

Land-use assembly, planning, compensation and ADR: Lessons learned and next steps Remote Evidence Session

Monday, 4th May 2020



CIArb Live Webinar
All-Party Parliamentary Group
(APPG) for ADR evidence session
4 May 2020 | 3:00pm (BST)

ALTERNATIVE
DISPUTE RESOLUTION



Land-use assembly, planning & compensation from the perspectives of the Dispute Resolver and retained Counsel

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NPF/PINS Mediation in Planning Report – published June 2010



Mediation in Planning

Report commissioned by the
National Planning Forum and the
Planning Inspectorate

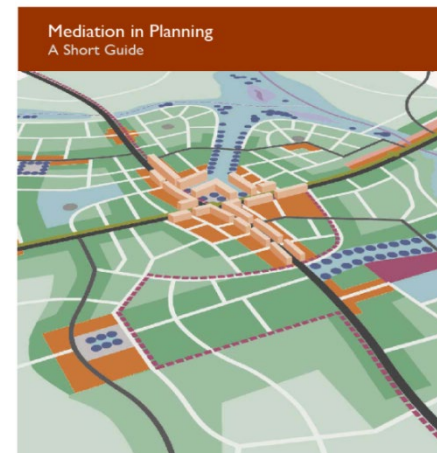
by Leonora Rozee OBE and Kay Powell

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 (Sir) Bob Neill MP, former Minister for Planning: Launched at the RTPI Planning Convention June 2011 and still available on the NPF web-site: www.natplanforum.org.uk



Some overarching principles

What is “mediation” in this context?

- 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 **BUT**
- **There does not have to be a formal “dispute”**

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/her 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

ADR Mechanisms currently being used within “ the Planning System” and adding real value

Based upon my experience of using mediation and facilitation techniques being used to help resolve specific issues both as “the neutral” and as counsel :

- **Land assembly** - As co-mediator in a multi-party series of disputes between landowners (with LPA acting as broker) over major residential development coming forward through emerging Local Plan allocations
- **Design & layout** – Part of Design Council’s Built Environment Expert team
- **S.106s** - Negotiation of obligations esp. financial contributions and terms as DCLG “broker” and, on an interpretative basis, as RICS President's Panel appointed arbitrator and independent expert
- **Enforcement** - Avoiding formal measures (demolition) by voluntary physical changes to building and to ensure practical compliance with Notice requirements as mediator, s.174 appeal counsel and facilitator

More Experience

- **Judicial Review :**
 - **Pre-Action Protocol stages:** limiting sustained objections, agreeing settlement terms (e.g. fresh consultation, design solution) as retained counsel
 - **After Commencement:** Compromise & Settlement both in the roles of parties' appointed independent Mediator (after Court stay) and as Counsel
- **Highways :** Scope of works and footpath diversion routes as retained Counsel
- **Compensation:** Resolution of “preliminary issue(s)” (Revocations of PP and PDR due to Habitats Regs; Minerals compensation) both as parties' appointed mediator and as retained counsel

Some Challenges

- **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)

Other Professional Experiences

Membership Surveys of Compulsory Purchase Association and Planning and Environment Bar Association (Jan/Feb 2020)

- Participants:** 136 of which 39 were also PEBA Members (20% response rate) seeking use and experiences from those acting in one or more of the following capacities:
 - Mediator
 - Independent Expert/Adjudicator/Evaluator
 - Arbitrator
 - Neutral 'chair'
 - Facilitator (i.e. intermediary)
 - Advocate
 - Expert Witness

- 6 questions of which 4 most directly relevant to this session

Membership Surveys of CPA and PEBA

Headline Results

Q1: *Within the last five years, in relation to compensation, land-use, and/or community issues (e.g. party walls, rights to light, boundary disputes) have you acted in the following capacities (more than one can be answered)*

Outputs:

Areas:	(1) CPO etc.	(2) Planning etc.	(3) Neighbour disputes
• Mediator :	(1) 8.09%	(2) 9.56%	(3) 4.41%
• Independent Expert etc :	(1) 11.76%	(2) 8.09%	(3) 2.21%
• Arbitrator:	(1) 2.21%	(2) 3.68%	(3) 0.74%
• Neutral:	(1) ---	(2) 2.94%	(3) 0.74%
• Facilitator:	(1) 5.15%	(2) 5.15%	(3) 2.21%
• Advocate:	(1) 43.38%	(2) 41.18%	(3) 12.50%
• Expert Witness:	(1) 39.71%	(2) 10.29%	(3) 3.68%

Other Professional Experiences

Q2: *Where dispute resolutions were proposed, were they (a) cautiously accepted, (b) readily accepted or (c) rejected?*

Areas: (1) CPO etc. (2) Planning etc. (3) Neighbour disputes

- **Mediator:**

(1)(a)16%; (1)(b)14%; (1)(c)7% (2)(a)7%; (2)(b)6%; (2)(c)3% (3)(a)6%;(b)6%; (c)0%

- **Independent Expert etc :**

(1)(a)12%; (1)(b)11%; (1)(c)7%; (2)(a)2%; (2)(b)7%; (2)(c)1% (3)(a)&(b)0%; (3)(c)1%

- **Arbitrator:**

(1)(a)1%; (1)(b)3%; (1)(c)6%; (2)(a)2%; (2)(b)7%; (2)(c)0% (3)(a)&(b)&(c) 0%

- **Neutral:**

(1)(a)2%; (1)(b)1%; (1)(c)4%; (2)(a)3%; (2)(b)3%; (2)(c)1% (3)(a)2%; (3)(b)& (c)0%

- **Facilitator:**

(1)(a)16%;(1)(b)14%;(1)(c)7%; (2)(a)7%;(2)(b)6%;(2)(c)3%; (3)(a)6%; (3)(b)6%;

- **Advocate:**

(1)(a)9%; (1)(b)15%; (1)(c)4%; (2)(a)15%; (2)(b)7%; (2)(c)6%; (3)(a)7%; (b)7%; (c) 2%

- **Expert Witness:**

(1)(a)8%; (1)(b)20%;(1)(c)9%; (2)(a)1%;(2)(b)4%;(2)(c)2%; (3)(a)1%; (b)1%; (c)1%

Membership Surveys of CPA and PEBA Headline Results

Q3: *Where used, how did the parties perceive the process?*

☐ Outputs:

	(1) Positive	(2) Negative	(3) Opinion varied between parties
• It failed :	(1) 5.26%	(2) 13.16%	(3) 27.63%
• Successful - relieved:	(1) 17.11%	(2) 5.26%	(3) 11.84%
• Successful - satisfied:	(1) 32.89%	(2) 1.32%	(3) 23.68%
• Successful - impressed	(1) 11.84%	(2) 3.59%	(3) 6.58%

Membership Surveys of CPA and PEBA

Headline Results

Q4: *Please rank the drivers required to change behaviours in relation to ADR. You rank by using the arrows on the very left and dragging the item upwards/downwards so you display the list according to your desired ranking*

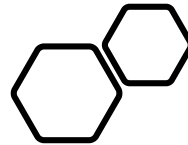
☐ Outputs:

Areas:

	(1)	(2)	(3)	(4)	(5)	(6)	
• Legislation:	(1) 38.39	(2) 8.96	(3) 16.07	(4) 9.82	(5) 8.04	(6) 18.75	%
• Professional							
• Guidance :	(1) 27.68	(2) 31.25	(3) 24.11	(4) 11.61	(5) 2.68	(6) 2.68	%
• Procedural							
• Requirements:	(1) 13.69	(2) 34.82	(3) 24.11	(4) 15.18	(5) 9.82	(6) 2.68	%
• Training:	(1) 7.14	(2) 12.50	(3) 12.50	(4) 35.71	(5) 26.79	(6) 5.36	%
• Employers:	(1) -- --	(2) 5.36	(3) 4.46	(4) 9.82	(5) 31.25	(6) 49.11	%
• Clients:	(1) 13.39	(2) 7.14	(3) 18.75	(4) 21.43	(5) 8.04	(6) 21.43	%

