

## **Telstra v City of Onkaparinga appeal update**

*The Environment, Resources and Development Court has released a memorandum intimating its decision in relation to the Telstra v City of Onkaparinga appeal at Sellicks Beach. This report investigates appeal options available to Council.*

This is a regular or standard report.

Director:	Terry Sutcliffe, Director City Development
Report Author:	Renée Mitchell, Manager Development Services
Contact Number:	8384 0584
Attachments:	1. ERD Court memorandum (22 pages) 2. Michael Roder SC advice (3 pages) CONFIDENTIAL

---

### **1. Recommendation(s)**

#### **1.**

a. **under the provisions of Section 90(2) of the *Local Government Act 1999* an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**

b. **the Council is satisfied that it is necessary that the public be excluded to enable the Council to consider the report at the meeting on the following grounds:**

**Section 90(3)(h) legal advice**

**Section 90(3)(i) – information relating to actual litigation, or litigation that the Council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.**

c. **accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.**

2. **That Council not appeal the expected Environment, Resources and Development Court decision to the Supreme Court in the matter of Telstra Corp Ltd v City of Onkaparinga for a proposed telecommunications facility at Sellicks Beach, as the legal advice on the prospects of success are not so high as to warrant expending further monies on such an appeal.**

3. **That with the matter of the Telstra v City of Onkaparinga appeal update having been considered in confidence under Section 90(3)(h) and 90(3)(i) of the *Local Government Act 1999*, an order be made under the provisions of Section 91(7) and (9) of the *Local Government Act 1999* that the agenda report and minutes for the Telstra v City of Onkaparinga appeal update be kept confidential until the conclusion of legal proceedings (including any appeal actions). Report Attachment 2 containing legal advice shall remain confidential.**

4. **That, pursuant to section 91(9)(a) of the *Local Government Act 1999*, Council delegates the duty to conduct an annual review of the confidentiality order to the Chief Executive Officer, or their sub-delegate.**

**5. That, pursuant to section 91(9)(c) of the *Local Government Act 1999*, Council delegates the power to revoke the confidentiality order to the Chief Executive Officer, or their sub-delegate.**

**2. Background**

On 17 April 2013, Commissioner Green of the Environment, Resources and Development Court (ERD Court), issued a memorandum to the parties, intimating that the Court will uphold Telstra's appeal and reverse the decision of the Council (by the Development Assessment Panel) to refuse development plan consent to a proposed telecommunications facility at Sellicks Beach. A copy of the memorandum, including background to the appeal and details of the proposal, is contained in Attachment 1. The judgement proper has not been issued at the time of writing the report.

At its meeting of 30 April 2013, the Council heard a deputation from Mr Gene Canala in relation to the ERD Court memorandum. Mr Canala requested that Council investigate its options in further appealing the matter to the Supreme Court.

In response to this deputation, the Council resolved:

*That a report comes to Council as soon as possible that canvasses appeal options regarding the outcomes of the legal proceedings in relation to the application by Telstra for the installation of a telecommunications tower within Sellicks Beach.*

This report addresses this resolution.

**3. Financial Implications**

The total legal fees to date for the ERD Court planning appeal are \$58,760.44 plus GST. The expert planning consultant fees for the appeal are \$28,600 plus GST.

The following Council staff appeared as expert witnesses in the appeal, with their costs being absorbed as part of the operating budget:

- Andrew Thomas, Work Group Coordinator – Water Resources
- Corna Kotze, Property Services Officer
- Matthew Paetz, Principal Development Policy Planner.

Michael Roder's (barrister) costs to date are about \$2,000 plus GST.

Mr Roder SC estimates that his costs for an appeal to the Supreme Court would be approximately \$20,000.

Mr Roder's fees in preparing to lodge an appeal in the Supreme Court would cost \$4,000 to \$5,000, including the Court filing fee of \$2,196. If Council were to lodge an appeal to preserve its decision, and then withdraws the appeal, there is a presumption that it should pay Telstra's reasonable costs incurred in receiving and considering the notice appeal. A contingency costs payout for an appeal which is withdrawn should be allowed. To this would be added another \$3,500 in transcript fees, filing fees and copying together with solicitor time.

The total costs therefore for an appeal to the Supreme Court is estimated at about \$30,000 to \$35,000.

The Supreme Court is a costs jurisdiction, meaning that if Council were to lose an appeal, the Court would order that it pay Telstra's costs (generally agreed to be about 65% of its legal costs).

#### 4. Risk and Opportunity

Key risks	Risk details and analysis
Socio political risk of not lodging an appeal in the Supreme Court	The decision of the ERD Court remains unaltered and Telstra constructs the approved mobile phone tower at Sellicks Beach. Residents opposed to the tower may question the rationale for Council's decision. This would be addressed upon release of the report from confidentiality.
Procedural and financial risks of lodging an appeal in the Supreme Court	<p>The decision of the ERD Court is challenged. Should Council win the appeal, Telstra will be liable to pay our costs. Telstra may decide not to challenge the decision and the tower is not constructed. Telstra may appeal the decision further (to either the Full Bench of the Supreme Court or the High Court), with Council needing to decide if it wishes to defend the matter further. Further funds would need to be expended to defend any appeal.</p> <p>Should Council lose the appeal, Council will be liable for Telstra's costs, and would also then need to consider whether to further appeal the matter.</p>

#### 5. Discussion

An appeal to the Supreme Court can only be upon errors of law, not the merits of the proposal.

An appeal can be lodged to preserve the Council's position and maintain our ability to appeal. The initial appeal need not contain all of the necessary grounds of appeal, however it would be preferable that it did at least insofar as they raise questions of fact. That is because permission is necessary to appeal upon those grounds and it is always preferable to have an application for such permission lodged within the relevant timeframes.

An appeal to the Supreme Court must be lodged within 21 days of the date of the ERD Court decision. However, if Council lodges an appeal to preserve its position and then withdraws the appeal, there is a presumption that it should pay Telstra's reasonable costs. The amount of costs can be minimised to an extent by pre-warning Telstra that the Council is simply preserving its rights, but Telstra will not stand for being delayed for very long.

