

PLANNING

A Guide to the Use of Mediation in the Planning System in Scotland

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A Guide to the Use of Mediation in the Planning System in Scotland

**This Guide has been
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1. Introduction

Purpose of this Guide

The purpose of this guide is to help those involved in the planning system in Scotland to understand how mediation can be used to enhance the planning process. The guide is designed to be a practical resource for a wide audience including:

- planning authorities
- applicants/developers
- statutory consultees and other agencies
- third parties (individuals, communities and non-government organisations)
- planning consultants and other professional advisers

Context

The guide sits in the context of the Scottish Government's agenda to modernise the planning system and its priority to promote increased sustainable economic growth. Recent legislation and ongoing reforms to improve the speed and quality of the planning system and increase community involvement can make an important contribution to achieving this objective. Greater use of mediation in planning is in line with the shared commitment to positive culture change in planning and the Government's desire to encourage more effective collaboration within Scotland to realise the country's full potential, balancing inclusion with efficiency.

The 2005 White Paper 'Modernising the Planning System' identified mediation as a tool which could help improve the speed and quality of the planning process. Mediation can be viewed as complementary to current procedures and decision-making, adding value not an extra layer.

It is important to recognise that mediation cannot *replace* the statutory planning decision-making process, as any planning application will require to be determined by the appropriate decision-maker. However, mediation may assist in improving the quality of an application, or may serve to resolve or narrow a dispute – and, as such, it has the potential to help the planning process to flow more smoothly and to arrive at better informed and more cost-effective outcomes. Whether mediation will or will not work in a particular matter will depend largely on the willingness, open-mindedness and hard work of those involved to find a resolution.

What does Mediation offer?

Given the range of competing private, community and government interests in land use across Scotland, conflict and differences of view are inevitable. Mediation can help parties deal with such differences, both in terms of building consensus and in resolving or narrowing disputes when these arise. Around the world, it has a proven track record of enabling parties to work together constructively rather than destructively and of providing swift, cost-effective and creative resolutions. It is also viewed as a tool by which to manage risk. Mediation can help to change the language of discussions and the culture of processing applications from one of confrontation or polarisation to that of cooperation and collaboration.

In a planning context, research carried out by the UK Government in 2002 estimated that the use of mediation in the planning system could release more than £3 billion of investment into the economy more than 40 weeks earlier than if other routes to dispute resolution were used. A key benefit for Scotland could be earlier decisions and a reduction in time taken to determine applications. In a time of economic challenges, mediation may also offer

significant benefits to planners and developers who seek to move more efficiently through the planning process.

Mediation's cost-effectiveness compared to more adversarial processes, comes in part from its speed and, as such, costs of participation are likely to be less prohibitive, enabling increased involvement by stakeholders from any socio-economic background. In addition, the mediation process is highly flexible and can be tailored in each case so that any issues relating, for example, to gender, ethnicity and disability or other perceived imbalances which require appropriate recognition can be accommodated. Through its confidential nature, mediation can help contain issues thus providing a valuable risk management tool.

Summary of Potential Benefits of Using Mediation and Mediation Skills in Planning

The following benefits may be gained from using mediation and its corresponding skills in the planning sphere:

- Meaningful engagement by interested and concerned parties
- Better identification of the real issues and a narrowing of differences
- Reduced time and cost in reaching effective decisions
- More constructive and creative outcomes
- Breaking deadlock or a logjam and reducing barriers to dialogue
- Identification of interests rather than positions
- Explanation of new developments and reassurance about change
- Creating opportunities to modify plans and make concessions while saving face
- Better quality of decision-making and outcomes
- More effective management of risks for all parties
- Opportunities to be heard and to listen
- Acknowledgement and recognition of concerns and fears
- Greater overall understanding
- Separating the issues from the people
- Redressing of any perceived power imbalances
- Preserving, building or rebuilding of personal and professional relationships
- More effective communication and building of trust between various parties
- A structure which supports cooperation rather than confrontation

2. About Mediation

What is Mediation?

Why Use Mediation?

How Does Mediation Differ from other Processes?

Central Elements of Mediation

Who is Involved?

How Does Mediation Work?

Making a Start

Selecting a Mediator

What about Cost?

Using Mediation within an Organisation

When not to Use Mediation

What is Mediation?

Mediation is defined in the glossary of Planning Advice Note 81 on community engagement as being: *“a process involving an independent third party, whose role is to help parties to identify the real issues between them, their concerns and needs, the options for resolving matters and, where possible, a solution which is acceptable to all concerned.”*

The mediator should have no connection to the matter being addressed and acts as a **facilitator of discussions** between and among those with a dispute or difficult situation to address, helping them to communicate effectively with each other. Commonly, this occurs where traditional ways of moving forward have not worked or are not appropriate. Where there are complex issues or several parties, more than one mediator may be engaged

In mediation, **the parties themselves retain control over the terms of any agreement reached**, even if that has then to be ratified elsewhere.

Mediation offers the potential to achieve relatively swift, creative and cost-effective outcomes, which so far as possible take account of the underlying interests, needs and concerns of those involved.

Even if not everything can be resolved, those involved can gain a **real understanding of the issues** and of others' points of view, narrowing the areas of difference and discussing ways to go forward.

