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2021

GUIDANCE ON THE PROMOTION AND USE
OF MEDIATION IN THE SCOTTISH
PLANNING SYSTEM

■ circular

Scottish Planning Series

PLANNING CIRCULAR

**GUIDANCE ON THE PROMOTION AND
USE OF MEDIATION IN THE SCOTTISH
PLANNING SYSTEM**

Circular 2/2021: Guidance on the promotion and use of mediation in the Scottish Planning System

Introduction

1. This guidance on the promotion and use of mediation in the Scottish planning system is issued under powers contained in section 268A of the Town and Country Planning (Scotland) Act 1997, as amended. The powers were introduced by section 40 of the Planning (Scotland) Act 2019¹.

2. Elements of the Scottish development planning and development management system are currently subject to change in light of provisions in the Planning (Scotland) Act 2019. This guidance will therefore be subject to review in due course.

Background

3. Mediation is one of a range of techniques sometimes labelled as ‘alternative dispute resolution (ADR)’ which can include facilitation, conciliation and arbitration as well as mediation. These techniques can be used to help to build bridges between stakeholders and resolve issues of dispute. The Scottish Government has been supportive of the use of mediation, and other ADR techniques, particularly in the area of access to justice.

4. Whilst there is no legislative requirement for the use of mediation in the Scottish planning system, section 268A of the Town and Country Planning (Scotland) Act 1997 (the 1997 Act) provides that the Scottish Ministers may prepare guidance on the promotion and use of mediation in the Scottish planning system.

5. Mediation is a voluntary process, generally between two parties, which can be facilitated by a third, independent party. The guidance is aimed at promoting the use of mediation rather than requiring its use and, as set in the definition of mediation in the amended 1997 Act, as a means of exploring, resolving or reducing disagreement between persons.

6. For the purpose of this guidance, “mediation” is defined in terms of section 268A(7) of the 1997 Act and ‘includes any means of exploring, resolving or reducing disagreement between persons involving an impartial person that the Scottish Ministers consider appropriate’. Where the guidance refers to ‘mediation’ planning authorities are to have regard to such guidance, as set out in subsection 268A(3).

7. Where the term ‘informal mediation’ is used in this guidance, this relates to situations where planners and other relevant stakeholders take a mediation-style /

¹ Planning (Scotland) Act 2019 <https://www.legislation.gov.uk/asp/2019/13/section/40/enacted>

facilitatory approach in their work in appropriate situations but are not aided by an impartial third person.

Development Planning

8. Current advice on development planning is contained in Circular 6/2013: Development Planning². This guidance will supplement that contained in the Circular.

Preparation of the Planning Authority Development Plan Scheme

9. Section 20B of the amended 1997 Act³ requires each planning authority to prepare a Development Plan Scheme (DPS) at least annually. The scheme is to set out the authority's programme for preparing and reviewing their Local Development Plan (LDP) and what is likely to be involved at each stage.

10. In preparing participation statements under section 20B(4)(c), Scottish Ministers already expect such statements to contain a range of innovative techniques and activities for consulting stakeholders.

11. In considering the range of innovative techniques and activities for consulting stakeholders, Scottish Ministers expect planning authorities to consider the opportunity there may be for the use of either informal mediation or mediation with parties including communities / developers, or any other such party as the planning authority considers appropriate. The planning authority should have regard to any requests for the use of mediation when preparing its participation statement.

12. As with other techniques and activities, opportunities for informal mediation and mediation should be tailored to local circumstances and the issues being dealt with in the plan. The planning authority's view on the opportunity and potential scope for the use of mediation should be set out in the planning authority's participation statement. Mediation, for example, may be appropriate in circumstances where a proposal / site in the emerging LDP has attracted community opposition which cannot be readily resolved. The implication of any potential use of mediation should be factored into the proposed timetable to be set out in the Development Plan Scheme in accordance with regulation 24 of the Town and Country Planning (Development Planning) (Scotland) Regulations 2008.

13. Whilst mediation is generally considered to be a confidential process, parties are encouraged to be open and transparent with the results of any mediation.

² Circular 6/2013: Development Planning <https://www.gov.scot/publications/planning-series-circular-6-2013-development-planning/>

³ Town and Country Planning (Scotland) Act 1997
<https://www.legislation.gov.uk/ukpga/1997/8/section/20B>

Preparing a Plan

14. Planning authorities should look to resolve differences and build support for proposals through discussion and negotiation, and where possible, prior to the publication of the proposed plan. Early engagement with stakeholders in the preparation of the plan, for example through Place Standard exercises or plans prepared by the community, may highlight locally contentious issues or sites that could be prioritised for informal mediation or mediation activities.

Examination

15. The scope of Development Plan Examinations is set out in secondary legislation. For LDPs this is 'only to assess issues raised in unresolved representations'. Examinations are intended as the principal means of independently examining any unresolved issues from representations on proposed local development plans, rather than be a wider test of soundness of the plan.