Mr Roder's preliminary advice is contained in Attachment 2. Although he considers that the *DAC v 3GIS* decision has significant difficulties and should be reconsidered

(and preferably overturned), doing so will be difficult and, even if that occurs, reversing the ERD Court's decision about the Sellicks Beach tower will be even harder. Mr Roder believes that the Council has a less than even (ie less than 50%) chance of winning an appeal.

To overturn *DAC v 3GIS*, we would have to go at least to a three member Full Court of the Supreme Court. A five-judge Full Court should put the issue beyond any future dispute unless one of the parties wishes to appeal to the High Court. However, convening a five-member Full Court is at the discretion of the Chief Justice.

Mr Roder believes that at best, the Supreme Court would remit the matter back to the ERD Court to reconsider the matter and that the decision would likely be the same (that is, that approval is granted for the tower).

Special leave must be sought to appeal to the High Court. Usually such appeals are concerned with errors of law made by the Supreme Court. The High Court rarely grants leave to appeal unless there is an important principle of law to be determined. That said, telecommunications towers are contentious nationally, and that may be a factor that weighs in favour of a grant of special leave. In 2006, the High Court heard (and allowed) an appeal by Hutchison 3G Australia Pty Ltd in relation to whether facilities on Stobie poles were low impact facilities and/or otherwise required development approval (this is discussed further in the report).

Our solicitors have advised that it is unlikely that either party would apply for special leave and even less likely that special leave would be obtained.

### **Telstra v City of Onkaparinga and Snailham**

Further to this, another appeal was completed in March in the ERD Court against Telstra, this time in relation to a proposed tower at Aldinga Beach (that was refused by the Development Assessment Panel). Commissioner Green also presided over this appeal. The legal fees expended on this appeal are \$35,346 plus GST. The expert landscape architect's fees are \$11,015 plus GST and the expert planning consultant's fees are \$3,990 plus GST. Council also presented Corna Kotze, Property Services Officer, as an expert witness.

David Snailham, resident, presented six lay witnesses in this appeal.

Our solicitors have advised that it is likely the Court will uphold Telstra's appeal and planning consent will be granted for the proposed tower.

A total of \$50,351 has been expended in relation to this appeal. Should the outcome not be favourable for us, an appeal to the Supreme Court would be similar in cost to the appeal currently being considered.

### **Request for support from other councils**

In 2004, the City of Mitcham sought a declaration from the Supreme Court that the practice by ETSA of 'swapping out' existing Stobie poles with larger poles to accommodate low impact telecommunications facilities erected by Hutchison Communications constituted development under the Development Act and should be the subject of a development application.

The City of Mitcham requested financial support from each metropolitan council to assist with its expected legal costs.

Mitcham Council received a favourable Full Court judgement from the Supreme Court in 2005, which was subsequently appealed by Hutchison to the High Court.

The City of Mitcham again requested financial support to assist with its expected legal costs. At its meeting of 4 October 2005, Council considered the City of Mitcham's request for financial assistance in the High Court and agreed to pay \$14,634.00 to the City of Mitcham should it lose its appeal and be required to pay Hutchison's costs.

The High Court overturned the decision of the Supreme Court and found that the swapping out of Stobie poles to accommodate low impact mobile antennas is not subject to a development consent process.

The City of Mitcham was therefore required to pay Hutchison's costs and we paid our promised contribution accordingly.

This approach may be an option for Council to pursue should it decide to appeal the matter to the Supreme Court. There is no guarantee that any Councils would contribute to such a request, but given the importance of a potential favourable decision in the Supreme Court to all South Australian Councils, such a request may be appropriate.

### **Conclusion**

To date, \$87,360 has been expended in defending the Council's (Development Assessment Panel's) decision in the ERD Court. Expending a further \$30,000 to \$35,000 in a Supreme Court appeal that has a less than a 50% prospect of success may not be the most appropriate use of resources. It is therefore recommended that no appeal be lodged in the Supreme Court.

However, should Council wish to pursue an appeal, the following resolution options are appropriate in lieu of Recommendation 2:

- That Council appeal the expected Environment, Resources and Development Court decision to the Supreme Court in the matter of Telstra Corp Ltd v City of Onkaparinga for a proposed telecommunications facility at Sellicks Beach.
- That Council appeal the expected Environment, Resources and Development Court decision to the Supreme Court in the matter of Telstra Corp Ltd v City of Onkaparinga for a proposed telecommunications facility at Sellicks Beach, and that financial support for the appeal be requested from all metropolitan Adelaide Councils.

**ENVIRONMENT, RESOURCES AND  
DEVELOPMENT COURT OF SOUTH  
AUSTRALIA**

**TELSTRA CORP LTD v CITY OF ONKAPARINGA**

**Memorandum of Commissioner Green**

**17 April 2013**

**Memorandum from the Court to the parties by their Counsel**

**NOT FOR GENERAL PUBLICATION**

**Appellant: TELSTRA CORP LTD    Counsel: MR S HENRY SC - Solicitor: TRISH ROSS  
CONSULTING**

**Respondent: CITY OF ONKAPARINGA    Counsel: MR D BILLINGTON - Solicitor: NORMAN  
WATERHOUSE LAWYERS**

**Hearing Date/s: 26/11/2012 to 29/11/2012**

**File No/s: ERD-12-50**

**B**

**TELSTRA CORP LTD v CITY OF ONKAPARINGA**

**THE COURT DELIVERED THE FOLLOWING MEMORANDUM:**

- 1 This matter comprises an applicant appeal against the decision of the City of Onkaparinga ("the Council"), to refuse to grant Development Plan Consent for Development Application No. 145/511/2011, made under the *Development Act 1993*, to erect a telecommunications facility ("TF" hereafter) on vacant land off Sellicks Beach, Justs and Country Roads, and Bluewater Boulevard at Sellicks Beach.
- 2 The Council's Development Assessment Panel refused the application for the following reasons:

