Craig Howell Williams QC explains when mediation can be the solution to planning disputes

Planning ahead

Mediation can be used in a variety of circumstances, from boundary disputes to commercial litigation, and in a range of the litigation contexts, from the Upper Tribunal (Lands Chamber) to employment tribunals.

Various government reports have encouraged more use of mediation in the planning sphere. The recent report by Leonora Rozee concludes that mediation could provide an effective tool to tackle a wide range of planning issues.

It also comments that the more consensual approach that mediation involves is consistent not only with the aims of the 'frontloaded' spatial planning system introduced by the Planning and Compulsory Purchase Act 2004 but also with the aims of the current government to develop neighbourhood planning.

How it works

Before the mediation the parties will send to the mediator an agreed bundle of the relevant documents, including case summaries. The mediator will contact the parties and explain the process. He will also confirm the terms of the mediation agreement, including his instructions. The mediator may hold joint sessions, but will then hold private sessions with each party to understand better their concerns, to consider (sometimes by testing) the strengths and weaknesses of their cases, and to explore options for settlement.

The parties must be well prepared to participate and normally have authority to settle. The litigants must be present, a lawyer or a trusted friend should attend to advise the litigant, and if necessary speak for him, and experts may be required in some cases to consider technical issues.

If the mediation is successful, the parties will record the terms of this in writing. The result may be a binding agreement, a conditional agreement, heads of terms or a form of agreed statement.

When to mediate

There is significant potential for the use of mediation across a range of issues in the planning sphere, such as: design and layout, section 106 obligations and infrastructure cost negotiations, pre-application consultation, conditions, neighbour objections, compulsory purchase and compensation, enforcement, and development plan documents.

One of the pilot cases studied in the Rozee report related to arguments about the wording of a draft policy in an area action plan. The result was that the developer and council officers through mediation agreed an amended form of draft wording. Another related to an enforcement case about scrap on agricultural land. The landowner and council officers reached a settlement through mediation, including future compliance.

Another case study focused on mediated consultation between stakeholders involved in planning proposals for a brownfield site. The process resulted in the developer agreeing to amend the scheme and in the residents supporting the revised plan. Another case referred to related to a claim for compensation under section 237 of the Town and Country Planning Act 1990. The claimant and the acquiring authorities reached agreement on the sum of compensation. The legal arguments were complex and the case would otherwise have had to be heard for over several days in the Lands Tribunal.

Mediation can assist in resolving substantial issues and can be cost effective too. It is also flexible so that it can be used not only in cases where a complete settlement is sought, but also where parties want to narrow issues, reach common ground or simply improve their understanding of opposing views. Even the facilitation of dialogue can be advantageous.

Possible hurdles

There are perceived difficulties, which are referred to in the Rozee report. For example, it is said that the fact that there is a statutory framework imposing procedural constraints on local authority decisions militates against mediation. However, mediation is not intended to avoid lawful decision making nor to negate the role of committees in determining planning applications. A local planning officer may attend a mediation, but he must thereafter report to the relevant planning committee (just as he would do following negotiation). While a mediation can be confidential, its outcome must be open and the reasons for any subsequent officer recommendation to committee must be made public.

Some mediations will require a large number of third parties, and this may present a practical problem (or even a fundamental obstacle). But the flexible nature of mediation means that it can be used where there are many parties involved depending on the objectives of the mediation.

Who pays?

There is also the question of costs – who pays for the mediation? At present, there is currently no formal mechanism in place. Much will depend on the circumstances of the case and the incentives for the parties involved. A developer may think that the costs of mediation are worthwhile if it will improve the prospects for a beneficial planning permission. A local planning authority may consider that mediation is worthwhile because there is a saving in costs, time and resources so that it is in the public interest to agree contributing to the costs for mediation.

Time and again the government has been advised to do more to encourage the use of mediation in planning-related disputes and the publication of the Rozee report is a timely reminder of the merits of using mediation in planning.

In times of economic constraints, and in the context of the new localism agenda, the potential benefits of mediation should not be ignored. All those involved in the planning system should consider carefully the use of mediation in their planning disputes.

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