Mediation in Planning—from Talking the Talk to Walking the Walk

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Aim of paper

There is massive untapped potential for the use of mediation in planning and related areas such as Transport and Works Act cases, environmental appeals, the negotiation of s.106 Agreements and compensation under Compulsory Purchase Orders. There is similarly untapped potential for its use in relation to applications for development consent orders to the Infrastructure Planning Commission.

Yet the development of mediation in these and other areas of public law has been obscured, in part, by the government's narrow research agenda which has focussed almost entirely on the planning appeal process, where it has proved to be a successful mechanism for resolving issues but again its use has been fairly limited.

This paper is written from the perspective of a Director of a mediation service provider and mediation practitioner with experience of ''community'' mediations as well as commercial ones. It argues that the real benefits of mediation are to be found in its use in specific planning contexts where there are clear areas for negotiation and in the development plan system where there are needs for the broader facilitation of dialogue.

The benefits that mediation can deliver to the planning process include:

- better communication between aspiring developers, planning authorities and interested parties (be they the local communities likely to be affected by proposed development or the statutory and other consultees with an interest in the development);
- a clearer understanding by all parties of the different viewpoints and interests in relation to an application which is likely to improve the contribution that all parties are able to make to the decision-making process because it will enable all legitimate interests to be factored into the decision on the basis of an understanding;
- better decision making which may result in better developments which in turn may lead to greater community acceptance because the views of the community have been manifestly understood and taken into account;
- swifter decision-making, because it may either help to avoid refusals and repeat applications if the applicant is able to reflect properly and realistically the views of potential adversaries in the proposals put for permission at the outset or it may help to avoid unnecessary appeals and/or other judicial proceedings if the parties have a clear understanding of the issues and this has resulted in a better application;
- less expensive applications and other proceedings which may release monies for more community benefits rather than cost being wasted on unnecessary appeals and proceedings or repeat applications (perhaps not the most attractive benefit in the Oxford Joint Planning Law Conference!).

This paper sets out some practical considerations, based on experience, for setting up and participating in mediation.

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Introduction: policy and reality

Looking at mediation in planning cannot ignore the wider context of the integration of mediation in the civil justice system and a parallel trend by government for well over a decade to promote non-adversarial behaviours, not just in the resolution of disputes but in the negotiation and operation of all forms of commercial contracts.[1]

Collaborative approaches to solving problems and dealing with conflicts have been consistently referred to in government reports and guidance. ''Partnering'' became a buzzword and, as part of the government's programme of public sector reform, ''partnership'' became the mantra for industrial relations and public sector projects. Now few areas of commercial disputes are considered unsuitable for mediation and it is far from being seen as a sign of weakness or an admission of failure. It has developed to place emphasis on the recognition of the parties' needs which involve both a risk-analysis and problem-solving analysis as part of a mutually agreed outcome. Additionally, in litigation cases, a party may face cost penalties if the court believes it unreasonably refused to try mediation.[2]

While the effective use of mediation in the litigation and commercial environment has provided a key indicator for the effectiveness of the civil justice system as a whole, it has also placed perceived obstacles in the use of mediation in some areas of public law, including planning.

These perceived obstacles have, to some extent, emerged from commentators looking at mediation in a litigation context, the goal of which is settlement, and then trying to apply the same goal *and* the same process ingredients to a limited range of planning settings. However, the role of applicant or appellant in the planning process cannot be compared with a claimant in civil litigation with the planning authority in the role of a defendant.

Planning conflicts generally are conflicts between a landowner or occupier (or a proposed developer) of land and a local planning authority about what is acceptable for a particular site as opposed to a dispute about a right. The private interest of the applicant or appellant may not always square with the public interest represented by the planning authority. Third parties are entitled to become involved and have their say and their interests also may not equate to what is best for the wider public interest, including the interests of future generations in the community.

It is also important to note that a planning application is a statutory process subject to technical legal rules and is often (in the more controversial cases at least) decided by a planning committee whose members have political rather than judicial status.

These are all aspects of a planning mediation which are likely to affect the particular approach to mediation in planning matters that might not apply to straightforward commercial disputes and which might constrain how the parties proceed in mediation in planning matters.

