The Role of the Expert and the Planning Principles

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The Role of the Expert and the Planning Principles

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Introduction

I limit my scope in this paper to perhaps a narrower scope than my given title may imply. Without apology, I draw my examples from my own narrow role as a technical expert, and hasten to disclaim the breadth of experience that some others could bring to bear on this topic.

I also assume that others are defining in particular the nature and purpose of the Land and Environment Court's Planning Principles. From the Court's web site, I quote only the introduction:

> What is a 'planning principle'?
>
> A planning principle is:
>
> - statement of a desirable outcome from;
> - a chain of reasoning aimed at reaching; or
> - a list of appropriate matters to be considered in making a planning decision.
>
> While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils' plans and policies.
>
> Planning principles assist when making a planning decision – including:
>
> - where there is a void in policy; or
> - where policies expressed in qualitative terms allow for more than one interpretation; or
> - where policies lack clarity.

Two kinds of Principles

Michael Neustein has on previous occasions commented on another simple categorisation that may be applied to the Principles. Michael suggests that the Principles may be simply distinguished as addressing primarily matters of *process*, or attempting to define *standards*. We would be concerned to make this distinction if it helps us reach any conclusions as to the likely utility and robustness of a Principle.

In the broadest terms, it is likely that a Principle addressing *process* may be relatively safely formulated by the Court — in as much as it is likely to be based on reliable observations of the utility of such processes, in clarifying the issues before the Court. A good example is the newest Principle, addressing 'Height, bulk and scale', in the judgement by Roseth SC in *Veloshin v Randwick Council [2007] NSWLEC 428*.

The Principle sets out a sequence of questions that between them give structure and consistency to the examination of the relevant issues. In spite of the Senior Commissioner's disclaimer relating to comprehensiveness, the intention is clearly to make more likely that an opinion or assessment prepared in a manner consistent with the proposed procedure, is more likely to be comprehensive. But the Principle does not attempt to attach to each question a quantitative standard, or a technical method for measurement or other quantification.

In this, such principles are distinguished from others — which may themselves contain procedural structures, but conspicuously do attempt to fill gaps in standards enumerated in the usual planning controls. The example that comes most readily to my mind is of course 'Access to sunlight' in *Parsonage v Ku-ring-gai Council [2004] NSWLEC 347*, also by the hand of Roseth SC. *Parsonage* has sufficient direction concerning both technique and quantitative standards relating to the characterisation of effective sun access, to have assumed *de facto* planning control status, and to have been incorporated in codified precedent based decision making by Council officers (as for instance at Woollahra Council). In the case of *Parsonage* in particular, the presence of apparently simply expressed modes of quantification has had much the same effect as the use of *'Rules of Thumb'* in the Residential Flat Design Code — namely, the specifics of the rules dominate the thinking of both designers and assessing officers, in effect masking consideration of the very principles to which they purport to respond.

While such Principles as *Parsonage* are made necessary as described in the Court's definition, they may not be assumed to be as safe as those confined to procedural matters. The issue is the level of expertise that may be expected to be applied to the formulation of the technical procedures, the peer review process to which such formulations may be subjected, and the manner in which, perhaps inadvertently, they may establish a numerical standard with unforseen consequences. I have on previous occasions expanded on the specific technical difficulties of the *Parsonage* Principle, and do not intend to do so here again.

So far, on balance, what I refer to as the technical difficulties of the *Parsonage* Principle have been overlooked, because more generally it has appeared to bring some order to an otherwise chaotic area of assessment. But on at least one occasion, a Principle was propounded in judgement, where that balance did not result. A Principle was formed relating to daylight access, that would have had the effect of sterilising almost all two storey developments adjacent to buildings with windows on the ground floor — to its credit, the Court demonstrated a degree of administrative flexibility in withdrawing the offending Principle from its Web site with remarkable speed. However, when it comes to questionable detail, the Court appears unable to modify standing Principles, except by subsequent judgements based on evidence put in the case to which they apply.

Experts with Principles?

Which makes one reflect again on the true impact of those Principles that address standards, and which may be technically contentious. I am not in a position to support by evidence any contention that, for instance a generally deleterious effect could be attributed to *Parsonage*. Indeed, the topic of this paper is not that, but rather how the Court's practices on the one hand relating to the application of the Principles, and on the other the use of experts, have interacted. To my own surprise, I conclude that the Principles may not have been helpful in this regard.

Again, I confine myself to my own area of interest, which happens to include solar access assessment for residential developments. On the face of it, solar geometry and shadow casting are purely geometric exercises, which should be well within the competence of any practicing architect or building designer. Overshadowing and solar access compliance is almost always assumed to be one of the matters that is well within the competence of Commissioners to determine — if only reliable projection of those impacts is put before them. Yet, as we all are aware, it is one of the most contentious areas of assessment. At the same time, perhaps because it is so clearly geometric and dimensional in nature, it is also one of the strongest design determinants. Thus, it becomes the perfect vehicle for asking the relevant questions with which I was asked to deal:

- **Do Court Appointed Experts have the expertise to deal with at least some issues assigned to them by Court orders?**

When it comes to meeting the Court's injunction to be economical in the choice of experts — especially single parties' or CAEs (Court appointed experts) — it appears to have been assumed that overshadowing and solar access is merely a subset in an assessment of either planning

compliance generally, or urban design specifically. My experience to date is that such 'generalist' experts are indeed sometimes well placed to *evaluate* technical information before them, but rarely or never do they consider it part of their scope of reporting to actually undertake the necessary technical analysis.