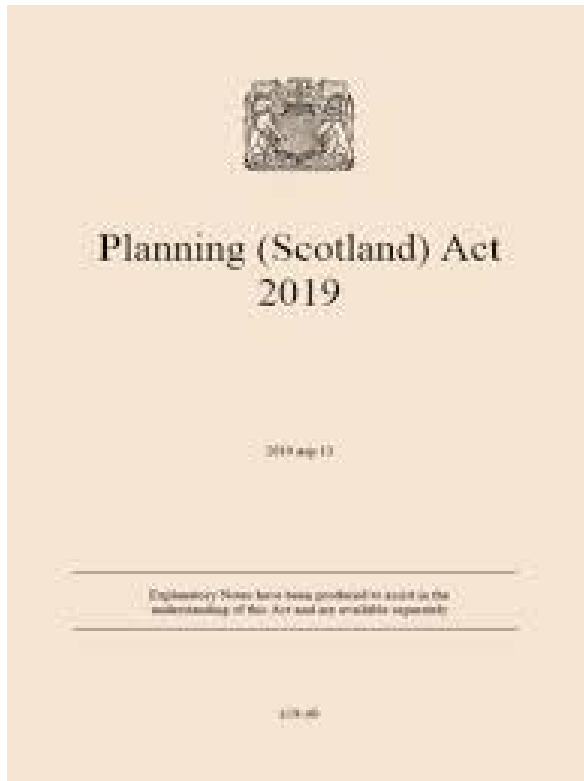
Some Conclusions:

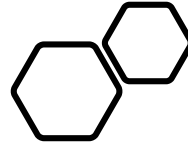
- Mediation now tried and tested in many spheres
- Opportunities to apply it to most parts of current land-use system, and, to related areas
- Growing interest but still relatively little experience throughout UK
- Some good experiences to learn from with more in the pipeline
- Significant potential 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



BRIEFING: Land-use assembly, planning, compensation and ADR: Lessons learned and next steps

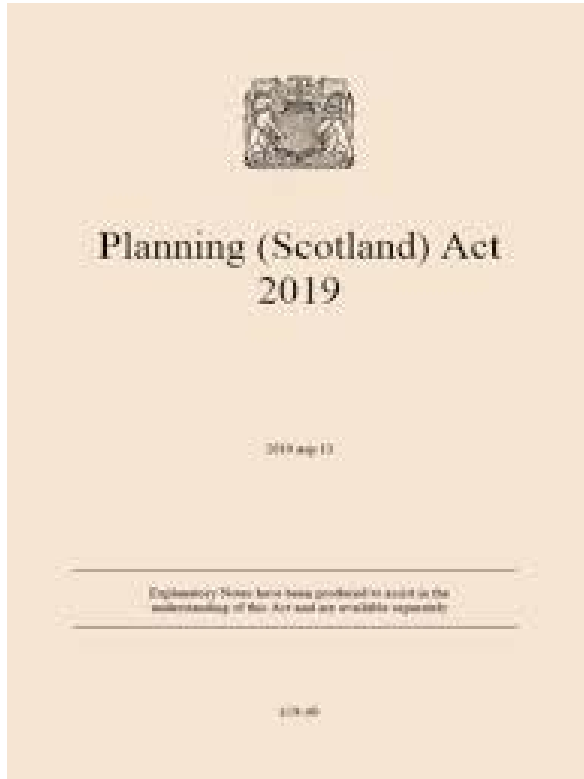
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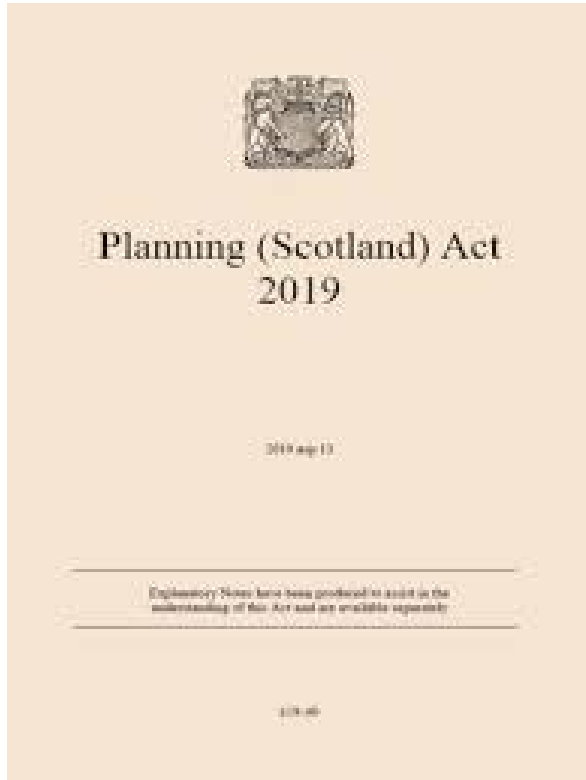
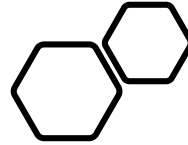