... The proposal is refused due to amenity concerns based on the proximity of the telecommunication facility to residential properties, visual intrusion on the escarpment vistas, lack of a structure plan and the location of the proposal precluding future options on the site.
- 3 The application was registered on 24 February 2011, thus the appropriate and relevant Development Plan was and is Onkaparinga (City) consolidated version 4 November 2010 with the relevant zone being Urban Zone ("UZ" hereafter) and future "living area" depicted on MAP Onka/1 (Overlay 1) Enlargement K and MAP Onka/112. The Court viewed the subject land and the locality as well as other suggested alternate locations on the morning of Monday 26 November 2012, in the presence of the parties and the experts.
- 4 Witnesses providing evidence to assist the Court comprised, for the appellant, Mr M Baade (Exhibit A3) a qualified town planner but in this matter giving background and search activity evidence concerning alternate sites and locations; Mr A Edwards, a most experienced electronic engineer in the employ of Telstra (Exhibits A4, A5 and A10, as well as R8, R9 and R10 - some of these were tendered and accepted on a confidential basis pursuant to s 20(2)(b) of the *Environment, Resources and Development Court Act 1993*, and some of his oral evidence was given on the basis of the public, other than the parties and their witnesses, being excluded from the gallery pursuant to s 20(2)(e) of that Act). That material and evidence was submitted and accepted as being commercially sensitive and inappropriate for broader consumption. The appellant also called Mr A Just (Exhibit A8), managing director of St Vincent Pty Ltd, land owner of the subject land and some of the alternative site locations as well as much farming land generally to the east, south-east and south of Sellicks Beach, regarding either decisions made by or the likely attitude of the company's board. Mr J Smith (Exhibits A6 and A7) an experienced consultant town planner also gave evidence for the appellant.
- 5 In the Council's case, evidence was provided by Mr A Thomas (Exhibits R2 and R3, Water Resources Co-Coordinator with the Council);

ERDC No. 50 of 2012

2

Ms C Kotze (Exhibit R4) Asset Planner with the Council concerning Council's property interests; with written evidence provided to the Court but not required by either party or the Court to be called for cross-examination and to provide oral evidence. The Council also called Mr I Lampard (Exhibit R5) a resident of an adjacent dwelling at 5 Bluewater Boulevard; Mr M Paetz (Exhibit R6) a qualified town planner and Principal Development Policy Planner for the Council, with respect to future planning in the area particularly with regards to a possible future neighbourhood centre north of the creek line on the land; and finally Mr P Jensen (Exhibits R7 and R11) an experienced, qualified town planner.

#### **The Subject Land**

6 The subject land comprises part of Allotment 94, FP 214800 contained in Certificate of Title Vol. 5749, Fol. 461.

7 The whole allotment is regular in shape with frontages of some 598 metres to Sellicks Beach Road to the north and some 536 metres to Country Road (formerly Justs Road) to the east. It adjoins to the west the "Ocean View Estate", an establishing residential area and has a small frontage to the end of Bluewater Boulevard.

8 The area of allotment as a whole comprises some 33 ha, however the TF would occupy approximately 100 square metres only adjacent the western allotment boundary fronting Bluewater Boulevard to the west and butting up against the creek/drainage channel to the north. The land is bisected by the Sellicks Creek, which runs generally from east to west and is fenced off from the balance of the land used for grazing purposes. It would form the northern edge of the TF site and compound. The land also slopes gently from south-east to north-west with a fall of some 1:18.

9 Along both the northern and western boundaries there are two fence lines set about 8 metres apart within which there are a row of mature pine trees along the Sellicks Beach Road frontage for most of its length. The trees have a height in the order of 8 to 10 metres and they form a relatively dense screen along the Sellicks Beach Road frontage providing partial views through and into the farm paddocks behind. Adjacent to the western boundary in places the row of screen pine trees has been replaced by a few medium height shrubs and trees in the order of 4 metres. The pine trees along the western boundary are a little lower than those fronting near Sellicks Beach Road and perhaps in the order of 6 to 8 metres but with generous spread.

#### **The Development Proposal**

10 The development comprises the construction of a telecommunication facility including a monopole supporting 3 panel antennae together with equipment shed within a fenced compound area scaling some 4.9 by 11.6 metres. The monopole is to be made of concrete and some 35 metres high with 3 panel

antennae that are relatively flat and strap mounted at the top. The adjacent shed has dimensions of about 2.28 by 3.28 metres with a height of 3 metres and it would be clad in Colorbond metal of "pale eucalypt" colour. The pole will have a natural concrete grey colour.

- 11 The compound is to be enclosed by a 2.4 metre high open fence with gate on the western side providing vehicle access to the end of Bluewater Boulevard. A hard stand area of some 53 square metres is also proposed adjacent the western side of the compound site facilitating such access.
- 12 The facility would be connected to electricity and fibre optic infrastructure within the northern road verge of Bluewater Boulevard.
- 13 The purpose of the proposal is (from statement of Mr Edwards, Exhibit A4):
- to provide a new cellular mobile cell site (base station) at Sellicks Beach to service the current and future residential, business and commercial uses within the suburb;
  - to improve service to customers in that area largely due to an increase in demand for services and the inability of the existing nearby facilities – particularly Mt Terrible and Aldinga to provide sufficient quality of service and system capacity to customers in the area;
  - to supplement the service provided by the Mount Terrible facility to the east which has reached its capacity and the evidence is that demand continues to increase as new dwellings are completed in the area with existing customers experiencing slower data throughput, more call drop outs and service denials associated with a congested network.
- 14 Such development proposal is neither a complying or non-complying development in the UZ (Principles 11 and 12) and is for consideration and assessment on its merits under s 35(5) of the Act.

#### **The Locality**

- 15 It is appropriate to define and describe the relevant locality for the purposes of interpreting guidelines within the Development Plan. In general, the locality comprises that part of the area surrounding the subject land of tangible influence on it and that the specific proposal affects, to a notable degree. Noting the evidence of Messrs Smith and Jensen on this topic, and the logic/reasoning behind their locality depictions (having regard to likely visibility of the proposal, topography, tree/building screening and road and layout patterns as well as vantage points), I conclude that a combination of the two is appropriate. I agree with the generalised 300 metre guide for the locality of Mr Smith as it applies to the north, south and west but the greater distance put forward by Mr Jensen to the

ERDC No. 50 of 2012

4

east, to include the areas adjacent Justs and Country Roads/Sellicks Beach Road corner and along Country Road south of that intersection for about 400 metres, is appropriate.

