

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND ENVIRONMENT

INQUIRY INTO DRAFT VARIATION TO THE TERRITORY PLAN No 256

KINGSTON GROUP CENTRE PART SECTION 22 (DV 256)

**SUBMISSION BY THE OWNERS CORPORATION EXECUTIVE COMMITTEE
(UNITS PLAN 585)**

OAKLEAVES, 6 HOWITT STREET, KINGSTON ACT 2604

April 2006

1. Introduction

1.1 This is a submission by the Executive Committee of Units Plan 585 on behalf of the owners of the 12 residential units comprising that Units Plan concerning Draft Variation 256.

1.2 The *Oakleaves* Owners Corporation Executive Committee welcomes the recognition by the Minister and the ACT Planning and Land Council of the adverse effect on the environment and lifestyle of Kingston residents of the establishment of restaurants and drinks establishments on the boundaries of the residential area in Section 22 Kingston.

1.3 The Owners Corporation Executive Committee wishes to express its gratitude to the members of the Standing Committee for making themselves available to view the area and to observe the difficulties experienced by residents as a result.

1.4 Submissions lodged by the Executive Committee and its members individually to ACTPLA on Draft Variation 256 are in Appendix 4 of the documentation accompanying the Recommended Final Variation.

1.5 The Executive Committee and its members individually lodged objections to Development Applications for variation of the Crown leases by the lessees of Block 27 (drink establishment/restaurant use), Block 22 (restaurant and other uses), Block 30 (restaurant use) in Section 22. We were joined parties in *Ergas & Bird and ACT Planning & Land Authority & Ors [2004] ACTAAT 18 (18 May 2004)* and *Stryver Pty Ltd and ACT Planning & Land Authority & Ors [2004] ACTAAT 42 (13 December 2004)*. Submissions were also lodged by a member of the Executive Committee to the ACT Planning and Land Authority *Planning System Reform Project* and to the ACT Legislative Assembly Standing Committee on Public Accounts *Inquiry into the Auditor-General's Report (No 2/2005) on the Development Application and Approval Process in the ACT*.

1.6 *Oakleaves* comprises twelve units. The complex is more than 25 years old. The majority of *Oakleaves* units are set back from the Howitt Street frontage. All bedrooms are located at the rear of the apartment complex and open to balconies or courtyards in close proximity to the rear boundary. Courtyards are surrounded by timber open-slat fencing; and upper floor units have balconies with similar timber railings. *Oakleaves* is directly opposite and less than 25 metres from the rear of the Section 22 commercial premises. In all units air flow (and cross-ventilation) is via sliding glass doors to the outdoor courtyards or balconies. The building has no windows and, being an older building, does not lend itself to effective retro-fitting of noise attenuation measures. The *Oakleaves* apartments are clearly vulnerable to disturbance and loss of amenity from commercial activities operating well beyond normal trading hours immediately adjacent to the residential area.

2. Purpose of Draft Variation 256

2.1 The purpose of Draft Variation 256 (as stated in the Minister's March 2005 media release, *Draft variation protects Kingston residential amenity*) is to 'provide a

buffer between residential and commercial entertainment areas in the Kingston Group Centre’.

2.2 ACTPLA’s view, as stated in its *Report on Consultation with the Public and Government Agencies* (Annexe B) Recommended Final Variation 256, is that ‘the Variation seeks to establish an appropriate balance between the interface of commercial premises in Jardine and Giles Streets and residences in Section 22 and surrounding areas’. A balance is not a buffer.

2.3 It is evident from submissions lodged with ACTPLA that many Kingston residents, and particularly those whose properties in Section 22 immediately abut the commercial area, believe that their amenity can only be protected by restricting the operation of all commercial premises on the eastern side of Jardine Street and at 84 and 86 Giles Street to low impact commercial activities conducted during normal business hours (8 00 am until 6 00 pm).

2.4 Lessees of the commercial premises in Section 22 who engaged McCanns Property and Planning to advocate their interests, wish to see the widest possible range of land uses, including restaurant use, retained without limitation on trading hours.

