Introduction
In this newsletter we examine ‘amenity’ under planning law. We state what it is and what aspects of amenity can and cannot be considered in decision making. We then consider the implications of the Court of Appeal’s recent decision in Macedon Ranges Shire Council v Romsey Hotel Pty Ltd.1

What is amenity?
Considering the effects of land use and development upon people has been a longstanding feature of land use planning. Amenity is an elusive concept. It has its usual meaning of pleasantness,2 but also has a wider ambit. It has a physical (or tangible) component, which could include character and appearance of building and works,3 proximity to shopping facilities,4 quality infrastructure and absence of noise, unsightliness or offensive odours. It has been said to embrace all the features, benefits and advantages inherent in the environment in question.5 It also has a psychological or social component.

How does amenity feature in planning law?
Amenity is not defined in, and no requirement in relation to amenity directly arises under, the Planning and Environment Act 1987 (PE Act). However, a responsible authority (RA) must consider ‘as appropriate … [t]he effect on the amenity of the area’ in deciding a permit application or approving a plan.6 It must also consider the objectives of planning,7 one of which is securing a pleasant working and living environment.8 A pleasant environment equates with amenity.

The social and economic effects of proposed use or development of land are relevant to the concept of amenity.9 This is consistent with provisions of the PE Act that, in deciding an application, a RA must consider any significant effects a proposal may have on the environment

Summary
Amenity is a fundamental but sometimes elusive concept in planning law. In the recent Romsey Hotel case, the Court of Appeal discussed the concept of amenity in deciding what factors needed to be considered in determining the social impact of a gaming venue under the Gambling Regulation Act 2003. The Court has provided useful insights into the scope of amenity under planning law. Responsible authorities should be aware of the Court’s views so that legal errors are not made in considering amenity.
or the environment may have on the proposal and may consider any significant social effects of the proposal.\(^{10}\)

How did the question of amenity arise in the Romsey Hotel case?
The Romsey Hotel (the Hotel) applied to the Victorian Commission for Gambling Regulation (the Commission) for an approval under the Gambling Regulation Act 2003 (the GR Act) to install 50 gaming machines. The GR Act required the Commission to refuse the application unless it was satisfied that ‘the net economic and social impact of the approval will not be detrimental to the wellbeing of the community of the municipal district in which the premises are located’.

The Macedon Ranges Shire Council (the Council) informed the Commission that its community survey showed the local community was strongly opposed to gaming machines. At a subsequent VCAT hearing, the Council did not rely on the survey. Although VCAT was aware of the survey, it did not take it into account because the Council no longer relied on it. The only negative impact VCAT considered was a potential increase in problem gambling.

The Court of Appeal found that VCAT’s failure to consider the survey was an error of law. The Court held that to consider the net social impact of the approval required consideration of wider community concerns, consistent with the community consultative objectives of the GR Act.\(^{11}\) The Court held that objections based on philosophical, moral or religious grounds were relevant under the GR Act.\(^{12}\)

The Hotel had relied on the concept of amenity in planning law in support of a restricted approach to social impact. In rejecting the Hotel’s approach as too narrow, the Court considered the current state of amenity in planning law. It adopted a broad view about social impact under the GR Act.

What factors are included in amenity?
The Court adopted interstate appellate authority that amenity (of a neighbourhood) was a ‘wide ranging’ and flexible concept.\(^{13}\) Some aspects are ‘practical and tangible such as traffic generation, noise, nuisance, appearance and even the way of life of the neighbourhood … but others are more elusive such as the standard or class [or reasonable expectations] of the neighbourhood’.\(^{14}\)

May subjective criteria be considered?
The Court held that the amenity of a place includes a resident’s subjective perceptions of the place, and involves subjective judgments for which it would be difficult to offer a ‘rational concrete foundation’.\(^{15}\)

However, the Court referred to the remarks of the NSW Land and Environment Court (LEC) which cautioned a decision maker not to ‘blindly accept … subjective fears and concerns … [and] whilst such views must be taken into consideration, there must be evidence that can be objectively assessed before a finding can be made of an adverse effect upon the amenity of the area …’.\(^{16}\)

May questions of morality be considered?
This issue sometimes arises for certain proposals, such as brothels, sex bookshops and gambling premises. In Victoria, the position has been that morality does not form part of amenity, except possibly in very narrow circumstances.\(^{17}\)

The Court adopted the remarks of the LEC that matters of morality must not be disregarded and that proposals might be refused if they cause ‘great offence to a significantly large part of the community’.\(^{18}\) However, the LEC emphasised that a Court must not allow its personal views of ‘matters of taste or sexual morality’ to substitute for the evidence.\(^{19}\)

The Court also referred to another LEC case which held that if a proposal ‘causes antagonism or affront to an immediately affected and
identifiable group because of their particular religious or cultural values or practices and beliefs then a detrimental social impact may be demonstrated and, that if a church community is the identifiable group, the moral and sexual standards of the group will be relevant.20

The Court of Appeal stated that the decisions in Broad, Novak, Venus and Perry had been adopted by the LEC in holding that issues of ‘taste and morality are not necessarily set aside’ in assessing public concern.21

Are the Court’s remarks about interstate authority about amenity binding in Victoria?

We emphasise that the Romsey Hotel case is not a planning law case. It concerned the meaning and scope of social impact under the GR Act. The Court’s remarks about amenity would not strictly be binding on a judge of the Supreme Court or VCAT in a planning law case, but would be accorded considerable weight. This is emphasised by the Court’s view that the interstate authority on amenity is similar to the approach in Victoria under planning law.22

What does this mean for Responsible Authorities?

