



The Planning
Inspectorate



National Planning Forum
Inspiring planning

Mediation in Planning

Report commissioned by the
National Planning Forum and the
Planning Inspectorate

by Leonora Rozee OBE and Kay Powell

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FOREWORD

We are pleased to produce this report on Mediation in Planning which follows the growing interest in the potential value of using mediation in the planning system since Chris Shepley CBE first raised the subject in 1996. We have built on the studies undertaken in the early 2000's by Michael Welbank and his team and we firmly believe that the time is now right for mediation to take its place in the toolbox of the planning system.

We recognise the challenges faced by those who simply see mediation as adding yet another stage in the process which will add time and cost. However, we believe that the determination of Government to re-balance the planning system to create much greater local ownership and responsibility for addressing the issues in their local areas requires new techniques to be used to deliver that vision. Planners, elected members, developers, businesses and local communities all need to find ways to work more effectively together and the non-confrontational, collaborative approach that mediation offers provides a way of achieving that.

Mediation should not replace the appeal system which is needed to support local decision-making as the planning system is complex and there will always be areas where mediation will not provide a solution. Mediation is a typically voluntary process which requires willing parties and there will be occasions where co-operation cannot be achieved. Furthermore, there are planning situations which will not lend themselves to a mediated solution. Nevertheless, given the history of support for using mediation as an alternative dispute resolution procedure within the planning system, from the Welbank studies, from Kate Barker in her review of the planning system in 2006 and from the Killian/Pretty recommendations which stimulated this study, we strongly recommend that the planning system now embraces mediation, as the Courts have done. We set out in this report what actions should now be taken by a range of players in the planning system, from Government to education providers, to enable and support the use of mediation in the planning system as part of normal business.

We note that several individual members of the Steering Group have indicated their commitment on a personal basis to continuing to develop and promote the use of mediation in planning and are keen to continue to work together in some form or other to support the delivery of the recommendations in this report.



Leonora Rozee OBE
Chair



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CONTENTS	PAGE
Executive Summary	3
1. Introduction	4
2. Lessons from previous studies, commentaries, academic treatise and international experience	9
3. Findings from case studies, local authority survey and 'expert' interviews	13
4. Conclusions	19
5. Recommendations	29
Annex 1: Acknowledgements	32
 APPENDICES	
Appendix A Literature Review	35
Appendix B Follow up survey	54
Appendix C Evaluation of Case Studies	55
Appendix Ci Preparing the ground for mediation	64
Appendix D Completed mediation cases	66
Appendix E Local Planning Authority Survey Results	73
Appendix F Expert interviews	83
Appendix G Evaluation report	92
Appendix H Role of ATLAS	100
Appendix I Role of Planning Aid	103
Appendix J Assessment of approaches to delivering mediation	106

EXECUTIVE SUMMARY

This report was commissioned by the National Planning Forum (NPF) and the Planning Inspectorate(PINS) in June 2009 as a response to a recommendation in the Killian-Pretty report (2008) urging investigation of the use of alternative dispute resolution at all stages in the planning process.

Mediation is a cost effective way of resolving disputes with the help of an independent third party. It also incorporates safeguards for third party rights and satisfies public requirements for transparency. The project aims to demonstrate its value by undertaking and evaluating 5 'live' case studies involving enforcement, an Area Action Plan and a major development, by drawing on the results of completed mediations as well as related work being undertaken in England, expert interviews and a specially commissioned survey to test opinion, international experience, and relevant literature. Lessons are drawn from all these sources and the similarities and differences between the use of mediation in civil litigation and in planning explored.

Evaluation of the live cases shows that that the tone and atmosphere is entirely different from the conventional hearing, inquiry or public meeting; very positive results can be produced for all parties; complexity reduced and key issues resolved; but much depends on the mediator's skill and on the preparatory work s/he undertakes; confidentiality within the process is an important ingredient, but outcomes can be structured to safeguard the public interest of the planning system.

Analysis of the evidence results in identification of the barriers and opportunities to the use of mediation in planning. The barriers are a lack of understanding of mediation and its potential use in planning, scarce resources and capacity, existing systems and processes, and culture. The opportunities are the current favourable context, the fact that mediation allows better use of resources, fits well with the spatial planning and localism agendas, and can be made accessible to a wide range of people.

The report concludes that mediation could provide an effective tool to tackle a wide range of planning issues. It recommends that mediation should be strongly encouraged by Government by providing a policy framework, creating capacity to allow its benefits to be realised and establishing an appropriate regime of incentives and penalties to support the delivery of a new approach to planning. In due course it concludes that it might be sensible to require mediation to be considered in planning disputes, as is the case in our civil justice system. Recommendations cover the need to develop and build a market; provide advice and guidance; develop skills and create capacity.

The authors acknowledge the support of project sponsors NPF and PINS; the funders NPF, PINS and the Planning Advisory Service; the invaluable advice of the Steering Group who gave their time freely to the project; the skill and dedication of the mediators; the important contribution of the consultant evaluators; the enthusiasm of all those in local planning authorities and Planning Aid who participated in, or volunteered for, the project; and the encouragement of all the people who contacted the project team to offer their services or to register their interest in the project.

MEDIATION IN PLANNING

Report of joint project commissioned by the National Planning Forum and the Planning Inspectorate

1. INTRODUCTION

Origin and purpose of project

- 1.1 In 2008 the Government commissioned David Pretty and Joanna Killian to *“look objectively at the planning application process, to identify how it could be further improved, and in particular to consider ways to reduce unnecessary bureaucracy, making the process swifter and more effective for the benefit of all users”*.¹ The Review recommended that *“greater use of alternative dispute resolution approaches should be encouraged at all stages of the planning application process where this can deliver the right decisions in a less adversarial and cost effective way.”*²
- 1.2 The Government’s response to this recommendation was that *“the Planning Inspectorate will work with Communities and Local Government and others on investigating the role of mediation in reducing the need for planning and enforcement appeals and/or reducing the time and effort in determining such appeals”*.³ In response to this commitment Katrine Sporle, Chief Executive of the Planning Inspectorate (PINS), initiated a project jointly with the National Planning Forum (NPF) to investigate the potential use of mediation in the planning system. Leonora Rozee OBE (former Deputy Chief Executive and Director of Policy, Quality and Development Plans at PINS) and Kay Powell, then Secretary to the NPF, were appointed as Chair and Secretary to the project respectively. The project was supported by funding from PINS, the NPF and the Planning Advisory Service.

What is mediation?

- 1.3 Mediation is one of a family of techniques used to assist with improving communication, negotiation and consensus building. They are generally conducted with the help of a neutral third party. Such processes can be one-off events leading to resolution of a specific dispute or difference (which may involve a number of separate issues), or an ongoing process operating throughout the life of a

¹ Executive Summary Killian Pretty Review: Planning Applications A faster more responsive system. Published by CLG November 2008

² Recommendation 12

³ Government response to the Killian Pretty Review. Published by BERR March 2009

project (from evolution through development to delivery). Its purpose is to enable issues as they arise to be resolved in ways which reflect the interests of the parties and, in the case of planning matters, consistently with planning policies and requirements.

1.4 The NPF commissioned a 'think piece' on Mediation in Planning from Chris Shepley former Chief Planning Inspector who, in that role, had commissioned studies which were undertaken by Michael Welbank in 2000 and 2002. This think piece provides the history and wider context to the project and it set out six potential areas which might provide opportunities to pilot mediation techniques. These included the Severn Barrage and the Infrastructure Planning Commission (IPC), which were considered to be beyond the potential scope of this project, and specific proposals for PINS, which are a matter for them to consider. Thus, at a meeting of the NPF Executive Board in May 2009 it was decided to pursue three of the identified priorities ie:

- delivering a major project
- addressing enforcement issues
- developing an Area Action Plan.

1.5 Chris Shepley also recommended that a steering group be established to ensure that the proposals were implemented and to monitor the outcomes. A cross sector group was set up covering national and local government interests, advisory bodies, professional and business interests and third sector interests.⁴

1.6 The purpose of the Steering Group was to *"to steer and provide critical comment on the proposed project, assisting in the identification and ultimate evaluation of suitable case studies"*. At its first meeting the Steering Group (SG) agreed that the project objectives would be:

- to investigate the role of mediation in reducing the need for planning and enforcement appeals.
- to support the delivery of the NPF Culture Change Action Plan and in particular Action 1.2 to *"co-operate on joint case studies, dissemination of best practice and training both within and across sectors, providing inputs and holding joint events"*, and Action 3.2 to *"engage early in policy and spatial plan-making and pre-design pre-application discussions to achieve consensual outcomes that integrate social, economic and environmental objectives, drawing on all available expert knowledge"*.

As it progressed the project focused on the more generic concept of the potential of mediation as a means of improving the effectiveness of the planning system.

⁴ Communities and Local Government; Local Government Association; Administrative Justice and Tribunal Council; Planning Advisory Service; Homes and Communities Agency Advisory Team on Large Applications (HCA ATLAS); Royal Institution of Chartered Surveyors; Royal Town Planning Institute; Planning Officers' Society; Law Society; Planning and Environment Bar Association; British Property Federation; Town and Country Planning Association; Friends of the Earth; Planning Aid. It should be noted that the individuals on the SG were not formally representing the body to which they belong but were bringing knowledge and expertise relevant to their organisations to inform the project.

Project method

- 1.7 The project was initially designed to demonstrate the benefits and uses of mediation in plan-making as well as in decision-making by undertaking some case studies. As it became clear that ATLAS and Planning Aid were using a range of techniques akin to mediation to support local planning authorities and communities in managing major developments, it was agreed to extend the project to investigate current knowledge about what techniques are already in use which might fit within the concept of 'mediation in planning'.
- 1.8 Expressions of interest were sought from the planning community for live planning cases which might be suitable for mediation having regard to the following principles:
- the case has reached a dispute likely to lead to a refusal of planning permission or enforcement action being taken; or
 - a dispute has arisen over specific aspects of an emerging plan (eg an AAP) which might be suitable for mediation;
 - the parties who would be asked to engage must be the parties to a dispute;
 - the participants must agree, and have the authority, to participate.
- 1.9 Initially, 20 cases were put forward for consideration including a major urban extension, several complex enforcement cases and a number of Area Action Plans. Ultimately a total of 4 mediations have been followed through, covering enforcement and development plans, and a further very complex and high profile major case has been subject to early discussion with the parties to assess the scope for a mediated approach. These cases, suitably anonymised, are discussed in section 3 of this report.
- 1.10 The project established a panel of accredited mediators who tendered for individual cases. We have been fortunate to have received a great deal of goodwill and 'pro bono' work from all of those interested in the project and who we have identified in our acknowledgements at Annex 1.
- 1.11 Consultants⁵ were appointed to carry out the evaluation of the case studies. Details of the process are set out in section 3 of this report. The aim was to capture from all participants, including the mediator, their experience of the mediation to enable some conclusions to be drawn.
- 1.12 Given the limited number of mediations carried out under the project a review of 3 mediations which had been completed by others in recent years was undertaken to provide additional

⁵ Chrissie Gibson of Connectivity Associates and Scott Jones of Mind the Gap Research and Training.

evidence on which to draw conclusions⁶. Those who had offered cases at the initial stages of the project were surveyed as were all Local Planning Authorities in England and a selection of 'players' in the planning system were interviewed to provide some background information about perceptions.

- 1.13 Finally, a thorough review of relevant literature and international experience was undertaken the key points from which are summarised in section 2 of this report.

Relevance of project

- 1.14 Since Chris Shepley raised the issue in 1996 some interest in using mediation techniques as a form of alternative dispute resolution (ADR) within the planning system has been expressed - particularly in relation to appeals. However, few formal planning mediations have been undertaken. To date there has not been any noticeable change in the way the planning system operates to indicate that it has started to embrace mediation, although we have found considerable interest in the subject. The further calls for greater use of ADR by Killian Pretty, following similar calls by Kate Barker in her review of the land use planning system published in 2006, provide the impetus for this project.
- 1.15 The lack of progress in the planning system contrasts with what has happened in the courts where the use of ADR procedures, including mediation, is actively encouraged. Indeed paragraph 26 of Circular 6/2004 on Compulsory Purchase sets out clear advice on 'the use of alternative dispute resolution procedures', referring to the potential saving of time and money. It also refers to the *"Government's own pledge to settle legal disputes to which it is a party by means of mediation or arbitration wherever appropriate and the other party agrees"*. The recently published Jackson Report on the 'Review of Civil Litigation Costs' (January 2010) states in relation to mediation *"properly conducted mediation enables many .. civil disputes to be resolved at less cost and greater satisfaction than litigation. .. many disputing parties are not aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too readily"*. Mediation has also been embraced within the tribunal system more generally⁷. The conclusions of our report suggest that the lack of knowledge and understanding of what mediation can offer in the planning system may be a significant reason why it has not been embraced as an ADR method to date.
- 1.16 Since the Welbank studies in 2000 and 2002 there have been some fundamental changes to our planning system which make it particularly relevant to look again at the potential value of mediation. These include the 2004 Planning and Compulsory Purchase Act focus on early and

⁶ Although not all these cases involve planning issues there are useful lessons to be learned from them

⁷ Transforming Public Services: Complaints Redress and tribunals (Cm 6243) in which the use of mediation among other proportionate dispute resolution mechanisms is strongly championed

effective community engagement in both plan-making and decisions on planning applications and the 2008 Planning Act new regime for major infrastructure projects which, similarly, places considerable emphasis on effective pre-application processes as the key to achieving the efficient examination of major schemes. The Coalition Government's focus on localism and empowering communities to take more responsibility for the planning issues in their area⁸ suggests that a more consensual process, including the use of mediation where appropriate, would assist in the delivery of a more locally focused and effective planning system.

- 1.17 In our literature review we refer to a thought-provoking article by Lucie Laurian of the University of Iowa (2010) which addresses the issue of "Trust in Planning". In this she notes that *"trust facilitates cooperation, collective actions and alliances" and that "distrust .. can preclude collaboration .. and can be damaging to the implementation process"*. Lack of trust between major players in our planning system is frequently demonstrated. When trust breaks down between, for example, developers and local planning authorities, citizens and 'experts', elected members and officials, this can lead to poor and inefficient decision-making. Mediation is based on the need for cooperation as it is a voluntary process controlled by parties to the mediation and so it offers the potential to build trust which is a valuable commodity whatever the outcome of the mediation process.
- 1.18 We also refer to a lecture dedicated to Peter Boydell QC and given in May 2008 by Sir Henry Brooke, Chair of the Civil Mediation Council, on the subject of the 'Role of Mediation in Planning and Environmental Disputes'. He noted that in the Courts *"mediation has come to stay as an add-on to our litigation processes"* and it is extending into other fields such as employment where workplace mediation is replacing statutory grievance arrangements. He believes that *"mediation may have a lot to offer"* in the field of planning.
- 1.19 The growing interest in mediation in planning in the UK is reflected in this study in England, the Scottish Executive's decision to issue guidance in March 2009 on the 'use of mediation in the planning system in Scotland' and the decision of the Royal Institution of Chartered Surveyors (RICS) to set up a Planning Mediation Panel under their Dispute Resolution Service, which was launched in October 2009. We understand that there is also interest in the potential use of mediation in Wales and Northern Ireland.
- 1.20 This project has sought to draw together the disparate threads of activity and interest which the concept of mediation in planning has created over the past 14 years or so. By undertaking a small number of mediations and learning the lessons from them, taking soundings from a range of players in the planning system, seeking the views of Local Planning Authority planners and studying the relevant literature we believe that our conclusions are founded on a sound evidence base.

⁸ Proposed Decentralisation and Localism Bill included in Queen's Speech on 25 May 2010.

2. LESSONS FROM PREVIOUS STUDIES, COMMENTARIES, ACADEMIC TREATISE AND INTERNATIONAL EXPERIENCE

- 2.1 A key element of this project has been the research undertaken into the role of mediation as a technique for dispute resolution and the evolution of the interest in the use of mediation in planning. This has involved a review of a handful of relevant publications from the extensive body of literature on mediation in planning and more generally which exists in the form of books, manuals, journals and studies which examine cases and issues both in Britain and overseas. Our starting point was to build on the studies undertaken by Michael Welbank and his team in the early 2000's and to look at the use of mediation in its widest sense. The full literature review is included at Appendix A.
- 2.2 Perhaps the two most important lessons to learn about mediation are that: (i.) mediation should be entered into willingly so it should be a voluntary process; and (ii.) the mediator must be neutral with respect to the mediation outcomes. This distinguishes mediation in planning from the appeal process where the decision is made FOR the parties rather than BY the parties and the Inspector is representing the Secretary of State (in England, the Welsh Assembly Government in Wales and the Scottish Executive in Scotland⁹). The fact that mediation is voluntary is critical to the ownership of the process by the parties. Table One in Appendix A offers a simple analysis of the difference between mediation, arbitration and state law as types of dispute resolution. The current appeal process, which is the main dispute resolution process within the planning system (with judicial review limited to a review of the process by which the decision has been reached rather than a review of the decision), is a form of State Law.
- 2.3 Mediation is defined in the Scottish Executive's guidance as *"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"*. The key feature of mediation is that the power lies with the participants to resolve the issues at hand. It is not the role of the mediator to find the answers. The skill of the mediator is in helping the parties to find the answers for themselves. Many of the skills used in mediation are used by planners in the negotiations they routinely engage in with developers and others. However, as a formal dispute resolution technique mediation has not become mainstream and it is not embedded in the planning system. This is despite the response of the then Planning Minister (Beverley Hughes) to the Welbank studies that *"Further consideration is also needed to assess how mediation might be integrated into the existing planning system"* and the firm recommendation of 'The Barker Review of Land Use Planning' in 2006 that *"DCLG should establish a planning mediation service to act as an alternative dispute resolution mechanism"*

⁹ In Northern Ireland the Planning Appeals Commission is independent of the Northern Ireland Assembly and is thus decision-maker in its own right.

within the planning system". Table Two of Appendix A sets out the key milestones in the development of mediation in planning, culminating in the publication in March 2009 of the Scottish Executive's 'Guide to Mediation in Planning' referred to above.

- 2.4 The research suggests that there are many potential advantages to using mediation in planning which go beyond the issues of time and costs savings as identified by Welbank, important though these are. These include the contribution that mediation can make to building capacity for dialogue between planners, developers, communities and other stakeholders, especially in complex cases such as major development. This will become an increasingly important requirement of the new planning system which the UK Government is seeking to build. It would help ensure that community empowerment does not lead to increased conflict between the different players in the planning system who may well approach the issues from very different standpoints.
- 2.5 The New Zealand (NZ) Environment Court, which deals with planning issues, uses mediation to encourage settlement, narrow and settle issues within disputes and reduce complexity in advance of a hearing. This recognises that 'success' in mediation in planning is not restricted to finding a complete solution but is also valuable in supporting and simplifying later stages in the process and making hearings more efficient. Potential parallels in Britain (albeit with our different planning system and culture) might include the use of mediation to reduce the number of appeals or the time taken to deal with appeals, a matter looked at in detail by the Welbank studies which found that appeals were avoided in 73% of mediated cases. The benefits of using mediation in planning have been identified in a paper produced by a Commissioner to the NZ Environment Court as:
- Flexibility
 - Ownership
 - Maintaining relationships
 - Resource efficiency
 - Accessibility
 - Information, shared learning, and capacity building
 - Confidentiality
 - Governance/trusteeship of the public interest.
- 2.6 Confidentiality is an issue which can be seen as being in conflict with the planning system where openness is critical to ensuring fairness in democratic decision-making processes. Whilst it is fundamental to successful mediation that participants feel able to speak freely and in private with the mediator in the knowledge that matters will not be disclosed without their agreement, private conversations can still lead to publicly expressed proposals which are then transparent within the statutory process. The value of enabling private meetings is that it allows the mediator to get to the heart of matters which may otherwise seem intractable and to help the parties to identify the choices as to how they might proceed. None of this can happen in an appeal process where all relevant matters must be disclosed in public and the Inspector cannot enter into private discussions with any one party. The fact that, ultimately, the outcome from any mediation still

has to proceed through the statutory planning system, which will require disclosure of any matter relevant to the decision, should safeguard the public interest and overcome the concerns of those who feel that mediation might lead to undemocratic decisions. Greater use and understanding of mediation as a way of producing more acceptable plans or proposals whilst not prejudicing the final decision would help, provided that the core issues agreed as a result are made public.

- 2.7 Further advantages of the use of mediation in planning identified in research include swifter, more cost effective decision-making as many mediation sessions produce a result on the day, offering the potential to reduce the costs of the planning process to the development community, the local authority and any others involved in the process. Sir Henry Brooke noted that, a few years ago, a complex mineral case involving the Green Belt, and described by Sir Henry as *“not on the face of it very tractable material for mediation”*, which was due to be heard at a 3-week planning inquiry and was also the subject of an interim injunction due to be considered by the Court of Appeal, was successfully mediated in two days leading to the Inquiry being called off and the saving of *“thousands of pounds and a massive amount of management time”*. The Planning Inspectorate has assessed that the cost of an appeal ranges from £918 for a written representation appeal, £2,757 for a Hearing appeal to £8,360 for an appeal dealt with by Public Inquiry, giving an overall average of £1,395 per appeal and a total cost of the service in 2007/8 of more than £25m. This does not include the costs faced by the Local Planning Authority (LPA), the appellant or any other party. The potential for mediation to reduce the cost of the planning system to the public purse is a matter of some significance in this era of financial constraint.
- 2.8 Furthermore, the process of engaging with the other party/ies within the mediation process which offers a non threatening environment, as parties are not there to persuade a decision-maker of the ‘rightness’ of their case, enables a better appreciation of others’ viewpoints and the opportunity to build or re-build trust. Better communication and improved trust allows parties to work together to find creative solutions offering the potential for achieving more sustainable development. It is noted that both of the Welbank Studies (and indeed our own case studies) have shown that participants achieved a high degree of satisfaction with the mediation process, which adds a further advantage of the use of mediation in planning.
- 2.9 It is recognised in research that mediation is not a panacea and will not be appropriate in all situations. Mediation does, however, offer a means of developing policy in a more consensual way and has the potential to allow communities to have more effective influence over policy development as sought by the Government’s “Open Source” approach to planning. Our own case studies have shown that mediation can assist the development plan process as well as the, perhaps more obvious, areas of development management and enforcement.
- 2.10 Concerns have been expressed that to add mediation to the process will simply add cost and delay to an already complex planning system. Our own questionnaire to all Local Planning Authorities in England highlighted these matters as issues amongst local authority planners. These are legitimate concerns which will need to be addressed if mediation is to become part of

mainstream planning and we offer some suggestions on how to address these in our conclusions and recommendations later. It is worth noting, however, that in other countries where mediation has been embraced as a form of public dispute resolution, such as in the USA, it has been concluded that *“consensual approaches to handling conflict in the public sector can yield outcomes that are fairer, more efficient, wiser and more stable than traditional methods, at least some of the time”* and *“consensual approaches consistently seem to do better than conventional approaches in generating public confidence in government and empowering citizens to take greater responsibility for meeting the needs of all segments of society”*. This would appear to be very relevant to the need for our planning system to find more effective ways of dealing with the planning challenges we face in the 21st century than we have been using to date, based on a single approach to resolving planning disputes ie appeals.

- 2.11 Mediation as used as an alternative to litigation generally involves limited numbers of parties, whereas in the planning system there may be a large number of both primary and secondary interests which need to be accommodated. Research on the use of mediation overseas shows that even the most complex cases involving multiple parties representing a very wide range of interests can be accommodated. As an example, in Appendix A we refer to the use of mediation to resolve conflicts over the expansion of Vienna Airport. This process involved over 60 representatives from over 50 different groups and it dealt with a wide range of disparate issues over a 5-year period. The process overcame many challenges but showed that *“..even extremely controversial issues that generally do not lead to a win-win situation can finally be satisfactorily solved by means of a mediation procedure”*. The mediation in that case also allowed the parties to set up a framework for future dispute resolution, thus paving the way for more constructive relationships and dialogue in the future.
- 2.12 Questions arise as to where mediation might fit in the planning system. The Welbank studies focused on planning applications and argued that there is a good reason to employ mediation before a formal decision is made. This view is supported Sir Henry Brooke, whose paper we refer to in section 1 above. Figure One in Appendix A shows the planning application process with Welbank’s suggested points at which mediation might be appropriate. In the context of the development plan process Planning Policy Statement 12 supports the use of mediation particularly if it leads to greater community involvement. Figure 2 in Appendix A shows where mediation might assist in the development of Local Development Framework documents. Although the process set out is a little out of date as the last stage of inviting representations now precedes submission of the document for examination¹⁰, the approach set out is still relevant. Our studies included enforcement cases. There appears to be no research relating specifically to the use of mediation in enforcement but our findings suggest that this may be a fertile area to develop mediation from as early as possible in the handling of unauthorised developments. One

¹⁰ Following changes made to the process in 2008.

of our cases was a major development proposal which remains unresolved after 5 years, which had led to increasingly entrenched, opposing views on the way forward. Preparatory work prior to formal mediation showed the potential role for neutral mediators in setting the scene for more constructive negotiations in future (see Appendix Ci).

- 2.13 Funding for mediation remains an issue which has been seen as a potential stumbling block to its greater acceptance within the planning system. The second Welbank study showed substantial savings to all parties with the mediation route estimated to cost 11% of the appeal route and in releasing planners' time to deal with other cases. Nevertheless, LPAs have not shown great interest in exploring this potential to date. This is possibly at least partly as a result of the impact of targets. These can act as a perverse incentive to make a decision quickly even if it means refusing permission for a scheme where an acceptable scheme might be achievable if there is time within the process to enable mediated discussions to take place. Power to charge for appeals was included in the 2008 Planning Act and this might act as an incentive to seek alternative forms of dispute resolution if the costs of the alternative were to be seen as more economic. However, to date no decision has been made to implement that provision. In our conclusions and recommendations we offer some suggestions as to how the funding issue might be addressed but it should be noted that the value of mediation as a tool may not be easily or most appropriately assessed in pure monetary terms.
- 2.14 Finally, in this section it is worth highlighting the increasing use of mediation in many areas of law and to the strong advocacy of its use by both the Lord Chief Justice and Master of the Rolls as referred to by Sir Henry Brooke. Planning disputes do differ in many ways from other areas of law where mediation plays a strong part such as contract and commercial law. Planning disputes are not generally about private rights and interests but about what is acceptable in the public interest and planning decisions are made in a political context, frequently involving a number of third parties who may be directly or indirectly affected by the decision. Nevertheless, some of the good practice learnt in the courts and in other tribunals are likely to be transferrable to the planning process, such as the ability to stay proceedings to allow time to explore settlement and the use of the costs regime to incentivise the parties to consider the use of mediation as an alternative form of dispute resolution.

