STAND UP AND DELIVER EXPERT EVIDENCE

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INTRODUCTION

Preparing and giving evidence, whether at council level or before a Court, can be challenging. This paper looks at the preparation of reports and evidence under the Resource Management Act 1991 ("RMA").

Many questions arise: Where do you pitch it? What are the assessment tests? Then, there is the new Environment Court Practice Note which now sets out a lot of requirements for expert witnesses. Quite simply, what is the best way to go about it?

Fear not! This paper will prepare you to present expert evidence confidently, and will enable you to stand up and deliver expert evidence with ease, whether you are an experienced expert witness or just starting out.

EVIDENCE AND REPORTS

Commonly, transport engineers will be asked to prepare reports and/or evidence, under the RMA, in relation to:

- Resource consent applications;
- Regional or district plan preparation;
- Proposed plan change applications;
- Submissions on any of the above.

Your fundamental obligation when preparing evidence is to remain independent. The purpose of your evidence is to assist the decision maker. You are not an advocate for your client.

When preparing reports, you should bear in mind that the application or matter could eventually end up in the Environment Court. If so, it will be a logical assumption that you may be asked to give evidence in the Court at that stage.

For that reason, you should keep in mind the Environment Court requirements when preparing your reports and evidence at Council level, as other lawyers and the Court may cross-examine you, in Court, on any differences or inconsistencies between your earlier (Council) reports and your evidence to the Court. It also means that your evidence or report at Council level will most likely be of a superior standard and, therefore, will get your message across in the best possible fashion. This increases the likelihood that the decision maker will prefer your evidence over other, conflicting, evidence.

This is an extensive topic, so this paper focuses on resource consent applications, however, the general principles are applicable to all circumstances in which expert evidence is required[1].

Council Reports and Hearings

You may be asked to prepare a report and / or assessment of adverse effects to form a part of a

[1] Noting, of course, the specified procedure set out in the RMA for Direct Referrals, for example, and where specific directions have been given by the Council hearing panel or Court.

resource consent application, or the Council may ask you to prepare a section 42A report. Similar concepts apply to both scenarios in terms of preparation.

Under section 42A of the Resource Management Act 1991, the local authority may ask a council officer or consultant to prepare a report on information provided, by the applicant or a submitter, on a resource consent application[2].

Changes introduced by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 sought to reduce repetition in s42A reports and provided that:

a. The report does not need to repeat material from an assessment of environmental effects provided by the applicant.[3]

b. The report may—

(i) adopt the whole assessment; or
(ii) adopt any part of the assessment by referring to the part adopted[4].

So, there is no need to repeat the general matters, such as description of the application, and the application site, within your section 42A report. If you agree with some or all of the assessment, you may adopt the part or whole of the assessment, but you must clearly state which parts you are adopting.

When you prepare a section 42A report, you should consider the possibility that the application may be appealed to the Environment Court. If the Council decision is consistent with your opinion and any recommendations in your section 42A report, the Council will very likely call you to give evidence in the Environment Court to support that decision. If the Council's decision differs from your opinion and any recommendations, one of the other parties, which wishes to take the position outlined in your section 42A report, may require you to appear in Court to present your section 42A report in support of their case.

First and fundamentally, you must be satisfied that you can support the opinions and recommendations in your section 42A report, at council level and beyond. As outlined below, that will include expert conferencing with your peers, as well as cross-examination from other lawyers, and questions from the Court.

Experts for the Applicant should also consider these same matters, as should experts for any submitters. If you are preparing a report or Assessment of Environmental Effect which supports the application, you, too, should consider how your opinions will stand up in Court, as, if the application is appealed to the Court, you are also likely to be called to give evidence for the Applicant in Court. The same principles also apply if you give evidence or prepare a report for a submitter at Council level.

Environment Court

When a matter is appealed to the Environment Court and it proceeds to a hearing, a timetable for the exchange of written evidence will be set by the Court prior to the hearing. All witnesses will need to prepare their evidence in writing.