3. Comments on Explanatory Statement

3.1 Green Square is not the retail core of Kingston. The Precinct ‘a’ retail core comprises all the blocks in Section 21 which is bounded by Giles Street (north), Jardine Street (east), Eyre Street (south) and Kennedy Street (west). Variation 158 (as amended by Variation 213) extended Precinct ‘a’ to include the commercial premises on the eastern side of Jardine Street and the Block 33 public car park (that part of Section 22 which is the subject of Recommended Final Variation 256) to enable the establishment of ‘specialty shops’.

3.2 The primary purpose of Precinct ‘a’ is ‘to make provision for shops and services in a consolidated core’ with ‘the primary function of the retail core ... generally focussed on the supermarket and other smaller complementary retail outlets and services’. Most of the convenience shopping facilities (eg supermarket, newsagent, chemist, etc) are located in Giles Street.

3.3 The change in nomenclature of the Draft Variation (from ‘Section 22 Kingston’ to ‘Part Section 22 Kingston’) should be noted. The initial Draft Variation contained incorrect information about the boundaries of Section 22 stating that it is bounded by Howitt Street to the east. Section 22 extends from the eastern side of Jardine Street to the western side of Wentworth Avenue between Giles and Eyre Streets. It is a predominantly residential section and includes some of Kingston’s older medium density apartment complexes, such as *Pinoak Place*, *Oakleaves*, *Quadrant*, *Wentworth Gardens* and *The Holford*. The commercial blocks comprise only a relatively small part of Section 22.

3.4 Block 33 does not divide the precinct ‘a’ commercial land use area from the residential land use area. The rear boundaries of the commercial premises fronting Jardine Street adjoin a 6 metre wide unnamed road reserve which adjoins Block 33.

Block 33 immediately abuts the rear boundary and, in turn, the bedroom and outdoor living areas of the *Oakleaves* and *Quadrant* apartment complexes (Blocks 19, 20 and 34) which have their frontage onto Howitt Street.

3.5 Block 14 (*The Holford*) does not comprise residential buildings with offices on the top floor. The three-storey townhouses are entirely residential.

3.6 The apartment complexes on Blocks 19, 20 and 34 (ie *Oakleaves* and *Quadrant*) do not comprise '2-3 storey townhouses': They comprise A Class units over two levels with undercroft parking.

4. Consultation on the Draft Variation

4.1 We have serious reservations about the 'community consultation' process which has done no more than comply with the minimum legislative requirements and certainly cannot be regarded as promoting or facilitating 'community engagement'. A particular concern is that lessees in Section 22 received no formal correspondence from ACTPLA, notwithstanding the fact that Section 22 was the very subject of the Draft Variation. This shortcoming is compounded by the fact that, unlike most other Inner South suburbs, Kingston has no formal mechanism for community consultation on planning matters. In addition, the Explanatory Statement contained many errors of fact and the omission of any block numbers in Section 22 from the figures provided rendered the document almost meaningless. We do not believe it is an unreasonable expectation that information provided by a government agency should be accurate.

4.2 By far the majority of the 25 submissions received on Draft Variation 256 considered that the proposals for land use controls and operating hours were not sufficiently restrictive. The Recommended Final Variation has, however, moved to an even less restrictive position – favouring that of the commercial lessees. It clearly benefits commercial leaseholders at the expense of residential leaseholders. We are sure the Committee will agree that it would be a matter for concern if ACTPLA gave subjective weighting to a particular submission (or submissions) for reasons of origin or any other factor that would give irrelevant cause to elevate the importance of one submission above another.

5. Absence of licensed premises planning policy

5.1 The operation of licensed premises has the potential to have a significant adverse impact on residential amenity, particularly through the transmission of noise from vehicles, plant and equipment, staff and patrons. This has already been the experience of our residents by reason of the commencement in business of the Belgian Beer Cafe.