16 Accordingly, I define the locality to include:

- most of the subject land allotment to the east and south-east (including the creek line and the rural land use applicable to it);
- to the frontage of land on the eastern side of Country Road for about 400 metres south of its corner with Sellicks Beach Road (semi-rural and with a few dwellings);
- into the "Ocean View Estate" a mix of one and two-storey dwellings and a local reserve, to the south-west and west for about 300 metres;
- marginally into the new residential development to the north-west and north of Sellicks Beach Road;
- for perhaps an allotment depth also on the northern side of Sellicks Beach Road to the north and north-east generally (comprising approximately 30, mostly single storey dwellings and an existing Telstra telephone exchange use); and
- key roads and vista incorporated include Sellicks Beach Road moving downhill from east to west; Bluewater Boulevard entry southwards into the Ocean View Estate and up to the western boundary of the subject land; and Country Road, in a north and south direction within about 400 metres south of its corner with Sellicks Beach Road.

17 The character of the locality is of mixed residential nature to the north, west and south-west and rural character to the east and south to south-east.

18 Amenity levels from a residential perspective are high enhanced by:

- proximity to and views of coastal areas;
- views of general rural land to the hills backdrop; and
- some local dwellings, gardens and streetscapes.

19 Negative factors comprise:

- overhead infrastructure (particularly on Sellicks Beach Road);
- creek line general appearance; and
- some built form and property appearance/degree of maintenance.

### **Relevant Development Plan Provisions**

- 20 I have had regard to those provisions referred to by the experts and counsel and I find the following to be relevant provisions for the assessment of the proposal and particularly the key issues:

#### **Council Wide (CW hereafter)**

##### **Design and Appearance**

**Objective:** 1; and

**Principles of Development Control:** 1, 3, 5, 17, 19 and 20.

##### **Hazards**

**Objectives:** 1-3; and

**Principles of Development Control:** 1-3, 6 and 7.

##### **Heritage Conservation**

**Objective:** 1; and

**Principle of Development Control:** 1.

##### **Infrastructure**

**Objectives:** 1 and 4; and

**Principles of Development Control:** 1 and 10-12.

##### **Interface Between Land Uses**

**Objectives:** 1 and 2; and

**Principles of Development Control:** 1-3 and 9.

##### **Land Division**

**Objective:** 4; and

**Principle of Development Control:** 5.

##### **Landscaping, Fencing and Walls**

**Objective:** 1; and

**Principles of Development Control:** 1(a)(c), 2 and 4.

##### **Orderly and Sustainable Development**

**Objectives:** 1-4 and 7;

**Principles of Development Control:** 1-3, 5, 7 and 8.

##### **Residential Development**

**Objective:** 1.

ERDC No. 50 of 2012

6

**Siting and Visibility**

**Objective:** 1; and

**Principles of Development Control:** 1(a)(b), 2, 4, 5 and 8.

**Telecommunications Facilities**

**Objectives:** 1 and 2; and

**Principles of Development Control:** 1 and 3.

**Transport and Access**

**Objective:** 2; and

**Principles of Development Control:** 8, 13, 21, 22, 27, 30, 32 and 36.

**Residential Zone (RZ hereafter)**

**Objective:** 4; and

**Principle of Development Control:** 1.

**Sellicks Beach Policy Area 42**

**Desired Character;**

**Objective:** 1; and

**Principles of Development Control:** 1 and 4.

**Urban Zone (UZ hereafter)**

**Objectives:** 1, 2, 4, 7, 9(a)(d);

Commentary para 1 sentence 2 and para 5.

- 21 The most important guides to the key issues in focus are reproduced in Attachment A.

**Processing**

- 22 I note that the Council determined the proposed development to be a Category 3 development and following formal public notification some 100 or thereabouts, representations were received by the Council.
- 23 I also note that the Council referred the proposal to the Adelaide and Mt Lofty Ranges Natural Resources Board with respect to advice on creek protection and remediation; and to the Aboriginal Affairs and Reconciliation division of the Department of Premier and Cabinet with respect to whether there were any entries on the register for the site or near area (with response being in the negative).

**Approach**

- 24 Section 33(1)(a) of the Act requires the relevant authority (the Council) and on appeal this Court, to assess a development application against the provisions of the appropriate/relevant Development Plan and s 35(2) specifies that where

a development is assessed as being seriously at variance with the Development Plan, it must not be granted consent. The whole of the Development Plan must be assessed, including on appeal. The relevant guidelines in the Plan provide the firm basis for decision-making together with a consideration of any other relevant matters.

25 In terms of s 35(5) and the relevant provisions of the Development Plan, the proposal is for consideration on its merits against the Development Plan guidelines and involves weighing up the pros and cons and considering whether it is sufficiently conducive to the overall intent, purpose and desired character and amenity of the UZ and tested in the specific site and locality context. The Development Plan is also to be utilised as a flexible, advisory planning policy document, not as a mandatory legal statute and as a practical guide for practical application, superimposed upon an existing state of development on the site and in the relevant locality. Ultimately, a planning judgment is to be made on a fact and degree basis as to whether the specific proposal sufficiently meets the Development Plan and having regard to all relevant matters, warrants consent.