[1] In March 2001 the Lord Chancellor's Department pledged that all government departments would seek to avoid litigation by using mediation and other Alternative Dispute Resolution (ADR) processes wherever possible. Government departments and their agencies would include clauses on ADR in their standard procurement contracts and central government would produce procurement guidance on different ADR mechanisms available for Government disputes. The government, through the pledge, avoided the potential criticism that in asking the public to consider carefully not going to court it did not exclude its own departments and agencies.

[2] Much of the good practice referred to in the revised *Circular on Costs Awards in Appeals and Other Planning Proceedings* Department for Communities and Local Government (April 2009) is drawn from the Civil Procedure Rules and its pre-action protocols. The Circular emphasises co-operative behaviour and dialogue between the parties at all stages of the appeal process, and continual case assessment and case management. As with litigation, one aim of the costs regime is to ensure that parties in the appeal process behave reasonably.

Nevertheless, just as mediation in the civil justice system emerged through the failings in the litigation system as it was reported then,[3] delays in decision-making associated with planning gave rise to increased interest in the use of mediation.

In May 1998 the then Department of Environment, Transport and the Regions launched a pilot for planning appeal and enforcement cases. The objective of the research covered by the pilot scheme was ''to establish the viability of introducing mediation effectively into the planning process in order to speed up decision making, reduce the pressure on public funds and the number of disputes which might otherwise result in appeals''.

The report of the joint DETR/PINS pilot study was published in May 2000.[4] Some of its findings were that:

- mediation was welcomed by almost all participants, irrespective of the outcome;
- householder applicants seemed to gain most from mediation because of a perception of ''user friendliness'';
- disputes focusing on design and layout were best suited to mediation;
- mediation could result in a reduction in the number of appeals but neither applicant nor LPA would pay for mediations, whatever the perceived benefits;
- the skills of the mediator were more important than expert knowledge of planning.

A successful mediation was defined as having one of the following outcomes:

- either a solution is reached or an agreed statement produced highlighting the issues which have been resolved where no final solution is reached;
- a plan of action is agreed by all parties which gives the greatest chance for a solution.

The question of cost savings was considered in the light of whether the mediation was able to avoid an appeal. Appeals were avoided in 73 per cent of mediations.

Then, in December 2001 the Green Paper *''Planning: delivering a fundamental change''* was published for consultation by the Department of Transport, Local Government and the Regions (DTLR). The Green Paper referred to mediation specifically as a ''user-friendly form of dispute resolution''. It also recognised a wider application of mediation in:

- resolving neighbour objections to small-scale household development;
- enforcement cases;
- narrowing the areas of disagreement on planning cases going to public inquiry.

At the same time, DTLR commissioned further research into the use of mediation in the planning system. Once again, the research, defined by DTLR's research specification, was broad in scope. Its objective was to:

- provide further information on the costs, benefits and practicalities of using mediation in the existing development control system;

[3] Interest in the use of mediation was driven by the government's wish to reduce court congestion which included examining the claimed advantages of mediation over litigation, lower cost, user satisfaction, settlement rates, the durability of agreement and the preservation of relationships. Thus, the emergence of mediation arose from the negative aspects of litigation rather than seeing mediation as something positive in itself.

[4] Welbank, M. in association with Davies, N. and Haywood, I., Mediation in Planning, (London: Department of the Environment, Transport and the Regions, 2000).

- examine how mediation might promote social inclusion and greater participation in the planning system;
- consider whether the existing statutory framework for determining planning applications and appeals might be changed to make more effective use of mediation;
- consider the potential for a national planning mediation service working as a subsidiary unit of the Planning Inspectorate but autonomous in its operations. As a national referral agency, it would contract out mediation services to a range of mediation service providers.

The research report was published in December 2002.[5] It identified the post-decision (refusal)/ pre-appeal stage as the intervention point at which mediation was likely to offer the most potential benefits. Amongst other points, it also concluded, as the Green Paper had suggested, that mediation could be used in a number of planning interventions and in addition to improving the efficiency of the planning system through speedier dispute resolution. The report also envisaged that the remit of the national planning mediation service would extend beyond dealing with disputes over planning consents to the use of mediation in connection with Community Strategies, enforcement procedures, environmental impact assessments, s.106 Agreements and objections to draft plans.