5.2 Our understanding is that the Liquor Licensing Authority does not address the question of whether the issuing of a liquor licence to a premise may detract from or be detrimental to the amenity of an area adjoining, or in close proximity to, the area in which the premise is located on the assumption that such considerations will have already been addressed at the planning and approval stage by ACTPLA and/or Environment ACT.

5.3 We contend that, by definition, some activities are always detrimental to the amenity of a neighbourhood – and others are detrimental because of their frequency and/or timing. Businesses operating well beyond normal business hours – and particularly licensed premises operating with unrestricted trading hours where there is no buffer between the noise-generating and noise-sensitive environments (as proposed in Recommended Final Variation 256) – will, no matter how well managed and without any associated anti-social behaviour, still detrimentally affect the amenity of residential neighbourhoods. Furthermore, it will inevitably be left to the residents to monitor, complain and in effect to manage any problems that arise. They should not have to do this in a city like Canberra. They are entitled to quiet enjoyment of their properties.

5.4 While ACTPLA distinguishes between ‘drinks establishments’ and ‘restaurants’, the ACT liquor licensing authority makes no such distinction for liquor licensing purposes. Its only requirement (apart from the applicant being a fit and proper person to hold a licence) is approval in the lease purpose clause for the ‘restaurant’ or ‘club’/‘drinks establishment’ land use. Both types of commercial premises may also, on nomination to the Registrar, trade until as late as 4 00 am or 5 00 am (and re-open at 7 00 am or 8 00 am respectively).

5.5 This issue has been raised with ACTPLA on a number of occasions, including by those lodging submissions on Draft Variation 256. Not only has it not been addressed at all in ACTPLA’s *Report on Consultation with the Public and Government Agencies*, but ACTPLA seeks to absolve itself from any responsibility for adverse outcomes from the issuing of liquor licences on the grounds that liquor licensing is beyond its control. If this is the case (and evidence presented to the AAT suggests that there is no interface between the two agencies), then a precautionary approach to the approval of land uses which can be licensed under the *Liquor Act 1975* is essential. Similarly, ACTPLA abrogates any responsibility for the adverse impact on residential amenity of alcohol-related anti-social behaviour on the grounds that ‘the Territory Plan is not the mechanism to address these issues, which are primarily law enforcement and civil matters’. This makes a mockery of the planning guidelines for *Crime Prevention Through Environmental Design* which clearly identify licensed establishments as crime generators and which urge planners to ensure that issues of community safety are adequately addressed in decision making for land use, including by avoiding placing too many liquor serving establishments close to each other.

5.6 The potential for premises approved as ‘restaurants’ to operate as *de facto* ‘drinks establishments’ needs to be addressed as a matter of urgency and this ‘loophole’ closed. We would also suggest that serious consideration be given to the introduction of a mechanism for third party appeal to the Liquor Licensing Board.

5.7 It is critical that decisions on land use and/or decisions on the hours of operation of those land uses which may be licensed under the *Liquor Act 1975* take full account of – and adopt a ‘worst case scenario’ approach to – the site location and the amenity expectations of a residential area.

5.8 It is a function of planning to ensure that the amenity of adjoining land owners and occupiers is protected from unreasonable noise emissions and other adverse environmental impacts through the exclusion of land uses from particular precincts or

areas. We contend that the operation of licensed premises in Section 22 - a section which is primarily and predominantly residential - should not be allowed under any circumstances.

6. Health effects of noise

6.1 We believe there is sufficient evidence to support the relationship between the quality of an acoustic environment and the adverse health effects on health, work, leisure and sleep of residents. The approval of the drink establishment/restaurant on Block 27 (the Belgian Beer Cafe) resulted in an immediate and significant deterioration in the noise environment in the surrounding residential area. A continuing major source of noise pollution is noise generated by heavy vehicles making deliveries to or collecting waste from the commercial premises and includes noise generated by the engine, exhaust, fan, transmission, refrigerated units, the unloading of goods and, last but not least, the high frequency warning beepers of trucks which cannot avoid reversing either in or out of the narrow space available in the Block 33 car park immediately behind the Belgian Beer Cafe and adjoining the *Oakleaves* and other residential units.