26 I have had regard to case law dealing with telecommunications facility appeals and particularly *DAC v 3GIS Pty Ltd* [2007] SASC 216 particularly at paras 44-48 and 69-76; *Hutchison 3G P/L v City of Mitcham & Ors* [2005] SASC 249; *City of Burnside v City Apartments Pty Ltd* [2004] SASC 294 regarding 'minimisation'; and a number of other judgments of this Court, particularly in the metropolitan Adelaide area. Being mindful of the approach and outline to assessment in those judgments I note that some of the key aspects include:

- that the Development Plan expressly recognises in its objectives, that telecommunications facilities are essential infrastructure required to meet the rapidly increasing community demand for communication technology, and that demand is assumed;
- the Development Plan assumes that telecommunications facilities will be constructed in the Council area in order to satisfy the community need for such relevant telecommunication technology;
- it is appropriate to ensure that the necessary facilities are constructed in a manner which ensures that coverage is available to satisfy the need (in the target search area and the radio frequency (RF hereafter) technology need in the context of surrounding facilities and demand growth), but in a way which minimises the visual impact of those facilities on the amenity of the local environment;
- it is not a matter of balancing the impact of a particular development on the amenity against some demonstrated demand need as the demand need is given;

ERDC No. 50 of 2012

8

- with respect to the facility need (as opposed to demand need), the weighing process is not a balancing of the need against the effect of development on visual amenity but a weighing of available alternatives and options and the extent to which they would each minimise visual impacts on the amenity of the locality;
- in considering minimising the effect on the environment, the planning authority is to consider alternative sites or low impact facilities, whether minimisation can be better achieved by installation of a facility at some other site(s) but the other so-called preferred or possible site(s) will need to meet the facility demand and if they do not, they may be discarded from the search;
- with regard to the role of alternative sites it is appropriate to consider obvious alternative sites which would clearly better meet the objectives and principles of the Plan and to consider them in a practical and commonsense fashion; and
- where alternative sites are under consideration, the Court is required to consider only the proposed facility and not whether some alternative site with some modified form of development would be more environmentally sensitive. An alternative site would have to be a reasonably practical alternative (including the likelihood of tenure being obtained) that would meet the facility demand and be a feasible alternative.

#### **Planning Assessment**

27 Given the above, and the nature of this matter, I propose to assess the proposal under three main discussion areas:

- need (community and facilities);
- minimisation of visual impact;
- alternative locations and attributes/consequences; and

to then formulate conclusions with respect to the proposal location and design.

28 I propose to consider the assessment and consideration of this matter under the key general heading areas of community and facilities need, land use, siting, location and zoning, minimisation of visual and character impacts, and consideration of alternative locations for the development.

#### **Community and Facilities Need**

29 It is worthy of note that the community need for Telco facilities, apparent as it is to many of us in the community, is established by the *Commonwealth*

*Telecommunications Act 1997* and the CW telecommunications facilities Objective 1 (Attachment A), as confirmed by the Supreme Court in several cases before it.

30 Mr Edwards (Exhibit A4 and other) has made the case for an additional TF at Sellicks Beach as set out in his paras 45 to 48:

45. The need for a new cellular mobile cell site (base station) at Sellicks Beach has been identified, to service the current and future residential, business and commercial precincts within the suburb of Sellicks Beach. Specifically, the need is to improve service to customers located throughout the region roughly bounded by Seascope View to the north, Wellington Avenue to the south, The Esplanade to the west and Napier Avenue, Alexander Street, Silvercloud Grove and Justs Road to the east.
46. This need has arisen largely due to an increase in demand for services and the inability of the existing nearby facilities to provide sufficient quality of service and system capacity to customers in the area. This target area is indicated by the area encompassed by the blue line on the map images in Attachment A and Attachment B [set out in Exhibit A4].
47. Telstra's cellular network coverage in the target area is currently provided by a single radio cell from the existing facility located at Mount Terrible to the east. This facility was recently augmented with additional radio infrastructure in an attempt to add capacity, however the facility is too far away from the target area for this augmentation to provide the needed capacity relief. This facility has reached its capacity limit.
48. As demand continues to increase, especially as new dwellings in the area are completed, the network performance will continue to degrade with customers experiencing slower and slower data throughput and more and more call drop outs and service denials associated with a congested network.

31 The appellant's RF team identified the "target area" in which a new facility or facilities were required. Whilst thoroughly examined and cross-examined, Mr Edwards retained the above opinions.

32 I accept his evidence as to a facilities need in the Sellicks Beach area as defined (p 25 of Exhibit A4). In doing so, I detect an underlying set of assumptions or goals, concerning adequacy and level of service provided in both the near and longer term for the particular area. It seems, and rightly so, that Telstra appears to be setting high standards of service (coverage, data/download speeds, dropout and interference minimisation), apparently more so than its competitors. Analysis and choice of a new location for a new TF in Sellicks Beach seeks, on the evidence of Mr Edwards, to ensure that outcome. It would seem sensible that with the costs involved and the apparent continued thirst of the public for such services, why would any organisation plan for or accept a "B-grade" location or solution which may require further upgrades or additional new facilities in the shorter term. However, as clearly set out in the Development Plan, TF proposals must demonstrate minimisation of impacts to visual amenity

and character, to an acceptable level having regard to the technology and practical considerations. I note that no expert technical evidence was put against Mr Edwards.

Land Use, Siting, Location and Zoning

- 33 The proposed TF land use is sought to be located in the UZ (an uncommon Zone name, type and policy content), where eventual urban development (residential, open space, centres and other) is expected, but with agricultural and other low intensive land use in the interim so as to not prejudice the former (refer Objective 1, 2, 4, 7 and 9 in Attachment A). It is a development not listed as “non-complying” and is for consideration on its own merits.
- 34 The proposed location and siting is in the north-west corner of the Zone on MAP Onka/1112, adjacent the RZ to the west and north of Sellicks Beach Road. However, even in the RZ, whilst a less preferred zone given the policy content of CW TF Principle 1(d) and 3, TF (at any height) are also a merit form of development.
- 35 There also exists a limited “Structure Plan” MAP Onka/1(Overlay1) Enlargement K for Sellicks Beach depicting the whole of the subject land for future “living” purposes (equates mostly to residential use) and with a “stormwater drainage path” through it. However, the evidence of Mr Paetz of the Council (Exhibit R6) and Mr Jensen (Exhibit R7) in the Council’s case, is that a future neighbourhood centre planning study has been undertaken by the Council in recent years which recommends the nominal neighbourhood centre location and for a school(s) be effectively relocated to the Sellicks Beach Road frontage of the subject land north of the creek, from the position shown on Structure Plan K some 600 metres to the east, past the Just Road corner and on the northern side of Sellicks Beach Road.
- 36 I acknowledge and note the study, but I find that I can place no substantive weight on it or the neighbourhood centre relocation possibility, as it has no weight under the Development Plan, may involve different owners of land and is far too uncertain. Nevertheless, even if it were to eventuate north of the creek line in between that and Sellicks Beach Road, the proposed TF location would not significantly impact on that in a functional sense and improved TF services are likely to enhance the success of the centre.
- 37 I understand that the amended siting of the proposed TF (Exhibit A14 compared to A1), would facilitate the extension of Bluewater Boulevard toward the east and south-east and it could be incorporated into part of a local open space reserve with the creek.
- 38 Arising from the evidence and the case of the Council, it would also seem to be the case that the proposed siting of the TF would not prejudice the potential

upgrade of the creek line for stormwater and or environmental goals and purposes.

