

Mediation in Planning

A Short Guide



Foreword



Bob Neill MP, Minister for
Planning, Department of
Communities and Local
Government

I am pleased to commend this “Short Guide to Mediation in Planning” - produced by the National Planning Forum - which I hope will encourage greater use of mediation techniques to resolve differences and produce better outcomes from planning. This new approach chimes with the Government’s localism agenda. It seeks to involve communities, developers, local authorities and agencies in finding ways forward locally rather than having solutions imposed.



Cllr Michael Haines, Chair of
the National Planning Forum,
LGA Environment Board, and
Cabinet Member for Planning
Teignbridge Council

This Short Guide to Mediation in Planning has been written in response to one of the recommendations in the report on mediation in planning commissioned by the National Planning Forum. One of the Report’s recommendations was preparation of a guide to mediation in planning.

I am sure that you will find the booklet helpful and that it will inspire greater use of mediation techniques.



Mediation is “a process involving an independent third party, whose role is to help parties to identify the real issues between them, their concerns and needs, the options for resolving matters and, where possible, a solution which is acceptable to all concerned”.

(Guide to Mediation in Planning, The Scottish Executive, March 2009)

Put simply, mediation is a cost effective way of resolving disputes and building consensus with the help of an independent third party. It is not a substitute for good planning, but it can build trust and confidence in the planning system:

The essential elements of mediation

- i. Mediation is a voluntary process, taking place only where the participants agree to its use.
- ii. Mediation is a flexible process, with no set rules of procedure. Whilst mediations usually follow a similar pattern, the procedure can be adapted to meet specific needs of participants and circumstances.
- iii. Mediation is normally conducted as a confidential process, although the outcome will become public if the participants agree.
- iv. The mediator is independent of the participants and neutral as to the outcome of the dispute, his/her role being to assist the participants reach agreement or reduce differences

Key points about mediation in planning

- i. Mediation does not remove the need to follow the statutory code. Nor is it intended to avoid transparent lawful decision-making or to negate the role of committees in determining planning applications.
- ii. It can be designed to ensure that the important representational and decision-making roles of elected councillors are fully respected.
- iii. It is compatible with the democratic planning process because it does not bind the decision-maker unless they are a party to the mediation. It can be designed to involve third party interests such as neighbours and other interested parties.
- iv. It can be undertaken so as to include confidential exploration of individuals' positions without infringing public law/third party rights.
- v. It provides an opportunity for participants to discuss issues and resolve problems in a structured and non-confrontational atmosphere.
- vi. It can be cost-effective - the additional cost, primarily the mediator's time, is paid for as agreed between the participants, either by one of the participants, or split.
- vii. It has the potential to save significant time and money, especially where appeals are avoided.

- viii. It can be used in a wide range of matters both simple and complex eg. neighbourhood planning, development management, negotiations on financial obligations, and enforcement.
- ix. It is a flexible tool, and can be put to a variety of uses including assisting dialogue between participants and helping build understanding and consensus; and
- x. If a satisfactory outcome is achieved, this can be expressed as a formal agreement or less formally, depending on the needs of the situation.

Preparation for mediation

Whilst there is no fixed procedure the following provides guidance as to what happens before a mediation:

- i. The participants will discuss and agree to use mediation.
- ii. They should satisfy themselves that each has the necessary authority to reach an agreement.
- iii. The participants will jointly commission an independent mediator, being satisfied that the chosen mediator is appropriately qualified and has the relevant experience.
- iv. Although highly flexible, the “ground rules” by which the process is likely to be conducted will be set out in the document confirming the appointment of the mediator e.g. that it is confidential and non-binding until the participants agree.
- v. In advance of the mediation the participants will send the mediator agreed relevant background documents which may include position statements in which each participant sets out what they want to achieve through the mediation.
- vi. The mediator will sometimes arrange an initial confidential exploratory meeting or discussion by telephone to generally assist the parties to prepare for the mediation including checking the need for further professional planning support and the practicalities of the process.
- vii. A venue should be chosen that is suitable for the nature of the mediation, in a neutral location, with space for joint meetings and for each participant to have a separate room for private discussions with the mediator, as well as facilities for basic refreshments.

What happens in a mediation

Whilst there is no fixed procedure the following provides guidance on the basic structure of a mediation:

- i. The mediation will often begin with a joint meeting attended by all participants during which the mediator will invite each participant to summarise their position and state what they wish to achieve through the mediation.

