



Land and Environment Court
New South Wales

Case Title: Telstra Corporation Limited v Clarence Valley Council

Medium Neutral Citation: [2012] NSWLEC 1125

Hearing Date(s): 19, 20 and 26 April 2012

Decision Date: 26 April 2012

Jurisdiction: Class 1

Before: Dixon C

Decision:

- (1) The appeal is upheld.
- (2) Development consent is granted to DA2010/0675 subject to the conditions in annexure A.
- (3) The exhibits will be returned upon publication of this judgment in writing.

Catchwords: DEVELOPMENT APPEAL – Telecommunications facility, visual impact, streetscape

Legislation Cited: Environmental Planning and Assessment Act 1979
State Environmental Planning Policy (Infrastructure) 2007
Clarence Valley Local Environmental Plan 2011
Macleay Local Environmental Plan 2001

Cases Cited: Telstra Corporation Limited V Hornsby Shire Council [2006] NSWLEC 133; (2006) 67 NSWLR 256

Texts Cited:

Category: Principal judgment

Parties: Telstra Corporation Limited (Applicant)
Clarence Valley Council (Respondent)

Representation

- Counsel: Ms S Duggan SC (Applicant)
Mr A Simpson, Solicitor (Respondent)

- Solicitors: Ashurst Australia (Applicant)
Pikes Lawyers (Respondent)

File number(s): 11201 of 2011

Publication Restriction:

EX TEMPORE JUDGMENT

- 1 COMMISSIONER: The applicant, Telstra Corporation Limited (Telstra), seeks development consent for the erection of a telecommunications tower and associated equipment shelter on land described as lot 2, DP 738054, 1-3 Treelands Drive, Yamba, New South Wales.
- 2 The Telstra compound is proposed adjacent to the entry driveway of the Yamba Shopping Fair complex on land leased from the owner of the shopping centre. It will contain a 20 m monopole and a 6.5 m turret with panel antennas and surrounded by concrete bollards. The equipment shelter will be next to the tower and landscaped.
- 3 The site is located within a commercial strip of land zoned Business 3(a) under the *Macleay Local Environmental Plan 2001*, (Macleay LEP 2001). The site adjoins residential, recreational and special purposes zoned lands.
- 4 The Clarence Valley Council has refused development consent for the telecommunication infrastructure because in its assessment the development will have a negative visual impact on the streetscape and

locality. In particular, the council contends that the telecommunications facility does not satisfy objective 2(a) of the 3(a) Business Zone of the Maclean LEP 2001. (The repealed Maclean LEP applies to this development because of the savings provision in cl 1.8 (a) of the *Clarence Valley Local Environmental Plan 2011* (Clarence Valley LEP 2011). The council also contends that the development does not satisfy the aims in Part 1 of clause 2.1(2)(f), (j) and (k) of the Clarence Valley LEP 2011 or the height controls in C 6.1 and the setback controls in C8.2 of the Business Zone Development Control Plan 2011 (DCP 2011) and the Clarence Valley LEP 2011.

5 It is also asserted that the development offends Principle 1(b), (d) and (g) of the *NSW Telecommunications Facilities Guideline Including Broadband July 2010*, which apply by virtue of cl 115 of the *State Environmental Planning Policy (Infrastructure) 2007* (SEPP).

6 Before I explain my reasons for approving this development it is necessary to deal with the email received from the respondent's solicitor after the conclusion of the hearing on 23 April 2012. It concerns the notation in subclause 4 of the 3(a) Business Zone in the Maclean LEP 2001. The notation relates to development not included in item 3 or 5 of the 3(a) Business Zone. The notation states:

"Note consent for development included in this item will be refused if the proposed development is not consistent with the objective of the zone."

7 The respondent contends that the telecommunications facility (which is not included in Item 3 or 5) is not consistent with the objectives of the 3(a) Business Zone and therefore this appeal must be refused in accordance with the notation.

8 In reply to this further submission the applicant sent an email to the Court on 26 April 2012. The response confirmed its position articulated at the hearing that the development is a telecommunications facility and essential

infrastructure; therefore, it is not commercial or retail development. As such, the development can not be inconsistent with the zone objective to *"be well designed commercial and retail development which will enhance the appearance... of commercial and retail areas..."* within the 3(a) Business Zone.