- 39 Once constructed and installed, the proposed TF as a land use is reasonably benign and low intensity as a use. The vehicular traffic to it is expected to be relatively low. The impact is mostly visual and further tree planting is possible in proximity to it. I consider that the land use, siting, location and intensity of use in the UZ context, is acceptable in-principle and nothing arises under these considerations justifying refusal of the proposal. It would not thwart the orderly and proper planning and development of the UZ or other zoned land.

Minimisation (of impacts on visual amenity and character)

- 40 Two different aspects require consideration – elements to minimise impact in the design of the TF proposal and secondly alternate locations of the same development (to seek to minimise or have lesser impact than the selected site). First the former.

- 41 In some respects the siting location adjacent relatively tall pine trees (general rows at an intermediate distance to the north as well as the row in closer proximity to the west which tend to be at the rear of residential use in the new estate) obscures in part the view of the proposed facility from Sellicks Beach Road (as well as that gained from some medium level vegetation along the creek corridor) which is effective in providing minimisation of visual impact from many dwellings, roads and vantage points. However, unsurprisingly, only partial screening is achieved from many viewing locations given the (required) height of the proposal.

- 42 From my experience, I perceive that on the scale of heights of TF supporting poles, the 35 metre pole selected is clearly taller than those that are low, (20-25 metre range), but is also significantly less in height than a 40 or 50 metre pole often utilised or sought (from time to time) by the providers, but clearly it would cause greater impact than the much lesser height. Such height is not practical in the circumstances of this proposal (Edwards).

- 43 The form of the pole and antenna location and design are also a minimising element(s):

- the slim line pole is much less visually apparent than a lattice type structure or a small/narrow lattice pole plus guy wires type;
- the 3 antennae are flat in profile, strapped to the top of the pole and few in number, not extending outward or above the top of the pole; they are not as obtrusive as commonly used tuft antennas or those attached to a somewhat bulky and obtrusive headframe structure used from time to time; and

ERDC No. 50 of 2012

12

- the concrete material and grey colours of the pole are probably the best possible to minimise visual impact; the grey concrete lightens when very dry making it less visible in clear skies, whilst it darkens up with rain or moisture which is a better matching shade and fit in darker skies.

44 These attributes, will in part achieve minimisation of visual impact.

45 In terms of the equipment shed, its size, height, Colorbond metal and colour selected, as well as the compound fence 2.4 metres in height (presumably open mesh with barbed wire strands) would minimise visual impact compared to other alternative sizes, materials and colours.

46 There also remains a reasonable possibility, particularly to the south and east of the compound, for some screen buffer planting to be undertaken to further minimise visual impact from existing and likely proposed residential use to the south and east.

Alternate Locations (refer to location plan Exhibit A2)

47 The following alternate locations appear to have been derived from at least three sources – firstly suggestions by the Council, secondly by its planning consultant or other advisers, and thirdly those alternate locations considered as having potential by the appellant itself.

48 I briefly summarise those locations and some key attributes associated with them having regard to the evidence of Mr Edwards in terms of RF technology and the evidence of the planners with respect to visual impacts.

49 **A** – 88 Esplanade (near Sellicks Beach Road corner) in Local Centre Zone with 30 metre pole required to achieve similar technical outcomes:

- best candidate for the appellant from an RF perspective;
- excellent coverage to most of the target area;
- Development Application lodged, refused by the Council, then owner refused or changed positive position regarding tenure, hence no appeal pursued or lodged by the appellant, such that the site is considered no longer available.

50 **B** – Lot 1, eastern end Gisborne Road, near paddock gate, in Urban Zone with 35 metre pole required:

- good coverage to most of target area except northern reaches (north of Sellicks Beach Road) and to coastal residential areas west of the site; and
- partial capacity relief only – not as good as or better than selected site.

- 51        **C** – Lot 28, in olive grove, north-west of Riviera Road in MOSS Rural Zone with 35 metre pole required:
- adequate signal would only be achieved to north-east and centre of target area; too far from southern reaches and providing poor outcomes to locations west of it;
  - one additional facility would be required to address capacity issues in foreseeable future; and
  - only partial capacity relief – site not comparable with or superior to selected location.
- 52        **D** – Lot 148, north end of Riviera Road in RZ at Council Community Centre location with 35 metre pole required:
- similar outcomes as per C above.
- 53        **E & F** – Lots 1004 and 1002 to the north and east off Seascape View and Maritime Avenue in RZ – on effluent management site with 35 metre pole required:
- similar response to C above; though marginally better outcomes for sites west of it; and
  - partial capacity relief only achieved.
- 54        **G** – Lot 221, Sellicks Beach Road in RZ – existing Telstra telephone exchange site – 35 metre pole required:
- area west, south and north would not receive adequate signal;
  - excessive interference difficult to contain;
  - one or two additional facilities likely required; and
  - only partial relief to capacity problem at Mt Terrible facility.
- 55        **H** – subject location of development proposal – refer later/elsewhere for details and assessment.
- 56        **I** – subject allotment, 80 metres due north, opposite side of creek on farm land – UZ – 30 metre pole required:
- similar performance to subject site and proposal H;
  - would also provide sufficient capacity relief for Mt Terrible facility;