Why use Mediation?

Negotiation may be defined as a process by which those involved in a discussion of issues seek to find a common understanding and to explore options for resolving differences between them by agreement. Negotiation without any outside help can be – and often is – very successful.

However, in some situations, negotiation between two or more parties can become deadlocked through the parties' anxiety or unwillingness to divulge their true positions and interests to others. They get stuck. Similarly it may be difficult for parties to have the confidence to co-operate with one another to achieve mutual goals within the negotiation process. If there are a number of parties or complex issues, this can be magnified.

They may become competitive and polarised. Trust is a precious commodity that is often lost or compromised. **The presence of an independent mediator can help to build a platform for discussions, unlock entrenched positions, narrow the differences and allow the**

parties to move towards a satisfactory outcome. The mediator adds a further dimension to negotiations, and the confidential setting of mediation allows parties to examine matters fully and constructively while acknowledging their own special interests.

How Does Mediation Differ from other Processes?

- **Arbitration, Litigation or Appeal**

In an appeal, as in arbitration or litigation, a third party acts as decision-maker, issuing a judgement after considering the evidence and submissions of parties. **A mediator does not make a decision and cannot impose a solution.**

Occasionally, mediators may be asked by the parties to perform a more evaluative role, expressing views or suggesting a solution which the parties may accept or reject. This is highly unusual and generally mediators will not encourage this.

- **Consensus Building and Other Techniques**

Mediation skills can be applied to situations where there is no clear dispute but a desire to reach a shared understanding of issues, aspirations, needs and concerns. The skills used by a mediator or other facilitator in enabling dialogue to take place between parties are essentially the same as those used by a mediator when parties have a more specific dispute.

Where there are a number of parties affected by a particular matter, there may be benefit in trying to work with those parties' concerns and aspirations with a view to building consensus and, for example, agreeing a statement of shared interests or common ground. This may be known as **consensus building** or **public engagement** or **consultation**. An independent facilitator or facilitators can enhance this approach.

Similarly, using mediation skills can often help people to identify and narrow factual or other issues in a non-adversarial way. This can be part of a wider decision-making, investigation or research process. Often, planning officials will use mediation skills – see the section on Using Mediation within an Organisation.

A mediator or other independent facilitator can also be engaged in a number of similar capacities. These might include working alongside senior decision-makers to help them to resolve conflicts or disputes between their organisations or businesses or being engaged for the duration of a development or other project as the “project mediator” to help those involved to address problems as they arise.

Central Elements of Mediation

Creativity - Fundamentally, mediation should enable people to focus on their true interests rather than positions. The outcome of a mediation is often more creative, wide-ranging and suitably tailored to a situation than the remedies which are available and can be achieved through a court or other hearing.

Control - The parties retain complete control over what information is conveyed to other parties via the mediator. The mediator will work with each party to find out the best way to ensure that there is clear communication about the main issues and concerns. Nothing said or done is binding on the parties unless they reach agreement. The parties are not bound to enter into any agreement or do anything they do not want to do. Mediation is generally voluntary and people may leave if they do not wish to continue.

Confidentiality - Mediation is generally a private process. The parties are able to discuss important issues and, if they wish reach a resolution, discreetly, without the fear of disclosure of what has been discussed or other publicity. They are not obliged to disclose information if they do not wish to do so. In some settings where the principles of openness and transparency are important, it may be necessary to make public the result of negotiations in mediation and the reasons for decisions in order that these can be approved and implemented. If parties wish to conduct all or parts of mediation in public, they may agree to do so. There may be a need for, or value in, drafting an agreed statement of reasons, recommendations or a description of the process, for information to statutory bodies, the public, press and others.

Without Prejudice - Mediation is usually conducted on a “without prejudice” basis. In other words existing legal and other rights are not compromised in any way unless the parties agree that these can be waived, and generally anything discussed within the mediation setting cannot subsequently be used as evidence in a court or other hearing unless agreed to by all concerned.

Focus - Even if full resolution is not achieved, the issues are usually narrowed and parties have a far better appreciation of the realities of their own and the other parties’ positions. This in turn may result in a reduction in the number of issues scheduled to be determined in a planning setting or court hearing. Further mediation or further negotiation may occur. Very often a resolution is achieved after time for reflection.

Agreement - If a satisfactory outcome is achieved, this can be expressed in a formal agreement or in a less formal manner, according to the needs of the situation. In some circumstances, heads of agreement may be drafted and a full agreement finalised after time for reflection, and for legal or other issues to be formalised or for advisers to be consulted. An exchange of letters or emails may suffice. On occasion, a formal record may be required for submission to another body for approval.

Who is Involved?

Parties - At mediation, those with an interest in the issues which are being addressed will usually be involved (often called “the parties”). In planning matters, these may include planning officials, developers/applicants, key agencies (such as Scottish Natural Heritage, the Scottish Environment Protection Agency and Scottish Water), community councils and interested third parties. Mediation can be structured to include a number of parties depending on the circumstances.

