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Manuscript title: Briefing: The Potential of Mediating Planning and Environmental Disputes
in England and Wales

Author: Andrew Agapiou

Affiliations: Department of Architecture, University of Strathclyde, 3rd floor, James Weir
Building, 75 Montrose Street, Glasgow, G1 1XJ, Scotland.

Corresponding author: Andrew Agapiou, Department of Architecture, University of
Strathclyde, 3rd floor, James Weir Building, 75 Montrose Street, Glasgow, G1 1XJ, Scotland.

Tel.: 44 141 5483067

E-mail: andrew.agapiou@strath.ac.uk

Abstract

Mediation provides a more cost-effective, faster and generally more beneficial form of dispute resolution than litigation for certain types of disputes. It is for these reasons that mediation may be considered a potentially useful form of dispute resolution in the field of planning and environmental disputes in the UK. Mediation for such disputes promises to facilitate participation in planning disputes on a much broader level, thereby promoting inclusiveness, and allowing for a broader and thus more accurate range of interests to be taken into account. The flexible nature of mediation also enables the process to be tailored according to the particular features of the individual case. It is within this context that the potential benefits of mediation for environmental and planning disputes should be approached and considered within this briefing article, in order to determine whether such benefits are applicable to this type of dispute.

Mediation is typically defined by reference to its qualities and features, such as “private, informal, oral, more collaborative, facilitative, future-looking, interest-based processes that bring parties to a calibrated, multi-dimensional, win-win remedy” (Xavier, 2005). While litigation has persisted for years as the preferred method for solving most types of disputes (Goldberg et al, 2014), mediation has experienced a marked increase in popularity for particular types of disputes, such as construction, family and commercial disputes (Lovan et al, 2017). It is moreover not a new or novel form of dispute resolution; it has in fact been used to solve disputes for centuries (Folberg, 1983). Mediation over the years has however been used for an increasingly broader range of disputes, which has given rise to the question as to whether it should be used to solve planning and environmental disputes (Hersperger, 2015). Planning and environmental disputes are inevitable because they encompass and affect a broad range of government, community and private interests. They are also important in terms of their implications, because the outcome of a dispute is rarely limited to the parties directly involved in the dispute. This gives rise to the need to examine the potential role that mediation could (and should) play in such disputes in the UK. This is because mediation has the potential to help the disputing parties deal with differences in interests, both in the context of establishing consensus, and also in resolving disputes when they do arise. It also has the ability to include and address broader interests, and the views of other stakeholders. While litigation-type disputes are typically geared towards achieving a win-lose outcome, mediation seeks to achieve a negotiated compromise that takes into account the interests of all involved.

It may therefore be a highly suitable alternative to litigation in the field of planning and environmental disputes.

Globally, mediation has proven to be extremely successful in enabling disputing parties to engage in a constructive rather than destructive manner (Goldberg, 2003). For example, in the context of construction disputes, which typically involve complex agreements and time-sensitive contracts, mediation enables a particular dispute to be solved quickly so that the contract itself does not become frustrated. This is just one reason why construction and commercial contracts often feature a mediation/arbitration clause, so as to avoid lengthy and costly litigation. It moreover provides for a cost-effective and swift method of solving disputes in a more informal manner than litigation. Such benefits produce the expectation that mediation of planning and environmental disputes will result in quicker decisions, reduced time in determining applications, greater efficiency and an overall cheaper system. However, it is important to recognise that mediation is not automatically more beneficial than litigation, and its role and advantages depends on the type of dispute involved. It is also important to point out that mediation depends ultimately on the consent of the parties, and hence to impose it as a compulsory method of dispute resolution would undermine the very qualities and advantages that it claims to have over litigation.

The potential for mediation in the field of environmental and planning disputes has certainly not gone unnoticed in the UK. In 1996, a public debate was commenced by Chief Planning Inspector Chris Shepley concerning the potential benefits that mediation could offer environmental and planning disputes (Shepley, 1997). It also addresses certain important

features and qualities of mediation that would need to be maintained and protected in order for the benefits of mediation to become realised.

