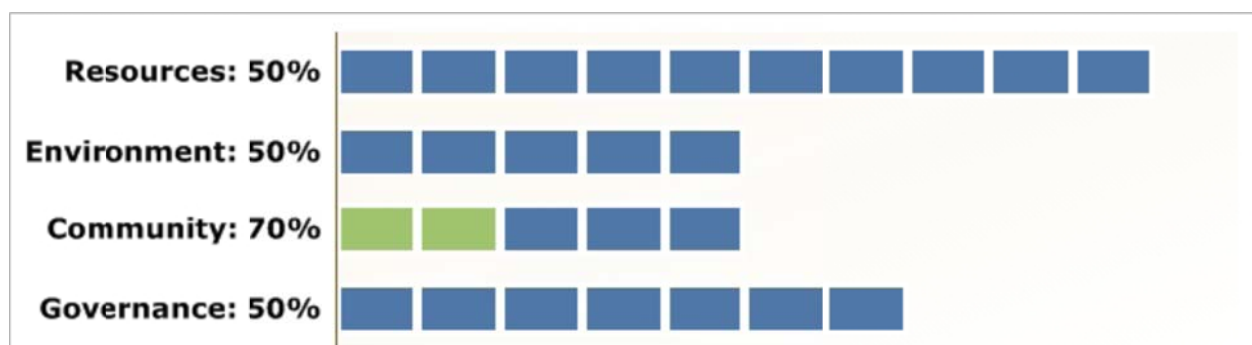
Council does expose itself to a level of risk by allowing smoking, in approved areas, on the footpath. Members of the public who may be adversely affected by tobacco smoke could allegedly have some claim against Council. This level of claim remains largely untested, but there is significant case law regarding second hand smoke in workplaces.

Sustainability:

Not allowing footpath areas for smoking use is sustainable and enhances community health and well-being. The following extract is taken from the Commentary for the Australian Bureau of Statistics Data:-

Smoking is recognised as the largest single preventable cause of death and disease in Australia. It is associated with an increased risk of heart disease, stroke, cancer, emphysema, bronchitis, asthma, renal disease and eye disease. Tobacco contains the powerfully addictive stimulant nicotine, which can make smoking a regular and long-term habit that is not easy to quit.

The Sustainability Scorecard shown below is based on not allowing DOSA's on Council controlled land.



There is a neutral impact on resources and the natural environment.

The cessation of smoking and/or the enforcement of no smoking policy conditions, will have an overall benefit to the community in terms of health & well-being.

The outcome could provide an opportunity for the council to demonstrate leadership in the community.

CONSULTATION:

Cairns Office of Queensland Health (QH) were requested to provide information on the approval of DOSA's. Part of the response from a QH Environmental Health Officer is given below:-

"Qld Health does not approve DOSAs. Qld Health can provide advice and will also undertake inspections of existing DOSAs. Qld Health's position in relation to smoking in public areas is that it is preferred that people do not smoke at all however if they do smoke it must be conducted in accordance with the *Tobacco and Other Smoking Products Act 1998 (TOSPA)*. i.e. Not in enclosed places, not in eating/ drinking places, not within 4m of an entrance to an enclosed place, not within 10m of children playground etc.

OPTIONS:

Option 1

- a. Council defers a decision on the application by Hilrok Hotel Group to use part of a Council controlled footpath area for smoking, whilst a review is undertaken throughout the Regional Council area as part of the future review of Local Laws; and
- b. The applicant be advised that the area outside the Central Hotel be required to comply with the terms and conditions of the current Permit to Place Tables and Seating on a Footpath; issued in 2001 and subsequently approved as a no smoking area from the commencement of the 2008/2009 financial year.

Option 2

Council refuses the application to use part of the footpath as a Designated Outdoor Smoking Area.

Option 3

Council approves the application to use part of the footpath as a Designated Outdoor Smoking Area.

CONCLUSION:

The owners of the hotel wish to carry out part of their commercial business on a Council controlled road (footpath area). It is the view of Council Officers that when the application is assessed against the relevant criteria, as required by Local Law No. 59 (Commercial Use of Roads) 2002, the application should not be approved.

Footpath smoking in permit areas has not been approved in Port Douglas since September 2007. It is acknowledged that DOSA's are operating in the Cairns CBD area and other areas throughout the CRC area. Deferment of a decision on the application will allow Council officers to review arrangements in other areas and report back to Council to enable Councillors to make an assessment based on a more comprehensive picture of what occurs throughout the Cairns Region.

ATTACHMENTS:

- A. Application by Hilrok Hotel Group for Activities within the Road Reserve;
- B. Photo of subject area
- C. Local Law relevant criteria
- D. Information from the World Health Organisation and the Australian Bureau of Statistics

Carole Todd

Manager Environmental Assessment

Attachments

- a). [Local Laws Application](#) by Hilrok
- b). **Photo of Subject Footpath Area Outside Central Hotel**



- c). **Criteria for the Grant of a Permit under LL59 (Commercial Use of Roads) 2002**

The granting of a permit will be consistent with the relevant criteria if-

- (a) *the applicant holds all other necessary statutory approvals for the activity; and*
- (b) *the activity will not be inconsistent with the terms and conditions of the trust and any statutory provisions relevant to the land; and*
- (c) *plans showing any temporary structure intended to be erected on the road as part of the activity indicate that it is structurally sound; and*
- (d) *the activity will not be conducted within close proximity of a business carrying out another commercial activity or, if it will be conducted within close proximity of that business - the activity will not be likely to have an adverse effect on that other business; and*
- (e) *if relevant, the activity will not significantly detract from the capacity of the road to provide a vehicular and, where relevant, pedestrian thoroughfare; and*
- (f) *the activity will not constitute a nuisance to any person; and*
- (g) *the activity will not constitute a danger to any person or property; and*

- (h) *if relevant, the activity will not obstruct access from the footpath to kerbside parking; and*
- (i) *the activity will not have an adverse effect on the amenity of the area; and*
- (j) *the activity will not have an adverse effect on existing services located in, on or over the road.*

d). **Information from the World Health Organisation and the Australian Bureau of Statistics**

World Health Organisation-Framework Convention on Tobacco Control

Article 8

Protection from exposure to tobacco smoke

1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.
2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

Guidelines to Article 8 state that there is “no safe level of exposure to tobacco smoke”. Creating 100% smoke-free environments is the **only** way to protect people from the harmful effects of second-hand tobacco smoke.

The Australian Bureau of Statistics 4125.0 - Gender Indicators, Australia, Jan 2012(ABS Data)

23% of male and 19% of female Australians over the age of 18 are current smokers. The following extract is taken from the Commentary for the ABS Data:-

In 2007-08, the NHS reported that 8 million Australian adults aged 18 years and over had smoked at some time in their lives. 3.3 million were current smokers, with the vast majority (91%) of these people smoking daily.

In recent years the negative effects of passive smoking have also received considerable attention, demonstrating that the risks to health of smoking affect more than just the smoker. Passive smoking increases the risk of heart disease, asthma, and some cancers. It may also increase the risk of Sudden Infant Death Syndrome (SIDS), and may predispose children to allergic sensitisation. During 2007-08, 3.5% of people who were not current smokers (aged 15 years and over) and 7.2% of children (aged under 15 years) lived in a household where a daily smoker was reported to have smoked indoors.

These people may be exposed to environmental tobacco smoke and the associated health risks of tobacco consumption. The Australian Government has invested heavily in anti-smoking campaigns, and has increased restrictions on smoking in public places such as workplaces, restaurants and pubs. In line with the increased awareness of the negative impacts of tobacco smoke, the proportion of people who smoke has declined steadily.