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**INFORMATION SHEET 5 – Alternative Dispute Resolution and Consent Agreements**

**1.1** The Tribunal offers a range of alternative dispute resolution procedures (ADR) ranging from mediation and conciliation to neutral expert evaluation. At the preliminary conference, the suitability and choice of ADR will be assessed. ADR is governed under Section 102 and 103 of the *Tasmanian Civil and Administrative Tribunal Act* 2020.

**1.2** Virtually all disputes before the Tribunal will be referred to mediation or other appropriate dispute resolution processes before proceeding to a full hearing. The case officer will determine whether exceptional circumstances arise which make ADR inappropriate.

**1.3** **Do not delay in preparing your case for full hearing just because the parties are engaging in mediation.** Parties should not delay or defer preparing their case just because a matter has been referred to ADR. In the event the dispute is not settled by ADR, parties must comply with the tribunal’s directions for exchange of evidence and be ready to proceed to hearing on the appointed hearing date**.** A formal application must be made and approved if the parties wish to delay preparation for a hearing.

**1.4** If you intend to be legally represented during ADR procedures or wish to bring a person to assist you, please notify the Tribunal and other parties at least 48 hours prior to the appointment. Where ADR has been listed, you must ensure you attend that listing. A failure to do so may result in an order that you be dismissed as a party or the proceedings itself be dismissed (see Schedule 2, Part 8, Clause 9(5) of the *Tasmanian Civil and Administrative Tribunal* 2020).

**1.5** The parties who attend mediation or other ADR process must ensure that they have authority to negotiate and settle the dispute. If you are acting on behalf of another person, please ensure that you have read Practice Direction 1*.* When attending ADR you will be expected to be in a position to make decisions as to whether the results of the ADR are acceptable. It is neither acceptable nor satisfactory to have to discuss the results of ADR with a person not present at the ADR process. You should advise the mediator at the directions hearing whether you will have authority to settle at the ADR conference. There are some exceptions to this requirement for authority to settle which apply in the instances of Council officers representing a Council.

**1.6** The ADR assessment may identify information needed to prepare for a mediation conference. Parties may be encouraged to take advice from suitably qualified professionals to assist them in making informed decisions during the ADR processes. The venue for the ADR process will also be determined. Please note that many ADR processes are conducted on-site at the location of the proposed development or sometimes at the Local Planning Authority’s Offices.

**1.7** Mediation is the most common form of ADR procedures applied in the Tribunal. It involves a case officer who impartially assists the parties in identifying issues in dispute, exploring those issues, and generating possible options for resolving the dispute. The mediator has limited involvement in generating resolutions for the parties or offering opinions on the outcome of the dispute.

**1.8** Conciliation follows a similar process to mediation; however, the conciliator may offer suggestions or feedback to the parties concerning the merits of the dispute. Any opinion or comment by a conciliator does not constitute a ruling of the Tribunal, and parties are at liberty to disregard any opinion or comment and proceed to hearing if they choose. However, the conciliator may encourage parties to take their own private advice before deciding to proceed to hearing to assist them in making a fully informed decision as to the likely outcome of a hearing process.

**1.9** Parties may request neutral expert evaluation. The decision as to whether it is appropriate to engage an expert lies with the Tribunal case officer. The Tribunal appointed expert will have read the appeal file, including the original papers from the first decision maker and any notices of appeal or statements of issues filed with the Tribunal. Neutral expert evaluation occurs at the subject site and follows the same structure as mediation (see below). The parties are afforded an opportunity to explain their concerns and issues in the presence of the expert. The expert will be afforded an opportunity to ask any questions. At the conclusion of all these submissions from the parties, the expert will briefly meet with the mediator and then provide an opinion concerning the merits of the proposal to the parties.

The opinion of the expert is based on the file and the information supplied through the mediation process, but is not a formal ruling of the Tribunal. Because this is an informal procedure and does not constitute a full and tested case before the Tribunal, a party may disregard the opinion given and decide to proceed to hearing. In that instance, the neutral expert’s opinion may not be referred to in any way at the hearing and the expert will have no further involvement in the proceedings.

It is possible that a neutral expert may identify new issues which have not been raised by any party. If the parties disregard the opinion of the expert and proceed to hearing, the Tribunal cannot disregard any relevant new issue identified by the neutral expert. In those circumstances, the Tribunal will formally notify the parties that it will require the provision of evidence and submissions in relation to the issue identified by the expert. That notification will not disclose either that the new issue(s) arose from a mediation conference, nor any opinion expressed by that expert. It will follow the format for a ground of appeal and will be supplied to the expert members of the Tribunal panel and all parties. The inclusion of a new ground of appeal does not mean that the Tribunal necessarily agrees with the opinion of the neutral expert. Rather it ensures that the panel hearing the appeal is alerted to an issue which another expert considered important enough to raise. At the final hearing, the panel will form its own opinion about a new issue once all evidence has been considered.