Lessons from the framing and implementation of the Planning (Scotland) Act 2019

Graham Boyack, Director, Scottish Mediation

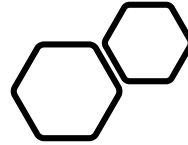




The Bill Consultation

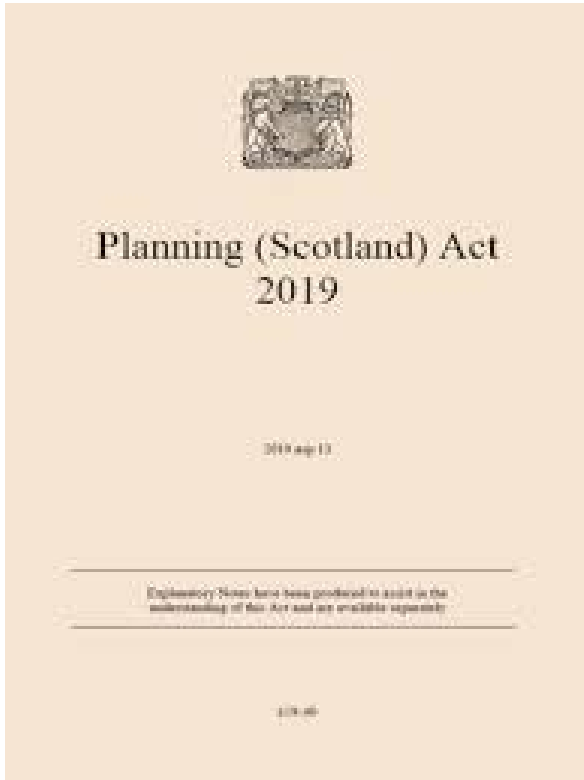
Scottish Alliance for People and Places

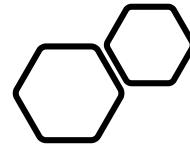
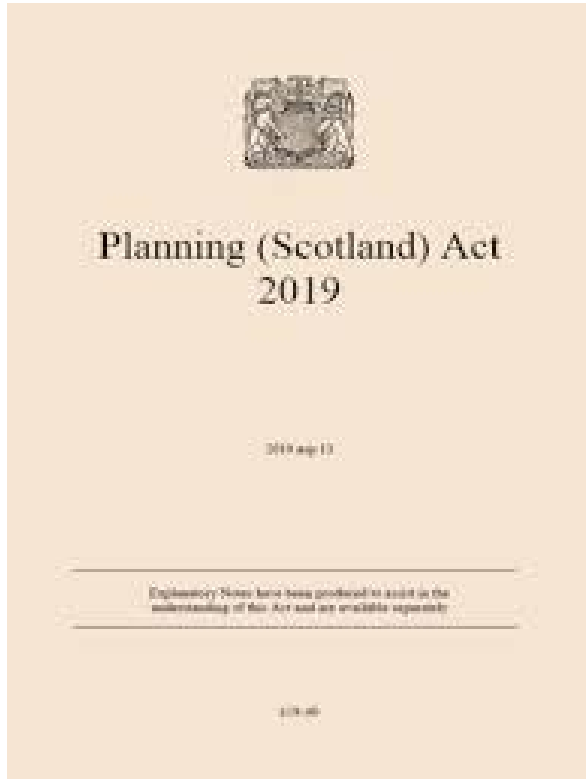
Bill team, the Minister Discussion in Parliament



The Act

