The ultimate issue; evaluative planning evidence and the place of law.

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This paper explores the intersecting lines between the professional practice of planners and lawyers. Planners have been referred to as “jacks of all trades” and as such planners must be conversant with many different disciplines. The NZPI education policy advises: *A key attribute of a planner is the ability to work across disciplinary and institutional boundaries and to integrate knowledge from a range of disciplines within the framework of the discipline of planning.*

The NZPI is moving forward with efforts to refine with greater clarity the place of the professional planner. Initiatives in relation to continued professional development, formal accreditation of planning degrees, associated prescription of content and structure of educational programmes and regulation of membership, are moulding the role of the planner in New Zealand. Aspects of the law, in particular, institutional planning frameworks and resource and environmental law, are considered to constitute core academic knowledge foundation for planning students. As a result, law is taught in planning degrees.

This paper examines divergent views and practice in terms of evaluative planning evidence and the use of law. Examples of everyday practice are examined and discussed and conclusions drawn as to best practice.

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INTRODUCTION

The purpose of this short paper is to discuss the role of the planner as it relates to law. The intent is to examine the sometimes blurred boundaries between the professions with a view to gaining greater clarity for the practicing planner, in terms of the extent of planning expertise. The need for this examination was identified through my role teaching law to planners and also as a result of discussion with members of both professions.

INTERSECTING LINES

Role of the planner

The nature of the planner's role calls for close familiarity with the law. Operating within a range of statutory processes, at times, the planner's role is that of a project manager regulated only by the wider process within which he or she operates, but at other times more tightly prescribed by statute. This paper will focus upon the role of the planner under the Resource Management Act 1991 (RMA), in the context of the resource consent and plan making processes.

The role of the planner has changed and extended from when I commenced practicing law in this field several decades ago. Then, it was unusual to see a planner front a local authority hearing in relation to an application for consent, without a lawyer present. Today planners commonly appear without the presence of a lawyer, and thus their role, whilst strictly only extending to that of an independent expert evaluative witness and project manager, moves closer to the traditional role of a lawyer. Whilst all experienced professional planners well understand the distinction between expert evidence and advocacy (for discussion see Bhana, undated, Newhook undated) this repositioning potentially erodes boundaries between the professions. In addition planners in carrying out the role must, amongst other things, understand the law, comply with the law, evaluate plans and proposals against the law, recommend lawful conditions, and in the context of the plan making process, actually write the law.

The NZPI Education Policy and Accreditation Procedures (NZP 2011) recognises the need for familiarity with the law and pursuant to cl 2.2 requires accredited planning programmes to demonstrate delivery of content related to Planning Law, including institutional framework, legislation and case law.

Despite this, familiarity with the law does not make a planner a lawyer, in the same way that familiarity with planning does not make a lawyer a planner. This paper will now examine some of the more contentious areas in terms of where to set the professional boundaries. There appears to be general acceptance that practice at a local authority hearing level may be more relaxed than in a court, due to pragmatic reasons of scale, associated with time and cost.

The general position is, however, governed by statute, in particular the RMA, the Commissions of Inquiry Act 1908 as applied by s 41 of the RMA, and the Evidence Act 2006, and also the Environment Court Practice Note 2011.

The scope of evidence

The starting point for the scope of planning evidence is generally wide, tailored a little more finely by the requirements of the particular Acts and then further defined by the limitations of expertise.

General

In local authority hearings, the position is governed by s 4B of the Commissions of Inquiry Act 1908 which provides that the "Commission may receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of law". In the Environment Court, pursuant to s 269 of the RMA, the Court has wide powers to regulate its own proceedings in such manner as it thinks fit and in accordance with s 276(1)(a), it can consider anything in evidence that it considers appropriate to receive. The Court is not bound by the rules of law about evidence that apply to judicial proceedings. The Evidence Act 2006, which applies to judicial proceedings, states pursuant to s 7, a fundamental principle that relevant evidence is admissible, with some limited exclusions. In terms of expert evidence and admissibility, the Act applies a test related to the value of the evidence to the decision maker. Pursuant to s 25(1) the expert evidence will be "admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding". This remains a useful benchmark for Environment Court proceedings.

Consideration of the nature and direction of expert evidence given before the Environment Court is also apposite at this point. Unlike other proceedings, matters before the court will routinely involve a prospective evaluation as opposed to a retrospective evaluation, as witnesses and decision makers look ahead to appraise the implications of the matters proposed. In criminal law, experts will look backwards to determine what has happened, in contrast to what may happen. Environment Court proceedings tend to move away from conventional legal analysis, focused largely on fact and law, and may develop policy either at the general level of plan making or the particular level of the resource consent. These decisions are often the product of sustained interplay between the decision makers and the expert witnesses, with the court determining the value and hence weight of the evidence proffered.