The Environment Court has had a Practice Note in place for some years, and the Court updated its Practice Note last year. The new Practice Note took effect from 1 November 2011. The full

[2] Or any other matter outlined in section 39(1) of the Resource Management Act 1991

[3] Section 42A(1A) RMA 1991

[4] Section 42A(1B) RMA 1991

Practice Note can be viewed at:
http://wynnwilliams.co.nz/WynnWilliams/media/Articles/Environment-Court-Practice-Note-2011.pdf

The Code of Conduct for Expert Witnesses forms a large part of the Practice Note. It is based on the High Court's Code of Conduct, but the recent amendments have tailored the Practice Note very specifically to Environment Court proceedings. Obligations for witnesses to caucus or attend witness conferences have been spelt out in greater detail, and there is a real drive for witnesses to discuss methodologies, outcomes and opinions, with a view to reaching, at least, an understanding of these matters between the witnesses.

Evidence Preparation

Under the Practice Note, every expert witness must be provided with a copy of the Practice Note/ Code of Conduct[5]. When they prepare their evidence, an expert witness must comply with the Code of Conduct, as well as when they give oral evidence in Court. A statement acknowledging that the witness has read the Code of Conduct and agrees to comply with it must be included in the witness' Statement of Evidence.

Under the Code of Conduct, the witness has an over-riding duty to assist the Court impartially on matters within the expert's area of expertise[6]. The Code of Conduct specifically states that the expert witness is not, and must not behave as, an advocate for the party engaging them. Any relationship with a party, or interest in the outcome, must be declared.

In the evidence, itself, the witness must also:[7]:

(a) acknowledge that the expert witness has read the Code of Conduct and agrees to comply with it;

(b) state the witness's qualifications as an expert;

(c) describe the ambit of the evidence given and state either that the evidence is within the expert's area of expertise, or that the witness is relying on some other (identified) evidence;

(d) identify the data, information, facts, and assumptions considered in forming the witness's opinions;

(e) state the reasons for the opinions expressed;

(f) state that the expert witness has not omitted to consider material facts known to the witness that might alter or detract from the opinions expressed;

(g) specify any literature or other material used or relied upon in support of the opinions expressed;

(h) describe any examinations, tests, or other investigations on which the expert witness has relied, and identify, and give details of, the qualifications of any person who carried them out; and

(i) if quoting from statutory instruments (including policy statements and plans), do so sparingly. A schedule of relevant quotations may be attached to the statement of evidence, or a folder containing relevant excerpts may be produced.

[5] Environment Court Practice Note 2011, Clause 5.5.1

[6] Environment Court Practice Note 2011, Clause 5.2.1

[7] Ibid, Clause 5.3.1

The aim behind these requirements is to ensure that the expert witness has read and is well aware of their obligations under the Code of Conduct. Following on from that, the bases upon which the expert evidence is based, and on which opinions are formed, should be transparent and clear. This is important because only an expert witness may express an opinion on evidence and it must, therefore, be clear how that opinion is derived. For example, where the work of another witness is relied upon, it should be explained, as is the case when other material is referenced.

The intention is also that the views of the witness are identified without having to read through copious amounts of statutory material that, in some cases, is self-evident, well-known or unnecessary.

Likewise, any qualifications or clarifications in relation to insufficient information or data must be outlined in the evidence. If a witness changes their opinions or views after the evidence is exchanged, they must communicate that change to the party calling them.

The intended outcome is that evidence will be logical, easy to follow, and the bases upon which conclusions and opinions are formed will be clear. There should not be any unexposed arguments about methodology that are not obvious from the evidence. In days gone by, inconsistencies in methodology have not been evident, meaning that it has been more difficult for decision-makers to compare statements of evidence which differ in opinion.

The evidence of the expert witness is for the benefit of the court, not those instructing them. The witness is not there to have an opinion on the final outcome of the case. Expert witnesses should read, understand and adhere to the Code of Conduct for Expert Witnesses at all times, regardless of area of expertise and/or who is paying the bill.

Expert Witness Conferences

If you prepare evidence for an Environment Court hearing, it is highly likely that you will be asked to attend an Expert Witness Conference.