- ii. Then, via joint meetings and/or using one to one meetings with the mediator seeing each participant in private and acting as go-between (with “break out sessions” if needed e.g. for experts to discuss specific issues), the mediator will encourage the participants to understand better each others’ positions and to discuss the differences between them and agree common ground. Through this structured dialogue the mediator will help the participants to resolve the dispute between them or to reach agreement on as many matters as possible.
- iii. Any agreements or understandings reached are written down and signed off by the participants with the help of the mediator. N.B. whatever the agreement or understanding, this will not substitute for the relevant statutory process.
- iv. If no agreement or understanding is reached, the participants are not obliged to explain this in writing. N.B. the mediation will remain confidential unless the participants agree otherwise.
- v. Even if agreement is not reached within the session, the mediator will usually stay in touch with the parties as some mediations are settled later. Participants should at least be able to agree a course of action in the initial mediation in order to move forward.
- vi. Matters such as planning policy preparation are often complex, involving multiple parties. Mediation in such cases is likely to take place over a period of time and may involve a range of techniques, including workshops and themed meetings involving all parties.

Where mediation is appropriate

- i. Mediation is a flexible tool that can provide potential benefits across a wide range of planning matters and issues, including: development plan documents; planning applications; planning obligations and infrastructure cost negotiations; pre-application consultation; design and layout; conditions; neighbour objection; enforcement; compulsory purchase issues and compensation; and community right to build. Examples of mediations in planning are given in the Annex.
- ii. It is not suitable in order to determine questions of law.
- iii. It is not suitable if the issue is beyond the legal competence of any of the participants to resolve e.g. the formulation of national policy.
- iv. Mediation techniques can be beneficial when used at an early stage in the planning process, to create openness, trust and good communication before any conflict has arisen. They are particularly useful for engaging with the local community in a structured and constructive way.

Mediator qualities to look for

- i. Mediators may be sole practitioners or made available via provider bodies.

- ii. Mediators should be accredited by a recognised qualification body and have appropriate indemnity insurance cover.
- iii. The mediator should understand the planning system, or be assisted by someone who does.
- iv. The mediator(s) should be independent of the participants and impartial in relation to the subject matter.

Want to find out more?

- Mediation in Planning by Leonora Rozee OBE and Kay Powell (June 2010); prepared for the National Planning Forum and The Planning Inspectorate (includes reviews of literature and experience as well as evaluation of case studies):
<http://www.natplanforum.org.uk/Final Report - Mediation in Planning - PDF.pdf>
- A Guide to Mediation in the use of Mediation in the Planning System in Scotland (March 2009); prepared for the Scottish Government by the Core Solutions Group - provides guidance to those involved in mediations in Scotland:
<http://www.scotland.gov.uk/Publications/2009/03/10154116/0>

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- Administrative Justice and Tribunals Council (AJTC)
- British Property Federation (BPF)
- Centre for Effective Dispute Resolution (CEDR)
- Civil Mediation Council (CMC)
- Homes and Communities Agency: Advisory Team for Large Applications (ATLAS)
- Infrastructure Planning Commission (IPC)
- Law Society
- Planning Advisory Service (PAS)
- Planning Aid
- Planning and Environment Bar Association (PEBA)
- Planning Officers' Society (POS)
- Royal Institution of Chartered Surveyors Dispute Resolution Service (RICS DRS)
- Royal Town Planning Institute (RTPI)
- Town and Country Planning Association (TCPA).

ANNEX: MEDIATION EXAMPLES

The following are summaries of successful mediations. Fuller summaries are in the June 2010 Mediation in Planning report. These cases show the wide range of situations in which mediation can be used successfully, and cover:

- Area Action Plan: Residential development;
- Area Action Plan: Retail development;
- Enforcement;
- Evaluating design & location options; and
- Pre application community engagement.

CASE STUDY: AREA ACTION PLAN – RESIDENTIAL

Context: Two sites in the same ownership were allocated for residential use in an Area Action Plan (AAP) being prepared by the council. The allocation was subject to a maximum of 200 units – the figure had been imposed in a bid to limit the potential impact on nearby Housing Market Renewal developments. The Council also wanted to restrict use of an existing building on one site to B1(b) or B2 because of precedent elsewhere in the City.



The owner and Local Planning Authority (LPA) had not found common ground in previous discussions. The LPA suggested mediation and the landowner agreed to participate.

