THE RIGHT WAY TO CALL AND GIVE EXPERT EVIDENCE

Judge W.G. Everson

Planning and Environment Court of Queensland

Introduction

[1] The planning and environment jurisdiction is an area of the law which requires the assistance of appropriately qualified experts in many ways. Planning controls including regional plans and planning schemes may rely heavily on studies undertaken by experts in designating what is an appropriate land use in a particular area. Parties may make submissions during the development assessment process relying upon arguments put forward by appropriately qualified experts. In the former circumstance the expert is merely providing a study or similar technical input, in the latter circumstance the expert may be advocating on behalf of the party which engages them.

[2] Should a development application proceed to an appeal to the Planning and Environment Court however, the form of and receipt of expert evidence is subject to well established legal principles and it must comply with them.

[3] It is my experience that the experts who appear in the Planning and Environment Court well understand the formal requirements of the various rules which govern the reception of this evidence. What is not always as well understood are the limitations on the receipt of expert evidence by a court. That is the focus of this paper.

Relevance and Expertise

[4] For evidence to be admissible in a court proceeding it must be relevant. As the High Court observed recently "the basic principle of admissibility of evidence is that, unless there is some good reason for not receiving it, evidence that is relevant is admissible".[1] A witness is not permitted to give evidence based on their own opinion unless they are considered an expert. Before evidence of an expert witness will be admissible, it is necessary to establish that the witness is, in fact, an expert in a field of particular knowledge or experience.[2]

[5] I am happy to say that the question of whether an expert has the necessary expertise has almost never arisen in my experience in the Planning and Environment Court.

Properly engaging the expert and presenting their evidence

[6] Recently the Planning and Environment Court considered a circumstance where the relevant experts, being traffic engineers, had not been appropriately engaged and consequently sought the assistance of the lawyers engaging them to clarify the correct approach to their task. In *Wagner Investments Pty Ltd v Toowoomba Regional Council*[3] there were ten separate appeals concerning infrastructure charges notices issued by the Council for various development approvals relating to the development of the Brisbane West Wellcamp Airport and the Wellcamp Business Park. The infrastructure charges levied in the notices concerned charges for storm water and transport networks. Effectively the dispute between the parties arose out of differing interpretations of the phrase "The adopted charge is the charge that the Council determines should apply…based on the assessment of use and demand" which appeared in Table 3 of the Council's Charges Resolution. Whereas the Council contended that it was entitled to select an appropriate use elsewhere defined in Table 3, the appellant contended for an interpretation of this provision that required

a detailed modelling exercise to be undertaken of the trunk road usage generated by the proposed uses.

[7] Before undertaking the modelling exercise relevant to their area of expertise the traffic engineers requested that the threshold question of the meaning of the relevant part of Table 3 be clarified. This in turn led to an application in pending proceeding being brought to determine this issue. Relevantly the court observed:

> "The impasse which developed in the course of the joint meeting of the traffic experts has arisen in circumstances where they appear to have not only misapplied principles of statutory interpretation, having stated their question in the context of selecting an appropriate 'best fit' use from Table 3 in Charges Resolution No. 2, but also as a consequence of them being engaged to consider the statutory parameters of the dispute between the parties. It has been said on many occasions that questions of statutory interpretation are matters of law for the court, not matters which are properly within the province of expert evidence. …"[4]

[8] Further the court stated:

> "The parties have different interpretations of the relevant provisions of Charges Resolution No. 2. One of these interpretations requires appropriate modelling by traffic engineers in order to calculate the appropriate charge. The traffic engineers have already been engaged. They should be instructed to undertake the modelling exercise required of them. That is the only basis on which they can assist the court in resolving this dispute…"[5]

[9] Many years ago the Court of Appeal stated in *HA Bachrach Pty Ltd & Ors v Council of the Shire of Caboolture & Anor*:

> "The opinion of a town planner upon a question of construction, whether that question is one of law or fact, is irrelevant."[6]

Often in expert reports tendered in the course of hearings in the Planning and Environment Court and also in the course of oral evidence, experts give evidence of the meaning of statutory provisions, including parts of planning schemes. This obviously offends this principle. The lawyers for parties who engage experts need to ensure that this does not occur. While I have no difficulty with an expert setting out the basis for their approach to a particular issue within their area of expertise (and it may be that such an approach is premised on a particular interpretation of the relevant provisions), the expert should not make a legal argument that as a matter of construction a particular legislative provision should be afforded a particular legal meaning. I also wish to observe that where an expert embarks upon such a course and prefaces it with words to the effect of "while I acknowledge that the interpretation of the planning scheme is a matter for the court" it does not change the status of this type of evidence, it remains irrelevant.

[10] To use what occurred in *Wagner* as an example, the traffic engineers should have been engaged by the lawyers to undertake the necessary modelling. It should have been made clear to them that it was not for them to consider which interpretation of the relevant provisions of the table of the Charges Resolution applied. Had this occurred the time and expense of the subsequent application to the court would have been avoided.

[11] Accordingly lawyers for parties need to clearly communicate to experts the appropriate ambit of their role, experts need to acknowledge the limitations of their role and when reports are settled care needs to be taken to avoid transgressing into

areas which are outside the area of expertise of the expert in question. These may properly be a matter for submissions by lawyers or the parties themselves.

Experts should not swear the issue

[12] I have noted on many occasions in the context of minor change applications that the applicant will engage an expert, typically a town planner, to explain the changes which are proposed in the context of the planning controls. This is both convenient and helpful. What is not appropriate and what is unhelpful is where the expert proceeds to state that in their opinion the changes come within the definition of a minor change. Not only does this offend the principle expressed in *Bachrach* because it involves giving an opinion upon a question of statutory construction, but it also swears the issue. By this I mean that it states as a fact the answer to the very question which it is for the court to decide.

[13] The practice of swearing the issue is to be avoided as it constitutes not only giving irrelevant evidence but it is also disrespectful to the authority of the court which is charged with determining the issue.

Conclusion

[14] I am grateful not only for the quality of the experts who regularly give evidence in the Planning and Environment Court but also for the quality of the lawyers who practice there. Nonetheless a greater focus upon the correct preparation and presentation of expert evidence will only enhance the standing of both the experts and the lawyers.

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1 *HML v R* (2008) 235 CLR 334 at 351.
2 *Clark v Ryan* (1960) 103 CLR 486 at 491.
3 [2018] QPEC 23.
4 Ibid at [8].
5 Ibid at [10].
6 [1993] QPLR 33 at 37.