In September 2003 the then Office of the Deputy Prime Minister published a research report (Cliff Hague and others): *Participatory Planning for Sustainable Communities: International experience in mediation, negotiation and engagement in making plans*.

The core message of the report was to discard the idea of ''public participation'' and move to ''participatory planning'', i.e. replacing a process led by the planning authority where information flows mainly from the planners to the public who are given opportunities to comment on proposals, with a process where the public is involved from the start in shaping proposals. That could sometimes involve using third party mediation to resolve conflicts and objections to a plan. The report referred to a spectrum within participatory planning including engagement, negotiation, pre-mediation (where the planning authority leads in attempting to resolve potential disputes between other parties and arrive at agreements which can be incorporated into the plan) and mediation by an impartial third party when the planning authority is a party to the dispute.[6]

The report of the Barker Review of Land Use Planning in 2006 referred to the greater use of mediation having the potential to reduce the number of appeals and supported the recommendation made four years earlier to establish a national planning mediation service.

More recently, the Report of the Killian Pretty Review ''Planning applications: A faster and more responsive system'' published in November 2008, 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 more cost effective way. To achieve this:

- local authorities and applicants should explore opportunities for applying alternative dispute resolution approaches throughout the process;
- the Department and the Planning Inspectorate should carry out a more detailed investigation into the use of formal mediation as a less adversarial and speedy alternative to appeal;

[5] Welbank, M., Davies, N., Haywood, I., Shenfield, M. and Ayvazyam, T. in association with Grant, M. and Dean, J., Further Research into Mediation in the Planning System. Planning Research. Office (London: Office of the Deputy Prime Minister, 2002).

[6] In September 2004 the government introduced a significant change in replacing local plans with Local Development Frameworks. Mediation was mentioned as having an important role in the process of working up Local Development Documents and attracting ''buy in'' from local communities. However, it was all but silent on how it would work in practice.

- to establish whether the potential time and cost savings would justify the costs of introducing such a scheme.

So, the government's flirtations with mediation in planning over the last decade have focussed their attention on the appeal process to which has been attached the nagging problem of reconciling an appeal system which is currently free, with the exceptions of certain planning enforcement appeals, and some form of mediation service which will have to be paid for. As a result of this tension, the government may be unwittingly sending signals to sceptics that it is not entirely convinced of mediation being appropriate for dealing with planning conflicts outside the appeal process.

As with other calls for further research into the appeal system before it, the Killian Pretty review suggests that mediation is being seen as an add-on to the planning system to deliver quicker decisions. This draws attention away from two important points: first, that the use of mediation can have different goals and can be adapted to different situations and, secondly, that as part of the government's national planning policy, community involvement in delivering sustainable development is one of the key principles identified in Planning Policy Statement (PPS) 1. Amongst approaches to effective community involvement, PPS1 says that communities should be able to put forward ideas and suggestions, and participate in developing options and proposals. In other words, communities should be given the opportunity to participate actively rather than simply being invited to comment on worked-up proposals. It is in this territory where mediation has an optimal part to play.

What is mediation?

There is no universal definition of mediation. The definition will depend in which context it is primarily used. So, for example, in a commercial or litigation context, CEDR defines mediation as,

> ''a flexible process, conducted confidentially in which a highly skilled impartial person actively assists parties to work towards a negotiated agreement of a problem or dispute, with the parties in ultimate control of the decision to settle and the terms of resolution''.

In a planning context that definition will raise a few obvious practical questions. So, rather than attempting to give an all-encompassing definition of mediation as applied to planning, it is more useful to look at the outcomes which mediation can achieve which, in turn, point to the working framework under which the mediation can operate. These fall into two basic categories:

1) reaching a settlement or legal agreement—mediation as assisted negotiation;
2) reaching a consensus or shared understanding—mediation as facilitated dialogue.

The first category must assume that there is both something to negotiate and a capacity to negotiate. Where local planning authorities are concerned, this makes demands on their flexibility in negotiating potential agreements because they are charged with protecting the public interest. The second category may have an element of negotiation but is focused on improving communication and allowing real dialogue to take place.