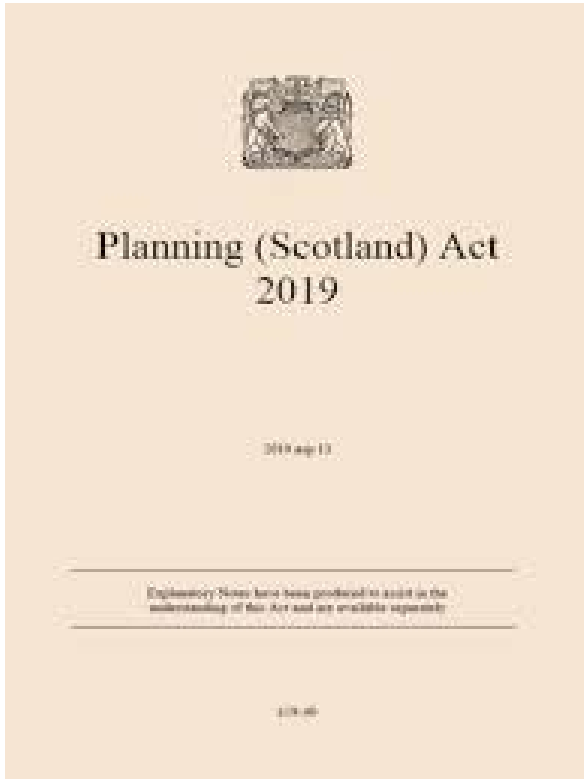
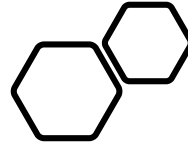
local development plans
pre-application consultation
determination of an application
any other matter considered
appropriate.





Implementation

Regulations and Guidance



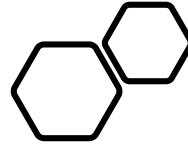
Implementation

Development Plan Guidance

Has mediation been used?

Call for sites, Gate check triggers.

If conflict arises point to mediation?

