



Blue Mountains City Council Facilitation and Mediation Policy for Land Use Applications

Negotiation and consensus building have long been used to resolve conflict. Governments, businesses, interest groups and individuals negotiate and use co-operative approaches to decision making every day, whether formal or informal, by choice or out of necessity. These activities are not new.

What is relatively new is the application of these processes, assisted by an impartial facilitator, to a wide range of multi-party, multi-issue development and construction disputes and issues.

Consensus based approaches can broaden the understanding among participants, which in turn can enable them to work out differences and arrive at better solutions. These consensus-based approaches are increasingly being viewed as a cornerstone in improving community relations and fostering better solutions.

This policy relates primarily to the land use application process and to the facilitation, mediation and decision making roles within Council. It also establishes the ground rules and administrative procedures necessary to ensure a successful process. In implementing the policy Blue Mountains City Council seeks to promote:

- + *Community involvement* by allowing everyone concerned with the application to participate more fully in the decision-making process.
- + *A change in attitude to conflict* within the general community and Council by encouraging improved communication and a problem solving culture.
- + *Good neighbourly relationships*.

Definition of terms

The following terms are used to distinguish the *agreement seeking processes* or **mediation** from two other primary purposes for discussions i.e., *information exchange / facilitation* and **decision making**. These differences are identified as follows:

Facilitation (information exchange)

A facilitation meeting seeks to improve communication and understanding by clarifying issues and establishing facts. It identifies or lists concerns and/or options to better define problems or issues. It also helps to identify relevant stakeholders. Its main objective is not seen as one of resolving disputes, however this may occur in the course of exploring issues.

Mediation (agreement seeking)

Mediation is assisted negotiation in which a neutral third party helps the parties to negotiate their own solutions and

reach a formal agreement. Mediation agreements are recorded and if signed by the parties, are legally binding on those parties.

Decision making

Council as the consent authority has a determination role in development issues. After assessing the proposal and any concerns that have been raised a decision will be made on planning grounds. Whilst Council may receive advice that parties have come to an arrangement in respect of a development, such advice will not substitute for the Council making an objective determination of the application either by granting an approval subject to conditions or refusing the proposal. As part of the statutory process any conditions or a refusal may be appealed by an applicant. In a limited number of situations an objector has the right of appeal.

Mediator

The term 'mediator' is used to identify the person who conducts either facilitation and/or mediation meetings.

When to facilitate or mediate

In the majority of applications submitted to Council there will not be a need to involve facilitation or mediation. However in certain circumstances major issues may arise and a facilitation meeting if requested, may be organised in the first instance. If the matter is not resolved and the issues and parties to the dispute are clear and prepared to continue to seek agreement, then it may proceed to formal mediation.

Is facilitation / mediation appropriate?

It should be highlighted at this point that not all matters are suitable for facilitation and mediation and that they should not be viewed as a panacea for all ills. The evaluation of cases suitable for facilitation and mediation requires consideration of a range of issues. Assessment is to be made on a case by case basis. The determining criteria have been divided into categories based on: submissions; parties; assessment by Council; legal issues and other issues and are outlined in the table on the next page.

Criteria for determining whether facilitation / mediation is appropriate

Issues for Consideration	Response			
	Other Action	Facilitation / Mediation Suitable	Facilitation / Mediation Unsuitable	Comment
A. Objections				
Are there factual issues or misunderstanding of proposal or Council policies	4			Disputes arising from issues of fact are usually better dealt with by the assessment officer seeking more information about the details of the application and would not usually require facilitation or mediation.
Many issues / many parties involved		4		Some applications give rise to a large number of issues and concerns, which can complicate the assessment process. Facilitation in particular can be very useful in assisting Council to clarify or narrow down the range of issues and identify the parties concerned.
Amenity issues / issues seeking modification to the development proposal		4		These issues are generally suitable for an agreement seeking process because there is some basis for discussion and negotiation. Facilitation or mediation may resolve, clarify or narrow down concerns.
Main issue concerns application of Council policy			4	Issues that relate to the application of Council policy are not suitable for facilitation or mediation.
Application of Council policy part of the issues but not the primary issue		4		
Matters of principle			4	If there are entrenched positions on principle it will be difficult for parties to reach agreement.
B. The Parties				
Applicant not yet aware of concerns	4			Applicant to be made aware of and to consider issues.
Applicant and other concerned parties agree to facilitate or mediate		4		Facilitation or mediation are voluntary processes. Relevant stakeholders need to agree to participate before facilitation or mediation can proceed. In multi party disputes, one or more objectors may not want to participate. In this case, it is necessary to consider whether there is an opportunity for productive discussion even without all objectors.
One or more parties have an entrenched position that is not likely to change			4	This can be difficult to judge. Matters of principle that are held firmly by one or more of the parties are difficult to deal with in facilitation or mediation because the process requires the parties to be open to negotiation.

