PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Optus Mobile Pty Ltd v Sunshine Coast Regional Council & Ors* [2020] QPEC 15
PARTIES:	**OPTUS MOBILE PTY LTD** (appellant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (respondent) **and** **HELEN LANGLOIS** (first co-respondent by election) **and** **ALEX LARKMAN** (second co-respondent by election)
FILE NO/S:	928 of 2019
DIVISION:	Planning and Environment
PROCEEDING:	Application in Pending Proceeding
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	17 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Rackemann DCJ
ORDER:	**The application is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION TO EXPAND ISSUES FOR DETERMINATION IN THE APPEAL – where orders were made by consent defining the issues in dispute and setting a timetable for the nomination of experts and for the preparation of joint expert reports – where the present application was filed 5 months after those orders were made – where expert meeting and report process completed in the meantime – where the first co-respondent by election claims that her consent to the orders made was a mistake due to confusion regarding legal procedures – where allowing the application would be contrary to the principles of the just and expeditious resolution of the issues and the

	avoidance of undue delay and expense – whether it would be unjust to dismiss the application
CASES:	*Anderson v Logan City Council* [2014] QPELR 185
	Broad v Brisbane City Council [1986] 2 Qd R 317
LEGISLATION:	*Planning Act 2016* (Qld) ss 43(2)(b), 45(5)
	Planning and Environment Court Act 2016 (Qld) s 10
COUNSEL:	J Brien for the appellant
	Solicitors for the respondent
	The first co-respondent by election – self represented
	The second co-respondent by election – self represented
SOLICITORS:	Clayton Utz, Lawyers for the appellant
	Sunshine Coast Council Legal Services for the respondent

[1] This is an applicant appeal against the respondent's refusal of an application for a development permit to facilitate a proposed 40 m high telecommunications facility and associated equipment. The application required impact assessment. The co-respondents by election were adverse submitters.

[2] The parties have requested the Court to determine, on the papers, an application in pending proceeding by the first co-respondent by election (Ms Langlois). That application is to:

> *"expand the issues for determination in this appeal to include expert documentation, reports and witnesses in relation to:-*
>
> *1 The Impact on Property Devaluation*
>
> *2 Health Concerns and Safety Standards"*

[3] The grounds relied upon are said to "have been raised in my previous submission." Reference is made to reasons for refusal filed by Ms Langlois on 16 October 2019, which are discussed below.

[4] The respondent takes a neutral stance in respect of the application and will abide the order of the Court. The second co-respondent by election has advised of his issues, which do not include those now sought to be added by Ms Langlois. The application is opposed by the appellant.

[5] The appeal was instituted on 18 March 2019. It was the subject of a without prejudice meeting before coming before the Court on 16 August 2019, when orders were made setting a timetable for the appellant to provide an amended notice of appeal and for the other parties to notify reasons they would rely upon to contend for refusal of the development application. On 3 October 2019 the respondent's consolidated reasons for refusal were filed. On 16 October 2019 Ms Langlois' reasons for refusal were filed. They supported the respondent's reasons and went on to list the following ten 'key reasons' for her opposition to the proposal:

> *"1. Visual impact*
>
> *2. Maintenance, Access and Noise*
>
> *3. Site Access – Road*

4. *Property Devaluation*

5. *Health Concerns / World Health Organisation*

6. *Insurance*

7. *ARPANSA (Australian Radiation Protection and Nuclear Safety Agency)*

8. *ACMA (Australian Communications & Media Authority) Industry Code*

9. *Legals*

    (a) *Environmental Protection Act 1994*

    (b) *Human Rights Act 2019*

    (c) *Common Law*

    (d) *Qld Criminal Code Act 1995*

10. *Medical Report is forthcoming from an Australian Registered Medical Provider"*

[6] The document expanded on some of those, including on Ms Langlois' concern that the facility would or may have adverse health effects and that its presence would devalue her property thereby causing extreme financial disadvantage. Those had also been amongst the issues raised in the submission she made to the Council prior to its decision on the development application.