- 9 The telecommunications facility provides improved telecommunications coverage and capacity to the retail and commercial businesses within the Yamba Fair Shopping Centre and along Treelands Drive. According to the applicant's evidence to the fullest extent possible the telecommunications facility has been designed to minimise the development's visual impact on the adjoining commercial and retail area.
- 10 In dealing with this late submission, the Court understands that a notation within a LEP is not part of the LEP. Therefore, it cannot be argued that the notation is a basis for the refusal of this development.
- 11 More relevant, as was discussed during the hearing, is the provision in cl 46(5) of the Maclean LEP 2001 which states:
- "Except as otherwise provided by this plan consent must not be granted to the carrying out of development on land to which the plan applies unless the consent authority is satisfied that the development is consistent with the objectives of the zone within which the development is proposed to be carried out."
- 12 Obviously, cl 46(5) could be used to justify a refusal of the development if I am not satisfied that the development is consistent with the objectives of the zone within which the development is proposed to be carried out. In order to determine the matters raised by the clause it is first necessary to define the development and consider the zone objectives.
- 13 I accept the evidence of both planners that the development is for a telecommunications facility and it is essential infrastructure. However, the applicable planning instrument, the Maclean 2001 LEP, does not define a telecommunications facility. Therefore, the council has characterised the

development as commercial development and adopted the definition of "commercial premises" found in the dictionary to the Maclean LEP 2001. It defines commercial premises as: *"a building or place used as an office or for other business or commercial purposes, but does not include a building or place elsewhere specifically defined in this clause or a building or place used for a purpose elsewhere specifically defined in this clause."*

- 14 Based on the above, the council contends that objective 2(a) of the 3(a) Business Zones applies to this development. It relies on Mr Ridgway, the council's planner's assessment (at p 2 of the joint report exhibit 6) that the telecommunications monopole and equipment shelter cannot enhance the appearance of the commercial area because:
- *The height and scale is excessive in this location;*
 - *It will significantly exceed the height control in Council's DCP;*
 - *It is inconsistent with the established heights, setbacks, streetscape and development pattern in Treelands Drive;*
 - *The height and scale is foreign to any other development in the locality, particularly, on the street frontage.*
- 15 For the above reasons the council says I cannot be satisfied that the development is consistent with the zone objectives and therefore it must be refused under cl 46(5) of the LEP. In short, the development does not enhance the appearance of the commercial and retail areas and is therefore not consistent with the zone objective for *"(a) well designed commercial and retail development which will enhance the appearance, function and viability of commercial and retail areas."*
- 16 Mr Juradowitch, the applicant's planner takes a different view. He believes that the development cannot be defined as commercial premises because it is essential infrastructure necessary to meet the needs of the local area. In order to meet its service requirements it must be taller than the existing buildings and tree canopy so that it can provide adequate coverage to the target area. In his opinion it is not possible for infrastructure items to be capable of enhancing the appearance of a commercial area. In this case he is of the opinion that the proposed telecommunication facility will have a

neutral effect on the appearance of the commercial and retail areas because it will be read as part of the existing infrastructure corridor of electricity poles and streetlights. Although the other infrastructure is lower than the proposed development his evidence is that with landscaping the slim line, grey coloured telecommunication pole and equipment shelter will essentially blend with the other vertical infrastructure in the locality. The applicant's photomontages and the Court's view of the locality support Mr Juradowitch's assessments. Based on that evidence, I am satisfied that the development is well designed and will have a neutral impact on the appearance of the commercial and retail area. I also agree for the reasons stated by Mr Juradowitch that this development is not commercial development or commercial premises as defined. It is essential infrastructure which enhances the viability of the commercial and retail area in which it sits and is not inconsistent with the zone objectives in which it is to be carried out. Therefore, cl 46(5) of the Maclean LEP 2001 does not preclude me from approving this development.

- 17 According to the evidence, the objective of this development is to provide a Telstra's Next G network for mobile phones and Internet to the developing residential areas to the south and west of Yamba. The applicant's radio frequency design and optimisation engineer, Mr D'Amico told the Court that the proposed site is the best location for achieving this objective. At paragraph 22 of his affidavit sworn on 30 March 2012, he says:

"The site selection process and review of potential sites confirm that there is no alternative to installing the facility at the proposed site that will achieve Telstra's RF coverage objectives for the targeted area".