C. Assessment by Council				
Are the stakeholders identifiable and supportive of the process?		4		In order for an agreement-seeking process to be credible and legitimate, representatives of all parties – those involved with or affected by the potential outcomes of the process – should agree to participate, or at least not object to the process going forward. If some interests are not sufficiently organised or lack resources and these problems cannot be overcome, the issue should not be addressed through mediation.
Is the proposal likely to be approved notwithstanding objections raised?			4	This may arise where the development is in compliance with relevant controls and the concerns are not significant, or can be addressed through appropriate conditions of consent. In this case mediation may not be necessary, however in some cases, it could assist in reaching agreement on the content of the conditions of consent and provide better community acceptance.
Does the application raise issues that could form a precedent?			4	If the primary issues are matters that may form a planning precedent, mediation may not be appropriate because the Council will have a central role in determining the outcome on the issue(s).
Is the proposal likely to be refused on planning grounds?	4			Planning issues that have been identified by Council should be communicated early to the applicant. This provides the applicant the opportunity to consider the issues and comments from Council and elect whether to modify the plans.
D. Legal Issues				
Appeal likely		4		Council may seek to continue to work towards a satisfactory outcome, however mediation is only relevant if parties agree.
Desire for a legal precedent			4	
E. Other Issues				
Desire to avoid a dispute / negative impacts		4		Mediation an option if parties agree and there are relevant development issues.

Who decides if a matter is suitable for facilitation or mediation?

In general, early intervention can prevent parties from becoming locked into positions, which become more entrenched as time passes. In most cases, concerns will be identified on completion of the site inspection by the assessing officer or on closing of the community notification / advertising period.

It is at this time that a request or recommendation for facilitation and/or mediation could potentially come from a variety of sources, which include applicant; objector(s); assessing officer and/or Councillors. The decision to proceed with facilitation or mediation will be determined by the relevant Development Team Manager in the Health and Development Group of Council. This decision is to be based on the following principles.