Expert Conferencing is helpfully described in the Practice Note, as:

> *the process by which expert witnesses confer and attempt to reach agreement on issues, or at least to clearly identify the issues on which they cannot agree, and the reasons for that disagreement*[8]*.*

It is expected that Expert Conferencing takes place in each case before the Court, and that the parties turn their minds to it at an early stage[9]. The witnesses who will be expected to attend these conferences are those who are recognised by the Court as an expert in his or her field by reason of relevant qualifications and/or experience. Witnesses without such qualifications and experience will not participate in conferences unless otherwise agreed by all parties or directed by the Court. Likewise, conferencing is unlikely to occur when there are no other experts in that field or area of expertise involved in the case.

These conferences are structured discussions between peers within a field of expertise which can narrow points of difference and save hearing time (and costs). All experts have a duty to ensure that any conference is a genuine dialogue between them in a common effort to reach agreement about the relevant facts and issues.

Such discussions are private or "without prejudice". Experts must act in accordance with the Code

[8] Ibid, Clause 5.4.1

[9] Ibid, Clause 5.5.1

of Conduct and must not act as an advocate for the client in these conferences. They are required to exercise their independent and professional judgement, and must not act on instructions from someone else.

When preparing your written evidence, you should consider how you would approach the Expert Conferencing and ensure that your opinions and reasons will stand up to, not only the Court's scrutiny, but those of your peers in an Expert Conference.

KEY CONSIDERATIONS FOR RESOURCE CONSENT APPLICATIONS

Section 104 - Consideration of Applications

Section 104 of the Resource Management Act 1991 sets out how resource consent applications are to be considered by the decision-maker, be it the council or the Court.

The decision-maker must have regard to[10]:

a. Any actual or potential effects on the environment of allowing the activity; and

b. Any relevant provisions of various documents including a national environmental standard or national policy statement, a regional policy statement (including proposed) or proposed or operative plan;

c. Any other matter the decision-maker considers relevant and reasonably necessary to determine the application.

It follows, therefore, that evidence to the decision-maker would address the matters that the decision-maker needs to consider. You should be familiar with those matters to which regard is to be had.

Within each of those matters, there are a number of issues for consideration. For example, what are the adverse effects and how should you assess them. It is noted that this section requires regard to be had to all "actual or potential adverse effects on the environment of allowing the activity". This is not limited to only adverse effects which are more than minor. This issue is considered further below.

Make sure that you cover all relevant considerations under the RMA when you prepare your evidence. You should also address any negative issues.

You should also know the activity status of resource consent that is being sought, so that you can formulate your report or evidence to ensure that you correctly address the test required for that particular application.

Controlled Activities

Controlled activities must be granted[11] but conditions may be imposed. Those conditions can only relate to the matters on which the council has retained control in its relevant plan.

Restricted Discretionary Activities

An application for a restricted discretionary activity may be granted or refused, however, in doing so, the decision-maker must consider only those matters over which the council restricted discretion in its plan. This also applies to the conditions that may be imposed should the consent

[10] Section 104(1) RMA

[11] Unless there is insufficient information to determine whether or not the application is a controlled activity - section 104A(a).

be granted.

A common mistake with both controlled and restricted discretionary activities, is to traverse into considerations that are not set out in the relevant planning documents, and, therefore, cannot be considered. You should ensure that you check the provisions of the relevant planning document carefully.

Discretionary Activities

A discretionary activity may be granted or refused, and, if granted, conditions can be imposed (without restriction but subject to section 108).

Non-Complying Activities

A non-complying activity may also be granted or refused, with conditions imposed, however, it must also pass the "gateway test" in section 104D in order to be granted. That is, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—

a. the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

b. the application is for an activity that will not be contrary to the objectives and policies of—

   i. the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

   ii. the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

   iii. both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

The section 104D test is a threshold test which can be addressed as either an entry or exit test. Nevertheless, one of the tests, must be met before consent may be granted.

However, many people concentrate on this s104D test as being the only matters of consideration for a non-complying activity. However, there is still the requirement to "have regard to" all of the factors set out in section 104(1) for consideration of an application generally. The words "have regard to" mean that the decision maker is required to "give genuine attention and thought to the matters set out in s104, but they must not necessarily be accepted"[12].