[7] The matter came before the Court on 21 October 2019 when orders were made which defined the issues in dispute and set a timetable for the nomination of experts and for the preparation of joint expert reports. The issues were then identified by reference to:

(i) an amended notice of appeal;

(ii) the respondent's consolidated reasons for refusal, and

(iii) some parts only of Ms Langlois' reasons for refusal.

The parts of Ms Langlois' reasons for refusal which were included in the issues did not include those in relation to property devaluation or health effects.

[8] The appellant had, by its notice of appeal, always sought to make relevant the absence of any unacceptable impacts on public health and safety. By its amended notice of appeal however, that contention was qualified by the words "as it complies with the applicable legislative requirements including the standards detailed in acceptable outcome AO3 of the Telecommunications Facility Code in the Respondent's planning scheme". The appellant's issue with respect to health and safety was thus tied to compliance with applicable standards. What was left out in relation to health and safety was Ms Langlois' concerns which extended to potential adverse effects irrespective of compliance with applicable standards.

[9] On 17 October 2019 the appellant's solicitors had sent an email to the parties, including Ms Langlois which, amongst other things, explained the importance of the identification of the issues, informed her that the draft order only included certain of her issues and contended that her remaining issues, including the devaluation and health concern issues could not be accepted as issues for various reasons. Ms Langlois then consented to the orders made by the Court on 21 October 2019, the draft of which had been amended, at her request, to allow a longer period for the nomination of experts.[1] In consenting to the order Ms Langlois effectively abandoned those of her issues which were not identified in the order as issues.

[10] The order required the parties to nominate their experts on or before 11 November 2019. The appellant and the respondent duly notified experts in the fields of town planning and visual amenity. Neither of the co-respondents by election nominated any experts by the due date.

[11] On 25 November 2019 Ms Langlois sent an email to the parties seeking to nominate Dr Russell Cooper, a medical practitioner, as an expert to provide evidence with respect to "health issues". Unsurprisingly the solicitors for the appellant responded, on the same day, pointing out that Ms Langlois' issue, in this respect, was not one of the issues in dispute in the proceeding. There followed an argumentative email exchange in which Ms Langlois insisted that her expert be accepted and threatened to seek directions from the Court if that was opposed and, on 29 November 2019, the solicitors for the appellant confirmed their position and pointed out that it was up to Ms Langlois whether she decided to seek orders expanding the scope of the issues.

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1 Affidavit of Motti filed 24/03/2020 para 10, 11.

[12] In the course of the email exchange Ms Langlois pointed to her general adoption of the respondent's consolidated reasons for refusal and asserted that her issue fell within the broadly expressed paragraph 4 thereof which states that "a large number of submissions have been received objecting to the proposal which raise valid planning issues of concern". The order which defines the issues by reference to, amongst other things, that broadly expressed reason cannot properly be construed, in the circumstances, as incorporating a specific issue raised by Ms Langlois but then excluded from those which became issues in the appeal. Ms Langlois' application to expand the issues appears to accept as much.

[13] Ms Langlois did little, if anything, after receipt of the appellant's solicitors' email of 29 November 2019. She did not respond to it,[2] nor did she bring the matter on for directions as she had threatened. She did, it would now seem, obtain a report, of sorts, from Dr Cooper, although not one which was the product of the joint meeting and report process. Dr Cooper practises, it would seem, in Tasmania and produced a report dated 11 December 2019. There is no curriculum vitae attached to his report. He considers that "incoming 5G technology … could herald a health catastrophe". He does not have faith in existing standards and, indeed, opines that "it is my opinion that you are not protected by the very standard that is designed to protect all Australian citizens". He concludes that the proposal would expose Ms Langlois, her daughter and granddaughter to "extreme risk of harm".[3]

[14] Following the nomination of experts, the matter proceeded to be prepared for hearing. The visual amenity experts met and produced two joint reports dated 4 December 2019 and 4 February 2020. The matter was reviewed by the Court on 28 February 2020 and set for further review on 12 March 2020. The town planners produced their joint report on 4 March 2020. The joint meeting and expert report process having been completed, the appellant was proposing to seek orders at the review on 12 March 2020 to set a timetable for the remaining steps to occur and for the matter to be heard in the July sittings. The subject application was filed on 11 March 2020, the day prior to the directions hearing when the matter would, in all likelihood, have otherwise been allocated to a sittings for hearing.