Particular

In examining particular statutory requirements, s 42A RMA is a good starting point for scrutinising the role of a planner. This section mandates the production of a report by an officer of a local authority or a consultant "on information provided on any matter described in section 39(1) by the applicant or any person who made a submission". Section 39(1) covers a wide range of proceedings in which a planner may be involved, including the plan making process and resource consent applications.

The RMA is not prescriptive in terms of the content of a s 42A report, but it is implicit that its preparation is intended to assist those conducting the hearing. Common practice has developed in relation to these reports, such that templates for the production of the reports are now widely available, with a well used example being found on the Quality Planning website. In terms of a resource consent, the reports tend to set out the facts, evaluate the application against plan provisions and the statutory criteria and make a recommendation on the grant or decline of the consent. A report produced in the plan making process will assess the particular provision against the statutory criteria and make a recommendation on the viability of the particular provisions.

On appeal, the evaluative expert planning evidence follows a similar formula. In order to give expert opinion evidence as opposed to factual evidence the expert will qualify her or himself, outline the proposal, and analyse and evaluate the proposal against the relevant statutory instruments and

provisions. In a separate but related process, s 87F(4) RMA governs reports prepared by a consent authority to assist the Environment Court where a request for direct referral has been granted under s 87(D). The report is mandatory and in terms of content of the report, the consent authority has discretion to address issues that are set out in ss 104 to 112, to the extent that they are relevant to the application and to suggest conditions that it considers should be imposed if the Environment Court grants the application.

Preparation of the reports and evidence necessitates a sound understanding of statutory framework and the ability to evaluate the facts of the proposal or a provision against statutory criteria. The reach of this evaluation is at the heart of this paper. How far can a planner proceed in terms of applying and interpreting the law? At what point does a planner move beyond the role of a planner and into the territory of a lawyer? The limit of expertise is the final matter which shapes the parameters of expert planning evidence.

Expertise

Determining the expertise of the planner and thus the bounds of expert opinion evidence, is a task somewhat obscured by the nebulous and expansive nature of the planner's role. The NZPI Education Policy and Accreditation Procedures, at cl 1.2, discuss the role of the planner:

"A planner brings professional expertise and knowledge to the management of the environment within the context of the four well beings: environmental, social, cultural and economic and is concerned with making informed choices about the consequences of human actions and with bridging the gap between the present and the future. Planners consider strategic, policy, technical, legislative, administrative and community factors and often operate in multi or trans-disciplinary environments."

Evidently a broad portfolio within which the planner "considers the law", this explanation is encompassing rather than delimiting. A planner's education will be broad and wide ranging and may include study of social science, science, law and management, but exactly what does this make a planner an expert in? Some have argued "jack of all trades, master of none", however, in my view this tends to negate the expertise that planners develops in evaluation. To a proposal or the creation of a plan, the planner brings a range of competencies to assist in collecting and synthesising information and evaluating that information using a range of technical skills, in a variety of contexts, including the relevant statutory framework.

In terms of boundaries of expertise in relation to the law, an examination of known factors which limit the role is a good place to start. Established through common law and practice and entrenched by cl 5.2 of the Environment Court Practice Note, the role of the planner requires that a planner must be an impartial expert witness with an overriding duty to the court and must not be an advocate for the party by whom they are engaged. A planner cannot advocate a position, advise on the law or make legal submissions, to do so reaches beyond expertise.

Yet it is the "in between" areas where clarity can be lacking. How should a planner in evidence deal with case law, or criteria developed through case law, what of legal concepts such as the permitted baseline and how far should evidence progress in terms of the ultimate issue?

Practical examples

Case law

In my view it is permissible for a planner as an evaluative expert to sparingly refer to case law where that case law has been of assistance in forming an opinion, but in many instances it will be as effective to make an unreferenced statement, which lawyers may choose to argue over subsequently if necessary. For instance as opposed to saying "the decision in … defined reverse sensitivity as …", instead it may be more effective to simply state a preferred definition of reverse sensitivity. This can avoid inaccurate reporting of case law and legal referencing, commonly seen in planning reports and potentially avoid criticism for stepping beyond expertise. Alternatively the definition of legal concepts can be left to the decision-maker who will possess expertise in these concepts.

A planner may refer to another case, for example where a court has ruled on the meaning of a provision in a plan, but it would be unwise for a planner to rely on another decision for establishing a precedent. This is because it involves the planner in identifying the ratio decidendi (reason for deciding) of that case and takes a planner without legal qualifications beyond the area of expertise. Similar caution would apply to attempts to distinguish a potentially parallel legal authority.