- 18 The telecommunications facility will, according to the applicant's technical expert at paragraph 30 of his affidavit provide very good:

"Long term coverage capacity and performance (for voice and data calls) to the area west of Yamba including Oyster Cove being located centrally in existing commercial district within the targeted area means that 360 degree coverage and even distribution of traffic can be achieved from this facility".

- 19 According to Mr D'Amico there is no opportunity to reduce the height of the pole (paragraph 25 of his affidavit dated 30 March 2012). This is because the height of the monopole is the minimum required to clear terrain limitations, particularly the ridge and the tall trees to the south of the site between the site and the residential and tourist development at Oyster Cove. The height is designed to ensure that the telecommunications facility will address identified coverage issues in the targeted area of West Yamba and relieve the demand on existing facilities that currently provide limited service to the Yamba area. The facility will also provide depth of coverage and capacity to deal with the predicted demand on the mobile voice and data network for the rapid increase in the use of wireless applications such as smart phones, wireless internet devices and tablets that place a considerable demand on the network.
- 20 Mr D'Amico also told the Court that existing distant telecommunication facilities are already at or near their capacity limit; therefore, the proposed tower cannot be reduced in height or moved even 100 m without impacting on the network range and coverage performance.
- 21 The facility has been assessed against the Federal Government's Health and Safety of People Standards known as ARPANSA (standard) (2000) Maximum Exposure Levels to Radiofrequency Fields - 3 kHz to 300 GHz Radiation Protection Series Publication No 3 (ARPANSA standard) (paragraphs 31 - 36 of Mr D'Amico's affidavit dated 30 March 2012).
- 22 Based on the environmental EME assessment report the telemagnetic emissions that would be generated by the proposed RPS as a proportion of the ARPANSA standard for EME exposure limits for human health is extremely low. In fact it is 833 times lower than the limit set by the ARPANSA and this low reading makes no allowance for signal attenuation resulting from buildings, trees and general environment and that cellular networks rarely operate at maximum power. The Court was told by Mr D'Amico that the EME exposure limit is likely to be even lower than the assessed level of 0.12%.

- 23 Based on that evidence, I am satisfied that the health concerns raised by the objectors have been addressed against the relevant standard of assessment at this point of time. It is appropriate that the Court accept the standard created by a specialist authority such as ARPANSA: *Telstra Corporation Limited V Hornsby Shire Council* [2006] NSWLEC 133; (2006) 67 NSWLR 256 at [98 – 100]. Therefore, I accept the applicant's evidence that the telecommunication facility emissions will comply with the adopted public health and safety standard.
- 24 Clause 5 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* sets out the objects of the Act for the regulation of development. Relevantly, an objective of the EPA Act is to encourage "(iii) *The protection, provision and coordination of communication and utility services.*" The proposal is consistent with this object. It ensures the provision of mobile telecommunication services to the target area in Yamba and thereby protects and provides coordination of communication and utility services.
- 25 Section 79C(1) of the *EP&A Act* calls up a consideration of the *State Environmental Planning Policy (Infrastructure) 2007 (SEPP)*. Division 21 of the SEPP deals with telecommunications and other communication facilities. This development is a telecommunications facility as defined in the SEPP. Clause 115(1) of the SEPP provides for the development of a telecommunications facility with consent on any land and has the effect of overriding any of council's controls - LEPs and zonings where telecommunication facilities are prohibited. There is no need to rely on cl115 in this case because the proposed telecommunications facility is permissible under the 2001 LEP and the 2011 LEP.
- 26 Council contends that the telecommunications facility does not comply with aims (f), (j) and (k) of the Clarence Valley LEP 2011 because the proposal does not (a) maintain the character of the area; (b) it does not successfully integrate this infrastructure within the commercial zone;(fronting Treelands

Drive; and (c) it does not maintain or improve the scenic value of the land (being Lot 2 in DP 738054).

