

# 1 **Mediating planning disputes: Opportunities, experiences and challenges**

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## 6 7 **Abstract**

8  
9 There is no dearth of academic research into the apparent benefits of mediation as a  
10 tool for the resolution of planning disputes. Several eminent lawyers have proffered  
11 their support for the use of this alternative dispute resolution mechanism within the UK  
12 planning system. Further, formalised mediation regimes have been introduced into the  
13 respective planning systems of a number of international jurisdictions, with apparent  
14 success; for example, in Australia, 34% of all planning disputes are now resolved via  
15 a form of mediation. Notwithstanding this apparent evidence-base, in England and  
16 Wales a substantial number of property developers, local authorities and planning  
17 professionals continue to believe that mediation is not useful or appropriate as a  
18 mechanism for resolving planning disputes and, despite early indications that a  
19 formalised mediation regime would be developed and adopted in England and Wales,  
20 to date no such regime has been implemented. This present research paper seeks to  
21 examine through black letter analysis and semi-structured interview why this apparent  
22 'mediation paradox' continues to exist and critically evaluates whether or not there  
23 does indeed exist a 'business case' for the introduction of a formal mediation regime  
24 within the UK planning system.

## 25 26 **Introduction**

27  
28 Globally, mediation has proven to be extremely successful in enabling disputing  
29 parties to engage in a constructive rather than destructive manner (Golberg, 2003).  
30 For example, in the context of construction disputes, which typically involve complex  
31 agreements and time-sensitive contracts, mediation enables a particular dispute to be  
32 solved quickly so that the contract itself does not become frustrated. This is just one  
33 reason why construction and commercial contracts often feature a  
34 mediation/arbitration clause, so as to avoid lengthy and costly litigation. It moreover  
35 provides for a cost-effective and swift method of solving disputes in a more informal  
36 manner than litigation. Such benefits produce the expectation that mediation of  
37 planning disputes will result in quicker decisions, reduced time in determining  
38 applications, greater efficiency and an overall cheaper system. However, it is  
39 important to recognise that mediation is not automatically more beneficial than  
40 litigation, and its role and advantages depends on the type of dispute involved. It is  
41 also important to point out that mediation depends ultimately on the consent of the  
42 parties, and hence to impose it as a compulsory method of dispute resolution would  
43 undermine the very qualities and advantages that it claims to have over litigation. The  
44 purpose of this paper is therefore to consider mediation in the context of planning  
45 disputes in the UK, with a view to determining its potential role, opportunities and  
46 challenges. This will be applied to determine the viability of mediation for planning  
47 disputes in the UK, and whether a framework can be developed and structured to  
48 ensure that maximum benefit is gained from using mediation for such disputes.

## Research Context

As has been briefly addressed above, 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 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 (Bacow and Wheeler, 2013). It is within this context that the potential benefits of mediation planning disputes should be approached and considered, in order to determine whether such benefits are applicable to this type of dispute.

The potential for mediation in the field of 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 and planning disputes (Shepley, 2013). 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 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, 2013; pg 49) Academic attention has also been given to such issues, with prominent focus on the successes of mediation for 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 (DCLG, 2006). Given the recognised advantages of mediation in the field of planning 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 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 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 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, 2007).

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102 The UK government has however taken relatively few tentative steps towards promoting  
103 mediation for planning disputes. It has, for example, merely expressed that it “support[s] the  
104 voluntary use of mediation within the planning system”, and recognised the need to “work with  
105 relevant professional bodies to promote mediation services by local authorities”(HM  
106 Government, 2007). It appears that policies and plans have lost pace when they reach the  
107 implementation stage, giving rise to the need to determine how a mediation framework for  
108 planning disputes may be best implemented, and what such a framework would need to  
109 contain. Planning disputes do not typically involve disputes concerning rights; they rather  
110 feature a disagreement between a local authority and a landowner about what they consider  
111 to be appropriate (Watson, 2016). This becomes all the more complicated due to the fact that  
112 third parties are able to participate in and contribute to the debate. Planning disputes may  
113 therefore often be more accurately defined as debates. This further supports the claim that  
114 mediation is better suited to such disputes/debates because it provides an arena for voicing  
115 opinions and arriving at a negotiated outcome (Kaufmann et al, 2014). It is therefore clear that  
116 there is convincing evidence to suggest that mediation may play an important and valuable  
117 role in solving planning disputes. It is further necessary to ensure that the mediation process  
118 is tailored to suit the particular features of land disputes, so that potential problems and  
119 challenges may be avoided or minimised. Examples from other countries in which a structured  
120 mediation regime for planning disputes has been implemented will provide guidance in this  
121 respect.

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123 This research is of considerable importance for a number of reasons. First, if mediation  
124 is indeed a cost-effective tool for the expedient resolution of planning disputes, then  
125 the adoption of a formalised mediation regime the UK could accelerate investment into  
126 the respective property sectors of England and Wales. After all planning disputes delay  
127 developments and, consequently, a dispute resolution mechanism which can facilitate  
128 an earlier settlement of such disputes will ensure a faster realization of the benefits of  
129 development projects, including but not limited to higher levels of taxation revenue,  
130 employment, and housing stock (IRS, 1971). A study commissioned by the UK  
131 Government in 2002 estimated that the adoption of a formal mediation regime within  
132 the UK’s planning sector would result in the realization of £3 billion of investment into  
133 the UK economy 40 weeks earlier than would be the case if all planning disputes were  
134 resolved via formal litigation. The findings of this study suggest that there is indeed a  
135 strong evidence-base in support of the adoption of a formal mediation regime within  
136 the UK’s planning system.

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138 Second, planning appeals in the UK cost the Exchequer around £25 million each year  
139 (Planning Inspectorate, 2010), and substantially more still for the developers and local  
140 authorities embroiled in these formal proceedings (Ratcliffe et al, 2009). If mediation  
141 is a cost-effective and viable alternative to formal litigation, then its widespread  
142 adoption would almost certainly result in a reduction in the number of appeals being  
143 lodged each year and a substantial cost saving for all parties involved and the  
144 Exchequer (Ratcliffe et al, 2009).

145

146 Third, there is evidence that the UK government is seeking to promote the  
147 development of a less centralised and more community-oriented planning system  
148 (Pemberton et al, 2015); for example, the *Planning and Compulsory Purchase Act*  
149 *2004* and the *Planning Act 2008*, both emphasise—and give a statutory footing to—  
150 the importance of efficient pre-application procedures and community participation.  
151 While mediation is only required after a dispute has arisen, as opposed to at the pre-

152 application stage, nevertheless there is a clear synergy between the objectives of  
153 mediation and this emerging public policy agenda.

154 Ultimately, the overriding objectives of this agenda are to increase stakeholder  
155 participation and to reduce the number of formal planning appeals being lodged with  
156 the courts. If mediation can help the parties to resolve their disputes without recourse  
157 to the formal appeals process, then at least the latter of these two agenda will be  
158 promoted, albeit at the post-application stage. Whether or not mediation is  
159 simultaneously capable of enhancing stakeholder participation is something that will  
160 be discussed at length within the body of this paper. Traditionally, mediation was  
161 developed as an informal and private mechanism for the confidential resolution of  
162 bilateral or bipartisan disputes; however, it will be argued in this paper that mediation  
163 is a highly flexible process and this form of Alternative Dispute Resolution (ADR) has  
164 no intrinsic qualities or characteristics that would preclude it from being modified to  
165 accommodate a wider number of community participants. So long as the expectations  
166 of the parties are managed appropriately, and a suitable form of mediation is adopted,  
167 this ADR mechanism can be an excellent way of allowing a wider range of  
168 stakeholders to participate in the negotiation process than would ordinarily be entitled  
169 to participate in the judicial appeal process (MacLaren et al 2007).