Further, the decision-maker (and report or evidence writer) is directed specifically to Part II of the RMA also. In doing so, the decision maker must be satisfied that the grant of consent will meet the single purpose of the RMA, being sustainable management, as set out in section 5 of the RMA. It must take into account all of the provisions of relevant plans, including district and regional plans, and all effects which are more than minimal or de minimis. As an expert witness or report writer, you should address these matters.

In particular, in addition to the gateway test[13], considerations for a non-complying activity must turn to:

a. all other provisions of a plan in addition to policies or objectives; and

[12] *Foodstuffs (South Island) Limited v Christchurch City Council* HC Christchurch AP27/98, 31 March 1999, at [9], confirmed in *Stirling v Christchurch City Council*, HC, CIV-2010-409-002892, 19 September 2011

[13] In Section 104D RMA

b. effects that are more than minimal, but less than minor.

One approach for those assessing an application is to follow the *Baker Boys*[14] approach and:

a. examine all effects of the proposal (including beneficial effects);

b. examine all relevant provisions of the plan; and then

c. examine whether the adverse effects are more than minor; or, in the alternative

d. whether the proposal is contrary to the objectives and policies of the plan.

Another approach is to consider the threshold test[15] first, however, difficulties arise[16]:-

a. In identifying only effects that are more than minor, witnesses discount effects which are more than minimal but less than minor. This can have a particular impact where there are multiple or cumulative effects, each of which is not significant, but is more than minimal; and

b. After addressing the objectives and policies of the plan, the witness forgets to return to consider all the other provisions of the plan before addressing the various criteria in Section 104(1).

There is a danger in conflating the examination of effects which are more than minor and the objectives and policies of the plan, with the discretionary criteria in Section 104(1) of the Act. This can result in the witness failing to consider effects which are more than minimal but less than minor, and provisions of the operative and proposed plans other than the policies and objectives.

In *Foster v Rodney District Council*[17] the Court said:-

> "*Quite simply, this Court's understanding of the law is that Section 104D is a threshold or high level test which enables jurisdiction for the Court to grant consent under Section 104(1). It is fundamental that the two tests are different in that the threshold of tests under Section 104D are broad or high level filter, and do not mean that an application passing these tests should or will be granted consent under Section 104(1)."*

Witnesses should not, therefore, fall into the trap of addressing only section 104D for a non-complying activity, and not addressing the remainder of the effects and/or planning documents.

Adverse Effects

Assessments carried out under the RMA focus on adverse effects in many different ways. There is widespread uncertainty about the differences between de minimis, less than minor, minor and more than minor effects. Cumulative effects are frequently questioned too.

Definition of "Effect"

The tendency is to concentrate on adverse effects, however, "effect" is defined in the RMA[18] as including:

a. Any positive or adverse effect;

b. Any temporary or permanent effect;

[14] *Baker Boys Limited v Christchurch City Council* [1998] NZRMA 433

[15] See Section 104D RMA

[16] As the Court noted in *Foster v Rodney District Council*, Env C, A123/2009, Judge Smith, at [17]

[17] Ibid, at [24].

[18] Section 3, RMA

c. Any past, present or future effect;

d. Any cumulative effect which arises over time or in combination with other effects-

regardless of the scale, intensity, duration, or frequency of the effect, and also includes -

e. Any potential effect of high probability;

f. Any potential effect of low probability which has a high potential impact.

Thus, all effects, of varying nature are technically up for consideration.

De Minimis Principle

Usually, de minimis effects are disregarded in a resource consent assessment[19].

De minimis is the shorthand way of expressing the latin term "*de minimis non curat lex*", which is usually translated as "*the law is not concerned with trifles*".

In the resource management context, the meaning of de minimis is not the same as "minor", or even "less than minor". It describes an effect which is so small and trifling that the law should not be concerned with it. The test of whether an effect is de minimis is different from, and more stringent than, the test for whether an effect is minor or less than minor.