3. FINDINGS FROM CASE STUDIES, LOCAL AUTHORITY SURVEY AND 'EXPERT' INTERVIEWS

Case Studies

- 3.1 At the beginning of the project we sought a range of live cases in which we could offer mediation as an alternative form of dispute resolution. The principles we established for identifying suitable cases were:

- the case has reached a dispute likely to lead to a refusal of planning permission or enforcement action being taken; or
 - a dispute has arisen over specific aspects of an emerging plan (eg an AAP) which might be suitable for mediation;
 - the parties who would be asked to engage must be the parties to a dispute;
 - the participants must agree, and have the authority, to participate.
- 3.2 Whilst we initially had 20 expressions of interest mainly from local government, many of the cases ultimately did not proceed for a variety of reasons as set out in Appendix B. Ultimately we had 5 live cases: 2 enforcement; 2 Area Action Plan (AAP); 1 major case. For each of these cases we appointed a mediator from those who had expressed an interest in being involved in the project. All were accredited mediators with experience of the planning system. Three of the cases (1 enforcement and the 2 AAPs) proceeded to a conclusion within the project period. The other enforcement case has not yet progressed to a formal mediation and the major case is also ongoing. Further detail on these cases is set out below.
- 3.3 We appointed consultants to assist in the evaluation of the studies. The aim of the evaluation process was to gather evidence to allow conclusions to be reached about:
- whether there are circumstances in which mediation in planning disputes can add value and if so what those are;
 - whether there is any need for changes to be made to the statutory or regulatory framework to facilitate the use of mediation in planning; and
 - to identify the possible triggers for introducing formal mediation into a planning dispute;
 - to define the skills, knowledge and expertise required to deliver effective mediation in planning disputes.¹¹
- 3.4 The consultants attended the mediation sessions for the 3 cases which have been completed. They followed up the session with questionnaires to the parties involved and to the mediator. The full evaluation report of these case studies is at Appendix C.
- 3.5 The 2 AAP mediations related to two different proposals in the same AAP. One was a proposed residential development where there was an issue about the number of dwellings and the other related to a policy concerning 'mixed use' for a site where the wording was felt to make retail development unviable. The AAP in question was at a late stage in its preparation having reached publication. Both of the mediations resulted in a change to the plan. Unfortunately, the AAP has been subject to ongoing slippage as a result of a number of post publication changes the LPA wished to make (in addition to those flowing from the mediations) and it is not clear at this stage whether the mediations will result in any time saving at the Examinations. However, it would

¹¹ These criteria were developed with the help of HCA ATLAS and their consultants DATABUILD Research and Solutions.

appear that the mediations have led to the resolution of the issues so far as the original representors are concerned, although it is understood that there have been further representations on one of the sites as a result of the changes made following the mediation. The report of the mediation shows that it resulted in a better understanding between the LPA and the developers in each case and both the LPA and the developer found it a positive experience (see Appendix C cases A and B).

3.6 The completed enforcement case involved not untypical issues of unauthorised storage on agricultural land (Appendix C Case C). The case had a long history which had led to criminal convictions of the landowner. The local authority was keen to find an alternative to taking further court action. The mediation led to a successful outcome with agreement being reached to clear the site by the end of April. The clearance was done and the local authority was able to notify the landowner that the enforcement notice had been complied with.

3.7 The evaluators' findings from these cases were:

- All the case studies were different, but there were some common threads.
- The tone and atmosphere were entirely different from a formal hearing, inquiry or public meeting. This approach allowed the participants to work through the issues themselves.
- The three live mediations produced very positive results for all participants. There was only one negative response from the participants.
- The role of the mediator is crucial to the success of the mediation. It is important to set the tone, explain the process and provide the structure.
- The format was not prescribed. In the first two cases, the professionals worked together once the air was cleared. In the third case, the mediator was the 'go-between', working in different rooms.
- Some issues are difficult to resolve but it is possible to reduce complexity, make some agreements and encourage a sense of optimism and progress which will give parties the will to succeed.
- A successful mediation demands significant preparation time, particularly by the mediator.
- Mediation input at the right time can turn round an acrimonious situation into one where there is constructive working and an agreed outcome.
- Confidentiality was a key ingredient. Some mediations would not have progressed without guarantees of confidentiality.
- Suggested improvements include
 - Using mediation techniques earlier in the process
 - Ensuring all the right people with legitimacy and power are in the room

3.8 A further case reported to us involved the use by a local planning authority of a private sector mediation service to facilitate a mediated consultation stage of a Land Allocation Development Plan Document involving a primary school for which the LPA had identified 8 sites as their preferred options. The public consultation had identified divided opinions about the merits of the

different sites and a wide range of issues affecting the different sites including: community value; alternative layouts; feasibility of a shared access; network of public footpaths; impact of traffic and access proposals; adequacy of a shared pedestrian and vehicular access; provision of security fencing and lighting; the difference between the likely site development costs. The mediated consultation stage was designed to explore the issues in greater depth, clarify the views of the stakeholder groups and identify any common ground. Appendix D (Case A1) provides a summary of the process used and the outcomes. The key finding from this case is that *“the mediated discussions were widely acknowledged to have provided a constructive environment for calm and reasoned dialogue between the stakeholders”*.¹² A further report on a facilitated consultation process involving a controversial housing development in a medium sized town is included in Appendix D (Case A2).

- 3.9 The second enforcement case we studied has a very lengthy history dating back to 1984 and involves an elderly lady who recently lost her partner on whose farm she lives. There has been no agreement between the parties over: what should be removed from the land; when those things should be removed; how removal should be paid for; how or where the landowner is to store those things that need to remain on the land. There is a willingness to mediate to address these issues but a number of practical issues have affected the timetable and the mediation has yet to take place. The appointed mediator has said that *“It is a classic case in my view for a mediated solution but it is currently foundering given (a) cautiousness of the lpa; (b) lack of a “friend” steering xx¹³ in that direction; and (c) the range and intractability of the issues.”* Given the length of time over which this dispute has been allowed to fester it is perhaps not surprising that it has not proved easy to get the parties together. One of the key findings of this case is the crucial importance of finding someone with the appropriate skills and knowledge of both planning issues and the mediation process who can act as a ‘friend’ to the lay person involved. This was also a finding of the other enforcement case we dealt with (as reported in para 3.6 above) where a local solicitor provided ‘pro bono’ support to the individual the subject of the enforcement action.
- 3.10 The major case, referred to in paragraph 3.2 above, was brought to our attention by the local planning authority and involves a major city centre regeneration scheme which has been in development for over 5 years. The resulting planning application was the subject of a public inquiry and permission was refused. In the meantime a great deal of distrust has built up between a number of the 7 key parties involved – the LPA, developer, landowner, statutory body, national interest group, local interest group and an individual. Two highly experienced mediators were appointed to *“explore with a number of parties whether mediation might be appropriately used as a means of making progress on the development proposals”*. All the parties agreed to a round of preliminary meetings the basis of which were:

¹² It is noted that this case has a lot in common with Planning for Real.

¹³ Name removed to ensure anonymity.

- To explain how mediation might work and answer questions;
 - That the content of any discussion would be confidential;
 - That no-one meeting the mediators was making any commitment to mediation at that stage or at all;
 - That the mediators were neutral and impartial;
 - That an effective process would need to be voluntary, including the right to withdraw without an obligation to give reasons;
 - That any process adopted was not in any way a substitute for the statutory planning application, consultation and determination process.
- 3.11 Following this round of meetings the mediators published a “Proposal for an independently facilitated dialogue” to involve 3 stages:
- Stage 1 would be a round of without commitment meetings (as already conducted);
 - Stage 2 would include the facilitation of separate dialogues with the ‘promoters’ and the ‘objectors’ the aim being for the separate groups to define where they have a common approach and where not and to enable the definition of common factors needed to move to stage 3;
 - Stage 3 would be a dialogue about the next iteration of the scheme.
- Moving to stage 2 would imply no commitment to move to stage 3.
- 3.12 All parties were invited to indicate their willingness to proceed to stage 2. At the time of writing this report it is not clear whether stage 2 will follow in its proposed form, not least because the effects of the earlier refusal now need to be evaluated in the context of new constraints. In the meantime the mediators have offered to work with the local authority on *“their role as community leader charged with getting the best for the (area), engaging effectively with community and other interest groups and maintaining effective separation between its statutory roles and those as a trustee of public assets”*. This work would be generic rather than focused on the case.
- 3.13 The findings from this case so far demonstrate the challenge of moving parties from their traditional positions as ‘promoters’ and ‘objectors’ while addressing the complex issues relating to a major city centre regeneration scheme. If this could be achieved constructive dialogue could take place but of course this might not lead to a scheme acceptable to all the parties. There may well remain a number of genuinely irreconcilable issues. In such circumstances the role of the decision-making process within the planning system will require the decision-maker (the Local Planning Authority in the first instance and if necessary the Secretary of State if it goes to appeal) to balance the arguments in the normal way. The potential value of the process is to provide an environment in which a more mutually respectful, constructive and creative dialogue can take place from the outset, or in the case of a matter well advanced, to narrow the issues in dispute and – crucially - to build trust through independently facilitated dialogue, although the fractured relationships in this case are still some way from repair. Appendix C1 sets out a short summary of some of the issues and lessons learned in preparing the ground for mediating planning related schemes generally, but particularly complex schemes.

Local Authority Survey

3.14 As part of the evidence base for the project we carried out a survey of all local planning authorities to assess their knowledge of, and interest in, mediation in planning. We had a good overall response rate of 20%. The full analysis of the survey results are set out in Appendix E. We note that, despite what we had thought was the good publicity given to the project especially in 'Planning', only 61% of respondents had heard of the project. Nevertheless, about 74% of all respondents said they would consider using mediation in the future even though about 62% had never previously considered using an independent mediator. Where mediation had been used the most common area was in enforcement (6 occurrences). One important finding from this survey is the need to emphasise the importance of the 'neutrality' of the mediator as some local authority planners consider that they are acting as mediators when they are negotiating development schemes.

3.15 The following summarises the key findings from the survey (Appendix E):

- There is a general awareness of mediation although it is clear that there is a need for advice and guidance on what it entails and its application.
- There are a wide range of potential applications (in a planning context).
- A small number of mediations in planning have taken place but more work would be required to ascertain the eventual outcome.
- There are existing bodies and organisations who have successful track records in providing or facilitating mediation e.g. local voluntary groups to HCA ATLAS.
- There is a willingness to consider using mediation in planning by LPAs.
- The key barriers or hurdles to using mediation in planning essentially relate to uncertainty, questions over legitimacy, financial and time implications and the nature and status of any outcome.

'Expert' interviews

3.16 Fourteen interviews with a range of players in the planning system were conducted by our consultants. The interviewees included: QC and mediator; Head of Legal Services in a LA; Director of Planning in a LA; Planning Inspector; Partner in a national planning consultancy; Planning Consultant in a small planning consultancy; Planner and Solicitor, Partner in a national law firm; former Chief Planning Officer; two representatives from Planning Aid; regeneration consultant; Leader of a District Council; Deputy Director Community Voluntary Services; Chair local Civic Society. An evaluation report of the interviews is attached at Appendix F.

3.17 The findings from these interviews is summarised by the evaluators as follows:

- some people had direct experience of mediation; others could identify cases where mediation might have been used.
- issues of transparency need to be addressed to retain public confidence in the planning system
- many planners do not fully understand mediation as a process or its potential to resolve disputes.
- developers and consultants were often wary of a system which they felt was untried and untested.
- the views of other council officers eg legal department had a part to play in the decision whether to attempt mediation.
- lessons can be learned from mediation processes in other areas of law, where mediation is the default process and it can be decided to “stop the clock” by having an adjournment.
- planners need to understand the difference between mediation, negotiation and other alternative dispute resolution mechanisms.
- there is a need for training for LPA officers and for the private sector.
- the role of the public and local councillors is unclear in relation to mediation.
- it is not as intimidating for the lay person as an inquiry or hearing.
- it provides the opportunity to develop local solutions to local issues.

3.18 An evaluation report based on the completed mediations and the interviews is attached at Appendix G. This summarises the evidence which supports the assessment of the barriers to and opportunities for mediation in planning as set out in the next section.

4. CONCLUSIONS

4.1 Our conclusions flow from our consideration of all of the evidence we have referred to in this report and from the outputs of a workshop we held in early May “*to review the evidence and reach conclusions on the potential use of, and barriers to, mediation in planning having regard to the original objectives of the project*”. The Workshop was attended by most of the Steering Group members and a number of invited participants who had either been involved in the project or who had a specific interest.

4.2 The workshop looked at 4 specific questions:

1. How should mediation in planning be defined – what should it embrace?
2. What service might the mediator be asked to provide?
3. In what ways could mediation in planning be funded?
4. Having regard to the evidence collected and to the evaluation report what factors encourage or inhibit the potential use of mediation in planning?

These conclusions are set out against these topics. We have used question 4 to provide a summary of the barriers we consider need to be addressed in order to allow mediation in planning to become part of the normal business of the planning system and the opportunities which exist to encourage it to happen now. Our recommendations are designed to overcome the barriers whilst making the most of the opportunities. Finally, we suggest how introducing mediation in planning into the planning system might be delivered most effectively.

How should mediation in planning be defined and what should it embrace?

- 4.3 The broad consensus of the workshop was that it would be sensible to adopt the definition in the Scottish Guidance for consistency ie *“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 acceptable which is acceptable to all concerned”*. We suggest that a simpler version would be: *“mediation is a flexible method of achieving consensus in the planning system such that the outcome of any mediation is reached by the parties themselves with the help of an independent mediator”*.
- 4.4 In terms of what mediation in planning should embrace there are four critical elements:
- the defining characteristic of mediation is that it aims to resolve disputes in a timely manner and in a way which encourages mutual understanding and recognition of the interests of participants and confidence in the outcome;
 - the defining quality of a mediator is ‘independence’ or ‘neutrality’ ie having no personal interest in the case or the outcome of the dispute;
 - the defining requirement for the parties is willingness to enter mediation;
 - the defining factor in planning is the statutory process ie democratic decision-making, inclusion, transparency.
- 4.5 Other important factors are: recognition that mediation can be an ongoing conflict management process and can happen throughout negotiations (ie throughout the planning process not simply for the purpose of reaching a final resolution of a dispute); mediation needs to take place within a controlled or structured environment (philosophically rather than physically); terms used need to be clear, especially for those unfamiliar with the planning or mediation process.

What services might a mediator in planning be asked to provide?

- 4.6 Mediation is most often ‘facilitative’, where the parties formulate their own propositions, but can sometimes be ‘evaluative’, where the mediator is asked by the participants to use expertise to offer neutral views to the parties at the same time. However, the real benefit of either approach is that it is a flexible tool which can be adapted to suit the circumstances of a case and the needs of the parties. For example, even an essentially facilitative approach will usually involve some element of private challenge or reality checking to the thinking of the participants individually.

Regardless of whether the process is evaluative or facilitative (or even a mix of both) what is crucial is the ability of the mediator to understand the nature of the dispute and the language of the parties and to adapt as needed to ensure that all participants feel properly included and ensure that they 'buy-in' to the process.

- 4.7 Expertise in planning does not impact on the independence of the mediator but planners working for a particular party (eg the Local Authority) cannot provide the independence necessary to act as a formal 'mediator' although planners and other officers may use mediation skills. For example, ATLAS are using mediation techniques and developing mediation skills to help achieve their vision *"To secure the timely delivery of high quality sustainable development through effective planning processes, collaborative working and the promotion of good practice."* They act as advisors to LPAs and their development partners and they help LPAs improve their interaction with stakeholders and others. They have a good track record in unblocking conflict between LPAs and developers by enabling key parties to work collaboratively to help deliver major schemes. However, it is arguable whether they would be perceived by all sections of the wider planning community, including local residents and interest groups, as independent mediators. The role of ATLAS is set out in Appendix H.
- 4.8 Planning Aid *"provides free, independent and professional help, advice and support on planning issues to people and communities who cannot afford to hire a planning consultant."* Planning Aid volunteers work closely with LPAs but they are wholly independent of them. They have the potential to act as a 'friend' to the lay person/s involved in a mediation, but to be effective in that role volunteers would need to be familiar with the mediation process. The role of Planning Aid is set out in Appendix I.
- 4.9 Mediators require, amongst other things, a specific skill set which will enable them to: set up the mediation – meeting the parties' timetable; set the agenda; unravel the issues; chair meetings; provide reality checks; coach parties in communication/negotiation; identify informed opportunities eg when to abandon; narrow areas of dispute; act in a non-judgmental way / build trust. Accredited mediators can demonstrate appropriate qualifications and they would be expected to have any necessary professional indemnity cover and a proper appreciation of means of dealing with conflicts of interest.
- 4.10 The workshop agreed that there were potentially a wide range of planning issues for which mediation could provide an effective tool for overcoming the many challenges faced in delivering controversial development. These include negotiations on s106 obligations, enforcement, AAPs and masterplanning, pre-application processes on major infrastructure development etc. Furthermore, it was also identified that under the framework of a Planning Performance Agreement a mediator could be identified through agreement for any conflicts that may arise on the related project. Indeed, the Scottish Guidance includes a lengthy list of *"Particular Opportunities for the Use of Mediation in Planning"* and this includes such things as flood relief schemes, renewable energy and neighbour disputes.

In what ways could mediation in planning be funded?

- 4.11 The cost of mediation is an issue which has come up in the evidence and is of particular concern to LPAs and lay people. The cases we undertook were funded by the project. Without that offer of funding it is unlikely that we would have been able to attract any cases to study. It was a particularly important issue in the major case and, given the level of distrust between the parties, it is questionable whether one of them offering to fund the whole process (eg the developer) would have been seen as acceptable to some of the other parties.
- 4.12 It is worth noting what the Scottish Guidance has to say on cost as it emphasises that *“one of the major benefits of using mediation is its cost effectiveness”*. We refer in section 2 above to the case referred to by Sir Henry Brooke where a 2-day mediation on a complex minerals case saved the cost of a 3-week inquiry and a hearing in the Court of Appeal. We note the comment of the applicant in the case evaluated by ATLAS in which it was suggested that an appeal would have cost £750k and caused a delay of around 2 years (Appendix H). A further completed mediation which led to agreement over compensation in relation to the acquisition of rights led to several days in the Lands Tribunal being avoided with savings of all the associated costs (Appendix D Case B1). In a further case we report concerning a rent review which was not mediated it was concluded that *“it is likely that a 1 day mediation would have settled the dispute - it could have been organised within a month, and cost (in current terms) less than £30K”* compared to the 2 years the process actually took (Appendix D Case B2). We also note the point picked up in the Scottish Guidance that previous research (Welbank 2002) *“estimated that the use of mediation in the planning system could release more than £3 billion of investment into the economy more than 40 weeks earlier than if other routes to dispute resolution were used”*.
- 4.13 A further factor which needs to be taken into account when considering the issue of funding is the non-monetary value which mediation can bring to the planning system by offering a different approach to problem-solving and dispute resolution, an approach which is founded on building trust between parties. In para 1.6 above we refer to the value of trust in facilitating *“cooperation, collective actions and alliances”* all qualities which will be needed if the Government’s vision of a more collaborative planning system is to be realised. In the context of ‘localism’ mediation offers a form of ‘participatory democracy’ which feeds into decisions made by elected members (‘representative democracy’).
- 4.14 We acknowledge that the cost of mediation in planning and potential savings (displaced costs) which might result are not fully evidenced, and this is an area where further research would be useful. We have not found it easy to get any robust information on such costs other than what is set out in our report. We are aware that mediation costs can vary considerably as it is a flexible process so there are no fixed fees and costs. These will vary according to a number of factors including complexity of the process, the time involved, the location and number of parties, the expertise required to support the process. However, having regard to the evidence that is available here as well as by reference to previous studies such as Welbank, which found that the mediation route cost 11% of the appeal route, it is not unreasonable to conclude that in

appropriate cases mediation will provide a cost effective alternative to the formal appeal process or to litigation with potential savings to the public and private purse.

- 4.15 The approach to meeting costs in the planning system is established by the costs regime as set out in Circular 3/2009¹⁴ which makes clear in Annex A that *“in planning appeals and other proceedings to which this circular applies the parties involved normally meet their own expenses”* (para A1). It might reasonably be assumed that the same might apply to any mediation process, but this is unlikely to be acceptable to those who may not feel that they have anything to gain from the system but still wish to participate. It also fails to recognise that the economic circumstances and priorities of different parties will be different. As mediation can only work with willing parties, relying on the parties to pay for themselves is likely to act as a significant stumbling block.
- 4.16 The workshop identified a number of potential ways of funding, including: public subsidy direct or via a special mediation body; one party pays (eg developer, or LPA, or objector); all parties pay for the mediator and each funds their own participation with exceptions for the disadvantaged; some parties ‘pay’ by non cash means such as providing the venue, giving their time etc; the creation of a ‘mediation fund’ from a system of penalty payments for not considering using mediation (eg through changes to the costs regime).
- 4.17 Other options suggested include setting up a mediation service within PINS funded by savings on appeals (although the evidence to demonstrate such savings is limited) or a PINS mediation service managed by an external body which has a mediation accreditation and appointments infrastructure in place to source mediators and provide background ‘soft services’¹⁵; use of voluntary sector organisations (eg Planning Aid) to support mediation especially the non experts; adopt an ‘easy-plan’ approach as being developed in LB Barnet where mediation could be offered as part of a fast track application service.

What factors encourage or inhibit the potential use of mediation in planning?

- 4.18 We have identified the following ‘barriers’ and ‘opportunities’ to the potential for mediation to provide an alternative dispute resolution model for the planning system (alongside other mechanisms including the appeal system) and we have referred where appropriate to how we address these in our recommendations.

¹⁴ “Costs Awards in Planning Appeals and Other Planning Proceedings.”

¹⁵ It is noted that PINS has access to a Panel of Specialist Advisors who can be used to support Inspectors in their decision making role. This Panel is managed by the Dispute Resolution Service, an independent body within of the RICS.

Barriers

Understanding

- 4.19 *Definition of mediation in planning:* There is a general lack of awareness of what is involved in mediation and its potential to be used even in the most complex of cases. The nature of the planning system is such that mediation in planning will need to be flexibly defined as the activities involved are likely to differ according to the nature of the process involved (eg development plan; enforcement, planning application) and the stage at which mediation (or mediation techniques) is introduced into the relevant planning issue. It will also have to reflect the lessons learned by ATLAS (Appendix H) and the advice on the preparing for mediation on complex schemes (Appendix Ci) which demonstrates the need for mediation in planning to be capable of responding to a range of issues and conflicts involving potentially many parties at different stages of the process. Our conclusions suggest a working definition of mediation and our recommendations include the development of guidance to explain the role and use of mediation which should make clear what mediation involves (Rec 2.1). As we show in Appendix A, mediation can have a role at different stages of the planning process and we recommend further piloting of mediation which will help establish where mediation can have most benefit (Rec. 1.3). We also recommend the need to embed mediation in Government policy (Rec 3.1).
- 4.20 *Language:* People involved in planning use language in different ways. It is not always easy for different professions to work with the language of others, or for lay people and technical people to comprehend one another. This can create a sense of distance or “not being listened to” which is part of the mix of issues to work with in a mediation. In particular, the use of technical or legal language, where it is not properly explained, can create an un-level playing field potentially disadvantaging those unfamiliar with the planning system and creating a barrier to building confidence. Such language, if used by the mediator and without proper consideration of the ability of the parties present to understand, can result in a loss of confidence. The appropriate use of language is, however, part of a wider communication issue which affects the planning system as a whole. The guidance we recommend should stress the particular importance of the use of appropriate language in mediation to support the inclusive nature of the process (Rec 2.1).
- 4.21 *Skills and knowledge:* Whilst planners often use some of the skills required in mediation they may not necessarily understand the significance of the neutrality of the mediator in providing reassurance to all parties. Members of the public involved in mediation may also feel inhibited or low in confidence because of perceived poor skills in inter-personal communication or negotiation. Differences in perceived education levels may also be inhibiting for some. We recommend the provision of bespoke training packages (Rec 3.8) which can be used by different sectors to develop understanding of what mediation means and how it can be used to assist in resolving planning disputes.

- 4.22 *Gender balance/diversity:* The lack of diversity, including gender balance, in the professions, including mediators, may inhibit the acceptance of mediation by those who feel that cultural or gendered aspects of any intervention are important, and perhaps not easily understood by some professionals, including mediators. Indeed in a study relating to Tribunals it was found that “those Minority Ethnic Groups most likely to perceive unfairness at hearings were less likely to do so when the tribunal itself was ethnically diverse”¹⁶. It is noted in Appendix G that a CEDR survey found that the more experienced mediators are predominantly male (90%) and white (96%). The relatively informal approach of mediation, however, makes it more accessible to those unfamiliar with the planning system, including some ethnic minority cultures in which mediation is a familiar process. It may provide a useful route to enable more effective involvement in planning issues by minority and ‘hard to reach’ groups. The non-confrontational approach of mediation has the potential to improve communication between diverse parties within the planning system and to break down perceived silos by encouraging constructive dialogue rather than defensive positioning. Successful mediation requires the mediator to ensure that whoever is participating in the process should not feel excluded by their gender, ethnicity, education or intellectual capacity. The enforcement case we studied allowed a non-literate participant, with his young children present, to play a full and active part in the process and to arrive at a satisfactory outcome thus avoiding what would no doubt have been an intimidating experience had he been taken back to court. Our recommended guidance and training proposals should make clear the benefits of mediation as an inclusive and accessible process (Recs 2.1 and 3.8).