6.2 Noise can have serious direct and indirect adverse physiological, mental and social effects. Members of the community who are exposed to noise by virtue of where they live who are most sensitive to noise impacts include the elderly, infants, shift workers and those with physical or mental health conditions. Adverse health effects include sleep disturbance, annoyance (particularly from higher frequency noise), and hypertension and ischaemic heart disease (with noise acting as a stressor). The frequency and duration of exposure to noise will also influence noise-induced stress.

7. Revisions to the Draft Variation

7.1 We are extremely concerned at the proposal in the Recommended Final Variation that a noise management plan for the uses of 'restaurant' and 'commercial accommodation use' will only be required to 'minimise' the impact of noise on neighbours by complying with 'the noise standards in the relevant environmental legislation and the hours of operation relevant to the appropriate noise standards'.

7.2 The position of the Environment Protection Authority - as a witness in the AAT case regarding lease variation to allow a wide range of land uses on the site of the Commonwealth Bank in Giles Street - was that, consistent with the objects of the *Environment Protection Act 1997*, it seeks to have the potential for ongoing noise pollution addressed before it occurs. It stated 'It is therefore preferable in the Environment Protection Authority's view to address noise issues at the planning and design stages rather than when problems become evident'.

7.3 It is our understanding that there is no requirement under the *Land (Planning and Environment) Act 1991* for Draft Variations to the Territory Plan to be referred to the Environment Protection Authority. We would appreciate it if the Committee could confirm this and perhaps provide information on the rationale underlying what, in our view, is an extraordinary omission. We would also ask the Committee to seek evidence from the Environment Protection Authority as part of its inquiry into

Recommended Final Variation 256.

7.4 We would expect that all applications for change of lease purpose will be required to demonstrate compliance with the *Environment Protection Act 1997* and *Environment Protection Regulation*. We would also expect that, in all such applications, the proposed land use will be 'carefully considered' against the Noise Management Guidelines (and other relevant planning guidelines, such as the Guidelines for the Location of Community and Recreation Facilities and the guidelines for Crime Prevention Through Environmental Design) as required in the land and planning legislation – and for that 'consideration' to be thoroughly documented. The fact that this did not occur in assessment of the development applications for drink establishment/restaurant use on Block 27 (the Belgian Beer Café) and restaurant use on Block 22 (Commonwealth Bank site) – by either ACTPLA or, on review, by the AAT is regrettable.

8. Noise covenant in Crown lease - Block 27 Section 22 Kingston

8.1 The decision [2004] ACTAAT 18 imposed a requirement that noise from the premises not exceed 50dB(A) between 7:00 am and 10:00 pm (Monday-Saturday) and between 8:00 am and 10:00 pm (Sundays and public holidays); and 40 dB(A) between 10:00 pm and 7:00 am (Monday-Saturday) and between 10:00 pm and 8:00 am (Sundays and public holidays). It also imposed a requirement that waste collection be restricted to the hours 7:00 am – 7:00 pm (as in residential areas).

8.2 While some restriction on noise levels is better than none, it needs to be borne in mind that the allowable decibel levels of 50 dB(A) until 10:00 pm and 40 dB(A) between 10:00 pm and 7:00 am (or 8:00 am on Sundays and public holidays) are significantly higher than Environment ACT's indicative noise levels for a quiet bedroom, that is 20-30 dB(A), and a quiet residential area, that is 35-45 dB(A) (*Environment Act Information Sheet, Noise in Residential Areas 21 February 2006*). Noise generated during the daytime (noting that for the purposes of the *Environment Protection Act* and *Regulation*, 'daytime' is defined as being between 7:00 am and 10:00 pm), particularly disturbs certain members of the community (eg the elderly, the sick, infants, shiftworkers) and it should be noted that in [2004] ACTAAT 42 (the Commonwealth Bank site case), the acoustic expert gave evidence of the particular impact on such residents of noise emitted by large vehicles' reverse warning beepers.