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## 171 **Research Issues, Aims and Objectives**

172 The first research issue relates to the potential benefits that mediation provides in  
173 planning disputes, both in its own right, and in comparison to litigation. This will  
174 provide a basis for developing specific conclusions and reasoned arguments  
175 pertaining to the benefits of mediation for planning disputes. This then gives rise to  
176 the research issue pertaining to the potential disadvantages of mediation for planning  
177 disputes. This is an important issue, because it recognises that mediation is not  
178 automatically advantageous for all mediation disputes. The objective of this research  
179 area is to balance the potential advantages and disadvantages of mediation for  
180 planning disputes. This will provide a formula for determining how a mediation  
181 framework may best emphasise the advantages and eliminate the disadvantages of  
182 mediation for planning disputes, by reference to, for example, mediator training and  
183 confidentiality. Example in this context will be drawn from planning mediation regimes  
184 in other countries, in order to determine their strengths and weaknesses, and how a  
185 similar, improved framework may be established and implemented in the UK. Other  
186 jurisdictions in which mediation is used to resolve planning disputes will be examined,  
187 in order to determine how they are applied, and their failures and successes.

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189 The research paper seeks to (i) evaluate the viability of mediation as a mechanism for  
190 the resolution of planning disputes which occur between developers and public  
191 authorities, (ii) identify the barriers to the uptake of mediation within the planning  
192 system of England and Wales; and, (iii) derive recommendations for legal and political  
193 reform to bring England's planning system in line with some of its more progressive  
194 counter-parts, such as Australia and Scotland.

195

## 196 **Research questions**

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198 These aforementioned research issues, aims and objectives may be outlined as  
199 encompassing the following research questions:

200

- 201 (i) Is mediation more cost-effective than formal litigation and ADR in resolving  
202 planning disputes? How can this cost-effectiveness be measured? What is the  
203 'mediation paradox' and is it a paradox, after all?
- 204 (ii) What issues routinely characterise planning disputes and how might mediation  
205 better be suited to the resolution of these kinds of dispute over formal litigation  
206 and other forms of ADR?
- 207 (iii) Is mediation an appropriate mechanism for the resolution of disputes between  
208 private developers and public authorities?
- 209 (iv) What lessons may be learned from the respective mediation regimes for  
210 planning disputes in Scotland and Australia and how might these regimes  
211 inform planning law and policy in England and Wales?
- 212 (v) Is there a compelling business case for the introduction of a formal mediation  
213 regime within the UK's planning sector? In any event, what recommendations  
214 for reform can be proffered as a result of this findings of this present study?

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## 216 **Methodology**

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218 The primary methodology of this research takes the form of black-letter analysis.

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220 For each research question identified above, a set of core database search terms were  
221 derived, which were used to locate relevant textbooks, sections in edited textbooks,  
222 journal articles, case reports, legislation, government consultation papers and  
223 newspaper articles. Relevant facts, figures and arguments were then extracted from  
224 these sources and categorised broadly into (i) data highlighting actual (empirical) or  
225 potential (theoretical / academic) benefits of mediation in planning; (ii) data revealing  
226 actual or potential challenges and barriers to the adoption of mediation in planning;  
227 and, (iii) data providing insights into the legal and political reforms required to exploit  
228 those advantages and/or overcome those barriers.

229

230 In addition, a semi-structured interview was conducted with a Planning Director at the  
231 London branch of Nathaniel Litchfield and Partners, the UK's pre-eminent planning  
232 and development consultancy. The purpose of this interview was to glean an expert  
233 practitioner's perspective on the various barriers to the increased uptake of mediation  
234 by developers and local authorities in England and Wales. It was hoped that this  
235 primary research would reveal certain cultural or practical barriers to the uptake of  
236 mediation in this context which are not so readily identifiable from black-letter analysis  
237 of the academic literature alone. In addition, because developers usually act on the  
238 advice of their planning consultants, the interviewee's own opinion on the merits or  
239 otherwise of mediation within planning is directly relevant.

240

241 The semi-structured interview methodology was selected to ensure that the interview  
242 process was sufficiently flexible to allow this researcher to explore any novel issues  
243 which were raised by the interviewee during the interview (Crichton et al, 2013). This  
244 was particularly helpful as the interviewee raised a number of interesting issues and  
245 perspectives which this present author had not identified from the black-letter analysis  
246 undertaken during the preliminary stages of this research project.

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249 While the reliability of the data obtained from this interview is tempered by the fact that  
250 the sample population comprised only one individual, this was more than mitigated by

251 the expertise and seniority of the interviewee, whose team is directly responsible for  
252 the strategic management of a property portfolio valued in excess of £1 billion. If a  
253 Planning Director at Nathaniel Litchfield and Partners holds a particular viewpoint on  
254 the merits of mediation, that viewpoint is highly likely to be representative of the  
255 professional opinions of a substantial number of consultants and professionals within  
256 her industry. An “expert interview” with a small number of senior professionals is  
257 preferable, in terms of data quality, than a greater number of semi-structured  
258 interviews with persons with less relevant professional expertise (IAC-MEBM, 2016).

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260 The results from the semi-structured interview will not be analysed individually;  
261 instead, this author will cite relevant excerpts from the transcript of the interview to  
262 support arguments made throughout this paper.

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265 **Definitional and methodological uncertainty; defining and evaluating the cost-**  
266 **effectiveness of mediation, as opposed to formal litigation or other forms of**  
267 **ADR.**

268  
269 In this section, this author examines the difficulties in defining a working definition for  
270 the term ‘mediation’ and explains the implications of this definitional and conceptual  
271 uncertainty for reliable international comparative analysis and also for evaluating the  
272 cost-effectiveness of mediation, as compared to formal litigation or, indeed to other  
273 forms of ADR. It is concluded that the primary rationale for this present study is not as  
274 convincing as it appeared during the preliminary research phase of this project.

275  
276 The problem of deriving a working definition for the term ‘mediation’

277  
278 It is no straightforward task to derive a working definition for the term mediation  
279 (Morasso, 2011). The term and the process of mediation are used in so many  
280 different contexts (Nicholson, 2009)—legal and non-legal—that it is difficult to derive  
281 one singular definition which encompasses all essential characteristics of this process  
282 (Barsky, 2009). Definitions which do attempt to achieve generality are invariably too  
283 simplistic to be useful to an academic researcher. For example, Schrupf et al define  
284 mediation as, “... a communication process in which the people with the problem work  
285 together, with the assistance of a neutral third party, cooperating to resolve their  
286 conflict peaceably (Schrumpf et al, 1997)” This definition provides no real insight into  
287 the nature of the mediation process, the role of the mediator—beyond the fact that  
288 mediators are ‘neutral’—or the nature of the outcome of the process. It is also not  
289 entirely clear that this definition is capable of distinguishing mediation from other types  
290 of ADR, such as conciliation [1]

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298 Those definitions which *are* sufficiently specific to serve as a working definition for the  
299 term mediation, tend to be limited to a specific context or to a particular variant of  
300 mediation or to one or more author’s personal conceptions of the process or a variant

301 thereof, and are therefore also of limited use. For example, even though it is generally  
302 agreed that there exist five main types of mediation—facilitative, evaluative,  
303 transformative, therapeutic and narrative mediation (Brooker,2013)— there is no  
304 general consensus as to the meaning of these terms and different authors tend to  
305 adopt their own prescriptive or descriptive definitions for this nomenclature. Bush and  
306 Folger, for example, define ‘transformative mediation’ through reference to a process  
307 of human development which involves a transformation in the behaviour of the actors  
308 involved in the mediation process (Spencer and Brogan, 2007); whereas, Boulle and  
309 Nesic have an entirely different conception of ‘transformative mediation’, and use the  
310 terms ‘transformative mediation’ and ‘therapeutic mediation’ interchangeably  
311 (Brooker, 2013: pg 8).