Resources/capacity

- 4.23 *Availability of trained mediators:* There are still relatively few mediators especially those with an appropriate knowledge and understanding of the planning system. In Appendix G it is noted that in 2008 there were some 20 qualified or accredited mediators working in the field of planning. The RICS Mediation in Planning Panel established in 2009 has some 12 members. Our recommendations include a range of measures to develop and build a market for mediation in planning (Recs 1.1-1.5) which, combined with the increased interest in mediation across the devolved administrations, should stimulate the growth in the availability of suitably trained mediators.
- 4.24 *Support appropriate to the case:* A system involving mediation requires appropriate support including the availability of a ‘friend’ for those who do not have access to professional advice. Such support was given in both of the enforcement cases we studied, in one case the support was given by Planning Aid. It also requires access to suitable neutral venues to allow all parties to have confidence in the impartiality of the process, especially where there is ill-feeling involved and clear lack of trust. Our recommended guidance should cover the nature of the support

¹⁶ Study by Professor Hazel Genn et al “Tribunals for Diverse Users” – DCS Research Series 1/06
<http://www.justice.gov.uk/publications/docs/research-backlist.pdf>

required to ensure that all can participate on an equal footing. The role and nature of the ‘friend’ and the skills and knowledge required to perform such a role should be defined as should the need for appropriate venues (Rec 2.1).

- 4.25 *Cost:* Who should pay? There is currently no mechanism for funding mediation. Whilst the development community might consider it worthwhile to pay for a mediation process if they feel that it will save money in the long run the evidence suggests that LPAs have less confidence in the value of mediation and fear that it will simply add to their costs. The value of mediation in non-monetary terms (for example in building capacity for a more consensual planning system) which might justify allocating funding to it is also difficult to assess. We acknowledge in our conclusions that we do not have the evidence to carry out a full cost-benefit assessment of the value of using mediation in planning, although we believe there is sufficient evidence to show that mediation in planning has the potential to be cost effective. Accordingly, our recommendations include the need to identify funding opportunities (Rec 3.5) and the need to find mechanisms for identifying non-monetary benefits (Rec 1.2).

Systems and processes

- 4.26 *Targets:* Current targets within the planning system lack flexibility to allow mediation to be used once an application/appeal has been made. We note in the report that there is scope to ‘stay’ proceedings in the Court to provide ‘space’ for mediation to take place and we propose a similar regime for the planning system (Rec 3.2).
- 4.27 *Decision making process:* The democratic decision-making process limits the ability to reach a final binding agreement in a mediation. Furthermore, the role of officers and members in the mediation process lacks clarity. Indeed mediation has implications for democratic legitimacy and the quality of decisions taken by democratically elected members and it needs to be recognised that some councillors may see mediation as a threat to their role. To overcome this they need to understand the value of such a process in building good relationships with their communities. ATLAS experience, as reported in Appendix H, raises the potential risks of a lack of member involvement in a mediated approach. It is important to note that encouraging mediation in planning is not in any way intended to dilute the safeguarding of public rights inherent in the statutory planning system or the role of elected members. Our recommendations reflect the need for that role and the status of a mediated outcome in the decision-making process to be clarified in policy (Rec 3.1) and for the guidance to provide advice on integrating mediation into the statutory planning process (Rec 2.1).

Culture

- 4.28 The culture of the planning system tends to be based on knowledge of the system and reflects different players’ sense of their rights rather than their responsibilities. Whilst this is starting to change it often leads to a confrontational approach to dealing with planning issues and an imbalance between those ‘in the know’ and those outside (especially more marginalised groups in society). The more consensual approach required for effective mediation is not embedded.

There has also been limited progress in shifting from development control to a development management approach which involves a more collaborative way of working and would lend itself to using mediation as a means of resolving conflicts. We recognise, however, that the effective use of mediation in other parts of the world is not necessarily simply transferrable due to cultural differences which have led to different forms of planning systems. Hence the need to develop models for the use of mediation which suit our English planning system. The training and guidance we recommend should address the need to understand how cultural issues may impact on the way mediation is perceived by different sectors of society (Rec 3.8).

Opportunities

Favourable context

- 4.29 There has been a history of support for the use of alternative dispute resolution techniques in areas of civil and administrative law (eg Circular 06/2004). The Coalition Agreement and Queen's Speech indicate a desire for greater involvement of communities in planning their area and for ensuring sustainable outcomes. The literature review shows that there is a growing interest in mediation planning, especially amongst the legal profession both in the devolved Governments of Britain as well as overseas. There is also evidence from the LPA survey of a growing interest from planners in local planning authorities. Greatly increased use of mediation in the courts and elsewhere such as the Lands Tribunal (and overseas) provide potential models and good practice. We seek to tap into this potential opportunity in our recommendations by seeking direct support from Government in the form of a policy and legislative framework that will enable and encourage mediation to happen (Recs 3.1-3.3).

Better use of resources

- 4.30 Continuing and increasing pressure on resources in both the public and the private sector should lead to greater desire to find more cost effective means of dispute resolution including mediation which the Welbank studies showed leads to savings compared to going to appeal. There is also evidence from the Courts to show that successful mediation saves time. We recognise that further work is required to fully understand the costs and benefits of using mediation in planning so our recommendations include further piloting of the use of mediation (Rec 1.3) and the need to develop costs benefits models which allow non-monetary benefits to be properly assessed (Rec 1.2)

Good fit with the spatial planning system and with the localism agenda

- 4.31 The more consensual and co-operative approach which mediation requires is consistent with the aims of the 'frontloaded' spatial planning system introduced by the 2004 Planning and Compulsory Purchase Act and with the aims of the current Government to develop neighbourhood planning. Mediation allows the exploration of a wide range of issues which affect the use and development of land in a non confrontational manner thus potentially supporting a more holistic approach to the resolution of planning issues (eg in enforcement cases and in development planning). The use of mediation techniques has the potential to break down

barriers and build trust and to reduce complexity by providing a structured approach to problem-solving. Mediation enables local ownership of issues to be retained, consistent with the aims of the spatial planning system to deliver solutions at a local level. Our recommendations seek to provide a practical way forward to ensure that the potential for mediation to be embraced in the planning system is realised. We include quality assurance safeguards for ensuring that mediators are appropriately qualified (Rec 2.2) and a monitoring process so that take-up can be properly assessed (Rec 1.5).

How should mediation in planning be delivered?

- 4.32 Appendix J sets out an assessment of the advantages and disadvantages of seeking to deliver mediation by either 'requiring' or 'encouraging' it. We are firmly of the view that mediation has a lot to offer the planning system but, given the comparative strengths and weaknesses of the two approaches, we believe that, at this stage, its use should be **strongly encouraged** to provide more good practice examples before it is formally required. This would enable practitioners to develop skills and capacity for this new way of working, allow time for specific guidance to be produced, and develop understanding of its value and potential (ie build a market for mediation in planning). In the context of the objectives of the project the evidence that we have examined reinforces the findings of the earlier Welbank studies that the use of mediation in planning offers the potential to reduce the number of appeals and/or reduce the time taken to deal with them. It also fits the 'culture change' agenda being pursued by the National Planning Forum (NPF). Furthermore, it is entirely consistent with the more collaborative and locally based approach to planning being advocated by the current Government. In future, and as it becomes clearer where mediation can add most value, it would be appropriate to more firmly require mediation in planning to be considered by embedding it in legislation, as is the case in our civil justice system.
- 4.33 In order to provide the stimulus needed to make mediation become an accepted tool in the planning process, the Government needs to facilitate and strongly encourage its use by providing a policy framework, creating capacity within the system to allow its benefits to be realised, and establishing an appropriate regime of incentives, and where appropriate disincentives, to support the delivery of this new approach to planning. This might be done alongside the work on the Decentralisation and Localism Bill proposed for later in 2010. Thereafter, it is the role of the planning and other professions, the development sector, local authorities and third sector interest groups, all of whom are represented on the NPF, to take the initiative to make mediation in planning happen. Our recommendations are based on this approach. We also suggest that the Planning Inspectorate might develop a mediation unit which would signal Government commitment to mediation forming part of the planning system (rec 3.4). Existing service providers with planning mediation expertise should also be encouraged so that there are a range of service providers on offer (rec 3.5). In recognition of the value of community mediation as a way of developing and embedding practice we also recommend support for the establishment of community mediation services (Rec 3.7).

5. RECOMMENDATIONS

5.1 Our recommendations are set out in the attached table under three headings:

- **developing and building a market** to include: developing awareness, assessing the value of mediation, developing practice, selling the idea and assessing the effectiveness.
- **providing advice and guidance** to include: developing understanding; quality assurance;
- **developing skills and creating capacity** to include: providing a framework, developing the infrastructure to support the use of mediation, developing the skills and knowledge of all players in the planning system.

TABLE OF RECOMMENDATIONS

1. Developing and building a market

What?	How?	By whom?
Developing awareness	1.1 Develop and implement a delivery strategy to include disseminating knowledge and good practice.	NPF/PINS Project Steering Group in consultation with Government /LPAs
Assessing value	1.2 Develop costs and benefits models including mechanisms for identifying non monetary benefits	Government and the professions
Developing practice	1.3 Support ongoing pilots such as on a targeted regional or sub-regional basis. Use pilots to establish where major benefits likely to be delivered using mediation.	NPF/the professions/local government Government/Planning Advisory Service
Selling the idea	1.4 Develop and deliver 'promotional' material for elected members and others involved in the planning system.	LGA/IDEA/the professions/the development community/Planning Aid/Planning Advisory Service
Assessing effectiveness	1.5 Establish mechanisms and process to monitor take-up; satisfaction levels; appeal numbers/time taken to deal with appeals.	Government/PINS with advice from expert bodies such as CMC and members of the Project Steering Group

2. Providing Advice and Guidance

What?	How?	By whom?
Developing understanding	2.1 Develop Government endorsed practical guidance building on Scottish model and utilising case studies. Guidance to include advice on what mediation in planning should embrace, how to ensure that it is a properly inclusive process, such as the role and expertise of a 'friend' to the non-expert, and how to integrate mediated solutions into the statutory planning process.	Commissioned by Government or developed by cross sector grouping such as NPF.
Quality assurance	2.2 Provide advice and guidance on what skills and expertise required by mediator and how to recognise those with appropriate qualifications.	Government and professional bodies in consultation with Civil Mediation Council

3. Developing skills and creating capacity

What?	How?	By whom?
Providing a framework	<p>3.1 Embed mediation in policy, setting out what mediation is and where it could be beneficial; the status of a mediated outcome in the decision-making process; and the role of elected members in the mediation process.</p> <p>3.2 Ensure that procedures and processes for plan-making and decision-making provide scope to 'stop the clock' to allow mediation to take place.</p> <p>3.3 Review the scope for using the costs regime to incentivise the use of mediation.</p>	Government
Develop infrastructure to support the use of mediation	<p>3.4 Establish a mediation unit within PINS either to provide direct service or to use established service providers to resource mediators and provide support systems;</p> <p>3.5 Encourage existing established service providers with expertise in planning mediation.</p> <p>3.6 Identify funding opportunities.</p> <p>3.7 Support for the establishment of community mediation services.</p>	Government /PINS in consultation with professions and relevant national bodies (eg Civil Mediation Council (CMC); RICS; Planning Aid; ATLAS)
Develop skills and knowledge of planners and other professionals, councillors, developers and landowners, planning students, third sector and the public.	3.8 Provide a range of bespoke, targeted training packages specifically designed for the planning system, based on experience and to include 'soft' skills such as communication and cultural issues which may impact on the way mediation is perceived by different sectors of society.	RTPI/RICS and other professions; schools HE/FE providers; agencies such the Planning Advisory Service, ATLAS, Planning Aid

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Report on Mediation in Planning June 2010

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33

Report on Mediation in Planning June 2010

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APPENDIX A

LITERATURE REVIEW

Background to Mediation

Mediation is one of a family of processes used to assist with negotiations. Assisted negotiations are processes through which people that are in dispute try to address their problem with the help of a neutral third party. A large body of professional and informal practice exists worldwide with many cases and issues discussed in specialist books, manuals and journals. Well-established professional societies and associations exist for the benefit of professional mediators and clients. Some countries, notably New Zealand and Australia, have drawn on customary approaches to mediation and incorporated these into state supported policy and practice, within or adjunct to statute law.

Significant potential exists for the planning system to draw on this literature and experience, even though much of it is based around particular areas such as family, environment, civil law and restorative justice. This literature review draws on a handful of relevant publications to illustrate this potential.

There are two key aspects of mediation. The mediator is neutral with respect to the mediation outcomes, and the process itself is voluntary. These are also attributes of negotiation and other forms of assisted negotiation, such as facilitation and most approaches to non-binding arbitration (Susskind *et al*, 2000). Using a combination of negotiation, mediation, arbitration and facilitation can be referred to as Alternative Dispute Resolution, or ADR (Barnes, 1998). Other types of dispute resolution may be neither neutral nor voluntary (Table One).

PROCESS	MEDIATION	ARBITRATION	STATE LAW
WHO DECIDES	Parties	Arbitrator	Court
WHO CONTROLS	Parties	Arbitrator	Court
PROCEDURE	Informal - rules agreed by parties	Combination of formal and agreed rules	Formal and complex
COSTS	Generally low	Moderate	Substantial
RULES FOR EVIDENCE	None	Established but relatively informal	Established, complex
PUBLICITY	Private	Usually private	Public
RELATIONS OF PARTIES	Aims to develop cooperative effort	Adversarial - can be antagonistic	Adversarial - often antagonistic
METHOD	Consensus or compromise	Hard bargaining	Hard bargaining
COMMUNICATIONS	Aims to improve	Curtailed	Blocked
RESULT	Aims for win/win	Often Win/lose	Win/lose
COMPLIANCE AND COMMITMENTS	Usually honoured	Often resisted or appealed	Often resisted or appealed

Table One: Three types of dispute resolution compared (adapted from Lovenheim 1996, and Cloke and Strachan 1987).

A mediator cannot make decisions or judgments. The mediator's job is to help the parties describe and evaluate their own needs, goals and options, so that they can find their own solution. The process is not coercive and parties:

- Retain full access to legal rights and alternatives
- Can still elect to try other approaches to conflict management, and
- May be helped to access any other rights that exist, for example in customary or institutional approaches (although this probably has restricted relevance in the planning system)

Goals and Benefits of Mediation

The goal of mediation is problem-solving, not to find a single 'truth' or impose a 'law.' Other goals or additional benefits may include:

- Improved communications and understanding between parties – what Weeks refers to as developing a “partnership” approach to managing a conflict (Weeks, 1994).
- Reduced anger, fear, anxiety, shame or other emotions brought about by face-to-face meeting
- Speaking one's mind and having a chance to be listened to
- Increased awareness of the weaknesses and strengths of one's position, helped by private meetings between each party and the mediator

- Improved recognition of hidden issues such as personal approaches, character traits or self management that may be a part of the dispute but of which one was previously unaware
- Exposure to and improved awareness of creative ideas that may have been encouraged by the mediator
- Increased understanding of the implications, costs and benefits of other options
- Improved capacity to better manage issues that arise in the future.

Many of these additional benefits have broader points of contact with the planning system, for example through planning needs for consultation, disbursement of Section 106 monies, and the changing discourse around public participation and greater stakeholder engagement with planning processes (see for example Grossman 2009).

Of particular relevance is the contribution that mediation can make to building capacity for dialogue between planners, developers, communities and other stakeholders, especially in complex cases such as major developments. Many of the people involved in a mediation are likely to meet again in future cases. This helps to create a sense of purpose, enable a body of experience and practice to develop, and provide a shared sense that there are other possibilities than litigation for problem solving. Examples where mediation has helped to build a community of practice that people can draw on include:

- Cross-cultural mediation with communities in London and North Ireland (Stewart 1998, Fitzduff 1999)
- Environmental disputes in North America (Susskind et al 2000) and
- Community problem solving in Papua New Guinea (Jones 2001)
- Planning for airport expansion in Vienna (Prader 2005 – see review below)

Lovenheim (1996) describes other advantages of mediation compared with litigation, and also its disadvantages. Advantages include:

- *Speed* - mediation can typically be arranged and concluded faster than legal process.
- *Confidentiality* - mediation is a private process. With trust on all sides and strong ground rules, content can stay inside the meetings and not be made public.
- *Low cost* - in general, legal costs are very high and mediation costs are not so high.
- *Fairness and Equity* - Precedent does not necessarily feature in mediation, as it often does in statutory law. The parties decide their own solutions based on their own decisions about fairness and equity.
- *Flexibility* - In a mediation it is possible to raise any issues that a party might feel are important. In litigation or other processes, this may not be true and rules may disallow the 'entry' of some information.
- *Success* - In non-voluntary processes, some parties are often angry, hurt, or upset. One aim of mitigation is to avoid this distress and to develop mutual success.
- *Stress* - Mediation can be stressful. But stress levels and anxiety often are low compared with the stress of court or arbitration procedures, the financial costs and the publicity that may be involved.

Disadvantages can include:

- *Imbalance of Power* - Different aspects of power are important to address. One party may have more power than another through money, intellectual knowledge or ability, people skills, confidence, etc. This can be an important consideration and mediation aims to balance different types of power in some way.

- *Revealing Secrets or Private Knowledge* - Sometimes a party may feel they have to reveal something they would rather keep secret - especially if they wish to be seen to be being 'cooperative.' This may threaten a settlement if a party feels they revealed too much.
- *No Enforcement* - A mediator cannot force a settlement or ensure compliance. That depends on good faith and the monitoring of commitments that are agreed during the mediation. This is often less of a problem in mediation than other processes but is an important factor to consider.

Mediation in Planning

Mediation is successfully used in many, different settings, for example, commercial, compulsory purchase, employment and family law. It has been defined as *"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"* (Scottish Executive, 2009).

The key feature of mediation is that it involves a third party (a mediator), but the power lies with the participants to resolve the issues at hand. All matters discussed within a mediation session are confidential unless all parties agree otherwise. It has been advocated for use in British town planning since at least 1996 and has been given strong recommendations from two key government reports - see Table Two below. Despite these recommendations, the planning system has not yet adopted it.

Whilst mediation has occasionally been used in planning, it is not a mainstream route to resolve disputes and the process is not embedded into formal planning procedures. Chris Shepley recently described it as having a "somewhat unstructured basis" (Shepley, 2009).

Mediation can be useful at different stages in the planning process, for example in development planning, development management, enforcement and s106 discussions.

1996	Chris Shepley, then Chief Planning Inspector, gave a paper at the RTPI National Conference advocating the use of mediation in planning.
2000	<i>"Mediation in the Planning System"</i> published by the Department of Transport and the Regions May 2000 (Welbank <i>et al</i> , 2000)
2002	<i>"Further Research into Mediation in the Planning System"</i> published by the Office of the Deputy Prime Minister (Welbank <i>et al</i> , 2002)
2006	Barker Review of Land Use Planning Recommendation 25: DCLG should establish a planning mediation service to act as an alternative dispute resolution mechanism within the planning system.
2008	Killian-Pretty Review - Planning applications: A faster and more responsive system <i>Recommendation 12</i> : the greater use of alternative dispute resolution approaches throughout the process and proposes further study into the potential benefits of formal mediation as an alternative to appeal or to resolve issues within an appeal.
2009	Scottish Executive and Core Solutions Group produced the <i>Guide to Mediation in Planning</i>

Table Two. Key milestones in the development of mediation in planning

Previous Research in the UK

Two major studies have been undertaken on mediation in planning in England and Wales. The first was the *Mediation in Planning* study (Welbank *et al*, 2000), intended specifically to explore the use of mediation to speed up decision-making and reduce the number of disputes. During this study, 48 mediations were observed and all participants interviewed. All the cases related to development control, mainly planning application refusals, but some enforcement and CPO cases were also considered. 54% were householder applications.

The study team found that after mediation, three-quarters of the cases did not go to appeal; some of those submitted revised proposals, some did not proceed with the cases. There was a high level of participant satisfaction from all parties and the process was welcomed whatever the outcome. They also found that in some cases, pre-application discussions and communication during the determination process might have avoided a refusal and they made recommendations about the need for clear advice before applications are submitted.

The Office of the Deputy Prime Minister (ODPM) published a second study two years later (Welbank *et al*, 2002) which was also positive. The study team focused on the costs, benefits and practicalities of introducing mediation into the development control system, and also considered the wider use of mediation beyond planning applications as recommended in the first report. They set up workshops and interviews with key contacts.

Beverley Hughes, then Planning Minister, suggested that mediation might have a wider role to play in planning disputes: *"I would like to see further investigation of the use of mediation at other stages in the planning system, for instance, at development plan stage or in resolving particular issues in cases going to inquiry. Further consideration is also needed to assess how mediation might be integrated into the existing planning system."*

This second study team found that there were significant savings to all parties as compared with the appeals process, estimating that the mediation route cost 11% of the appeal route. The time savings brought about by mediation also released planners' time to deal with other cases. Appeals were avoided in 73% of mediations. The study team was also asked to:

- examine how mediation might promote social inclusion and greater participation
- consider changes to the statutory planning framework, and
- evaluate the potential for a National Mediation Service.
-

In March 2009 the Scottish Executive published their *Guide to the Use of Mediation in the Planning System in Scotland* (Scottish Executive, 2009). It was designed as a practical resource aimed at planning authorities, developers and their advisors, other agencies and the public. It put forward the view that mediation should be complementary to current procedures, not an extra layer.

Whilst being very positive about mediation, the report also listed a wide range of potential uses beyond those explored by the two government-sponsored reports, for example flood management, transport

schemes, national parks and good neighbour agreements.

CHANGES TO THE PLANNING SYSTEM AND ITS EFFECT ON APPEALS

There have been significant changes to the planning system since the two government-sponsored studies were carried out. The Planning and Compulsory Purchase Act 2004 brought in Regional Spatial Strategies, Local Development Documents, including Statements of Community Involvement, and Supplementary Planning Documents. The Act also increased the power of local authorities for Compulsory Purchase and restricted the scope of objections.

Four years later the Planning Act 2008 introduced changes to improve the efficiency and service of the appeals process to the customer. A related circular (3/09) allows the award of costs (to or against the appellant or LPA) for all types of appeal (including written representations). Key changes overall include:

- increased clarity on appeal documents
- emphasis on staged deadlines
- earlier submission of statements of common ground
- the Inspectorate to decide the method of appeal, and
- a streamlined system for householder planning appeal.

The emphasis on frontloading in the plan-led system (whereby the Local Planning Authority is required to fully involve the community in the evolution of the plan) may provide the impetus needed for mediation to find a place in the development planning process.

The cost of appeal and the potentially greater risk of costs being awarded give added impetus to the choice to engage in mediation. In particular, where insufficient effort has been made to discuss matters before and during the application process, this could lead to an award of costs¹⁷ which potentially makes the appeal route less attractive.

ADVANTAGES OF MEDIATION IN THE PLANNING SYSTEM

In addition to the discussion above on advantages and disadvantages of mediation in a general sense, there are particular advantages and disadvantages in the planning system. The main advantages are speed, cost saving and greater understanding. Many mediation sessions produce a result on the day. Swifter decision-making gives certainty to developers and enables investment to flow more quickly into the economy. Mediation has the potential to reduce expenses both to the developer and to the public purse. Parmiter (2008) writes that many housing applications are caught up in excessively lengthy. He points out the consequence of the delay is that housing targets will not be met. Section 106 agreements are particularly prone to delay.

There is also the potential for all parties to reach a mutually agreeable outcome, rather than the 'win – lose' situation in an appeal. Sturrock (2009) endorsed the values of mediation to break impasses and

¹⁷ See para B3 Circular 3/09 Costs Awards in Appeals and Other Planning Procedures

blockages, give people their "day in court", help others to save face, address competing interests, engage key stakeholders and (re)build trust. The process gives the parties an appreciation of the realities of their own and the other parties' positions. The ability to retain control over the terms of any agreement is an important factor for participants in the decision to opt for mediation.

There were benefits in better communication between aspiring developers, planning authorities and interested parties. By getting a clearer understanding of the different viewpoints, the parties can also work together on a creative solution to an issue in a way which could not happen in conventional appeal processes of inquiries, hearing and written representations. The end result can be a more acceptable development.

The nature of the cases, the authority of the people involved and the requirements for further consultation may mean that the mediation itself may not result in a solution on the day. However, in most of the cases examined there was significant progress towards a solution, which made it worthwhile. Both the studies concluded that the participants achieved a high degree of satisfaction (Welbank *et al*, 2000; 2002).

Grossman (2009) also emphasised the benefits to people in the community who may feel that their views have been taken into account. Money could also be saved by local authorities by not fighting unnecessary appeals and or by not dealing with repeat applications.

Ricketts and Shattock (2007) spelled out the benefits of mediation over planning appeals. In an appeal, the decision is out of the LPA's hands and open to new debate. The process is quasi-judicial and relatively slow. It can be adversarial, reduce opportunities for constructive dialogue and there is a danger of an "undesirable outcome being foisted on the local community." Parmiter (2008) points out another disincentive to appeals is that the parties cannot negotiate through the inspector.

Similarly, Grossman (2009) described the disadvantages of destructive debate whereby "participants express unyielding commitment to a point of view or approach, and listen only to give a rebuttal of the other side's information and to trip up the logic in their arguments."

Additionally, Sir Henry Brooke (Brooke, 2008) claimed 80% success rate in the planning mediations which he has undertaken. With case loads likely to increase (Parmiter and Phillips, 2008), the cost to the public purse needs to be reduced.

DISADVANTAGES OF MEDIATION

Whilst mediations can be preferable to an appeal in many instances, the studies showed that local authority planners, in particular, had reservations. They had concerns about the resources required and the consequent delay to statutory processes. Some saw it as an extra layer of decision-making. For all their disadvantages, appeals have a certainty – i.e. a clear result, win or lose – that mediation cannot guarantee. Planners were worried that by going to mediation there was an expectation that the LPA would make concessions, particularly when there was little room for manoeuvre on policy issues.

