

# POSITIVE TOOLS WITH PITFALLS

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*Three case studies demonstrate the benefits of mediation and negotiation while recognising their shortcomings.*

Mediation, negotiation and facilitation are the buzz words for new techniques to resolve planning and resource management issues. While we have probably used elements of the techniques for years, they now have a higher profile than in the past.

While the Resource Management Act (RMA), like its predecessor, the Town & Country Planning Act, provides a largely adversarial and legal process for the resolution of resource management issues, Section 99 which deals with pre-hearing meetings introduces the concept of "clarifying, mediating, or facilitating resolution of any matter or issue". The Ministry for the Environment has promoted the use of these techniques.

**Mediation** involves the use of an independent mediator who uses his or her skills to bring the parties to a negotiated settlement. **Facilitation** involves a person bringing parties together, to facilitate a negotiated settlement. Facilitation is a more neutral technique than mediation. In mediation, the mediator parties can actively seek areas of agreement. Mediation requires a conflict between parties, whereas facilitation can have a broader use and does not necessarily require there to have been conflict. **Negotiation** between parties does not involve an independent person; the parties agree to negotiate a solution between themselves.

## PLANNERS AS MEDIATORS

Are planners able to act as mediators or facilitators, or do we need to bring in outside expertise? Planning is often about the art of compromise, of balancing competing arguments, objectives and issues. Our training and experience often allow us to see an issue from a number of viewpoints, and understand where parties are coming from.

However, other parties may not see us as neutral. We usually work for or represent a stakeholder other than ourselves. Local authorities are often stakeholders (or seen to be so) in their own right.

While in some minor disputes or hearings we may be able to perform the role of mediator well, on many occasions it is preferable to involve someone else. What is

probably most important is learning to recognise when mediation or negotiation is an appropriate tool, rather than being experts in how to perform it.

The direct costs of employing a mediator are obviously far less than if all parties employ legal representatives, planners and other advocates. However, the time invested by all parties to achieve a solution may well be considerably greater. That time may not always be directly chargeable. Mediation sessions often take place outside normal work hours.

While mediation may not necessarily be cheaper, it probably produces a better solution or outcome than other processes. It will also be more accepted (owned) by the parties involved. But limitations arise if all the parties (stakeholders) are not involved in the process. The Taylor's Mistake case study which follows is an example. In that case, mediation produced a far better solution than previous processes, but one that will be even more bitterly opposed by those who were not involved (or refused to be involved) in the mediation process.

## TAYLOR'S MISTAKE BACHES – MEDIATING THE IMPOSSIBLE

There have been baches at Taylor's Mistake, a promontory of Banks Peninsula, since before the turn of the century. They are located on public land (legal road) adjoining the sea. Since 1911, local authorities have been trying to control or remove the baches.

A decision in 1976, based on issues of public health, resulted in the removal of a number of the baches, and ordered the removal of the rest by 1986. Despite various attempts to resolve the issue, the baches have remained.

In 1991, the Christchurch City Council decided to see whether the future of the baches could be resolved by mediation between the affected parties. The suggestion came from Tony Hearn, the legal representative of the Taylor's Mistake Association (representing the bach owners). At the same

time I was also considering whether mediation might be a solution. When I discussed the matter with Gay Pavelka, a mediator with the Centre for Resolving Environmental Disputes, I commented that if mediation could solve the Taylor's Mistake Bach issue, then I would be sold on the technique. We probably couldn't have provided a much sterner test.

The council invited representatives of a number of organisations to meet: the Christchurch City Council, the Canterbury Regional Council, the Department of Conservation, Taylor's Mistake Association representing the bach owners and the Taylor's Mistake Ratepayers Association representing the permanent residents of Taylor's Mistake.

An initial meeting was held to discuss whether mediation was appropriate. With the exception of the Taylor's Mistake Ratepayers Association, all the parties agreed that this long-running issue needed to be resolved, and that mediation seemed to be an appropriate means of trying to reach that resolution.