Principles

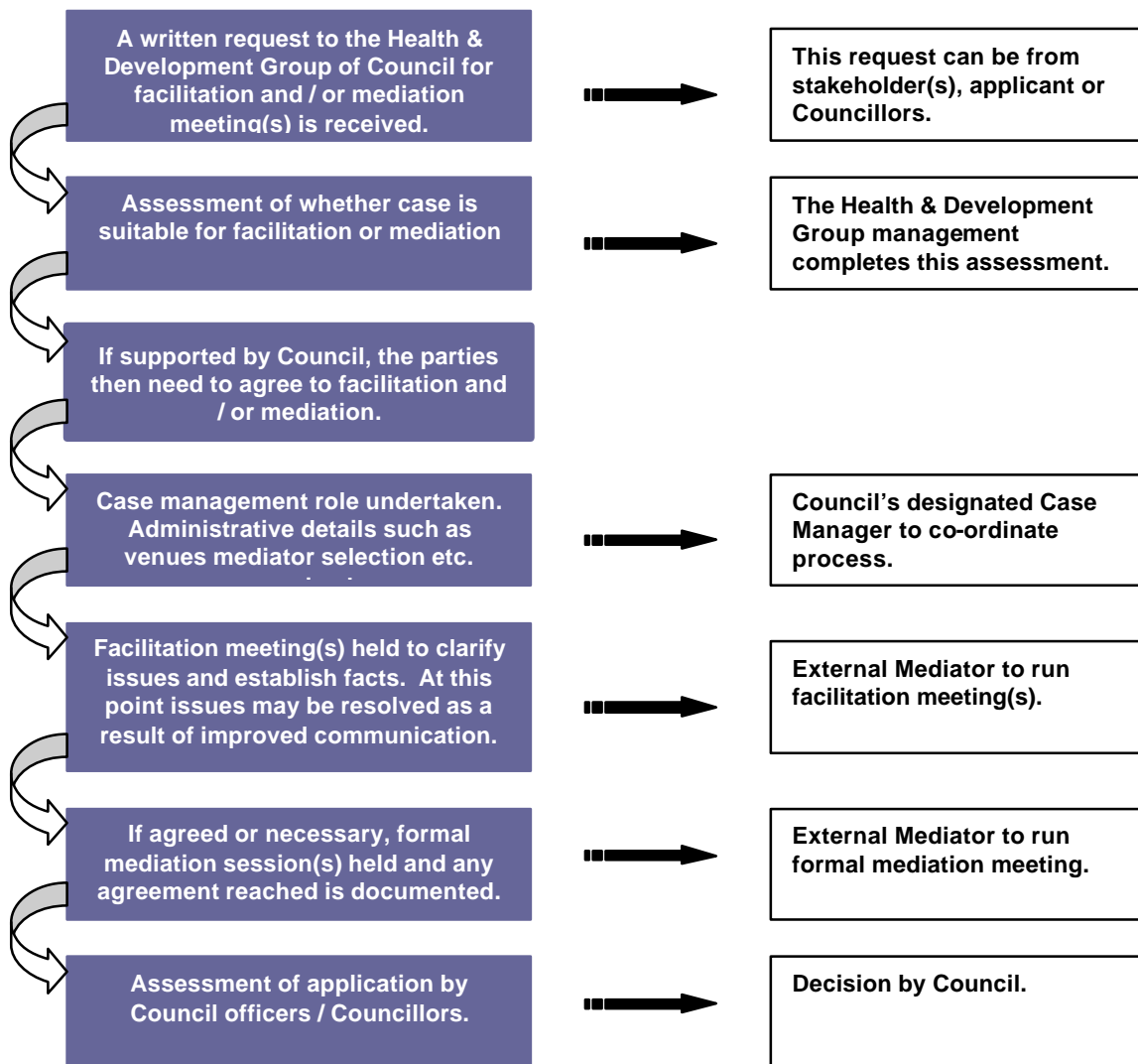
The following are the principles, which underpin the success of this policy and must be adhered to if facilitation and/or mediation meetings are to be effective.

- + *The role of a mediator* is similar to that of a chairperson. A mediator is not a referee; they should not give advice, make judgements or impose decisions. Mediators can test the strength of the parties' assertions and the solutions they come up with, but should never advise them. In selecting a mediator it is essential that consideration be given to the following qualities:
 - *impartiality* – mediators should not show or be perceived as showing bias to one party. Parties are unlikely to participate freely and openly in a process if they feel that the mediator is biased, it is one of the key aspects of mediation. The success of a mediator in managing the mediation process depends upon the parties willingness to accept and trust the mediator as an impartial person with no stake in the outcome.
 - *neutrality* – mediators should have no vested interest in the outcome or a conflict of interest.
- + *Voluntary* – facilitation and mediation meetings can only proceed effectively if the parties participate fully and with a genuine commitment to discussion. If a party is forced or pressured to participate it is unlikely that they will involve themselves in an effective way. For example, Council should not require a mediation as a precondition to the determination.
- + *Representation* – When decisions are made in consensus-based forums, the influence of advisers can increase. To preserve the legitimacy of the process, all parties must be given the opportunity to be represented and have joint control over the shape of the process and its outcomes.
- + *Without prejudice* – Anything said during the course of mediation cannot be used in any legal proceedings (if settlement is not reached). If a settlement is achieved then the agreement will be finalised in writing.
- + *Confidentiality* – parties to formal mediation are required to sign an agreement stating that confidentiality will be maintained. However, documents brought to the mediation are discoverable (that is, documents made for the purpose of the mediation can be subpoenaed). In the planning context confidentiality is qualified by the reporting of relevant parts of any settlement agreement to Council.

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- + *Decision* – Council has a statutory responsibility to discharge in relation to particular land use matters. This function persists even when formal agreements are in place. Facilitation and/or mediation will not affect the objectivity of Council's role as a decision-maker and as a consequence, the role of staff and Councillors in the process is clearly defined within this paper.

The process of facilitation / mediation

The following diagram illustrates the steps in the Council's Facilitation / Mediation Policy. These matters are more fully detailed in the following sections.