At its simplest, mediation is a non-binding process in which an impartial person assists parties in attempting to reach a particular outcome. Unlike a planning inspector, a mediator does not make a decision and cannot impose a solution.

While the core elements of mediation are few in number, there are many important variable features. These include:

- the degree to which the parties enter into mediation of their own volition, are influenced by the courts or other statutory process, enter the process as a condition of the contract, or as a consequence of a previous dispute resolution process, such as neutral evaluation or expert determination, where a crucial legal or technical expert issue required resolution first;
- ''track record''—the previous experience of the parties to the mediation process and their willingness to try it, either on the basis of that experience or the experience of others whose judgement they trust;
- the extent of the parties' choice of mediator(s);
- the professional background, expertise and skills of the mediator;
- the extent and nature of the mediator's interventions with regard to facilitating, evaluating, recommending or persuading the parties;
- the extent to which past conflicts are brought to the mediation and future interests are taken into account;
- the extent of authority a party has to negotiate and agree to the terms of a resolution if the goal of the mediation is to reach an agreement or settlement;
- the degree of confidentiality of the process.

The last two of these variables pose obvious considerations for the landowner and the local authority, as well as other local community representatives.

Mediation as assisted negotiation

Authority and probity in decision-making

Many decision-making powers of a local authority such as planning are statutory discretions. Public bodies cannot fetter a discretion and they may not be able to delegate a decision to anyone else. For example, a planning officer may only be able to say that a revised planning application in a particular form could be recommended for approval to the planning committee. Assuming the planning officer does not have delegated authority, a landowner negotiating with the local authority would always have to accept the risk that the planning committee may take a different view to that of the planning officer. That would apply to mediation, whether it is played against the backdrops of, for example, a pre-application negotiation, a s.106 negotiation, or a post-decision/pre-appeal negotiation. Even with officer delegated matters, it would be wrong and dangerous for an officer to ''promise'' an outcome before appropriate consultation and appraisal processes had been undertaken.

Confidentiality

Confidentiality is regarded as one of the key ingredients of mediation in a commercial setting. It is conducted on a ''without prejudice'' basis, which means that all communications made for the purposes of the mediation will not be admissible in court or other proceedings, though the fact that mediation has taken place is not, in itself, inadmissible. Existing legal rights, therefore, are not compromised (unless the parties agree to waive them).

Because planning is subject to public consultation under a statutory process, full confidentiality cannot be imposed on the mediation and the outcome of negotiations will have to be made public in order that they can be approved and implemented.

Typical structure

Mediation is a fluid process. It varies significantly according to the type of case, the parties, the content and the timing before any statutorily based determination process.

Most civil or commercial mediations are conducted in a day and although there are many shapes to mediation, it is convenient to describe the process as involving five phases consisting of any number or combination of joint and private meetings.

1 **Preparation**—the mediator (or the mediation service provider) will contact the parties to confirm the:

- date and duration of the mediation;
- latest date of receipt, or simultaneous exchange, of case summaries and supporting documents;
- terms of the mediation agreement;
- venue;
- mediation fees;
- party representatives attending the mediation and authority to settle.

The mediator will then make follow-up confidential telephone calls with each party to address any concerns they may have about the mediation. The mediator may also ask questions related to the case summary and supporting documents. The parties, together with the mediator, may possibly agree a pre-mediation meeting would be worthwhile to discuss points of process.

2 **Opening**—on the day of the mediation it is common practice to have an initial joint meeting at which the parties present a summary to each other of how they see the dispute and identify the issues which need to be addressed to move towards a resolution of their dispute or problem.

3 **Exploration**—the mediator will have private and confidential meetings with each party separately to:

- examine the important issues and needs of each party;
- understand the party's case so that it can be articulated when meeting the other party;
- encourage openness about the weaknesses and strengths of the party's and the other party's case;
- discuss the effect of non-agreement and the risks that may follow;
- discuss options for settlement.

4 **Bargaining**—during this phase the mediator may consider that joint meetings may be more appropriate to enable the parties to:

- set the agenda;
- negotiate directly;
- discuss differences in understanding of fact, expert opinion or likely legal outcome;
- involve a meeting of experts or sub-groups on specific issues;
- agree a possible adjournment.

