

Planning enforcement during lockdown – is remote mediation the solution?

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Amongst the many areas of normal life to have been suffocated by the Coronavirus is the planning appeals process, where things have more or less ground to a halt. At the time of writing PINS is talking about rolling out digital hearings, but there is a huge backlog, and the new arrangements will start slowly. Furthermore, it seems likely that enforcement appeals will start near the back of the queue. The likely reality, therefore, is ongoing planning harm and uncertainty for some time. Could mediation, conducted remotely, provide the answer in at least some of those cases?

Mediation is, in essence, a without prejudice negotiation facilitated by a neutral conflict resolution expert. The aim is to strike a deal to resolve the dispute, or substantially narrow its scope. Its flexibility allows both the process and the outcome to be tailored to suit the parties, and by litigation standards, it tends to be cheap and quick. Statistically, it is very successful – producing a deal in well over 80% of cases. Usually it takes place over the course of a day in meeting rooms, but at the moment is being performed remotely, most commonly via Zoom, with, anecdotally at least, positive feedback and high success rates.

Having for years played a central role in commercial dispute resolution, mediation is at last becoming popular in disputes involving local government. There may be good reasons for this generally, but what about in planning enforcement? Here are some possible advantages:

First, enforcement cases are often factually and legally complex. It can be difficult for the LPA to establish what has happened when and where. Landowners – typically small-scale operators – often misunderstand the law. The result is all too often a ‘catch all’ enforcement notice and a ‘catch all’ appeal, setting up a complex and expensive hearing or inquiry. Mediation can deliver clarity and understanding, resolving or at least substantially narrowing the scope of the dispute.

Second, unlike an appeal, which often becomes an ill-tempered contest pitting stakeholders against one another, mediation is capable of working through difficult emotions, reversing entrenchment and repairing relationships. In the planning context, where neighbours and the LPA can rarely escape their long-term links to one another, this can be particularly valuable.

Third, by contrast to the narrow powers of an inspector on appeal, mediation can provide creative solutions that reflect the parties’ real concerns and objectives. These could include, for example, undertakings in relation to works or activities, on or off the land in question, or an indication that a planning application for works explored in negotiation would be supported by officers.

Finally, mediation’s speed and limited cost can help to save public and private resources, and resolve planning harm and uncertainty, efficiently.

There are, of course, challenges. Most obvious, perhaps, is the public interest dimension, with its requirement for more complex decision-making processes. This requires sensitive handling, pragmatism and, probably, a mediator who understands the planning system.

Take a typical example – a muddle of light industrial and storage activities, and some hastily erected buildings, on a yard in a residential area. Having failed to establish precisely the current and historical situation, and in some frustration, the LPA issues a catch all enforcement notice, which tiggers a scattergun appeal on multiple grounds by the frustrated landowner. The timetable for this complex appeal is thrown into disarray by the virus. At mediation the LPA is able to establish the facts, whilst the landowner comes to understand the law and the LPA's position. There is cross-party acceptance that some development is unlawful and unacceptable, some is unlawful but immune, and some is unlawful but probably acceptable. The outcome? The landowner undertakes to cease certain activities, remove certain buildings and apply for permission for the rest; the LPA agrees to withdraw the notice and indicates that officer support for the application is likely; neighbours go away happy; an expensive but distant post-lockdown appeal is avoided. If this all sounds too good to be true, well, it might well be, but perhaps it gives a sense of the way in which mediation has the potential to contribute to enforcement cases, whether or not a notice has been issued, during the lockdown and perhaps even beyond.

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