312  
313 In the introduction to this paper, this author stated that there is wide support in the  
314 academic literature for the adoption of a formal mediation regime within the UK’s  
315 planning system. One would have thought, by now—bearing in mind that this debate  
316 originates from the mid-1990s—that a single working definition for the term ‘mediation’  
317 or at least for the preferred type of types of mediation would have emerged from the  
318 planning literature. Unhelpfully, this is not the case; in fact, it is not uncommon for  
319 academic articles dedicated to the promotion of this agenda to avoid altogether any  
320 attempt to define this term or to specify which type of mediation they are advocating.  
321 This could help to explain why, to date, this recurrent agenda has failed to be  
322 implemented in the UK; if there is no broad agreement on the form that the mediation  
323 process comprising this formal regime should take then how can the authorities be  
324 expected to know which type of mediation process and (accompanying) procedure to  
325 prescribe?

326  
327 The lack of definitional certainty in this area is perhaps itself a result of the informal  
328 nature of mediation and the wide degree of autonomy which is given to mediators to  
329 decide how to bring the disputing parties towards consensus (Brooker, 2013; pg 1).  
330 As Chern argues, “There are as many different types of mediation as there are  
331 mediators (Chern, 2014).” In the UK, the focus of mediation training is on the  
332 ‘facilitative’ and ‘evaluative’ varieties (Chern, 2013); however, in practice, the  
333 professional experience and instinct of the mediator is more likely to guide the  
334 mediation process than his or her formal training. This view is supported empirically;  
335 various studies have found that one of the more reliable predictors of the success of  
336 mediation is the skill and experience of the mediator (Roberts, 2014). In practice, this  
337 means that there must be a high level of inconsistency in the success rates between  
338 different mediators (Bercovitch and Jackson, 2009). This inconsistency may help to  
339 explain why there seems to be such wide disparity between the success rates of  
340 mediation within different nation states. For example, in Canada and New Zealand,  
341 the success rates of mandatory mediation are 80% and 73% respectively; whereas, in  
342 England and France, the published success rate for mandatory mediation is 50% or  
343 lower (Hopt and Steffek, 2013). A wide variety of different forms of mediation are being  
344 practiced internationally, within entirely different legal and cultural environments, by  
345 mediators with different types and level of training and experience, and consequently  
346 there is a wide disparity between the success rates of mediation within different nation  
347 states.

348

349 **The implications of this uncertainty for this present study and the difficulty in**  
350 **measuring the cost-effectiveness of mediation, as compared to formal litigation**  
351 **and other forms of ADR: Debunking the ‘mediation paradox’.**

352  
353 The implications of this uncertainty and inconsistency for this present study are  
354 potentially profound. In order to build a ‘business case’ for the adoption of a formal  
355 mediation regime in the UK’s planning system, it is necessary to present compelling  
356 evidence that mediation is likely to be more cost-effective at resolving planning  
357 disputes than either formal litigation or other forms of ADR. Intuitively, it seems that  
358 the best source from which to derive this evidence is empirical data from other  
359 jurisdictions which have already adopted such a regime, successfully. However, in  
360 practice, due to the disparity identified *supra*, it is now clear that this methodology is  
361 flawed; simply stated, there are too many different factors which affect the success  
362 rate of mediation to defend the assertion that a particular mediation regime would be  
363 effective in the UK, on the basis that it has proven to be effective in another jurisdiction.  
364

365 This does not mean that lessons cannot be learned from other jurisdictions which have  
366 implemented a formal mediation regime successfully; however, it does mean that  
367 recommendations for reform cannot be based solely upon international experience. It  
368 also means that one has to be very careful to examine the processes and procedures  
369 which are being employed by these successful regimes, avoiding wherever possible  
370 the use of popular nomenclature, such as ‘mediation’ and ‘facilitative mediation’, which  
371 denotes a degree of generality which, simply stated, does not exist. As Poon writes,  
372 “...there are so many different styles and approaches [to mediation] that labels cannot  
373 capture them accurately (Poon, 2010).” Failure to heed this warning could result in the  
374 well-intentioned, but totally meaningless, comparison of ‘apples’ and ‘oranges’ or,  
375 worse, a proposal to adopt ‘apples’ to do the job of ‘oranges’, because ‘fruit’ has proven  
376 to be effective in a foreign jurisdiction. Ardent proponents of mediation attempt to  
377 overcome these challenges by asserting that mediation is more cost-effective than  
378 litigation, even if the success rate of mediation is inconsistent. Mediation is so  
379 inexpensive as compared to formal litigation, they argue, that even if success rates  
380 are low, the additional expenses incurred as a result of failed mediation are  
381 insignificant compared to the cost-savings which result from a successful mediation  
382 and the avoidance of court litigation (MacNaughton and Martin, 2002).  
383

384 To these commentators, the lack of uptake of voluntary mediation therefore represents  
385 a ‘paradox’ of sorts; these authors cannot comprehend why a rational actor would not  
386 choose to participate in mediation when its cost-benefits are so obvious (Cortez,  
387 2016). To these authors, the lack of uptake of this form of ADR can therefore only be  
388 explained through reference to factors other than cost-effectiveness.  
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390 In the opinion of this present author, and for reasons which will be explained below,  
391 the ‘mediation paradox’ is not a paradox at all. In fact, there are legitimate and rational  
392 reasons for disputants to choose to forego voluntary mediation and proceed directly  
393 to formal litigation.  
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397 For one thing, the cost-effectiveness argument fails to take into account the other  
398 ‘costs’ of a failed mediation, such as the delay in resolving the dispute (Agapiou and



399 Ilter, 2016) and the fact that the parties to a failed mediation may have inadvertently  
400 compromised their legal positions by revealing their respective legal strategies to their  
401 opponents during the mediation process (Clark, 2007). It also fails to take into account  
402 the fact that disputes which are resolved by mediation may have been resolved in any  
403 event, through negotiation, prior to trial (Clark, 2012). Further, the parties to a  
404 mediation may decide to appoint legal professionals to represent their interests, and  
405 consequently, mediation may prove to be just as costly as formal litigation, especially  
406 since these extra-judicial legal costs cannot usually be recovered in most jurisdictions  
407 (Susskind et al, 2000). Furthermore, the cost-effectiveness of mediation needs to be  
408 evaluated within the context of the specific legal system in which it is taking place;  
409 legal rules governing mediation can affect substantially the relative cost-effectiveness  
410 of this process (Alexander, 2008).

411  
412 In any event, there is no reliable empirical methodology available to test the veracity  
413 of this pro-mediation argument. Not only would the findings of such a study lack  
414 external validity due to the inconsistencies discussed previously in this section, unless  
415 the sampling was sufficiently broad and data extracted from a sufficiently wide cross-  
416 section of different types of 'mediation' from the same jurisdiction, but hypothetical  
417 assumptions would also need to be made about the likely costs of resolving by court  
418 litigation disputes which have been resolved successfully through mediation. This  
419 would be required in order to prove that the cost-savings enjoyed by the parties to  
420 successful mediations exceed the additional costs expended by the parties whose  
421 mediations were not successful. Unsurprisingly, the few noteworthy attempts that have  
422 been made to empirically test the cost-effectiveness of mediation (as compared to  
423 litigation) (Bondy and Mulcahy, 2009) have been as inconsistent as the definition of  
424 'mediation' and the published success rates of this form of ADR.