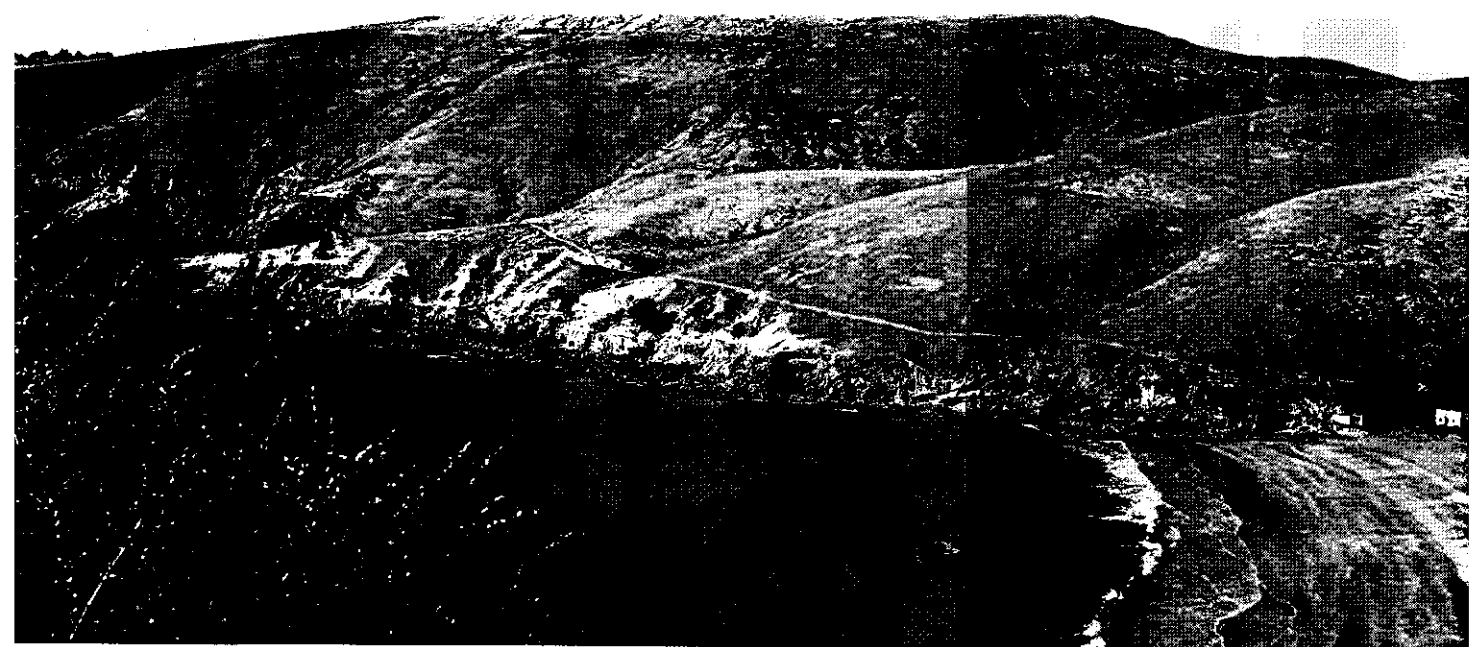
The Taylor's Mistake Ratepayers Association decided not to be involved in the mediation process. The association believed that all the baches should go.

The refusal of the association to be involved meant the other parties had to seriously consider whether they should proceed with the mediation. As mediator, Gay Pavelka felt compromised and had serious reservations about continuing.

However, the parties decided to carry on with the mediation, with the condition that the door be left open to the Ratepayers Association, and that if any solution was arrived at, a public meeting would be held. It was also recognised that any mediated solution would be subject to a public planning process, which would allow public input.

The mediation process took almost a year with 13 meetings of the 14-strong working party, and smaller meetings in between.

At the beginning of the process, a number of the representatives were quite firm that all of the baches should go, although some conceded the possibility of an alternative location for new baches to replace the existing baches. Other representatives, particularly the bach owners, wanted all the ▶



baches to stay, and saw the matter as an all-or-nothing, with either all the baches staying, or all going.

At the early meetings, parties gained an understanding of each other's positions and attitudes. A range of potential solutions was identified and discussed.

It was not possible to arrive at a solution by assuming all the baches possessed the same qualities and problems. The realisation that some of the baches could go and some could stay enabled the embryo of a solution to be identified.

The Taylor's Mistake Association's ownership of a large area of land (70 hectares) in the valley and hills surrounding Taylor's Mistake was also a key factor in compensating the people of Christchurch for the continued occupation by some of the baches of prime public land.

Eventually a solution was arrived at which was accepted by all of the people sitting around the table. The solution involved the removal of the baches which most affected the recreational and scenic values of public spaces at Taylor's Mistake; the retention of the baches which had the most historical and heritage value, in locations where they had less impact on public use of Taylor's Mistake; the creation of a new bach zone for the baches which had to be displaced, and the giving of 70 hectares of land to the city council as a new major recreation reserve.

The solution arrived at by mediation was, in my opinion, a vastly superior solution to any that had been arrived at by any previous processes. It involved a package which meant that all parties had to give a bit, but there were major gains for everybody.