Process: The mediation session gave the opportunity to air the reasons for past misunderstandings and to explore the rationale for the policies. Neither side had strong evidence to back up their case. However the short breakout sessions enabled officers to discuss amongst themselves. The participants worked well together, not only agreeing the common ground but narrowing the areas of disagreement right down to the wording of a revised policy. There was a key moment when both parties started to annotate the draft plan. The mediator formulated the final wording of the agreement with the participants and the revised policy, an extract of the annotated plan was attached and the agreement was signed the same day.

Outcome: The residential policy in the AAP changed as a result of the mediation. Parties believed that the policies under discussion would have greater robustness having been through the mediation process and that the time spent on mediation would probably save time at a hearing.

CASE STUDY: AREA ACTION PLAN – RETAIL

Context: Developers wanted to develop their site for retail use. However the majority of the site which was outside the district centre boundary in the draft AAP and was identified for ‘mixed use’. They wanted to develop the whole of the site for retail and were in negotiation with a major retailer. They said that the site was not viable without a clear allocation for retail use. The developer had thus objected to the plan.



Process: This involved three Council officers, the developer and representative, and two consultants acting for the Council. The mediator listed all the objections and from this initial exercise parties were able to compromise on some aspects immediately. The consultant for the Council made a suggestion which was agreed by the other side, which set a positive tone. By thinking about joint objectives, solutions started to be developed collectively.

The developer disclosed that they had been in discussion with a major retailer who had planning permission for a superstore elsewhere in the area, but would be prepared to relinquish consent on the other site, in return for planning permission on this site. However there were concerns about the implications of such changes on the capacity of the area for more retail development, the need to revise traffic assessments, and the need to re-consult the shopkeepers who were likely to object. Reflection about relevant points in Planning Policy Statement 4: Planning for Sustainable Economic Development (PPS4) allowed participants to discuss the matter that an allocation of ‘employment generating uses’ would include retail. This opened up the discussion for a more creative form of words in a policy to cover the part of the site which was not within the district boundary.

Outcome: The officers agreed to propose a change in the wording of the policy and the supporting text to facilitate mixed use (including retail) on the whole site. They agreed to consult the developer when the updated results of the survey were available. When the new supporting text has been agreed, the developer agreed to withdraw appropriate sections of their objection. The requirement to consult other stakeholders on any significant change to policy meant that it was never going to be possible to resolve the issue completely and get rid of all the objections. However, there was scope to clarify and move discussions on. The confidential nature of the mediation process allowed the developers to be frank about their development opportunities in a way that would be unlikely in a public inquiry/ hearing. The Local Authority gained potential new business for the town as a result. The participants felt that mediation could also have been used to inform the AAP rather than to react to it.

CASE STUDY: ENFORCEMENT

Context: The site comprised a 1.6 hectare field used periodically for keeping pigs. External screening was limited and so there were views into the site.

In 2006 the LA was advised that the site was being used for the storage of non-agricultural items and scrap; an Enforcement Notice requiring removal of all non-agricultural materials and scrap was issued in May 2006. Compliance was not achieved and three Court hearings also failed to achieve compliance.



Planning permission was refused in October 2007 for the erection of an agricultural barn on the site; an appeal was subsequently dismissed. In August 2008 a Stop Notice and Enforcement Notice were served regarding the unauthorised deposit of spoil and other materials and the raising of land. The compliance date expired and full compliance was not achieved, although some removal work had taken place.

Before the mediation clearance of the site was in progress, but at an extremely slow pace. Site visits were being made weekly, meaning that LPA resource inputs were disproportionate to what was being achieved. There was pressure from the District Councillor, Parish Council and residents to make faster progress

Process: Took place over 1 day in a neutral venue. The 2 parties were the LPA (planner, enforcement officer and lawyer) and the landowner, his immediate family, and lawyer acting as a “mediation friend”. The mediation was successful, a Mediation Agreement and a Settlement Agreement were signed by the parties on the day.

Outcome: Compliance with the Agreement was achieved within the timescale agreed. The landowner and LA were able to air their concerns in confidence and gradually both parties recognised that there had been a history of misunderstandings which lead to a break down in communication. The mediation process allowed parties to gradually reach clarity about each others needs and provided a better forum for the landowner to communicate. The result was that they found a mutually beneficial solution that had not been identified through previous legal procedures.