Additionally, it appeared to give attention to the mediation participants over and above other applicants. Frequently mentioned concerns included the need for transparency, the importance of a democratic decision-making process, and the uncertainty some planners felt about how to consult third parties. Overall, the two main studies showed very mixed views from local authority planners.

Why has mediation not become a mainstream part of the planning process? Brooke (2008) points out that mediation is not part of the “culture” of planning appeals. Targets and timetables for planners and inspectors do not encourage mediation. Mediation may not produce a final outcome on the day, even though it may have narrowed the objections and made progress towards a solution. Brooke (2008) says this feels less satisfactory because there is a lack of finality.

TYPES OF CASES

Both Welbank studies found that householder applications and design issues were best suited to mediation, whereas mediation was less useful in relation to policy issues. Officers were concerned that they might set precedents when dealing with the application of policy to mediation cases. However, a refusal on policy grounds may not conflict with the objective of the policy itself.

The process for appeals on householder applications has now been streamlined which means that little time would be saved by going to mediation on this type of application. The 2000 study had found mediation to be particularly useful when the Planning Committee had overturned an officer’s recommendation. It served as a damage limitation exercise.

Brooke (2008) lists a number of instances where mediation might be appropriate, for example, to sort out a better design solution than that submitted in an application, to resolve third party objections to an unpopular development, to enforce conditions or to determine the content of an s106 agreement. Parmiter and Phillips (2008) point to the value of mediation in affordable housing and infrastructure cost negotiations.

CONFIDENTIALITY

Confidentiality is a “key ingredient” of mediation (Grossman, 2009). It allows full and frank discussion and disclosure of commercially sensitive information that would not be aired in other circumstances. The outcome of the mediation is made public in order for it to be approved and implemented. Confidentiality might be (or perceived to be) an issue when third parties are involved.

BEST TIMING

All the studies have discussed the best stage in the process for mediation to take place. Ideally, this is before views become entrenched. The 2000 *Mediation in Planning* study stated that there is good reason to employ mediation before a formal decision is made. As this study primarily considered planning applications, this would occur before the Planning Committee meets to make a decision on the

application. The application would then be deferred pending mediation and, if necessary, resubmitted (see Figure 1).

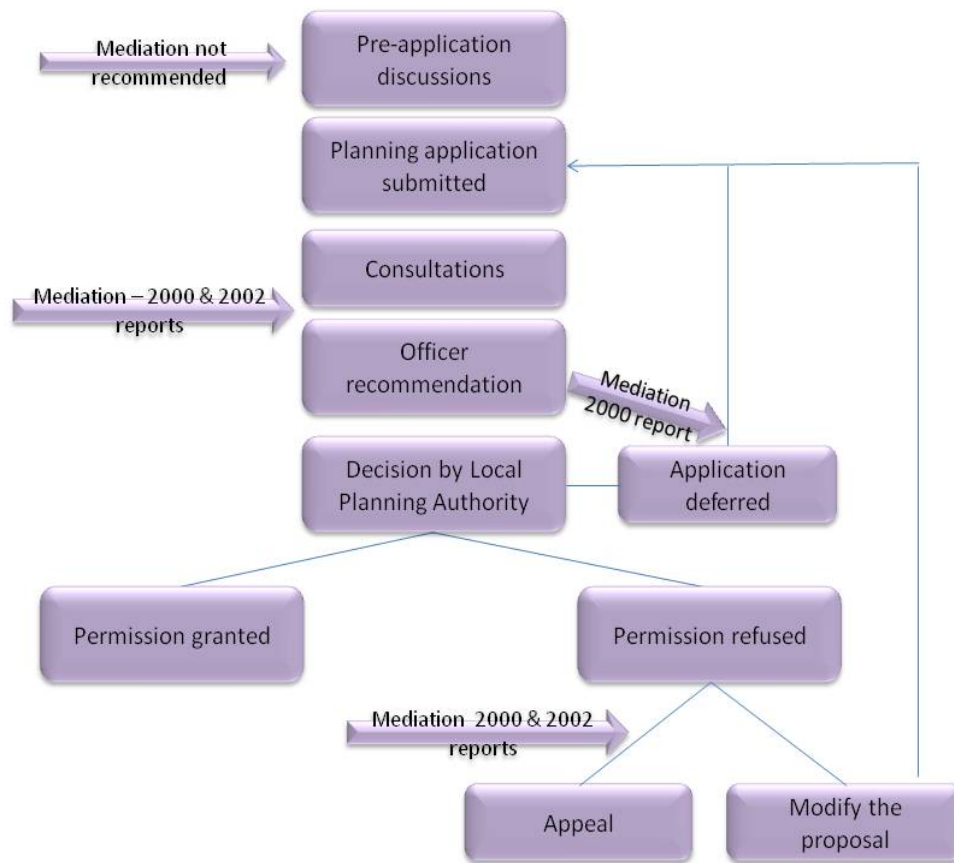


Figure 1 The Planning Application Process

The 2002 study looked at this issue in more detail. Mediation at the pre-application stage was considered but not normally recommended; clear advice and negotiation were considered to be more appropriate. With major or complex applications, independent facilitation of community discussion might potentially be beneficial. Mediation could take place after submission, but before a decision. However, there was not much support for mediation at that stage from the 2002 findings because the survey respondents considered that there was no formal dispute.

These two studies found that the best time for mediation was after the decision and prior to an appeal. They suggested that the offer to set up mediation should be made before the decision notice is issued. Brooke (2008) suggests that the best approach would be if the LPA issued a statement that they were 'minded to refuse' an application and then give the applicant 14 days to opt for mediation. It would be easier to amend a live application than to ask for a resubmission.

Different procedures will be required to determine whether a proposal is suitable for mediation depending on whether the case is with the LPA for a decision or whether an appeal has been lodged where responsibility rests with the PINS.

Brooke (2008) criticises the Department for Communities and Local Government for its ‘*thoroughly flaccid response*’ to the research and to Kate Barker’s recommendations. He also accuses them of making “*pious incantations.*”

The two Welbank studies focussed on planning applications. There is also a role for mediation in development planning, see Figure 2. PPS12 supports the use of mediation particularly if it leads to greater community involvement. The main opportunities are at the stages when representations have been made.

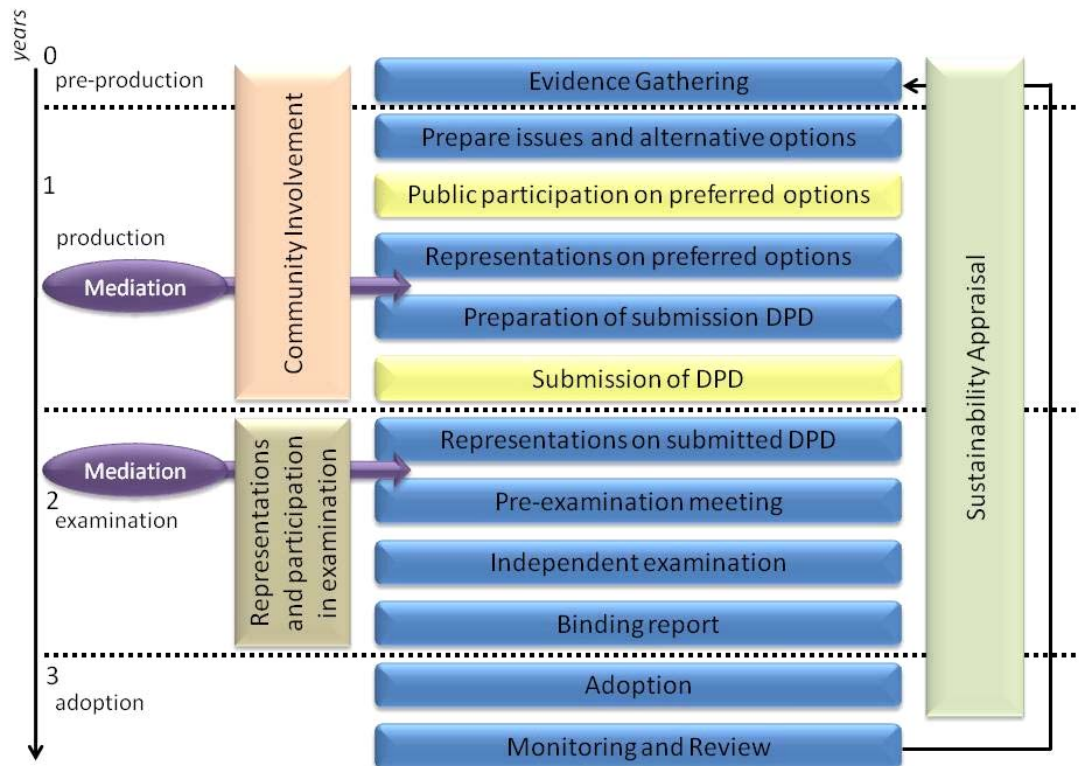


Figure 2 The Local Development Framework Process based on Pinsent Mason (2007) *Planning: Developer's LDP Toolkit*

COMMUNITY INVOLVEMENT

Planning Policy Statement 1 (CLG, 2005) says that communities should be able to put forward ideas and suggestions and to participate in developing options and proposals. They should be given the opportunity to participate actively rather than simply being invited to comment on worked-up proposals. Grossman (2009) states that, “this is the territory where mediation has an optimal part to play.” The Scottish Executive report (2009) strongly supports this view. They point to the opportunity to deal with the planning conflicts in a way that builds consensus and narrows differences rather than increasing confrontation.

In the 2002 study, individuals representing community interests gave unqualified support to mediation. However, the role of third parties is unclear. The 2002 study indicated that there was no barrier to third parties and that mediation can improve the role of other stakeholders. Interestingly, Ricketts and Shattock (2007) do not envisage third parties participating in the mediation unless they have an important technical input.

Ellis (2008) writes mainly about the Infrastructure Planning Commission (IPC), but he makes the general point, challenging the view that public involvement means delay, and is therefore a problem. He says there is a danger that time pressure will reduce the legitimacy of planning decisions. He is warning against reducing the involvement of stakeholders from the decision-making process.

Nick Gallent (2008) discusses the tensions in decision-making where planners have to defend unpopular proposals out of strategic necessity. In particular, he uses a case study of the proposals to expand Stevenage by 10,000 homes, with three local authorities facing the problems of strong local opposition. "Local processes were unable to find a way through the maze of issues that evolved over a seven-year period and so ultimately a solution was forced by the Secretary of State" in 2005. (302:1)

Gallent discusses how planning has moved from a land use planning approach to a spatial planning approach with more emphasis on the local community. However, he highlights the deficiencies in the planning system and the lack of consensus on how to resolve conflicts such as in Stevenage.

COSTS TO PARTICIPANTS

"Who pays for mediation?" has been a stumbling block to mediation's wider adoption. Mediation could result in a reduction in the number of appeals but Welbank *et al.* (2000) determined that neither applicant nor LPA would pay for mediations, whatever the perceived benefits. The second Welbank study specifically explored the costs to the LPA and showed a substantial saving, but this had not caused LPAs to take the view it will save them time in the long run.

In making a decision about mediation, both the LPA and the other parties must weigh up the relative costs of mediation and appeals and the chances of success at each. The costs of professional representation and officer time can be considerable with no certain outcome. Grossman (2009) points out that charging for mediations when there is no cost to lodge an appeal sends a signal that the government is not entirely convinced of the value of mediation. It is noted that the power to charge for an appeal was included in the Planning Act 2008 but there is no date set for the implementation of that provision. Parmiter and Phillips (2008) lament the fact that there are no incentives to encourage mediation in planning.

RESEARCH FROM OUTSIDE THE UK

AUSTRIA

One of the biggest planning mediation procedures achieved in Europe has been a five-year mediation to resolve conflicts around the Vienna International Airport. Dr. Thomas Prader, the initiator of the

process, published a report on the mediation in 2005 that began in March 2001 with final contracts and declaration signed 22 June 2005.

Mediation was suggested as a possible solution to a conflict that arose after a 1998 Vienna Airport “Master plan” proposed major infrastructure expansions, including construction of a third runway. The local community was hostile to a plan they saw as “a provocation instead of an offer of information.” The conflict received significant press coverage and local politicians became involved. The Master plan followed a decades-long struggle over noise pollution between residents and the airport and revived residents’ fears that noise pollution would increase.

Prader (2005) states that the mediation process was welcomed by all stakeholders. The Vienna Airport funded all procedural costs without imposing a time deadline. The process involved over 60 representatives from 50 different groups, and dealt with a wide range of disparate issues, including:

- The environmental impact of airport expansion, in part addressed to speed up the future Environmental Impact Assessment process
- Health and quality of life of local residents impacted by noise pollution
- Economic effects of increasing air traffic
- The effect of airport expansion on local farmers, and
- Possible limits on the future growth of air traffic

Parties were generally satisfied with the results of the mediation. A balance was struck that (a) helped protect affected residents and limited future noise pollution to minimise the area of affected residents, while (b) supporting economic growth by allowing airport expansion. Mediation also allowed participants to set up a framework for future dispute resolution, the Dialogue Forum Vienna International Airport.

The Vienna mediation overcame many challenges involved in a complex, at times chaotic situation, with many diverse and conflicting interests. It has shown that “... even extremely controversial issues that generally do not lead to a win-win situation can finally be satisfactorily solved by means of a mediation procedure.”

UNITED STATES

In 1999, Lawrence Susskind and Sarah McKernan published a paper on the history of public dispute resolution in the United States, titled “The Evolution of Public Dispute Resolution.” They stated that third party dispute resolution, including mediation, has relatively rapidly gained legitimacy across many sectors in the US.

Towards the end of the 1970s, the public sector experimented with dispute resolution. By the mid-1980s, groups and individuals involved in public dispute resolution began to collaborate and share ideas, while demand for services was growing, and more mediation and consensus-building resources were published. The field of public dispute resolution and the demand for its services continued to expand during 1990s, and Susskind and McKernan (1999) predicted that the demand for public dispute resolution would intensify in the future.

Two key conclusions were that:

“Experience with public dispute resolution in the United States indicates that consensual approaches to handling conflict in the public sector can yield outcomes that are fairer, more efficient, wiser, and more stable than traditional methods, at least some of the time...,” and

“... Consensual approaches consistently seem to do better than conventional approaches in generating public confidence in government and empowering citizens to take greater responsibility for meeting the needs of all segments of society.”

NEW ZEALAND

In addition to its four-tier court system, New Zealand has a number of specialist courts, one of which is the Environment Court. In a paper given at the Indian Society of International Law, Marlene Oliver, Environment Commissioner at the NZ Environment Court, discussed Environment Court-annexed mediation and ADR.

Most of the Court’s work involves substantial matters that are of public interest. Mediation and ADR have become increasingly important aspects of the Court’s work especially in:

- Policy and planning
- Resource consents (permits), and
- Enforcement proceedings

Mediation and ADR are often managed by a specially trained Environment Commissioner and are used to encourage settlement, narrow and settle issues within disputes, and reduce complexity in advance of a hearing. “Success” is therefore not restricted to finding a complete solution but to supporting and simplifying later stages in the process and making court hearings more efficient. Grossman (2009) makes a similar point in respect of the UK planning system.

It is important to note that although the mediation itself has no decision-making authority the mediation process remains annexed to the Environment Court and occurs within the jurisdiction of the Resource Management Act (RMA) 1991.

The number of Commissioner-assisted mediations rose from six in 1993 to 544 in 2005-6, and 449 in 2006-7. Of the 2006-7 mediations, full agreement was reached in 40% of cases while a review in 2004 concluded that about 80% of mediations resulted in successful outcomes. As experience has grown, many less complex appeals “...are now being resolved expeditiously through the Court’s mediation service...” (Oliver 2007:17).

Oliver describes several illustrative cases; urban land subdivision, residential development, consents around a quarry and a power station, and redevelopment of an historic building. She describes the benefits of mediation as:

- Flexibility – “whilst adjudication through the more adversarial court hearing [remains] primary ...the opportunity to trial and develop ...alternative techniques is enabled by having sufficient flexibility within the empowering statute...” (RMA 1991).

- Ownership – including aspects of empowerment, sustainability of outcome and the ability to address matters that would not have been permissible in a hearing (cp Grossman 2009, Lovenheim 1996).
- Maintaining Relationships – including the opportunity to retain or rebuild trust where stakeholders are likely to meet again.
- Resource Efficiency – “Mediation is perceived as both a ‘low cost’ and ‘speedy’ form of dispute resolution – especially in comparison to litigation.”
- Accessibility – for example, less intimidating and more local geographically to the disputants’ case.
- Information, Shared Learning and Capacity Building – “... these benefits can have an enduring effect on how people approach resolving disputes in the future ... [and] can culminate in changes in behaviour – including institutional and governmental behaviour and practices, as well as individuals...”
- Confidentiality – information is not disclosed outside the mediation
- Governance/Trusteeship of the Public Interest – One aspect of having the process annexed to the Environment Court is that it secures legitimacy in terms of jurisprudence and the formal legal system while retaining the flexibility that mediation brings.
-

Oliver mentions two concerns:

1. Abuse of process – people using the process to delay or stall the RMA process, and
2. Protecting the public interest and achieving the purpose of the RMA – confidentiality means that there is no public guarantee that the parties have taken the public interest into consideration, where many disputes are of significant interest to the public. Safeguards include the fact that Commissioners are “...not operating in a law-free vacuum (but) under the statute’s jurisdiction,” and “...any agreement has to be endorsed by the Environment Court.” Judges will need to be satisfied that public interest needs have been met.

Oliver concludes that mediation and other forms of consensus-based decision-making are “...a cornerstone of sustainability”, and offers other remarks in support of sustainability agenda as it relates to planning, consent and enforcement.

OTHER AREAS OF THE LAW

The use of mediation is prevalent in many areas of the law. Both the Lord Chief Justice and the Master of the Rolls strongly advocate mediation in a range of cases, (Brooke, 2008). Public law is different from commercial law. Planning cases present complexities which are not present in contract or family law, where the goal is usually a settlement. In particular, planning disputes are frequently between the LPA and a developer or landowner. They hinge around what is acceptable on a site, not a dispute about a right. The other fundamental difference is that planning decisions are made in a political context, either by a committee of elected members, or by officers accountable to those committees. Furthermore, they frequently involve a number of third parties who may be directly or indirectly affected by the decision. That said, there are lessons which are transferable.

Alternative dispute resolution (ADR) is actively encouraged in civil court cases (Ricketts & Shattock, 2007). Once statements of case have been exchanged, the court *automatically* circulates a

questionnaire. One of the questions is whether the parties would like a one-month “stay” to explore settlement. This period can be extended by notifying the court. Therefore, mediation is embedded into their legal procedures.

The courts require the parties to use their “best endeavours” to resolve disputes by mediation. There is significant pressure to use mediation – the court can make a recommendation that mediation is considered and can warn parties of the adverse consequences if they unreasonably refuse to do so – these generally relate to costs. It cannot be a requirement as it might violate the European Convention of Human Rights. However, it appears to be the ‘default position.’

Courts have also criticised parties for not attempting mediation early in the dispute and “for allowing the ‘wheels of litigation’ to turn on and for heavy costs to mount” (Ricketts & Shattock, 2007). Recent case law shows that a party may be penalised in the award of costs if it has unreasonably refused to mediate, even if it is later successful in any litigation.

In certain employment tribunals, an officer of the court will routinely go through the cases and refer to mediation those which are appropriate, having consulted the parties. Litigants have to opt out, rather than opt in.

The Lands Tribunal advocates mediation for compulsory purchase cases. It is commonplace to have a “stay” whilst mediation takes place. Mediation may be used more frequently now that there is less scope to object.

Brady (2010) refers to the endorsement of mediation as an important element in the legal process and access to justice by the Jackson Review of Civil Litigation Costs 2009 which advised that mediation “should have a significantly greater role” in the civil justice system. She points out that the Review identified that some judges and lawyers still need to be persuaded to recognise the merits of mediation and to encourage its use, recommending that a single authoritative handbook about ADR in the civil justice system should be produced and updated annually. She also notes that the Review warned that the mediation process can be expensive and that mediators need to have expertise in the relevant field of practice. All these issues have potential resonance for mediation in planning.

Other professions have embraced the use of mediation. The RICS has recently established a Planning and Environmental Mediation Service and publishes a list of Accredited Mediators. Other professional bodies produce excellent guidance which could, with permission and adaptation, be used for planning cases. There is no overall regulation of mediator training.

GOOD PRACTICE

Much of the literature identifies good practice. If the use of mediation is to expand, this will prove to be very useful. Whilst all cases are different, many of the same principles apply. Grossman (2009) identifies some key elements of mediation. A typical structure has five phases - Preparation including pre-meetings, Opening, Exploration, Bargaining, Conclusion (including recording the outcome).

The choice of mediator is best done independently on a consensual basis, so that the parties do not feel that somebody has been imposed. The mediator must be, and seen to be, independent. All parties should be invited to any pre-meetings.

Lucie Laurian (2009) discusses the importance of trust in mediation "The use of neutral mediators can mitigate trust and facilitate open and effective communication. When participants trust each other (even if they hold different values or goals) and trust the fairness of the process, they are more likely to communicate actively, listen empathetically, and work towards consensual solutions."

She concludes, *inter alia*, that "Empirical research is needed to describe in more depth how trust and distrust actually emerge and play out in planning practice, affecting planning processes and outcomes. Case studies should focus on the relations between trust, risk and power and explain how they play out in planning practice ... and consider the role of trust in various planning processes ..." This sits very well with the current study.

The mediator should have a familiarity with the planning system, but should not use jargon or technical terms. It must be made clear at the outset that the mediator is not an inspector and cannot make a decision. Occasionally, two mediators have worked together to provide a momentum with the parties (Grossman, 2009)

A neutral venue is preferred with at least three rooms (one plenary and two break-outs). It should not be formal and there should be facilities for drinks, food and toilets.

It is very important to have the right people in the room (Shepley, 2009). The 2002 study found that the experience, status and authority of the parties had a strong bearing on the outcome. In addition, all the necessary people e.g. highway engineers, must be present. If possible, officers with appropriate delegated powers should be there so that a decision can be agreed at the time.

The outcome may be a complete agreement, an agreement on some of the issues, a narrowing of the issues or a shared understanding of each other's position. These are usually captured in a plan of action to arrive at a solution after the event.

A written agreement should be drawn up which succinctly captures the outcome and signed by all parties at the end of the mediation event. If there has not been a complete solution to all the issues, the agreement can identify matters which will form a Statement of Common Ground and which matters remain to be resolved at an appeal or via a revised application potentially saving time at a later inquiry (Ricketts & Shattock, 2007). In the case of a planning application, it may set out the matters to be covered in a s106 agreement.

RECOMMENDATIONS FROM THE LITERATURE

In order to improve communications, the 2000 study recommended the production of a Best Practice Guide. The 2002 study recommended a one-stop shop for applicants, pre-application discussions, a

nominated case officer and guidance to be sent out with application forms. Some of these points have been taken on board by LPAs and the Planning Portal addresses many of these issues.

To encourage more people to take up mediation, Ricketts and Shattock (2007) recommended that planning appeal forms should include a question asking whether mediation has been attempted and, if not, whether the parties would be willing to try.

The first report (Welbank *et al*, 2000) recommended the establishment of a National Planning Mediation Service (NPMS) operating on a voluntary basis. The 2002 report (Welbank, 2002) also recommended the establishment a NPMS as an independent unit within the Planning Inspectorate (PINS). To roll out the process they recommended an implementation programme to be set up in two regions. They also considered that incentives would be needed to encourage participation in mediation events. In his recent paper, Shepley (2009) stresses the importance of raising awareness of the benefits of mediation. Sir Henry Brooke (2008) also points out the need for more publicity for mediation to gain wider acceptance. In particular, a high profile case would be beneficial.

Brooke (2008) advocates a free planning mediation service and points to precedents in the small claims mediation service and ACAS. However, he notes that it would involve significant costs which are unrealistic. Consequently, he says that mediation will have to be funded by applicants. He states that it would be most effective if mediation is the preferred route, unless there are special circumstances to indicate otherwise.

As far as wider participation in the planning process was concerned, it was recommended that the remit of the NPMS should be broadened to include stakeholder dialogue services. The aim was to use mediation skills to avoid disputes at the early stages of the discussion of plans or projects.

Shepley (2009) also recommends establishing a panel of mediators. He suggests involving the Homes and Communities Agency for major and difficult housing sites. He believes that the IPC should consider mediation, citing the Vienna airport case as a “considerable success in lowering the temperature”.

In order to increase capacity to expand the use of mediation, there is a need for training for more mediators. The Civil Mediation Council and the Centre for Effective Dispute Resolution (CEDR) both provide their own training. In Scotland, there is the Scottish Mediation Register, which has a planning and environment section. The RICS has Accredited Provider status from the Civil Mediation Council.

Importantly, there should be CPD provision for planners and inspectors and it should form part of the curriculum in Planning Schools. (Shepley, 2009)

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APPENDIX B

FOLLOW-UP SURVEY

NO:	ISSUE	RESPONSE
1	Major urban extension - S106	Issue resolved by ATLAS
2	Enforcement case	Ombudsman report received which brought the dispute to a close
3	Enforcement case - use of site as an agricultural/ general contractor's base	2 nd case from the same LPA used in the project
4	AAP	Related planning application refused
5	Enforcement case – residential use of marina	Council decided to focus on developing policy
6	Major case	Options appraisal in progress
7	Minerals case	Nearing resolution following further work
8+9	2 enforcement cases	-
10	CPO	LPA opted to go straight to public inquiry
11	Major application	-
12	AAP	When eventually there was interest in exploring mediation there was insufficient time to include it in the project
13	Major application	Applicants opted to go straight to appeal
14	AAP	Insufficient time to include this case in the study
15	Major application	Issues at consultation stage on this allocated site related primarily to housing issues

NOTE: - no response received

APPENDIX C

EVALUATION OF CASE STUDIES

CASE A: AREA ACTION PLAN - RESIDENTIAL DEVELOPMENT

ISSUES

The landowner owned a site with potential for residential development and he was hoping to develop another site close by. The development of both the sites would bring other related community benefits. The Council had a draft policy stating that there should be a maximum 200 dwellings on both sites and he had objected. Additionally there was an issue about the use of an existing building which the Council wanted to restrict to B1(b) (research & development) and B2 (general industrial). The owners felt the B1(b) was overly restrictive.