Case management

Once a matter has been identified as appropriate for facilitation and /or mediation it is necessary to conduct matters in accordance with consistent case management procedures. Council seeks to ensure that the parties:

- ✓ understand and are committed to the process;
- ✓ are prepared;
- ✓ have the authority to negotiate.

In the Blue Mountains local government area, a designated Council officer will be the case manager. Key steps in the case management process are as follows:

Informing parties

It is important that the parties are clearly identified and fully understand the process. Participants will receive explanatory information about facilitation and mediation principles and the development assessment process. Information will also be provided on the role of Council. The case manager will confirm that all parties have an opportunity to review submissions and relevant application documentation. Council will not provide copies and the documentation must be viewed at Council's offices, by arrangement.

Selection of mediator

The case manager will select a mediator based on the qualities outlined below. The parties will then be advised whom Council has selected and are given the opportunity to decline if the choice is not acceptable to them. This may be because of prior involvement or some form of perceived conflict of interest, such that the impartiality of the mediator is compromised.

Only external mediators trained by a recognised independent mediation training organisation and with adequate experience in mediating will be selected. Other qualities considered in the selection process are:

- *sufficient knowledge of planning and local government;*
- *awareness of Blue Mountains community;*
- *a mix of genders, relevant cultures, ages and backgrounds;*
- *totally independent of Council and Blue Mountains community.*

The process

When the previous steps have been carried out, the mediator will decide on how the process proceeds. This may be in conjunction with the case manager. In a typical matter, facilitation meetings will be organised in the first instance; it may then proceed to a formal mediation meeting.

In complex matters such as those that involve a large number of interest groups and parties, the mediator and case manager will develop an appropriate process. In some cases, co-mediation (more than one mediator) may be required because it may be difficult for a single mediator to manage a large group and/or complex matters on their own.

Arranging the meeting

This involves the case manager arranging a date and time for the facilitation and/or mediation meeting in consultation with the parties and determining an appropriate venue. The venue will have:

- adequate seating facilities for the parties and disabled access;
- a separate "break-out" room to allow private conferences;
- whiteboard facilities (or similar) for the mediator;
- located where Council officers are readily accessible to respond to technical issues if requested.

A venue on Council premises is generally suitable but it will be made clear to the parties that they are not attending a Council meeting.

Facilitation / mediation outcomes

The case manager must inform the assessing officer in the Health and Development Group, of the outcome of any facilitation and/or mediation meetings. This includes advice on resulting changes sought to the application or if the concerns are to be withdrawn or changed.

If a formal mediation meeting produces agreement on some or all of the issues, the parties will be requested to sign a form setting out the terms of their agreement. The formal mediation process is confidential and only the parts of the settlement that are relevant to the assessment of the application are reported to Council / considered in the assessment. For example, a part of the settlement which is not of concern to the Council might be an agreement to share the cost of fencing or to share the costs of using higher quality materials.

Notwithstanding any agreement that may be reached as a result of a mediation, as noted earlier, Council must still meet its statutory role in determining the application. This could result in certain matters agreed by the parties not being supported by Council on planning grounds.

Role of legal representatives or advisers

In some cases parties will want to be assisted by an adviser, such as a town planner or architect. This is quite acceptable practice, however any third party representative needs to be informed about the process and to appreciate that it is not an adversarial one. Prior to the any facilitation or mediation meeting advice on the third party representation must be provided. This needs to be communicated to the case manager at least 5 working days in advance of the session. The case manager then advises the other parties. The case manager or the mediator has the authority to discontinue the process where balanced representation is not achieved or insufficient notice is given.

Role of Council

Role of Council staff

Council officers can attend facilitation meetings as observers. In formal mediation meetings Council officers will be available on-call. In both situations, their advice can be sought on specific technical and procedural matters that may arise during the course of the facilitation or mediation session.

Role of Councillors

Councillors should not participate in a mediation or a facilitation as a representative, adviser or assistant to one of the parties. It can be perceived to compromise the Councillors neutrality and can direct the attention of other parties to convincing the Councillor of the merits of their particular point of view rather than looking for solutions to the issues in dispute.

In some cases it may be appropriate for Councillors to observe a facilitation meeting, which is used to isolate and clarify issues, as this may provide them with a better understanding of the matter.

Who Pays?

In implementing this facilitation and mediation policy, Council will initially undertake to bear the costs of mediator fees and administration costs as they relate to disputes in the land use application process. However, any advice from independent experts, which the parties may choose to use during the process is to be paid for by the parties.