VCAT’s (and its predecessors’) authorities that questions of morality are irrelevant considerations or relevant in very narrow circumstances should not now be relied upon.

Responsible authorities (and their planning officers) should now take into account such questions of morality (and evidence on such questions) in relevant circumstances.

Those circumstances will change over time. To date, the questions have arisen mainly in relation to mortality (funeral parlours), sexual services (brothels) and gambling (gaming venues). However, in the future, they may arise more commonly in relation to animal welfare (eg broiler farms), public health (eg liquor and tobacco premises) and unsustainable use of resources (eg refuse disposal).

The Court’s reasoning does not affect the requirement that a person who may object on amenity (or other) grounds must be ‘affected’ by the grant of a permit.23 However, this does not require direct and personal effects. An objector whose community is potentially affected suffers that effect, even if it is only in the same way and to the same extent as other members of the community.24 A person is not, however, affected if their interest is one of a busybody or they are barrow-pushing.25

VCAT consideration of the Romsey Hotel case

VCAT recently considered Romsey Hotel in a planning case concerning a sex bookshop.26 VCAT confirmed it could not reject all sex bookshops on the grounds that pornography may be ‘immoral or socially harmful in all circumstances’ because the sale of specified forms of pornography was lawful. VCAT stated ‘it was entitled to acknowledge social concerns and sensibilities associated with’ access to forms of pornography that could not be sold in Victoria (eg X-rated media).27 Opponents to the grant of a permit tendered a petition that was said to be evidence of community opposition of the type required to be considered in Romsey Hotel. The petition was considered but given no weight because it was not conducted or obtained in the same way as the plebiscite in Romsey Hotel and because PE Act did not have the same social impact test as the GR Act.28

Conclusion

The Court of Appeal has provided useful insights into the elusive concept of amenity under planning law. The Court has confirmed that amenity is a wide ranging and flexible concept; that subjective views need to be considered; and that matters of morality must not be disregarded. The decision tends to widen the concept of amenity.

The application of the Court’s views by the Supreme Court and VCAT will be watched with interest.
For further information

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3 It includes heritage character (Doug Wade Consultants Pty Ltd v City of Melbourne (1984) 2 PABR 221, 237).
6 Victoria Planning Provisions cl 65.01.
7 PE Act s 60.
8 PE Act s 41(1)(c).
9 Kentucky Fried Chicken Pty Ltd v Gantidis (1979) 140 CLR 675. Section 60(1) of the PE Act expressly allows these matters to be considered.
10 PE Act s 60(1)(e); s 60(1A)(a). In Romsey Hotel at [62], the Court referred to the NSW LEC’s decision in Perry Properties v Ashfield Council (No 2) (2001) 113 LGERA 301, 318, [64] (Perry). In Perry, the Court adopted a wide view of amenity, although social impacts (not amenity) are directly invoked under NSW planning law.
11 Romsey Hotel, [57].
12 Romsey Hotel, [58].
14 Broad, 319-20 (Thomas J); applied in Novak v Woodville City Corporation (1990) 70 LGRA 233, 236 (Full Court of the Supreme Court of South Australia) (Novak).
15 Romsey Hotel, [60]; citing Broad, 326 (De Jersey J).

16 Romsey Hotel, [64], citing New Century Developments Pty Ltd v Baulkham Hills Shire Council (2003) 127 LGERA 253, 316; [2003] NSWLEC 154 [60]-[61] (New Century). New Century was a planning case concerning a Moslem place of worship.
17 In a funeral parlour case, Hande v City of Broadmeadows (1973) VPA 66 (Hande), 68, the former Town Planning Appeals Tribunal, accepted that ‘psychological disturbance’ or ‘mental aversion’, if reasonably held, forms part of amenity. The former Planning Appeals Board, in a brothel case, held that morality is not a town planning consideration (Linton Bistro Pty Ltd v City of South Melbourne (1985) 18 APAD 212, 221-2). The approach in Hande was doubted, and tentatively accepted only in narrow circumstances in Brook v City of Brighton (1986) 4 PABR 50, 58 (Brook). The three cited circumstances were religious adherents’ concern with certain butchers, reformers who put values on moral values, sometimes even religious values, but in exercising planning powers, it is inappropriate ‘to simply apply [such] values’. In HGC Administrative Services Pty Ltd v Greater Shepparton CC (2005) VCAT 1432 (HGC), [10]-[11], the statements in Tabcorp were adopted in the context of the social effects of a sex bookshop, and VCAT confirmed a long line of cases that ‘moral values’ were irrelevant in sex bookshop cases. In the brothel case, Cahill v Greater Shepparton CC (2006) VCAT 925, [42], VCAT rejected claims of increased illegal prostitution as a ‘moral viewpoint’.
18 Romsey Hotel, [61], citing Venus Enterprises Pty Ltd v Parramatta City Council (1981) 43 LGRA 67, 69-70 (Cripps J) (Venus). Venus was a planning case concerning a sex bookshop.
19 Venus, 69-70.
20 Dixon v Burwood Council (2002) 123 LGERA 253 (Pain J) (Dixon). Dixon was a planning case concerning a brothel near a church.
21 Romsey Hotel, [64]; New Century, [60]-[61].
22 Romsey Hotel, [65], where the Court cited City of Camberwell v Nicholson (unreported, Supreme Court of Victoria, 2 December 1988) and five decisions of VCAB concerning a brothel near a church.
23 PE Act s 57(1).
24 Chadband v Murrundindi SC [2005] VCAT 1039. (Chadband), [10].
26 Rowe v Wangaratta Rural CC [2008] VCAT 1472 (Rowe).
27 Rowe, [63]-[64].
28 Rowe, [44]-[50].