SETTING

The rooms were not ideal. They were within Planning Department, people had to walk through the main planning offices to get to the meeting rooms. Everybody needed a Council pass to get back from the toilets. It felt like the Council's territory. Coffee and tea facilities were available.

INTRODUCTION

The mediator gave the introduction which included the confidential nature of the event, his neutral role, the housekeeping arrangements and the breakout rooms. He explained that the outcome would be a statement at the end which everybody would sign and which would be the public record.

PARTICIPANTS

For the residential development case, there were three Council officers present, the developer and his representative, the mediator and the evaluator. Snow prevented the Council's consultants from being there.

MEDIATION SESSION

The objector and the Council each explained the reasoning behind their points of view. They explored common ground – the will to see the whole area regenerated. The officer from the Housing Market Renewal Pathfinder was worried that a significant build of new housing would jeopardise the success of the HMR scheme which has been funded by a significant amount of central government money. This led to the Council wanting to be cautious and prescriptive in its policy. After some discussion, they realised that they could not justify the figure of 200 houses. Similarly, regarding the employment use, discussion revealed that the Council's reason for being so specific was precedent elsewhere in their area. When the participants talked about this particular case, they agreed a "swap". The officers agreed to delete the B2 (which was unlikely to happen) and to include B1(a) (offices). Different solutions were explored, including phasing of the residential development. All the participants started to work on the wording of a policy which would add clarity. Ideas were bounced around and there were many

iterations. There was key moment when both parties started annotating the draft plan, which demonstrated that they were working together.

THE ROLE OF THE MEDIATOR

Once he had set the ground rules and the tone of the event, the mediator's input was low-key, because the participants were managing the discussion themselves and exploring solutions. His role was to

- structure the discussion
- identify the key issues (on a flip chart so that they were visible to everybody)
- explore flexibility and room for manoeuvre
- seek clarification at certain points
- remind people about the time
- push on to an agreement when participants were flagging
- draft and refine the agreement and ensure clarity at the end of the day

REFLECTION ON THE PROCESS

The Mediation session presented an 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. The mediation exposed the fact that some of the arguments were based on supposition about what might happen. The breakout sessions were fairly short, but they enabled officers to discuss issues 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. They all suggested ways to deal with the problem of needing flexibility as well as certainty. Towards the end of the session one of the participants said to the mediator "we are now thinking that it would be a good idea..." the 'we' referred to all the parties. The mediator formulated the final version of the agreement and formally read it out. Once the wording of the agreement and the revised policy were agreed, an extract of the annotated plan was copied and attached, and the agreement was signed. The mediator said that the policies under discussion would have greater robustness having been through the mediation process. He was reinforcing the fact that the time spent on mediation would probably save time at a hearing.

OUTCOME

The residential policy changed so that the 200 maximum applied to only one of the residential sites. There was greater flexibility on the land to the east. The Use Classes allowed for the building were changed to delete B2 and include all B1, with some changes to the text. A very successful outcome.

WHAT MADE IT WORK?

- Experienced mediator.
- Willingness of all parties to be open and to consider alternatives.

Report on Mediation in Planning June 2010

- Being clear about the scope for negotiation
- Being clear about the alternative process ie hearing
- Having people with authority to make alterations
- Time

KEY POINTS FROM PARTICIPANTS

Mediator: "In the mediation, realism triumphed over principle on both sides." The disadvantage is that the parties did not have final authority to settle. Time taken 31 hours (the preparation and travel covers both mediations). Exceptional factors – very bad weather

LPA Planner: Very satisfied with the mediation process. Total time spent 12 hours.

Local Economic Development Officer: Gained a greater appreciation of planning issues and consideration. No disadvantages. Total time spent 3 hours (standing in for a colleague, so no preparation time).

Housing Market Renewal Officer: Overall, a positive process. It would have been better with a reflection/time out period to consider the implications on the wider area. Time taken – 8 hours.

Agent for the developers: Overall, positive view. It would have been improved by the attendance by others involved in earlier negotiations to provide consistency. Very satisfied. Time taken – 14 hours

CASE B: AREA ACTION PLAN: RETAIL DEVELOPMENT

ISSUES

The developers want to develop their site for retail use. The site comprises frontage land which is included in the district centre boundary in the draft AAP and the majority of the site which is outside the boundary and is identified for 'mixed use'. They want to develop the whole of the site for retail and are in negotiation with a major retailer. They said that the site is not viable except with a clear allocation for retail use. The developer has objected to the plan on the grounds of the procedures for the preparation of the AAP, the evidence base (they believe is out of date) and the treatment of their site. They were also worried that they would not have an opportunity to comment on the new results as the plan preparation process would be too far down the line. This could potentially undermine their case at the planning application stage.

SETTING

Same as case A

INTRODUCTION

Same as case A

PARTICIPANTS

For the retail development case, there were three Council officers present, the developer and his representative, two consultants acting for the Council, the mediator and the evaluator.

MEDIATION SESSION

The mediator listed all the objections on the flip chart. It was decided to deal with the last one first because it was the easiest. The consultant for the Council made a suggestion to slightly alter the wording which was agreed by the other side. This set a positive tone. "Enormously helpful" the developer said. The developer disclosed that they had been in discussion with a major retailer who has 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. They wanted the district centre boundary to be revised to include the whole of their site for the sake of certainty when they submitted a planning application. The local authority policy planner was concerned about the implications of such changes on the capacity of the area for more retail development, the need to revise traffic assessments, and, particularly, the need to reconsult the shopkeepers who would be likely to object as well. Fortunately, the new draft Planning Policy Statement 4: Planning for Sustainable Economic Development (PPS4) would mean that an allocation of 'employment generating uses' would include retail. This opened up the discussion for more creative form of words in a policy to cover the part of the site which was not within the district boundary.

THE ROLE OF THE MEDIATOR

Same as case A. Additionally, the mediator gave more structure to the sequence of discussions because of the number of, and interrelated nature of, the objections.

REFLECTION ON THE PROCESS

The requirement to consult other stakeholders on any significant change to policy meant that it was never 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 potential development partner, in a way that would be unlikely in a public inquiry/hearing. The possibility of attracting significant investment in the centre was of interest to the planners and there appeared to be more collaboration when this information came out. The planners were keen to facilitate retail development on the site and were helped by the new PPS4. They were unwilling to change the district centre boundary because they thought it would prompt objections from shopkeepers who were currently struggling in the rest of the centre. This would also cause delays

to the plan making process. A compromise of a positive policy and supporting text for the site was as far as they were prepared to go. The consultant acting for the Council seemed unwilling to concede much ground on principle.

Relationships improved to the extent that the developer was prepared to let the Council redraft and then consult them on it. (The bad weather and train times deterred people from finalising the words there and then.) By the end there was lots of positive language – Council consultants “we will leave the door ajar...” At one point, the mediator said “you seem to be saying the same things”. The developer said he would rather deal directly with the Council than leave it to an inspector.

OUTCOME

The Council agreed to change 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 when available. When the new supporting text has been agreed, the developer will withdraw the appropriate sections of their objections.

WHAT MADE IT WORK?

As above in case A.

KEY POINTS FROM PARTICIPANTS

Mediator: Much was achieved. Both sides seemed eager to conclude quickly (perhaps because of the weather?). Time taken 28 hours

LPA Planner: Overall, a positive experience. One huge advantage of the process was the confidential nature of the talks. A slightly longer reflection period might be required when developing complex policies for plans which last many years. I felt this session was very useful. Time taken: 12 hours.

Housing Marker Renewal Officer: As case A. One form submitted for both cases.

Consultant A acting for the Council: The process was hindered by the lack of a senior manager figure from the Council’s team. Overcame sticking points and improved relationships. Time taken 2 hours

Consultant B acting for the Council: The session confirmed the robustness of the evidence base but would have been better at the beginning or midway through the process. The use of mediation would help progress discussion between planners and developers and help speed up progression of major applications. Confidentiality is the key to achieving the openness required to facilitate frank discussion and agreement. Time taken 18 hours

Developer: It was a positive, time and money-saving.

Developer's agent: Significant funds invested in the site. Confidentiality enabled participants to “lay cards on the table”. Mediation should have been used to inform the AAP, rather than react to it. The mediation worked very smoothly. Time taken: 8 hours

CASE C: ENFORCEMENT - ENVIRONMENT AND AGRICULTURAL LAND USE

SETTING

Four rooms were allocated for use in the offices of a large law firm. They were situated at the end of a quiet corridor with easy access to lavatories and kitchen, and appropriate levels of privacy between rooms. Two rooms were used by two of the parties involved (local authority, farmer) with a third room between them preventing noise or the chance of being overheard. The mediator and evaluator used a small room from time to time and the fourth, bigger room when other work was necessary or lunch was served. The setting felt neutral and proved highly advantageous given the extreme weather and unexpected need to accommodate two young children. Snow meant that most participants were a little late and that the mediator himself was unable to reach the office until after the other participants had arrived. Moreover, the farmer's children (aged about 6 and 9) were unable to get to school, so the entire family used one of the rooms. Of all the settings I have used or seen used in mediation involving so many people, I would rate this as in the top 10% for space, flexibility and ambience (professional but relaxed). In addition, effective and courteous support from the law firm's office staff greatly helped the day's proceedings.

INTRODUCTION

The mediator introduced himself to all parties. He and the evaluator then met in one of the rooms to agree roles and discuss logistics. The mediation started fairly quickly thereafter, acknowledging that the day would be a little different than planned due to the presence of young children. The mediator clarified that the time by which he aimed to finish (mid-afternoon) was acceptable, and established that neither party wished to meet the other but that the mediator would move between rooms. Beyond that, and some decisions about refreshments and time, the structure and ground rules for the day were not immediately clear. However, everyone accepted the need for flexibility, given the weather and the fact that children were present.

PARTICIPANTS

The farmer had with him his wife, his two young boys, and a solicitor. His wife was able to read and write while the farmer apparently was not. The solicitor and the mediator knew each other and had worked together in the past. The local authority (LA) stakeholders included the Head of Development & Regeneration; the Enforcement Officer; two solicitors and the Director of Planning and Strategy, the mediator and the evaluator. Planning Aid sent apologies that they were unable to have a representative available on the day, although they were approached.

ISSUES

The landowner has essential agricultural needs from a small area of land (about 1.5 hectares) on which he keeps pigs. The LA wish compliance with an order to remove materials (including equipment, scrap, spoil and vehicles) from the land that are (a) not part of essential agricultural needs and (b) the subject of a May 2006 Enforcement Notice, non-compliance with which has led to the landowner's criminal convictions in June 2008 and May 2009.

MEDIATION SESSION

The mediator had visited the farmer and spent many hours preparing for the mediation on January 7th, including a short pre-mediation session to finalise arrangements and recap earlier issues and scope. On the day, after a weather-related delay, the mediation began around 0930. After introductions and establishing the things mentioned under Introduction above, the issues were explored in a series of exchanges between the parties through the mediator. A list of "essential agricultural needs" was developed with the farmer. The relevance and acceptability of the items on this list were explored with the LA and its legal team. Through the mediator, the LA and the farmer explained the reasoning behind their points of view. Towards noon some misunderstandings during this process about which the LA legal team requested clarification, suggested a process that might achieve clarity. There was a period of frustration that seemed to be due to three things:

- i) Uncertainty (especially among LA stakeholders) about the structure and the process of the day,
 - ii) The realisation by LA stakeholders that the farmer regarded almost all the materials mentioned in the Enforcement Notice (EN) as "essential agricultural needs," and by the farmer that the LA were going to insist that he comply with the EN and that the "essential" category needed to be much smaller.
 - iii) The feeling among some that the day was going to be a longer one than originally thought
- The reality of the situation was explored gently but clearly with the farmer (e.g. the legal consequences of not reaching a settlement here today) and after some time, the list of essential needs became smaller. As each party offered small concessions, progress became a little swifter and the mediator supported each party's understanding of the other. A Settlement Agreement was developed iteratively as clarity emerged about what the LA could authorise and what the farmer realistically required. This was signed by all parties along with the mediation agreement.

REFLECTION ON THE PROCESS

It was a most unusual day. Less experienced mediators may not have felt able to proceed. Some things that would not normally enter an evaluation need to be mentioned because they form a part of the context that needs to be understood.

The mediator's positive attitude, experience and "reading" of the situation enabled people to proceed with confidence under his guidance. A number of additional things supported his skills and good judgement.

- 1) The fact that a known colleague with humanity and skill was able to act as the farmer's solicitor. If this person had not been there, I do not feel that the outcome could have been achieved.
- 2) The ability of the evaluator to serve as an "assistant" who was also experienced with mediation and young children, but who could work as an evaluator unobtrusively in the background.
- 3) The professionalism, commitment and flexibility of the local authority staff and their legal team – all of whom brought the highest level of skills and experience.
- 4) The knowledge that the enforcement officer had of the family and the overall context over a long period. He brought care and concern as well as his significant professional expertise.
- 5) The very high quality of the office space, the law firm's staff and the professional support they provided throughout a long day.
- 6) The extraordinary levels of patience, commitment and dignity that the family maintained throughout the day. The two children deserved a medal. They were fabulous and their parents did a wonderful job of attending to proceedings, supporting their children, and trusting others with childcare.
- 7) The significant investment of time, effort and preparation the mediator gave to the process before January 7th.

OUTCOME

The key issues from participants were:

1. Process
2. Immediate Product (Settlement Agreement)
3. Medium term and longer term compliance

WHAT MADE IT WORK?

- The mediator's skills plus points (1) to (7) above (under 'Reflection on the process').
- The fact that the alternative for the farmer was a likely suspended sentence.
- The farmer's wife clarifying the need for the farmer that he had to be realistic and make concessions
- Getting close to the end of the day and people not wishing to return or restart the process
- Having everyone who had legitimacy and authority to make decisions present, committed and fully engaged throughout a long day.

KEY POINTS FROM THE PARTICIPANTS

Mediator: Time taken was 14 hours pre-mediation, 10 hours mediation, ½ hr post-mediation. The process could have worked better if one of the LPA lawyers had a better understanding of the process and why this type of mediation differs from a commercial one.

LPA Planner: Mediation useful in moving the case on, would recommend that it becomes part of mainstream planning process. Serious reservations about costs of mediation were the LPA paying – this would discourage smaller authorities. Time taken was 6 hours pre-mediation, 10 hours mediation, 3 hr post-mediation.

LA representative: Prevents the need to return to court saving cost and officer time. Useful process assuming that the agreement remains firm and is implemented. Time taken was 3-4 hours pre-mediation, 10 hours mediation, 1 hr post-mediation.

LPA enforcement officer: Process has given both sides the option to set agreed timescales and criteria but required a big investment of time. Time taken was 30 hours pre-mediation, 12 hours mediation, 5 hr post-mediation

LA solicitor (one of two solicitors present): Satisfied with this mediation process and would recommend that it becomes part of mainstream planning process. Time taken was 8 hours pre-mediation, 10 hours mediation, 5 hr post-mediation. “

CONCLUSION FROM THE CASE STUDIES

- All the case studies were different, but there were some common threads.
- The tone and atmosphere were entirely different from a formal hearing, inquiry or public meeting. This approach allowed the participants to work through the issues themselves.
- The three mediations produced very positive results for all participants. There was only one negative response from the participants.
- The role of the mediator is crucial to the success of the mediation. It is important to set the tone, explain the process and provide the structure.
- The format was not prescribed. In the first two cases, the professionals worked together once the air was cleared. In the third case, the mediator was the “go-between”, working in different rooms.
- Some issues are difficult to resolve but it is possible to reduce complexity, make some agreements and encourage a sense of optimism and progress which will give parties the will to succeed.
- A successful mediation demands significant preparation time, particularly by the mediator.
- Mediation input at the right time can turn round an acrimonious situation into one where there is constructive working and an agreed outcome.
- Confidentiality was a key ingredient. Some mediations would not have progressed without guarantees of confidentiality.
- Suggested improvements include
 - Using mediation techniques earlier in the process
 - Ensuring all the right people with legitimacy and power are in the room

APPENDIX C1

PREPARING THE GROUND FOR MEDIATION

A number of key issues and challenges emerge in initiating and preparing the ground for mediation particularly in complex schemes but which also have broad application.

Initiating mediation and the decision to engage in mediation or not

- The source of the suggestion to consider mediation can be important. A proposal made by a party to a dispute can be received with suspicion by another
- Where mediation is suggested by one party on a complex and sensitive scheme, the potential mediator(s) will need to carry out a comprehensive conflict assessment to identify:
 - Who has a stake in the conflict and potential mediation (or other related process)
 - What issues are important
 - Whether or not it makes sense to proceed given statutory, financial and other constraints
 - Under what circumstances the parties will agree to participate
- Mediation is a rigorous process requiring understanding of the constraints and opportunities. Participants need to prepare thoroughly not only for their engagement in mediation but also in their decision-making as to whether to participate in mediation or not
- Interest groups may have wider or contradictory objectives beyond the particular disputed issues (which mediators may need to challenge). The involvement of an interest group may be on the basis of a wider campaign regarding particular planning or design approaches, extending a local dispute into a dispute about principle
- Consideration needs to be given to how the cost of external intervention will be funded, particularly before the value of mediation and the input of the mediators can be fully assessed.

Process design

- The particular process adopted, whether it relates to improved consultation, communication, a facilitated dialogue, mediation or consensus-building needs to be individually designed. A “one size fits all” approach does not work. Mediation can be limited to a single intervention or, in relation to complex proposals, can involve ongoing involvement by mediators over the normal gestation period of large schemes. Whatever the extent of the mediator’s involvement, participants must be invited to engage in the design of the process even if it is only possible for the mediator(s) to give an outline of what the process might look like at the very early stages
- In a planning context specifically, processes will need to accommodate requirements for confidentiality and/or transparency. The design of the process needs to ensure that it does not inadvertently undermine the statutory system of checks and balances, requirements for transparency, safeguarding of rights of objection and rights to know or requirements for natural justice in relation to decision making. It is also important to ensure that all groups in the community have an adequate opportunity to influence outcomes, not just the most articulate or forceful.

Local Authority roles

- Local authorities which own land affected by the dispute, need to work hard to avoid conflicts of interest at member and officer level and to avoid even the appearance of special interest
- The prospects for mounting or engagement with complex schemes by local authorities can be affected by internal political relationships, arrangements for accountability, relationships with communities more widely and the insights, skills and knowledge of the actors
- It is important to have and maintain a clear evidenced vision of the need or requirement to be met by complex schemes for comparison with the opportunities for development available so that both needs are met as far as possible or the thresholds of acceptability are understood. The needs of different stakeholders rarely meet exactly and will change over time as constraints and opportunities change. Effective involvement, communication and consultation with all legitimate stakeholders is a key ingredient in the acceptability of a scheme.

Mediators

- Early engagement of mediators can be very helpful before positions harden but it is not axiomatic that they have a less effective role later. Sometimes events need to have progressed sufficiently for the sharpness of difference to have become apparent or for parties to have explored the implications of their differences more deeply in order to make progress
- Mediators need to be alert to not being made “part of the problem” by participants. Mediators need to maintain an appropriate balance between neutrality and private challenge, be aware of the speed with which they may need to respond to rapid changes in circumstances, whilst still retaining objectivity, optimism and constructive persistence with the parties
- Time spent by mediators talking to the parties, managing expectations, explaining and negotiating ground rules and building trust and confidence is essential and rarely wasted.
- It helps if the mediators speak the technical language of the participants and have an appropriate background / understanding of their issues but are adept at simplifying and demystifying the language, especially for lay participants
- In complex schemes involving many parties, the mediation can benefit from having two mediators combining different skills and areas of professional experience.

APPENDIX D

EXTRACTS FROM REPORTS OF COMPLETED MEDIATIONS

A. Planning related mediations.

A.1 MEDIATED CONSULTATION PROCESS RELATING TO THE PREPARATION OF LAND ALLOCATION DEVELOPMENT PLAN DOCUMENT INVOLVING A PRIMARY SCHOOL¹⁸

Approach

The mediated consultation process was structured around the key issues identified and divided into two consecutive phases. The first phase comprised a round of eight mediated discussions, each tackling one of the key issues. The discussions were held in private session during July 2006 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 discussions lasted up to three hours, during which time the mediator held a short dialogue with each representative to clarify their existing position followed by a mediated discussion between all of the representatives. The purpose of the sessions was to explore the range of views surrounding the contentious issues, establish any common ground between the parties and seek to find a positive way forward for all. The appointed mediator coordinated the discussions and actively 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 the content 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, held in late July and early August 2006. The meetings were neutrally chaired by the mediator and divided into short sessions, each focusing on one of the key issues. During the public meetings, the mediator briefly reported the outcomes of the mediated discussions before opening up the floor. The purpose of the meetings was to allow those who did not take part in the mediated discussions the opportunity to present their views. The mediator directed the flow of discussion and endeavoured to give fair hearing to the full range of comments on each issue.

Neutrality

The success of the mediation process relies upon the ability of the mediator to remain impartial. Throughout the mediated consultation, the mediator did not act on behalf any party or advocate any particular standpoint, nor did he have any stake in the outcomes. It was essential that the mediator acted, and endeavoured to be seen to act, fairly and without bias at all times and towards all parties. For this reason, he avoided direct contact with any of the stakeholder group representatives, the public or the Council except at sessions of the mediated consultation process.

¹⁸ This case was offered to the "Mediation in Planning" project as an example of a completed mediation and has been used as 1 of our 2(3?) previously completed cases. This Annex summarises key parts of the report produced by the mediation service for the local planning authority and has been anonymised,

Effectiveness of the mediated consultation

The mediated consultation process was beneficial in drawing out specific areas of concern, identifying matters which required further consideration and enabling those involved to gain a greater understanding of the complex issues surrounding the allocation of a site for the new school. In particular, the mediated discussions were widely acknowledged to have provided a constructive environment for calm and reasoned dialogue between the stakeholders. The public meetings, whilst achieving their objective of allowing an open forum for comment, were criticised by some for permitting an unfair balance of opinion to be expressed. However, it should be recognised that from the outset a decision was taken not to make any attempt to control comment for or against either site, but to enable those who took a view to state it without restriction. It is always easier to achieve quality dialogue in small discussion groups but the public meetings were still an important element of the consultation because they encouraged the whole community to participate. The mediator found difficulty in persuading the stakeholders to engage in meaningful negotiation. Unfortunately this seemed inevitable whilst a choice of sites remained. Understandably, the parties were reluctant to compromise to any great extent because they were anxious not to undermine any supporting or opposing argument they presented. Once a site had been allocated, there might have been greater scope for negotiation, in which case mediation could have been beneficial. Whilst it cannot be disputed that there was a deep divide in opinion between certain factions of the [local] community, this strength of feeling was only expressed by a relatively small number of people who were - justifiably - very keen to emphasize their viewpoint. It appeared that a much larger number of residents took a view on their preferred site but elected to remain relatively silent. As a consequence, it should be acknowledged that the split in opinion of the vocal minority was not necessarily representative of the split in opinion of the wider community. However, what was clear was that for the vast majority, the priority was to achieve a high quality, fit for purpose primary school and to take full advantage of all the benefits that a new school could potentially bring to the village.

A.2 THIRD PARTY INTERVENTION ON A RESIDENTIAL DEVELOPMENT ON A BROWNFIELD SITE

Background

This case study focuses on mediation activities between four key stakeholder groups involved in the planning of a potential brownfield site in a medium-sized town: the parish council, community, developer and planning authority.

The area designated for re-development was land purchased by a developer from two factories. The sites run east-west and are flanked by a road to the south, and the canal and a surface water drain (The Channel) to the north. The channel, canal and walkways around them were the subject of a community development and environment project, which was being led by the local Pathfinder.

Identification of issues

An unprecedented 50 residents arrived for the parish discussions on the development. Neither of the local councilors could discuss much detail or give views because they were on the planning committee. The residents expressed dismay and frustration that they did not understand the process, felt that they had no voice, received no satisfactory answers from councillors they normally appreciated for their strong representative skills, nor could do anything to take their concerns forward either with their own representatives or anyone else. In short, people felt stuck, with nowhere to take their concerns.

Response

One of the Pathfinder tasks was to engage local people on matters of interest to them and involve them in shaping the delivery of services at neighbourhood level. Here were 40+ people desperate to comment on planning proposals and a development brief. The pathfinder representative (PR) thus offered to facilitate a meeting so that they could share their views and seek ways forward. In a 90-minute facilitated process key issues were identified and discussed in small groups. At the end of the meeting it was agreed that:

1. Three local people would represent the group
2. The PR was an acceptable and neutral, third party mediator
3. The proposed reporting and wider community engagement mechanisms were acceptable
4. The whole group would meet again after 6 weeks before the planning committee meeting was due to take place.

The first meeting with the developer began in an astonishingly adversarial way, given the pre-meeting agreement for respect and care. The developer (a senior manager) ignored the PR and adopted an aggressive tone with the residents, pointing his finger and saying "What you have to understand is ...". After an unhelpful exchange between the developer and a local businessman the meeting continued with an exploration of ground rules and how to talk in ways that would be helpful. The meeting ended with a review of positions and planning proposals and a commitment to have a second meeting to which relevant maps would be brought. The second meeting involved a new manager from the developer's side and a productive look at scaled maps and the development brief. The developer shared his views and financial/code constraints while residents asked what was possible by way of reduced density in a couple of locations, some issues of turning and car parking, reduced overlooking possibilities, and mini-roundabout locations.

The PR was somewhat discouraged by the informal view of the local Government Office that the process was "... far too grand..." and that local planning law and a process of objection and appeal should sort any problems and by the difficulty he had in meeting the local planners.

Between the second and the third meeting, the whole process was reframed to assist those who felt it was in unhelpful opposition to the normal planning process. For the developer it became clear that:

- a. This process amounted to a consultation exercise that would in any event have to take place for the re-submission of the planning application that they suspected would be requested. As a

result, they re-engaged in friendly and constructive ways, in exchange for the residents agreeing to continue to consult the whole street opposite the proposed development.