425  
426 As Brian Clark writes, "While hyperbolic, anecdotal claims as to the cheapness of  
427 mediation abound, the empirical evidence on the issue of cost-effectiveness is more  
428 mixed. Discernable cost benefits for parties may vary wildly of course depending on  
429 context (Clark, 2012)" In fact, there is a body of empirical evidence supporting the view  
430 that mediation may *not* be a cost-effective dispute resolution mechanism at all,  
431 especially if the mediation process is court-connected or mandatory (Agapiou and Ilter,  
432 2016). While these studies are also methodologically flawed, they nevertheless  
433 demonstrate conclusively that the cost-effectiveness of mediation cannot be taken at  
434 face-value, however intuitive the arguments of its proponents may appear to be.

435  
436 **Revisiting the rationale for this present study and the conclusions of this**  
437 **section.**

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439 In the introduction of this paper, this author cited the findings of a study commissioned  
440 by the UK Government in 2002 which estimated that the adoption of a formal mediation  
441 regime within the UK's planning sector would result in the realization of £3 billion of  
442 investment into the UK economy 40 weeks earlier than would be the case if all planning  
443 disputes were resolved via formal litigation.

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446 In light of the preceding analysis it seems quite clear that the findings of this  
447 government-funded study must be treated with a high level of scepticism; bearing in  
448 mind the uncertainties and inconsistencies identified in this section, especially those

449 pertaining to the challenges of relying upon international comparative analysis in this  
450 context, there is simply no methodology available which could produce reliable results  
451 with this level of quantitative specificity.

452  
453 The focus of the preceding analysis was limited to a comparison between the cost-  
454 effectiveness of mediation and court litigation. However, logically, the same  
455 conclusions and concerns derived above are equally applicable to a comparison  
456 between the cost-effectiveness of mediation and other forms of ADR.

457  
458 In conclusion, it must be argued that presently there does not exist an adequate  
459 evidence-base from which to justify the implementation of a formalised mediation  
460 regime within the UK's planning system, on grounds of cost-effectiveness alone.  
461 Consequently, in order to justify the introduction of such a regime, it is necessary to  
462 take a step backwards, and look specifically at the nature of planning disputes to see  
463 if there exist other *measurable* barriers to efficiency, in this context, which might be  
464 overcome, *measurably*, through the adoption of a formalised mediation regime. For  
465 example: In the introduction to this paper it was argued that the UK government is  
466 committed to improving community participation in the planning system; if mediation  
467 could improve stakeholder participation in an appropriate way, then this could be a  
468 legitimate ground in its own right for introducing a formal mediation system within the  
469 UK planning system.

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482 **Mediation, within the context of planning disputes: What issues routinely**  
483 **characterise planning disputes?**

484  
485 The term 'planning' encompasses a wide spectrum of different activities and  
486 consequently, the term 'planning dispute' demands definition. For the purposes of this  
487 present paper, the term is used narrowly to refer to those disputes which arise between  
488 developers and local authorities, prior to, during or after the grant of 'planning  
489 permission', i.e. permission to develop or commercialise real estate in a certain way.

490  
491 Because of the intrinsic value of real estate, the outcome of a planning dispute can  
492 have substantial economic impacts on the parties. A successful application for  
493 planning permission can add considerable value to a developer's land. Conversely, an  
494 unsuccessful application can reduce considerably the value of that land, by confirming  
495 that the land in question does not enjoy short- or medium- term development  
496 prospects. A successful planning application can also have profound positive and/or  
497 negative impacts upon the community at large, depending upon the nature of the  
498 proposed development and its likely impact on the aesthetics, economy, infrastructure  
499 and citizenship of the affected locality. Therefore, planning disputes are rarely frivolous  
500 or vexatious, and they are invariably contentious, as they navigate those difficult  
501 waters which exist at the interface of private rights and public interests (Levy, 2016):

502  
503 Private developers understandably wish to maximise the land value of their real estate  
504 holdings, and are therefore likely to pursue aggressive and ambitious development  
505 strategies (Barlow and Duncan, 2004). Local authorities welcome planning  
506 applications for such schemes, as privately-funded property development can bring  
507 considerable benefits to the local area, including new housing stock, infrastructure,  
508 local amenities and aesthetic enhancement. However, all large-scale developments  
509 will have both positive and negative impacts upon the local community, and local  
510 authorities must consider each planning application carefully on its own merits, to  
511 ensure that the overall impact of any approved scheme is likely to be positive (Crook  
512 et al, 2016). This utilitarian approach to planning decision-making enjoys a statutory  
513 footing. For example, section 106 of the Town and Country Planning Act 1990 (as  
514 amended) adopts a mechanism through which developers may offer local authorities  
515 incentives to offset the potential negative impacts of their proposed development  
516 schemes (Jansen et al, 2008), for example, by providing a sum of money for local  
517 authorities to invest in public amenities (Cullingworth et al, 2014).

518  
519 Planning disputes may arise for a number of different reasons. However, in practice,  
520 the vast majority of planning disputes arise where a developer believes that a local  
521 authority has failed to discharge its duties or powers properly or in a timely manner  
522 and commences formal litigation against the local authority to appeal that decision or  
523 compel a determination (Isaac et al, 2016). The substance of such a dispute usually  
524 hinges around the correct interpretation and contextual application of a particular law  
525 or policy. As Pauline Roberts, of Nathaniel Litchfield and Partners, explains, "It all  
526 comes down to planning law and compliance with the statutory development plan.  
527 Proposals either comply with the statutory development plan or they don't. Recourse  
528 is the appeal procedure or judicial review if an unlawful process has taken place."

529  
530

531 Consequently, planning disputes are atypical—as compared to traditional claimant-  
532 defendant litigation—because they arise when developers and planners have different  
533 views of what is appropriate, rather than as a result of the alleged infringement of a  
534 right, *per se*. This viewpoint is supported by Sir Henry Brooke who explains the nature  
535 of planning disputes, succinctly:

536  
537 *A typical planning dispute does not involve a dispute between parties about a right. It is an*  
538 *argument between a landowner and a local authority about what is appropriate... It is wrong to*  
539 *assume that an applicant for planning permission, or an appellant who challenges a refusal of*  
540 *planning permission, can be equated with a claimant in civil litigation, with the local authority in*  
541 *the role of a defendant [Brooke, 2015].*

542  
543 These kinds of dispute do lend themselves to settlement by mediation, as they are  
544 interest-based rather than positional (Berger, 2006); as noted previously a developer's  
545 interest is in maximizing the value of their land asset and local authorities are (or ought  
546 to be) interested solely in protecting the public interest. This means that there is wide  
547 scope for the parties to move from their opening gambits to reach a consensus, so  
548 long as the local authority is able to reconcile a compromise with the public interest.

549  
550 In England and Wales there are three different ways that an appeal can be 'heard'; by  
551 written representations, by hearing or by public inquiry (Isaac et al, 2016). While there  
552 is no right, under English law, for third-parties to appeal an initial planning decision  
553 (Norton, 2017), once an appeal has been lodged by a developer, interested third  
554 parties, such as neighbouring local authorities, commercial rivals, neighbours,  
555 statutory bodies or local groups, are entitled to participate in the appeal process,  
556 should they so wish, by submitting written representations and giving oral testimony  
557 at any hearings or inquiries (Harwood, 2013). The entitlement of third parties to  
558 participate proactively in the appeal process is an added complication of English  
559 planning law (Brooke, 2015), and it follows that if the judicial appeal process is going  
560 to be replaced with a formalised first-instance mediation regime, then that regime will  
561 need to accommodate at least the same level of third-party participation as is  
562 accommodated by the judicial process.

563  
564 This presents both a challenge and a potential opportunity for the pro-mediation  
565 agenda; the challenge is to ensure that the rights of third parties to be represented  
566 within the planning appeal process are not compromised by the introduction of a formal  
567 mediation regime; the potential opportunity is to devise an alternative dispute  
568 resolution process which actually enhances third party participation. Whether or not  
569 this challenge and opportunity can be overcome and realised, respectively, forms the  
570 subject-matter of the following section of this paper.