5 **Conclusion**—if the parties reach a resolution, they will need to record the mediation outcome in writing which may take the form of a:

- signed settlement agreement which forms a binding contract;
- conditional agreement, such as a draft heads of agreement or letter recommending approval;
- settlement set out in the form of a schedule made the subject of a Tomlin Order, under which a court order is stayed on terms which have been agreed between the parties.

If settlement is not reached, it is usual for the mediator to convene a joint meeting at the end of the day with all participants (or at least the lawyers) to review progress made and the areas which remain in dispute. This primarily allows the mediator to plan how further discussions between the parties might be taken forward. The parties may agree to record a statement giving areas which are/are not in dispute or agree an agenda for further mediation.

Clearly, not all of these steps will be appropriate to all planning mediations—or if they are appropriate some of them will need to be adapted to meet the circumstances of the planning matter in question. Here are some examples of how mediation can be adapted and applied to some typical, real-life planning-type situations.

Mediation example—post refusal/pre-appeal

This mediation concerned the refusal of planning permission to develop and refurbish a listed building owned and used by a trust as a home for people with learning disabilities. The building, a substantial Grade 2* listed 18th century house set in a landscaped park had been subdivided to provide bed-sit units. Four modern buildings within the park grounds provided additional units.

The trust wanted to develop new accommodation and found a development partner to build new facilities, releasing the main house for conversion and refurbishment without the trust having to use its own funds. An architect prepared a scheme and submitted plans to the Local Planning Authority.

Although recommended for approval by the planning officer, the planning committee refused permission for the development. Although an appeal had been prepared, the trust had not yet lodged it with the Planning Inspectorate and hoped to avoid the appeal by trying mediation.

Participants in the mediation included a director of the trust, a senior planning control officer, a regional inspector from English Heritage, the architect for the trust and the developer, a representative from the parish council, a local councillor and three representatives from the local residents group.

Having received all the case summaries, the mediator had substantial telephone contact with the parties before the mediation. The mediator also arranged to meet one of the directors of the trust at the house to see the site. In particular, the mediator wanted to persuade the trust not to attempt to present an alternative proposal at the opening session of the mediation.

Beginning with a joint meeting, all parties, in turn, presented their views and identified the key planning issues. These were listed as: the interior of the main house, the new buildings, the setting of the house, traffic, parking and access, the preservation of trees, the protection of wildlife and the general viability of the proposal. The trust was also keen to show the financial restrictions it was working under.

The joint meeting soon exposed the residents' antipathy towards the planning officer and hostility towards the developer as this was the first time the proposal had ever been explained in detail. It emerged that a number of invitations to attend presentations made by the architect had been ignored, which came as a surprise to the local councillor.

After a single private meeting with each party, the mediator prepared the parties for a final joint meeting at which the trust's architect proposed a potential reconfiguration of the site and design alterations to the main house. The new proposal was accepted in principle and further meetings were agreed with English Heritage and the planning officer to enable the trust to make a new planning submission which the planning officer was prepared to recommend for approval. The development was subsequently granted permission.

Mediation example—public right of way

The dispute involved objections to a number of extinguishment orders and a creation order across farming land in five ownerships.

The owner of a farm, an isolated private dwelling surrounded on all sides by public footpaths, went to the district council to discuss proposals for changes to the footpaths. Before making an application to the council, the owner worked with the neighbouring farmers to come up with a proposed route which would be acceptable to them all and the council. The council was pro-active in its approach. Despite various concerns and alternative suggestions offered by the Ramblers' Association, the new owner made an application for changes to the footpaths resulting in a package of extinguishment orders and a creation order. It was thought that the changes offered greater privacy and security and would enable more efficient farming of the arable land. It was also thought that the new route was more direct and less intimidating, with easy to follow, wider paths, and of a firmer surface.

However, two objections remained from the Ramblers' Association. The first related to a proposed increase in road walking from the next nearest public right of way and the second related to the drafting of the orders.

Despite trying to overcome the objections, the council felt unable to progress matters. Meanwhile, the applicant and the farmers were becoming increasingly frustrated, particularly as they had been able to agree a new footpath route. The council, therefore, proposed mediation to which all the parties agreed.

