

Planning Committee

2.00pm, Wednesday, 3 February 2021

Response to Scottish Government's consultation paper on Mediation in the planning system

Executive/routine
Wards
Council Commitments

1. Recommendations

- 1.1 It is recommended that Committee agrees Appendix 1 to this report as the Council's response to the Scottish Government's consultation paper on mediation in the planning system.

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Response to Scottish Government's consultation paper on Mediation in the planning system

2. Executive Summary

- 2.1 The Scottish Government has issued a consultation paper which seeks views on draft guidance on the promotion and use of mediation in the Scottish planning system. While it recognises the wide potential use of mediation, it intends to focus initially on aspects of the development plan process and the pre-application stage in development management.
- 2.2 This report sets out the proposed response to that consultation paper which agrees in principle with the Scottish Government's proposals but identifies some practical issues to be considered further.

3. Background

- 3.1 The use of mediation in the planning system has been part of the wider discussions on planning reform and the Planning (Scotland) Act 2019. Mediation has been identified as a tool which could reduce conflict, improve community engagement and build trust in planning matters. Its potential to enhance planning processes has been examined over the last 15 years and it has been used in various planning contexts.
- 3.2 Scottish Planning Policy supports the use of mediation initiatives as an innovative way of early, meaningful and proportionate engagement between stakeholders. A guide to the use of mediation in Planning was issued in 2009. It categorises mediation in relation to helping to build consensus or helping to resolve specific disputes.
- 3.3 In 2016, the report of an independent panel's review of planning, "Empowering planning to create great places" considered the role of mediation, primarily in development planning.
- 3.4 At Stage 3 of the Scottish Parliament's consideration of the Planning (Scotland) Bill, an amendment was passed by the Parliament requiring the Scottish Ministers to introduce guidance on the promotion and use of mediation. The provision in the 2019 Act states that Scottish Ministers may issue guidance on the promotion and

use of mediation in the Scottish planning system. It also requires that Ministers must issue such guidance within the period of two years beginning with the date on which the 2019 Act received Royal Assent, namely by 25 July 2021.

- 3.5 The Scottish Government is requesting responses to this consultation paper by 12 March 2021.

4. Main Report

What is mediation?

- 4.1 The 2019 Act defines “mediation” to include any means of exploring, resolving or reducing disagreement between persons involving an impartial person that Ministers consider appropriate.
- 4.2 The definition of ‘mediation’ used in the consultation paper relates to processes which include the involvement of an impartial person rather than relying on the parties involved using mediation / facilitation style skills themselves. It recognises that mediation is a voluntary process and can be flexibly applied.

Opportunities for mediation

- 4.3 The consultation proposes to focus guidance for mediation in the Planning process on two specific elements:
- 4.3.1 development planning stages of Development Plan Schemes / Gatechecks and Plan examinations; and
- 4.3.2 development management processes for Proposal of Application Notices (PANs) / Pre-application consultation

Consultation Questions

- 4.4 The consultation paper contains nine key questions about the content of the draft guidance on mediation. Appendix 1 of this report contains the proposed responses to these questions.
- 4.5 In summary, the Planning Authority is generally supportive of the overall aims which mediation seeks to accomplish, particularly the desire to resolve conflict and clarify the reasons behind potential misunderstanding of the positions of various parties in the process.
- 4.6 While there is potential for mediation to bring benefits to the planning system, any attempt to introduce it as a formal part of the process should be approached with care and caution. It is recognised that the planning system often involves parties with diametrically opposed interests which can be difficult to reconcile
- 4.7 The Planning Authority recognises that guidance on mediation will need to be clearly supported at national level in National Planning Framework 4.
- 4.8 The Planning Authority has no objection in principle to mediation being included as one of several potential techniques within the development plan process to engage stakeholders. However, it should be noted that under the changes introduced under

the Planning (Scotland) Act 2019, local authorities are already required to consult with members of the public on the participation statement. The introduction of mediation into the development plan process should therefore be handled with great care in order to avoid any delays to the process.

- 4.9 The Planning Authority has no objection in principle to mediation being included as a potential means to resolve conflict during the pre-application Consultation (PAC) process in a PAN in respect of major development applications. However, a clear distinction should be made in any guidance that mediation applies only to pre application discussions undertaken as part of a PAN. City of Edinburgh Council operates an optional and chargeable pre-application advice service entirely independent of the PAN process and does not believe that mediation would be appropriate in this context given the informal nature of pre-application advice.

5. Next Steps

- 5.1 Following committee approval, comments will be submitted to the Scottish Government in response to its consultation programme.

6. Financial impact

- 6.1 There is no direct financial impact for the Council arising from this report.
- 6.2 If mediation processes were to be used in the development plan process, the costs would have to be provided as part of the plan's project budget.
- 6.3 Mediation at pre-application stage of development proposals is likely to be between developers and the local community and, as such, the developer would be expected to fund the cost of mediation as part of their engagement budget.

7. Stakeholder/Community Impact

- 7.1 The Scottish Government's consultation is open to all stakeholders.
- 7.2 The national programme for reform of the Planning system has engaged stakeholders at different stages. Details can be found on the Transforming Planning website.

8. Background reading/external references

- 8.1 [Scottish Government consultation paper](#)
- 8.2 [Scottish Government Transforming Planning programme](#)
- 8.3 [Scottish Planning Policy](#)
- 8.4 A [guide](#) to the use of mediation in the planning system in Scotland:

9. Appendices

9.1 Appendix 1 – Proposed response to consultation paper

Appendix 1 - Proposed response to consultation paper

Guidance on the promotion and use of Mediation in the Scottish planning system

Q1. Have we got the range of areas to which the mediation guidance should cover right?