571  
572 It has been argued in the academic literature that mediation may also be a viable  
573 alternative to judicial enforcement action, i.e. where local authorities bring proceedings  
574 against land owners who have failed to comply with the conditions and limitations of  
575 their planning permission (Pugh-Smith, 2011). This type of planning dispute does not  
576 usually involve third parties, even though enforcement proceedings are often  
577 instigated as a result of third party referrals.

578  
579  
580

581 In the opinion of this present author, there are some immediate and obvious concerns  
582 with the utilization of mediation as a first-instance enforcement mechanism;  
583 notwithstanding the definitional uncertainty surrounding the word 'mediation' and the  
584 huge variety of different processes which are subsumed by the umbrella of this term,  
585 it is unlikely that the threat of enforcement action would have the same deterrent effect  
586 if mediation replaced litigation as the dispute resolution mechanism of first instance.  
587 In fact, the adoption of a formal mediation regime for the resolution of such disputes  
588 could lead developers to believe that the conditions and limitations attached to  
589 planning permission grants are somehow negotiable *post facto*. Unfortunately, there  
590 is no empirical data available to test this thesis or to quantify the potential reduction in  
591 compliance with planning conditions which might result from the adoption of a formal  
592 mediation regime for planning enforcement action. There is, however, in the context  
593 of the criminal justice system, evidence that mediation has less of a deterrent effect  
594 than more formal enforcement mechanisms (Roberts, 2002); it seems likely, to this  
595 author, that a similar effect would be observed within the context of the UK planning  
596 system.

597  
598 Legal precedent is also valuable in this arena, and the adoption of a formalised  
599 mediation regime could curb the development of planning law (Costello, 1996). As  
600 noted previously, the substance of a planning dispute usually hinges around the  
601 correct interpretation of a particular law or policy; if such disputes are routinely  
602 mediated then future litigants may not be able to enjoy the precedential value of the  
603 outcome of that dispute (Arnavas, 2014). While the adoption of a formalised mediation  
604 regime *might*—and the evidence is by no means compelling—cause a reduction in  
605 litigation costs for disputing parties, it would almost certainly cause more disputes to  
606 arise in the first place, as mediation outcomes are usually bespoke, confidential,  
607 idiosyncratic, party-controlled and not legally binding on anyone except for the  
608 signatories to the mediated settlement agreement (Hopt and Steffek, 2013). This  
609 unintended consequence of the adoption of such a regime could, ultimately, be more  
610 costly than the problem which the regime seeks to overcome.

611  
612 In addition, if the majority of planning disputes were settled through traditional  
613 mediation, which would presumably be the objective of a formalised mediation regime,  
614 then local and regional disparity in planning decisions would be exacerbated, because  
615 the settlement of those disputes would be controlled by the local authorities involved  
616 and not by an independent tribunal applying national laws, policies and principles. This  
617 would be at odds with the UK government's focus on addressing these kinds of  
618 disparity in the application of planning law (Thomson and Maginn, 2012).

619  
620 **How might 'mediation' satisfy or exceed the minimum requirements for**  
621 **community participation?**

622  
623 It has been argued in the academic literature that mediation can be an highly effective  
624 mechanism for the resolution for disputes which occur at public-private interface  
625 (Alexander, 2006). Various models have been proposed to combine conflict resolution  
626 and public participation through mediation and such schemes have been shown to be  
627 highly successful at empowering local communities and building trust between  
628 community interest groups, private parties and local government (Spencer and  
629 Brogan, 2006).

630

631

632 However, these scheme are invariably complex, and their success depends upon the  
633 quality of the preparatory work undertaken by the mediator and his or her skill in  
634 managing what is tantamount to a multi-party (facilitated) negotiation (Sanoff, 2000).  
635 As Leibmann argues, in a multi-party mediation involving various interest groups it is  
636 important for the mediator to meet with each group individually to discern the main  
637 issues which they wish to be addressed or resolved during the mediation process  
638 (Liebmann, 1998); this is painstaking and meticulous work and would take  
639 considerable time to manage at a considerable cost. In larger disputes involving a  
640 substantial number of parties it may even be necessary to appoint more than one  
641 mediator in order to preserve the neutrality of the process and ensure that all the  
642 parties interests are adequately addressed (Cooley and Lubet, 2003).

643

644 It is no straightforward task to evaluate the likely cost of such a process and it is by no  
645 means clear that mediation lends itself naturally to community or third-party  
646 participation; in fact, as has been argued above, the management of the mediation  
647 process can be very complex when there are more than two parties involved (Cooley  
648 and Lubet, 2003). Various questions would need to be resolved in order to devise a  
649 formalised mediation regime capable of replacing the existing appeals process. For  
650 example, would third parties be allowed to participate actively in the mediation  
651 process, or would they simply be allowed to make representations in the hope that  
652 these representations would influence the negotiating positions of the parties? If the  
653 former was the case, then would the mediation fail if consensus could not be reached  
654 between all the parties to the mediation? This would be giving third parties far more  
655 control over the outcome of planning disputes than the current appeals system and  
656 would likely reduce considerably the success rate of the mediation regime, as a  
657 successful outcome would be contingent upon a consensus being reached between a  
658 larger number of parties. On the other hand, if the latter was the case, then there would  
659 be no guarantee that third-party representations would be taken into account by the  
660 disputants, at all, as in a traditional mediation the parties to the dispute retain control  
661 over the substance of the settlement agreement (Hardy and Rundle, 2010).

662

663 There does exist at least one case study of mediation being used successfully as a  
664 consultation mechanism for stakeholders involved in planning proposals for a  
665 brownfield site (Williams, 2010). However, this was not a planning dispute, *per se*, and  
666 therefore is of limited value as a procedural precedent for the management of multi-  
667 party mediations. As Craig Howell Williams QC concedes, the inclusion of multiple  
668 third parties in the mediation process may not only present practical problems but may  
669 represent a fundamental obstacle to the use of this form of ADR in the planning context  
670 (Williams, 2010).

671

### 672 **How might 'mediation' overcome the precedent issue identified *supra*?**

673

674 One potential solution here would be to vet all disputes, prior to mediation, to ensure  
675 that they are not likely to have important precedential value on a point of law. A similar  
676 evaluation process is used in Canada, where judicial mediation is routinely utilised to  
677 resolve both civil and criminal disputes (Alexander, 2006). However, this would add  
678 another layer of procedural complexity to the process and add further costs, which  
679 would need to be quantified before giving any serious consideration to its adoption.

680

681 In addition, it has been argued that a significant number of planning disputes do  
682 involve points of law, and therefore this ‘solution’ might actually prevent a large number  
683 of planning disputes from being mediated, undermining *raison d’etre* for a formalised  
684 mediation regime within the UK planning system.

685  
686 Another potential solution would be to choose a different alternative dispute resolution  
687 procedure entirely, such as arbitration, which is capable of producing awards with  
688 precedential value (Rovine, 2013), even though arbitral awards are not *per se* binding  
689 on third parties (Smeureanu , 2011). In the following section of this paper, this author  
690 will discuss a form of mediation which has been adopted in Italy, under which the  
691 mediator—a highly trained legal professional—is entitled to hand down an award of  
692 his or her own device, if the parties are unable to reach consensus. It is possible that  
693 awards produced by this mediation-arbitration hybrid process would be capable of  
694 having precedential value, so long as the mediator also ensured that the parties were  
695 not free to reach a private consensus on a valuable point of law. In other words, the  
696 evaluation process described in the previous paragraph of this section would be  
697 undertaken by the mediator, who would arbitrate points of law while allowing other  
698 aspects of the dispute to be mediated, if possible (Telford, 2000).

699  
700 In any event, the discussion of such a proposal falls outside the strict scope of this  
701 present research study, and it is not clear whether or not the adoption of such a  
702 scheme would ameliorate concerns about the exacerbation of regional disparities in  
703 decision-making by local planning authorities.

