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How the use of ADR techniques can work within the planning process

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Terminology

- **ADR** (alternative dispute resolution) - "*a non-court based dispute resolution process*" (Sir Geoffrey Voss MR in *Churchill v Merthyr Tydfil CBC* [2003] EWCA Civ 1416)

- **Types of ADR**:
  - *Neutral chairing*
  - *Mediation*: a specific, usually confidential, process
  - *Early neutral evaluation*: non-binding assessment
  - *Independent determination*: binding decision

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, who can be:

- “*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

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.

Some benefits

- Parties remain in control - better on relationships?
- Flexibility increases prospect of success
- 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
- Cost effective
- Real engagement by parties
- Narrowing of differences

Some specifics

- **Confidentiality**
  - ➢ 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 usually subject to member endorsement;
  - ➢ Extent of delegated powers and/or member mandate and involvement made clear, preferably at outset of mediation process

- **Public interest**
  - ➢ Not fettered and sufficient safeguards (as above)

Why mediation suits the planning system

- It can accommodate multiple parties, giving stakeholders (e.g. communities and other affected interests) an opportunity for genuine engagement that is rarely offered by the appeals process.
- It can maintain and repair relations: especially valuable in the land use sector where stakeholders are effectively locked into long-term relationships (e.g. between landowners and their LPA and neighbours).
- Unlike the binary planning appeals process, it is capable of delivering tailored solutions to complex land use problems that reflect varied interests.
- It has the potential to reduce substantially the use of public funds and other resources in lengthy litigation.

What mediation can contribute

- Enforcement: Offering a greater chance to deliver mutually acceptable and lasting outcomes.
- Development management: Resolving or narrowing the range of issues at pre- and post-application stages **and** at appeal (including SoCG).
- Implementation: Facilitating the discharge of conditions and multi-consent stages of reserved matters.
- Forward planning: Refining options and issues (local and neighbourhood plans); land assembly.
- High Court judicial review: Helping achieve rectifiable procedural errors (e.g. lack of proper consultation) or alternative solutions (e.g. reduced tree loss).

Some practical examples

- COMPULSORY PURCHASE :

  - EARLY STAGE – NB – *CPO & Crichel Down Guidance*: *"The confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement….Compulsory purchase is intended as a last resort"* also see DCO Guidance

  - PRE-ORDER MAKING – Negotiation between the AA or DCO applicant and Landowner and benefit of offering reluctant Landowner mediation

  - MEDIATION CAN BE AT ANY STAGE INCLUDING POST ORDER MAKING PRE CONFIRMATION

  - COMPENSATION STAGE – *CPA Guidance* – mediation; early neutral evaluation; expert determination; arbitration and 'med arb' . CLEAR ALTERNATIVE TO Upper Tribunal (Lands Chamber)

Some practical examples

- <u>ENFORCEMENT ACTION:</u>
  - PCN warning stage
  - Post EN service especially if making s174(2)(a) and/or (f) and (g) appeals e.g. form of '*Tapecrown*' lesser and/or alternative development (including how permission can be granted through appeal process or during)
  - Injunctive action pre and post EN – reality of lawful use of land/fallback
  - Mediation can bring solution and clarity protecting both LPA and landowner/occupant

- <u>PLANNING APPLICATION AND POST APPEALS:</u>
  - Post refusal and especially pre enforcement if retrospective element

Some practical examples

- <u>STATUTORY AND JUDICIAL REVIEW:</u>
  - Timing constraint makes ADR options difficult at early stage but JR is supposed to be last resort
  - Post grant of permission negotiation of consent order terms N.B. mediation can go wide e.g. negotiated s106 to address enforcement case to avoid demolition but left unamended notice in place (allowed time to put series of planning applications in and ultimately successful (on appeal))

