Mediation in the planning system

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South African Planning Journal 42 June 1997, pp. 49-53

This article is drawn from a paper given by Chris Shepley to a conference organised by the North West Branch of the Royal Town Planning Institute in Warrington (UK) on 15 October 1996.

An Australian report on mediation in planning disputes (known as the Keaney Report) gives a useful definition:

> An understanding by parties to a dispute to enter into discussions so that those parties, with the assistance of two impartial persons, can agree to resolve the dispute themselves. It is a voluntary system and entirely 'without prejudice'. If a party decides to withdraw from mediation and go to another forum they are entirely free to do so. No rights are forfeited by choosing mediation as an option. The process is entirely confidential.

There are a number of things to note about this definition. The first is that mediation is voluntary; I do not think that in any country mediation is forced upon parties, and I do not think it would work if parties did not take part of their own volition.

The second is that it is 'without prejudice' - it does not affect the rights of applicants to go on to appeal, in the normal way; or the rights of local authorities to make democratic decisions.

The third is that it is confidential - options can be explored without undermining the positions which the parties may wish to take at any subsequent inquiry. There are mediation systems in some parts of the world which do not operate on a confidential basis, but in the context of the UK development control/appeal system, my own view is that confidentiality would normally be essential.

A variety of advantages is claimed for mediation, as compared with formal legal processes. The most important are the following:

1. It is quick. There is no need for formal and substantial preparation or post mediation procedures. The mediator simply handles the case and leaves the parties to take subsequent action. Except in complex cases, prior written submissions would not be needed.

2. It is, in relation to the normal inquiry or hearing process, cheap (though there would probably be a charge for the process). It would save costs for both parties and, if any appeal was averted, for the Inspectorate.

3. It is informal. This may be more important in Australia and New Zealand, where the alternative is a very formal procedure; in the UK we have the hearing process, which is fairly easy to tackle. Nonetheless, mediation can be very relaxed.

4. It is flexible. Techniques can be adapted as required, in relation to the case in hand, and parties can withdraw if they are unhappy without affecting their case or their rights.

5. The traditional processes generally lead to a 'win/lose' situation; entrenched positions are taken, and public inquiries do not provide a good forum for negotiating compromises or reaching agreement. Mediation, at its best, can lead to a 'win/win' situation, where both parties gain from the process and a better solution is achieved.

6. There is more likely to be an enduring resolution of the problem. The process is likely to decrease, rather than increase, levels of animosity and misunderstanding; and if the parties have shaped the agreement they are more likely to stick to it. In the traditional process, if one or more parties remain dissatisfied, there is always the possibility that the dispute will re-emerge in a different form. For example, the possible failure of a developer to comply with conditions, and the likelihood of subsequent enforcement proceedings, could be averted as a result of an agreed solution, rather than one which is the result of the normal process.

In my view, although the speed and cost factors may drive the process in the UK, it is the potential improvements to the quality and durability of decisions which provide the strongest reasons for considering it.

The mediator needs to be demonstrably independent, and to carry the respect of the parties. Some agents and architects involved in the planning process on behalf of developers have claimed that they already act as mediators, during the negotiations with the planning authority. I think that this something of a misunderstanding; the mediator needs to be separate from the process, and not representing either of the parties in any way. Certainly planners, architects and others currently seek to reach agreement, and indeed a friend of mine once observed that 'the biggest problem that planners have is that they can always see the other person's point of view'. This is all to the good, but clearly in the present system it fails to resolve every dispute. The question therefore is whether there is scope for a rather more specific mediation option to be introduced into the process.

Wherever he or she comes from, the role of the mediator would simply be to meet the parties (together or separately or both) and seek to help them to reach an agreement. It is not the role of the mediator to make a decision or impose a solution; the aim is simply to build a consensus. This, it seems to me, could be done at one of four stages in the planning process.

1. During the pre-application stage. There are some who feel that mediation is more successful in dealing with incipient conflicts than it is at a later stage where more entrenched positions have been taken.

2. After the planning application has been made to the local authority, but before the committee have considered it.

3. After the planning committee has made a decision to refuse an application (or where it is minded to refuse an application), but before the appeal is lodged.

4 After the appeal has been submitted, but before the inquiry/hearing/site visit.

Problems

There is, of course, a whole series of problems relating to mediation and there has been a great deal of debate about them.