704  
705 In conclusion to this section, while a substantial number of planning disputes are likely  
706 of a kind which lend themselves naturally to resolution by mediation, it is not at all clear  
707 how the present rights of third parties which are enshrined within the existing English  
708 planning system—namely, to be represented in the planning appeals process—would  
709 be replicated or enhanced by the use of mediation. In addition, legitimate concerns  
710 have been raised by this author that the use of mediation in this context could  
711 exacerbate the regional disparity in public decision-making which the UK government  
712 seems so keen to address. Further, an increase in the number of planning disputes  
713 being resolved through mediation could stifle the development of English planning law,  
714 by restricting the flow of judicial precedent. While it might be possible to overcome this  
715 challenge by introducing a pre-mediation dispute evaluation or screening procedure,  
716 to decide which disputes ought to be resolved by a judge and which ought to be  
717 mediated, ultimately this would add to the infrastructure costs of the UK planning  
718 system and would probably mean only a small number of disputes end up being  
719 mediated (as planning disputes often involve disagreements on the appropriate  
720 application of law and policy).

721  
722 Finally, it is not at all clear that mediation would be a viable alternative to judicial  
723 enforcement in this context, as the adoption of a formalised mediation regime for these  
724 kinds of ‘dispute’ could undermine the deterrent effect of the conditions annexed to  
725 planning permission grants. Further research would be required in order to test this  
726 thesis, but empirical data pertaining to the effect of introducing mandatory mediation  
727 into other parts of the UK legal system indicates that this may well be the case.

728  
729  
730





732 **Can the public interest be mediated? Is mediation an *appropriate* mechanism**  
733 **for the resolution of disputes between private developers and public**  
734 **authorities?**

735  
736 In this section, this author critically evaluates the *appropriateness* of mediation as a  
737 formal alternative to the existing judicial appeal and judicial review processes, bearing  
738 in mind the public interest in the outcome of planning disputes.

739  
740 It has been argued in the academic literature that mediation is not always an  
741 *appropriate* tool for the resolution of planning disputes between local authorities and  
742 developers, because its success, as a process, depends upon both parties reaching  
743 a compromise solution and the public interest ought to be non-negotiable (Brooke,  
744 2015). In other words, local authorities are constitutionally bound to determine and  
745 protect the public interest (Harlow et al, 2003) and it is not appropriate for local  
746 authorities to compromise on that position in order to accommodate the private  
747 interests of property developers.

748  
749 It is important, here, to compare the process of mediation with the process of formal  
750 litigation and ask the question, what makes mediation less appropriate than formal  
751 litigation as a guardian of the public interest? The most obvious answer is that a judge  
752 is competent and duty-bound to protect the public interest whereas a mediator or the  
753 parties to a mediation are not. The role of the courts is not to resolve disputes but to  
754 give meaning and operational content to the values of society, together 'the public  
755 interest'. In contrast the role of a mediator is to facilitate the settlement of a specific  
756 dispute between two or more parties. Concerns have been raised in the academic  
757 literature as to whether the public interest can be appropriately safeguarded if public-  
758 private disputes are diverted towards non-legal channels, such as mediation, which  
759 are not subject to the same procedural safeguards as formal litigation (Roberts, 2013).

760  
761 While this argument enjoys intuitive appeal, it is predicated upon the assumption that  
762 planning authorities always make the right decisions, *ab initio*, which of course is not  
763 the case. A planning decision will be informed by an authority's own interpretation of  
764 applicable local, regional and national laws and policies and when private parties  
765 believe that these laws and policies have been misinterpreted or misapplied then a  
766 dispute may arise. For such disputes, the mediation process could actually help the  
767 parties to better understand the arguments of their counter-parts and result in a  
768 compromise solution which better serves the public interest than the respective initial  
769 positions of the disputing parties. There is a strong public interest in reversing  
770 inappropriate decisions of public authorities as quickly as possible; as argued  
771 previously, delayed dispute resolution slows down the rate of investment into the UK's  
772 property sector and increases the administrative and legal costs of the parties involved  
773 and the Exchequer. Consequently, mediation could, in theory, serve an important  
774 function in protecting the public purse, by providing an informal and (arguably)  
775 inexpensive preliminary appeal or review process.

776  
777 Even when a local authority's initial planning decision *did* represent the public interest  
778 at the moment in time when that decision was reached, the public interest is not a  
779 static animal; the process of mediation might bring new information and options to light  
780 which could justify a re-evaluation of the local authority's initial position.

781 For example, a local authority might decide to reject a planning application on 'green  
782 belt' land to preserve and protect its open spaces and to control urban sprawl. While  
783 it would certainly be inappropriate for that local authority to compromise on its position,  
784 solely to accommodate the private interests of a developer, a compromise solution  
785 may involve that developer offering to provide additional investment into social  
786 housing, for example, which could outweigh the authority's initial objections to that  
787 development. While, historically, this kind of public-private negotiation was viewed as  
788 a form of bribery, since the enactment of section 106 of the Town and Country  
789 Planning Act 1990, it is now commonplace for developers to offer local authorities  
790 financial incentives to approve applications which might otherwise be deemed contrary  
791 to the public interest and there is now a statutory framework governing the procedure  
792 for this kind of negotiation.

793

794 In light of the existence of section 106, which specifically encourages negotiation  
795 between developers and local authorities, it is difficult to find a principled objection to  
796 the *idea* of a mediation-led settlement process, even where that settlement results in  
797 the reversal of an otherwise appropriate and lawful planning decision; the settlement  
798 agreement may better serve the public interest than the initial decision, as it may result  
799 in a greater public benefit than the benefit which would have resulted had the initial  
800 position or decision of a local authority been upheld. However, in reality, it is difficult  
801 to see what role mediation could play in this scenario when there already exists a  
802 statutory framework governing section 106 negotiations and those negotiations are so  
803 similar to the mediation process, albeit without an independent third party sitting  
804 between the disputants. This is a point that was raised by Pauline Roberts of Nathaniel  
805 Litchfield and Partners during the semi-structured interview conducted as part of this  
806 research study. When asked whether mediation might be a useful next-step, if a  
807 section 106 negotiation does get stuck, as opposed to proceeding directly with a formal  
808 appeal, Mrs Roberts replied in the negative: "If section 106 negotiations do become  
809 stuck, then the correct approach is to lodge an appeal within the strict time limits or  
810 you will risk not getting a decision at all. The negotiations are usually led by  
811 experienced consultants—and are usually successful—and so, if section 106  
812 negotiations become stuck there is a strong chance that mediation would also fail to  
813 produce a compromise solution. For that reason, it is preferable to lodge a formal  
814 appeal on grounds of non-determination."

815

816 Based upon these expert insights, it seems clear that if mediation is going to play an  
817 effective role in expediting section 106 negotiations, the mediation process would need  
818 to be of a type capable of replacing the function of the appeal process, rather than the  
819 function of the section 106 negotiation process. After all, if the mediation process  
820 simply usurped the function of the section 106 negotiation, then it would be largely  
821 redundant; it is not in the interests of either developers or local authorities to protract  
822 their negotiations and it is difficult to see how the presence of a third party mediator  
823 could, by itself, render mediation more effective than negotiation, especially when the  
824 parties to these kinds of disputes are experts in their field.

825

826 Additionally, guarantees would also need to be offered to ensure that participation in  
827 the mediation process did not prejudice the applicants' right to appeal on grounds of  
828 non-determination, should the mediation fail, a concern which is clearly implicit in Mrs  
829 Robert response, *supra*.