**1.10 Structure of ADR:**

1.10.1  *Mediator introduction*

The mediator will briefly explain the structure of the mediation conference, confidentiality requirements and any relevant statutory provisions.

1.10.2 *Opening statements by parties*

Each party will be invited to give a brief statement of their prospective issues in the dispute and any topics of discussion that they wish to raise. These opening statements are to be a brief summary of what the parties understand the dispute is about and should not exceed five minutes.

1.10.3 *Agenda setting*

The mediator will attempt to identify, from the statements made by the parties, the key issues that need to be discussed. Those will be listed and the parties invited to agree upon an order in which to discuss them. The parties may raise further matters during the course of mediation if they forgot to raise them during these early stages.

1.10.4 *Discussion of agenda items*

The mediator will facilitate discussions between the parties about each of the issues identified on the agenda. These issues should be explored as fully as possible to ensure that all parties understand each other’s concerns. Although the parties may be tempted to begin discussing options at this stage, it is preferable to defer this until later in the mediation.

1.10.5 *Private Sessions*

The mediator will then hold a brief private session with each of the parties. These are separate private discussions between the mediator and each party, the contents of which are confidential between the mediator and the party. The mediator will attempt to give equal time to each party in private sessions and should advise the parties if a private session with one party may take longer than anticipated. Private sessions are an opportunity for the mediator to assess how the parties believe the mediation is progressing and to begin the process of consideration of possible resolution.

A private session does not necessarily have to be called at the conclusion of 1.10.4. The mediator may wish to speak to the parties in private sessions at any time during the mediation process.

1.10.6 *Identifying options*

At the conclusion of the private sessions, the parties will be brought back together to discuss options which may exist to resolve the dispute. The parties will be invited to suggest options and to test those options to see if they are acceptable to the other parties. This process will entail the refinement of options and testing the details of resolution.

1.10.7 *Confirming an agreement*

Any agreements reached between the parties will be documented at the conclusion of the mediation. Ordinarily, the original decision maker will be charged with the responsibility of drafting the terms of that agreement.

1.10.8 *Cool down period*

The Tribunal must ensure that the parties settling a dispute have been given the opportunity to consider the outcome of mediation and to have taken advice, if necessary. Accordingly, the Tribunal will ordinarily allow seven days for the parties to consider the results achieved through mediation, to take advice and to confirm whether they still wish to settle the matter in the terms agreed to.

During the seven day cool down period, the original decision maker will have drafted the terms of the agreement between the parties and forwarded it to all parties. Parties satisfied with the terms of the settlement are to sign the consent and forward it to the Tribunal registry. A party reconsidering its position or disagreeing with the wording of the settlement should make contact with the mediator to arrange further mediation or the resolution of the wording of the settlement.

1.10.9 A final settlement submitted to the Tribunal is inspected by the Chairperson or any other expert of the Tribunal to determine whether it should be endorsed. Although the endorsement of a settlement is the final part of ADR, it is a separate procedure and is covered in Practice Direction 3.

**1.11** **Section 102 of the Tasmanian Civil and Administrative Tribunal Act 2020.**

There are exceptions in relation to this requirement as set out below. As Section 102(8) only relates to the giving of evidence at a full hearing of the Tribunal, the Tribunal cannot enforce total confidentiality in relation to discussions which arise during ADR procedures.

However, the Tribunal ordinarily requests that the parties agree to confidentiality of discussions. That is, the parties agree that anything which is discussed in ADR is not discussed with persons external to the proceedings without the express permission of the other parties involved.

If you are in any doubt as to whether to disclose something in the course of ADR, you should take your own private advice from a suitably qualified person.

**1.12** The confidential nature of the process of ADR may not prevent a court in other proceedings from ordering disclosure of information that may relate to Acts which are contrary to other pieces of legislation.

The final exception which should be noted is that a party may wish to produce revised plans in ADR for consideration of the parties as a possible settlement. Merely because that document was produced in ADR for consideration would not preclude the person from submitting that revised plan in a formal hearing of the Tribunal. What cannot occur in most circumstances is any comment as to the discussions which arose in ADR concerning the revised plans. This commonly occurs where a Proponent revises a development to satisfy some of the parties to proceedings and then seeks to apply to amend the Application for Use or Development pursuant to Schedule 2, Part 8, Clause 9(7) of the TASCAT Act 2020such that the revised proposal proceeds to be the subject of the hearing (see Practice Direction 2 at 2.18-2.19)