

Mediation in Planning – a mediator’s view

This article was first published in **Scottish Planning and Environmental Law**, No. 102, April 2004. **Scottish Planning and Environmental Law** is published by IDOX (www.idoxplc.com).

Mediation is currently one of the hot topics in planning in Scotland. The Scottish Executive consultation paper, ‘Getting Involved in Planning’, published in November 2001 specifically invited views on the application of mediation in the planning system.¹ The consultation responses make interesting reading.² The findings state that:

‘Mediation was held to be useful as an additional option in dispute resolution, albeit in relatively limited sets of circumstances. Respondents suggested that mediation had the potential to save time and expense, and to help parties better understand the issues where there were planning disputes.’

More recently the Scottish Executive has also voiced its approval of increased use of mediation in the planning process in its Partnership Agreement, and pledged to answer the calls of many for further research into how procedures might change to encompass different dispute resolution processes.³

This reflects a growing trend in Scotland and elsewhere over the last few years. Mediation is now being used increasingly, in both the public and private sector, across a broad range of disputes. This in turn is encouraging a change in culture and attitudes away from an adversarial to a consensual approach to managing and resolving disputes.

Mediation is often described as a form of dispute resolution and it is probably the most common form of alternative dispute resolution available in the UK today. However, increasingly those engaged in this field use mediation skills in situations not only to resolve conflict but also to manage areas of potential or actual conflict. In planning matters, engagement and consultation with the local community may be particularly critical prior to lodging an application. Mediation – or perhaps, more accurately, facilitation by an independent third party – could be invaluable. In this article “mediation” is used in its broadest sense to cover not only where a dispute has emerged but where there is a desire to manage a process to avoid conflict.

Context

Planning, by its very nature, involves the balancing of many conflicting interests as it seeks to take into account a variety of economic, social and environmental factors. Increasingly, mediation is viewed as a process by which differences can be managed collaboratively and which, in a relatively short time, can achieve outcomes which are in the interests of all concerned including private individuals or businesses and the wider public – with consequent savings in costs and time. The independent and impartial mediator assists the parties to reach a mutually acceptable agreement and the process, being flexible, can be tailored to the particular requirements of the parties.

Who the appropriate parties will be in any particular planning matter will have to be carefully considered. It is acknowledged that councillors are advised not to give any indication of their voting intentions to the applicants before the application has been considered at committee. Giving such an indication might prevent their involvement

at mediation. However, the relevant planning official, with an insight into the concerns of the planning authority, would be present and would be live to the challenges of finding an outcome which might be acceptable to that authority. Of course, no guarantee of the final outcome at committee stage could be given by the planning officials. Provided this was made clear to the parties at the outset it should not prove problematic.

Mediation in practice

The planning process has many layers and covers a great variety of applications from householder to large scale developments which impact on the community at large. The results of the recent consultation suggest that mediation tends to be considered more suitable for the smaller householder or other small-scale applications, though it was also thought to be helpful where there was significant community interest or opposition.⁴ Design issues have also been identified as being particularly suited for mediation.⁵ Certainly there must be scope for planning authorities to reduce the number of objections to development plans that reach inquiry by the use of mediation.

In an interesting case study undertaken in Washington, USA an independent mediator was used to facilitate the preparation and development of the city-wide plan after there had been a court battle over the original proposals.⁶ The mediator in this instance worked with the planning authorities over a two year period covering the entire plan-making process from defining the issues to developing the policy and ensuring its implementation city-wide.

While this was clearly not a quick fix, that was never the intention. The mediator acted as a facilitator, enabling a plan to emerge which met the needs of all the parties, thus saving time and public money in the long run. This was not mediation in the narrow sense in which it is sometimes understood – settling a dispute between two parties – but an outworking of the continuum of consensual approaches to managing differences and, where possible, preventing conflict. ‘Mediation’ may involve different approaches at different stages in the planning process and having regard to particular circumstances.

Whilst it might be tempting to advocate mediation in all types of planning disputes a more measured approach may be more realistic. Andy Grossman has suggested that rather than ‘wrapping mediation up in an over radical change, greater impact might be achieved by supporting its use in public enquiries on major infrastructure projects and on development of the new Local Development Frameworks.’⁷ Mediation is certainly not a panacea, but it can play a valuable part in oiling the wheels of the planning process. Pilot studies into the use of mediation in Scotland in specific types of planning disputes would assist in providing further information by which to measure the potential benefits.

