



PITTWATER COUNCIL

Policy – No 138	Adopted:	OM:13.08.2001
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	Revoked:	

TITLE:	MEDIATION
STRATEGY:	Business Management
BUSINESS UNIT:	Administration and Governance
RELEVANT LEGISLATION:	None
RELATED POLICIES:	None

Objective

To establish processes that will assist to:

- Reduce the level of community conflict related to development, environmental and land management
- Empower the parties in dispute to take control of their own dispute and attempt to reach a resolution which satisfies the needs and interests of all those involved
- Permit the parties the opportunities of informing the council of any agreements they have reached and or clarification of issues still in dispute, in order for Council to take these into account in determining the development application or resolving other matters that are in dispute
- To pursue consistency and fairness in the manner in which the Council deals with and resolves disputes

Policy Statement

This policy applies to the following:

- Disputes arising from differences of opinion between neighbours or other persons external to Council who are in conflict but seeking to resolve their differences, e.g. development applications and related planning, development and land management matters; and
- Any other environmental dispute concerning animals, trees, noise, effluent, odours or other pollution that Council considers appropriate to be dealt with by mediation.

WHAT IS MEDIATION?

Mediation is a voluntary process of assisted negotiation between disputing parties conducted by an impartial person or persons.

Mediation aims to provide a fair, consensus-building dispute resolution process in which the disputing parties are empowered to:

- Clarify their needs and interests,
- Acknowledge the needs and interests of other parties,
- Become aware of the range of potential solutions, and

Negotiation in good faith to achieve an agreement which; satisfies their mutual interests, is fair and is capable of implementation within the existing statutory processes and is consistent with Council policies.

TO WHICH MATTERS DOES THIS POLICY APPLY?

This policy applies to the following:

- Disputes arising from differences of opinion between neighbours or other persons external to Council who are in conflict but seeking to resolve their differences, e.g. development applications and related planning, development and land management matters; and
- Any other environmental dispute concerning animals, trees, noise, effluent, odours or other pollution that Council considers appropriate to be dealt with by mediation.

WHAT MATTERS ARE CONSIDERED IN DETERMINING WHETHER MEDIATION WILL BE APPLIED?

In general terms, the Council will recommend mediation when:

- It appears that mediation is the best method for dealing with the issues involved;
- The parties are willing to participate in mediation;
- There are a large number of participants, they are willing and able to appoint representatives to attend mediation (this ideally is a maximum of two people).

WHEN WILL MEDIATION NOT TO BE USED?

Mediation will not be recommended when, in the opinion of the Council:

- There is intractable animosity between parties (including, but not limited to threats of violence, or acts of violence, between parties).
- There are too many parties for mediation to work and each group is unable or unwilling to nominate a representative.
- One or more of the parties is not willing to participate and negotiate in a genuine effort to reach a negotiated solution.
- (In relation to a development application) the application is grossly inconsistent with Council's policies or other legal requirements, and is likely to be refused by Council.
- Another dispute resolution procedure may be more appropriate.
- The dispute does not involve Council's business or responsibilities.
- The nature of objections is not a reasonable basis for which to conduct mediation.

PRINCIPLES OF MEDIATION

The following are to be the principles upon which the mediation programme in Pittwater is to be based:

- Mediation is conducted by a recognised and independent mediator that is impartial to the dispute at hand;
- Mediation is a voluntary process;
- Mediation is most effective when applied as soon as possible after a dispute and stakeholders are identified;
- Where the mediation is attended by a representative of a group of people, a process must exist whereby any in principle agreement can be referred back to the group for endorsement in a timely fashion;
- Any agreement reached is a decision made by the parties themselves, and is one which satisfies their needs and interests. If the subject of the mediation relates to a statutory process such as an application for development, Council will take into consideration such agreement but will still need to assess that application under any legislative requirements and Council's policies such as the Local Environmental Plan;
- Mediation is confidential and only the agreement reached can be publicly discussed. This applies even if no agreement is reached. Parties may pursue a private agreement not involving Council related issues. Parties may choose to maintain confidentiality over such an agreement;
- Mediation does not prejudice any future action a party may wish to take;
- Council officers shall not be present at mediation sessions except to provide technical advice and only with the disputing parties' agreement;
- Mediation will not always be the most appropriate method of dispute resolution available;
- Participants in mediation are of greatest value to those parties most affected by the proposal. This is usually those closest to the site or area of which a proposal or action is pending.

