

BY DAVID COLLINS PLANNING CONSULTANT

TO RECOMMEND OR NOT TO RECOMMEND?

THE PLANNER'S ROLE IN
THE JUDICIAL PROCESS

.. and therefore I recommend consent is declined." Of course we should give a clear recommendation at the end of our planning evidence. Or should we?

Environment Judge Smith came out firmly against recommendations when he spoke to the Canterbury Branch NZPI recently. Although emphasising this is a personal not an official view, and tactfully saying he was not commenting on what should happen at council hearings, Judge Smith explained why he finds recommendations from witnesses (and he was talking specifically about planners) are inappropriate.

I think he is right. This has been a hobby horse of mine for years because to me a planner giving a recommendation at the end of her/his evidence shows a fundamental misunderstanding of the nature of planning and judicial/quasi judicial processes.

Strong stuff - I can sense the hackles rising - but let's look at this. My argument does not in any way diminish our role as planners.

Specialist witnesses like traffic engineers often conclude their evidence with a recommendation, but if you questioned them they would acknowledge that what they are really saying is that from a traffic (or noise or whatever) perspective the proposal is good (or bad). Their "recommendation" is just a summing up; it is not a view on what the decision should be because as any responsible specialist will concede, she/he does not have an expert contribution to make on other relevant considerations. That sort of "recommendation" is just saying "if traffic (or whatever) was the only consideration, consent should be granted (or declined)."

But planning is different. It is our role to make an overall assessment taking into account all the specialist contributions. Quite right, and former Judge Skelton in particular has acknowledged that role and its value. The planning input is different and if we are not able to provide a useful synthesis we are in danger of becoming dispensable in major cases where specialists in every relevant field are called and it

may seem there is nothing left for the planner to cover. (We are also in danger incidentally of being cast as "resource managers", whose role according to one view is limited to defining "environmental bottom lines" and then just providing technical assessment of whether something meets or doesn't meet those standards - a different profession in my view.)

Now here's the crux of the argument. When you make that overall assessment, bringing in all those considerations and ramifications that no one else has thought of, what do you find? You usually find there are factors favouring consent and other factors weighing against consent. Commonly it is a question of concrete, immediate and substantial benefits for an applicant, versus less certain, possibly delayed adverse effects on the wider community or on the natural environment. There are trade-offs, winners and losers.

Section 5 of the Act is a valiant attempt to provide a seemingly objective assessment criterion, but as the Courts have acknowledged (after a bit of a false start with Campbell v Southland District) in real life it is not possible to sustainably manage every resource on every site, even if we went back to living in caves.

Planning/resource management requires complex decisions on priorities, and ultimately these involve value judgments. This is why sections of the Act such as sections 6, 7, 8, 104, and 171 use language such as "have regard to" and "have particular regard to". They are drawing attention to things that have to be weighed in the balance. They are not listing objective standards that automatically trigger consent or refusal of consent.

Decision-makers have a discretion about how to weigh all these factors. Of course that discretion is constrained, sometimes severely constrained, by the policy guidance given in the Act and relevant plans and policy statements. An important part of the planner's role is to systematically relate the effects of an application (or a policy initiative such as a plan change) to these guidelines, applying professional judgments on the implications and likely

consequences of what is proposed.

The question then is whether it is appropriate for a planner, having pointed out all these considerations, to then give a recommendation. She/he will probably have come to a view on the proposal, perhaps a strong view. But is that view a matter of professional opinion? How can it be if it involves value judgments and weighing of priorities?

I happen to be enthusiastic about preserving built heritage; other planners are not. Should I push personal priorities like this at every opportunity under the guise of a "planning" recommendation?

Does it matter if we complete our evidence with a recommendation? I think it does, for three reasons. Firstly, it diverts our focus from our real task of identifying and analysing relevant considerations. It is not uncommon for evidence, especially from consultants, to work backwards from a recommendation and just provide a commentary on points supporting that recommendation. This can come close to being


just a statement of submissions, especially when it includes references to cases to support the stance.

Secondly, as Judge Smith pointed out, recommendations force the decision-makers to appear to accept or reject our evidence, when, as he noted, the evidence of a planner who gave a recommendation that was not followed may in fact have provided the most useful contribution.

Thirdly, and perhaps most importantly, giving recommendations at the end of our evidence sends the wrong message to councillors. It implies that there is a correct technical/professional answer to complex situations involving value judgments. It undermines their role as decision-makers, putting them in a position of being able to rubber stamp and hide behind (to mix my metaphors) staff recommendations rather than really thinking about the decisions they have to make.

I accept that councils and clients are accustomed to seeing recommendations at the end of our evidence. We should gradually wean

them off that expectation. Council planners could start by focusing more on identifying the trade-offs instead of presumptuously suggesting how discretion should be exercised. For example, I think it is appropriate to include statements like: "a key factor in this case is the effect of x on y, which in the other previous consents I have discussed proved greater than expected, balanced against the policies on x in the Plan I have highlighted". Let them do the weighing up.

Finally, I know there is reluctance on the part of some council planners to set their hearing panels adrift without recommendations. Have faith! They are the right people to make the decisions and they were elected to do it. All they need is better training on the legal parameters of RMA decision-making and high-quality evidence clearly identifying what they need to consider. 

David Collins is a planning consultant specialising in commissioner work. He has had 12 years experience as a councillor.