Before the mediation, the mediator contacted the parties to gauge their understanding of the dispute, what problems they each thought they would have to confront and overcome, and to what extent the council, applicant and the neighbouring farmers were speaking as one. The mediator also addressed the technical objection to the drafting of the orders with the council and the Ramblers' Association so that the issue was not used as a means of posturing at the mediation.

Subsequent negotiation at the mediation was influenced by a number of factors including: the personal involvement and investment of time by the Rights of Way Officer whose post was being made redundant and who was, therefore, determined to have the dispute settled; the representative and negotiator for the Ramblers' Association working in the shadow of his senior colleague who was a recognised expert in rights of way matters; one of the farmers owning substantially less land than the others; the council entering the mediation assuming it was speaking for the applicant and the farmers; one of the farmers hoping to build on his land and for which planning permission was almost certain never to be granted; and, more generally, the principled objections of the Ramblers' Association set against the practical considerations of the landowners.

The mediation lasted for five hours at the end of which the parties agreed to a modification on the creation order. However, the mediator was concerned that one of the farmers, who was worse off financially than the other landowners, and who was having to bear an increased responsibility for

the agreed route, had the opportunity to speak to family business associates. The farmer was given time to contact his brother to confirm acceptance of the compensation being offered by the council for the additional length of proposed footpath over his land to cover for the loss of crop area. After a positive telephone call, the council recorded the outcome and actions agreed in the mediation by way of a memorandum. The Ramblers' Association agreed to formally withdraw its objection in writing.

Mediation as facilitated dialogue

Although debate plays a valuable role in comparing different ways of looking at and solving problems, it can often become destructive when it is repetitive, entrenched and rhetorical.

In destructive debate, 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. Questions are asked from a position of certainty (rather than genuine curiosity) and are often rhetorical challenges or disguised statements. Statements are predictable and offer little or no new information. Also, participants speak to their own constituents rather than to each other.

Mediation used to facilitate dialogue aims to encourage people to listen, speak and interact in ways to help reverse the tendency of debate to deteriorate and for participants to rely on, or revert to, hard-wired adversarial behaviours.

For example, in relation to an application for an order under the Transport and Works Act 1992 for the construction and operation of a guided bus system, the promoter, through its legal advisers, approached CEDR to assist in the design and facilitation of a communication process to give an opportunity for objectors to openly discuss issues with the promoter outside the formal environment of the inquiry. The aim of the process was to minimise the number of issues and/or objections brought to the inquiry. Also, it was agreed by all participants that the outcome of the process should be recorded in a report drafted by the mediator (reviewed and agreed by representatives of the participant groups) and made available to the inspector.

In another recent example, CEDR was approached by a planning authority for the design and delivery of an independent planning consultation process in relation to a proposed extension of an existing Gypsy site.

The planning authority made a successful bid to secure funding from the Department of Communities and Local Government (DCLG) to meet its statutory obligation to provide additional accommodation for Gypsies and Travellers.

Prior to submitting the funding bid, representatives of the planning authority met with representatives of local parish councils to advise them of the proposals. A subsequent event to explain the outline proposal to the local community, which also included the involvement of the Gypsy family who owned the site, did not go well.

With the funding being contingent upon a planning application being submitted to, and approved by the local planning authority, the council wanted help to ease tensions between itself and the local community and also to return to a focus on the substantive planning issues which would need to be addressed in any application.

The common reasons in both these examples surrounding a request for mediation were that the parties wanted:

- to find a way to narrow the issues between them;
- a forum in which they would really be heard and listened to;
- to build trust (even if they did not agree with each other on many issues).

Convening the mediation and choosing the mediator

In both of these examples CEDR was approached as the mediation service provider, but equally, the approach could have been made to a mediator direct. In either case, the way in which the mediation is convened is critical, particularly where there is a clear lack of trust and anxiety between the parties. In a matter where one party is likely to be paying the fees of the mediation, it is essential that all parties have a say in both the selection of the mediator and the design of the process once the mediator's involvement has been agreed.

Unless the parties already have a mediator in mind, the mediator is usually chosen through a mediation service provider. There are many mediation service providers in the United Kingdom. Most of them are accredited by the Civil Mediation Council, which requires accredited providers to have minimum standards of training and continuing professional development for their mediators.