It is usually very helpful for key decision-makers to be present if possible with as much authority as is appropriate to reach conclusions and decisions. Failing that, it is important that there is a clear line of communication to the decision makers or an understanding of the limits on the authority of those present. It is also useful to have present in the process all those who are likely to be affected, or who have rights upon which they may rely, in order to reduce the possibility of subsequent unhappiness or challenge to what has been discussed. The mediator should seek to ensure that all relevant parties are given an opportunity to participate. It may be helpful to have groups of interested people represented by a spokesperson or other agreed representative who can help to focus the views of that group.

Advisers - The use of mediation will often benefit from the input of legal or other professional advice. This will depend on the nature of the matter to be discussed, the extent of the legal issues and the costs involved. Advisers often play a crucial role in mediation.

The role of planning consultants, lawyers and other advisers is to support the process and assist their clients to make the best use of mediation – while providing expert input from their own experience and knowledge. Sometimes, participants find it helpful to have friends or relatives attending with them.

How Does Mediation Work?

Meetings - Typically mediation will take place on an agreed day or days with all the parties taking part in discussions present in one venue, often at a convenient independent location such as a conference facility, community hall or hotel (possibly near to or at the site of any development or other physical place which is being discussed).

The mediator may meet jointly with all concerned, if they agree, and will also conduct confidential meetings with the parties (and their advisers) in private rooms, exploring the issues and options and encouraging a frank assessment of the situation. This enables people to reflect on their position and to work out possible solutions. What is discussed in these meetings remains private throughout, unless parties specifically agree to share information. It is possible for the parties (and/or their advisers) to meet together jointly at any time, usually with the mediator present.

Occasionally, the parties do not wish to meet at any stage, and this can be accommodated with the mediator effectively shuttling between the parties throughout.

Flexibility - In some situations, perhaps with several parties, there is benefit in a different approach. Rather than having one set-piece series of meetings on a single day, meetings can be held over a period of time in order to build the necessary understanding and framework for addressing the issues. This can often be beneficial when there is a need for information to be gathered and perhaps for external input on some crucial issues. This may also be useful when there is a need for time for reflection.

The flexibility of the process also allows appropriate provision to be made when there are cultural, ethnic, language, access, perceived power imbalances and other needs to be accommodated. A good mediator will be sensitive to these issues and will help parties to find ways to express what is important to them in an appropriate way.

Prior to the Meetings - Parties and/or their professional advisers will often meet with the mediator in advance of the mediation meetings to discuss preparation, appropriate venue, the exchange of documents and other steps to ensure that best use is made of the meetings. Combined with regular contact with all those concerned in the period before the mediation day(s), this can help focus the parties' minds on their approach to the issues and significantly enhance the prospects of success.

Typically, the parties (or their advisers) will be invited to provide a short, written summary covering the main issues as they see them, as well as submitting any relevant documents. The parties and others attending will usually sign a formal agreement which confirms the confidentiality of the process and other matters which ensure that the mediation runs smoothly.

Preparation - In advance of the mediation, or at the beginning of the mediation day, the mediator may often ask the parties involved to consider questions such as the following:

- What are your overall objectives?
- What do you have in common with the other party?
- What is in dispute?

- What are your needs? What are your concerns?
- What might the other parties' needs be? What are the other parties' concerns?
- What do you think the other parties need to hear from you?
- What might you say to the other parties?
- Where might misunderstandings have arisen?
- What are your strengths? What are your risks? What are those of the other parties?
- If you do not reach agreement what are the alternatives?
- What costs have you incurred to date?
- If you do not reach agreement, what costs will you incur in the future?
- If you do not reach agreement, what other consequences will there be?
- What are the options for resolving this matter? What creative possibilities might there be?
- How will you assess any proposals put forward by the other parties?
- What proposals might you make? How?

Making a Start

The following steps are a suggested route for initiating and making best use of mediation when using an external provider of mediation services:

1. You may contact the other party(ies) who are involved in the dispute or other difficult situation to propose that the matter be addressed using mediation. You may then agree jointly to approach a provider of mediation services (see Appendix A). Alternatively, you may contact a mediation service provider first and discuss with the provider how to get started and how to approach other parties. The provider will often undertake this.
2. The mediation service provider may suggest that, if helpful, you take part in an initial, without commitment meeting with other parties to discuss the possibility of mediation and how it would work and to help build understanding of how to go forward. This may involve legal or other advisers and/or the parties themselves.
3. The mediation service provider will help the parties to identify a suitable mediator and will discuss the mediator's terms of engagement, including fees, and help to identify a date or dates and venue. There may be a meeting to discuss preparation, exchange of summaries and documents and who should participate.

This general approach should also apply when approaching a mediator direct, or a mediator from another organisation, or when making use of an internal mediator (see below).

Well organised mediation services will help you through the various stages including guiding you on the appropriate documents, the terms of a mediation agreement and other preparation.

Selecting a Mediator

There is no uniform regulation of mediators in Scotland. Mediators are trained in a variety of settings with training courses of variable duration and quality. Mediators practice in a number of areas, including the commercial, family, community, neighbourhood and environmental sectors.

It is important to find a mediator or mediators with appropriate training, skill and experience who has trained with a credible training provider and who continues to develop skills through regular continuing professional development. Subject knowledge may be helpful (in that planning knowledge and experience may assist in formulating creative solutions and facilitating a resolution) but, given the mediator's facilitative role, should not be the principal determining factor. It is often possible to address this issue by appointing an assistant mediator with knowledge of the subject area, to work with a mediator who has considerable mediation experience. A good mediation service will advise and help with this.