16. Prior to an examination of the unresolved issues, there must be an examination of whether the authority has consulted on the Proposed Plan and involved the public in the way they said they would in their current participation statement. This is restricted to the actions of the authority concerning consultation and public engagement in respect of the Proposed Plan, rather than the extended plan preparation process.

17. Any potential use of mediation should have been set out in the planning authority's participation statement. It is recognised that mediation is a voluntary process and although set out, may not take place should other parties not wish to take up the opportunity. Planning authorities should make clear the reasons if this is the case in their Statement of Conformity. When assessing planning authority conformity with the participation statement, the reporter should take into account the voluntary nature of mediation when considering whether there are any shortcomings.

Development Management

18. The Scottish Government wants to encourage improved trust and open, positive working relationships from the earliest stages in the planning process and to provide, where possible, an early opportunity for community views to be reflected in proposals.

19. Current advice on Pre-Application Consultation and Proposal of Application Notices is contained in Circular 3/2013: Development Management Procedures⁴. This guidance supplements that contained in the Circular.

⁴ Circular 3/2013: Development Management Procedures <https://www.gov.scot/publications/planning-series-circular-3-2013-development-management-procedures/> (section 2 Pre-Application phase)

Proposal of Application Notices

20. The prospective applicant should indicate in the Proposal of Application Notice (PAN) what consultation, if any, they will undertake in addition to the statutory minimum.

21. When preparing its Proposal of Application Notice for any development requiring Pre-Application Consultation (PAC), the prospective applicant may want to consider approaching communities to help frame their PAC engagement. As a part of that dialogue, prospective applicants and communities are encouraged to consider in the circumstances of the development proposal and any planning history of the site, informal mediation or mediation may be an appropriate method of encouraging dialogue between the parties.

22. In instances where the prospective applicant has not approached communities to help frame the PAC, prospective applicants are still encouraged to consider in the circumstances of the development proposal and any planning history of the site, whether informal mediation or mediation may be an appropriate method of encouraging dialogue with communities.

23. Where the opportunity for mediation is to form part of the prospective applicant's engagement strategy, this intention should be recorded in the PAN as part of the account of what consultation it proposes to undertake, when such consultation is to take place, with whom and what form it will take.

24. On submission of a Proposal of Application Notice, the planning authority must respond within 21 days of receipt of the notice specifying any additional notification and consultation they wish to see undertaken (including that indicated by the prospective applicant) beyond the statutory minimum, in order to make it binding on the prospective applicant.

25. On reviewing the PAN, planning authorities should consider whether suggesting mediation might be helpful should any points of dispute arise between the prospective applicant and communities.

26. In requiring any additional pre-application consultation, planning authorities must have regard to the nature, extent and location of the proposed development and to its likely effects, both at that location and in its vicinity. Additional consultation requirements should be proportionate, specific and reasonable in the circumstances.

Pre-Application Consultation

27. The applicant must prepare a report of what has been done during the pre-application phase to comply with the statutory requirements for PAC and any requirements set out in the planning authority's response to the proposal of application notice.

28. The legislation does not currently specify the content of the report beyond that it should set out what was done to effect compliance with the aforementioned

requirements. Current guidance suggests that as a minimum, applicants should set out how they have responded to the comments made, including whether and the extent to which the proposals have changed as a result of PAC.

29. Legislation also requires that planning authorities decline to determine an application (i.e. refuse to deal with it) where PAC requirements apply and, in their opinion, have not been complied with. In reaching a view on compliance, the planning authority considers the requirements specified in the legislation and any additional consultation measures which they themselves required in their response to the applicant's Proposal of Application Notice. Mediation is not in itself a statutory requirement, and planning authorities should not require it in their response to a PAN (see paragraph 25) as prospective applicants may not be able to comply if other parties are unwilling to engage in mediation.

30. Whilst mediation is generally considered to be a confidential process, parties are encouraged to be open and transparent with the results of any mediation. This should allow for any output from the mediation to be included in the PAC report.



PLANNING SERIES:

Scottish Planning Policy (SPP) is the statement of Scottish Government policy on nationally important land use planning matters.

National Planning Framework (NPF) is the Scottish Government's strategy for Scotland's long term spatial development.

Circulars contain Scottish Government policy on the implementation of legislation or procedures.

Statements of Scottish Government policy in the SPP, NPF and Circulars may be material considerations to be taken into account in development plans and development management decisions.

Planning Advice Notes provide advice and information on technical planning matters.

Further information in the Scottish Government's role in the planning system is available on the [Scottish Government website](#)

Information on the current programme of planning reform and implementation of the Planning (Scotland) Act 2019 is available on our [Transforming Planning website](#)



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