But for the non-involvement of the Taylor's Mistake Ratepayers Association, the mediation process would have been highly successful. The proposed solution, outlined at a public meeting drew a very mixed response. A considerable number of people at the meeting supported the solution. However, the representatives of the Taylor's Mistake Ratepayers Association, other

local residents, and other environmental organisations found the solution unacceptable. Those who had chosen to not be part of the mediation process continued to oppose any solution which involved retention of any of the baches.

The proposed solution requires the council to initiate changes to the district plan. Other parties will be able to have their say through the adversarial resource management process.

It will be interesting to see how the resource management process works when the local authority, the regional council, the Department of Conservation and the bach owners stand together supporting a solution arrived at by mediation, against those who, in the main, chose to stay out of that process.

### CLARE PARK CARPARK: AN ATTEMPT AT A PRE-HEARING MEETING

The Parks Unit of the Christchurch City Council lodged an application to establish a

carparking area in a rear portion of Clare Park, a district park of some 18 hectares, of which four hectares is a popular sports ground containing one full-sized and two junior-sized soccer fields.

With no carparking within the park, users have parked on the adjacent Burwood Road, and on the edge of a controlled access expressway (the latter causing some traffic concerns). Neighbours have resisted the establishment of a driveway access and potential carparking areas within the park.

Carparking is a discretionary activity in the Waimairi section of the council's district plan on sites contained in the Open Space A Zone. The resource consent application lodged by the Parks Unit attracted five submissions, one of which was signed by 14 residents, and another signed by six residents. All submissions opposed the application.

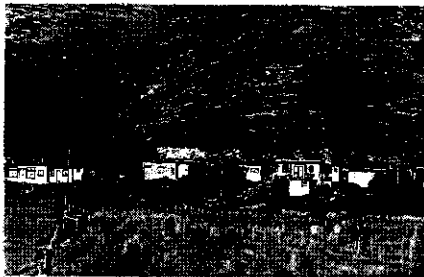
A pre-hearing meeting between the applicant (Parks Unit) and the objectors was held in order to see whether there was any room for compromise or negotiation about the provision of a carpark.

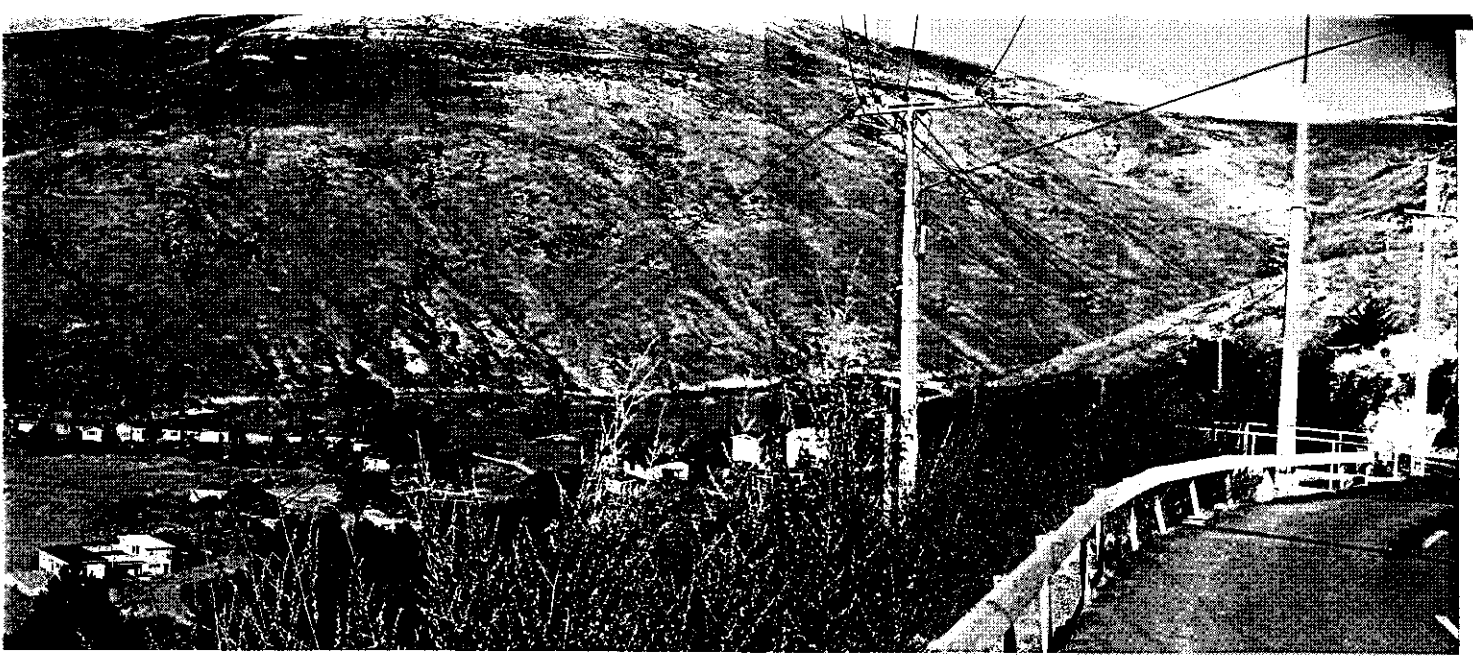
I agreed to chair the pre-hearing meeting. As well as the applicant and objectors, two officers who would be responsible for writing planning and traffic reports at any hearing were also present, together with a councillor from the local Community Board and a community secretary. The meeting was attended by three of the objectors, on behalf of the other residents.

