

ZONING HEARING BOARD TESTIMONY TIPS, TRICKS AND WAR STORIES

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The Audience/Constiuencies

MUNICIPALITIES PLANNING CODE (MPC)

- Section 901. *Every municipality which has enacted or enacts a zoning ordinance pursuant to this Act or prior enabling laws, shall create a zoning hearing board.*

What motivates Zoning Hearing Board Members?

- Section 903. *The membership of the board shall, upon the determination of the governing body, consist of either three or five residents of the municipality appointed by resolution by the governing body.*

Why do members continue to want to serve on board?





WAR STORY



- Interference By Supervisors – Example Of Which Caused Zoning Board Solicitor To Resign

- Worse than Halloween scary!!



- Section 907(8). *The board....shall not communicate directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate....*
- 908(1). *Mediation Option. - - (A) Parties to proceedings authorized in this article and Article X-A may utilize mediation as an aid in completing such proceedings. In proceedings before the zoning hearing board, in no case shall the zoning hearing board initiate mediation or participate as a mediating party. Mediation shall supplement, not replace, those procedures in this article and Article X-A once they have been formally initiated. Nothing in this section shall be interpreted as expanding or limiting municipal police powers or as modifying any principles of substantive law.(B) Participation in mediation shall be wholly voluntary. The appropriateness of mediation shall be determined by the particulars of each case and the willingness of the parties to negotiate. Any municipality offering he mediation option shall assure that, in each case, the mediating parties, assisted by the mediator as appropriate, develop terms and conditions for:...*

RUMORS – Not in my Backyard (NIMBY)



Tip: contact audience in advance before notices are distributed



Informal Invitation To Public Meeting

- Choreographed Nicely



- Audio Presentation



Informal Invitation to Public Meeting (Continued)

- Not to be overplayed
- Credible
- Disinterested third parties to participate-
 - Agricultural Zoning
 - War Story Hearing experience.
- Avoid “no” negatives, such as: “will not cause...”, “will not...” etc... which show defensiveness; presentation needs to be positive.

Informal Invitation to Public Meeting (Continued)

- How much time is to elapse before zoning hearing board application is submitted?

Tip: establish community benefit area- (i.e. Supermarket; i.e. offering a community area for clubs, scouts, lions usage and promotion of non-profit activities)

- Perception of use - how is the community's benefit/detriment perceived?



Invitation to Public Meeting (Continued)

- Even hearsay is allowed



Tip: presentation begins with zoning application.



- Clients desire for speed versus accuracy.
- It is best for all consultants to participate in application for accuracy and complete list.
- Alternative relief.
- Such other relief as may arise during the presentation – can cut off need to re-advertise for what may be viewed as expansion in the scope of presentation and request.
- Time/budget constraints but preparation often pays significant dividends.



War Story



Adult Book Store Case

RESTRICTED
ACCESS

shutterstock_158299916



WAR STORY



Agricultural Zoning Heidelberg Township/Perception of Land Value

Public Hearing

- Attorney for various municipalities that had previously enacted agricultural zoning
- Supervisors from both York and Lancaster County municipalities who were also participating in the agricultural business.

Disinterested Witness

- Benefits of disinterested witness- they are uncompensated and have no stake in the outcome
- Descriptions of prior employee who had a previously held enterprise and therefore has full knowledge of operation (including all of the warts, particularly in change in non-conforming use cases.)



Professional Testimony

Is it Necessary?



Professional Testimony

- Determine if circumstances can be described accurately without special knowledge.
- Even lay witnesses can express an opinion such as guessing the miles per hour a vehicle is traveling, however, they generally would not have knowledge of traffic counts without access to empirical data.
- An expert has specialized knowledge experience with or without possessing a particular degree
- Expert must claim to have higher knowledge or skill than a layman
- Knowledge of the expert may be as a result of occupational experience or practice.
- Expert should be personable and likeable so as not be perceived as a “hired” expert.



Professional Testimony: Examination and Cross Examination



- “You are being paid for your opinion aren’t you?”
- Proper answer :“I’m not paid for my opinion, I’m paid for my time as devoted to my examination and my appearance etc..., much like ‘you’ are likely being paid for your work...”
- To limit credibility of expert witness: “Would it be a true statement to say that you are compensated at least \$500 for your time and involvement? \$1000? \$5000 (etc...) “. Example: With Bob Cox’s Participation
- Often best way to preface opinion testimony is by asking whether or not the expert has an opinion followed by the basis of the opinion (ex. Handling the potential odors at transfer station and whether or not odor should extend beyond the boundaries).

Professional Testimony: Cross Examination

- Expert witness should not volunteer information which is not requested.
- Expert witness should not become angry, impatient, or agitated.
- If interrupted by audience members, the expert should not try to speak over the audience but instead should remain quiet or calm until the expert can speak in an uninterrupted fashion.
*The chairman of the zoning board or solicitor will usually restore order.



Professional Testimony: Cross Examination

- Attorney presenting case:
 - “Expert, you and I had discussed your opinion in nature of your testimony have we not”? Then discuss reasons for approaching this way.
 - “Mr. Engineer or Mr. Planner, you expect to be compensated for your time and expenses?”
 - Hypothetical: Qualified expert can answer hypotheticals such as:
 - “Based on the testimony of witness A, B, C and exhibits so and so, assuming those testimonies, fact and exhibits to be true, do you have an opinion within a reasonable degree of professional certainty?”
 - “What is that opinion?”