THE PROCESS (DEVELOPMENT APPLICATIONS)

The Council has adopted a five stage structured process for processing development applications which provide opportunities for issues to be discussed and resolved.

They are as follows:-

1. Pre-Lodgement Period
2. Notification / Assessment Period
3. Point of Determination – Development Unit
4. Point of Determination – Council/Committee Meeting
5. Post Determination Period – Prior to Legal Proceedings

In the course of assessing development applications at any of these stages in the process where issues become conflicts, then the parties in conflict may apply to Council for mediation as an additional means or tool for resolving the conflict.

The mediation programme will operate according to the following process for applications for development.

1. Pre-lodgement

Parties proposing development are encouraged to consult with the local community about their intentions prior to lodgement of an application to Council. Council may provide a venue for such discussions upon request.

2. Lodgement of development application

Upon receipt of a development application, Council will notify nearby residents in accordance with its Notification Procedures. In this notification, advice will be included describing Council's mediation programme. The advice will encourage potential objectors to discuss the DA with the relevant Development Officer prior to applying to participate in the mediation programme.

3. Assessment of Applications

Upon receipt of an application to mediate, the mediation co-ordinator, in consultation with the case officer, will determine whether mediation is likely to be the preferred method of approaching the dispute having regard to this policy. The matter will only proceed to mediation if the applicant is willing to participate in the process.

4 Preparation Meeting

A preparation meeting may be held prior to mediation involving the mediation co-ordinator, the application case officer and objectors and the applicant. The purpose of the preparation meeting is to provide each party with sufficient information to enable them to effectively participate in mediation. Issues may be resolved here by the submission of additional information or amendments without the need to take the matter further. The preparation meeting will provide each party the opportunity to ask questions about technical details and clarify issues.

A Development Officer will be present at the pre mediation meeting. His or her role will be limited to explanation of the proposal at hand and controls that may apply and description of the development control process generally. He or she will not speculate about the likelihood of approval or refusal nor comment on development controls that require discretionary judgements to be made.

Where matters in dispute appear to be straightforward or there are timing constraints, the mediation co-ordinator may determine that a preparation meeting is not necessary.

5. Scheduling of Mediation

Following the preparation meeting, mediation will be organised by the mediation co-ordinator. In order to reduce delays in addressing the dispute or in the determination of applications, these sessions will be organised at short notice by phone, fax or e-mail.

6. Mediation

Mediation will be conducted with all parties as identified in the preparation meeting and with all necessary information for the mediation to be an informed session. The application case officer should be available either by phone or in person to advise the mediation session upon request to provide clarification of Council's policies and guidelines, but not to offer opinion or speculate.

7. Reporting and Determination

The Officer's report to Council and/or the Officer's report to the Development Unit dealing with the application will be accompanied by a report of the mediation conducted. The report on the mediation will only include factual details such as date of mediation, attendance etc, and mediation agreement, if agreed to by participants. The discussions that occur in the mediation are confidential and will not be reported.

The path of determination (i.e. under delegated authority or Council) will not be altered if mediation is undertaken.

8. Amended plans

If an agreement results from mediation which requires amended plans to be submitted, the applicant may wish to lodge these prior to determination of the application by Council. Those participating in the mediation should have the opportunity of viewing such amended plans prior to the application being determined by Council.

9. Payment of Costs – External Mediator(s)

The applicant for development approval is responsible for the payment of all costs associated with the engagement of an external mediator(s) where applicable.

THE PROCESS (OTHER MATTERS)

The mediation programme will operate according to the following process for matters other than development applications to which this policy applies.

1. Identification of a Dispute

Upon identification of a dispute, a Council officer may recommend mediation as a form of resolving that dispute to any or all of the parties in dispute. Application to mediate in accordance with Council's mediation programme should be made to the mediation co-ordinator as soon as possible after the identification of the dispute. Alternatively, a party in dispute may initiate mediation by way of application directly to Council.

