Richard Gardner-
EVIDENCE Federated Farmers
TOPIC GMO PC 131 / PC 18
SUB# 016
DATE 14/6/2016

BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 133

IN THE MATTER	of appeals under Clause 14(1) of the First Schedule of the Resource Management Act 1991 **(the Act)**
BETWEEN	TRAM LEASE LIMITED VIADUCT HARBOUR HOLDINGS LIMITED and VIADUCT MANAGEMENT LIMITED (ENV-2014-AKL-000200)
AND	RSCJ TRUST (ENV-2014-AKL-000199) Appellants
AND	AUCKLAND COUNCIL Respondent

Hearing at: Auckland on 22-24 June 2015, inclusive of site visit

Court: Environment Judge JA Smith
Environment Commissioner ACE Leijnen
Environment Commissioner SK Prime

Appearances: Mr T Daya-Winterbottom for Tram Lease Limited, Viaduct Harbour Holdings Limited AND Viaduct Harbour Management Limited **(Tram Lease)**
Ms BC Parkinson for RSCJ Trust **(Baradene)**
Mr MC Allan for Auckland Council **(the Council)**
Mr G Smith for Volcanic Cones Society (s274 party)

Date of Decision: 6 August 2015

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

DECISION OF THE ENVIRONMENT COURT

A. **Baradene withdrew their appeal and the Council raised no issue as to costs. Accordingly, those proceedings are at an end and no order for costs is made.**

B. **The appeal by Tram Lease is disallowed, and the provisions of Plan Change 339 are confirmed as set out in the Commissioners' decision.**

C. **The Commissioners' version of PC339 to the Isthmus Plan is confirmed accordingly.**

E. **Costs are reserved. Any application for costs in relation to the Tram Lease matter is to be filed within thirty (30) working days of the date of this Decision. Any reply is to be filed fifteen (15) working days after that and any final reply ten (10) working days thereafter.**

REASONS FOR DECISION

Introduction

[1] These appeals relate to view shafts inserted into the Auckland District Plan (**Isthmus Plan**) by Plan Change 339 (**PC339**). One relates to view shaft H17, a view from Ngapipi Road towards Mt Hobson, which includes a portion of Baradene School, operated by the RSCJ Trust (**Baradene**). The other view shaft is from the North-western Motorway around the Te Atatu on-ramp, and looks towards Mt Albert. This view shaft, A13, is also imposed by PC339 with accompanying amendments to planning maps and overlays. Tram Lease owns land on New North Road affected by PC339.

The Baradene appeal

[2] The Council, as promoter of the Plan Change, advanced its case, which dealt with both the Baradene and Tram Lease view shafts, first. Original evidence had

non-complying consent whatever view shaft-sensitive area limit was imposed. This is because it is well beyond the zonal height limits Furthermore, there has been no analysis that we are able to see in terms of the Regional Plan provisions, Regional Policy Statement provisions or the District Plan to assess whether or not the intrusion has been reduced to the maximum extent practicable.

[101] These are matters for a non-complying application for consent, and we acknowledge that one purpose of the application is to ensure that there is no incremental or cumulative change through a series of minor intrusions into the view shaft. In this regard we agree entirely with Mr Brown that to view each application incrementally as simply a less than minor change does not reflect either the ARPS or the Isthmus Plan provisions.

The planning evidence

[102] Mr Foster's evidence to this Court can be summarised in four questions asked by the Court and responded to by Mr Foster. I have clarified the statements to avoid repetition and mis-spelling:

Q The conclusion that you are seeking in respect of the protection of the view shaft to Mt Albert is predicated on a conclusion which you reached that Mt Albert is not an outstanding feature?

A That's correct.

Q The second predicated conclusion is that it is possible to revisit a superior document in any appeal on a lower order document. In other words, we can revisit a national policy statement in a regional policy statement, and we can revisit a regional policy statement in a district plan?

A Yes.

Q The third proposition that your opinion seems to be based on is that an expert opinion can substitute for regional and district document provisions?

A Where there is good and sound reasons to do so, yes.