Professional Testimony: Cross Examination

- One must know all one can about the expert, i.e backgrounds, qualifications, writings, attitudes, manner and appearance etc.. the expert retained by the applicant can be helpful that regard.
- It is necessary to learn all that can be learned about the subject by way of testimony and literature in order to properly cross examine and look for weak points.
- Applicant's expert to study and critique any report of opposing expert.
Ex: Is opinion offered in accordance with recognized authority/learning treatise?



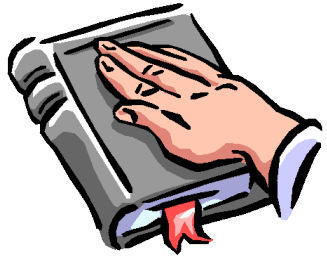


Expert Credibility

- Expert opinion can be limited in credibility by often not attacking the opinion but the facts upon which the opinion is based, (ex. assuming witness A's testimony is incorrect.)
- Generally, to use a textbook or an article the expert must agree that the author is an authority on the subject. Then literature can be read into the record/example.
- Experts who have built similar uses vs. others who have theoretical knowledge only and have not participated in the design of a building.

Tip: Often it is best for expert not to sit at council table as this limits the expert's credibility.





Qualifying a Witness

- Most qualified witness is not always most appropriate witness

****The most appropriate witness is the one that the zoning board and audience will listen to and accept****

Qualifying a Witness (Continued)



Robert Cox PEPLS Vignette

- *As our first witness we'd like to call Mr. Robert Cox.*

Robert Joseph Cox, having been duly sworn, was examined and testified as follows:

-
- *EXAMINATION AS TO QUALIFICATIONS BY MR. STOPP:*
- *Q: Bob, may I ask you to move your chair closer to the stenographer so that you can face the public and everybody can hear you clearly.*
- *I know you're not shy and you'll speak up so the folks in the back of the room can hear you. (cont'd)*

Qualifying a Witness (Continued)

Q. Your full name?

A. My full name is Robert Joseph Cox.

Q. Are you employed?

A. Yes.

Q. Where are you employed, Mr. Cox?

A. Barry Isett & Associates, a consulting engineering firm in Trexlertown, Pennsylvania.

Q. Your age?

A. You didn't have to ask that, 54.

Q. Your educational background?

A. I have a bachelor's of science and civil engineering technology from the University Pittsburg. And I've studied structural design at the University of New Hampshire on a masters' level. (cont'd)



Qualifying a Witness (Continued)

Q. Do you hold any licenses from the State of Pennsylvania in your profession?

A. I'm a licensed professional engineer in Pennsylvania. And I'm also a licensed land surveyor in the State of Pennsylvania.

Q. How long have you held a license in Pennsylvania as a professional engineer?

A. Since, I think, around 1994.

Q. How long have you actually been practicing either before or after your licensure in the engineering profession?

A. I've been in the engineering profession for 33 years. And I've been a professional engineer since 1982.

Q. Do you have any professional affiliations?

A. I'm a past member and past president of the East Penn chapter of the American Society of Highway Engineers. I'm a member for the Pennsylvania Society of Professional Engineers.



Qualifying a Witness (Continued)



Q. Do you do any lecturing or teaching in your engineering profession?

A. I've taught for 11 years in the civil Engineering Department at Lehigh University in a course in engineering economics and also a course in project management and construction management.

Q. In the course of your engineering career, how many – would you say – subdivisions or land developments have you worked on, either in part or in whole?

A. 400, maybe.

Q. Are you the engineer of record and is Barry Isett the engineer of records at the firm for the applications here this evening?

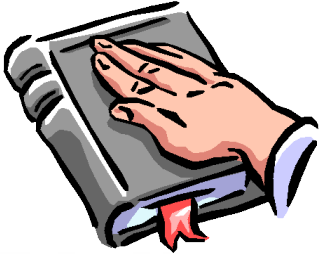
A. Yes.

Q. Do you have anything to add, Mr. Cox, with respect to your professional qualifications?

A. I think you've covered that pretty well.

Mr. Stopp: Thank you. We would offer Mr. Cox, Members of the board, as an expert witness in the field of engineering with respect to these proceedings.

Qualifying a Witness (Continued)



- First announce the intention to qualify a witness as an expert.
 - Mr. Cox's curriculum vitae

The Expert Witness

- Expert witness to be familiar with the literature on the subject matter as expert witness may be cross examined on the literature.
- Language should be clear, clearly understood, and technical terms should be translated into terms lay persons can understand and relate to.
- Expert should address the board and speak as if the board members are friends having a discussion in the expert's own home.
- Importance of graphics/charts/visual presentations
- When expressing an opinion, the expert should respond with terms such as: "in my opinion, it is my belief", words such as "probably" or "possibly" should not be employed



Questioning Qualification of Expert: Cross Examination

- Explain difficulties with no discovery (as in no discovery or limited discovery as opposed to court presentations, interrogatories, depositions).
- Get to know the background of opposing party expert.
- Go through mock examination of whether or not expert had experience in designing a particular use.
ex. Transfer station questioning: “Would it be a correct statement that in your professional career you’ve not participated in a design of 20 or more transfer stations (go down a sliding scale to continue) then rest.

*Tip: The expert should usually end by a statement such as “This concludes the observations as I recall”. This type of statement leaves it open for the expert to have his/her “memory refreshed” as opposed to a statement such as “that’s all the observations I have” which does not leave it open. . *



Zoning Board

- Sometimes it is necessary to challenge what appears to be hostile board members or board members sympathetic to the objectors. Board members should be reminded of their duty to apply the ordinance and not to follow the crowd otherwise no zoning board would be necessary.



Conclusion

“We are all experts...”

- Benjamin Franklin