In one case[20], which considered the term "de minimis", the Court, helpfully, said:-

> *[10] The term "de minimis" has survived, though the use of Latin maxims is now out of fashion, since there is no equally convenient and pithy English alternative. It is a shorthand way of expressing the full Latin maxim "de minimis non curat lex". That is usually translated as "the law is not concerned with trifles". In the present context, it means that an adverse effect on a person can be disregarded, so that notice to that person will be unnecessary, only if it is so trifling that the law should regard it as of no consequence. That is a much more stringent test than whether the adverse effect is minor. A minor effect may well be more than de minimis, as the citation from Bayley confirms.*
>
> *[11] I have felt it necessary to expand on this point at some length, since a reading of the Council's decision suggests that the Council officers have regarded the terms "minor" and "de minimis" as synonymous or interchangeable. They are not."*

So, before an effect could be disregarded on the ground that it is de minimis, it would have to be close to non-existent.

Even an effect which is "less than minor" will not necessarily be de minimis.

The RMA does not use the term "de minimis". It is always best to use the wording from the Act, where possible. If not possible, care should be taken to ensure that the term de minimis is used in the right context.

Less than Minor, Minor or More than Minor Effects

The classification of effects as "less than minor", "minor" and "more than minor" have relevance in relation to the following:

a. Public notification: a consent authority must publicly notify an application if it decides that the activity will have or is likely to have adverse effects on the environment that are more than minor[21].

[19] Conducted under section 104 RMA

[20] *Rea v Wellington City Council* [2007] NZRMA 449

b. Determining "adversely affected persons" for the purpose of limited notification: A consent authority must decide that a person is an affected person if the adverse effects of an activity on that person are minor or more than minor, but not less than minor[22].

c. Passing a "gateway" or "threshold" test for a non-complying activity: a consent authority may grant a resource consent for a non-complying activity if the adverse effects of the activity on the environment will be minor[23].

It is a question of fact and degree as to whether an effect is minor, and it will vary from application to application, and from site to site. So, there is no one answer as to what constitutes a less than minor effect.

For example, whether or not additional vehicle trips created by a proposal will be less than minor, minor or more than minor will depend on the location, the permitted baseline, the receiving environment including other activities in the area, the type of vehicles, the provisions of the relevant planning document and the like. It is not possible to say, for example, that an increase of 100 vehicles per day will always fall into one of these categories.

The decision-maker will consider the overall combined effects of the proposal on the broader environment. This could lead the decision-maker to find that there are more than minor effects on a neighbour, but that the effects are still minor when considered in the context of the wider environment.

There is a clear distinction, in the RMA[24], between localised effects, which influence limited notification of applications, and effects on the wider environment, which influence full public notification.

Now[25], when considering public notification, the council must disregard owners and occupiers of the land on which the activity will occur, and of any land adjacent to the land, when considering whether the activity will have or is likely to have adverse effects on the environment that are more than minor. So, an application must have more than localised effects to be publicly notified. Otherwise, it will be limited notified, or not notified.

When assessing whether an activity will have or is likely to have adverse effects that are more than minor, regard needs to be had to the following:

a. The cumulative nature of any effect over time, or in combination with other effects;

b. The probability of occurrence;

c. Temporary effects, including those associated with construction;

d. The scale and consequences of the effect;

e. Duration of the effect;

f. The permitted baseline;

g. The frequency or timing of the effect;

h. Whether the effect relates to a s6 or s7 matter;

i. The area affected (neighbours or wider environment);

[21] Section 95A RMA

[22] Section 95E RMA

[23] Section 104D RMA

[24] Since the Resource Management (Simplifying and Streamlining) Amendment Act 2009

[25] Ibid

j. The sensitivity of the surrounding uses to the effect;

k. Reverse sensitivity issues; and

l. Whether the effect is to be mitigated or avoided by a condition (offered or agreed to by the applicant).

Even if the traffic effects are considered to be more than minor, the Court will consider the mitigation measures proposed. Quite often, those mitigation measures may result in an overall assessment that the adverse traffic effects are less than minor or minor.