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2 Affidavit of Motti filed 24/03/2020 para 21.

3 The report speaks of consequences which extend to effects on mental health such as anxiety.

[15] It is unclear precisely how Ms Langlois intends to proceed if she is successful in expanding the issues. I note that her application refers to expanding the issues "to include expert documentation, reports and witnesses". Her submission in support of this application refers to a "literature base of well over 10,000 peer-reviewed independent studies" and to "the substantial research I have supplied to all parties … around my issues and concerns". Similarly, her supporting affidavit refers to seeking leave not only to include issues but "to include my supporting documentation and proposed expert witnesses".

[16] Ms Langlois has conducted some research, but she is a guest house relief manager who appears to have no expertise to give opinion evidence in relation to the issues she wishes to ventilate. I would not, on this application, be minded to make any order which permitted Ms Langlois to give opinion evidence in relation to matters in respect of which she does not have expertise or to rely on matters not properly proved.

[17] Insofar as the devaluation issue is concerned, Ms Langlois has letters from two real estate agencies, but has not sought to notify either author, or indeed anyone else, to give expert opinion evidence at a hearing. Insofar as the health issue is concerned Ms Langlois has previously sought to notify Dr Cooper as an expert witness and presumably would do so if her application is successful. In that event, the success of this application would, in effect, return the case to the nomination of experts stage and lead to an inevitable significant delay in it being heard and determined and an increase in costs.

[18] It was submitted, for the appellant, that the issues sought to be raised are not, in any event, appropriate issues for the Court to consider. The issues in the appeal include alleged amenity impacts. Whilst an adverse impact on amenity may have a consequent effect of devaluing a property, it is the amenity impact which is the relevant town planning consideration.[4] Whilst evidence of the tendency of a facility of a particular kind to have a devaluing effect could conceivably be relevant as indicative of an otherwise alleged amenity impact,[5] Ms Langlois seeks to expand the issues in relation to "the impact on property devaluation" which, in her reasons

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4 *Anderson v Logan City Council* [2014] QPELR 185.

5 Whether specific or of the perceived kind referred to in *Broad v Brisbane City Council* [1986] 2 Qd R 317.

for refusal filed on 16 October 2019[6] is said would cause her extreme financial disadvantage. That is not a conventional town planning consideration and Ms Langlois' personal financial circumstances are neither relevant to an assessment benchmark[7] nor are a relevant matter.[8]

[19] The potential for a telecommunications facility to cause human exposure to electromagnetic radiation is the subject of provisions of the planning scheme and, in particular, the Telecommunications Facility Code. Performance outcome PO3 provides that a facility not cause exposure beyond accepted precautionary limits and the acceptable outcome nominates applicable standards. The issues in the appeal include the proposal's compliance with those standards. It was submitted, for the appellant, that it is no part of this Court's role or function when determining planning appeals to 'step behind' instruments called up by the planning scheme as Ms Langlois' issues would, in effect, invite the Court to do.

[20] It must be remembered that, in the case of impact assessment, in addition to assessing the development application against the assessment benchmarks,[9] the assessment manager and, on appeal the Court, may also carry out the assessment against, or having regard to, any other "relevant matter" other than a person's personal circumstances, financial or otherwise. An example cited in the legislation is where an assessment benchmark is based on material error. Evidence of an undue health and safety risk notwithstanding compliance with the applicable code might arguably be within the bounds of a relevant matter. It is ultimately unnecessary for me to express a concluded view on that because, for the reasons which follow, I consider that the application should be dismissed in any event. It should be observed however that, in dismissing the application Ms Langlois is being denied relief to expand the issues so as to include an issue (devaluation) which, at least in the way she has articulated it, is not a proper consideration and a further issue (health and safety) which[10] relates to a matter dealt with by provisions of the planning scheme the proposal's compliance with which is part of the issues in the appeal.

