

RTPI Cymru – Wales Planning Conference 2016

Seminar 4: A Cross Examination Survival Pack by Francis Taylor Building

Overview

The seminar explored giving evidence at planning inquiries. The attendees were separated into groups and asked to pick out the faults in a proof of evidence for an appeal. After a discussion of the faults in the proof of evidence, *Francis Taylor Building* set out several tips on giving evidence at planning inquiries.

Faults in a Proof of Evidence

An example of a Proof of Evidence for an Appeal was given to all attendees to analyse. In the example, Bailey Homes proposed to develop a site at Hafan for 35 affordable dwellings with the assistance of grant funding. Bailey Homes purchased the site with the benefit of planning permission granted in 2011 for 27 3 storey dwellings and 8 flats in a four storey block. Their architects discharged all of the pre-commencement conditions and drew up construction drawings. During that process it was realised that in order to meet the requirements of the flood risk condition, Building Regs and the Council's space standards, the first floor level and the roof need to be raised. These changes led to the dwellings being 1.44m higher than approved and the flats 1.2m higher. However, apart from the height of the buildings, there is no material difference between the as approved and as-built development. The architects did not consider the differences materials, however, the Council disagreed and a retrospective applications was made to regularise the development. Three different officers recommended approval on three separate occasions, but Members of the Planning Committee disagreed and ultimately refused the application. They resolved to take enforcement action requiring the demolition of the entirety of the development and also required that all work on site cease. Bailey Homes appealed both the refusal of planning permission and the enforcement notice. The substantially complete dwellings have stood empty for over a year at a cost to Bailey Homes of £1M. Alterations to the buildings in order to comply with the approved plans and all other requirements would require demolition of the as-built dwellings down to first floor level. There were several faults within the Proof of Evidence, including:

- There was no basis of the evidence – should start with who you are and who you are presenting;
- A critical part of the assessment was not undertaken regarding the shortage of housing and affordable housing;
- The housing requirement figures were missing from the Policy section;
- It was not a balanced view of the case;
- You can't just say '*there is a need for affordable housing*' – What is the need?
- The site is actually an allocated site in the Plan, however, this fact is not mentioned in the Proof;
- The Officer has picked out Policies that assist his case and ignored the others – You should go through all key Policy;
- The Officer goes into great detail about variation to the scheme in regards to the windows, however, it is clear that the Officer has misunderstood the scheme, and the windows don't actually differ from the plans; and
- The vast majority of the scheme is acceptable, it is only a few plots that there seem to be issues with, therefore the Officer could have issued a split decision rather than refusing it.

Tips for giving evidence at Planning Inquiries

1. Taking in your surroundings is very important to ensure that your voice is loud and clear and heard by everyone, remember in circular rooms with tall ceilings it can be difficult to project your voice.
2. Presence is an important aspect; the right amount of assurance (in contrast to brash over confidence) will enhance the prospects of both you and your evidence being respected.
3. Delivery is important; a measured presentation will ensure that you are heard, that those who need to have time to take a note of your evidence and that you allow yourself time to think and to give your best evidence.
4. You need to know when to stop; short and punchy will be remembered; directionless waffle will not.

Research

1. Preparation is key. Proper preparation requires reading of all relevant background material but with an eye to how it can best be deployed to your advantage.
2. As an expert you have an obligation to the Inquiry to present objective evidence and not simply to 'cherry pick'. You should not just look for things that help you, look for and note those which do not. This will help you to think what you will say in response when asked about them and reduce the risk of being taken by surprise.

The Proof

1. Approach your preparation on an issues basis; set out your definition of each of the issues in dispute and look for the pros and cons. These issues will inform the core of your proof of evidence and, if correctly identified, will ensure a focussed, well reasoned and digestible submission.
2. Don't be tempted to start drafting the proof before identifying the key issues; this is lazy proof writing and will result in unnecessary regurgitation of fact and policy with the analysis appearing as an afterthought.
3. If there are 'difficult' issues, such as good points which can be made contrary to your case, then think about whether attack is the best form of defence. It is usually better to acknowledge the weakness and to provide reasons why you think it should not be determinative rather than to make no mention of it.
4. Don't overstate your case. Very few cases are unanswerable and very few cases result in the award of costs against the opposing party. Leave the advocacy to the advocate. Your job is to win the argument on the merits.

Giving your evidence

1. In giving your evidence to a planning inquiry on the planning merits of an application or appeal, you are acting as an expert witness. You are bound by the rules of professional conduct relating to your profession and you owe a duty to the inquiry not to mislead it. Most importantly, you are there to give your professional opinion on the issues.
2. The evidence you give must be your own opinion. You can still set out the views of others, but when asked for your own opinion, you must give it, even if to do so is contrary to the interests of your client.
3. Evidence in chief serves a number of functions. Firstly, it settles the witness and introduces them to the inquiry. Secondly, it provides the opportunity for a crisp summation of the witness' evidence. Thirdly, it allows for rebuttal of the key points raised by the opposition

evidence. The thoughtful witness will have identified from the opposition evidence, the key issues upon which some rebuttal comment or pre-emptive strike is required. These should be given a logical structure which can then be converted into an aide memoir or speaking note for the inquiry. If appropriately drafted, this could be submitted as a document to the inquiry to save note taking.

Cross Examination

1. Against a well prepared expert witness, speaking to a structural well-reasoned proof, an advocate starts from a disadvantage. However, a skilful advocate will be able to overcome these apparent obstacles and leave the inspector questioning the weight to be accorded to the witness' evidence. All too often, this is because the witness chooses to self destruct.
2. Always answer the question you have been asked. If a yes or no answer is required give it but allow yourself the opportunity to add a rider e.g. "Yes BUT.." / "No BUT...".
3. Don't trust the opposing advocate. If you are invited to agree a proposition, make sure that you accept the source and check it. Context is nearly always important and few propositions can be baldly stated as absolutes.
4. If you don't know the answer to a question, say so. This is likely to be less damaging than guessing or pretending to know.
5. Do not be tempted to stray beyond your discipline. You are there to give your opinion on matters within your expertise.
6. If you realize that you have made a mistake in your evidence, admit it. Then consider whether it makes a difference to your opinion and, if not, say so.
7. Stay measured. Think about the question, think about the answer and respond. Don't let the advocate set the pace and rush you.
8. Don't get heated or flustered. The inspector is interested in hearing your evidence not any snide or offensive comments from the opposing advocate.
9. Humour can have its place but be very sparing in its use. It is best left to the Inspector to make the jokes in which case you should always laugh.

Re-examination

1. The proper function of re-examination is to clarify or amplify answers given by the witness in cross examination. Whilst it can be used to elicit an entirely different answer than the one given in cross examination, the circumstances where that can be done without wholly undermining the evidence of the witness are few in number e.g. where an answer was elicited on a false premise.
2. This is the most difficult stage of your evidence giving but don't get flustered and don't start guessing. Your advocate will gauge how well you are coping with the questions and respond accordingly.

Conclusion

Remember, all of the best witnesses are prepared, honest, thoughtful and helpful; even the most inexperienced can possess these attributes.

Written by Hannah Barry – Assistant Planner at LRM Planning Ltd.

Tips produced by Simon Bird, QC at Francis Taylor Building.