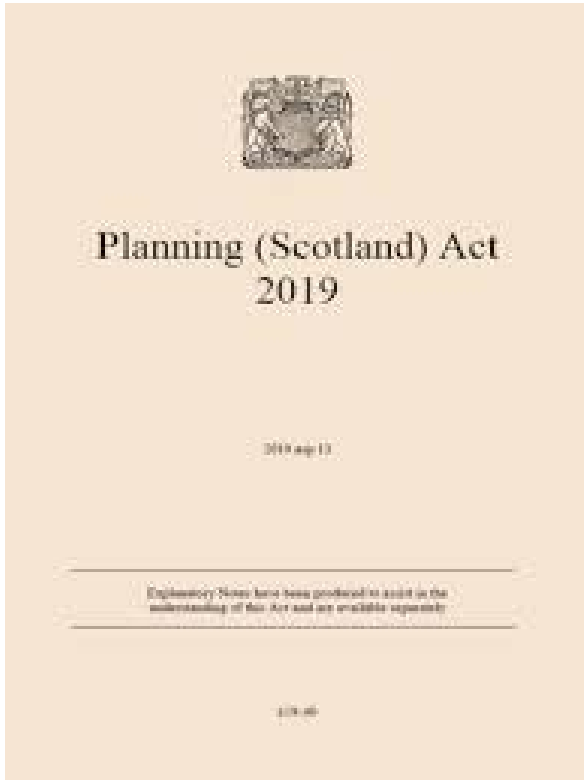


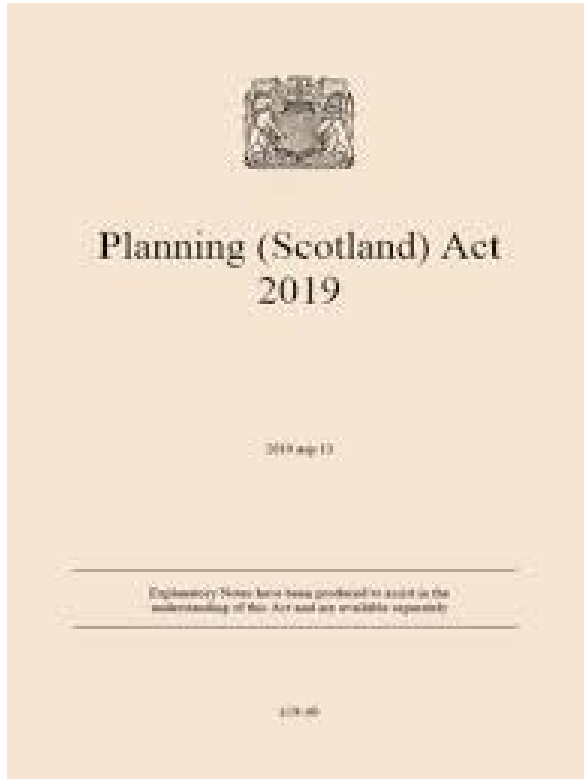
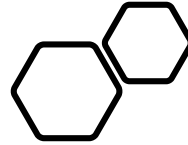
Implementation

Local Plan Preparation

Perfect opportunity to guide communities.

Advice and support on how to access.





Implementation

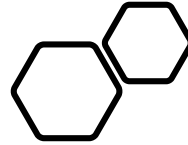
For planning applications

Use in pre-application process.

Mediator at pre-applic events.

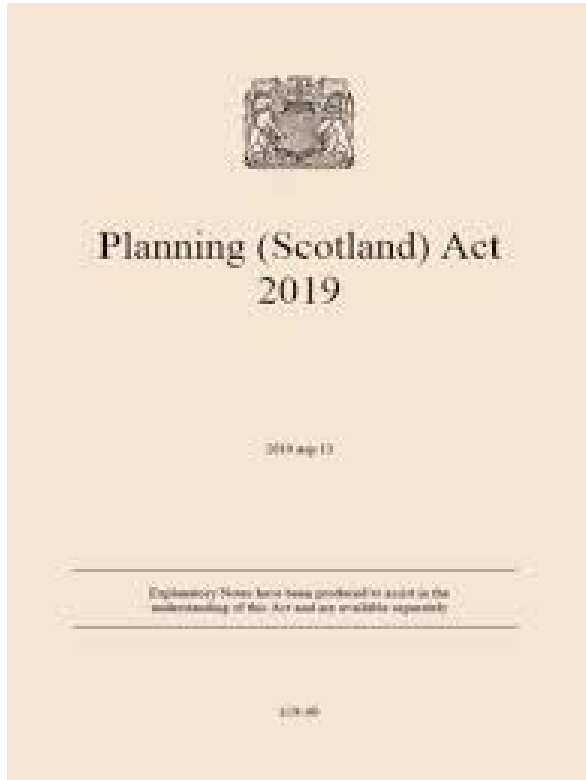
Question in application on use.