- **Are such orders framed effectively if the Court has not had the benefit of appropriate expertise to begin with?**

In the case of solar access and overshadowing, the orders often contain specific clues to what the Commissioners may expect by way of evidence on some technical matters: for instance reference to specific representational techniques, such as shadow diagrams — whether or not they are likely to be the best techniques for the purpose. My experience leads me to assume that the Court orders are taken fairly literally in their detail, by applicants and their legal representatives.

- **Are CAEs' requests for information from Applicants framed effectively if they don't have appropriate expertise?**

More disturbing is that the before mentioned generalist experts are sometimes quite cavalier in requiring onerous supplementary technical analysis to be prepared by Applicants, often at short notice, and with sometimes a remarkable ignorance of whether the specific representations of that analysis will actually answer the relevant questions.

My concern is that the apparent stricture of operating under a Court order makes it more difficult to challenge such requests.

- **To what degree do the situations above lead to *extra*, not lesser demand for experts — both 'shadow experts' and joined experts?**

As a logical consequence of my previous comments, I am of the opinion that such additional involvement by experts happens more often than it should, and that the institution of the Court appointed generalist expert in the L+EC is probably contributing to this.

I have certainly been mystified by how CAEs are supposed to 'come up to speed' on certain issues without the benefit of the history with the project, which some experts on both the Applicant's and the Council side would naturally have.

Previously, practice directions to CAEs did nominally deal with this issue by requiring them to treat certain matters as *given*, if not exactly as 'fact' in their considerations….thus for instance, it would appear that if there is an already prepared Statement of Evidence from an expert who was part of the project, that evidence is supposed to be treated in that manner. Unfortunately, the majority of the Court's practice directions were repealed in May this year, and I haven't yet found in the revised practice notes as clear a direction of the kind I describe. It may not make much practical difference, because it has not been my experience that Court appointed experts have been systematically mindful of that direction, or that in the relaxed procedures of the Land and Environment Court, they have been directed to be so.

- **How much extra work has the joint conferencing blown out into, where Councils do not bring to bear expertise on the issues at the time they are framed, and produce new evidence that they then want to shoehorn into the joint conference reports?**

My question contains its own answer. Only since the implementation of the constellation of practices, including court appointed experts and the emphasis on the role of joint conferencing, have I experienced the phenomenon I describe. For some reason not logically ascribable to the Court's rules, but perhaps to its failure to implement them, I have repeatedly experienced that Council officers have come to joint conferencing — as experts to be heard by the Court — without having submitted an evidence report, and therefore without at any time prior having attempted to support the relevant issues by appropriate analysis.

It would appear that evolving expectations of the status of the Joint Conferencing Report in evidence have encouraged some Council officers to delay any actual analysis until they can perform it purely reactively, in an adversarial manner, with the evidence of the Applicant already supplied to them. Not only do I think that it cause inordinate amounts of additional work overall (I have at times spent far more hours on the preparation of the joint Report than on the original analysis and Statement of Evidence), but I would have thought it is exactly the opposite of what the Court intends to be its directions to expert witnesses.

Unfortunately, my observations from my particular technical vantage point — on the effectiveness of the application of the Principles taken together with the use of Court appointed experts — is that it has led not to a reduction of work for experts and greater cost effectiveness in the resolution of matters. Rather for someone like me, it has led to a distortion of the way in which my expertise is applied. If anything, generating evidence that might eventually find its way before the Court has become less efficient and more *ad hoc*. On a personal note, I actually find it far more frustrating than the small risk of an adversarial role as a potentially competing expert.

Principles without experts?

If my concern in this paper has been the specific problem of how technical expertise is brought before the Court, and especially how in the context of the growing collection of Principles, the role of such technical expertise is becoming increasingly difficult to delineate, it might be appropriate to conclude with a different question:

- **How, if at all, can the Court initiate Principles in areas where they might be very much needed, but where the technical base is generally eroded?**

The example I have in mind is that same area of daylight amenity, which was itself the subject of the narrower, and hastily withdrawn Principle I mentioned before. But my question is more general in nature.

I have highlighted a problem of how the Court may subject a likely Principle to peer review. But it is only fair to also acknowledge that the Court may have expected the source of that expertise to be the Universities, or even the traditionally reputable research institutions such as the CSIRO.

Sadly, I am not alone in recognising that the base of relevant technical research in the public institutions is fast disappearing, and is not attracting post-graduate students or younger academics. The situation is not quite as dramatic in non-technical areas, but local academics from planning and architecture generally are not as active as before in the role I identify. In instituting the Principles, the Court has certainly exercised initiative; it may well fall to the professions to replace academia and actively participate in the critical review I advocate — and of which we are part in these workshops.