



## **Providing Expert Witness Evidence at Planning Appeals – Thoughts of a Transport Planner**

I was recently invited to give a lecture to University students on the subject of acting as an expert witness at planning inquiries. In preparation for the lecture, I looked back at the past appeals in which I had given evidence and the different experiences I gained from each of them. It allowed me to think about the whole Appeal process and the knowledge I have gathered over the years from acting as an expert witness.

Many professionals working in the planning sector will at some point in their career attend a public inquiry or hearing to provide expert evidence. It can be a daunting prospect, particularly the first time that a professional has to undertake this task. This paper provides some thoughts on the process based on my own experience of acting as an expert witness on transport planning matters at over 20 public inquiries and hearings. I hope that it may be of some interest and benefit to other professionals, particularly those that have not acted as an expert witness before, but may do in the near future.

### **The Beginning of the Appeal Process**

The beginning of the appeal process might be thought to start when an applicant submits an appeal to the Secretary of State in accordance with Section 78(1) of the Town and Country Planning Act 1990. However, the professional should consider that the Appeal process really begins the moment that they provide their professional opinion on a planning application. Every report, piece of correspondence, even a telephone conversation could potentially be discussed and scrutinised at some future public inquiry or hearing. Therefore, the professional should always bear this in mind when providing their professional advice on any planning application, even those applications that they do not think are likely to end up at an Appeal. The Secretary of State has power to take over the determination of a planning application and may 'call in' an application that was expected to be approved locally. The point is, the professional cannot know which application will end up at an Appeal at the start of the application process and should treat every application as if it will end up before a Planning Inspector.

When an appeal is made against a refusal of planning permission or a non-determination of the application, there is often (though this should not be relied upon) several months between an Appeal being lodged and the inquiry or hearing taking place. I have always used this time to try and resolve any outstanding highways/transportation issues if possible. It is not unusual for an application to be given a highways reason for refusal due to 'insufficient information' being provided to the highway authority. This may be because an application has been refused under delegated powers by the planning officer before outstanding issues have been resolved. Alternatively, the applicant may have appealed against non-determination of the application before all of the highway issues have been agreed with the local highway authority. The



transport planner should continue to liaise with the highway authority to try and resolve as many of the outstanding issues as possible. No matter how confident a professional might be about their prospects at an appeal, why take a risk if that matter can be resolved through further information and discussions? It will not always be possible to reach an agreement with the highway authority, but the professional should explore all of the options available in order to try and at least reduce the areas of disagreement. If, for example, a decision notice contained three highways reasons for refusal, the Appellant must demonstrate that the Local Planning Authority was wrong on all three points for the Appeal to be allowed. In contrast, the Local Planning Authority only needs to be right once. Therefore, it is in the Appellants interest to minimise the number of reasons for refusal if possible and their consultant should explore all legitimate options to achieve this.

In some cases, the expert witness may not have visited the Site prior to the applicant making the Appeal. This may be because a colleague undertook this aspect of the application work or because the witness has taken over from another consultant. However, it is very important that the witness is very familiar with the Site and the surrounding highway network early in the Appeal process. Analysing traffic data provides important information, but the witness should observe the operation of the local highway network for themselves. Local residents usually have questions for highways witnesses and if, in answering these questions, it becomes apparent that the witness is not familiar with the local highway network, this will be to the detriment of the witness both in the eyes of local residents and the Inspector.

### **Statements of Common Ground**

An important aspect in the lead up to a planning inquiry is the agreement of a Statement of Common Ground (SoCG) between the Appellant and the LPA. In some circumstances, there may be additional SoCG between the Appellant and other interested parties. In the case of highways, it is often common to prepare a separate SoCG between the Appellant and the local Highway Authority. A SoCG may also be needed between the Appellant and Highways England (HE) and representatives of a third party or interest group. The object of the SoCG is to minimise the areas of dispute between the parties and to avoid debating issues that could easily have been resolved before the inquiry is opened. Inspectors are rarely pleased if time is wasted on discussing matters such as walk distances and other issues that should be matters of fact and that could and should have been agreed beforehand.