8.3 Block 33 is a road related area. Heavy vehicles on a public road and waste collection vehicles are exempt from noise standards prescribed in the environmental protection legislation and regulation.

8.4 Motor vehicles being driven on a public road are subject to the *Motor Traffic Act 1936* and are exempted from the provisions of the *Environment Protection Act* and *Regulation*.

8.5 Vehicles collecting waste from commercial premises are also not required to comply with the zone noise standards providing they are covered by the *ACT Commercial Waste Industry Code of Practice*. Further, no action is undertaken in relation to noise from commercial collection of waste outside the hours prescribed in the zone noise standards (07:00 am to 10:00 pm in residential areas and 05:00 am to

10:00 pm in the Kingston Group Centre) – and presumably also outside the hours designated in any noise covenant in a Crown lease - unless the Environment Protection Authority receives a complaint from an affected person.

8.6 The experience of *Oak/leaves* owners in trying to seek assistance to address noise (including noise generated in the car park by large vehicles making deliveries to, collecting waste from, or providing trade and utility services to the premises has been buck-passing between ACTPLA and Environment ACT. Environment ACT officers (while certainly attempting to assist both when responding to specific incidents and when providing residents with information on what action can or cannot be taken to address ongoing noise pollution) have advised that, because the noise covenant is contained in the lease, it is a matter for the ACTPLA compliance area to address. They have pointed to the constraints in (and exemptions from) the environmental protection legislation and regulation. The limited advice from ACTPLA has been that it is a matter for Environment ACT to pursue under the *Environmental Protection Act and Regulation*. Further, issues relating to noise and/or traffic movement in the Block 33 car park need to be raised separately with Roads ACT and/or Parking Operations and/or other areas of the Department of Urban Services.

8.7 It should also be noted that compliance action will only be taken on receipt of a written complaint. The complainant's details are in turn provided to the offending lessee. *Technical Paper 1* prepared for the *Planning System Reform Project* identified the 'problem of complainants wanting action on a compliance breach, but not wanting to apply for an order because their identity would be revealed to the lessee allegedly in breach as part of the notification process' and noted that an unintended consequence is that 'unless the complainant chooses to use the application for order process, there is no requirement for the Authority to advise the outcome of any investigation or in fact even investigate a complaint'.

8.8 We submit that there is not sufficient noise or social separation by distance of the many high impact permissible land uses proposed in the Recommended Final Variation from the boundary of the adjacent residential blocks on which *Oak/leaves* is sited (less than 25 metres from the commercial premises in Jardine Street and less than 7 metres from Block 22 in Giles Street). This is the only area in Canberra where precinct 'a' immediately abuts a residential area without some form of buffer from high impact commercial activities.

8.9 There are no safeguards in the Territory Plan or lease variation processes for residential amenity in the future and ACTPLA has refused to adopt a precautionary approach.

8.10 ACTPLA has not taken proper account of the adverse effects on residents' environment, lifestyle and right to quiet enjoyment as a result of noise generated by heavy vehicle movement, utility services, mechanical plant and equipment, staff and patrons and their vehicles, and problems associated with the disposal of waste which have become evident since the drink establishment/restaurant commenced operations on Block 27 Section 22.

8.11 Residential land use is the major land use within Section 22. The Draft Variation in its current form renders permissible land uses known to have a high

probability of adverse impact on residential areas in close proximity and is at odds with the ACT's own guidelines relating to:

- noise management
- waste management
- location of community and recreation facilities
- crime prevention through environmental design.