Confidentiality

Confidentiality is central to the mediation process and concerns have been voiced that this does not sit well with the involvement of a public body with statutory duties and the Scottish Executive’s requirement for a fair, open, transparent and efficient planning service.⁸ The DETR pilot scheme showed that most mediation outcomes lead to the submission of a new application which is then subject to the existing consultation and decision-making process.⁹ Mediation did not override the normal role of the planning authority. Further, in this scheme, the confidentiality provisions of the agreement to mediate, which all parties involved in the mediation must sign,

made it clear that any agreement reached would require sufficient disclosure to implement it. Public disclosure of aspects of the outcome was thus assured. In general, confidentiality clauses can allow parties to make proposals throughout the course of the mediation which, if not forming part of the ultimate resolution, cannot be revealed at any other time. Parties are thus given the freedom to explore possible options without the concern that they will be held to any particular position at a later date.

Opportunity for greater equality

Mediation also provides an opportunity for all interested parties to contribute in the process as equal stakeholders. It is arguable that all those with an interest in the outcome should be invited to participate at the mediation. Mediation should be more capable of placing the parties involved on an equal footing than other means of managing disputes, not only financially as the costs ought to be significantly reduced, but also because it encourages a shared understanding of the issues and more open, and indeed creative, communication which will very often reduce the areas of disagreement. While this might give rise to concerns that an individual could jeopardise the outcome, in practice research has found that such a third party would not necessarily prevent an agreed solution being achieved between the local planning authority and the applicant, providing any opposing views are noted.¹⁰

Implementation of mediation agreements

There might be a concern that a planning authority might reject an application which resulted from a mediated resolution. While this is always a possibility, what can be done to maximise the prospect of implementation? It is suggested that independent, highly trained and experienced mediators are critical to assist the parties reach a workable agreement. Input from a representative of the planning authority would be invaluable in giving an indication as to how any proposed settlement might be viewed by the planning authority. While it is accepted that some of the approaches involved in mediation may already be part of current planning practice,¹¹ the research to date indicates that the skills of the mediator, rather than those of the planner, are crucial to the success of planning mediations.¹² There may well be a place for a permanent independent planning mediation service, with rigorous standards, which might initially be served by trained volunteer mediators. Certainly the Scottish consultation findings were that 'it needed to be an independent service to gain credibility and trust.'¹³ The question of how to fund such a service would need to be addressed. It would be important to ensure that funding is available to support a high quality service.

Potential application of mediation

As in litigation cases, where mediation can operate at any stage in the life of a dispute, mediation in the planning process could be used at a variety of points – pre-application right through to the appeal stage. Rather than being viewed as another layer of procedure it can be seen as cutting through some of the present procedures and enabling greater and more effective communication. While mandatory mediation might be one approach, an encouragement to consider mediation, perhaps embodied in legislation, is viewed by many to be as effective a way forward, allowing parties to decide themselves if the particular circumstances are appropriate. This is the approach taken by the courts in a number of jurisdictions, including England. The Civil Procedure Rules state that the courts should encourage the parties to use an alternative dispute resolution procedure if the court considers that appropriate and the courts are required to facilitate that procedure.¹⁴

Conclusion

Mediation is becoming a significant part of the mainstream dispute resolution scene. How and when it will be appropriate in planning matters to use mediation is now very much on the agenda for discussion, further research and pilot schemes. Undoubtedly, it has a part to play in helping to make the planning process in Scotland more consensual, creative and constructive.

Pamela Lyall
Director
*Core Mediation*¹⁵

References

- ¹ Getting Involved in Planning, Scottish Executive, November 2001.
- ² Getting Involved in Planning, Analysis of Consultation Responses, Scottish Executive Social Research Findings No. 154/2004.
- ³ A Partnership for a Better Scotland: Partnership Agreement, May 2003, p39.
- ⁴ Getting Involved in Planning: Analysis of Consultation Responses, Scottish Executive Social Research Department, Research Findings No. 154/2002.
- ⁵ Mediation in the Planning System, DETR, May 2000 paras 5.4.1 – 5.4.5.
- ⁶ Hague, Cliff and Higgins, Marilyn International Experience of Mediation in Development Planning (2004) 101 SPEL 6.
- ⁷ Centre for Effective Dispute Resolution, News 31 July 2002.
- ⁸ SPP 1: The Planning System, para 70.
- ⁹ Mediation in the Planning System, DETR, May 2000.
- ¹⁰ Mediation in the Planning System, DETR, May 2000.
- ¹¹ Getting Involved in Planning: Analysis of Consultation Responses, Scottish Executive Social Research Department, Research Findings No.154/2002.
- ¹² Mediation in the Planning System, DETR, May 2000.
- ¹³ Getting Involved in Planning: Analysis of Consultation Responses, Scottish Executive Social Research Department Research Findings No. 154/2002.
- ¹⁴ Rule 1.4(2)(e) Civil Procedure Rules
- ¹⁵ www.core-mediation.com