Threshold on number of objections that triggers mediation.



Summary

We believe that the use of mediation has the potential to contribute towards more constructive and positive conversations within the Scottish Planning System. It will encourage people to come together and collaborate and to reflect upon the perspectives of other stakeholders and groups. While the focus of mediation is often about finding a solution, in the planning context, the simple act of having a conversation about a potentially contentious situation, and allowing everyone to be heard, could help the situation to move forward even if a formal solution is not needed (depending upon the circumstances) or cannot be reached. This has the potential to lead to more effective decision making and ultimately better places for the people of Scotland.





RESOLVING PLANNING & CPO ISSUES

The psychology of disputes

Lessons learned and next steps

Presented by David Baker FRICS FCILT MCI Arb
Partner Baker Rose Consulting LLP





THE IMBALANCE OF POWER

Response to an imbalance of power

Personal control

Personal consequences





PLANNING

LPA decisions have political consequences

Lower financial consequences for the LPA

Housing need





NEIGHBOURS

Loss of control

Judicial Review only route to appeal

Time and personal impact to people's lives

- 6 years average for consent to build major housing schemes





NEIGHBOURS

Lobbying

Objecting & Judicial Review

Extends decision time and frustrates housing development





COMPULSORY PURCHASE

Response to an imbalance of power

Objections, Petitioning & Judicial Review delays

Real cost consequences





ACQUIRING AUTHORITIES' PERSPECTIVE

Public Interest

Public Money

Public Accountability





AFFECTED PARTIES' PERSPECTIVE

Safeguarding Constraints

- last for years
- e.g. HS2 first route plan Dec 2009

Relocation or Extinguishment - 3 months' notice

- No control over timing or market
- HS2 have just served GVD notices in the lockdown

Recovery of Costs and Losses – up to 6 years

- after possession taken
- Date of Valuation – date of possession





POLITICAL PERSPECTIVE

Public Good

Equivalence

Lands Chamber





THE LANGUAGE OF EQUIVALENCE

The Compensation Code

- statute and case law

Advance Payment

- after giving 3 months' notice
- not sufficient for commercial relocation

Betterment, Equivalence and Value for Money

- no worse off – audit approach - no better off





THE PSYCHOLOGY OF POWER

Control

Authority

Abuse / Misuse





THE PSYCHOLOGY OF FRIGHT

Stress

Irrational Behaviour

Fight







THE PUBLIC SECTOR PRESSURE

Audit

Authority

Accountability





THE PUBLIC SECTOR PRESSURE

Finance & Funding

Costs v Investments

Tax Payers' Money





COMMERCIAL DISPUTE

Contracts agreed voluntarily

Fall out

Dispute resolution within the parties' control





COMPULSORY PURCHASE DISPUTE

Safeguarded

Property Taken

Affected Party deeply out of pocket / in debt.





COMPULSORY PURCHASE DISPUTE

Affected Party can currently only force a reference to the Upper Tribunal Lands Chamber

Risk to Affected Party to bear both sides' costs, no increased risk to Acquiring Authority

Unnecessary dispute costs of no benefit to The Project or the Affected Party





COMPULSORY PURCHASE & PLANNING DISPUTES

Inequality of parties leads to natural disputes

Current drivers lead to real disputes

Cost of disputes in time and money is a waste.





EARLY & ALTERNATIVE DISPUTE RESOLUTION

Allows release of stress and political pressure

Improves understanding of different perspectives

Enables schemes to come forward with fewer challenges

WASTES LESS MONEY



- Increasing use of compulsory purchase powers for schemes large and small.
- CPO and planning system integral to scheme delivery, including:
 - Major infrastructure projects (e.g. HS2, Crossrail & Crossrail 2, Heathrow proposed expansion).
 - Town centre regeneration and repurposing retail driven high streets.
- Traditional adversarial approach through the planning and CPO process, from contested public inquiries through to compensation proceedings in the Upper Tribunal (Lands Chamber) and higher courts.
- Long standing calls from professional and industry bodies to improve the planning and CPO system growing louder, with focus on greater collaboration.