As stated above, this will depend on each application, the mitigation measures proposed, and the surrounding environment. In many cases, it will also depend on what is provided for in the relevant plan and the function that the particular road is designed to perform.

Traffic effects arise in a large proportion of cases before the Courts. I refer to a couple of examples below. The examples detail some of the evidence so give some indication of the Court's findings in different scenarios.

In *Christchurch Surgical Associates Holdings Limited v Christchurch City Council*[26], the Court considered the traffic effects of 154 vehicle trips from the proposal, which was 54 more than those from the current activities on the application site. The two traffic engineers involved agreed on the increase, but not the significance of it. One relied on a drop in traffic counts from 2,400 vehicles per day in 2000, to 1,630 vehicles per day in 2008, to demonstrate his opinion that an increase of 54 vehicles at the application site was unlikely to be of significance.

The Court considered that, whether it took 1,600 or 2,400 as the comparative environment, an additional 50, or even 150 vehicles, is unlikely to be of significance[27].

The Court considered the traffic effects from "what may be the biggest store in New Zealand, a Mitre 10 Mega on the corner of Lincoln Road, just off the motorway" in Auckland, with office space on the rooftop of the store, in *Laidlaw College Inc v Auckland Council*[28].

The two traffic witnesses, in that case, undertook modelling to estimate the likely traffic that would be generated by the proposal and its effects on the local traffic network. Both reached different conclusions about the level of delay resulting from the increased traffic generated by the development and what the significance of these effects were likely to be in terms of the statutory tests. One maintained that the effect would be more than minor and could not be mitigated, and the other witness maintained the opposite.

The Court considered the trip generation rate that should apply, followed by the effects that flow from the rate accepted by the Court. It then considered the significance of those effects, and whether they could be mitigated.

The Court found the peak trip generation rates from another hardware store close to a motorway as being 'instructive' to this exercise, rather than the rates from the applicant's existing, smaller site on another lower profile site[29]. The Court heard that, under one scenario, there would be additional travel time of a minute and a half over a four minute journey, which one of the witnesses described to be "*quite a way past more than* minor". The other witness, who acknowledged that the higher trip generation rate would have a more than minor effect during the Saturday peak, gave the opinion that there would be less than minor adverse traffic effects if the Court considered the traffic delays across the week and not just during the Saturday peak period. The Court concluded

[26] *Christchurch Surgical Associated Holdings Ltd v Christchurch City Council* EnvC, Christchurch, C120/2008, 3 November 2008,

[27] Ibid at [39]

[28] *Laidlaw College Inc v Auckland Council* EnvC, [2011] NZEnvC248, 1 September 2011

[29] Ibid at [65]

that there could be more than minor adverse traffic effects from the proposal at peak periods on a Saturday, which could worsen the existing traffic situation.

The Court considered that there were more than minor adverse traffic effects from the proposal, and was not convinced that additional mitigation proposed would be feasible or effective, or even allowed by Auckland Transport. The Court considered declining the consent, but took the less common step of issuing an interim decision so that the mitigation could be further explored. This was due to the fact that there was a possibility that the mitigation might work and there was evidence from one traffic expert that it would, as well as a favourable indication from Auckland Transport.

In *Living in Hope Incorporated v Tasman District Council*[30], the Court found that there would be no adverse effects due to the small increase of 23 to 52 vehicles per day generated by the proposed crematorium/chapel and memorial gardens, even when considered in conjunction with Gardens' traffic. The capacity of the roads concerned were at least 1500 vehicles per day compared to their existing flows of 852 and 657 vehicles per day. It considered that the very small number of cars needed to convey mourners to the 25 seat crematorium/chapel will have no discernable impact on nearby roads and will have ample parking available in the dedicated car park which the applicant was to provide.

In *Fair Investments Limited v Palmerston North City Council*[31], the evidence was that there would be an increase of 110 vehicle movements per day from 55 proposed units, which would result in vehicles passing a particular property once every 47 seconds instead of every 55 seconds without the additional 55 units. The increase was well within the capacity of the roads surrounding the site. The effect from traffic was considered to be less than minor.