Q The fourth [proposition] is based upon 7.5 of your evidence, where you acknowledge "*I accept that the extent of protection [of the view shaft] is very much a judgement call in balancing a range of competing factors.*" In making that judgement call you [the planner] can substitute your opinion for the deciding authority as to that balance; in other words, your expert decision would substitute for the regional policy statement or in fact this Court?

A That's not quite what I'm saying. I'm saying there is room for some modification to this view shaft that would recognise those regional and district principles and not compromise the view shaft, and the reason I'm saying that is that the HSA has been set at 9m. That setting is based on a residential height.

Q But whose role is it to make the judgement? You said a judgement call. You seem to be suggesting it's your role to make the judgement call, not the role of the local authority or, on appeal, this Court?

A I'm expressing my professional opinion.

Q That's not my question. You said that you accept that it is a judgement call. Obviously the Council exercised a judgement call, as did the regional council, and on appeal who is to make the judgement call here? Is it you or the Court?

A The Court is. You will have to make a judgement as to the worth of my professional opinion.

The role of the expert

[103] Mr Foster has some 30 years experience in planning, and frequently appears before this Court and is familiar with the expert code of conduct. However, Mr Foster's evidence, his answers to cross-examination and his answers to questions from the Court in these proceedings give rise to some significant issues as to the role of an expert planning witness before the Environment Court.

[104] It has always been the case that the giving of expert evidence before the Environment Court requires an opinion to be expressed:

(i) on a subject within that person's expertise;

(ii) explicit to the decision before the Court; and

(iii) based upon the facts and assumptions pertaining to the case.

[105] For current purposes, it is clear that the giving of an opinion before the Court is an exception to the general rule that a witness can only give evidence as to matters of fact.

[106] Although s276 of the RMA notes that:

(i) the Environment Court has a very broad discretion as to what evidence it **may** receive, and

(ii) the Court is not bound by the rules of law about evidence that apply to judicial proceedings,

(emphasis added)

[107] It is nevertheless assisted by reference to the general provisions applicable to the Court in respect of evidence. Thus, s276 gives the basis for the Court to depart from the general provisions, rather than a requirement that it do so.

[108] Section 23 of the Evidence Act 2006 supports the general proposition that an opinion is not admissible, and s24 and s25 of the Act set out the basis on which an opinion may be given. Any opinion evidence must be of **substantial help** to the Court and is not excluded simply because it addresses the ultimate issue to be determined by the Court or addressed as a matter of common knowledge.

The overriding duty

[109] As reflected in the Environment Court Code of Conduct, the overriding duty of an expert witness is to assist the Court impartially on relevant matters within the expert's area of expertise. Moreover, the expert opinion cannot substitute for that of the Environment Court, which is charged with reaching a decision rather than an "*oracular pronouncement by an expert*" (see ***Davie v Edinburgh Magistrates***[5]). Furthermore, higher standards of accuracy and objectivity are required if the expert witness is to carry any weight with the Court (see ***National Justice Companion Avier SA v Prudential Assurance Co Limited v the Kahraian Reefer***[6]).

[5] 1953 SC34 at [40]
[6] 1993 S Lloyds Report 68 at [81]

[110] The question of the evidence of a witness as to the ultimate issue has been addressed in s25(4)(A) of the Evidence Act, which indicates that opinion evidence is not inadmissible simply because it addresses the ultimate issue. On the other hand, the Privy Council has noted in ***Pora v R***[7] that the Rule still has a part to play in the decision as to whether particular species' of expert evidence is admissible. It noted:

> The dangers inherent in an expert expressing an opinion as an unalterable truth are obvious. This is particularly so where the opinion is on a matter that is central to the decision to be taken by a jury. There may be cases where it is essential for the expert to give an opinion on such a matter, but this is not one of them. It appears to the Board that in general an expert should only be called on to express an opinion on the "ultimate issue" where that is necessary in order that his evidence provides substantial help to the trier of fact.

[111] We have concluded that this paragraph noted is binding on this Court also. It reflects the obligation is s25(1) that:

> An opinion by an expert... is admissible if the fact finder is likely to obtain **substantial help** from the opinion...."

[112] This Court, as the fact finder, must reach conclusions based on a multi-faceted interplay of fact (existing and predictive), analysis and projections, law, and often elements of integration and judgement. It is a complex task integrating a series of disciplines. We cannot see how an expert in a single discipline can reach a conclusion on the ultimate issue where the outcome requires such integration.