A mediator should subscribe to a recognised Code of Conduct and have appropriate indemnity insurance cover. He or she should offer a procedure for addressing complaints or concerns and have the necessary administrative support.

There is a number of mediation service providers in Scotland (see Appendix A). Many mediators (though not all) are registered with the Scottish Mediation Register which sets certain minimum standards for training and continuing professional development (see Appendix A). The Scottish Mediation Network (www.scottishmediation.org.uk) offers information about contacting mediators, including those on the Scottish Mediation Register, and also provides a *Code of Practice for Mediation in Scotland*.

What about Cost?

Mediation can deliver many benefits such as better communication and better understanding. In addition, one of the major benefits of using mediation is its cost-effectiveness. Many mediations result in an acceptable outcome in one day; others may take a few days or extend over a relatively short period of time.

Mediation is a flexible process and there is no fixed approach to fees and costs. A number of factors will influence the level of fee in each different situation. These factors will include duration, location, preparation required, the seniority, professional affiliation and experience of the mediator, the number of parties and the complexity of matters under discussion. Generally, costs to be met will include those associated with providing an appropriate venue, preparation, representation by legal or other advisers and the fee of the mediator. A mediator may charge for preparation and for the time he or she is engaged in the mediation meetings. This is often on a daily basis or may be per hour. Mediator service providers and individual mediators will provide quotations on request.

The mediator's fees are usually shared equally among parties but this may not always be practicable and is frequently varied to recognise the economic circumstances and priorities of key participants. For example, fees may be met by a public sector organisation or an interested commercial party if to do so enables those with fewer resources to engage in the process. The initiator of the mediation process may decide that the cost of mediation is a worthwhile investment. In a matter where one party is paying, it is essential to involve all parties in the selection of the mediator, in order to maintain the perception of impartiality.

Using Mediation within an Organisation

Overview

Planning officers often already use mediation-type skills in day to day work to address conflicting interests. In some circumstances it may be appropriate to utilise mediators from within an organisation. Often this will work and, indeed, many organisations will have experience of using internal mediators or facilitators. This can raise issues about the independence of the third party and the perception of his or her ability to act in a wholly impartial manner. There may be situations where such a mediator will be acceptable to all concerned. This may be especially so if the mediator comes from a different department or discipline.

It is perhaps useful to distinguish between such an internal function and an independent third party fulfilling the functions described in this guide. That aspect apart, the same considerations about skills, training and processes will arise as narrated elsewhere in this guide. It may be helpful to devise a formal protocol where the use of internal mediators is contemplated.

Culture and Training in Mediation and Effective Negotiation Skills

The skills used by a mediator can be and regularly are applied in conventional negotiations where there is no third party acting as facilitator and by advisers and others in mediation itself. Part of building a more collaborative culture in the planning system in Scotland is to encourage an attitude towards the planning process which enables all those dealing with contentious planning issues in local authorities and elsewhere to utilise the skills and techniques highlighted in this guide.

A New Approach

This may entail a new approach to handling applications, together with objections and other challenges. This may require training. Training is available from a number of sources (see Appendix A). This is not a training guide, but the following are some useful tips which may be helpful for planning officials, other stakeholders and professional advisers when involved in either mediation or negotiation:

- Separate the people from the problem, whatever you may think of the individuals
- Be robust on the issues but always respectful of individuals
- Search for and try to understand the underlying objectives, needs and concerns of others
- Remember the power of acknowledgement of others' grievances and recognition of what they feel or have felt
- Look for mutual gains and common interests
- Avoid bottom line thinking - don't get stuck on one position or attitude
- Set aside difficult issues and work on others in parallel, trying to develop options
- Be prepared to make concessions and to help others to save face
- Avoid making assumptions - accept that generally everyone is trying their best
- Keep asking questions - what am I missing?
- Keep an open mind - flexibility is vital
- Remember the Big Picture
- Always listen to what others are saying

When not to use Mediation

Mediation may not be appropriate if:

- It is necessary to determine a general legal principle of wide application
- There are significant issues of public interest which need to be resolved in a formal manner
- There is an urgent need to provide a legal remedy or provide the protection of a court
- Those who might take part are wholly unwilling to do so.

3. Particular Opportunities for the Use of Mediation in Planning

There are a number of areas in the Scottish planning system where it might be appropriate for mediation – in the right circumstances – to take place. These include:

- **Pre-application Consultation** – section 11 of the Planning etc (Scotland) Act 2006 introduced statutory pre-application consultation between prospective applicants and communities of geography and interest likely to be affected by certain proposals. The scope of that consultation is to be determined by the planning authority on receipt of a proposal of application notice for a national or major development. The use of mediation may improve the quality of such consultation in informing the aspects of the proposal subject to pre-application consultation, thereby identifying ways of bringing benefits to both applicant and community, and removing potential objections once the application is submitted.
- **Pre-determination Hearings** – section 14 of the Planning etc (Scotland) Act 2006 introduced pre-determination hearings where parties may be afforded the opportunity of appearing before and being heard by a committee of the authority. Mediation could be employed at or around the hearing to seek consensus, minimise committee time, and at least narrow the issues in question.
- **Good Neighbour Agreements** – section 24 of the Planning etc (Scotland) Act 2006 introduces good neighbour agreements where an applicant may enter into an agreement with the relevant community body to regulate operations and use of land. Where the parties concerned each have an interest in the matter, mediation could form an appropriate method in which to discover respective interests, improve design quality, and help unlock any impasse in agreeing and modifying the terms of an agreement.
- **Neighbour Disputes** – disputes between neighbours in relation to planning applications are frequent within the planning system. Such tension has the capacity to strain relations within a community, as well as occupy planning officers' time to a disproportionate extent. The use of mediation may serve as a way to help parties identify a solution that is acceptable to those concerned, and (provided that the solution is compatible with local planning policy) minimise time and resources expended by planning officers.
- **Post-determination** – there may be merit in applicants seeking to mediate with objectors following refusal of an application or following an unsuccessful appeal should they be looking to vary or re-design a proposal.
- **Development Plans** – section 2 of the Planning etc (Scotland) Act 2006 introduced strategic and local development plans into the Scottish planning system. Mediation is best used during the early engagement phase to mitigate the possibility of dispute at a later stage, and to inform the preparation of the spatial strategy.
- **Planning Agreements** – under section 75 of the Town and Country Planning (Scotland) Act 1997, developers may enter into contractual agreements with planning authorities and other parties (where relevant) to control a development. The terms of such an agreement may be the source of a dispute. Similarly, developers are often expected to contribute to local services and infrastructure, as well as to provide a quota of alternative housing in residential development. Mediation could offer a process of assisting negotiations for the parties involved.

- **Enforcement** – in order to reduce time and expense, there may be scope for mediation to take place in advance of planning authorities carrying out full enforcement measures.
- **Major Applications** – in cases where parties to a major application are at a deadlock, it may be appropriate to consider mediation as a way to move matters forward. Similarly, there may be scope for the use of mediation when applicants, planning authorities and statutory consultees consider processing agreements.
- **Renewable Energy** – the importance of using clean and sustainable energy from renewable sources results from the need to tackle climate change, and to ensure secure and diverse energy supplies. Public opinion can be polarised on proposals for the likes of wind farms, hydro electric schemes and electricity transmission lines, and contention often arises as to how a particular development is to be designed. There may be scope – in appropriate circumstances – for applicants, local communities and statutory consultees to use mediation as a way to improve the design and siting of a project, identify ways of addressing issues such as the natural and historic environments and achieving community benefits.
- **Flood Management** – the importance of flood management in protecting homes and businesses from damage is set to increase with the passage of the Flood Risk Management Bill. Climate change is expected to add to the risk of flooding. Affected parties are able to seek compensation for any damage and disturbance caused by a scheme, but may also decide to object to a proposed flood protection scheme, for example, to seek changes to avoid disruption to their property. In the event that a local authority is unable to resolve an objection then a public examination (such as a public local inquiry or hearing) will take place. It may be appropriate for authorities to consider using mediation as a way to resolve objections, avoid the time and costs of a public examination, and accelerate the process.
- **Roads and the Transport and Works (Scotland) Act 2007** – an increasing number of towns and cities have sought the implementation of bypass routes to improve health and safety, as well as minimise pollution within urban centres. The extent of competing interests creates complex scenarios which are often referred to a hearing. In addition, the introduction of the Transport and Works (Scotland) Act 2007 brings the ability of public and private bodies to apply for TAWS orders. Pre-application consultation plays an important part in the process of applying for a TAWS order, and applicants are encouraged to engage with those potentially affected. In these typically multi-party scenarios that can become protracted, there may be scope for mediation to be introduced to help resolve deadlock, narrow the issues, or avoid the need for public examination.
- **Marine Fish Farming** – marine fish farms provide an important source of employment along the West Coast and around the islands of Scotland. Planning law now requires that fish farm operators apply for planning permission to operate marine fish farms. In appropriate circumstances, mediation could play a role in the marine fish farm sphere to assist and improve dialogue between applicants, district fishery boards, statutory environmental consultees and objectors to identify the most appropriate locations for fish farms, agree on appropriate conditions under which a fish farm should operate, and identify ways to ensure that both local employment and the natural environment are protected.
- **National Parks** – the National Parks (Scotland) Act 2000 established national parks in Loch Lomond and Trossachs as well as the Cairngorms. The aims of the national parks include: conserving and enhancing the natural and cultural heritage of an area; promoting sustainable use of the natural resources; promoting understanding and

enjoyment of the special qualities of the area by the public; and promoting sustainable economic and social development of the area's community. The broad range of competing land uses and interests creates particular challenges for national park authorities. Mediation could provide a tool that helps national park authorities find creative solutions to accommodate this variety of interests.