- Complexity of CPO rules and system – landscape ripe for dispute and challenge.
- Polarisation of parties:
 - Lack of early and/or proper engagement between Acquiring Authorities and Claimants can lead to adversarial mindsets.
 - Inequality of arms and imperfect advance payment regime.
- Varying standards in professional advice/practice in CPO and compensation.
- Upper Tribunal (Lands Chamber) – perception of delay, expense and risk.
- Ignorance of and/or reluctance/lack of experience in using ADR.

Overview of main ADR options

	Mediation	Early Neutral Evaluation	Expert Determination	Arbitration
What is it?	Informal procedure where a neutral third party assists parties to work towards a negotiated settlement.	Independent and impartial evaluator appointed to give the parties an assessment of the merits of their case.	Third party determination by specialist appointed expert suitable to case.	Formal process to determinate a dispute by an independent arbitrator.
Confidential?	Yes	Yes	Yes	Yes – but there are exceptions.
Without prejudice/Without prejudice save as to costs	Without Prejudice unless otherwise agreed.	Without prejudice unless otherwise agreed.	Not applicable as decision is binding.	Not applicable as decision is binding.
Binding Decision?	No decision made – parties retain total control whether or not to settle and on what terms.	No decision made – evaluator provides an informed view on likely outcome if matter determined by a court or Tribunal.	Decision is binding with limited grounds to set aside.	Decision is binding and akin to a court order with limited grounds of challenge. Award may in exceptional circumstances be set aside.
Costs	Parties generally bear own costs and split mediator fees 50/50. If no settlement, parties can agree that mediation costs form part of costs of any separate legal proceedings.	Parties generally bear own costs and split evaluator fees 50/50.	Expert will generally be given power to make a costs award, however subject to the terms of the expert's appointment.	Arbitrator usually has ability to make an award on costs.

- Awareness and use of ADR in the planning and CPO sector is generally low but growing, through increased use by major Acquiring Authorities (e.g. Network Rail, Highways England).
- Professional and industry body initiatives:
 - Royal Institute of Chartered Surveyors
 - Mandatory Professional Statement - “Surveyors Advising in Respect of Compulsory Purchase and Statutory Compensation”
 - RICS proposed Alternative Disputes Resolution mechanism for CPO compensation claims
 - Compulsory Purchase Association
 - The Land Compensation Claims Protocol (2018)
 - Alternative Dispute Resolution Guidance (2019)
- Scheme specific policies/procedures – e.g. HS2
- Upper Tribunal (Lands Chamber) - key role in driving behavioural change.

- CPO and other land compensation claims are well suited to being resolved through ADR due to specialist nature.
- ADR necessitates collaboration between the parties.
- Flexibility – the ability to combine elements of different forms of ADR into a tailored process is often attractive (e.g. evaluative mediation).
- Currently no legal or procedural requirement compelling use of ADR, but increasing expectation of professional bodies (e.g. RICS) and the Tribunal that the parties will engage in ADR at an appropriate stage.
- Costs – potential adverse costs consequences from unreasonably refusing ADR.

- ADR is only one component in wider moves to improve attitudes and behaviours of Acquiring Authorities, Claimants and professional advisers.
- Key drivers for change:
 - Education – professional and industry bodies driving sector awareness of ADR.
 - Upper Tribunal (Lands Chamber) – key role in driving behavioural change.
 - Adverse costs.
 - Practice directions.
 - Case management powers – facilitating and directing use of ADR
 - Major scheme policies – adoption of pro-active policies to use ADR.
 - Statutory and/or procedural intervention:
 - Costs sanctions.
 - Mandatory use of ADR in certain cases?