- b. It might be possible to continue to work with residents after the first site was developed, and make this fact known to the planning authority for whom local consultation was a key issue.

For the LPA it became clear that here was an attractive approach not only for this development but also, potentially, 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 resident group accepted the revised plan.

Outcomes

There were several important and innovative outcomes to this process which has been briefly described here.

1. The developer successfully submitted a revised plan to the LPA in response to successful mediation that lasted about 6 weeks.
2. Residents found a way forward, learning a lot about planning on the way and being able to influence and shape the changes to the plan, while understanding the developer's needs, publicly stating that they supported the development, and the developer.
3. The Pathfinder was able to resource one further successful planning mediation on a scheme which has since been completed and well received.
4. Significant capacity was built in warden, outreach worker and resident groups to develop skills in facilitation and dispute resolution.
5. The first site has now been developed and sales have started. The second site has been put on hold because of the recession.

To this, a satisfactory conclusion must be added two difficult issues that became strong learning points for the PR and for the residents.

1. One of the representative residents went to the local paper after the second mediation to provide an un-verified but still published story about how the developer was causing upset in the area. At the very moment when the mediation was proving successful and the reframing exercise was positive, one person achieved a moment of fame that nearly wrecked everything.
2. The PR failed to sufficiently involve the parish in the solution-finding exercise, missing an opportunity to develop and empower the parish in their area. This was the single biggest weakness in the process because it also left a feeling for them of being somehow not involved in an important event.

Key points from participants:

Chair of residents' group: Had been involved in negotiation and mediation in his business life as a trade's union rep and as a manager. Very pleased with the outcome and said that the mediator's help was invaluable in keeping them sane and focussed. The group had at times disagreed about the ways to achieve their ends, but overall he felt that the mediation process had worked well for them.

Comments from Planning Officer A: The Planning Department had produced a brief for the site. It was in two ownerships and the LPA sought a comprehensive scheme. There were many issues relating to this planning application. He felt the mediation process relating to the parking and access road helped “to some extent” and the points of view of some parties “did shift”. The question as to whether it saved time was difficult to answer because of the complexity of the case.

Comments from Planning Officer B: The officer had been involved more recently in the case. The developers wanted to get out of the commitment to carry out the off-site highway works. The Planning Department stood firm and pointed out that enforcement action might ensue.

B. NON PLANNING RELATED MEDIATIONS

B.1 Rights over land and compensation

Background

The Claimant owned land used as a restaurant and an associated car park. The claim was for the acquisition of rights over land (for a new supermarket development) and compensation under Section 237 of the Town and Country Planning Act 1990. A company and a town council were the Compensating Bodies. The parties disagreed on the principle and amount of compensation. The case was referred to the Lands Tribunal but the parties agreed that they would seek mediation as an alternative form of dispute resolution.

The issues

The claim was for around £125,000. The Compensating Bodies asserted that no compensation was due. Section 237 permits works to be carried out notwithstanding that it involves interference with an interest or right to which the section applies.

The central issue between the parties was a legal one: whether compensation should be assessed under section 7 or section 10 of the Compulsory Purchase Act 1965. The Claimant argued that section 7 applied. The company argued that section 10 applied. There was also an issue as to whether the effect of the section was to extinguish the rights affected.

The parties submitted expert valuation reports setting out the different valuation approaches that were affected by the legal issues referred to above. There was also some argument as to fact, and some argument as to valuation methodology.

Before the Mediation

The parties submitted various documents for consideration at the Mediation, including: position statements, legal submissions and expert valuation reports. The Mediator contacted each party to ensure the timely exchange of documents, to discuss the arrangements for the Mediation and to ask for brief oral opening statements to be made.

The Mediation

The Mediation took place in June 2009. The parties were in attendance with company representatives, solicitors and counsel. At the end of a full day's mediation a settlement was reached. The sum for compensation was £80,000 inclusive of costs.

Observations

The parties were at deadlock and without mediation the claim would have had to be heard by the Lands Tribunal. The legal arguments were numerous and difficult. It was clear to the Mediator, and to both parties, that the case would have taken several days to be heard in the Lands Tribunal. Both parties understood the benefits of settlement by mediation without further legal action.

The early stage of the Mediation was taken up by the parties exploring the perceived strength of the other party's case, in particular the difficult legal issues that arose. This phase took several hours but was essential to give the parties the information required and confidence to enter the bargaining phase.

The flexibility offered by the mediation process enabled a "break out" session for the expert valuers to seek agreement.

The parties eventually reached agreement on a figure for compensation. Both parties were satisfied with the mediation process and with the result.

B.2 Rent review

This case study relates to the effectiveness of a rent review notice on a lease of a 24,000 sq. ft. office building in central London. The landlord was a financial services company (which had previously occupied the premises) and the tenant was a major oil company. The lease had several years to run but the tenant had vacated, as it had amalgamated its operations into another building. The tenant had offered to surrender the lease to the landlord, but the landlord had declined. The tenant had been marketing the lease, without success, partially because there was a forthcoming rent review. The due date for the rent review approached. A surveyor representing the landlord telephoned the in-house surveyor for the tenant, and given that the rent passing was greater than the market value, it was agreed that there would be a "nil increase".

However, the market improved to such an extent that the market rental overtook the passing rent, and the landlord sought to implement a "late" review. This was allowed under the terms of the lease, but there had been negotiations between the landlord and the tenant regarding the landlord paying to accept a surrender of the lease - this was based on there being no rent review until the next scheduled one in 5 years. There was therefore the question of promissory estoppels ie could the landlord implement a late review when it had negotiated on the basis that there would not be another review until 5 years time?

Solicitors and counsel were consulted by both sides - at the first conference with counsel for the tenant, there were 7 people present (including the respective heads of the legal and property departments of the tenant company). The tenant commenced proceedings (even though it was advised that it only had a 45% chance of success) to obtain a declaration that the landlord was estopped from implementing a late review. It felt that it

was the “wronged” party and it won in the High Court. The landlord appealed, and the decision was reversed by the Court of Appeal. In all, more judges found for the tenant, but ultimately the landlord won.

The whole process took nearly 2 years. In current terms, the whole process swallowed about £1M in legal costs, as well as hundreds of person-hours of management time. It is likely that a 1 day mediation would have settled the dispute - it could have been organised within a month, and cost (in current terms) less than £30K.

APPENDIX E

LOCAL AUTHORITY CHIEF PLANNING OFFICER SURVEY: ANALYSIS OF RESPONSES

Background

An e-mail questionnaire was circulated to 395 authorities including National Parks and County Councils. 79 responses were received from individual local planning authorities (LPA), resulting in an overall response rate of 20%. The questionnaire sought to investigate whether authorities had given previous consideration to the use of mediation, whether they might consider its use in the future, and to ask planners to identify the (perceived) barriers or hurdles to the use of mediation in planning.

Copy of Questionnaire

Are you aware of the NPF/PINS Mediation in Planning project?

1a. If YES, how did you hear about it?

Have you ever considered using an independent mediator to help resolve any planning disputes?

2a. If YES please explain briefly.

Would you consider using mediation in the future?

3a. If NO, is this because of:

lack of guidance

cost

delay/impact on targets

other - please specify

4. I am/am not interested in hearing the interim conclusions of the project in March, and receiving a copy of the final report in June 2010

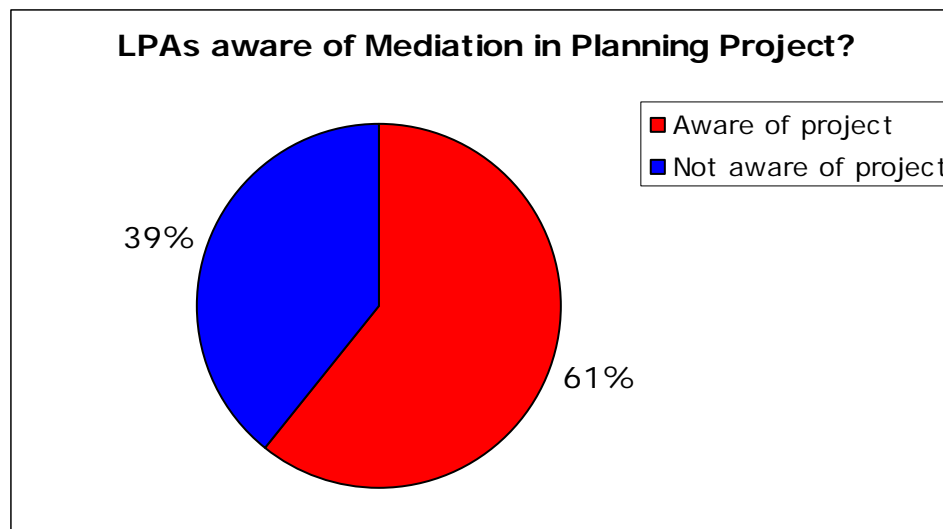
Results and findings

Question 1: Are you aware of the NPF/PINS Mediation in Planning project?

From the 79 LPA responses:

48 (61%) were aware of the project and

31 (39%) were not aware of the project.



Question 1a: If YES, how did you hear about it?

If multiple sources identified, the first one is taken for the purposes of the table below. Where respondent answered “unsure” but then gave a source, the source has been counted.

Source	Total LPAs
Planning Press*	13
Planning Officers Society (POS) *	7
Planning Inspectorate (PINS) *	7
Direct contact*	6
No Answer	5
Can't recall	4
National Planning Forum (NPF)	2
Planning Advisory Service (PAS)	2
From applicant interested in using mediation	1
Association of London Borough Planning Officers	1

*Planning Press includes Planning magazine, professional media, articles, press release in Planning

*POS includes request for case studies, Spatial Planning Committee, POS Update October 2009

*PINS includes newsletter, letter, talk by inspector, event/seminar

*Direct contact includes direct e-mails, offers to participate in pilot, conversations or phone calls with relevant individuals

Secondary sources: (primary sources noted and recorded above)

SWRTPI Housing Issues Conference January 2010

RTPI Development Management Network

Previous/similarly focused projects

Website (unclear which one)

Other relevant comments:

Only heard of RICS scheme

Not specifically aware of the project, but aware of concept

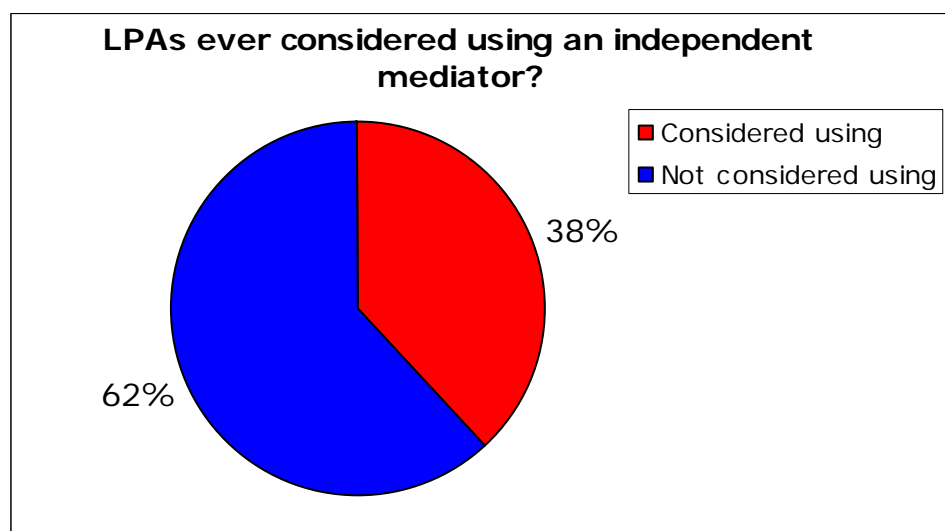
Other findings:

Of the 31 LPAs NOT aware of the project: 62.5% said that they had not ever considered using an independent mediator (Q2). Of the 48 LPAs aware of the project: 61% said that they had not ever considered using an independent mediator (Q2). Of the 31 LPAs NOT aware of the project: 74% said they would consider using mediation in the future (Q3 combined results for “possibly”, “yes” and “yes qualified” answers). Of the 48 LPAs aware of the project: 73% said they would consider using mediation in the future (Q3 combined results for “possibly”, “yes” and “yes qualified” answers). Prior knowledge of this project does not appear to have unduly influenced the responses regarding whether the use of independent mediation had been considered or would be considered in the future. This adds robustness to the findings.

Question 2: Have you ever considered using an independent mediator to help resolve any planning disputes?

From the 79 LPA responses:

30 (38%) had considered using an independent mediator and
49 (62%) had not considered using an independent mediator.



Question 2a: If YES, please explain briefly.

In reviewing the responses to this question, the most commonly occurring answer related to considering the use of an independent mediator for enforcement cases (6 occurrences). One example of actual use was given, but unfortunately no clear outcome was identified. One LPA indicated that they are currently in discussion with Mediation North Surrey to explore its use in planning enforcement cases. Despite being considered a potentially valuable use of mediation, it is perhaps notable that of the 2 responses received from enforcement officers, neither identified this as a suitable area. One enforcement officer noted that it can be difficult to engage with parties in an enforcement case in a positive way. After enforcement casework, both neighbour/developer disputes (3 occurrences) and negotiating s106 agreements (2 occurrences) received multiple mentions. The following list identifies other cases where respondents indicated they may consider using independent mediation:

Sites for Gypsies and Travellers because of local antipathy;

Sites promoted by Crown Estates or others with virtually no information and difficult to consult/progress/determine;
Public consultation events;
Affordable housing disputes;
High hedges complaints;
Large site infrastructure requirements/costs;
Progress major schemes; and
Ombudsman compensation (agree a reasonable level of compensation).

Some respondents provided actual examples of where mediation had been used in the past or has been considered. The outcomes were mixed and the situations themselves were also very varied. Examples ranged from council officers adopting a more collaborative rather than confrontation approach to negotiations on a general level, to negotiating details of S106 formula for infrastructure costs between two landowners on a large site. In both these cases the respondents unfortunately did not provide more detail about any positive (or negative) outcome although it was noted in the former case that strong resistance was experienced from planning and legal colleagues. As well as varying situations, other examples noted the various bodies/organisations that have experience in providing mediation services. For example, in a previous PINS pilot case, mediation was successfully utilised when an applicant had come to the conclusion that an LPA officer's advice was unreliable. Furthermore, ATLAS have been successfully brought in to achieve progress in the delivery of major development schemes and subsequently avoid the need for refusal/appeal. The use of local mediation services was noted in several responses including Portsmouth Mediation Service to help resolve high hedges complaints and Dorset Mediation to assist in boundary/neighbour disputes. These responses indicate that a variety of existing and external organisations have been utilised to positive effect. Considering a more 'internal' case study, a successful example was provided of a Council's Communications Officer (not a planner) being used to facilitate a mediation for a neighbour/developer dispute.

This series of examples raises an interesting question about how 'independent' a mediator should and could be in assisting with dispute resolution. In the majority of individual cases noted, the mediator has been external to a local authority. It is perhaps understandable that other bodies may have more refined mediation skills as opposed to the more traditional negotiation skills used in a planning department. Guidance should be clear on the respective roles of negotiation and mediation in any pre-decision process. Guidance should also make clear the potentially different levels of 'independence' for a mediator and when certain categories of mediator (e.g. internal or external) may be more suitable for certain casework types. Guidance should also be clear about the roles and expectations of others who are involved and affected, if not directly included, in the mediation process e.g. council legal colleagues and elected members.

It is of interest that there were not particularly strong trends or commonly occurring answers noted in these responses. This could suggest that the principle of mediation is considered to have multi-faceted application and that it is inherently accepted as an adaptable process. More disappointing is perhaps the lack of actual examples where positive outcomes were noted. This limited reaction may be less due to an actual dearth of positive outcomes and more that the questionnaire did not directly request this information. Respondents also noted particular cases where the use of an independent mediator had been considered but not progressed. Reasons for this can be summarised as:

No call in LDF work to date
Tend to rely on usual routes of PINS/Ombudsman
Decided mediation process was not expedient
Decided mediation was not appropriate to particular case

Funding ran out

Decided that the stage in which the application had progressed to meant that mediation should not be implemented

Other findings

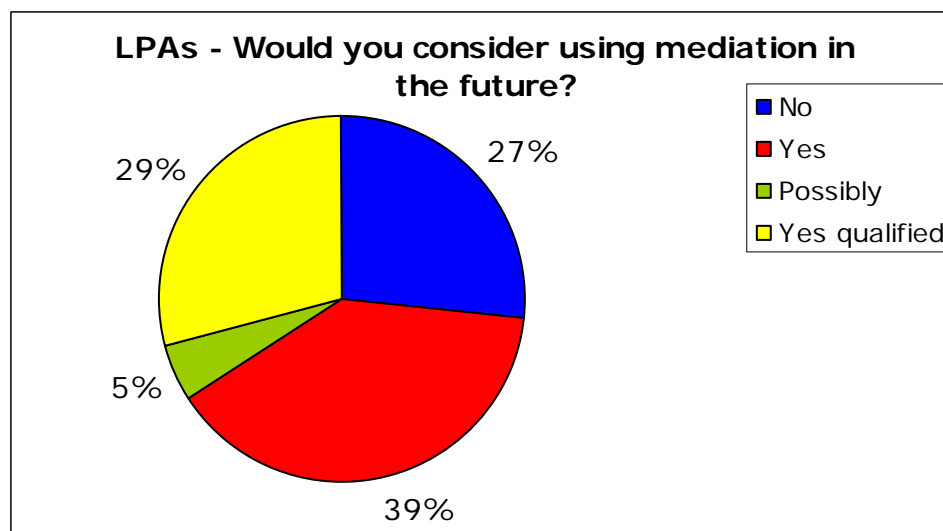
Of 49 LPAs who had not considered using an independent mediator: 69% said they would consider using an independent mediator in the future (possibly 4, yes 14, yes qualified 16). Of 30 LPAs who had considered using an independent mediator: 80% said they would consider using an independent mediator in the future (possibly 0, yes 17, yes qualified 7). The above figures suggest that where an authority has considered using mediation before, or has had some direct experience, they would be more likely to consider using mediation in the future. In addition, there was less 'qualifications' of the positive answer indicating a strong basis for considering mediation. However, even when an authority had not previously considered using mediation, the figures for consideration in the future (69%) were still significantly high albeit with a higher proportion of qualified 'yes' responses.

There were 6 authorities who had considered using mediation in the past ("yes" to question 2), but who would not do so in the future ("no" to question 3). Whilst the reasons varied, the most common was cost; this is perhaps not surprising given the current financial pressures facing local authorities. The affect on targets and delays was also a common feature in responses, with only 1 LPA stating that reason was a lack of guidance. 3 LPAs did not provide a reason for their answer. The "other" reasons given by authorities who had considered using mediation before but would not consider using it in the future have been included in the next section.

Question 3: Would you consider using mediation in the future?

From the 79 LPA responses:

	Total LPAs (79)	Percentage
Yes	31	39%
Yes qualified	23	29%
No	21	27%
Possibly	4	5%



The answers in respect of “yes qualified” will be reviewed after the answers for “no” have been assessed. However, from the initial review of all responses to question 3, very similar themes come through from both sets of answers.

3a: If NO, is this because:

Reason	Total responses
Cost	7
Delay/impacts on targets	5
Lack of guidance	4
Other	16

N.B. the figures in the Table do not equate with the number of authorities that answered “No” to Question 3 as each LPA could select up to 4 of the answers shown above, in any/various combinations.

For question 3a, the questionnaire provided the standard answers given in the table above for why mediation would not be considered in the future. From the analysis, cost can be seen as the most frequent of these standardised reasons. This is perhaps unsurprising given the current economic circumstances and the existing and forecast constraints on public sector funding and spending. Closer investigation of the “other” reasons given indicates considerable overlap with the categories of cost, delays/impacts on targets and lack of guidance. This suggests that respondents were using the “Other” category to provide more explanation of their standardised responses. The tables below therefore summarise the “other” comments in respect of the standard responses of ‘lack of guidance’ and ‘costs’.

Issue	“Other” Comments
	Lack of understanding of process.
	Lack of understanding of potential outcomes/benefits.
	Danger that ‘mediation’ could suggest that decision making process is far more malleable and can be negotiated. An Inspector is not expected to mediate when faced with conflict, but instead make a reasoned decision based development plan and any other relevant material considerations.

Lack of guidance	Cases are won or lost on technical arguments.
	Unclear how to mediate on planning issues; concern mediator may try and find the 'middle ground' rather than the right planning outcome; concern that mediation is not an opportunity for inappropriate schemes to be seen in a good light.
	Minerals and Waste appeals raise objections more usefully tested during the formal inquiry process.
	Unclear how mediation might resolve offenders' and Councils' opposing interests and concerns in enforcement cases. Difficult to engage with offenders in a positive way.
	Process too loaded towards appellant, who could walk away at any time.

It is acknowledged that many cross-cutting concerns have been categorised as relating to 'lack of guidance'. However, it is recommended that as a first step, clear guidance or advice would be produced that set out: a clear definition and description of mediation including its relationship to other forms of negotiation; an outline of expectations and possible outcomes; and a breakdown of the roles and responsibilities of each party. Within this it would be vital to address a key concern of how mediation could practicably be used in planning cases dealing with planning considerations. Whilst the purpose and applications of mediation in general appears to be understood, the ability of the process to deal with technical arguments and planning merits is not well understood or accepted given that there are established mechanisms for determining planning cases. In setting out the legitimacy of applying mediation to planning cases, any advice/guidance could usefully discuss certain cases or casework types where mediation may be more suitable or effective. It would be hoped that production of advice or guidance along the above lines would have the effect of negating or reducing the majority of the in-principle concerns.

Issue	"Other" Comment
Costs	Mediation is costly in itself to administer.
	Mediation would add another layer of debate, creating time and cost implications.
	Cost is for nothing if process fails and has to go to appeal anyway.
	Extra process within limited budgets.

In several cases, the comments made in the "other" section implicitly suggested financial implications of other concerns expressed, particularly in relation to delay/impact on targets, but also cost implications of duplicated processes (recourse to appeal) and possible training of staff. However, it is easy to consider mediation costs as purely additional to the standard processes when mediation is currently outside of, or not considered part of, usual practice. Even unsuccessful mediation could result in a statement of uncommon ground for any subsequent appeal, thus not adding costs to preparation of material for an Inquiry. It is recommended that any advice/guidance would include a section that covered indicative costs and timescales for a mediation procedure. A section of advice could also helpfully set out indicative cost savings, for example cost saved if appeal process avoided. Whilst such figures would necessarily be 'ball park', they would provide a more informed starting point in considering impacts and benefits of a mediation process.

In addition to “other” comments that have been encompassed into the standard answers above, it is perhaps possible to draw out 2 further themes/trends in the barriers identified by respondents to future use of mediation in planning. These barriers relate to necessity/suitability and outcomes.

Issue	“Other” Comment
Necessity / Suitability	There are other ways of achieving agreement e.g. PINS and Ombudsman.
	No need identified to date.
	A post decision peer review may well be as helpful.
	Very little scope for mediation as all parties had very definite views on development proposed.
	Delay in determination would be an issue where success and good service is monitored by simple speed of decision making.
	Size, scale, and nature of proposal would determine if mediation services were a good use of time or intervention in the planning process.
Outcome	No guarantee of success.
	Wasted effort unless decision binding on all parties.
	Refusing application is last resort therefore little to mediate on and unlikely to be suitable for mediation.
	Officers cannot guarantee outcomes as there is no guarantee that Planning Committee would agree.
	Members do not want others to lead in decision making process.
	Belief that it is not possible to find a solution acceptable to all parties.

Necessity and suitability essentially relate back to legitimacy of mediation in planning against existing mechanisms and processes. This view can be summarised by a comment that:

“in many ways the use of mediation is a dangerous course for us because it suggests that the decision making process is far more malleable and can be negotiated.” Comments related to ‘Outcome’ pick up on two further interesting issues. The first essentially relates to the suitability point but ultimately to the ability of parties: “can’t see benefit in mediation if either party cannot negotiate a resolution in pre-application discussions”. The second issue relates to who is suitable to undertake the mediation role. This reinforces the issue raised previously about the independence of the mediator. This issue can be best shown through quotes:

“We see the planning authority as having this mediation and deciding role.”

“Is an independent mediator better than usual negotiations between planners and applicants?”

“Councillors do not want others to lead them in the decision making process. They consider either their paid staff (many of whom have attended mediation/negotiation training) or themselves able to facilitate such a process.”

When considering the role of councillors it was also noted that officers involved in mediation could not guarantee that members would endorse the outcomes. This reiterates the importance of comprehensive guidance that sets out the expectations of all parties to the process, including those perhaps not directly involved but who are ultimately responsible for the outcome.

“yes qualified” responses

23 respondents gave a positive answer to Question 3 (i.e. they would consider using mediation in the future) but chose to qualify that answer in some way. In combination (‘yes’, ‘yes qualified’ and

‘possibly’ responses), 73% of the LPAs gave a favourable answer to the question, demonstrating a willingness to consider mediation. When considering the ‘qualified’ answers, it is perhaps unsurprising that the range of concerns closely reflects those given above. Responses for these 23 authorities did identify the primary concern as being lack of guidance and understanding (11 occurrences), followed by costs (10 references) and suitability of casework (8 references). The summary of responses is presented below, categorised by the themes/trends identified in the barriers/hurdles to use of mediation in planning.

Issue	Would consider mediation if ...
Lack of guidance	guidance was available to assist with understanding of process and exact purpose, and the difference made/benefits.
	guidance was available on how to balance policy matters with individual concerns.
	guidance was available on 3rd parties' involvement as possibility of challenge to legitimacy of process if not fully included.
	guidance was available on how mediation relates to the public examination process.
	mediation was embedded in planning legislation.
	there was agreement on openness/probity issues.
Cost	cost was not significant against reduced budgets.
	costs were reduced by avoiding unnecessary appeals.
	mediation did not impact on targets or unduly impact on other priorities.
	there was agreement on costs and timeliness.
Suitability	suitable cases were identified.
	mediation was the appropriate means of resolving issues.
	mediation cases related to matters of detail rather than principle.
Outcome	there was genuine room for movement.
	there was clear agreement on whether the ‘solution’ would be binding on all parties.
	mediation avoided potential for extensive discussion/negotiation without resolution.
Other	there was agreement on the independence of the mediator.
	mediators were available in timescales required.