Because service providers generally obtain detailed feedback on the performance of their mediators they can readily match a mediator to the particular needs and characteristics of a particular dispute. They can make the process of agreeing on the mediator easier because they recommend a mediator, rather than each party having its ''own'' candidate.

If the other party does propose a mediator it has worked with before, that is no reason to immediately object to that mediator: the mediator has no power to pressure a party to agree to anything it does not want to, and if the other party is proposing a mediator, it is probably doing so because it believes the mediator has the ability to do the job well.

Whichever route is taken to selecting the mediator, mediators must be selected on a consensual, rather than a least objectionable, basis. The important thing to keep in mind is that no two mediations are the same. The personalities will be different and will respond to different types of mediator. It is not enough for the mediator to understand the legal and technical issues. He or she must understand how to relate to the parties sufficiently to work with them constructively.

Some interventions may require the mediator to have the gravitas and authoritative voice that comes from many years of experience. Others may require a persuasive, personable mediator who reaches people well and can see the big picture. If the dispute is emotionally charged, the mediator will need to be comfortable with handling emotional parties and able to gently guide the parties to engaging with each other in a way which allows them to be understood and also enable them to listen and understand what the other parties are saying. If the parties are more abrasive and intransigent, they will need logic and tenacious persuasion.

It is also undoubtedly the case that planning disputes require the mediator to have familiarity with the planning system. Saying that, however, does not mean that the mediator must be an expert in planning. Subject matter expertise is less important than expertise in the process of mediation.

Some cases can benefit from having two mediators working together. Two mediators will be able to combine their different skills and areas of professional expertise and can achieve a balance between parties and mediators—for example, evening out cultural, ethnic or gender differences. By working in tandem, two mediators can keep parties more fully and efficiently engaged; by working with more

than one party at a time they can cut down on the amount of time parties are not occupied, which inevitably occurs when a mediation is conducted by only one mediator.

Alternatively, a mediator may work alongside an independent planning expert who is able to question any assumptions or responses made by the planning authority in any meetings dealing with more complex planning issues.

Where a unilateral approach (rather than an agreed joint approach) has been made by a party to the service provider or mediator then the other parties' sensitivity to the mediator's impartiality becomes acute. More so, when the party who has made the approach is likely to pay all the mediation fees.

The mediator has to earn the trust of all the parties and show that he or she is not in the control of the paymaster. Remember, the mediator will probably have met with the initiating party to enable the mediator to put forward a formal proposal for services which could be viewed by the other parties with some suspicion.

To that end, it is wise to have a pre-mediation meeting with representatives of all participating groups to discuss process matters and, more importantly, to give the parties an opportunity to assess the mediator for themselves. The mediator may help the initiating party draft a letter inviting the other parties to attend the pre-mediation meeting.[7]

The purpose of the pre-mediation meeting, which is chaired by the mediator, is to discuss and agree:

- the mediator and the scope of the mediator's role;
- the process;
- other interested parties or information givers who should be involved;
- the ground rules for participation which will be put in some form of facilitation charter to be produced by the mediator for agreement after the pre-mediation meeting.

The facilitation charter

The charter sets out the background to the conflict and the conduct to be adopted by the mediator and the participants. Typically it:

- identifies the participant groups and the sponsor;
- states that the fees and expenses of the mediator and other expenses related to the facilitation will be borne solely by the sponsor (i.e. the local authority or landowner) and, usually, that each participant will be responsible for its own costs and the expenses of its participation in the facilitation;
- states the outcome and deliverable associated with the facilitation and any deliverable due date or milestone dates preceding it;
- sets out the tasks and activities of the mediator, for example, chairing joint meetings, meeting separately with representatives of each participant group to find out the key issues as they see them, producing summary notes of joint meetings for agreement by all participants, reading any relevant documentation or correspondence as advised by participants, producing a conflict map, dealing with any press or media enquiries. Also, the extent to which, if any, the mediator can make recommendations;

[7] Alternatively, a senior representative of the mediation service provider may chair the pre-mediation meeting without a mediator yet having been selected.

- describes the degree of confidentiality applied to any private meetings;
- identifies or makes provision for the involvement of any other individuals for providing information at meetings or the participation of observers;
- states how the facilitation may be brought to an end.