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6 Referred to in her application.
7 s 43(2)(b) of the *Planning Act.*
8 s 45(5)(b) of the *Planning Act.*
9 And matters prescribed for the purposes of s 45(5) of the *Planning Act*.
10 Leaving mental health to one side.

[21] The principles which govern the Court in the exercise of its jurisdiction are contained in s 10 of the *Planning and Environment Court Act 2016*, and include the just and expeditious resolution of the issues and the avoidance of undue delay and expense. The same section imposes, on each party, an undertaking to the Court and to each other, to proceed in an expeditious way. Ms Langlois has not performed in accordance with her undertaking. To allow her application would fly in the face of an expeditious resolution of the issues and the avoidance of undue delay. It would also occasion additional expense. Whilst, in applying the rules, the Court must also act justly, I do not regard the rejection of the current application as unjust in the circumstances.

[22] Ms Langlois had every opportunity to formulate her issues, as she did in her document filed on 16 October 2019, and to agitate for the inclusion of all of those issues as part of the issues for determination as identified by this Court's order of 21 October 2019. When the inclusion of her issues with respect to devaluation and health concerns was challenged however, she consented to the orders which defined the issues in a way which effectively excluded them and then left it until 11 March 2020, almost 5 months later, and on the eve of a review of the matter when it would otherwise likely have been set down for hearing, to file the subject application which, if successful, would inevitably cause delay and cut across the expeditious resolution of the matter. She was on notice, not least as a consequence of the orders of 21 October 2019, that the expert meeting and report process would have been proceeding. I note that she also appeared on the review of the matter on 28 February 2020.

[23] Ms Langlois attempted to explain her consent to the orders of 21 October 2019 as a mistake made because she was "bamboozled with legal procedures" and that she consented "totally unaware that I could not raise 'my issues' or provide supporting material or an expert witness at a later date". It is difficult to accept that explanation given the terms of the prior correspondence that she had received and which explained the importance of the identification of the issues and that not only were those issues not included in the draft, but why. It is also apparent from the face of the order itself that only certain of Ms Langlois' issues were being included. Ms Langlois does not identify what it was about the "legal procedures" which "bamboozled" her or the respects in which she was "bamboozled". It is also difficult

to accept that Ms Langlois did not understand that she could not raise her issues or provide material or an expert at a later date, when the order was substantially about defining the issues and then setting a timetable for the expert nomination, meeting and reporting process and she participated in communications about that timetable.

[24] Even if Ms Langlois' explanation about being "bamboozled with legal procedures" on 21 October 2019 is accepted, she was disabused of any misunderstanding by no later than 29 November 2019 as a result of the email exchanges with the appellant's solicitors concerning her attempts to nominate Dr Cooper as an expert. By that time she had purported to insist that Dr Cooper be accepted and threatened to seek directions from the Court if not. The appellant's solicitors, in effect, left it to Ms Langlois to do as she pleased but, in full knowledge of the position, Ms Langlois did nothing, despite apparently receiving a report of sorts from Dr Cooper shortly thereafter. The further delay, for months, whilst the expert nomination, meeting and reporting process was completed[11] is unexplained.

[25] There is no suggestion of any relevant change in circumstances which explains the lateness of the application or other matter which tips the interest of justice in favour of granting the application. Indeed it has already been observed that the application seeks to, in effect, broaden the grounds to include some of those that were previously articulated by Ms Langlois but, in effect, excluded by the order of the Court to which she consented on 21 October 2019. She seeks to include a ground (health concerns) in respect of which she wishes to call, as an expert, someone she previously identified and unsuccessfully sought to nominate in November 2019 and from whom she received a report, of sorts, in December 2019 but then stood by whilst the expert meeting and report process was completed without seeking to agitate these matters.

[26] In the circumstances Ms Langlois has failed to comply with her implied undertaking to proceed in an expeditious way. Having regard to the ample opportunity which she had to agitate these matters earlier, I do not consider it would be unjust to deny her the relief she now seeks. To do otherwise would be to apply the rules in a way which does not facilitate expeditious resolution or avoid undue delay. The application is dismissed.

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11 And the matter was reviewed on 28 February 2020.