Summary of Opportunities

Stage	Opportunity for mediation	Initiated by	
National Planning Framework/ National Projects	Consultation Phase	Scottish Government	} <i>Emphasis on mediation to help build consensus</i>
Development Plans (strategic/local)	<ul style="list-style-type: none"> • Pre plan to identify issues/interests • Post draft plan to address issues 	Planning Authority	
Application	Pre application to improve design/minimise objections	Applicant	
Decision	<ul style="list-style-type: none"> • Pre determination hearing to narrow issues • Post refusal to improve resubmission/avoid appeal • Negotiation of planning/ good neighbour agreements 	Planning Authority Applicant Planning Authority, Applicant or Community Body	} <i>Emphasis on mediation to help resolve specific disputes</i>
Enforcement	To ensure effective and efficient execution of conditions	Planning Authority or Developer	

4. Examples of Mediation in Planning

There are many examples of mediation being used successfully in Scotland and elsewhere in difficult situations outside the planning field, including *construction, property and development, commercial contracts, workplace and human resources, intellectual property, professional services, management, landed estates, banking and finance, family, community, neighbourhood and restorative justice*.

The following examples of mediation being used in the planning process are taken from within both Scotland and other countries including England, Australia, the USA and South Africa. The examples illustrate ways in which mediation can be adopted to increase community involvement, attempt to narrow disputes and resolve deadlock, and help accelerate the planning process.

Links to key centres in other countries that promote mediation in the planning sector – such as the Land and Environment Court of New South Wales, Australia; the Environment Court of New Zealand; and the US Institute for Environmental Conflict Resolution – are provided in Appendix A.

Example 1: *Land and Environment Court of New South Wales, Australia*

Since 1991, the Land and Environment Court of New South Wales has offered a free mediation service to all parties appearing before the court (except those appearing in criminal matters). Mediation is entirely voluntary and as such any party may choose to terminate the mediation at any time. The mediation is facilitated by a trained mediator and can be conducted at any mutually suitable location for the parties. There are set rules under legislation for the exchange of statements in advance of the mediation; however no report is made out either orally or in writing as a result of the mediation and confidentiality is fully maintained. However, should the parties wish to advise the court of the result of the mediation, they are entitled to do so in mutually agreed terms.

Mediation also plays a part in disputes brought before the court under the Trees (Disputes Between Neighbours) Act 2006 where mediation in this area is compulsory. Only where parties are unable to reach agreement and the court is satisfied that a reasonable effort has been made, will the court intervene granting an order in respect of the particular trees in dispute.

Before even reaching the court, there are a range of Community Justice Centres throughout New South Wales where mediation is available on a wide range of issues, including planning disputes. Mediation tends to be facilitated by two mediators and generally begins with a joint meeting between the parties. It is estimated that more than 80% of such mediations result in an agreement being reached. Additionally, the Community Justice Centres offer a specialist mediation service for native aboriginals where the process is facilitated by aboriginal mediators.

This example shows how mediation can be effectively applied to community issues, and can be designed to recognise issues that may be particular to an ethnic group. The example also shows the compatibility of mediation with encouragement by the courts via a free mediation service and on a voluntary basis.

Example 2: Ratho Community Centre, Scotland

A dispute arose between the local authority and community groups at Ratho near Edinburgh in relation to a planning application. The parties were at an impasse, but it was decided to refer the matter to mediation to see if matters could be resolved.

The parties came together through formal mediation and within half a day managed to achieve a resolution that allowed them to move forward. As part of this, the community groups were able to provide important input to the local authority on their concerns about the matter. A key part of the process was re-building trust which ultimately helped improve relations.

Example 3: Bridgeport Land Sale Mediation, USA

A dispute had been ongoing in Bridgeport, California for over a decade between the Bridgeport Indian Colony and residents who objected to the colony's proposals to develop an area of land consisting of 40 acres from the Bureau of Land Management. There was a complete breakdown of trust and co-operation between the parties.

In 2006 the US Institute for Environmental Conflict Resolution was approached by the Department of Interior Board of Land Appeals to see if mediation could be implemented to reach an agreement. In 3 days of mediation which took place in 2007, the parties reached a compromise and entered into a written agreement for the sale to proceed, thus resolving a long-standing dispute.

Example 4: Major Development Project, Scotland

A team of developers had submitted a planning application during 2007 for a significant development project. There were a number of objections to the application which the developers were keen to resolve. A mediator was instructed to assist in resolving the dispute which was set to escalate.

The mediation resulted in constructive dialogue in which each participant was able to explain how it saw things and to understand the areas of concern on all sides, and to identify what was actually contentious. This provided a platform to enable the parties to reassess their positions and look at a range of options going forward.

This example shows the benefit of the parties coming together through mediation when a dispute arises so that differences between parties can be resolved or at the very least narrowed.

Example 5: *Listed Building, England*

A planning application was submitted by a trust who wished to develop a listed building in a landscaped park which they owned and used as a home for people with learning disabilities. The planning application was refused twice by the planning committee, even after an architect was brought in to revise the plan.

The parties engaged in a series of joint and private mediation meetings. As a result of a successful mediation process, the trust agreed to revise the planning application, which the planning officer and the local councillor agreed to support when presented to the planning committee.

Example 6: *Strategic Municipal Planning in Cape Town, South Africa*

Following the end of apartheid in South Africa, the city of Cape Town was faced with a major strategic challenge of restructuring its municipal districts to allow proper integration of the population following the practice of racial segregation. Between 1991 and 1996, a dedicated mediation project was put in place to restructure some 47 municipalities into 7 municipalities with clearly defined powers.