8.12 The expert who prepared the two acoustic reports presented to ACTPLA (and the AAT) in [2004] ACTAAT 42 (Commonwealth Bank site) – but not, we understand, referred to Environment ACT for its assessment – stated in evidence that, in the absence of any plans or information on the design, siting and construction methods to be used in the construction phase and of any details of layout for plant and equipment (eg airconditioning, kitchen and toilet exhaust systems), his advice was purely 'hypothetical' or 'guesswork'. Our concern is that, as with the development on Block 27 (Belgian Beer Café), once the lease variation has been approved, these important matters are dealt with (or not dealt with) behind ACTPLA's closed doors at a later stage in the building application process and far removed from any public scrutiny or objections from affected residents.

9. Deletion of proposed restricted land uses from Recommended Final Variation

Indoor recreation centre

9.1 In October last year the Committee raised with ACTPLA (via e-mail) its concern that a gym was to open shortly at 23 Jardine Street (Block 25 Section 22 Kingston) despite 'indoor recreation facility' being one of the land uses not permitted under Draft Variation 256 which had interim effect from 3 March 2005 to 2 March 2006. In particular, we asked when the land use was approved (noting that this would have to have been many years ago given that, as residents of the apartment complex immediately opposite the rear of the premises and therefore adjoining lessees for development application notification purposes, we had received no notice of such a lease variation); if not, whether ACTPLA had received a development application to fit out the upper floor of the premises as a gym; and what action would be taken in the event of non-compliance with land use restrictions or other planning controls.

9.2 The advice received in response from ACTPLA was that it was unable to identify the uses permitted under the Crown Lease on privacy grounds; that no development application had been formally lodged seeking a lease variation to permit an indoor recreation facility; that no plans had been lodged for an indoor recreation facility seeking leasing compliance (ie fit-out approval) for an activity in accordance with the Crown Lease; and confirming that with Draft Variation 256 having interim effect, no new indoor recreation facilities were permitted within Section 22, except where already permitted by the Crown Lease. Further advice was that, if the premises was actually being used for an activity which is inconsistent with or in breach of the Crown Lease, the Committee could seek compliance investigation/action under the *Land (Planning and Environment) Act 1991* through ACTPLA.

9.3 We are concerned that once again the onus was placed on the affected parties

to generate any action from ACTPLA, notwithstanding that ACTPLA can propose an order for compliance on its own initiative, instead of relying on an application by an individual or individuals.

9.4 ACTPLA has now addressed the matter by lifting the restriction on the 'indoor recreation facility' land use in Recommended Final Variation 256!

Restaurant hours of operation

9.5 Draft Variation 256 proposed that restaurant trading hours be limited to 7 00 am until 11 00 pm (Sunday to Thursday) and 7 00 am until 1 00 am (Friday and Saturday). Our view was that these hours were unacceptable on a site immediately adjacent to a residential area. They also failed to take account of the additional time required for set-up/clean-up by staff before and after the premises are open to the public. We are concerned that even these restrictions on operating hours have been removed from the Recommended Final Variation despite submissions from many residents (including residents of *Oakleaves*) that the restaurant use should not be permitted at all (as in Section 20 Kingston where the commercial premises in Kennedy Street back onto residences). Instead, ACTPLA has accommodated the wishes of the commercial lessees that restaurants should be permitted to operate without any restriction.

9.6 We note the commercial lessees' submission that any restriction on operating hours would render restaurants in Section 22 'unviable' and 'non-competitive' with similar businesses in the area. We have raised elsewhere in this submission our particular concerns about the lack of discrimination by the Liquor Licensing Authority between restaurants and drink establishments which effectively allows restaurants to operate as *de facto* drink establishments. We also note that the commercial lessees sought to have 'drink establishment' retained as a permissible land use in Section 22. The major Kingston drink establishments are located in close proximity to the Section 22 commercial premises. It can only be assumed that the lifting of any restriction on operating hours was sought by the commercial lessees (and agreed by ACTPLA) to enable any licensed establishments in Section 22 (either now or in the future) to be 'competitive' with those establishments.