This is an important issue, because it addresses the fact that the success or failure of mediation for environmental and planning disputes depends largely on how the mediation process is structured for such disputes. Shepley for example emphasises the need to maintain certain core standards in mediation for planning disputes, such as its voluntariness and confidentiality. He also stresses that mediation should “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” (Shepley, 2007, pg49). Academic attention has also been given to such issues, with prominent focus on the successes of mediation for environmental and planning disputes in other jurisdictions, such as the US (Stubbs, 1997). Such interest did not however provoke any major reforms in the UK; it merely resulted in the publication of policy guidance and recognition of the potential benefits of mediation for such disputes (Department for Communities and Local Government, 2006). Given the recognised advantages of mediation in the field of planning and environmental disputes, it is quite surprising that no major practical changes have been implemented in the UK. This forms the main context of the research, in that it recognises and acts upon the need to progress from theory to practice, and to develop an effective mediation framework for planning and environmental disputes. It is moreover important to draw experience from other jurisdictions in which mediation is used for such disputes. The most prominent is Scotland, although other jurisdictions such as Australia and the US will also prove helpful. Identification of the advantages and challenges of such a

system will provide useful guidance on whether, and if so, how, a mediation framework for planning and environmental disputes could be structured and implemented in the UK.

It is difficult to doubt or undermine the benefits that mediation has the potential to offer planning and environmental disputes. It has for example been recognised that it could reduce appeals, in that problems could be eased at an early stage rather than resorting to an expensive and time-consuming appeal process (Barker, 2006). The UK government has however taken relatively few tentative steps towards promoting mediation for planning and environmental disputes. It has, for example, merely expressed that it “support[s] the voluntary use of mediation within the planning system”, and recognised the need to “work with relevant professional bodies to promote mediation services by local authorities” (HM Government, 2007). While the National Planning Policy Framework (NPPF) provides the national framework for planning (, neither the NPPF nor the Localism Act 2011 has any specific references to mediation. It appears that policies and plans have lost pace when they reach the implementation stage, giving rise to the need to determine how a mediation framework for planning and environmental disputes may be best implemented, and what such a framework would need to contain.

Planning disputes do not typically involve disputes concerning rights; they rather feature a disagreement between a local authority and a landowner about what they consider to be appropriate (Watson, 2016). This becomes all the more complicated due to the fact that third parties are able to participate in and contribute to the debate. Planning and environmental disputes may therefore often be more accurately defined as debates. This further supports the

claim that mediation is better suited to such disputes/debates because it provides an arena for voicing opinions and arriving at a negotiated outcome (Kaufman et al, 2014). It is therefore clear that there is convincing evidence to suggest that mediation may play an important and valuable role in solving planning and environmental disputes.

It is further necessary to ensure that the mediation process is tailored to suit the particular features of land and environmental disputes, so that potential problems and challenges may be avoided or minimised. Examples from other countries in which a structured mediation regime for planning and environmental disputes has been implemented will provide guidance in this respect.

References

- Barker, K (2006) *Barker Review of Land Use Planning: Final Report*. HMSO, Norwich, p. 138.
- Department for Communities and Local Government (2006), *Planning Obligations: Practice Guidance*. DCLG, London, ch. 7.
- Folberg, J (1983) 'A Mediation Overview: History and Dimensions of Practice', 1 *Conflict Resolution Quarterly* 11, p. 4.
- Goldberg, SB (2003), *Dispute resolution: Negotiation, mediation, and other processes*. Aspen Law & Business, New York, pp. 50-54.
- Goldberg, S.B., Sander, F.E., Rogers, N.H. and Cole, S.R., 2014. *Dispute resolution: Negotiation, mediation and other processes*. Wolters Kluwer Law & Business.
- Hersperger, AM (2015) 'Comprehensive consideration of conflicts in the land-use planning process: a conceptual contribution', 10 *Carpathian Journal of Earth and Environmental Sciences* 4, p. 8.
- HM Government (2007) *Planning for a Sustainable Future: White Paper Cm 7120*. Stationery Office, London, paras. 9.60, 9.61.
- Kaufman, S, CP Ozawa & DF Shmueli (2014) 'Evaluating participatory decision processes: Which methods inform reflective practice?' 42 *Evaluation and program planning* 11, pp. 14-15.
- Lovan, W.R., Murray, M. and Shaffer, R. eds., 2017. *Participatory governance: planning, conflict mediation and public decision-making in civil society*. Routledge.
- Shepley, C (1997) 'Mediation in the planning system', *Town and Regional Planning* 42, p. 49.

- Stubbs, C (1997) 'The new panacea? An evaluation of mediation as an effective method of dispute in planning appeals', 2 *International Planning Studies* 3, p. 355; J Harrison (1997) 'Environmental Mediation: The ethical and constitutional dimension', 9 *J. Env'tl. L.* 79, p. 85.
- Xavier, A (2005) 'Mediation: Its Origin and Growth in India' (2005) 27 *Hamline Journal of Public Law and Policy* 275, p. 277.
- Watson, LM (2016) 'Planning, Organizing, Formatting and Executing the Mediation of a Complex, Multi-Party, Multi-Issue, Lawsuit', 9 *Am. J. Mediation* 111, p. 115.