I would always recommend preparing a draft SoCG and issuing this to the Highway Authority at the earliest opportunity. The local Highway Authority may not be as responsive as one might wish, particularly if there isn't a highways reason for refusal. Submitting SoCG at the last minute or even during the Hearing or Inquiry is not likely to impress and Inspector, yet it is surprising how often this happens.



In situations where there is a highways reason for refusal, agreeing the SoCG early will provide more time to concentrate on the areas that will be contested in the evidence. Non-determination appeals can be particularly problematic as the professional may have had limited comments back from the Highway Authority to the information submitted in support of the application. This can result in the need for an evidence that covers a very wide range of highways matters.

I have always found it is helpful to try and have a good relationship with the Highway Officer (or fellow consultant) that is dealing with the appeal. Even if you disagree with their professional opinion on matters relating to the Appeal, having a good working relationship is likely to help you identify the areas where you can agree and this then allows you to focus on only the areas of disagreement at the inquiry.

In the build up to an Appeal, it would be wise for the consultant to keep an eye on what could happen at the inquiry. Even when there is no highways reason for refusal and a SoCG has been agreed with the local highway authority, highways can still end up being discussed in detail at the inquiry. I have known several occasions when a third-party group has emerged and been given rule six status at a late stage in the appeal process.

### **Barrister Conferences**

Prior to preparing an evidence, it is likely that a witness will be invited to a conference or 'con' with the Barrister acting on behalf of the appellant or LPA. In my experience it is very important that the witness prepares properly for the conference and has a good understanding of the case, particularly the strengths and weaknesses of their own particular discipline. If the expert witness has not worked with the Barrister before, he or she is likely to be assessing their competence as a potential witness. If they are concerned that the witness may not be able to withstand rigorous examination at the Inquiry, it is possible that that witness is replaced by another consultant.

Even if a witness is considered competent in their profession, a Barrister may still consider them unsuitable to present evidence at a public inquiry. If a professional suspects that they may be required to give expert evidence at a public inquiry at some point in their career then I would recommend that they start preparing for that eventuality sooner rather than later. Take every opportunity to improve your public speaking skills, seek an active role in meetings, volunteer to make presentations at work, make speeches at social occasions. If you are going to give evidence at a public inquiry then you need to be comfortable speaking in front of an audience. If you are able to master that before your first appearance at a public inquiry then you will be half way there already. For some people it comes more naturally than to others, but everyone can improve their public speaking skills. I am of the view that it is mainly down to confidence and this is something that can be gained through practice and experience.

## Preparing Evidences and Rebuttals

Before starting to write an evidence, the first thing that is needed is to work out what are the key highway/transportation issues that need to be addressed in the evidence. This usually involves carefully reviewing the reasons for refusal, the LPA statement of case (if available at the time), the relevant local and national planning policies and the highway officer's comments.

When the key issues are identified, consider the structure of the evidence. It helps the reader if the evidence follows in a logical order. There is usually some overlap in Chapter topics and if you may want to refer to another part of the evidence to underline a point you are making. It is usually easier and more effective if you have already covered that topic in a previous chapter, rather than referring to a Chapter that the reader hasn't yet come to. By the time they do, they will probably have forgotten about the point you were making. I have reordered my Chapters, whilst in the middle of writing an evidence, on more than one occasion to try and improve the flow of my arguments.

It is obviously important that there are no gaps in your evidence. This is something that your Barrister will be checking and will undoubtedly bring this to your attention if they feel any areas haven't been adequately addressed. Nevertheless, this shouldn't be relied upon and the expert should ensure that their evidence covers all of the relevant areas.

I would recommend using your colleagues as a sounding board for the points and arguments that you propose to include in your evidence. People will look at things with a different angle that perhaps you will and it is always better to have another person's viewpoint. It is also easy to be very immersed in your evidence and there is a danger that you miss the bigger picture on an issue. A colleague that is slightly more detached from the Appeal may see something that you have missed. I have been lucky in my career that I have had colleagues that are very experienced in providing evidence at public inquiries and that has helped me enormously. It is of course your evidence and must be your opinion, but somethings are not black and white and you may be hesitant about a certain point. In these circumstances it is not unwise to seek colleagues view or to discuss the point in question. Think of it as a dress rehearsal for the inquiry, if you cannot justify a point you've made in your evidence to a colleague, then perhaps you might want to reconsider it.