830

831 This thesis seems to be supported by Martin Burns, the head of the RICS Dispute  
832 Resolution Services team, who argues that mediation could play a useful role in  
833 *ensuring* that local authorities engage in a timely manner with the section 106 process,  
834 for example by making mediation compulsory where a section 106 negotiation has  
835 failed to produce a definitive outcome:

836  
837 *ADR can be an effective mechanism to help speed up the planning process and, in particular,*  
838 *S106 negotiations. But perhaps it should be that, only in circumstances where S106*  
839 *negotiations do not result in S106 agreements, and developers and local authorities manifestly*  
840 *fail to comply with new statutory timescales, should the prospect of decisions being taken out*  
841 *of the control of local authorities actually become reality (Burns, 2016).*

842  
843 While Martin Burns does not overtly advocate the adoption of a special form of  
844 mediation here, he does indicate that once the negotiations have proceeded to  
845 mediation, the ultimate decision would be ‘taken out of the control of local authorities’.  
846 As discussed in section 1 of this paper, mediation does not usually involve decisions  
847 being taken out of the hands of the parties, as the mediator’s role is facilitative as  
848 opposed to being determinative. The only way to make sense of Burn’s comments is  
849 to assume that he is referring to a mediation process which can result in a mediator  
850 reaching a binding decision, in the event that the parties are unable to negotiate a  
851 mutually agreeable compromise solution. In other words, it seems that Martin Burns is  
852 advocating for the adoption of some form of mediation-arbitration hybrid to sit between  
853 the section 106 negotiation and formal appeal processes.

854  
855 When asked to comment upon the viability of such a process, during the semi-  
856 structured interview, Mrs Pauline Roberts replied:

857  
858 *If a local authority failed to reach a section 106 decision in a timely manner, and there existed*  
859 *a compulsory and binding form of mediation where the mediator could assume the role of an*  
860 *arbitrator if the mediation failed to produce a satisfactory section 106 agreement, then this could*  
861 *indeed be more attractive to a developer than a formal appeal. However, its value would*  
862 *probably be limited to larger schemes only, as section 106 negotiations on small or simple*  
863 *schemes tend not to get stuck [2].*

864  
865 This response suggests that there may indeed be some merit in introducing an  
866 alternative dispute resolution mechanism between section 106 negotiations and the  
867 existing appeals process; however, it is clear that traditional mediation is *not* the right  
868 tool for the job and that a hybrid of mediation and arbitration *may* be more appropriate.

869  
870 It is worth a quick mention that a mediation-arbitration or ‘med-arb’ regime has recently  
871 been introduced in Italy. Under this regime, if the parties are unable to reach an  
872 agreement, or if one of the parties does not attend the mediation, then the mediator is  
873 entitled to propose legal solutions and the parties to the mediation are bound to accept  
874 the mediator’s final proposals. Up until the final decision has been handed down, the  
875 parties remain free to negotiate not only with their counter-parts but also with the  
876 mediator, so they do retain a high degree of control over the process and also the  
877 outcome.

878  
879  
880  
881

882 This scheme has been criticised heavily within the academic literature for a number  
883 of reasons. First, it has been argued that this process is at odds with the very definition  
884 of mediation and compromises the neutrality of the mediator. While this present author  
885 agrees that this form of mediation is atypical, as was argued at length in section 1 of  
886 this paper, there is no such thing as a standardised mediation process and  
887 consequently it is difficult to see why this argument should be given much weight.  
888

889 Second, it has been argued that this kind of process would require a degree of skill  
890 and experience beyond that which can be expected from a normal mediator. As Hanks  
891 argues, "In any case, it indicates a particular need to ensure that mediators are  
892 adequately trained and have the requisite knowledge to propose solutions that are  
893 legally enforceable and in the parties' interests. Thus, the changes implemented by  
894 Italy will only be effective if they are complemented by the education of legal  
895 professionals and the training of a large number of mediators to handle the inevitable  
896 increase in claims (Hanks, 2012)."  
897

898 In the opinion of this present author, mediators should be adequately trained with the  
899 requisite knowledge of the subject-matter of the disputes they preside over irrespective  
900 of the kind of mediation which they are undertaking. This is supported by the empirical  
901 evidence cited in section 1 of this paper, which proves that there is a positive  
902 correlation between the skill of a mediator and the prospect for successful resolution  
903 of a dispute. In the context of planning disputes, which are in any event highly  
904 specialised, it is particularly important that the mediator is sufficiently knowledgeable  
905 in the intricacies of planning law. Consequently, it is difficult to see how this is a  
906 legitimate objection to the adoption of this kind of med-arb mediation.  
907

908 Hanks' concluding remark that the success of Italy's new regime will depend upon the  
909 training of a large number of mediators to handle the inevitable increase in claims is  
910 somewhat misplaced; this seems to be an objection to the mandatory nature of the  
911 process and not to the role of the mediator *per se*. If a mandatory mediation regime is  
912 going to be introduced, it follows that the relevant authorities will need to ensure that  
913 there is adequate infrastructure in place to accommodate the increased case load;  
914 however, if the regime failed because of a lack of infrastructure it would not be  
915 appropriate to conclude that the regime failed because of the role of the mediator or  
916 the nature of the mediation process being employed.  
917

918 Further research would be required in order to test the viability of introducing such a  
919 scheme in England and Wales. It will be very interesting to see how the Italian regime  
920 works in practice although, for the reasons articulated in section 1, one has to be  
921 careful not to assume that a system which works well (or badly) in one jurisdiction  
922 would perform equally well in another.  
923

924 In conclusion, this present author rejects the public interest objections to the  
925 introduction of a formalised mediation regime for the resolution of disputes flowing  
926 from failed section 106 negotiations. However, this author is not convinced that  
927 mediation could serve a useful function here; it is very similar in nature to negotiation  
928 and it is difficult to see why mediation would succeed where negotiation has failed,  
929 especially in this context where the disputing parties are highly professional,  
930 impersonal and are interest-oriented as opposed to being positional.

931 In any event, it seems that section 106 negotiations are usually successful so there is  
932 no real problem here for mediation to solve. If a formalised mediation regime is going  
933 to be adopted to sit between section 106 negotiations and the appeals process, it  
934 ought to replace the functions of the latter and not the former. In the opinion of this  
935 present author, for the reasons set out in this section, mediation, in its traditional non-  
936 determinative form, is the wrong tool for the job.

937

938

939 **What lessons may be learned from the respective mediation regimes for**  
940 **planning disputes in Scotland and Australia and how might these regimes**  
941 **inform planning law and policy in England and Wales?**  
942

943 In this short section, this author examines the different ‘mediation’ regimes which have  
944 been introduced into the planning systems of New South Wales and Scotland. The  
945 experiences of New South Wales reinforce the idea that mediation in its traditional  
946 form is not likely to be a viable alternative to court litigation for the resolution of  
947 planning disputes. The experiences of Scotland throw light on the potential role for  
948 mediation at the pre-planning stages and the need for further research here.  
949

950 New South Wales  
951

952 ADR has enjoyed a lengthy but turbulent history within New South Wales’ planning  
953 system. A dedicated Land and Environment Court [‘LEC’] was established in 1979 to  
954 try and move away from the adversarial style of dispute resolution which characterises  
955 the judicial process in the vast majority of common law jurisdictions. The emphasis of  
956 the LEC was on speed and informality. Disputes were presided over by Judges and/or  
957 non-lawyers (‘Assessors’)—experts in the field of planning, for example surveyors,  
958 town planners, architects and engineers (Ratcliffe et al, 2009)—depending upon  
959 whether the dispute involved complex points of law or technical planning issues. In  
960 tandem with this judicial process, the 1979 Act emphasised the importance of ADR  
961 and introduced a Conciliation Conference mechanism to allow parties to meet with an  
962 Assessor to resolve their planning disputes in a non-adjudicative manner; however,  
963 this mechanism was so unsuccessful in resolving disputes that it was ultimately  
964 disbanded in the 1990s and replaced with court-annexed mediation (Ryan, 2002). This  
965 was also largely unsuccessful; in its early years only 4% of all planning disputes were  
966 referred to this mediation mechanism, and only 60% of those disputes were resolved  
967 successful (Dearing, 2011). One of the reasons for the low number of referrals to this  
968 mediation process was that it remained voluntary and local authorities demonstrated  
969 a preference for their disputes to be resolved by the Land and Environment Court, as  
970 it was felt that this two-tier Court was better equipped to deal with complex legal issues  
971 than Assessor- or, as they latterly became known, Commissioner-facilitated mediation  
972 (Wulf, 2007).  
973