In considering ‘Outcome’ and ‘Suitability’, the quick hit would be for a change in legislation as suggested. Such a solution is unlikely in the short to medium term. As one respondent notes: “arguably an essential quality of mediation is that it should have the freedom to deal with the uniqueness of situations, rather than be tied into regulated straightjackets”. However progressive status and legitimacy could be achieved or created through publication of successful cases and a clear statement of the benefits of mediation in the planning system.

In conclusion, respondents noted that:

“if the benefits are significant and the process straightforward/simple then it could introduce a useful element to the decision making process” and “... it is accepted that in some cases where a proposal has

wider implications for community or council wide aspirations mediation could help shape and deliver those aspirations.”

“[Use of mediation in some cases] fits squarely with our attempts to replace development control with development management and the introduction of a problem solving approach to regeneration, although the ability to say 'No' will remain a potent force in our armoury.”

Question 4. I am/am not interested in hearing the interim conclusions of the project in March, and receiving a copy of the final report in June 2010.

All respondents indicated a wish to be made aware of interim findings with the exception of five authorities.

Summary of Key Findings

A general awareness of mediation and its potential use was clear.

A wide range of potential applications (in a planning context) were suggested.

Examples of actual practice were put forward; more work would be required to ascertain the eventual outcome.

Significant evidence of good practice was not forthcoming;

There are existing bodies and organisations who have successful track records in operating independent mediation services e.g. local voluntary groups to ATLAS.

A willingness to consider using mediation was demonstrated.

Key barriers or hurdles to using mediation in planning essentially related to uncertainty, questions over legitimacy, financial and time implications and the nature and status of any outcome.

Recommendations

1. Follow up on successful examples given in questionnaire responses to create/add to a log of good practice.
2. Production of an advice paper that sets out the status, benefits, process, roles and expectations for all parties for mediation in planning. This should include a variety of good practice examples.
3. Production of more detailed (but generic) guidance which should address:
 - a clear definition and description of mediation including its relationship to other forms of negotiation.
 - the legitimacy of applying mediation to planning cases including outlining certain cases or casework types (or stages within a process e.g. pre- or post-decision) where mediation may be more suitable or effective.
 - an outline of expectations (including likely costings) and possible outcomes.
 - guidelines on different types/categorisation of mediators for example, LPA planning officer, LPA non-planning colleague, external local mediation service, ATLAS etc.
 - a breakdown of the roles and responsibilities of each party directly and indirectly involved (eg legal and elected members).

APPENDIX F

EXPERT INTERVIEWS¹⁹

QC and Mediator

The respondent has dealt with many mediations, but his personal experience of planning mediations was limited. The benefits were breaking deadlock, understanding objections and refining proposals. The progress on increasing planning mediations had been slight. There has been lip service, but it is difficult to change habits. There are few incentives to adopt mediation rather than appeal.

He saw the barriers as a lack of understanding of the process, a fear of the new and systems which do not make it easy to opt for mediation. He felt the reluctance was across all stakeholders. The problem was getting all parties to a dispute to agree to mediation. Sometimes the LPA was reluctant, sometimes it was the developer. He was optimistic that more planning mediations would come about, but he felt it was a “slow burner”.

Head of Legal services, Local Authority

The respondent was not involved in formal mediation sessions. However her line manager is an accredited mediator and he had come in to advise on cases which were becoming more and more adversarial. She felt that the use of somebody in-house had advantages and did not involve the cost of an outside mediator. In general, she was supportive of the use of mediation when parties get locked into exchanges of bombastic letters. The opportunity to meet face-to-face changes the approach and people’s perceptions of each other. She had dealt with one case which she felt could have benefited from mediation. It was an enforcement case where an individual had built a house bigger than the approved plan. The neighbour complained and put pressure on the Council to take enforcement action. There was a public inquiry and the house owner had to take down part of the house to comply. The experience of an inquiry was very stressful for all parties. Matters had become so inflamed that it was not possible to negotiate. The inquiry involved counsel on both sides so became very costly. Another situation where mediation might be useful is for breaches of s106 agreements. The usual course of action is to go for court proceedings which are very unwieldy.

There “needs to be a dispute”, so mediation would not prove useful too early in the process. If participants had more confidence that mediation would save money, they would be more likely to opt for it.

Director of Planning, Local Authority

This local authority had tried to use mediation but the Director of Planning said it did not work for them. The respondent’s view was that planners are mediators anyway. They had suggested one case for the pilot, but that had been turned down.

Disadvantages:

¹⁹ Carried out by Chrissie Gibson Connectivity Associates, and Scott Jones, Mind-the-Gap Research and Training

If there is a policy issue, there is often no room to manoeuvre. If there is a negotiation involving quantities eg number of storeys, the applicant will assume the mediator will split the difference, so will initially go for a proposal which is deliberately high, knowing that he will get something in between. In most cases, the applicants who he deals with would rather go to appeal. Lack of transparency was a big issue. He was concerned that the mediation outcome would be considered as a deal behind closed doors. He thought that committee members would feel that they had been excluded from the process and would not be inclined to approve any resulting recommendations. A number of the cases they had dealt with recently had been high profile and had received a lot of press coverage. All decisions have to be seen by the public as being "squeaky clean", to be transparent and available to public scrutiny. He felt that a high proportion of developers would go for Judicial Review if they were dissatisfied with the outcome and he was not confident that the process of decision-making based on mediation would stand up in court. He was also concerned about the effect of the Freedom of Information Act. The Council's legal department took the view that everything should be considered in the public domain. He wondered whether there had ever been a legal challenge to the confidentiality of mediation. Many of the issues are complex with lots of stakeholders. He has often had conflicting evidence and he feels that the best way to resolve it is to go to appeal. He felt it was not good value of money. The Council has its own process for dealing with issues when negotiations between the case officer and applicant get stuck. The matter is then referred to the team leader and if there is no success, then to the Director of Planning. He felt that this process was preferable because all the people involved have full knowledge of local circumstances. An important key to success in dealing with a planning application is to have good professional advice. He felt that many problems occur because the applicant does not have a planner representing them. Once they can get planner talking to planner there is a greater understanding and better chance to resolve problems before an appeal.

Advantages: he could not see any role for mediation in planning.

It was recommended that mediation skills become part of RTPI-accredited Planning courses.

Planning Inspector

The respondent had no direct involvement with mediation. Her work mainly involves Local Development Frameworks. Considering where mediation might be used in the future, she said that 'front-loading' is a perfect example of the use of mediation techniques. She always asks parties to work on areas of common ground. She considers that she already uses some mediation techniques. In one of her current cases, she has asked the officers to go away and to do more work. For LDFs and s78, she felt it was important to have enough time built into the timetable to accommodate mediation.

Partner, National planning consultancy

The company had not been involved in any planning mediations. The respondent thought it might be appropriate in some of the cases he had dealt with. One example was a proposal for a secure hospital where there was a lot of vociferous opposition. The application was recommended for refusal, in part due to the pressure from objectors. There was a public inquiry. It might have been better to use mediation, but the process would have to be designed to allow the objectors to have their views expressed and considered. He considered mediation might be appropriate to agree the terms of a s106 agreement where the Council are asking a lot from the developer. This would avoid the hassle of an

appeal. The developer could come to an agreement and move on. Another situation where mediation might prove useful is a residential scheme where the issue was over the numbers or the height of buildings and the applicant might consider it is not worth going to appeal. Mediation could be used when the dispute revolves around the amount of affordable housing or of open space.

He thought that people did not use mediation because they did not know about it. It is not made explicit as an option. Ideally, mediation is used before a decision is made. When deciding whether to use mediation, a client would weigh up the time and cost as opposed to an appeal. A problem is that the outcome is not guaranteed. If there is a resubmission following mediation, the applicant will still have to pay for new plans to be drawn up and maybe a revised environmental impact assessment.

It is important to have the right people involved in the mediation but it would be difficult to allow a member of the decision-making committee because they would potentially be compromised. It might be appropriate to have ward councillor if they were not on the relevant committee.

Planning Consultant, small planning consultancy

The respondent works for a small consultancy that tends to deal with small-scale clients. He said that it was unlikely that his clients would be interested in mediation, even if they had heard of it. They preferred the tried and tested mechanisms and he felt that they were unlikely to change.

Planner and Solicitor Partner in national law firm

The respondent had not been involved in any planning mediation cases, but has been involved in two CPO cases.

Case 1 was a compensation case relating to sand and gravel extraction. It would normally be heard in the Lands Tribunal, which would be very expensive necessitating legal representation, surveyors, statements, lists and reports. In this case, a lot of money had been spent by the time it got to mediation. The mediator was very experienced and set the right atmosphere, developing rapport and trust. The outcome was a settlement, but would have been better and saved money, if mediation had occurred earlier.

Case 2 was about CPO compensation relating to industrial buildings. There was frustration on behalf of the claimant because they were getting no material response. The respondent suggested mediation. He felt that it could tie down some of the issues which needed to be tied down. The case was referred to the Lands Tribunal and that process was started, however, they agreed to a 'stay' to enable mediation. The position statement was similar to the pleading, but in simpler language. The intention was for the mediation to focus on the valuation and not become bogged down by other issues.

Points for planning mediation

At the Lands Tribunal hearing, compensation is decided on the merits of the case and on precedent. Therefore, the skill and legal knowledge of the advocate is very important. In mediation, a different set of skills is important and it is not the mediator's role to apply his legal/planning knowledge. The mediator's role is to coax the parties towards agreement. If the case goes to the Lands Tribunal, the value of the 'sealed offer' is used to determine costs. This is an added pressure towards using mediation. The mediator needs to establish the starting positions of the parties and define the issues underlying those positions. In a Lands Tribunal case, position statements are exchanged two weeks before.

Mediation or not? The decision about whether to go for mediation will depend on the strength of feeling on both sides and who has the deepest pocket. Mediation might mean that they get better than their worst position. It also reduces other risks of litigation eg witnesses may not have to appear. You may be able to choose when you disclose certain points, no cross-examination.

Situations where mediation might have been appropriate but was not used. He recalled an enforcement case relating to the quarrying of stone, but other uses had started eg garden centre. Result was that the enforcement notice was quashed and a certificate of lawfulness was issued. Mediation might have brokered a result where the LPA and the owner agreed a list of acceptable uses and a justification for them. Possibly: mixed use building, built too high. Officers recommended retrospective consent, members refused. Would mediation help in this case? Is an appeal more appropriate as it takes the decision out of the hands of the LPA?

Good practice: The mediator should be patient, tactful, discrete and be able to pick up a good grasp of the issues quickly. The mediator should be prepared to challenge all parties to consider whether they will be successful by pursuing their current position. The mediator should “hold up a mirror” for the parties to see the case from a new perspective at a point when they may be entrenched in their views. He should be able to manage the participants’ expectations. Timing is another key to success. It should not be so late that significant money has been spent. It is important to disentangle the interests of all parties to establish the pros and cons of mediation for them – a clear role for stakeholder analysis. A lot of elements of the Lands Tribunal system could be transferred to planning. Mediation is more strongly embedded in the formal process and as a result more frequently used. There is clear guidance to all parties about the difference between mediation and negotiation. In case 2, the Lands Tribunal case the hearing was ‘stayed’ whilst mediation was tried. In planning cases, an appeal could be lodged, but adjourned. However, there are some costs involved in lodging a planning appeal, but not as great as in a Lands Tribunal case.

Former Chief Planning Officer

The idea of mediation was very much on the back burner during my time as a CPO and Inspector. I have therefore no experience of formal mediation processes. I also thought that the 2009 report by the Scottish Government was very good in attempting to answer the various questions you have set out, albeit within the slightly different circumstances of Scottish legislation. To my mind there are particular challenges to a process which requires the active support of both parties, does not have formal outcomes (although the mediator's report would clearly become a material consideration) and is set against existing planning processes which are already all about finding a resolution to conflicting interests in land use and development. There are also the potential difficulties of the result of a private negotiation emerging into the public arena albeit with the 'non commitment' caveats that would be attached. Nevertheless I can see the possible attractions of an opportunity being available to discuss (in a concise and time limited way) with an independent person the kind of neighbour disputes that dogged our time in local government and also to avoid the frustrations felt by planning agents who get nowhere with intransigent planning officers. But again it requires the willingness of both parties to find a resolution and therefore requires real incentives to encourage the use of such a process (eg that those

appealing or complaining to the Ombudsman should be required to say why mediation was not pursued as a first step; and that it could be a ground for the award of costs against the LPA or appellant if the process was refused by them without good reason). It'll be interesting to see how the concept of mediation sits in relation to the Tory's proposal to greatly reduce the appeals system and have part of it run by the Ombudsman! Not sure that idea has been thought through properly. I am sorry that I cannot give you any insight from first hand experience of the process but hope these thoughts are of some interest.

Planning Aid A

The respondent had trained as a mediator but had not used the skill in a planning context.

The problem to overcome is that the people involved in the mediation usually do not have the power to make the decision, so the application has to be resubmitted to Committee or the issue has to be reconsidered. Mediation can have a role in planning disputes, for example, where there is disagreement over a Local Plan, planning application or an enforcement case. In some instances, that the respondent felt that it could be brought in earlier in the process. If the circumstances are right, there are real benefits such as saving money and not having to take issues through the court. However, the respondent was concerned that some mediations would not allow the wider public to have their say. The role of Planning Aid would be as a technical friend, particularly where the public are involved. They could talk through the implications of agreeing to certain things. This is a different role from their current advisory service. The planning system would be improved if it were not so adversarial and there were less reliance on legal professionals. We need to be clear about what we mean by mediation. There are other ways to enable communities to take part, for example, through education about the planning system, including opportunities to participate. Currently the system encourages people to object, which sets up an "us" and "them" situation, rather than opening a dialogue.

Planning Aid B

The respondent had been involved in mediation, in development planning, planning applications and enforcement. The reasons for people choosing mediation were to:

- Receive free professional, independent advice
- Ease LA burden
- Help with understanding issues
- Help people who can't afford planning consultant but interested in local area
- Help with language, terminology, jargon
- Target low-income or other areas / issues of need.

Sometimes people can't afford a planning consultant but they are interested in local area. Planning Aid might target low-income or other areas / issues of need rather than a well-off parish. The planning aid worker acted as explainer, facilitator, and adviser (planning), and gave empathy and guidance. There were a number of individual cases covering enforcement and Local Development Planning where mediation had been useful.

Examples where they had helped:

- An enforcement case where a member of the public was distressed about an enforcement issue not being taken seriously. Mediation was used to explore things and to provide clarity and give reasons why things were not happening.

- A community group in a midlands county – we were able to advise on how to make representations more effectively, how the process now might move on. This was more about how to equalise the playing field and look at different power.
- Facilitating discussions on Local Development Plans that involved consultation workshops with LA, community groups, police and other key stakeholders. While being a neutral facilitator, some of the aspects of that involved mediating between groups. We can get involved in nationally significant projects, mediating and fielding questions among stakeholder groups, and also between questions put to the CLG representatives and the wider group of stakeholders in the room.

She felt that mediation could be “hugely valuable;” it assists with mutual understanding, encourages people to get involved in development in their area and can overcome apathy. The disadvantage was limited budgets.

Regeneration Consultant

The consultant was not in favour of mediation as a separate activity because he believed that planning was all about mediation. His concern was that the use of mediation implied that planners could not be impartial, when it is their job to be impartial. Planners ought to have mediation skills without the need to resort to a separate service. They ought to be able to resolve issues themselves or agree to differ. There are few planners who are qualified mediators. He worried about the growth in quasi-legal businesses setting up as mediators, when planners ought to be using mediation as one of a range of tools to discharge their statutory duty. The RICS has a mediation service but most of the cases they deal with relate to the Lands Tribunal or other cases which do not have the complexities of planning cases. We should be positive about planners’ skills and acknowledge that they have the expertise to resolve planning issues themselves.

Leader, District Council

Although not involved in mediation, (in the sense of applicant vs objector) we as a council have a role as mediators and facilitators of the planning process. The biggest problem is that in early stages of putting together LDFs and strategies people don’t involve themselves sufficiently. For example, if we have to build 20,000 houses in the District over 20 years (not site specific), people need to do their searches well – the planning outline approval may be activated after they’ve bought. Costs of planning application don’t cover costs – fees are capped. In really big applications, council taxpayer subsidises the application cost. If there is a need for greater consultation, then applicant should bear the cost of that consultation. Not a mediation problem perhaps but if there is a change in government it may be that the liability on local councils to consult actually increases; decreasing the power of inspectors. Then, if councillors are not bound to stay silent (for or against) the councillor’s role can be much more of a mediator. If this happens, training will be needed – capacity building and training are important aspects. On balance – there are arguments for and against this. Mediation would not help (in his view) with a matter of law – the system would take care of that as normal. But it might help where there matters of judgement. An example would be where a different design of house is applied for in an existing row of houses that are all of one design/style – perhaps in a conservation area or with other issues.

If all that mediation does is explain planning law then it is not purposeful (Scott's note: examples given were mainly described in terms of applicant vs objector). In the vast majority of the Planning Committee's work, planning law clearly applies so mediation would not change the outcome. Timing: we need to turn applications around in a short time frame – mediation adds to that time pressure – actually getting people to sit around a table. Where it is important to look at land in a broader geographical sense: for example, destroying a cottage to build a strategic road – need to look at the broad sweep of things rather than the single issue about the cottage.

Deputy Director, Community Voluntary Services

The respondent had experience of mediation in a number of contexts:-

- the local Sustainability Working Group (includes, principal planning officer, SPOs, County, Environment Agency, Countryside Groups, HomeZone, Wildlife Trust and others),
- Taking proposals to the forum of the voluntary sector and connecting people with Planning Aid.
- Working with others on the LDF and S106 agreements

Her view was that the default position of planners seems to be “no.” Mediation can help find ways forward. The advantages of mediation were that

- It was not so full of intimidating red tape.
- You were able to talk to the same person – don't get moved from pillar to post
- Mediation could even be quicker than current system, given the right conditions
- Somewhere to go if Planning Authority says “no.”

She saw the disadvantages being the cost – it could be expensive. Also, you would need more than one person – a single mediator could be too busy, and also become too familiar with people and potentially less “neutral” over time. She felt that there was scope to use mediation with voluntary groups, developers and planners – mediation could have helped with buildings re-design in the town centre.

Chair of Local Civic Society

The respondent had been involved in mediation to comment on development proposals as a third party – taking it out of political and officer group and opening up discussion as an external group.

He saw the advantages as

- Dealing with the architectural merit of a proposal, in terms of use, function and aesthetic, is often not sympathetically dealt with in law. Officers can't say “this simply won't do” or “could we have a sketch first” – architectural merit has got to be considered but they are not able to consider it in planning law; mediation may be able to enable changes to be suggested.
- Could address time – if community is involved it can help plan ahead on the basis of community needs and wishes. In most developments, you are likely to get someone from outside the area who does not understand the area very well – they do the job and go away. “We did this elsewhere so we'll sell it here too.”
- Objectivity
- Helps address power inequalities

He saw the disadvantages as

- Can possibly encourage NIMBYism
- People who have an axe to grind or who are stuck in some way – who will not even consider relinquishing their dearly-held views.

- Can create expectations – the nature of power is such that power will still express itself. You are pushing against a lot of inertia and the forces are not usually with you. In fact, they are usually against you, very often not interested in your agenda but have their own, which is not in the interests of the community. Not sure that any third party process can easily overcome these forces.

There was potential to use mediation in other recent local cases. It has been decided to convert an old maltings into flats, where there were design issues. Perhaps mediation could have helped identify alternative uses – like a business incubation area and workshops.

A huge development on high quality agricultural land was sold to the community in one way. Actually, there is no overview of the whole scheme because it is sold off in tranches; no opportunity for 3rd parties to comment on the whole piece. Mediation early in the process may have helped here.

CONCLUSIONS FROM THE INTERVIEWS

Fourteen interviews with a variety of respondents were carried out. The table below summarises the interests of the primary stakeholders.

	+ve	-ve
Developer	<ul style="list-style-type: none"> • Speedier cheaper decisions. • Not a 'win-lose', may get least worst option. • Less chance of exposing the weaknesses in their case. • PINS and LPAs will be able to focus on other cases = speedier decisions on those. 	<ul style="list-style-type: none"> • Little known process. Risks difficult to assess.
Local Planning Authority	<ul style="list-style-type: none"> • Potentially speedier process • Reduce overall workload • Improves relationships 	<ul style="list-style-type: none"> • Concerns about delays conflicting with targets. • Little known process.
Planning Inspectorate	<ul style="list-style-type: none"> • Reduced case load = reduced costs • Ability to focus on other cases 	<ul style="list-style-type: none"> • Lack of experience of identifying cases
Community	<ul style="list-style-type: none"> • Opportunities to be heard in a non-confrontational environment. • Opportunity to have their point of view expressed. • Opportunity to create a better development. 	<ul style="list-style-type: none"> • Need to ensure that they are included
Councillors	<ul style="list-style-type: none"> • Still retain their decision-making powers. 	<ul style="list-style-type: none"> • May feel side-lined

Table: Stakeholder analysis for mediation

- There were mixed responses. Some people had direct experience of mediation; others could identify cases where mediation might have been used.
- Additionally, issues of transparency need to be addressed to retain public confidence in the planning system

- It was clear that many planners do not fully understand mediation as a process or its potential to resolve disputes.
- Developers and consultants were often wary of a system which they felt was untried and untested.
- The views of other council officers eg legal department had a part to play in decision whether to attempt mediation.
- Lessons can be learned from other mediation process, where mediation is the default process and it can be decided to “stop the clock” by having an adjournment.
- In other professions, there is greater clarity about the difference between mediation, negotiation and other alternative dispute resolution mechanisms.
- There is a need for training for LPA officers and for the private sector.
- The role of the public and the councillors is unclear in relation to mediation.
- It is not as intimidating for the lay person as an inquiry or hearing.

It provides the opportunity to develop local solutions to local issues.

Appendix G

EVALUATION REPORT

Introduction

This report is based on research carried out from November 2009 to March 2010. The primary data came from observation and attendance at three live mediations, questionnaires survey of mediators and mediation participants and the production of evaluation reports for each. There is an in-depth case study of completed mediation. Additionally, fourteen expert interviews were conducted either by telephone or face-to-face.

DEFINITION OF MEDIATION IN PLANNING

Mediation is one of a family of processes used to assist with negotiations. It is a process through which people who are in dispute try to address their problem with the help of a neutral third party. One of the expert interviewees stated that there was a lack of understanding of mediation in planning, a fear of new initiatives, compounded by systems which do not make it easy to opt for mediation. He felt the reluctance was across all stakeholders. The problem was getting all parties to agree to mediation. Sometimes the LPA was reluctant, sometimes it was the developer. One expert interviewee, a partner in a planning consultancy, thought that planners and developers did not know enough about it. A planning consultant from a smaller company felt that his clients (mainly small businesses) wanted the tried and tested route of an appeal. Some interview respondents interpreted mediation as the use of mediation skills that did not necessarily include the use of an independent mediator. One respondent felt that planners had the capacity to be impartial (indeed it was a key attribute of the job) so there was no need for a separate service.

LANGUAGE

Appropriate language combined with warmth, neutrality and professionalism go a long way to ensure that the parties feel it is their event. Some of the discussion in the policy cases revolved around planning concepts and used technical language eg the sequential test, the concept and the implications would not be immediately easy for the lay person to grasp. A friendly and constructive tone may be tricky to achieve in some situations, for example in the enforcement case where some legal aspects had to be mentioned in respect of conviction and its implications. Legal language by necessity has to be involved and its explanation in lay terms formed part of the language used by the mediator and others. Skill and care were needed in separating enforcement issues of “what must be done” (the legal bit) from “how you might get there” (the mediation bit). This applied to the local authority also, who sought clarification from their solicitor on what they could do by way of shifting positions while staying within the law.

A clear structure to the discussion added clarity for all parties. It is good practice to set out at the start the issues on the table, the format for the event and the resources available (additional rooms). In one case, the mediator listed all the issues and dealt with some easy ones first which set a positive tone for

the remainder of the day. Where there was uncertainty about the structure of the event, it caused frustration. Some expert interviewees talked about the importance of face-to-face sessions when relationships had become fractured and adversarial letters and emails were flying around. In one case, the mediator pointed out that the objection originated from a misunderstanding about what had been agreed and a lack of joined up thinking on behalf of the Council. The mediation allowed the objectors to voice their resentment and to move on to a practical and constructive agreement. All the live cases demonstrated the value of face-to-face meetings to air the reasons for past misunderstandings and to explore the rationale for the policies.

AVAILABILITY OF TRAINED MEDIATORS

Both the mediators involved in the three live cases were trained and experienced, one a planning barrister and one a planning inspector. Training for mediators can be expensive. Cases can be very sensitive. The enforcement mediation involved a very complicated set of planning, legal and family issues. A mediator must bring a positive attitude, experience and a “reading” of the situation to enable people to proceed with confidence under his/her guidance. Two local government officers interviewed were concerned about the practicalities of finding a mediator within the timescale of a mediation. In one of the large local planning authorities, they adopt a different use of mediation. The Head of Legal Services is an accredited mediator and he can be brought into difficult cases. In another large authority, they had an internal process for resolving disputes when the case officer and the applicant get stuck. The matter is then referred to a more senior officer and, if there is no success, to the Director of Planning. Neither of these processes is truly independent, but the advantage is that staff are available at short notice. There are still relatively few mediators especially those with an appropriate knowledge and understanding of the planning system. John Parmiter (2008) stated that there were at that time some 20 qualified or accredited mediators working in the planning field.