These cases demonstrate that the assessment is very fact specific. The capacity of the road will be an important factor when considering increased traffic. You will need to apply your expertise and judgement as a professional in your field of expertise to the considerations.

Cumulative Effects

Cumulative effects are used frequently, but, there is often confusion surrounding this term.

Cumulative effect is not defined in the RMA, other than by its inclusion in the definition of "effect" in section 3 of the RMA:

"*any cumulative effect which arises over time or in combination with other effects*"

Cumulative effects are often referred to as being at issue if they are "the straw that breaks the camel's back" or matters reach the point of "enough is enough".

Cumulative effects have been discussed at length in various Court decisions, and the definition remains unresolved. The Courts have said that cumulative effects are not the same as precedent effects[32]. Cumulative effects do not include future activities for which consent may be granted in the future, or plan integrity matters.

Cumulative effects do include the effects that would exist from the application, if granted, in combination with effects of other existing activities, and can be considered when assessing and determining a resource consent application.

In many cases, traffic effects can be partly or wholly mitigated with changes or additions to the road network and / or application site. Where a developer wishes to develop their land after several other developers have done so nearby, the issue often arises as to whether it is "fair" for the later developer to bear the full cost of upgrade works. In *Westfield (New Zealand) Limited v*

[30] Living in Hope Incorporated v Tasman District Council, EnvC, [2011] NZEnvC 157, 14 June 2011

[31] *Fair Investments Limited v Palmerston North City Council,* High Court, CIV 2010-454-653, Young J, 15 December 2010

[32] *Dye v Auckland Regional Council* [2002] 1 NZLR 337

Hamilton City Council[33], the High Court found that a developer has to tailor his or her development to the environment as it exists at the time that consent for the development is sought. A condition for a particular development would not be invalid simply because the developer in question happens to take adverse traffic effects over a threshold beyond which an expensive upgrade is required. In many cases, this becomes the price that the applicant pays for obtaining a resource consent in that environment.

Cumulative effects are still difficult to determine. If cumulative effects of existing activities are more than minor, there can be the temptation to conclude that no further consents should be granted. However, further considerations may influence this, such as:

a. The small scale of a proposed new activity;

b. Different operation times of a proposed new activity, for example, during low demand periods;

c. Introduction of conditions to mitigate or avoid adverse effects.

Therefore, the usual assessment must be completed for all applications in a methodical manner.

TIPS FOR PREPARING EVIDENCE

As an expert, you should ensure that you obtain all of the relevant material (including the application and any associated reports), including the materials demonstrating the strengths and the weaknesses of the client's case. A good expert witness should be able to concede points in their written evidence or in cross-examination. If you do not know about the weak points ahead of time, you will not be able to adequately address these points.

Spell out your experience and expertise and demonstrate that you are an expert in the area in which you are giving evidence.

You should ensure that you set out all relevant evidence in your statement of evidence. Do not be tempted to keep material back for your rebuttal. Rebuttal evidence should only answer new matters that have been raised in another expert witnesses' evidence in chief.

In your evidence, you should try to express yourself with authority, but succinctly. You should demonstrate that you are an expert and that you uphold your duty to the Court, rather than acting as an advocate for the client.

A real understanding of the proposal or case being decided is also important. Make sure that you consider the context of the proposal, and, importantly, make it clear that you have considered this in making your assessment.

Witnesses should be true to themselves. The credibility of the witness is immediately undermined if it emerges that their evidence has been prepared on the "instructions of the lawyer or client".

You should also ensure that it is your own evidence. Difficulties arise if you have prepared a statement of evidence in consultation with another expert, particularly if their views differ from yours. This can be important when preparing evidence at the Council stage. Remember that you cannot give evidence for someone else in the Environment Court (despite this being done frequently before Councils). Consider whether you need another witness to present some evidence at Council level.

In general terms, opinions are not admissible, however, the exception to that rule is where opinion evidence is based on experience and expertise. To this end, expert opinions are admissible. Experts should ensure that they express their opinions in an objective manner that can assist the decision maker to reach their decision.