It is easy to forget when preparing an evidence that the reader isn't necessarily familiar with some of the more technical aspects within the document. Whilst an inspector is likely to be reasonably familiar with highway issues, there may be specific technical points that they are not familiar with. It is important that these points are properly explained. You may have made a brilliant point within your evidence, but if nobody else understands it then you have squandered

an opportunity. Again, perhaps ask a colleague to read your evidence and ask them about the points you have made to assess whether they are clear to the reader.

Objectivity is something that you should always include in your evidence, this means acknowledging the weaknesses in your case as well as the strengths. I think it is very easy to lose objectivity when preparing an evidence, because it is a much more personal report than those normally prepared by professionals. It is the expert's own professional opinion that is set out in the evidence and nobody wants to be wrong, but we should try and look at the issues from our opponent's point of view. Ultimately, we do ourselves a disservice if we fail to be objective as this is likely to be obvious to the reader and may affect the credibility given to a witness.

I would recommend that all third-party objections are reviewed in detail prior to the preparation of an evidence. Highways issues are usually a strong feature of local objections to a scheme. Often the same or similar points are made by several different objectors. I find it useful to tabulate these objections, providing a response to each of the issues raised. This demonstrates to the inspector that they have been reviewed and considered and it should also be of assistance when answering third party questions at the inquiry.

A rebuttal should be short and concise and I say that as a complete hypocrite, because I have written a few long ones.

### **The Hearing or Inquiry**

Public Inquiries and Hearings can often go in directions that the main parties do not envisage. Issues that might be thought of as agreed between the Appellant and the LPA can often become major issues of discussion at the Appeal.

Harold MacMillan allegedly responded to a journalist's question about what is most likely to blow a government off course with the famous quote of:

*“Events, dear boy, events.”*

Whether MacMillan actually said this or not is disputed, but the quote can certainly be applied to Appeals. The likelihood of the LPA or Appellant's case being blown off course can be reduced by thinking of what might happen and planning for these eventualities. I have often attended Inquiries with variations of scheme plans and sometimes even additional alternative modelling of scenarios, just in case something happens and I need to provide alternative options. Though you may not want to, think about what might go wrong and plan accordingly.

Thorough preparedness will give the expert the best chance of reacting well to events. Consider what might concern the Inspector. If third parties have raised a particular issue, could this be



something the Inspector wishes to focus on. If acting for the Appellant and perhaps the Highway Authority, do not assume just because there isn't a highways reasons for refusal, that the Inspector will automatically reach that conclusion without a thorough review of all the highways evidence.

It is not uncommon for local action groups to be given Rule 6 status at the last minute. Whilst there are strict deadlines for these applications, Inspectors are sometimes sympathetic to late applications involving local residents. The Inspectorate is keen that local voices are heard at Appeals and tend to be more lenient with them with regard to deadlines. These action groups frequently raise highway matters at hearings and inquiries. You may go into an Appeal thinking that you are merely the support act, only to find out you are about to get star billing. Make sure you are prepared in case this happens.

It is likely that you will have discussed at length with the Barrister the areas that need to be covered in Evidence in Chief. I usually have a note setting out the points that I want to make during evidence and give a copy to the Barrister. Even with notes it is possible to miss an important point and giving the Barrister a copy provides an additional check that an important point is not missed.

Cross-examination is of course the part of an inquiry that most witnesses least look forward to, but it is there for good reason and if you cannot change it embrace it. It is easy to think of cross-examination with a defensive mindset, just trying to get through it without making a mistake or saying something you might regret. However, it is another opportunity to demonstrate and justify to an Inspector how you have reached the opinion that you have. The opposing Barrister controls the questions, but the answers are determined by the witness. Of course, the questions must be answered properly and truthfully, but there is opportunity to reinforce and justify your answers with references to your evidence.

I have found that Barristers have a cross-examination styles that range from borderline hostility to a much gentler approach. Whatever their style, the witness should remain calm and respectful. Cross-examination is a fundamental part of establishing the robustness of a witness's evidence and Barrister is merely doing their job in scrutinising your evidence. Whilst some may do this with a greater level of humility than others, in all cases the witness should never take it personally.