10. Drink establishment/restaurant - Block 27 - Belgian Beer Café

10.1 In April and May last year officers of Environment ACT agreed to raise with ACTPLA and other relevant ACT Government agencies *Oakleaves* residents' concerns about the negative impact of the operations of the Belgian Beer Café on their residential amenity. The following matters were raised via e-mail:

- When the AAT approved the lease change (which included a noise covenant), a number of matters were remitted to ACTPLA for more detailed plans, specifications, etc, including a noise management plan and acceptable arrangements for waste disposal. This further consideration took place behind ACTPLA's closed doors and it has not been possible to obtain information on the final outcomes of that process.
- A significant number of Howitt Street residents, including many living in the

apartment blocks immediately adjoining the Block 33 car park are elderly retired or semi-retired. Several have mobility or disability problems. At least one regularly works night shifts. The impact of noise during the day is therefore considerable and has the potential to adversely affect their health and wellbeing.

- The waste disposal and utility service area of the Belgian Beer Café is not secured or screened from public view during the day because one or both of the roller shutters is left open - the eyesore is visible from the interior of some units as well as private outdoor areas - because the waste storage area is higher from the ground and overlooks the units opposite.
- Parts of the adjoining kitchen/scullery area of the beer café are also clearly visible from within some units and the fact that staff and others are able in turn to see into units is both disconcerting and unacceptable to residents, especially as bedrooms are located at the rear of the apartments.
- Excessive noise is being generated from the waste storage area (particularly chucking of bottles into containers) and from the kitchen (clattering of pots and pans, etc) during the day and evening. Other sources of noise include staff congregating in the loading dock area for breaks (conversations - especially on mobile phones - carry across to units) and staff (and people making deliveries) talking/shouting above the noise of trucks left with engines running, etc.
- The roller shutters are generally not closed until about 10 00 pm.
- Excessive noise is being generated in the Block 33 public car park which has basically been transformed into a service alley for the beer café. Trucks making deliveries throughout the day have to travel up the middle of the car park (therefore only a couple of metres from residents' bedrooms and outdoor areas).
- Heavy vehicle engines are left running (including refrigerated units) producing noise, dust, and petrol and diesel fumes.
- Large trucks cannot turn in Block 33 and are therefore reversing in or out of the car park into Eyre Street. Apart from the frequent intrusion of reverse beeper noise, this is an inherently unsafe (and illegal) practice in the middle of a public area and one which places at risk the safety of legitimate users of the car park.
- The collections of waste and recyclable materials from the Belgian Beer Café are both frequent and very noisy. This is compounded by the fact that other commercial lessees use different waste contractors.

10.2 Despite follow-up by Environment ACT, no response was received from the compliance area of ACTPLA. Advice eventually forthcoming from ACT NoWaste was that the waste management arrangements for the former National Australia Bank on the site were considered quite acceptable for the drink establishment and restaurant which had taken its place. We find it quite extraordinary that the responsible

government agency considers that the type and volume of recyclable and non-recyclable waste generated by a drink establishment/restaurant trading for extended hours – and the frequency of waste collection – are the same as the waste generated by a bank operating during normal business hours. The requirement that waste and service vehicles accessing sites enter and leave the car park in a forward direction was not addressed nor was the danger posed to users of the public area.

10.3 What is of particular concern to *Oakleaves* residents is the fact that the applicant for the Belgian Beer Café gave the following assurances or undertakings to ACTPLA and/or the AAT in response to residents' concerns about the land use:

- The operations would not generate unacceptable noise levels at the boundary of the residential area and would be managed so that there was no negative impact on local residents.
- That it 'does not consider any aspect of its normal operation will have any impact whatsoever on the residents' enjoyment of their courtyards – at any time of the day or night.
- There would be no impact on the streetscape at the rear of the premises; and the waste storage area would be secured and screened.
- The roller door shutters providing access to the loading dock area would be closed at all times (and there was no possibility that staff might choose to leave them open allowing noise to escape).
- There would be no impact on the privacy, safety and security of residents.
- Times for waste removal would be set at between 7:00 and 8:30 am, two to three days per week.
- Waste would be properly stored and disposed of with a minimum of noise and inconvenience to residents.
- There was sufficient space in the car park for waste collection and other vehicles to access the premises and turn within the car park, thus enabling them to enter and leave the site in a forward direction.
- That, because of parking pressure in Kingston at peak times, the two designated loading zones would only operate between 6:00 and 9:00 am, Monday – Friday and that all deliveries would occur within these hours.
- Activity within the car park relating to the subject site (either by patrons, staff, delivery or trade vehicles) would be managed so as to minimise any disturbance of the adjacent residential development.

