

## **RICS Commercial Property Journal**

### **Potential for mediation in managing mixed use property development**

#### ***Policy background***

Mixed-use development has been promoted by Government in the UK since the 1990's as a mechanism for revitalising town centres. Mixed-use schemes are perceived as enhancing the attractiveness of the city, promote sustainable modes of transport and widen the ambit of housing choice. However, by nature such schemes involve many different stakeholders with as many differing interests, and delay if not dispute are a feature of their development. For this reason, mediation is a powerful tool for enabling progress of mixed-use developments and for resolving the disputes they generate, outside of the traditional administrative or judicial tribunals.

#### ***What is mediation?***

Mediation is a voluntary, flexible negotiation, facilitated by an independent neutral (the mediator). Its beauty lies in its infinite scope for creativity: solutions are generated by the stakeholders in the dispute, not an arbitral third party limited by legal rights and wrongs.

In multi-party disputes, such as those arising in mixed-use property development, the mediator will combine round table sessions during which all stakeholders can put their argument to others and brainstorm or negotiate compromises. It also involves private, confidential sessions between the mediator and one party or a combination of stakeholders. The mediator is then in the unique position of having a broader picture of the issues than the parties can ever have, thanks to the cloak of confidentiality of the private sessions.

There are other key ingredients of mediation which explain its high success rate in resolving disputes (over 80%), such as privilege, freedom for the parties to vent their emotions and the mediator's skills in generating constructive negotiation. However, it is the careful weaving of all stakeholders' needs and interests which make this process so uniquely suited to resolving complex property development disputes.

#### ***When is mediation appropriate?***

Traditionally, property development disputes are resolved by arbitration, built into construction contracts, by statutory appeal in the planning process or by litigation. These are all costly, expensive and – more importantly – result in decisions imposed on the parties, within the narrow framework of the adjudicator's remit.

Mediation will not be appropriate in all cases. For mediation to be effective, the parties need to know enough about theirs and other parties' case to enable them to gauge the benefits of potential settlement. It would not be appropriate to mediate where there are legislative or political constraints (such as a planning appeal) or where there is need to set precedent (such as within a broader, national development scheme).

Where it is appropriate, however, it can be a powerful force for change. Imagine, for instance, bringing together the developers, investors, neighbours and local authority in deadlock over the plans for an urban mixed use development, against a backdrop of environmental activism and political interests. Trying to resolve the myriad interlocking disputes through arbitral processes will be far less effective (and far more resource intensive) than bringing all the parties to a mediation.

### ***What are the other benefits of mediation?***

Reaching settlement is not the only benefit of mediation. Indeed settling complex property development disputes may not be achievable in a day of mediation. Often, in such scenarios, a mediator (or co-mediators) will work with the parties over a period of time, to conciliate differences of interest generated by the project. In the USA, mediation is embedded by law in the property development process. The success of this approach is slowly but surely encouraging the use of mediation in the otherwise litigious construction industry in the UK. The ODPM's "Mediation in the Planning System" study examined 48 pilot study cases involving mediation: of these, 47 local planning authorities were satisfied with the process and a settlement was achieved in 31 cases<sup>1</sup>.

Another key benefit of mediation in mixed-use property development is the opening up of communication channels between stakeholders whose interests, on the face of it, will be opposed. Consider parking issues arising between residents of a mixed use scheme, who will want safe but quiet parking facilities, and the commercial lessees of the property, for whom large, well lit facilities will be essential. Communication and negotiation will be key, and will generate improved community relationships in the long term.

### ***Who will mediate?***

Mediators like to believe their communication and facilitation skills are all that are needed to mediate any dispute. In the case of mixed use development schemes, however, the parties' interests are likely to be best served if the mediator has specialist expertise in this sector. Surveyors who have been trained as mediators are ideally suited for this purpose and would be well positioned to benefit from the likely increase in disputes the current economic conditions will generate.

RICS offers an intensive training and accreditation programme for its members, run by its Dispute Resolution Services<sup>2</sup>. Access to the course is open to all members and is accredited by the Civil Mediation Council.

### **Further reading:**

<http://www.communities.gov.uk/archived/publications/planningandbuilding/mixedusedevelopment>

Mediation of Construction Disputes, David Richbell (Blackwell publishing)  
When Talk Works, Deborah M. Kolb (Jossey-Bass publishers) – Cf. L  
Susskind: Activist Mediation and Public Disputes

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<sup>1</sup> Source: Barker Review of Landuse Planning.

<sup>2</sup> Provide contact details for DRS training?