1. The first, and most important from a planning point of view, concerns the role of third parties. In the planning process which we are discussing, they play a particularly important role.

   The flexibility of mediation is important in this context; different forms of mediation process, in different parts of the world, involve third parties to a greater or lesser extent.

   I have made the assumption that most commonly the mediation session will involve only the applicant (or agent) and the local authority. Where there are small numbers of third parties (for example in a dispute between neighbours), then it would be obvious that all of them should be present. But where, as is often the case, there is a significant number of third parties with an interest (not all of them identifiable on many occasions), then it is difficult to envisage how they could be directly involved if mediation is to provide a rapid and satisfactory solution in the development control process.

   The question, therefore, is how the rights of third parties can be safeguarded in this context. My own view is that this is quite

possible, and that mediation can be viewed as simply one of the series of meetings which normally and necessarily take place between applicants and council officials. In the development of a planning scheme, there may be very many private meetings, at which negotiations take place over the details of the proposal, and changes are made as a result. Third parties are rarely present at these meetings. Mediation is different in the sense that someone neutral is present to try to assist the parties to reach consensus. But in every other respect, the meeting is little different from those which happen now.

The rights of third parties are generally safeguarded because any revised proposals which emerge from such meetings (whether with a mediator or not) will be advertised and third parties will be given the opportunity to express their views in the normal way, before a final decision is made. It is very common for schemes to be changed, as they go through the process, and for public comment to be invited on new proposals.

It is crucial to the success or otherwise of mediation that this particular problem is taken on board, and that there is no diminution in the ability of third parties to become involved in the process. This is the single most important problem facing mediation in planning. Underlying it are concerns which have been expressed elsewhere concerning secrecy, open-ness, and accountability. So long as the principles of open-ness, fairness, and impartiality are taken into account in the mediation process, then I think that these potential problems are capable of being overcome.

2. The other major problem surrounds the role of local councillors, and it is clear that the outcome of mediation must be subject to the democratic process. Thus, any Council official involved in mediation with an applicant (with or without third parties) will need to be as clear as possible as to the views of elected members, and if the mediation process is not to fall into disrepute, the Council officer is going to have to be able to give a reasonable assurance that the outcome of the mediation will (subject to any further public consultation) be acceptable to Councillors. It will not usually be possible to give an absolute assurance: the mediation process cannot usurp the democratic process.

3. A third set of problems surround the psychology of the technique - what somebody called 'mediation as seduction'. There is, as mediation develops, a sense of cosiness, and a pressure on the parties to reach a settlement. Sometimes, it is said, that this can be a settlement at any price. To some extent, this is a question of education and experience; but those entering mediation, from any direction, need to be aware of this potential problem, clear as to their 'bottom line', and wary of being 'bounced' into a solution.

4. Another criticism which is frequently made of mediation is to do with 'unequal power'; the possibility that a persuasive party, in mediation, can carry all before him (or her) and that the result may be unfair. Whilst I think this is a valid criticism, I do not think it is any different from the situation which can exist in any other forum - a meeting between the parties, or even an inquiry. There are some very interesting questions about how far the mediator should intervene in such circumstances, and how much he or she should seek to restore the balance, or to bring into play questions of wider public interest, or the maximising of joint gains which he or she believes to be possible. The general view appear s to be that while the mediator may be legitimately concerned about the quality of an outcome, the assessment of the acceptability of the agreement is primarily a matter for the parties and not the mediator.

5. The question also arises as to the expertise of the mediator. It has been suggested that he or she need not be an expert in planning, but in my view this is not right. In the particular case of planning, I think that the mediator will have to have a good understanding of what is possible, and will need to have an appreciation of national planning guidance, the basics of planning law, and procedure. This means that mediators in planning

disputes need not only to be trained in mediation, but also to have some qualification in planning or a closely related discipline (such as architecture, surveying, etc).

Despite all these difficulties, I think that mediation has a significant role to play, potentially, in the development control/planning appeal process. It is important carefully to select the cases which are appropriate for mediation, and not to imagine that it could be panacea. A great deal of though is still needed as to some of the mechanics.

Local Plans

I would like to say a word about the local plan process. I have been particularly interested in the work of John Harrison, an English environmental and land use lawyer, on this subject, which has been published in America.

