

Landscape Architects and the Land & Environment Court

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When I was asked recently to represent the NSW Group of AILA on the Users Group of the NSW Land and Environment Court, I immediately thought, well, what views are there to represent?

While I have had some experience in appearing as an Expert Witness before the Court (once or twice a year over about 10 years), some of these appearances were related to heritage aspects of landscape rather than to design issues. In a few instances, the matter involved natural heritage, rather than cultural (or human-wrought) heritage.

Although I have politely suggested to the NSW Branch that the topic of landscape architects' experiences and concerns vis-à-vis the Land and Environment Court might be one for discussion at a workshop or seminar, there was no response. Accordingly, I am writing this piece to draw attention to the issue, and to try to tease out some ideas, experiences, and recommendations which I might draw upon when attending quarterly meetings of the Court Users Group.

Being an "Expert Witness"

The most likely role in the Land and Environment Court which a landscape architect may be called upon to play is that of expert witness. For some, the task of being an expert witness can be a little daunting, particularly if you are asked to join a developer's team which expects you to promote and defend a proposed project in which your own contribution may not have been adopted as hoped.

The usual scenario is that the developer's proposal, submitted through a Development Application, would have been refused by the consent authority (usually a local council), and the developer has decided to lodge an appeal against that refusal in the Land and Environment Court.

First, you will be approached, usually by the appellant's solicitor, to ascertain if you generally support the project and would be prepared to explain and defend those aspects of it within your field of expertise. If you agree, you will then be asked to attend a meeting of all the appellant's expert consultants/witnesses, in order to discuss all relevant aspects of the appeal. This can take hours.

Next, you will probably be asked to prepare a Statement of Evidence, which is to be written in accordance with certain rules and guidelines, e.g. those set out in the NSW Consolidated Regulations for Courts. These state that an expert witness "has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise". An expert witness' paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness). Indeed, an expert witness is not to be an advocate for a party. (This may require some firmness on the part of the expert, in the face of expectations by the proponent.)

In some cases, the Court may select its own expert on a particular topic, if both parties agree upon that person's suitability and expertise.¹ In that event, your services may not be further required, or you may need to meet with that Court expert once your Statement of Evidence has been prepared and submitted. This happened to this author two years ago.

The Statement of Evidence should specifically address the Statement of Issues for determination, which have been identified in the preliminary discussions between the two parties, and listed by the respondent to the appeal (usually the consent authority (who has not consented!). This provides a clear focus for the statements, and saves the Court's time and everyone's costs.

In NSW, Schedule 7 to the Uniform Civil Procedures Rules of 2005 provides useful guidance for witnesses in the form of a Code of Conduct:

- (1) An expert's report must (in the body of the report or in an annexure to it) include the following:
 - (a) the expert's qualifications as an expert on the issue which is the subject of the report,
 - (b) the facts, and assumptions of fact, on which the opinions in the report are based
 - (c) the expert's reasons for each opinion expressed,
 - (d) if applicable, that a particular issue falls outside the expert's field of expertise,
 - (e) any literature or other materials utilised in support of the opinions,
 - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
 - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.

Once a draft Statement of Evidence has been prepared, you may wish to pass it to the solicitor handling the case for comment. Usually, the latter will not provide advice on the substance, but may comment on presentational or legal aspects of the draft. Once you've

¹ A range of considerations regarding this is contained in the section on Experts' Evidence, Rule 31.23, Schedule 7 of the NSW Uniform Civil Procedures Rules of 2005

prepared the final version, this should be forwarded to the solicitor, who will then arrange for it to be filed with the Court. A copy will, of course, also be forwarded to the Appellant.

Several weeks are then likely to pass before you are called to confer with the expert witness from the other side, and possibly also with the Court-appointed expert as well, if one has been engaged. There are several rules to be followed in the conduct of that meeting, and in the joint report which is then prepared. These state that the experts must endeavour to reach agreement on any matters in issue, and if they cannot, they should prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement. They are to base any joint report on specified facts or assumptions of fact.

Importantly, an expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement. Usually, the legal representatives of each side are not to be present. The venue for the meeting can be either in the office of one or other of the experts (by mutual agreement) or in a neutral, third-party location. (Experts are usually pretty relaxed on this matter.)

Once the joint conference has been held, and the joint report has been submitted and circulated, you may be requested to attend another meeting of the legal team of the appellant or respondent, usually this time with the leading barrister. (He or she may, or may not, be on top of the brief, and this may be your one and only chance to speak up and try to influence him/her.)

After that you will need to wait until the Court commences hearing the Appeal. These days, it is usual for the Commissioner or Judge, or both, to commence the hearing on site, with the experts present. They can be asked to clarify their position on a matter within their expertise, in order to reduce any points of disagreement to a minimum. In my experience, they may speak only when invited, and are confined to clarifying matters of fact or explaining a point.

What happens after this can vary. In some instances, the legal representatives of the two parties to the dispute may decide that the experts have taken matters as far as they can be resolved, and that there is no point in questioning them further in Court. This has happened to this writer on the last two occasions; however, it may take a few hours of sitting in the courtroom before the legal teams reach this decision. (This can be something of a letdown, as one is usually geared up to speak.) Alternatively, you may be called upon to take the witness stand and respond to questions arising from your statement or joint report; however, this may not be as unnerving as you may fear.

One of the noticeable aspects regarding landscape issues is that legal representatives are usually not well acquainted with matters to do with landscape design, vegetation, visual quality (except views), and cultural landscapes. This applies even more to heritage issues, whether cultural or natural. Thus, lawyers tend to avoid questioning on these matters, as they do not wish to expose their limited knowledge or understanding of them.

For example, most lawyers have never heard of the Australian Natural Heritage Charter², and need to be shown a copy of it in Court to convince them that it actually exists. Looks of incomprehension or bafflement may become evident when you speak about its

2 First produced in 1996, with an accompanying Handbook on how to apply it, and substantially revised in 2002.

provisions, and the criteria to be used in determining whether a site with a distinctive landform or geology, or an impressive stand of endemic vegetation, or a remarkable riparian system or waterbody has natural significance. By contrast, lawyers do not hesitate to grapple with architectural or engineering matters, i.e. human-made, physical elements which can be measured, built, or changed.

The above information represents my own knowledge and experience vis-à-vis the NSW Land and Environment Court, but it is not extensive. Others may have had particular experiences which differ from mine, and which may have been frustrating or difficult.

So, it would be helpful to me to be told in what way members of our Institute may consider the procedures of the Court could be fine-tuned to assist landscape architects caught up in the system.

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