2. Assessment of Applications

Upon receipt of an application to mediate, the mediation co-ordinator, in consultation with the case officer or manager of the business unit (if relevant), will determine whether mediation is likely to be the preferred method of approaching the dispute having regard to "what matters are considered in determining whether mediation will be applied" of this policy.

3. Preparation Meeting

A preparation meeting may be held prior to mediation involving the mediation co-ordinator, the application case officer (if relevant) and parties involved. The role of the preparation meeting for "other matters" is similar to that involving development applications. The mediation co-ordinator may wish to proceed straight to mediation if the dispute appears to be straightforward and both parties appear to have a good understanding of the relevant issues.

4. Scheduling of Mediation

Following the preparation meeting, mediation will be organised by the mediation co-ordinator. In order to reduce delays in addressing the dispute or in the determination of applications, these sessions will be organised at short notice by phone, fax or e-mail.

5. Mediation

Mediation will be conducted with all parties as identified in the preparation meeting and with all necessary information for the mediation to be an informed session. The application case officer should be available either by phone or in person to advise the mediation session upon request to provide clarification of Council's policies and guidelines, but not to offer opinion or speculate.

6. Payment of Costs – External Mediator(s)

The parties in dispute are responsible for the payment of all costs associated with the engagement of external mediator(s) where applicable.

Mediators

Council will recommend a recognised mediation provider to provide the independent and impartial mediation service described in this policy. Mediators are to be accredited and trained professionals in the field.

Monitoring and Review

The effectiveness and cost of the application of this policy, shall be monitored by the Manager Administration and Governance and amendments to this policy recommended accordingly as necessary.

MEDIATION PRACTICE GUIDELINES

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Mediation in Pittwater should be conducted in accordance with the following guidelines:

INITIATION OF MEDIATION

Any party to a dispute described in this policy, may apply to participate in the mediation programme. If mediation is the selected dispute resolution process, the Councils mediation co-ordinator will contact each of the parties to the dispute to seek an agreement to mediate. An agreement to mediate must be signed by each party in which each party acknowledges and agrees to abide by these "Mediation Practice Guidelines"

SELECTION OF MEDIATOR

Upon agreement of parties to mediate, Council will request the recommended external mediation provider to organise mediation. The selected mediator must disclose to Council whether he or she has any interest in the matter to be mediated or if there are any circumstances that may lead to the presumption of bias. All parties are to agree to the selection of the mediator.

PREPARATION MEETING

The preparation meeting is to be conducted as soon as possible after all relevant parties have agreed to mediate the dispute.

The Councils mediation co-ordinator is to chair this meeting. The meeting is to be kept as informal as possible but it should be made clear that the purpose of the meeting is not to determine the application but to gather information and ensure there is common understanding about the dispute. The chairperson is to ensure that attendees do not engage in unconstructive argument nor should the Council officer:

- Be asked to speculate about the prospects of approval or refusal
- Be asked to make discretionary judgements about any aspect of this issue at hand.

PRELIMINARY ASSESSMENT

Where the mediation involves a development application, the relevant Council officer will prepare a brief preliminary assessment of the application. This assessment will only provide for a comparison of the application against the various Council policies. It is important that people entering the process understand that this represents a preliminary appraisal and no discretionary judgements or opinions will be expressed. Depending upon the stage of the development application process at which time this assessment will be made, such assessment should be treated as indicative and advisory only and not to be substituted for the assessment process required under the Environmental Planning and Assessment Act. A standard disclaimer which recognises this should be incorporated into every such advisory assessment. Parties should be made aware of this at the commencement of the preparation meeting.

The full assessment of the application will continue in parallel with the mediation process.

ARRANGEMENT OF MEDIATION

The Council's mediation co-ordinator is to arrange the mediation at a time and venue agreeable to all parties. The mediation is to occur as soon as possible after receipt of the application to mediate. Prior to mediation, all parties are to sign an "agreement to mediate" setting out the terms under which the mediation will be conducted.