SUPPORT APPROPRIATE TO THE CASE

Two of the live mediations (residential and retail) involved the landowners (or objectors) with professional backgrounds who were represented by consultants. The other live case, enforcement, involved the appellant and his wife who were not familiar with the planning system. In the enforcement mediation case, the appellant had limited reading/writing skills and needed help from his wife and a solicitor to read and interpret the documents. A local solicitor acted as advisor and his role was crucial to the outcome. In addition, the enforcement officer had long-term knowledge of the case and the family involved. He brought care and concern as well as significant professional expertise. Planning Aid staff could act as a “technical friend” helping participants to understand the implications of agreeing to certain points. This would be a different role than their current advisory service. They have already helped participants in mediation cases with language, terminology and jargon.

The type of accommodation was also very important to making the participants feel comfortable. The residential and retail cases (the same local authority) were in “a somewhat depressing council office”, as described by the mediator. All the participants had to walk through the Planning Department, so it felt that the planners were on “home territory”. The accommodation for the enforcement mediation was much better. It was in the offices of a large law firm, was neutral, spacious and private with easy access

to lavatories and kitchen and the office staff were courteous and effective. The atmosphere created was professional, but relaxed. The venue was very important to allow all parties to have confidence in the impartiality of the process, especially where there is ill-feeling involved and clear lack of trust.

Skills

Recently, RTPI-accredited planning courses have covered mediation as one of a number of professional skills, but there is very little provision of CPD on mediation in planning. A number of interviewees felt this was an important area which would help to raise awareness. If mediation is to expand, there should be capacity building within the planning profession. PINS and LPA staff would need additional training to enable them to understand the mediation process and to help them to identify suitable cases.

Gender Balance/Diversity

The planning profession and the accredited mediators do not reflect the make-up of the general population. Women make up only 24 percent of the membership of the RTPI (Petrie & Reeves, 2005). A CEDR survey found that the more experienced mediators are predominantly male (90%) and white (96%). (CEDR, 2007)

Costs

The question of who should pay and the cost of mediation compared with an appeal were key factors for many respondents. The problem is that the outcome of mediation is not guaranteed, which is an added risk. If there were a resubmission following mediation, the applicant would still have to pay for new plans and maybe a revised environmental impact assessment. However, mediation might mean that they get better than their worst option. One of the expert respondents from a local planning authority felt that mediation was not good value for money because it was better go straight for an appeal, particularly when the decision hinged on conflicting evidence. Planning authorities that used an in-house system were able to do it at no additional cost. In the enforcement case there was a question that had the LA been paying, questions would have been asked about value for money. The representative of the Community Volunteer Service was worried about the costs involved for the public.

A development control officer explained that they have to go through the processes we know and have costed in the budgets – no scope for added activity. There was potentially a high resource cost (other work suffered). Local authorities cannot afford to pay – especially with cutbacks, but there might be scope for mediation if the developer paid, or if Planning Aid could support the process. Planning Aid also talked about limited budgets. Two of the consultants felt that the mediation or other Alternative Dispute Resolution techniques would have been more helpful earlier in the process and that changes to policy would have been easier to make at an earlier date. Another participant suggested that more regular mediation discussion would break down existing barriers in communication, aiding development and reducing the time taken to negotiate on major applications.

Systems and processes

Current targets were mentioned by a number of local authority staff. A development control officer said “we have government targets and there is no time for a 3rd party we could not get discussions going fast enough we’d lose too much time”. The council leader also pointed to the need to turn applications round quickly. In one case, the planners had to consult other stakeholders about the potential effects of the mediation agreement. They also felt constrained either by past precedent elsewhere, or by creating new precedent from this case. It was important that the mediator set out clearly the scope of the mediation process and the next steps eg further consultation.

The planner expressed frustration that it was not possible to change the allocation. He felt the mediation would have become unwieldy if it included all the parties. It was difficult to completely resolve the issues because they had city-wide implications which would only play out at the hearing. The democratic decision-making process limits the ability to reach a final agreement in mediation. Once an application/appeal has been made the planning system lack flexibility to allow mediation to be used. LDF documents, planning applications and enforcement cases each have their prescribed routes through the LPA’s, DCLG’s and PINS’ procedures with targets pushing them along. Nowhere is there the opportunity to pause and ask “is there a more effective way to deal with this issue?” Neither is there any nominated responsibility for anybody to trigger a change in the process.

Culture

A number of respondents lamented the adversarial nature of planning. “Currently the system encourages people to object, which sets up an “us” and “them” rather than opening a dialogue. Developers and their representatives adopt an antagonistic approach because they believe “giving ground” will be interpreted as a sign of weakness. A member of one voluntary sector group felt that the default position of planners seems to be “no”. However, he saw mediation as an opportunity to cut red tape and to provide a less intimidating forum for discussion. During one of the mediations, the participants started to work together to clarify the sites referred to in the policies and to develop a set of words to encapsulate the agreement they had achieved. One of the agents said that the mediation gave the opportunity to resolve issues rather than have entrenched positions. However, he felt that the end result could have been achieved through negotiation with all the parties present.

Another case concluded with really positive language. At one point, the Council’s consultant said “we are leaving the door ajar...”, later the mediator said to both parties “you seem to be saying a lot of the same things”. The developer agreed to withdraw some of the objections as a result of the mediation.

One consultant thought that the opportunity to hear an explanation of the developer’s representations was very helpful, as it was better than reading objection forms. The developer independently expressed a similar view from his side, that it was difficult to express himself on the forms. The developer in the retail case felt that the most important outcome was the opportunity to have his case heard. A council leader identified the problem that people don’t get involved in the strategic planning process. Later they may discover that development is planned near their house. However, there was concern from two Chief Planning Officers that there was a lack of transparency. One felt that the mediation outcome might

appear to be negotiating behind closed doors and that both the public and the elected members would feel excluded. He thought that some developers might ask for a Judicial Review of the planning decision. He also thought that the Freedom of Information Act ought to be considered as the confidentiality of mediation had never been tested in court. His view was that developers and officers prefer an appeal as the best way to resolve issues. The other foresaw similar difficulties when the results of a mediation emerged into the public arena.

In the Midlands case study, there was a clash of cultures between the developer and the residents. The language and tone used by the house-builders set the scene for acrimonious discussion. The intervention by the potential mediator turned round the approach and led to the parties working constructively on a solution which met everybody's needs. The end result was a successful outcome relating to the development.

FAVOURABLE CONTEXT

A number of expert interviewees could identify cases where mediation might have been successful. Enforcement cases were mentioned more than once. In particular, where the case involved a member of the public and the experience of a public inquiry would be very stressful. Section 106 cases were also mentioned. During the initial negotiations, mediation could be useful when the local authority has a "wish list" and the developer considers that they are being unreasonable. It could also be used where there had been a breach of a s106 agreement as the alternative is to go for court proceedings which can be costly and unwieldy. The council leader felt that mediation would not help with a matter of law, but might be appropriate where there was design issue. It was also suggested that mediation be used in householder cases which can take up so much time, barn conversions or high hedges, especially where there are underlying neighbour disputes.

The Vienna Airport case was successful in dealing with major expansion plans and a large number of stakeholders. "The mediation proved that even extremely controversial issues that generally do not lead to a win-win situation can finally be satisfactorily solved by means of a mediation procedure." The Government is committed to the use of alternative dispute resolution techniques in all areas of civil and administrative law (eg C06/2004). Greatly increased use of mediation in the courts and elsewhere such as the Lands Tribunal (and overseas) can provide potential models and good practice.

One of the expert interviewees, a partner in a national law firm, had been involved in a number Compulsory Purchase Order (CPO) cases. Whilst there are distinct differences between the types of case, there are also common themes. In a Lands Tribunal case, the parties can agree to a "stay" to allow time for mediation. In some other areas of law, mediation is the preferred route to deal with a dispute and there are incentives to encourage that to happen. One planning officer suggested that appellants should be required to justify why they had not pursued mediation. Local planning authorities have to demonstrate community involvement within the LDF process and developers need to show that they have considered residents' representations. In the Midlands case, the developers saw the value in getting involved in the mediation as a way of convincing the LPA that they were addressing these issues. The revised plan incorporated the agreed changes.

BETTER USE OF RESOURCES

In the residential mediation case, where there was a clear outcome, the mediator said that the policies would be more robust having been through the mediation process and this would hopefully save time at the hearing. Much was achieved in the retail case, but a fundamental disagreement over an allocation could not be resolved due to a number of complex factors. The council officers were unsure at this juncture whether time would be saved, they reserved judgment until after the hearing. The main advantage was that clarity was achieved. Two of the council officers felt a little rushed to reach agreement on the policy wording. One suggested a time for reflection would have been useful. The mediator felt that preparation for and attendance at a formal hearing would have taken more time and that the parties would not now enter the hearing with entrenched positions. The consultant for the council scored the process highly on speeding up the process. The developer felt that the mediation was a positive, time and money-saving exercise. The residential case and the retail case both involved the same local authority. The initial consultations were carried out in summer 2008, discussions on both cases started in January 2009, formal representations were made in 2009 and the mediation took place in January 2010. The hearing is programmed for summer 2010. The enforcement mediation case had a long and complicated history. The farmer had been served with an enforcement Notice in May 2006 and had received criminal convictions for non-compliance in June 2008 and May 2009. The next stage would be court with a potential suspended sentence. In this case the most important tasks were to (a) achieving full compliance, while (b) realistically addressing agricultural needs of the family.

In all cases, the mediators had spent considerable time in advance understanding the case and listening to the points of view of the parties. The preparation time for all parties that have responded with questionnaires amounted to about 114 person hours and the mediations themselves took 93 person hours. The timing of the mediation within the process can influence the resources used and the outcome. In some of the Lands Tribunal cases which were examined, money was wasted by leaving it too long before going to mediation.

GOOD FIT WITH THE SPATIAL PLANNING SYSTEM

The use of mediation in Area Action Plans was successful. In the residential mediation case, an agreement was reached on the exact wording of the policies that could be move forward in the interests of both parties. In the retail case, it narrowed down the areas of disagreement. One of the planning inspectors interviewed felt it was important to build adequate time into LDF timetables to allow for mediation to take place. The use of mediation techniques has the potential to break down barriers and build trust and to reduce complexity by providing a structured approach to problem-solving. The live mediations provided an opportunity for the parties to work constructively on the problems based on an understanding of each other's point of view in an atmosphere less formal and less confrontational than an inquiry or hearing. The breakout sessions enabled officers to discuss issues amongst themselves. Towards the end of the residential case, one of the participants used the word "we" to refer to his 'side' and the local authority, who were working together on the policy details. One of the council officers

welcomed the way that mediation brought fresh ideas and focussed on reaching a solution and resolving issues.

The output of each of the live sessions was a short clear statement with an annotated map where appropriate. This encapsulated the agreement, or clearly stated those points which had been agreed and those which remained to be resolved. In each case, the mediator read out the agreement to ensure that everybody was clear about the points they were signing up to. In the retail mediation case, the developer disclosed commercially-sensitive information which he would not have done in a hearing. This led to a greater understanding of the nature of his objection and the urgency to resolve it. The planner considered this to be “a huge advantage” leading to an honest discussion about the positives and negatives about each party’s positions. One of the consultants said “confidentiality is the key to achieving the openness required to have a full and frank discussion”. The consultant for the council pointed out that the session allowed him to talk face-to-face with the objector which improved relationships.

One of the expert interviewees, the Chair of a local Civic Society, saw the advantage of mediation being the opportunity to make constructive comments about the design details of a proposal and to suggest alternative uses. He saw this as way of using the local perspective rather than a generic design imposed by a national company. A planning consultant from a major practice thought that mediation might have been appropriate in a controversial proposal he dealt with to build a secure hospital. There was lot of vociferous local opposition and a public inquiry. However, a mediation might have better allowed local people to have their views expressed and considered. Some respondents expressed concern that mediation would not allow the wider public to have a say. If guidelines are produced about setting up a mediation, then this can help ensure that the right people are “round the table”.

ACCESSIBILITY

The atmosphere set by the mediator encouraged all the parties to be open and to consider alternatives. The planner- solicitor who was interviewed said that the mediator should “coax the parties towards an agreement;” it is not his role to apply his planning/legal knowledge. One of the consultants acting for the developer in one of the live cases said that the mediation emphasised the ‘disconnect’ between planning and development, but showed that properly focussed and well-directed consultation can have a positive role. Other advantages of mediation are that each party can choose when to disclose certain points, and it reduces the other risks of litigation, for example, witnesses do not have to appear. Another interviewee felt that some local authorities do not show willingness to consult widely, or to go the extra mile with some groups.

In the retail case study, two parties (one from each side) said that the mediation provided the opportunity to explain the reasons behind the words in the documents. As a result, they achieved a better understanding and a basis to move forwards. The completed case study demonstrates that a highly-charged proposal where the developer was “astonishingly adversarial” can produce satisfactory outcomes.

In the Vienna Airport mediation, the participants voted to keep the process going because they believed that it could work.

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APPENDIX H

ROLE OF ATLAS

Background

The Advisory Team on Large Applications (ATLAS) is funded by Communities and Local Government (CLG) and is part of the Homes and Communities Agency (HCA). Work undertaken by ATLAS in facilitating large scale development has included the use of mediation techniques.

ATLAS provides a free and independent enabling/advisory service to local authorities and their partners on a variety of large-scale housing and regeneration issues. The main purpose is to secure the timely delivery high quality sustainable development through effective planning processes, collaborative working and the promotion of good practice. ATLAS performs a wide variety of roles within its project work including giving technical advice to both local authorities and developers. This can be a strength, but on occasion can create tension because of the need to balance the roles. It may compromise its ability to mediate in some cases as it is not perceived to be truly independent, however ATLAS clearly uses mediation techniques²⁰ and – if appropriate – can suggest use of an independent mediator.

The Team's experience in facilitating numerous large scale developments has shown that mediation techniques can be invaluable in resolving disputes and unlocking development proposals that have stalled for a variety of reasons.

Its mediation work has illustrated that:

- in cases where there are multiple issues and interrelationships focussing in on the key disputes can help unlock development and reduce delay;
- ensuring the most appropriate people are involved and gaining member agreement prior to mediation is essential;
- agreement to, and involvement in, mediation needs to be high-level;
- there is often a need to resolve issues between multiple stakeholders in the public sector.

Key success factors, in addition to those already identified in this report, have been:

- capitalising on the skills and knowledge of the participants wherever possible ;
- building confidence to enable the parties to negotiate effectively;
- taking things back to first principles and establishment of shared vision and objectives for the site, and separating out the key ingredients, or themes, that need to be resolved before putting them back together;
- the preparation of the mediator and the participants; and
- providing a structure for ongoing collaborative working and decision making.

²⁰ ATLAS is independently evaluated on a monthly basis to review its service and overall impact against added value criteria and there is clear evidence cited in feedback to support the role ATLAS has in mediating and resolving critical blockages in those cases where conflict exists between parties.

Case Study

An example of a case which ATLAS helped to resolve conflict on planning matters relates to a proposal for a new mixed use community of over 5,000 new homes adjoining a major urban area. The proposal fell mostly within an adjoining authority. A planning application was submitted in July 2007; AAP adopted in Sep 2007 and Resolution to Grant April 2008. However, following economic downturn the validity of the viability assumptions was challenged by the developer, which led to a process of S106 review in order to achieve a revised Heads of Terms.

The adopted Area Action Plan (AAP) had a policy target of 50% affordable housing (AH) and the delivery of AH was a priority for the lead local authority. The initial resolution to grant outline planning approval included provision for 36% AH provision, based on viability work undertaken by the LPA's with limited input of the developer. However, following the economic downturn the validity of the original viability assumptions was challenged by the developer who also maintained that these assumptions needed to reflect current market conditions. The developer wanted to renegotiate the S106 package in order to produce a viable and deliverable scheme. The local planning authority was not convinced that their original viability assumptions were flawed. They were also resistant to the potential implications on the originally agreed S106 package of a re-evaluation of the scheme based on current market conditions

A two stage approach was adopted. Firstly a viability options workshop was held by ATLAS to examine ways of reducing scheme costs while meeting the vision of creating a sustainable community. It also explored sources of complementary funding. Our role was clarified in a written engagement note with agreement by all key parties that we would undertake an independent role to help with mediation on the matters arising (akin to evaluative mediation rather than facilitative). Participants were required to identify and describe conventional and innovative approaches to content, financing and delivery of the development, which had the potential to support the desired S106 package; to generate and review proposals using their knowledge, research and experience; and to identify options and to make a preliminary assessment of their impact on the vision for the site and their potential to close the viability gap. ATLAS encouraged creative thinking by allowing the workshop to be run in a confidential manner without suggestions being binding until the final agreed outputs were decided. Following the outcomes of this workshop, it was then deemed necessary for the suggested revised proposals to be tested with key decision makers – the Members. ATLAS therefore held a Members' workshop which covered:

- viability and the statutory duty,
- need for evidence based approach,
- making the planning judgement, and
- use of responsive planning practices.

The key outcomes of both were:

- renegotiated S106 Heads of Terms,
- a range of benefits agreed without compromising overall quality.

The impasse was resolved and all the parties were pleased with the process and the result. However in addition, an outcome with potentially long term benefits, was the new collaborative working

relationship established between the applicants and the local authorities, and between the two local authorities.

The following quotes were obtained from the independent evaluation process about ATLAS' role in this project:

"An appeal would have been disastrous. First and foremost all bets would have been off in terms of outcome, because the priorities that we have been debating for years might not even figure heavily in the considerations. It would cost us at least £750,000. It would also cause a delay of around 2 years for both housing and affordable housing, which is obviously not a good thing" (Applicant)

"Without ATLAS, the worst case scenario would be that we end up in public enquiry. With their help it allowed us to bring all the parties together and they were able to manage it effectively because it was not driven by either side" (Local Authority A).

Key issues and questions that have arisen about the use of mediation from ATLAS' work on large scale housing schemes (in addition to those in main report) include:

Lack of Member involvement: The rules about Members involvement with regards to planning application means that mediation for the most part will have to be undertaken without member involvement. This can be a barrier as there will be reluctance in the private sector to invest heavily in process which may not lead to the same final decision; and officers can only take matters so far. This will depend on the officer member relationship but planning is a political activity and mediation cannot remove the risk of decisions being made at a committee contrary to recommendations.

Ensuring adequate transparency: The informal and without prejudice nature of current mediation in planning conflicts means there is no statutory public scrutiny of agreements reached. Consequently, mediation between developers and local planning authorities could risk alienating the local community which in turn may lead to a refusal at planning committee or even legal challenge. However, this issue can be addressed by agreement on how engagement will happen and placing mediation as part of a wider set of necessary activities including community engagement.

Multi-faceted Issues and Multiple Stakeholders: Planning conflicts are rarely single issues and bi-lateral discussions. For example, large and complex schemes will often involve technical agencies, such as Highways Agency, Environment Agency and Natural England, development consortia, more than one local planning authority, highways authority and local residents groups. This means the mediation process has to be suitable to deal with this range of issues and conflicts and constructed in a way to involve the relevant parties at the right time.

Achieving agreement at any cost? An issue with mediation in planning is whether it is right to facilitate an agreement between parties which may not be perceived as achieving the best planning outcome. For example, when agreement is reached on something which may not be environmentally desirable or unlikely to lead a high quality of place, is it acceptable to challenge that agreement or facilitate the agreement nonetheless. A further challenge is, therefore, whether mediation can be successful without compromising environmental or design quality.

These issues should not inhibit use of mediation but rather be acknowledged and addressed early on to maximise the chances of a successful outcome.

APPENDIX I

ROLE OF PLANNING AID

Background

Planning Aid provides free, independent and professional town planning advice and support to communities and individuals who cannot afford to pay professional fees. It complements the work of local planning authorities, but is wholly independent of them.

Planning Aid was started in 1973 following the publication of the Skeffington Report on “People and Planning” which recognised the importance of community involvement in the planning system. Planning Aid has overall aims to empower individuals, groups and communities from disadvantaged and socially excluded backgrounds to participate in the planning process. It also has an important remit to make the planning system more open, accessible, inclusive and democratic to all thereby helping to raise and maintain strong public confidence in the system. This is delivered by a small permanent staff and a network of volunteers, most of whom are chartered town planners, through a combination of casework support, community planning initiatives, capacity building, partnership working and skills development. Planning Aid encourages positive and early community participation in the planning system. Whilst this usually facilitates the delivery of better development, there may be occasions when the best solution is withholding of consent. Planning Aid is delivered by four services: Planning Aid England, Planning Aid for London, Planning Aid Wales and Planning Aid for Scotland. It helps people to:

- Understand and use the planning system
- Participate in preparing plans
- Prepare their own plans for the future of their community
- Comment on planning applications
- Apply for planning permission or appeal against refusal of permission
- Represent themselves at public inquiries.

Mediation and the Planning Aid Services

Planning Aid England, Planning Aid for London and Planning Aid Wales do not currently offer formal mediation services (assisted dispute resolution) as part of their activities. Planning Aid for Scotland is, however, currently involved in developing mediation in the planning system in Scotland. Further information is available from Planning Aid for Scotland.

However, there has been much debate about the meaning of the term “mediation”. If the term does encompass facilitation to assist in consensus building then all Planning Aid Services are very active in this area.

The Role of Planning Aid England in this project

Planning Aid England is represented on the Steering Group of the National Planning Forum/Planning Inspectorate Mediation in Planning Project and will consider its conclusions and recommendations. In addition, Planning Aid England has been involved in two of the mediation project case studies which informed the development of this project.

REPORT OF THE NATIONAL PLANNING AID CONFERENCE 29/30 APRIL 2010 MEDIATION IN PLANNING WORKSHOPS

A workshop on “Mediation – the what, how and when” was presented in two sessions to a total of 28 delegates at the Conference by members of the Mediation Steering Group: Sheena Terrace, Planning Aid England and Kay Powell, Project Secretary.

An initial show of hands indicated that of the 28, only 3 (11%) had been involved in mediation and 4 (14%) had considered using a mediator. A 15 minute presentation covered:

- (i) definition of mediation - key words were suggested as “voluntary”, “involving a neutral third party”, “building trust”, and “developing consensus”;

- (ii) the benefits of using it - including the potential to save time and money and produce better outcomes;

- (iii) the important point - mediation is not a substitute for good planning;

- (iv) an outline of the NPF/PINS project and its purpose - to encourage more use of mediation in planning;

- (v) how mediation can be used in planning - at a variety of different stages, not just when an appeal has been lodged eg in plan-making, development management, enforcement, s106 agreements / agreeing conditions, to facilitate community engagement, or just to narrow the number of issues in dispute; and

- (vi) the “natural fit” of mediation with the work of Planning Aid - which is involved in the project Steering Group and is supporting one of the parties in a live case study - and highlighting the potential for Planning Aid volunteers to suggest the use of mediation, be involved in it, or for Planning Aid to consider developing a mediation service.

Following the presentation break-out groups facilitated by the presenters introduced an anonymised enforcement case study. One group in each session considered for approximately 20 minutes (a) what could happen with mediation; and the other group (b) what could happen without mediation.

Outputs from the group (a)s included discussion of the need for the parties to have the necessary authority, a neutral venue, and to assess whether any support is needed for any of the parties ie mediation friend, childcare.

Outputs from the group (b)s indicated that the outcome would probably be unsatisfactory for all parties. Interestingly it also included suggestions that some form of mediation of the dispute should have been tried earlier in the process.

Each session was rounded off with slides to encourage consideration of when mediation can work: when the parties have delegated authority to reach agreement (this is not the same as the power to take the final decision), and when parties with less knowledge are supported by a “mediation friend” who understands the process; and when it won’t: if there is 1 or more unwilling party, the parties want “all or nothing”, or the issue is beyond the competence of the parties to resolve eg national policy.

A final show of hands was taken which indicated that some of the first workshop (of 12) participants were sceptical about how much value mediation could add to planning, but the second (of 16) was almost wholly positive about its potential use.

APPENDIX J

ASSESSMENT OF APPROACH TO DELIVERING MEDIATION IN PLANNING

The following sets out the outputs from the workshop held in May 2010 at which the Steering Group considered options for delivering mediation in planning.

‘Requiring’ mediation – Government would set out in Statute that parties in a planning dispute must consider using mediation prior to pursuing an appeal and should use mediation if it is appropriate and facilitating the use of such procedure is viable.

Advantages: would challenge Government to provide the necessary support infrastructure to ensure appropriate funding mechanisms in place and to protect against imbalances in power; would give impetus to develop the necessary skills to provide sufficient capacity to support a mediation option within the statutory process; would incentivise the need to improve education and knowledge of the potential value of mediation in planning; would provide greater focus to the opportunity to use mediation and help to raise its profile; would create the need for mediation to gain momentum.

Disadvantages: would need a legislative slot so not a quick solution; there is no adequate support structure in place; ‘forced’ approach potentially off-putting; risk that mediation will simply add to the time and/or cost of the overall planning process; incentives/penalties for participation/non-participation would be needed; mediation not always appropriate or helpful – need clarity about when reasonable not to opt for mediation; lack of clear ownership of the process if ‘dictated’ from the top; insufficient good practice to date to build on; maybe seen simply as another hurdle with appeal remaining as backstop option; risk that parties start from even more entrenched position and fail to attempt consensus if forced to consider mediation later in process; risk of perceived negative reaction to parties who decline to take up option to use mediation; performance indicators might have perverse impact.

‘Encouraging’ mediation – where Government provides endorsement and encourages the use of mediation.

Advantages: develops citizenship; is based on belief in the process rather than requirement to undertake it so it is more likely to succeed; indicates commitment by parties; offers peer support and raises awareness because driven from bottom up; not dependent on Government funding; recognises mediation as a tool in the toolkit; allows flexibility and experience to develop; reflects a constructive response to trying something different so the outcome is more likely to be delivered; under the Major Infrastructure regime the use of mediation gives comfort to parties in the absence of clarity about what ‘adequate consultation’ under the Planning Act 2008 means.

Disadvantages: potential to use mediation to ‘game’ the process (ie manage to own advantage); added cost without certainty of decision; status of mediated outcome unclear; may add complexity and costs with no tangible benefit; it may not happen without the stimulus of a statutory requirement.