The mediation process involved three key groups: professional mediators (or process organisers), mediating planners and other key “champions” representing stakeholders. All three groups were seen to represent a sufficiently broad range of interests, and the engagement of these parties played a key role in facilitating the restructuring of Cape Town in line with the principles advocated by South Africa in the post-apartheid era.

The example shows how mediation can be applied to a highly complex strategic planning issue, and be designed in a way so that stakeholders of different ethnicities and socio-economic backgrounds can be fairly represented.

Example 7: *The Allagash Wilderness Waterway, Maine, USA*

The Allagash Wilderness Waterway is a 92-mile collection of lakes and rivers which winds its way through a remote part of Maine Woods. It is regularly used by canoeists and other outdoor enthusiasts, seeking the wilderness experience. Controversies began in 2002 when the environmental pressure group Americas Rivers declared it the eighth most endangered river in the US owing to “mismanagement, overuse and too many access points.” When the Governor of Maine later suggested a further access point be created, the matter reached breaking point and a lengthy litigation seemed inevitable.

However, after two days of mediation, an agreement was reached preserving both wilderness environment and recreational access to the river, thus ending a dispute which had lasted a generation. The mediator noted that the process was assisted greatly by the fact that key representatives of the different groups were present, each able to act with authority.

The example demonstrates how mediation can be applied to access issues in the outdoors where there are competing demands for land use and recreation.

5. Frequently Asked Questions

- **Is mediation just a nice idea?** – Certainly not. It is a rigorous process, requiring hard work and commitment and a focus on what is really at issue. Participants are often surprised at what can be achieved in a short space of time and by how involved they are in the process.
- **To what extent has mediation been used in planning in Scotland or elsewhere?** – To a limited extent in Scotland and elsewhere in the UK. It is more widely applied in places such as Australia and New Zealand where it is a key part of the work of the Environment Courts.
- **Where might it be used in the planning system?** – Potentially at all stages of the system, but in particular in development planning and pre-application in order to build consensus and reduce objections, and post-rejection of an application in order to resolve issues before any fresh application is made.
- **Is it an alternative to the existing planning system?** – No, it complements the existing system by helping reconcile the private interests of different parties, but it does not eliminate the need for planning authorities to consider the wider public interest in fulfilment of their statutory duties.
- **Is there a role for elected members?** – Yes, as representatives of the community, although if they are also members of the planning committee which will decide on a particular application, this may limit their involvement in any mediation which addresses the issues in that application.
- **Can the confidential nature of mediation be reconciled with the transparency of the planning process?** – Where this is a relevant issue, this should be possible if the parties agree to the publication of the outcome of the mediation and the reason(s) underpinning that outcome. Publication would probably be necessary anyway so that the outcome can be fed into the decision-making process. Freedom of Information legislation should also be taken into account in drafting an agreement to mediate and in considering to what extent written documentation used or created in mediation may be recoverable at a later date.
- **How can you ensure that a mediator has sufficient skill?** – By using a recognised and experienced professional mediator or mediation service and by asking questions about their background, training, experience and expertise. You can ask for references. Mediators who appear in the Scottish Mediation Register or who are offered by established mediation services certify that they have achieved or exceeded minimum practice standards.
- **Do mediators engaged in a planning matter need to be expert in planning?** – This may be useful in some circumstances, for example to help test the realism of emerging options to resolve a matter, but it is not essential. Indeed, lack of expert knowledge may be an advantage in removing a possible tendency to judgement on the part of the mediator. Often, this issue can be addressed by appointing someone knowledgeable in planning to assist an experienced mediator.
- **Would mediation be a source of delay and additional work?** - Usually, mediation can be set up very quickly, owing to its informality. However, those involved do need to

be prepared to take part. Often this preparation is similar to work which will have been undertaken already or would be necessary in other processes. In this way, duplication can be avoided. The process itself can and should be considerably shorter than other approaches which can often be time-consuming and costly. Mediation nearly always produces one or more of these outcomes: progress on understanding key points, a narrowing of the issues and overall resolution of differences. .

- **Will parties to mediation prejudice themselves during future stages of the planning process if mediation is unsuccessful?** – This should not happen, as anything said in discussions during mediation is confidential and not binding (unless otherwise agreed or a formal agreement is eventually reached). This allows parties to be creative in exploring options and possible solutions without being bound in any way.
- **How successful is mediation?** – In commercial matters, most research reports that resolution is achieved in over 80% of cases which go to mediation. It is important to appreciate that it is unusual for any party to leave mediation having achieved 100% of what they hoped for. For mediation to be successful, parties often have to make some concessions in order to achieve their primary objectives ('give to gain'). Whether and how they do so is always a matter for them to decide. "Success" may also be the unlocking of a difficult situation and a narrowing of differences, enabling parties to move on with a more limited scope of topics for formal decision.
- **Will mediation favour the party with greater resources?** - No, a key role of the mediator is to ensure that any perception of power imbalance between those involved in the discussions is minimised so that a full and fair exploration of issues, interests and possible solutions can be achieved.
- **If mediation doesn't appear to be working, are parties locked in to the process?** – No, it is an entirely voluntary process from which parties can withdraw at any time if they wish.