CASE STUDY: EVALUATING DESIGN & LOCATIONAL OPTIONS

Context: A Borough Council had assessed the merits of 12 parcels of land and identified 2 as their preferred options for a new Primary School. Following public consultation it became evident that opinion in the village and amongst wider stakeholder groups was divided between the preferred sites. A number of key issues were identified as requiring more detailed examination and so it was decided to undertake a mediated consultation process.



Process: The Borough Council appointed a mediator to facilitate discussion of the following key issues: - for one of the sites: its value; alternative layouts; shared access with the Village Hall; and public rights of way; - for the other: the impact of traffic and access proposals; and - for both: security fencing and lighting; and site development costs.

The mediated consultation was divided into two consecutive phases. The first phase comprised a round of mediated discussions; each discussion focussed on one issue. The discussions were held in private and each stakeholder group with an interest in the issue was invited to put forward a representative to participate. Attendance was voluntary and the outcomes were non-binding.

The mediator spoke to each stakeholder representative to clarify their position before conducting a joint discussion between all the representatives. The purpose of the sessions was to explore the range of views on the contentious issues, establish any common ground between the parties and seek a positive way forward. The mediator assisted the parties to examine their own and others' viewpoints. He put forward suggestions for possible resolutions and tested views rigorously in the interests of fully understanding the strength of opinion and helping the parties to identify potential solutions.

Following the mediated discussions, a summary of each session was issued to the community with an open invitation to participate in the second phase of the consultation. This consisted of two public meetings which were neutrally chaired by the mediator and divided into short sessions, each focusing on one of the key issues

Outcome: The process drew out specific areas of concern, identified matters which required further consideration, and enabled those involved to gain a greater understanding of the complex issues surrounding the allocation of a site for the new school. It was widely acknowledged to have provided a constructive environment for calm and reasoned dialogue between the stakeholders

CASE STUDY: PRE-APPLICATION COMMUNITY ENGAGEMENT

Context: Proposals for residential development on a brown field site proved controversial. Fifty residents attended a Parish Council meeting to discuss the development. The local Councillors couldn't discuss much detail or give views because they were on the Planning Committee. The residents didn't understand the planning process and felt that they had no voice.



Process: In an initial facilitated meeting key issues were identified. At the end of the meeting it was agreed that: three local people would represent the residents; a mediator was agreed upon; proposed reporting and community engagement mechanisms were acceptable; the residents would meet again before the next Planning Committee meeting.

The first meeting between the residents' representatives and the developer started to be adversarial but was steered by the mediator into an exploration of ground rules for a constructive dialogue. The meeting reviewed positions and the proposals. The second meeting - with a new representative from the developer - looked at scale plans and a development brief. The developer shared his views and financial/code constraints while residents suggested reduced density in a couple of locations, better turning and parking areas, and possibilities for reducing overlooking. The Government Office at that time suggested that the usual process of objection and refusal by the LPA followed by an appeal would sort any problems. It was made clear at the 3rd meeting that mediation was an attempt to find a better solution, not a way of "getting round" the planning system.

For the developer the process amounted to a consultation exercise likely to be requested by the LPA before re-submission of the planning application. They re engaged constructively, in exchange for the residents agreeing to consult the whole street opposite the proposed development. The LPA realised that mediation was an attractive approach for this development and for future initiatives. The third and final meeting ended with an agreement by the developer to forego four dwellings and to redesign a small area to improve parking, turning and overlooking. The residents accepted the revised plan. The mediation process lasted about 6 weeks.

Outcome: The developer submitted revised plans to the LPA which were approved and the development built. The residents found a way forward, learned about planning and were able to influence and shape the plans, and understand the developer's needs.

The National Planning Forum

- is the only cross-sectoral forum focusing on spatial planning in England with a mission to inspire planning and planners
- has a membership of over 70 organisations representing the key national organisations with a role in, and commitment to, planning
- acts as a critical friend to the Planning Directorate within the Department of Communities and Local Government, helping to inform and shape policy by reflecting significant depth of experience of practice
- informs debate, builds cross-sectoral consensus and provides clarity on the issues where views differ
- operates as a membership network with a web-site that is open to all
- is committed to ensuring that spatial planning in England is fit for purpose
- provides a platform for all the sectors to engage in discussion and debate on key planning issues - identifying consensus and clarifying difference

The Forum embraces the five sectors of business, local government, the professions, the non-governmental and voluntary sector and planning in central government. It operates on an entirely non-political basis and represents a unique body of cross-sectoral experience. It is a valuable tool as both a 'sounding board' for new policy and practice initiatives and as vehicle for exploring new approaches to planning process.

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