I think as with most things in the Appeal process, thorough preparedness is key to cross-examination. A witness should think about the questions that they are likely to be asked and to consider the answers in advance. This isn't to try and come up some clever response to a difficult question, but to make sure the witness can articulate a response that properly addresses the question. The witness needs to assist the Inspector to make their decision and being able to answer a question with a well-considered and articulate response will help an Inspector. Cross-examination can be tough and it is better for all sides if the witness has given some serious



thought to the kind of questioning that can reasonably expect. Having an 'oven ready' answer when under pressure may help the witness to answer, particularly if it involves explaining a technical point.

It is important not to be rushed during Cross-examination. The witness should take their time and not be afraid to ask for the question to be repeated if needed. It is more important to be accurate rather than quick when responding to any questions during an Appeal.

### **Dealing with Third Parties**

An inspector will often ask local residents to speak on the first day of the inquiry, after the opening statements. I listen carefully and make notes of any of the highway comments that have been made. It is important that you try and address all of the local concerns. The Inspector will also be taking notes and will likely check that you have addressed the points raised.

On many occasions, when there hasn't been a highways reason for refusal, I have given evidence straight after the local residents have spoken so that they then have the opportunity to ask me questions afterwards. Hence, it is important to listen to the points made carefully. During this time. There may be an opportunity before questioning from third parties to look up information relating to their questions if this is not already to hand. Ensuring internet access is available will help you to do this if the need arises. Most venues provide free WIFI these days, but don't rely on it. Have a backup plan such as a device you can use to hotspot.

When speaking with local residents it is very important to treat them with courtesy, even if this is not always reciprocated. An inspector is unlikely to be impressed with a witness that appears arrogant and dismissive of local concerns. It is easy to forget that most people do not have expert knowledge of the planning system and are often genuinely concerned about the impact of the appeal development being considered. Try to answer their questions clearly and fully, even if they are perhaps not particularly relevant to the Appeal. The inspector will expect you to respond to any question within your field of expertise.

Expect the unexpected when dealing with local residents. Whilst a witness should be able to predict the areas of questioning that are likely to be covered during cross-examination, it can be more difficult to predict the questions from third parties. In my younger days I was quite a keen fencer and an experienced fencer will often admit that they don't like fencing beginners. The experienced fencer will of course almost always triumph over the beginner, but they may well get caught out and embarrassed a few times. An experienced fencer, though more skilful, accurate and measured in their attacks are also more predictable in their movements. Beginners are erratic and do unexpected things. This is how I like to think of third parties. Treat them with respect and don't underestimate them or you might end up being embarrassed.



Again, a thorough review of the local letters of objections is strongly recommended prior to preparing an evidence. This should allow the witness to understand the local concerns and predict at least some of the areas of questioning that might be expected from local objectors. There may be occasions when you simply don't know the answer to a question, but might be able to provide answer later after looking into the issue raised. Make sure that you do provide an answer, perhaps in a written note, that can be provided to the Inspector by your Barrister.

After leaving the Inquiry or Hearing, it is natural to think about your evidence and cross-examination and run back through the exchanges. The witness may wish they had answered a particular question in cross-examination better or that they had articulated a point better in their evidence. I doubt many witnesses come away from an Inquiry feeling 100% happy with their evidence, it is a tough arena for even the most experienced witnesses.

### Conclusions

Acting as an expert witness at Hearings and Public Inquiries has, at times, been daunting, enjoyable, humorous, challenging, interesting, sometimes rather less interesting and above all an honour and a privilege. I have been given the opportunity to work with some brilliant Barristers and fellow professionals, and I have also observed some on the other side of the room that are similarly excellent. I have on several occasions observed local residents acting with a degree of hostility towards the Appellant's team at the beginning of a Public Inquiry and then seen this gradually dissipate as the Appeal progresses and a level of mutual respect is gained.

I have learned an immense amount professionally acting as an expert witness. I believe I am a better witness now than I was at the start, from the experiences I have taken away from each Appeal. I have been fortunate to work with a range of different Barristers and this has broadened my experience, with each having their own way of running a case.

I would not hesitate to recommend to fellow professionals that they should act as an expert witness if the opportunity presents itself. I appreciate that it may not be for everyone and you certainly need to be a fairly robust character to withstand the pressures that are undoubtedly put on an expert witness. Nevertheless, I think most professionals rise to the challenge and become better with experience.

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