It is not uncommon in planning reports to see statements such as "case law establishes that s 6 matters must be accorded priority and cannot just be balanced alongside other matters" or "case law makes it clear that protection means to keep safe from harm". These statements pass beyond the expertise of the planner and into the realm of the lawyer and legal submissions. In a situation where lawyers are not involved it may assist the hearings panel to be informed in this manner, but generally it would be wise to avoid statements such as this and for the focus of the evidence to be trained on the words of the statute.

Criteria established by case law may be very relevant to forming an opinion and a matter upon which a court wishes to hear an expert's opinion, in order to reach a conclusion in terms of a classification such as "significance" or "appropriateness". Application of established criteria to the case in hand falls squarely within the role of the evaluative expert and evidence will often be formulated in response to this criteria. In discussing those criteria, a planner could identify an individual factor as inapplicable or irrelevant. Furthermore, unless the Court has excluded the possibility of other factors (which is unlikely) the planner could also identify any other factor considered relevant, even if that implied augmentation of the list. This role does not extend, however, to arguing the validity or completeness of the criteria determined through case law, rather identifying potential relevant factors. Where any legal authority is cited a professional approach demands correct citation. The New Zealand Law Foundation has recently prepared a universal style guide (http://www.lawfoundation.org.nz/style-guide/index.html), and it provides a valuable guide to referencing.

Legal concepts

Expert evaluative evidence will commonly require evaluation in context of legal concepts such as the "permitted baseline" or the terms "affected" or "minor". It is non-contentious to refer to an undisputed statutory definition when undertaking this task, but a planning expert should not stray into arguing what is meant by the term "minor" or "affected". Rather a planner should focus on considering, for instance, the degrees of impact in terms of frequency, intensity, duration, the baseline or other professional techniques. Legal submission or the expertise of the decision-maker can then be applied to the legal aspects of definition and it is always open to the witness to adopt the legal submissions of the counsel by whom they are called.

Plan provisions

Given that planners will often write plans it must be non-contentious that a planner should be entitled to give opinion evidence in terms of the meaning or construction of plan provisions or how a plan applies to particular proposal. Evaluating category of activity is standard fare, a planner may use their knowledge of the law when bundling categories to elect the more stringent category. Yet to argue legal principles of interpretation or construct an argument applying case law to category of activity or plan interpretation moves into legal expertise.

The ultimate issue

The final matter to consider is the degree to which expert planning evidence may extend to any 'ultimate issue" to be decided in any given case, and perhaps, how helpful such conclusions are to the decision maker. In a resource consent decision, consideration of the ultimate issue could include, for instance, whether consent should be granted, or if the application is consistent with s 5 of the RMA. Traditionally the common law prevented experts from giving evidence on the very question to be determined by the Court. Yet the wide jurisdiction of the Environment Court to receive any appropriate evidence militates against the operation of this rule, and more recently in relation to other judicial proceedings, s 25(2)(a) of the Evidence Act 2006 removes any presumption of inadmissibility in terms of evidence related to the ultimate issue. The Act as noted, instead, relies upon a test of whether or not the evidence is substantially helpful to the decision maker.

Accordingly when a planner prepares evidence that may relate to the ultimate issue, the first consideration is whether or not the evidence will be helpful to the Court. I am aware that there exists a body of opinion that it is unnecessary for a planner to draw a conclusion on consistency with s 5 of the RMA, or upon the matter of whether a consent should issue, and that those matters are best left to the decision maker who possesses sufficient expertise in that regard. Conclusions drawn on the ultimate issues may also potentially leave the witness open to cross- examination on legal elements, thus rendering them vulnerable. However, equally, other decision makers may find this input helpful and prefer to determine the matter by according due weight to the opinion as considered fit. Certainly there is currently discussion in other jurisdictions (where different regimes apply) as to the appropriateness of expert testimony on the ultimate issue and in reference to interpretation of statutory provisions (Howell Williams 2012, 1204, Craig 2012, 14). However, the New Zealand position is conditioned by broad powers of the court enabling flexibility of approach. Furthermore the New Zealand regulatory framework enables a planner to exercise delegated decision-making authority as an employee of a local authority or as hearing commissioner, pursuant to s 34A RMA. This decision making power frequently extends to the ultimate issue.

CONCLUSION

Defining the parameters of the expertise of a planning witness is a task made difficult by the expansive role of the planner and mounting professional engagement with an increasingly complex statutory planning framework. The role of the planner as facilitated by this statutory framework is as an evaluative bridge between the facts and the law and necessitates close attention to the law. Remaining within the realms of expertise and thus retaining credibility, is an exercise in understanding the general requirements of the law, the particular requirements of the statutory planning framework and the limits of expertise. Further discussion within the professions of where to draw these lines in practice, would assist in achieving consistency of practice.

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