As with a formal mediation agreement, the charter will also refer to the mediator conforming to a Code of Conduct and state that participants understand that the mediator is independent and impartial and does not give professional advice. It will also say that the participants agree that they will neither make any claim against the mediator or the service provider (if one is involved) in connection with the facilitation nor call the mediator to give evidence in any proceedings arising from, or in connection with, the matters in issue in the facilitation.

Paying for mediation and mediation fees

Unlike a commercial or litigation related mediation where the mediator's fees are usually shared equally among parties, a local authority or landowner/developer may decide that bearing the whole cost of the mediation is a worthwhile investment because it believes that:

- the independence and impartiality of a mediator is more likely to encourage positive engagement by interested third parties, particularly where the breakdown of trust is significant[8];
- the offer of mediation will send a signal to other parties that it is being entirely transparent in its dealings and is prepared to engage in constructive dialogue;
- it will focus on or narrow down issues particularly in highly contentious conflicts which involve differences of values, identity, and political or worldview and where it is easy for parties to make generalisations and assumptions, clouding their ability to acknowledge the specific aspects of their conflict.

Most mediations which aim for an agreement or settlement are conducted in a day or less. Where mediation is used to facilitate dialogue, often between many parties, the mediation will be spread, on and off, over a number of weeks or possibly months and meetings are likely to take place in the evenings after working hours. Location, preparation required, the seniority, professional affiliation and experience of the mediator, the number of parties, and the complexity of matters under discussion are all factors which will influence the level of fee in each different situation.

Conclusion

As the government has continued to focus calls for further research into the appeal process, the research has become bogged down in an area which is least likely to act as a promotional vehicle for using mediation more broadly in planning. As always, it turns on economic factors and what potential users would see as attractive in using mediation.

Where the determination of an appeal is currently free, the role of government in providing mediation services becomes more sensitive, and it becomes less open to use an argument which says that the provision of such services, particularly those involving householder appeals, can be entirely guided by market forces.

[8] Planning professionals may see that mediation is something that they do all the time, i.e. negotiating for the landowner or the local authority. However, the difference is that they are negotiating on behalf of someone and, therefore, can never be seen as impartial.

Also, the appeal system in which PINS has to meet target times for determining appeals, provides little incentive for mediation. Even if PINS granted a stay to an appeal, it would be highly unlikely that the local authority would contribute to the cost of the mediation. It would then be left to the appellant to initiate the mediation and pay for it, and weighing it up against entering a process which would slow down the appellant's appeal. This would be even less attractive if third parties were involved.

And, tied to the cost of mediation is the fact that, unless and to the extent that the outstanding issues can be resolved in an agreed Statement of Common Ground in the appeal to which all interested parties, as well as the appellant and local planning authority can subscribe, there is unlikely to be a neat and final conclusion to a planning appeal mediation as there is in a commercial mediation. Either the local authority would have to withdraw its objection(s) or the landowner would have to bin his proposed plans. What is left is usually the submission of a new planning application, leaving the landowner facing the possibility that this, too, may be refused despite assurances given at the mediation. However, the results of the pilot studies referred to at the beginning of this paper do not justify an overly gloomy prognosis for the outcomes of mediation in the planning process.

Where mediation is to be used as assisted negotiation, it should focus on those areas where there can really be something to negotiate such as s.106 Agreements and ''planning gain frameworks'', compensation under Compulsory Purchase Orders and the discharge of planning conditions. As a means to facilitating dialogue, the scope for mediation in planning is far wider.

But, if mediation is only seen as an add-on or a ''distress purchase'', then the cultural shift which is undoubtedly required for its use in planning is unlikely to occur. Mediation should be seen as part of good planning practice which involves adopting mediation techniques and approaches as much as it does in employing external and impartial mediators.[9]

The government is highly unlikely to spend any money on developing a planning mediation service: whether that is providing funds to establish an independent body or outsourcing to already established providers.

While it is true that mediation in planning has been limited, the mechanisms for its use are already in place through service providers such as CEDR or RICS whom potential users can always approach to discuss any planning conflict and the practical aspects of implementing mediation.

[9] A point also made in Hague, C., Participatory Planning for Sustainable Communities, (2003).