We would have expected the relevant government agencies to ensure that both the noise management plan and waste management plan for the premises reflected these assurances or undertakings. Clearly, this was not the case.

11. Approval of restaurant use - Block 22

11.1 *Technical Paper 1* for the *Planning System Reform Project* noted that in [2004] ACTAAT 42 'the applicant was able to gain approval of use change without the plans that would have enabled a proper assessment of its suitability and impact'.

11.2 What may not be apparent from the reported AAT decision is that the case arose from the deemed refusal by ACTPLA of an application for a lease variation for a wide range of land uses. The residents were joined parties with ACTPLA. On the first day of proceedings ACTPLA changed its position having received two acoustic reports from the applicant and decided to support most of the land uses. While the case is reported in terms of the applicant and respondent, in effect in the proceedings the applicant and respondent (and their legal teams) argued their case against the so-called joined parties - the residents.

11.3 The decision approved the use of the vacant part of the Commonwealth Bank site at 84 Giles Street (Block 22) for a wide variety of commercial purposes: non-retail commercial uses, restaurant, shop, child care centre, community activity centre, cultural facility and health facility. The site is less than 10 metres from the *Oakleaves* boundary and the implications of the decision – both for those residents most immediately affected and those in the wider Kingston residential area – are significant.

12. The laneway and Block 33 car park

12.1 In [2004] ACTAAT 42, the AAT rejected residents' concern that waste collection vehicles and delivery trucks would cause significant nuisance on the grounds that 'This land, along with other blocks, has most probably had access to the laneway since it was first constructed' noting that other businesses use the laneway for business related purposes and the applicant should not be disadvantaged relative to others because apartments have been constructed on an adjoining block'. It also stated 'we do not discount the possibility that problems arising from the use of the laneway might increase as businesses such as banks leave and others take their place. It may well be that the appropriate authorities need to consider how best to manage the laneway and public car park ... in the future'.

12.2 We ask the Committee to note that the *Oakleaves* and *Quadrant* residential apartments were built more than 25 years ago, at a time when the commercial activities immediately to their rear did not include restaurants and/or drink establishments.

12.3 It should be noted that the Department of Urban Services (Roads ACT) had provided advice to ACTPLA that access to the subject site could not be from the car park area and had to be via the laneway.

12.4 We would like to see the prohibition of the use of the car park by service and utility vehicles accessing the rear of the commercial premises for the reasons outlined elsewhere in this submission. In the event that the six-metre wide laneway reverts to its original purpose, the layout of the car parking area will need to be substantially revised. We suggest this may provide a timely opportunity for the construction of a

solid barrier on the boundary of the laneway and the Block 33 car park. Such a structure would need to be of sufficient height and appropriate materials to prevent the transmission of noise and visual sightlines from large heavy vehicles and should be appropriately landscaped on the car park side.

13. Conclusion

13.1 We would urge the Committee to seek expert advice on the many serious issues we have raised in this submission, particularly those relating to the rights of residents to the quiet enjoyment of their properties free from annoyance by reason of noise and invasion of privacy (including visual overlooking) and without the need for residents to become the monitors of commercial behaviour. We would also hope that the Committee would give consideration to the health and safety issues which arise from the immediate juxtaposition of licensed premises of any kind to residential premises.

13.2 The Executive Committee of the Owners Corporation of Units Plan 585 thanks the Committee for its consideration of this submission.

13.3 We would welcome the opportunity to discuss in further detail any of the issues raised in our submission should the Committee consider this would be useful to its inquiry.