The problems of the current local plan making process, and particularly of the very large number of objections and very lengthy planning inquiries which take place, are well known. Harrison suggests that mediation could improve the quality of this process and speed it up. He suggests that there are two different stages in the process where informal mediated dialogue would produce a better outcome. Firstly, Councils could convene multiparty negotiation sessions early in the development of the plan. But secondly, he suggests that at the end of the consultation process, but before the plan goes to public inquiry, negotiation sessions could be convened.

The recent consultation paper on Development Plans seeks to sort out this process, and to formalise it. In many cases, there would be no need for mediation; local authorities can continue to negotiate with objectors, to resolve some of the more difficult issues will need to go direct to the public inquiry. I think there is a possibility that at some point during the period between deposit and inquiry, a formal mediation stage might be introduced to seek to resolve those objections which both the local authority and the objector feel might be resolved in that way.

The results of the mediation, and any other amendments made as a result of negotiation between the local authority and objectors, need to be published in an understandable and comprehensive way so that counter-objectors or supporters have an opportunity to make their views known. Once again, it is crucial that nothing is done to undermine the position of third parties.

A good deal of thinking about the local plan process is continuing within the Department of the Environment (the British department responsible for planning); it is very important that the whole process should be simplified and speeded up - this is now the crux of the planning system, and plans will fall in repute if they are not kept up to date. Mediation, if introduced, would have to replace existing stages and would need to be tightly controlled so as to speed up, rather than slow down, the process. This cannot be emphasised too strongly; it will not be attractive to participants if it slows things down.

Major Projects

In the United States, mediation has been applied to the development of national policies (such as energy policy), and also to major projects such as the building of dams, incinerators, highways, airports, toxic waste dumps, and so on. This is a form of mediation which is considerably different from that which we have been discussing so far.

The system is very informal and flexible, with different processes being applied to different problems. In general, mediators come from the private sector. They may be employed for a period of several months, and their remit is - as neutral mediators - to speak to everybody who may have a stake in the outcome, in order to seek a consensus.

There are many well-publicised examples. For example, in the case of the clean up of a vast ex-military nuclear processing plant, mediators spent nine months discussing the issues with the Government, the regulators, local government and native American tribal governments, agricultural interests, economic development/business interests, environmental groups, trade unions, and *ad hoc* local interest groups.

In another example, there were four technical options for the construction of a new bridge. Three distinct interest groups were identified: people living close to the bridge, nearby home owners and business people, and potential users of the bridge. An independent and trained mediator devised a process which sought to reach an agreed solution, and eventually achieved consensus on an eight lane option, with two lanes available for buses and cycles. This was endorsed by a public meeting and accepted by the City Council.

These examples suggest other ways in which mediation might make another contribution to the planning process.

Conclusions

In practice, mediation already occurs in a variety of ways. Planners and others are seeking to help those involved in the kinds of conflict which are innate in the planning world to reach an agreed solution. It is rarely recognised, however, as mediation; and it has not been adopted as a formal part of the process. Nonetheless, mediators already exist, and there is nothing to stop anybody calling in a neutral person to try to resolve a problem at the present time.

However, if mediation is to become widespread in the planning process, it clearly needs to be introduced into the system in a much more recognisable fashion. Getting it off the ground seems to me to be a problem, and in the United States Harrison suggests that the identification and selection of suitable cases has been a major issues. There are, in several American states, 'State offices of dispute resolution' which publicise, popularise and advocate these techniques. They have been successful in strengthening and focusing the use of mediation, particularly in complex cases, and although they all operate in different ways, and are located in different branches of Government, they seem to have worked.

In the UK all the machinery is in place to maintain, manage, train, and monitor a group of home-working mediators nationwide, to allocate them to cases, and to make the necessary administrative and financial arrangements. Training is important and quality is crucial, as in the appeal system, and would need to be carefully assessed, monitored and maintained.

There is a great deal of work to be done on the mechanics, the financing, the procedures and the promotion of mediation in the planning field. Perhaps some experiments are needed; but I think the first thing which needs to be established is whether or not there is general support for the development of the idea in the planing process. It has become clear to me from reading the papers that have been sent to me and from thinking a little more about the subject that it does have potential. It offers us the opportunity not only to save time and money, but to achieve better solutions to some of the planning problems which face us.¶

References

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