[113] The Court has, on a number of occasions, expressed concern at planning witnesses giving conclusions as to the ultimate outcome, particularly when multiple expert witnesses are called. The Court has generally focussed on the expert reasoning and application of the law and facts to the situation. We have concluded that an expert opinion before this Court must be predicated upon:

(a) the law and facts as they apply to the situation;

(b) the other assumptions that the witness must express in their opinion;

(c) how the law, facts and assumptions lead to the opinion. This might be called the Coherence & Reasoning process.

[7] [2015] UK PC 9 at paragraph [26]

[114] In this regard there are significant issues with Mr Foster's evidence which means, for current purposes, we must give it no weight. These include:

(a) The ARPS identified Mt Albert as a Regionally Significant Feature, and at Policy 6.4.19.3 confirms the value applicable to these features:

(b) The view shaft provisions in the ARPS do not have their genesis or any substantive connection with the outstanding natural landscapes identified in that policy statement. Moreover, it is quite clear in terms of the District Plan that there is no reliance on or connection with outstanding natural landscapes for the significant view shafts inserted into the plan;

(c) The reference to such provisions in support of the planning conclusions is, at best, incorrect. When questioned around this issue, Mr Foster's view was that you couldn't have an ONF unless it was within an ONL. There was no source for this pronouncement, and it is quite clear from reference to the ARPS and to the Isthmus Plan that that is not the approach adopted in either of those documents. Accordingly, Mr Foster's opinion on this issue is clearly wrong as a matter of law and fact.

(d) Mr Foster gave evidence that the question of the height sensitive area and the permitted building height applicable to Tram Lease was, in the end, a judgement call balancing a range of competing factors. We are unable to see any basis upon which a value judgement, entrusted to the regional authority and local authority in respect of the various plans, and this Court on appeal, can be the subject of substitution by opinion.

(e) The suggestion by Mr Foster that he does not need to apply the ARPS or the Isthmus Plan is simply wrong in law, and shows a basic misunderstanding not only of the legal position in respect of planning evidence, but the role of a planner before the Court.

(f) The lack of overall reasoning in Mr Foster's opinions was clear through the cross-examination by Mr Allan. In fact, Mr Allan had to endure a number of entirely unprofessional retorts from Mr Foster, including

a. when advised by counsel that his answer was not on point, being told to let him finish his answer and then continuing to respond entirely off point;

b. at one stage telling Mr Allan that he regretted having to give him a lesson in Planning 101.

[115] To Mr Allan's credit, he did not correct the witness, although the witness was clearly acting well outside the scope of appropriate conduct in the Environment Court.

[116] Given that expert evidence before this Court is tested by the Court as to its coherence, reasoning and application of the applicable law and facts, Mr Foster's evidence cannot pass any of these thresholds. We disregard it entirely. Further, we were concerned as to whether it complied in any substantial degree with the expert Code of Conduct.

[117] The Court is unanimous that the standard of evidence in this case is well below that expected of an expert witness, and is unlikely to be tolerated in the future. We found Mr Foster's evidence unhelpful, obfuscatory, and without underpinning rational extension from existing Plans, facts or law. Of those statements made by Mr Foster, perhaps the most telling was his response to Mr Allan late in cross-examination whereby he stated (at page 344 of the Transcript) in answer to a question about the massing and height of the buildings:

> I don't believe for one minute that we would ever get consent for buildings of that sort of consideration on those sites because you have to take account of the regional objectives and policies that you have drawn my attention to and provisions that are contained in a district plan. It's a question of balance and weighing up whether a particular form of development can still maintain a degree of adherence to those principles. That's accepted planning practice.

Mr Schelleken's evidence

[118] Mr Schelleken gave land value evidence which was predicated on an assumption of greater intensification of Mt Albert Mixed Use and Business 2 areas based upon the Auckland Plan strategic direction, not any RMA document. His actual analysis appeared to rely on a 15m height limit being contemplated in the context of the PUP for all of the land.

[119] Unsurprisingly, his evidence was that the land had a greater value and greater development potential the higher the building could go. Whilst he acknowledged that he had taken a generalisation from the 17A piece of land and