974 In 2010, the *Land and Court Act 1979* (NSW) was reformed and a mandatory  
975 conciliation-arbitration system was introduced for the resolution of certain classes of  
976 residential planning appeals. This process has been largely successful—resulting in a  
977 substantial increase in the number of planning appeals being resolved without  
978 recourse to formal litigation—and has even been used in a limited number of cases as  
979 an alternative to judicial review proceedings. This supports the argument made in  
980 sections 2 and 3 of this paper, that if an alternative dispute resolution mechanism is  
981 going to be introduced as an alternative to court litigation, then a hybrid between  
982 mediation and arbitration is preferable to traditional mediation.  
983  
984  
985  
986  
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989 Scotland

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991 A Scotland-wide review of the strategic planning framework undertaken in 2002, along  
992 with a public consultation on public involvement in planning, revealed high levels of  
993 dissatisfaction and alienation between the electorate and the Scottish planning  
994 authorities (Hague and Jenkins, 2005).

995

996 One of the reform proposals to emerge from this process was the introduction of a  
997 third party right of appeal of first-instance planning decisions (Scottish Government,  
998 2004). Developers responded that the introduction of such a right, which is already  
999 enjoyed in various forms in various jurisdictions including Sweden, Ireland and New  
1000 South Wales, would increase substantially the number of appeal applications and  
1001 hamper the efficiency of the planning process (Sidaway, 2013). On the other hand,  
1002 some authors and commentators have argued that the introduction of such a right  
1003 would force developers to invite stakeholders to participate in the planning process at  
1004 an earlier stage, which would improve public confidence in the planning system and  
1005 mitigate the potential surge in third party planning appeals (Sidaway, 2013). Arguably,  
1006 it is here, at the pre-planning stages, that mediation *might* have a valuable role to play.  
1007 It will be recalled from the analysis undertaken in section 2 of this paper that there  
1008 does exist empirical evidence in support of this idea; while this kind of mediated pre-  
1009 planning consultation process may be costly and time-consuming, if there existed a  
1010 third party right of appeal, then developers would be incentivised to fund this exercise,  
1011 to reduce the likelihood of a third party appeal being lodged (Jackson, 2010). Perhaps  
1012 the most convincing argument for moving the public consultation process to the pre-  
1013 planning stage is that it gives developers and architects the opportunity to devise a  
1014 scheme which has the highest prospects of success; if the developer waits until the  
1015 appeal stage of the process to contest stakeholder objections then the scope for  
1016 amending the proposals and the costs of doing so will be greatly increased. This is a  
1017 view confirmed by Pauline Roberts of Nathaniel Litchfield and Partners, although she  
1018 confirms that her clients usually invite interested third-parties to participate in the pre-  
1019 planning process in any event, to de-risk the prospects of an application being refused  
1020 on the basis of third party objections.

1021

1022 While, ultimately, this reform was not implemented in the Scottish Planning Act  
1023 (MaCafferty et al, 2009), nevertheless this author believes that there is scope for  
1024 further research here. While an evaluation of the role of mediation at the pre-planning  
1025 stage falls outside the scope of this present paper—as this paper is concerned with  
1026 mediation as a dispute resolution mechanism and not as a dispute prevention  
1027 strategy—nevertheless, based upon the otherwise gloomy picture painted by this  
1028 research for the role of traditional mediation in planning, of all the reform proposals  
1029 discussed within this paper, the introduction of pre-planning mediation (either as a  
1030 requirement or as an indirect effect of introducing enhanced third party rights at a later  
1031 stage in the planning process) seems to hold the most promise, if not in terms of cost-  
1032 effectiveness, certainly in terms of enhanced public participation.

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1034

1035 **Final conclusions and recommendations for further research in this field.**

1036  
1037 The primary objective of this present study was to evaluate the viability of mediation  
1038 as a mechanism for the resolution of planning disputes which occur between  
1039 developers and public authorities, bearing in mind the overwhelming support amongst  
1040 practitioners and commentators for the adoption of a more formalised mediation  
1041 regime in the UK planning system.

1042  
1043 Surprisingly, the findings of this research indicate that, presently, there is no strong  
1044 case for the introduction of such a regime, at least not as an alternative to court  
1045 litigation. Firstly, the term ‘mediation’ is so poorly defined by its proponents that it is  
1046 not entirely clear what kind of dispute resolution mechanism any of these authors are,  
1047 in fact, proposing. Second, there does not exist an adequate evidence-base from  
1048 which to justify the implementation of a formalised mediation regime within the UK’s  
1049 planning system, on grounds of cost-effectiveness. Thirdly, while a substantial number  
1050 of planning disputes are likely of a kind which lend themselves naturally to resolution  
1051 by mediation, it is not at all clear how the present rights of third parties which are  
1052 enshrined within the existing English planning system—namely, to be represented in  
1053 the planning appeals process—would be replicated or enhanced by the use of  
1054 mediation. Fourthly, the adoption of a formal mediation regime of the kind proposed  
1055 could exacerbate the regional disparity in public decision-making which the UK  
1056 government seems so keen to address and could stifle the development of English  
1057 planning law, by restricting the flow of judicial precedent. Fifthly, it is not at all clear  
1058 that mediation would be a viable alternative to judicial enforcement, as the adoption of  
1059 a formalised mediation regime for these kinds of ‘dispute’ could undermine the  
1060 deterrent effect of the conditions annexed to planning permission grants. Sixthly, there  
1061 does not seem to be a strong case for introducing a mediation process to sit between  
1062 failed section 106 negotiations and the judicial appeals process; if a section 106  
1063 negotiation fails then a mediation would likely fail for the same reasons.

1064  
1065 Further research is required to test the viability of (i) introducing a mediation-arbitration  
1066 or conciliation-arbitration procedure as an alternative to court litigation for the  
1067 resolution of planning disputes; and, (ii) introducing a pre-planning mediation  
1068 procedure to improve the efficiency of the planning process and improve stakeholder  
1069 participation.

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1074 References:

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1076 Cases:

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1078 *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSWLEC  
1079 33.

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1081 *Catherine Hill Bay Progress Association v Minister for Planning & Another* [2011]  
1082 NSWLEC 40698.

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1085 Legislation:

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1087 *Land and Environment Court Act* 1979 (NSW)

1088 *Planning Act* 2008 (UK)

1089 *Planning and Compulsory Purchase Act* 2004 (UK)

1090 End Notes

1091

1092 [1] *It is very difficult to derive a definition which distinguishes conciliation and mediation*  
1093 *as, in practice, these processes are both forms of facilitated negotiation, albeit with*  
1094 *different procedural rules. See E. Uwazie (2014) *Alternative Dispute Resolution and**  
1095 *Peace-building in Africa. Cambridge Scholars Publishing. 170; and, M. J. Broyde*  
1096 *(2017), *Sharia Tribunals, Rabbinical Courts, and Christian Panels: Religious**  
1097 *Arbitration in America and the West. Oxford University Press. 87.*

1098

1099 [2] *Excerpt from the transcript of the semi-structured interview undertaken, by this*  
1100 *author, with Mrs P. Roberts of Nathaniel Litchfield and Partners.*

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