APPG ADR: FINAL 2016/17 SESSION ON ITS USES IN PUBLIC LAW

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ASPECTS OF LOCAL GOVERNMENT, PLANNING AND CPO

John Pugh-Smith

39 Essex Chambers

Barrister & CEDR Accredited Mediator

Rise of mediation in public law: context

- The Woolf reform led to the CPR rules (1999) and to the introduction of the Judicial Review Pre-Action Protocol (March 2002)
- Public Law mediation burst on the scene with *Cowl* v *Plymouth City Council* decided in January 2002
- Mediation in JR is mentioned as one of the ADR options in the JR PAP
- The ADR pledge (2001) [that was regarded by the Coalition Government to have saved an estimated £360 million - see the Dispute Resolution Commitment (2011) – in the relevant guidelines one finds '(Mediation) should be seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress'

A current landscape of bits and pieces?

- Judicial Review: Pre-Action Protocol + the Administrative Court Guide (July 2016)
- A number of disparate legislative provisions that encourage mediation (e.g. in the regulatory context Nursing & Midwifery Council – Mediation for the investigating committee with regard to fitness to practice)
- The use of mediation techniques (e.g. the HMRC use ADR to solve tax disputes)
- Pockets of rising practice (e.g. planning, community care, public procurement)
- CPO negotiations – duty on acquiring authority to seek to negotiate before resorting to CPO

A current landscape of bits and pieces?

- **Judicial Review: Pre-Action Protocol**
- **The Administrative Court Guide** mentions ADR and/or mediation in three places
- 1. When discussing the PAP:

'*Stage 1 of the Protocol requires the parties to consider whether a method of ADR would be more appropriate. The protocol mentions discussion and negotiation, referral to the Ombudsman and mediation (a form of facilitated negotiation assisted by an independent neutral party)'*

- 2. When discussing the duties of parties:

'*The parties should consider using alternative dispute resolution (for example, mediation) to explore the settlement of the case, or at least to narrow the issues in the case'*

- 3.When discussing the active management of the case by the Court:

'*Encouraging the parties to use an ADR procedure if the Court considers that appropriate and facilitating the use of such procedure*

Mediation & JR: A challenging reality

- ***"Mediation in Judicial Review: a tight squeeze between negotiated settlement and test cases"*** (N.B. Univ of Birmingham pilot study (2016) [See also research by Varda Bondy & Maurice Sunkin '*The dynamics of Judicial Review litigation*' 2009]:
- 60% of all disputes are settled before issuing proceedings (after LBC)
- 34% of all claims are settled/withdrawn after claim issued
- Of the remaining cases 40% were granted permission and of these 63.6% settled before a full hearing
- Only 46 cases out of a sample of 1000 disputes with LBC reached a full hearing
- This may explain the relatively small number of cases of mediation in JR (see **the need for test cases**)
- Ultimately it may give rise to concerns with regard to the **viability** of mediation in JR

The Current Wider Picture of disparate legislative provisions but useful application:

- Regulatory context – See the example of Health care Law commission in its report of April 2014 on 'The regulation of Health Care Professionals and the regulations of Social Care Professionals' recommended giving the power to regulators to organise mediation.
- Nursing & Midwifery Council – see art. 26 (6) & 29 (4) Nursing & Midwifery Order 2001, SI 2002 No 253 – Mediation for the investigating committee – fitness to practice – Never used
- HCPC – Health & Care Professions Council; see art. 26 (6) & 29 (4) Health and Social Work Professions Order 2001, SI 2002 No 254 – Mediation for fitness to practice – if there is a case mediation serves to re-build trust with the users – A pilot is in progress
- Sect.52 of the Children and Families Act 2014 gives a right to mediation to parents or young persons concerning an Educational Health Care plan
- Parliamentary & Heath Service Ombudsman – sect. 3(1)A – Possibility to appoint a mediator to assist in the conduct of an investigation

Mediation techniques and practices

- Reliance on mediation techniques to solve a dispute but not as a court avoidance mechanism but as part of the decision-making process – Mediation is used up-stream so as to ensure that the decision-maker gets it right first time (see the HMRC uses ADR to solve tax disputes, for instance disputes arising from the 'compliance check')
- SRA – No mediation but regulatory settlement agreement (see the guidelines that have been re-issued recently)
- Varying degrees of reliance on mediation to solve disputes – e.g. the publication of Mediation Guide in Planning (National Planning Forum) (June 2011); the DCLG Section 106 'brokering service (Aug. 2012) but lack of political joined-up thinking with subsequent but time-limited Growth & Infrastructure Act 2013 provision of Sections 106BA to BC specifically for affordable housing causing "stalled development" – sunset provision of 30.04.16