It became apparent during the meeting that there was a possible compromise location for the carpark which would place it in a position more removed from adjoining houses. While this site was considered less suitable by the Parks Unit, the representative of the unit indicated that he would be prepared to discuss that option further.

One of the objectors, acting for one group of residents, indicated that he was keen to discuss the compromise as it would appear to meet the concern of that group of residents. The other two objectors

*Taylor's Mistake baches.*





expressed concern about negotiating on that issue, essentially because they felt that there should not be a carpark in the reserve at all, and therefore there was no need to negotiate an alternative location.

The meeting concluded with the objectors going away to consider their position, and to advise the community secretary whether they wished to consider further negotiations. Two of the objectors decided not to pursue those negotiations.

The application was then considered by a commissioner appointed by the council to hear the application. A commissioner was used because the council's parks unit was making the application. The minutes of the pre-hearing meeting were made available to the commissioner.

The commissioner's decision was to approve the application in the position originally applied for, subject to some conditions relating to the vehicle access to the carparking area. He came to the conclusion that the site applied for adequately met the statutory criteria for the consent. He commented however that there could well be a better site within the park and that the council may wish to reconsider that position.

It is interesting to note that a compromise solution, which would have satisfied many of the objectors, could not be achieved because at least two of the objectors decided to proceed on an all or nothing approach. They have probably ended up with a worse solution than could have been achieved by negotiation.

## BEXLEY PLAN CHANGE — A SUCCESSFUL NEGOTIATION

The Christchurch City Council had agreed to a private request for a scheme change to rezone land in the Bexley area from Employment 1 (basically an industrial zone) to a Residential Zone. The council sold the land to the developer requesting the scheme change. The land adjoins the Avon River, near its mouth with the Avon/Heath-

cote Estuary, and contains significant wetland areas.

The council's decision on the scheme change allowed the rezoning, with some minor modification of the boundaries between the residential zone and a recreation zone area (containing the wetlands).

Eight parties appealed the decision. These included several environmental groups, two residents' groups, the Canterbury Regional Council, and the Department of Conservation. The appeals were not about residential development per se, but rather the extent of the residential zoning, and the amount of land that should be set aside for wetland purposes.

While the developer, and subsequently one of the residents' groups, were in support of the council's decision, the other seven parties were to varying degrees opposed to the decision. They considered more land should be set aside for wetland (Recreation zoning) purposes, and less for residential use.

A decision was made to attempt to find a negotiated solution before the hearing of the appeal. An independent mediator was not used. The appeals involved 10 parties, including several

environmental groups, two residents' groups, the developer, the City Council, the Canterbury Regional Council and the Department of Conservation.

The negotiation of the appeals involved three meetings between the appeal parties at the council offices, one site meeting and attendances at three pre-hearing conferences before the Planning Tribunal. The Planning Tribunal confirmed a consent order after two months of meetings and negotiation.

Bob Nixon, senior planner of the City Plan Section of the Christchurch City Council, formed several conclusions from his convening of the negotiation.

1. Where the convenor is drawn from one of the negotiating parties, it must establish the trust of all parties.
2. The convenor's position must be seen as non-partisan.
3. Boundaries of the issue under dispute must be clearly established.
4. Where negotiations arise out of a statutory process such as a scheme change hearing, legal parameters must be clearly established.
5. It is important for parties to establish the matters they would like to see addressed.
6. Parties' representatives must have the authority to represent their organisations.
7. All parties must have room to manoeuvre.
8. Comment to the media should be kept to a minimum until an agreement has been reached.
9. Sufficient time must be allowed for the negotiation process.
10. Each organisation should have its own stance clearly established before entering negotiations.

Says Nixon: "In this case I believe there was a genuine willingness to make some compromise in order to achieve a solution, and there was an acceptance by all parties that the matter would be better dealt with outside a 'confrontational' appeal situation."

*Bexley wet lands.*