ERDC No. 50 of 2012

14

- not currently practicable as owner not positive or supportive of providing tenure.
- 57      **J** – subject allotment, but 125 metres to the north in north west corner of allotment near Sellicks Beach Road – UZ – 35 metre pole required:
- similar performance to H; but better coverage to north-east of target area;
  - poorer performance signals to the west and south-west; and
  - partial capacity relief only;
  - not comparable or better than subject location and proposal; and
  - broad community impact likely to be greater with respect to visual amenity given close proximity to Sellicks Beach Road and the vistas to both east and west up and down it.
- 58      **K** – on subject allotment and farm land to the east and north of creek in UZ with 35 metre pole required:
- good coverage to north-east and north-west (but poor between) and difficult to limit interference;
  - inadequate signal strength in the coastal strip to the west and in far south-western part of target area;
  - partial capacity relief only; and
  - not comparable with or superior to subject location and proposal.
- 59      **L** – on subject allotment and farm land approximately 160 metres to the east, south-east of subject proposal siting H and south of the creek line in UZ and with 35 metre pole required:
- same performance and issues as per K above;
  - partial capacity relief only;
  - not superior and practical (tenure) issue likely to remain unsolved.
- 60      **M** – co-location with Optus facility on Main South Road, 1.5 kms to the south-east – Rural Zone:
- the location is some 1.5 kms from the coastal edge and over 2 kms from the north-western corner of the target area;
  - not sufficient signal strength likely to the majority of target area;

- interference a major concern due to elevation;
- additional facilities would be required in target area in foreseeable future.

Note: No other co-location opportunities or suitable tall buildings or structures as hosts were identified in the target area.

61 N – approximately 25 metres south of end of Silvercloud Grove (Pt. Sec. 671) in Rural Zone adjacent RZ, within farm land – 35 metre pole required:

- good coverage to a large part of target area;
- interference problems likely to arise due to higher elevation;
- north of Casino Boulevard and east of Palermo Street would not receive adequate signal – coastal strip also likely to receive inadequate services and signal;
- additional facility required in north-east part of target area in foreseeable future;
- better service likely to far south end of target area.

62 Mr Edwards concluded (paras 9 and 10 of supplementary statement Exhibit A5) that subject location H, is better than one at N from an overall RF engineering perspective and that was also the upshot of his evidence with respect to all other alternatives, even including the most comparable including the others within the subject allotment lettered I, J, K and L. Only site A (no longer available) would be superior.

63 It might be fair to deduce that one or two of the other alternative sites, considered from an RF technical view point, might have similar or perhaps even marginally less visual impact to existing (though not necessarily future) residential use, such as sites I, K, L and N, and potentially C, E and F. Tenure issues clearly arose in respect to sites I, K and L as it appears unlikely for these sites to be accepted by Mr Just and his company, owner of the land, and sites E and F are Council owned but not overtly supported. No owner feedback/advice/input is known with respect to item C (an inferior technical alternative), or item N and they thus remain problematic.

64 I accept the evidence of Mr Edwards (Exhibit A4, paras 52 and 53, and within Exhibits R8, R9, R10 and A10), despite thorough cross-examination by the respondent Council's counsel. To sum, firstly from an RF outcome perspective:

- the proposed location and design can provide coverage to existing and future customers predominately within the boundary of the target area and

ERDC No. 50 of 2012

16

with effective planning and configuration of this facility would also have a positive impact in reducing interference and improving capacity for customers located further afield;

- the proposal location lettered H, is the now preferred but second choice site (after the near coastal candidate A became no longer available), and it has the following advantages:
  - it is the best available to provide the necessary coverage and capacity relief for the existing facility;
  - relative central location provides for uniform sized radio cells each serving a balanced number of customers;
  - it would integrate well with the existing networks and will not create undue interference within the network;
  - the network performance objectives can be mostly achieved with only a moderate height pole of 35 metres;
  - the location and structure height will allow radio signals to be sent with a minimum of shielding or radio signal shadow areas caused by terrain, local buildings and trees;
  - the proposed height is near the lower limit to successfully achieve controlled coverage of the cell size, required for the target area;
  - users travelling within the network target area and surrounds will mostly have coverage from a single dominate radio cell, thus ensuring high quality calls and maximising available data throughput speeds;
  - users in most homes and businesses in the area would have sufficient in-building signal margin for good quality mobile voice calls, no call dropouts and high speed data calls, with the ability to use high speed data services indoors throughout the majority of the service area;
  - the type of antenna proposed allows for antenna tilt adjustments to be made electronically rather than mechanically, minimising maintenance attendance on-site and maximising the quality of service to users;
  - the site layout proposed results in minimal feeder cable length with minimal signal loss and enables signal reception and good quality service to be delivered to users;
  - existing mains power can be used thus minimising environmental impacts of extensions;

- use of optical fibre transmission facilitates, maintenance of the slim line appearance of the pole and not requiring additional antenna to be installed at the site and also enabling all cabling to be contained within the small diameter slim pole;
- optical fibre facilities are available to the site resulting in minimal impact from potential extensive trenching across public land;
- access to the site would be clear and straight forward with little or no visual or environmental impact and with no trees being required to be removed; and
- tenure at this particular site is confirmed and agreed.

65 I also note Mr Edwards' comments about visual minimisation and having regard to the views of Mr Jensen and Mr Smith, I assess and find that visual impact to residential amenity and in the public realm of the proposed location, siting and design is minimised in the following ways:

- wires and cables internal, flat antenna not protruding, minimal protrusions from the slim pole;
- location and siting utilised or has the benefit of:
  - a reasonable setback distance of approximately 150 metres from Sellicks Beach Road and more from the Lurline Boulevard corner with it, both distributor and collector roads in the vicinity; and
  - being a position behind trees to the west and north acting as a screen for many (not all) vantage points with mostly upper portions only likely to be visible;
  - the colour of the concrete pole (light grey when dry and dark when wet) and of the equipment shed (pale eucalypt Colorbond) will blend well with the surrounds and backdrop; and
  - opportunities for more localised planting, particularly to the south and east of the fenced compound are available and could be required by condition of consent.

66 Whilst the proposal exhibits a certain degree of minimisation of its visual impact, nevertheless it will be quite visible (and highly so from certain vantage points), including from Main South Road, parts of the locality to the west and north-west, from the somewhat removed Victory Hotel (and its outdoor areas) to the east, from certain foreshore adjacent areas and from several view points in and about nearby dwellings and locality roads in the Oceanview Estate including Bluewater Boulevard, Oriana Drive, Arcadia Crescent and others.