Some practical examples

- S 106 & DISCHARING PLANNING CONDITIONS – CIL

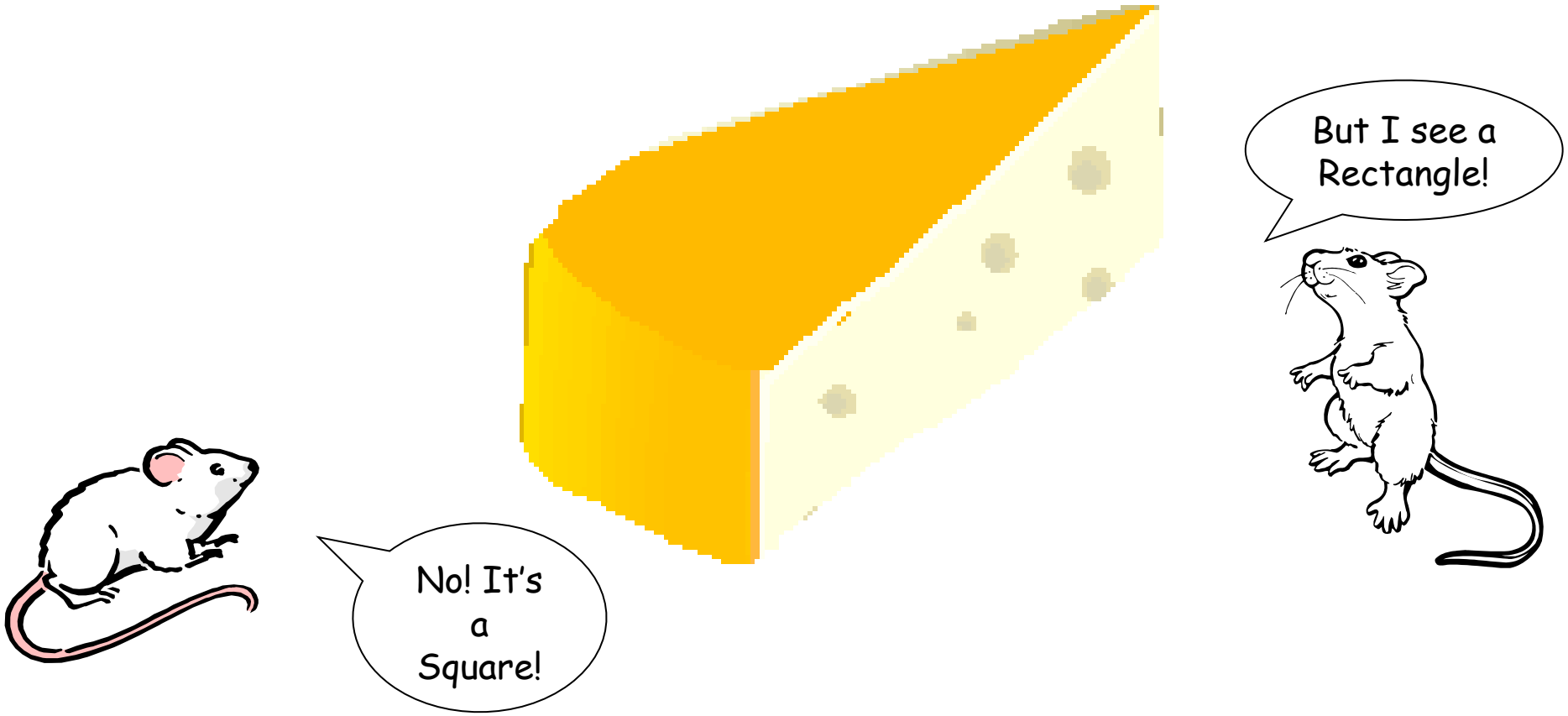
S106

- ADR can help avoid delay to s106 negotiations especially following resolution to grant
- Subsequent compliance issues with terms and delay or push back from LPA re proposed deed of variation and/or any s106A application
- Issues with condition discharge

CIL

- Avoiding surcharges and interest charge (some CAs treat as discretionary); late service of LN; revised notices (see *Braithwaite* and *Trent)*
- Agreements to pay

Some concluding thoughts



Some concluding thoughts

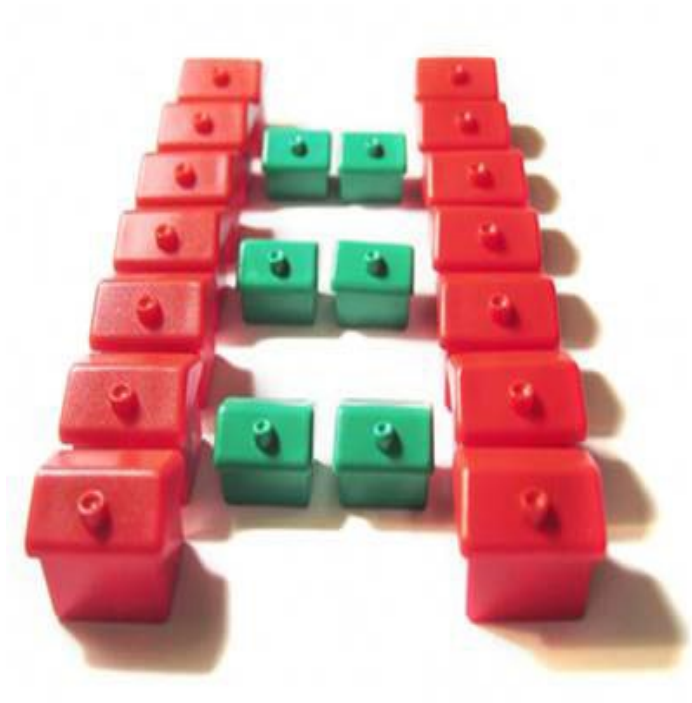
Although there will usually be at least two sides to a dispute (it just depends on your perspective), nonetheless, common ground can normally be reached

Credit: Blazing Saddles (1974)

And …

- Mediation (in all its forms) is now a tried, tested and successful resolution process within the development and infrastructure sectors, especially with contractual/real estate related issues and compensation claims.
- There have been good experiences, too, within the planning system even though, in most cases, the parties have adopted a confidential process so awareness has been more anecdotal.
- There are significant potential benefits in greater deployment and understandable concerns which can usually be addressed.
- There is still the need to build confidence and greater understanding.

So, please look for opportunities and give mediation a go !



Further Questions?

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