Where it is particularly working …

- **Upper Tribunal (Lands Chamber):** Rule 3 of its 2010 Rules encourages the Tribunal to seek, where appropriate
- *to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and*
- *if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure."*
- Para. 2.1 of the Practice Directions, supplementing the 2010 Rules, state:

"*1) Parties may apply at any time for a short stay in the proceedings to attempt to resolve their differences, in whole or in part, outside the Tribunal process …"*

- Paragraph 2.2 relates to costs in the context of the ability of the Tribunal to allow the parties time to settle disputes by ADR; and paragraph 12.2 of the Practice Directions provides that: *"… The conduct of a party will include conduct during and before the proceedings; whether a party has acted unreasonably in pursuing or contesting an issue … "*
- The Tribunal will automatically allow a six-week period for mediation, though the parties may apply for a longer stay.

And with a costs sanction …

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And the realities …

- Increasing degrees of success as costs of fighting a Reference are increasingly high and not fully recoverable
- Mediations conducted both by lawyers (like myself) and CPO surveyors (more on an evaluative basis)
- Statutory claims can run into many millions (e.g. cessation of mineral working due to revocation/modification of planning permissions) but be settled for much more modest sums N.B. DEFRA or DCLG (through LPA/MPA) often the “payer”

Planning: The Historic Impetus …

Killian Pretty Review of the English Planning System (Nov.08) recommendation 12:

" That greater use of alternative dispute resolution approaches should be encouraged at all stages of the planning application process where this can deliver the right decisions in a less adversarial and more cost efficient way."

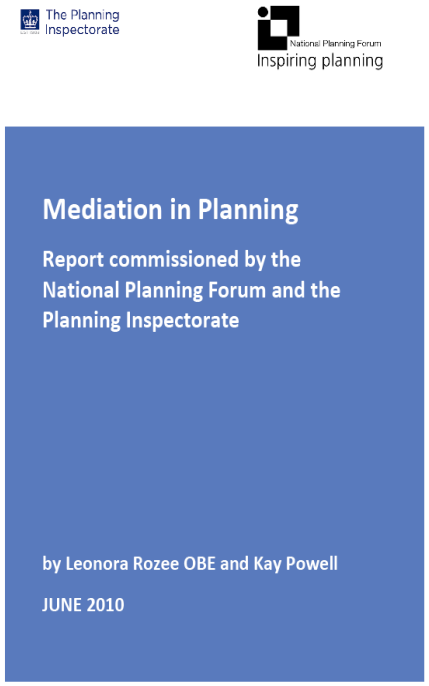
To achieve this:

- *local authorities and applicants should explore opportunities for applying alternative dispute resolution approaches throughout the process; and*
- *DCLG and PINS should carry out a more detailed investigation into the use of formal mediation as a less adversarial and speedy alternative to appeal to establish whether the potential time and cost savings would justify the costs of introducing such a scheme.*

Planning: Historic impetus [2]

- **CLG Response** (Mar.09) was to request PINS to work with DCLG "*on investigating the role of mediation in reducing the need for planning and enforcement appeals and / or reducing the time and effort involved in determining such appeals.*
- **The outworking** is currently being taken forward by the joint National Planning Forum/PINS mediation pilot evaluation project - final report published 30th June 2010
- Scottish Government launch (Mar.16, 2009) of "*A Guide to the Use of Mediation in the Planning System in Scotland*" identifying specific areas and opportunities for the use of mediation, and, encouraging the use of mediation providers www.scotland.gov.uk/Publications/2009/03/10154116/0
- Now being followed up by 2016 Planning System Review

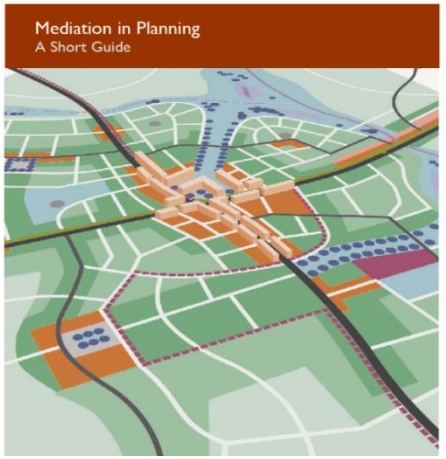
NPF/PINS Mediation in Planning Report – published June 2010