STATEMENT OF FACTS

Applicants under the mediation programme must provide on the application form, a brief statement of facts outlining the important issues and objections. This statement will be provided to the proponent for a response.

The statement of facts, response from the proponent and a briefing statement prepared by the relevant assessment officer setting out the details of the application and relevant issues will be provided to the mediator prior to mediation. The documents may be made available to all parties at the discretion of the mediation co-ordinator.

ROLE OF MEDIATOR

The mediator does not have the authority to impose any settlement on the disputing parties. The mediator's role is to help the parties reach a satisfactory understanding and resolution of their dispute.

The mediator is authorised to end the mediation whenever, in his or her opinion, further efforts at mediation will not contribute to a resolution of the dispute.

REPRESENTATION AND ATTENDANCE

If a party to a dispute is an individual, that individual must attend the mediation. If the party is a company, government authority or unincorporated association, an authorised representative must attend the mediation. If there are a large number of individuals constituting a number of parties, each party must send at least one representative. Representatives must have the authority to settle the matter.

Each party attending mediation may bring a legal representative or other advisors with knowledge or experience relevant to the dispute. Where the dispute involves a group of individuals with common interests, Council may request the group to elect one or two persons to represent the group. Others may attend strictly as observers (only with the consent of the participating parties), but may not participate in the formal proceedings except with the consent of the mediator and other parties.

At least three days prior to the mediation, the parties must inform Council of the names of each person who will be attending. Council will in turn inform other parties and the mediator prior to the mediation taking place.

TECHNICAL ADVICE

Council officers should not be present in mediation except to provide technical or procedural advice and only with the consent of participating parties. Council staff shall respond only to questions from the mediator. Upon completion of providing such advice, staff should vacate the mediation room. Responses will not be provided in relation to Council's likely determination of the application.

CONFIDENTIALITY

Mediations must be conducted in a confidential manner. It is not necessary that information disclosed during a mediation be confidential amongst those attending the mediation.

A mediator must not divulge records, reports or other documents received in the course of mediation, or testify as to the proceedings of the mediation, unless otherwise compelled to do so by law. A mediator must also maintain as confidential; any discussion with parties in "separate sessions" unless expressly authorised by that party to divulge details of such session.

Where parties are accompanied by an advisor, support person or other persons, these persons are to sign a third party confidentiality agreement.

Parties involved in mediation shall not rely upon, or introduce as evidence, in any arbitration (including a Development Unit or Council meeting) or litigation:

- Views expressed or suggestions made by another party with respect to a possible settlement of the dispute.
- Admissions made by another party in the course of mediation
- Proposals made or views expressed by the mediator.
- The fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the mediator.
- Statements or notes made by the mediator
- Documents presented at the mediation conference, unless these documents are otherwise discoverable
- Briefing notes and other documents distributed to the parties immediately prior to a mediation conference.

In addition, no transcript of proceedings shall be kept of a mediation conference. The mediator will destroy any notes made by him or herself at the termination of the mediation.

MEDIATION AGREEMENTS

Written agreements reached at mediation must be signed by all the disputing parties present at the mediation. Spokespersons are to confirm their authority to reach agreement from their constituents. Where there is no consensus among the parties in relation to an agreement, a partial agreement may be considered at the discretion of the parties concerned.

A copy of the agreement is to be retained by each of the parties and the Council's mediation provider. Where authorised by the terms of the agreement, the mediation provider is to convey the agreement or relevant clauses, to the mediation co-ordinator. The agreement may then be referred to the appropriate Council Officer for the appropriate action.

Participants in a mediation are to be made aware that in the circumstances of a development application being the subject of the mediation, the normal assessment process will still be followed regardless of any agreement or partial agreement reached. In other words, the mediation is an avenue that people involved in a dispute may pursue to maximise involvement and communication, however, any agreement reached does not bind Council to a certain course of action. It does however provide an additional consideration for Council in making a final decision.

TERMINATION OF MEDIATION

Mediation should be terminated if:

- The parties execute a settlement or agreement; or
- The mediator makes a written declaration to the effect that further efforts at mediation are unlikely to lead to a resolution of the dispute; or
- One or all of the parties makes a written or oral declaration to the proceedings that they should be terminated.