Appendix A: Resources

General Information in Scotland

- Scottish Mediation Network <http://www.scottishmediation.org.uk>
- Scottish Mediation Register <http://www.scottishmediationregister.org.uk>

Information about Mediation in Planning in Other Countries:

- Planning Mediation in New Zealand
<http://www.mfe.govt.nz/publications/rma/everyday/court-mediation/court-mediation-jun06.pdf>
- US Institute for Environmental Conflict Resolution
<http://www.ecr.gov/>
- Land and Environment Court of New South Wales, Australia
http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/pages/LEC_index

Appendix B: Selected Reading

Articles:

Biberbach, Petra - **Rules of Engagement** - The Journal of the Law Society of Scotland, June 2008

Brand, Martha - **Consensus Building and "Smart Growth"** - Conflict Resolution Quarterly, vol. 21, no. 2, Winter 2003

Brooke, Lord Justice – **Mediation and Planning: The Role of Mediation in Planning and Environmental Disputes** – based upon the Peter Boydell Memorial Lecture – 2008 Journal of Planning Law 1390.

Cowan, Robert - **Mediation Bridges the Communications Gap** - RTPi News in Planning - issue 1378, 21 July 2000.

DLTR - **Mediation in the Planning System** - DLTR, May 2000
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/158403.pdf>

E. Franklin Dukes - **What we know about Environmental Conflict Resolution: An Analysis based on research** - Conflict Resolution Quarterly, vol. 22, no. 1-2, Fall - Winter 2004, p.191, followed by Commentary p.221.

Grossman, Andy - **Mediation Demonstrates its Power in Planning Disputes** - CEDR, May 2000.

Hague and Higgins - **International Experience of Mediation in Development Planning** – (2004) 101 Scottish Planning and Environmental Law 6.

Lloyd, Greg and Peel, Deborah - **A Fundamental Shift** - Planning, March 2007.

Lloyd, Greg and Peel, Deborah - ***Mediating Mediation in Land Use Planning*** - (2003) 99 Scottish Planning and Environmental Law 102.

Lloyd, Greg and Peel, Deborah – ***Scoping Study of the Potential for a Pilot Project on Mediation Within a Local Plan Framework in Scotland***

Lyll, Pamela - ***Mediation in Planning: A Mediator's View*** - (2004) Scottish Planning and Environmental Law 30.

Parmiter, John and Phillips, Jeremy - ***Finding Common Ground*** - Planning, March 2008

Planning Special Report, Holyrood Magazine, September 2008

ODPM - ***Further Research into Mediation in the Planning System*** - ODPM, November 2002 <http://www.communities.gov.uk/documents/planningandbuilding/pdf/156678.pdf>

Scottish Government (2008) - ***Evaluation of the impact of the National Standards for Community Engagement two years after publication*** - July <http://www.scotland.gov.uk/Publications/2008/07/16085900/0>

Shanmuganathan, D - ***Two Birds, One Stone: A Solution for Planning and Environmental Disputes?*** - Journal of Planning Law, Jan 2006.

Watchman, John - ***Mediation in the Planning System*** - (2002) 89 Scottish Planning and Environmental Law.

Guidance brochures:

Neighbourhood and Community Disputes - Community Legal Service Direct.

Legislation, White Papers and Policy:

Planning etc. (Scotland) Act 2006
http://www.opsi.gov.uk/legislation/scotland/acts2006/asp_20060017_en_1.
Modernising the Planning System (White Paper) 2005
<http://www.scotland.gov.uk/Publications/2005/06/27113519/35231>.
PAN 81: Community Engagement - Planning with People
<http://www.scotland.gov.uk/Publications/2007/03/09095010/0>.

Books:

Cooley, John (2005) - ***Creative Problem Solver's Handbook for Negotiators and Mediators*** - American Bar Association (www.abanet.org)

Crawley, J. & Graham, K. (2002) - ***Mediation for Managers*** - Nicholas Brealey Publishing

Fisher, R and Sharp, A (1999) - ***Lateral Leadership: Getting Things Done When You Are Not The Boss*** - Harper Collins Business

Fisher, R and Ury, W (1991) - ***Getting to Yes*** - Penguin (2nd Edition)

Fisher, R and Brown, S (1988) - ***Getting Together: Building Relationships as We Negotiate*** - Penguin

Mackie, Karl J; Miles, David; Marsh, William; Allen, Tony (2007) - **Commercial Dispute Resolution - The ADR Practice Guide** - Butterworths (3rd Edition)

Malcolm, Ewan & O'Donnell, Fiona (Editors) (2009) – **A Guide to Mediating in Scotland** – Dundee University Press

Nesic, M and Boulle, L (2000) - **Mediation: Principles Process Practice** - Butterworths

Picker, Bennett G (2003) - **Mediation Practice Guide** - American Bar Association (2nd edition)

Richbell, David (2008) - **Mediation of Construction Disputes** – Blackwell Publishing

Sidaway, Roger (2005) – **Resolving Environmental Disputes – from Conflict to Consensus** - Earthscan

Stitt, Alan (2004) - **Mediation: A Practical Guide** - Cavendish

Stone, Patton and Heen (2000) - **Difficult Conversations** - Penguin

Ury, William (1999) - **The Third Side: Why We Fight and How We Can Stop** - Penguin

Ury, William (2007) - **The Power of a Positive No** - Hodder & Stoughton



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