67 I am satisfied with the research and analysis of potential alternative locations in or very near to the target area and that there are no other obvious alternatives that would sufficiently meet the facility and capacity relief need, and that are reasonably practical alternatives, so as to minimise visual impact on the environment to any greater, better or more acceptable extent, than the subject proposal with its location, siting, design and zoning, and amenity impacts and consequences.

68 Mr Edwards produced a series of colour plots of computer modelling over the target area and surrounds (some at the request or enquiry of the respondent Council's counsel), tendered as Exhibits R8, R9 and R10 (some 33 sheets) and A10 (another 12 plot sheets). These were the subject of detailed cross-examination by counsel for the respondent. In general they dealt with:

- (Exhibit R8) - existing network layout and antennae sectors; the target area for improvements sought for the network (performance and coverage); a co-location alternative with an Optus site; 3D views of terrain surroundings; interference sources from Optus and other Telstra owned sites; areas of influence and effectiveness from best server plots; and capacity headroom plots on existing sites;
- (Exhibit R9) – best coverage existing and proposed cells (sites H and N above), number of servers, signal strength, variations with pole/antenna height differences;
- (Exhibit R10) – alternative site locations and exception/exclusion areas of likely poor coverage and service; and
- (Exhibit A10) – considering proposal H with alternate N, as to the degree of interference in various parts of the target area, setting out the differences for each.

69 I believe it to be fair to say, as emerged through Mr Edwards' evidence, that no one alternative site, or the proposed site/design are ideal or perfect. Each had differing combinations of coverage, signal strength, interference and sector balance issues. Whilst acknowledging the pros and cons of each alternative and the proposal, Mr Edwards remained steadfast in his opinion that the proposed site and design were the best and acceptable from an RF perspective and overall that no other was superior, including sites lettered I, J, K, L or N.

70 On one aspect of the practicality of alternatives, namely tenure, the evidence of Mr Just was that his company had approved the lease over proposed site H but was unlikely to or had rejected approaches regarding sites labelled I, K and L, and with J (north of creek and in the corner close to Sellicks Beach Road), not supported but not without some chance. His company had considered no proposition or offer concerning sales/purchase of pieces of land at a price to be determined.

### Conclusions

- 71 I conclude, having regard to the evidence, the view, and from my assessment, that the facilities and demand need, and minimisation of visual impact to amenity and character of the localised environment, having regard to several alternative locations and designs, are such to sufficiently fulfil the specific TF related Development Plan guidelines in the context of case law (especially derived from *DAC v 3GIS Pty Ltd* [2007] SASC 216) and that the proposed development sufficiently meets the Development Plan as a whole and is acceptable and warranting of Development Plan Consent. It is not seriously at variance with the Plan when properly assessed.
- 72 I now intimate to the parties that the Court will be upholding and allowing the appeal by the appellant, reversing the decision of the Council to refuse to grant Development Plan Consent. Nevertheless, it envisages that there are likely to be some areas where the attachment of reasonable conditions of consent may be appropriate, particularly with regard to the implementation of the amended proposal (Exhibit A14), the provision of landscaping to the southern and eastern sides of the fenced compound, with respect to maintenance of near site vegetation and on an on-going basis, and potentially, with respect to construction period nuisance and other matters.
- 73 Further, I allow the parties 21 days to confer and provide written submissions to the Court regarding conditions of consent. If there is significant disagreement between the parties over conditions, the hearing would resume for oral submissions on that topic alone.

ERDC No. 50 of 2012

20

## **Attachment A**

### **Infrastructure**

#### **OBJECTIVES**

**Objective 1:** Infrastructure provided in an economical and environmentally sensitive manner.

...

**Objective 4:** The visual impact of infrastructure facilities minimised.

### **Landscaping, Fences and Walls**

#### **OBJECTIVES**

**Objective 1:** The amenity of land and development enhanced with appropriate planting and other landscaping works, using locally indigenous plant species where possible.

#### **PRINCIPLES OF DEVELOPMENT CONTROL**

- 1 Development should incorporate open space and landscaping in order to:
  - (a) complement built form and reduce the visual impact of larger buildings (eg taller and broader plantings against taller and bulkier building components);
  - ...
  - (c) screen service yards, loading areas and outdoor storage areas;
  - ...

### **Siting and Visibility**

#### **OBJECTIVES**

**Objective 1:** Protection of scenically attractive areas, particularly natural, rural and coastal landscapes.

...

#### **PRINCIPLES OF DEVELOPMENT CONTROL**

- 1 Development should be sited and designed to minimise its visual impact on:
  - (a) the natural, rural or heritage character of the area;
  - (b) areas of high visual or scenic value, particularly rural and coastal areas;
  - ...

## **Telecommunications Facilities**

### **OBJECTIVES**

- Objective 1:** Telecommunications facilities provided to meet the needs of the community.
- Objective 2:** Telecommunications facilities sited and designed to minimise visual impact on the amenity of the local environment.

### **PRINCIPLES OF DEVELOPMENT CONTROL**

#### **1 Telecommunications facilities should:**

- (a) be located to meet the communication needs of the community;
- (b) use materials and finishes that minimise visual impact;
- (c) have antennae located as close as practical to the support structure;
- (d) be located primarily in industrial, commercial, business, office, centre and rural zones;
- (e) where technically feasible, be co-located with other telecommunications facilities;
- (f) incorporate landscaping to screen the development, particularly equipment shelters and huts;
- (g) be designed and sited to minimise the visual impact on the character and amenity of the local environment, in particular visually prominent areas, main focal points and significant vistas.

...

#### **3 Telecommunication facilities should only be located in residential, township, town centre, landscape, coastal, hills face, MOSS and tourism zones if sited and designed so as to minimise visual impact by:**

- (a) using existing buildings and vegetation for screening;
- (b) where possible, incorporating the facility within an existing structure that may serve another purpose maintaining that structure's character;
- (c) taking into account the size, scale, context and characteristics of existing structures, landforms and vegetation so as to complement the local environment.