Available to download free from:
www.natplanforum.org.uk and
www.planning-inspectorate.gov.uk

Mediation in Planning: A Short Guide

- Mediation Guide prepared, endorsed by Bob Neill MP Minister for Planning Launched at the RTPI Planning Convention June 2011 and available on the NPF web-site www.natplanforum.org.uk



Some overarching principles:

- ***What is "mediation"?***
- A dialogue between parties to a dispute or difference conducted on a confidential and without prejudice basis, assisted by a neutral person (the Mediator); or, simply
- An assisted negotiation
- ***What services might a "mediator" provide?***
- To give the parties the best chance of reaching a solution to their dispute or difference that is quicker, less expensive and better suited to the circumstances of the dispute or difference than the alternatives
- "Facilitative" - helping the parties to formulate their own propositions
- "Evaluative" - helping the parties when asked to use his expertise to offer neutral views to the parties

Some more principles:

- ***What role does the "mediator" fulfil?***
- Manages process of negotiation
- Sets tone
- Encourages option generation
- Helps parties think the unthinkable – reality testing!
- Creates and preserves 'traction'
- Helps to close the gap **but** negotiations remain confidential and non-binding till settlement agreement signed.

N.B. If successful, mediation delivers greatest benefits the earlier it is used i.e. lower costs, greater goodwill, less entrenchment and less diversion of management time **BUT**

- A failed mediation rarely leads to a second attempt

Particular Land-Use Opportunities

The use of mediation to help resolve specific disputes:

- ***Planning decisions*** **–**

➢ Pre-determination to narrow the issues (LPA/Applicant)

➢ Post refusal to improve re-submission/avoid appeal (LPA/Applicant)

➢ Negotiation of obligations, financial contributions and terms of s.106s or under s.278 Highway Act (LPA/Applicant)

- ***Enforcement*** - to help avoid formal measures and/or to ensure practical compliance

More Opportunities

- ***Compulsory Purchase*** e.g. limiting sustained objections, reducing expert disputes, agreeing settlement terms, negotiating compensation basis – already proven track record
- ***Highways*** e.g. scope of works, drainage issues, footpath diversion.
- ***Specific Environmental Issues*** e.g. abatement notices; remediation of contaminated land; withdrawal of IPPC permit
- ***High Court Claims*** e.g. avoiding judicial review where an alternative “decision” can be made; agreeing or narrowing liability and compensation for nuisance or professional negligence claims etc.

Some Benefits

- Parties remain in control – better on relationships?
- High prospect of success -flexibility
- Better identification of issues
- Can be applied to any part of a dispute
- Ability to arrange and prepare for quickly
- Short: most = 1 day; but those involving facilitated dialogue may need to be spread over many weeks or possibly months, and, with out-of-hours meetings
- Very cost effective
- Real engagement by third parties
- Narrowing of differences

Some Objections

- **Confidentiality**
  - When does the process have to be confidential?
  - Willingness of parties to achieve a positive outcome
  - Structured agreement allowing later public announcement or ratification and reason(s) underpinning outcome
- **Limits to authority**
  - Not fettering the discretion of a public body as still subject to member endorsement;
  - Extent of delegated powers and/or member mandate and involvement made clear, preferably at outset of mediation process
- **The Public interest**
  - Not fettered and sufficient safeguards (as above)

The future?

- The disparity of practices, provisions (and their use)
- Moving mediation up-stream? (use of mediation techniques in the decision-making process) - Not only process of dispute avoidance but participatory decision-making
- Public law mediation moves easily between the administrative and judicial spheres
- The ‘Transforming our justice system’ joint statement – What ADR/mediation in this new digitised era?
- Willingness of MoJ, DCLG, DEFRA and DoT to work together to achieve consistency of approach?

Some Conclusions

- Mediation now tried and tested in many spheres
- Opportunities to apply it to most parts of current land-use system, and, to related areas
- Growing interest but still relatively little experience throughout UK
- Some good experiences to learn from with more in the pipeline
- Significant potential benefits and understandable concerns
- Need still to build confidence and greater understanding
- Moving forward will require more top-down encouragement and support, alongside bottom-up users

John Pugh-Smith

39 Essex Chambers

London & Manchester

www.39essex.com

john.pugh-smith@39essex.com