- Yes
- No
- No View

Please comment on your answer (particularly if you do not agree)

Answer – The City of Edinburgh Council (CEC) is generally supportive of the overarching aims which mediation seeks to accomplish. Resolving conflict and clarifying potential misunderstanding of the positions of respective parties in the planning system would enable sustainable development to be delivered in a more efficient and comprehensive manner, while also allowing for continued community involvement.

Having regards to the fact that the introduction of mediation guidance would represent a significant new feature within the planning system, CEC agrees that it would be appropriate to limit any guidance to focus on the two areas mentioned in the consultation in the first instance. This would allow the frequency or effectiveness of mediation as a tool to be monitored prior to any further decisions on either its continuation, or ultimate expansion to additional areas of the planning system.

Notwithstanding the above, any attempt to introduce mediation should be undertaken with great care and should recognise that the planning system very often involves diametrically opposed interests which can often prove very difficult to reconcile. In addition, CEC requests that any guidance includes a clear and concise distinction between 'pre application' and 'proposal of application notice' (PAN). CEC operates an optional and chargeable pre-application service which is separate from the legislative requirements of a PAN. CEC does not believe that introducing mediation into this system would be beneficial or constructive for either CEC or prospective applicants given the informal nature of pre-application advice.

Q2. Do you agree with the suggestion to maintain policy support for the use of mediation in National Planning Framework 4?

- Yes
- No
- No View

Please comment on your answer (particularly if you do not agree)

Answer - CEC agrees that there must be clear support for mediation at national policy level if it is to be utilised effectively.

Q3. Please tell us about your experience of using mediation including any financial / non-financial costs incurred. Please set out also how any costs were shared between the parties.

Answer – CEC does not have any experience of using mediation in the development plan process. CEC has a very limited amount of experience in using mediation for larger applications, but this experience concerns ongoing applications and as such it would not be appropriate to provide comment at this time.

Q4. Do you agree with the proposal that the Scottish Government's guidance on Development Plan Schemes should reference the use of mediation as one of a range of innovative techniques and activities for engaging stakeholders to be considered in the planning authority's participation statement?

- Yes
- No
- No View

Please comment on your answer (particularly if you do not agree)

Answer - CEC has no objection in principle to mediation being referenced as one of several techniques referenced within a Development Plan Schemes (DPS) which can potentially be utilised to engage stakeholders. However, it should be made clear within any DPS that mediation is one of several potential options and should not be the expected primary default means of resolving positions of conflict.

Q5. Do you agree with the proposal that planning authorities should consider the use of mediation when preparing the participation statement element of their Development Plan Schemes?

- Yes
- No
- No View

Please comment on your answer (particularly if you do not agree)

Answer - Under the 2019 Act, planning authorities are required to consult with members of the public on the participation statement. CEC would highlight that introducing mediation into the participation statement element of the DPS to resolve conflict does carry a possibility that overall preparation of the development plan may be delayed as a result. Any use of mediation should therefore be exercised with caution in order to avoid any delays to the development plan process which would be detrimental to the wider public interest in maintaining an up-to-date development plan.

Q6. Do you agree that the Scottish Government should further investigate the potential role of mediation at the gatecheck stage?

- Yes
- No
- No View

Answer - CEC believes that, as the gatecheck process is still at a formative stage, the Government should further investigate the role of mediation at the gatecheck stage. However, as highlighted in the response to Q5, any use of mediation should be exercised with caution to avoid delays to the development plan process.

Q7. Do you agree with the proposal that the Scottish Government guidance should encourage the use of mediation between parties in advance of the development plan examination stage?

- Yes
- No
- No View

Answer - As highlighted in the response to Q5, any use of mediation should be exercised with caution to avoid delays to the development plan process.

Q8. Do you agree with the proposal that the Scottish Government guidance should amend its guidance on Proposal of Application Notices to encourage the use of mediation between parties in any additional consultation activity attached to PAC?

- Yes
- No
- No View

Answer - CEC has no objection in principle to the introduction of a means to resolve conflict in the PAC process for PAN's. At this stage in the process, the use of mediation could assist in removing misunderstanding, particularly between developers and the local community, and therefore reduce objections. Mediation at the pre-application stage of development proposals is likely to be between developers and the local community and, as such, the developer would be expected to fund the cost of mediation as part of their engagement budget. Planning authorities should not be expected to cover the financial cost of providing venues for any mediation sessions to take place, or the cost of mediation staff. Such costs would place an unsustainable financial burden on local authorities at a time when existing budgets are under considerable strain.

Q9. Do you agree with the proposal that the Scottish Government should provide guidance encouraging the use of mediation between parties in Pre-Application Consultation?

- Yes
- No
- No View

Answer - Please see response to questions 1 and 8

Included with this consultation paper are partial versions of the following assessments: • Business and Regulatory Impact Assessment (Annex B) • Equalities Impact Assessment (combining Child Rights and Wellbeing Impact Assessment) (Annex C)

Q10. Please give us any views you have on the content of these partial assessments.

No comment

Q11. Do you have or can you direct us to any information that would assist in finalising these assessments

No comment

We have also included our initial assessments screening out requirements to undertake assessments on Island Communities Impact (Annex D), the Fairer Scotland Duty (Annex E) and Strategic Environmental Assessment (Annex F). Based on the information we 17 have identified, we do not consider there is a requirement to undertake full assessments in these cases

Q12. Please give us your views on the Island Communities Impact, the Fairer Scotland Duty and Strategic Environmental Assessment screening documents and our conclusion that full assessments are not required.

No comment

Q13. If you consider that full assessments are required, please suggest any information sources that could help inform these assessments?

No comment