[33] *Westfield (New Zealand) Limited v Hamilton City Council*, HC, (2004) 10 ELRNZ 254,

Make sure that you address all of the matters that the decision maker will need to consider when they make their decision. Your role is to assist the decision maker. In some cases, the Court has indicated that witnesses have not provided the Court with the necessary information to enable it to make its decision[34]. Whilst this does not always impact on the outcome of the case, it could result in some indirect or indirect comments about your evidence appearing in the Court's decision. This is something you want to avoid at all costs.

This issue often competes with the Court's desire to reduce the length of evidence presented to it. Some ways of addressing this include the insertion of reference material, such as plan provisions, in appendices, and reference to other evidence which already records certain detail. In many cases, it will be a judgement call as to the best way to manage those different interests.

Ensure that you are clear about the objective, and understand the data and workings behind your conclusions. This assists to present a credible piece of evidence. It will also be of assistance to you if you are required to attend witness caucusing. When you are in a room with colleagues, your discussions will likely turn to the data on which the opinions are based. You should also be carefully prepared for any witness caucusing.

BEING CROSS-EXAMINED

Giving evidence in Court and, particularly, being cross-examined can be nerve wracking, but it need not be.

Some basic points for giving evidence in Court include:-

a. On the night before, carefully read through the evidence you have previously prepared, as well as the application and supporting documents. You will be questioned about those. Bring any supporting documents that you may need to refer to, to Court.

b. Also, read the evidence of other witnesses relevant to your evidence.

c. Dress professionally.

d. Tell the truth and make sure you understand each question, and only answer that question.

e. Do not answer a question if you did not hear it completely. Ask the lawyer to repeat the question.

f. If you do not know the answer to a question or it is not within your expertise, just say "I don't know" or "That falls outside my area of expertise".

g. Do not be afraid to think for a few seconds after the question is put to you, if you need to consider your answer. However, do not purposefully introduce unnecessarily prolonged periods of silence.

h. Speak loudly enough so that everyone can hear. If there is a Court Reporter, you will need to speak quite slowly so that he or she can type your answer.

i. Look at the person who asked the questions and be as positive as you can.

j. If the lawyer instructing you interrupts when you are being questioned, stop talking. Listen carefully to what they say.

[34] For example, *New Zealand Historic Places Trust v Tauranga District Council* [2010] NZEnvC 322

k. Do not let the other lawyer put words into your mouth. Do not accept that lawyer's summary of your answer or evidence if the summary is incorrect in any way.

l. Do not tell jokes, and do not argue with the lawyer asking the questions. If you use technical terms which are not familiar to other parties or the Court, be prepared to explain those.

m. Do not volunteer extra information. Answer the question concisely.

n. If you need a document to answer a question, ask to see it or refer to it.

o. Never lose your temper.

p. Take a sip of water if you are feeling flustered.

q. Give a straight answer. Don't beat around the bush.

r. If you have made a mistake or need to correct something, do it as soon as possible. This will minimise any damage to your credibility as a witness.

If you make mistakes in your evidence, the lawyer instructing you may try to clarify those points in re-examination. Lawyers use re-examination very sparingly, so if the lawyer stands up to re-examine you, you can usually assume that they wish to correct an issue or problem from cross-examination.

Your client's lawyer cannot ask leading questions in cross-examination (for example: Are there exceedingly high crash statistics for this particular stretch of road?). Rather, they must ask open questions (for example, what are the crash statistics for this stretch of road?). You will, therefore, need to pay attention to the questions. If you are asked to repeat or check something, do so carefully, to ensure that the correct answer is given. You may have inadvertently verbalised your evidence or answer incorrectly.

CONCLUSION

The world of expert evidence is vast, and it is not possible to cover all matters in this paper. Carefully, consider all information that is relevant to your task in hand. Don't forget to address the unhelpful information and spell out your reasons for all of your conclusions. Look at the test that must be met and ensure that you provide all information that the decision-maker will need to make their decision.

Even at council level, apply the standards of the Environment Court to ensure that your evidence is the best it can be, and that you can confidently present the same evidence to a Court hearing, if matters progress that far.

Most importantly, trust your professional judgement and make sure that you use it wisely to put your best evidence forward.