- 27 According to the evidence of Mr Juradowitch, this development is an item of essential infrastructure necessary to meet the telecommunication needs of the local area. To achieve that, it must be taller than the existing buildings and tree canopy to provide adequate coverage to the target area, the proposal is to be located within the existing commercial strip with car parking in front and building signage, electricity poles and lights on the street frontage.
- 28 The Court's view of the locality and streetscape confirms the above evidence of the applicant's planner. The area is of a low to moderate visual quality (p 3, joint report, exhibit 6). It is the type of commercial location considered appropriate for the development of telecommunications facilities. It has been designed having regard to the New South Wales Telecommunications Guideline Industry Broadband July 2010 (The Guideline) and according to the applicant's planner its colour, slimline appearance and landscaping will *"mitigate visual impact, in recognition of the fact that such facilities are likely to have a material visual impact."*
- 29 The pole and antennae will be of a grey colour to assist the structure blend into the skyline and nearby vertical infrastructure electricity and street light poles. Screen planting is proposed around the equipment shelter and a super advanced tree (with a projected height of 10 m) is to be planted next to the compound. The shelter is compliant with the relevant DCP controls, and according to Mr Wagner, the traffic expert the landscaping will not restrict driver visibility/sight lines as required by fig 3.2 and fig 3.3 of AS28901/2004 (exhibit E).
- 30 The planners both agree that the development is not inconsistent with the objectives of the B2 Local Centre zone under the Clarence Valley 2011

LEP (despite the fact that the LEP only requires a consent authority to have regard to the objectives of the zone).

- 31 I accept the evidence of Mr Juradowitch that part of the character of the existing commercial area includes supporting infrastructure such as car parks, utility installations, and electricity and light poles. This development is for a telecommunications facility and such an infrastructure item located within a commercial area is not on the evidence before me out of character or unreasonable in the existing commercial context. Even if it were the SEPP would override any inconsistency with the aims and objectives of the 2011 LEP. The Council has suggested there are more suitable sites for the development, however the Court cannot consider alternate locations. It must deal with the application before it.
- 32 The proposed tower at 26.5 m exceeds the 9 m maximum building height within the B2 Local Centre zone (set out in pt C6.1 of the Business Zone DCP 2011). Due to the low scale building height in the locality it is impossible to integrate a tall communications pole into the commercial area. However, locating it with existing infrastructure poles will achieve an acceptable degree of integration. It will be visible when viewed from several locations including the residential streets the Court was taken to on the view. The tower will be visible from primary living areas and private open spaces at numbers 23, 25 Casuarina Close, numbers 24, 25, 26, 27 Heron Close and numbers 24 and 25 Kookaburra Court.
- 33 However, after a view of these areas and a consideration of the oral and written evidence of the objectors, view impacts are, in the most part, angled views over existing commercial buildings and/or associated car parking. The proposed facility will not obstruct any high quality views to the water, landmarks or scenic areas, as discussed in the coastal design guidelines. After consideration of the separation and distance and angling of view the visual impact is, in my view, acceptable, particularly when weighed against the essential service that this facility will provide. While the facility is not set back in accordance with the prevailing setback of

buildings to Treelands Drive, there are numerous examples of infrastructure items and car parking areas along the western side of Treelands Drive street frontage that encroach on the established setback. There is no opportunity to relocate the facility into the car park on the basis of the evidence before me.

- 34 After a consideration of all of the evidence I am satisfied that the development is acceptable. It is sympathetic to the relatively modest architectural and visual quality of the adjacent buildings and setback of those buildings and existing nearby infrastructure. The development has been designed and sited to minimise its visual impact and to be sympathetic to adjacent buildings as required by principle 1 of The Guidelines. As Mr Juradowitch states at p 3 of the joint report "*a judgment must be made balancing existing visual qualities of the locality, visual impact on the locality, ...and the need for service*". There is no doubt that the 26.5 m tower will be visible, however, the Court is required to assess this application based on the evidence before it and has no power to consider a better or alternative site for this essential infrastructure. Having undertaken an assessment under s 79C of the EPA Act I find no basis to refuse this development. I make the following orders:

- (1) The appeal is upheld.
- (2) Development consent is granted to DA2010/0675 subject to the conditions in annexure A.
- (3) The exhibits will be returned upon publication of this judgment in writing.



Susan Dixon
Commissioner of the Court