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**INFORMATION SHEET 6 – Evidence, Summonses and Preparation for Hearings**

**STATEMENTS OF EVIDENCE:**

**1.1** The Tribunal in making a decision regarding an appeal or application is required to make findings of fact and to state the evidence upon which those findings were made. A party needs to carefully consider what factual material needs to be presented to the Tribunal in order to be successful. Factual material provided to the Tribunal must be in writing in the form of a statement of evidence. This must be a complete written statement of all facts or expert opinion to be given by a witness; it is not a summary or a list, and should read as one would state the facts as if speaking. This information sheet is to assist the parties in understanding the mode and format of presenting evidence before the Tribunal.

**1.2** A statement of evidence must be individually prepared by each witness so that the author is identified and can be questioned during the hearing. The author of any document presented as evidence to the Tribunal must attend the hearing to be questioned about the document. A statement of evidence may include annexures such as letters, reports or studies. A party seeking to rely on the work of any other person must ensure that the other person attends the hearing in order to be questioned about the content of that document. A failure to do so may result in the evidence being excluded from consideration or, alternatively, be given diminished weight.

**1.3** The only exception to an author attending a hearing relates to documents which are generally accepted and used as authoritative such as dictionaries or medical and scientific texts. Reports by special groups or articles by experts not forming part of such accepted texts will not normally be accepted.

**1.4** All evidence that the parties seek to rely upon must be forwarded to each other party and filed with the Tribunal at least 21 days before the hearing. The parties then have a period of 14 days to prepare statements of evidence in response. Response statements of evidence must only respond to material that was supplied in initial statements of evidence; they are not an opportunity to adduce new evidence.

**1.5** Each party must serve upon each other party their statements of evidence and response statements; this is not the responsibility of the Tribunal. One copy of all documents to be relied upon at the hearing must be filed with the Tribunal at the same time they are served on each other party. The Tribunal also requires an electronic copy of all evidence filed.

**1.6** There are Practice Directions about how evidence is to be prepared and filed. Please make sure you read those requirements and comply with them (see Practice Direction 4)

**1.7** Persons who are not familiar with legal proceedings often make the error of confusing evidence with submissions or arguments. Appendix 6A is intended to show the difference between evidence and submissions. Statements of evidence should recognise the distinction between evidence and submissions as valuable hearing time can be wasted in dealing with objections correcting statements of evidence.

**CONDITIONS OF APPROVAL:**

**1.8** There are Practice Directions that require the Planning Authority to file draft conditions. These conditions are provided in the event the Tribunal is minded to grant a permit for the use/development the subject of the appeal. The draft conditions need to be responsive to the issues in the proceedings and are to be provided regardless of whether the planning authority refused or approved the use/development at first instance. A planning authority is at liberty to submit that it is not possible to frame practicable conditions of approval which are responsive to the issues in dispute, but they are to place all parties on notice of that submission at least seven days prior to the hearing. That submission will need to be substantiated by reference to the evidence led at the hearing which demonstrates the argument.

**AGREED FACTS**

**1.9** The Tribunal encourages parties to agree as many facts as possible prior to hearing. There is Practice Direction 4.6 that requires parties to proceedings to confer prior to the full hearing to attempt to identify facts which can be agreed. The parties are to confirm in writing to the Tribunal, seven days before the hearing, that they have conferred to agree facts and submit a statement of agreed facts. If there are no facts which can be agreed, then the Tribunal is to be advised of that result (see Practice Direction 4 at 4.6). Please note expert witnesses will be required to undertake a similar process of identifying agreed facts if they are required to file a joint report (see PD)

**1.10** When a party seeks to tender a bundle of documents to the Tribunal, they will be required to take the Tribunal to the particular documents in the bundle relied upon. It is those documents that will be taken into evidence. Any documents to which the Tribunal is not taken are excluded.

The Tribunal at a full hearing will ordinarily not have regard to original development assessment materials unless they are tendered as evidence in the hearing. Please note the requirements for the authors of materials being required to appear as witnesses if documents are being relied upon in proceedings (see Practice Direction 4 at 4.21)

The Tribunal is obliged to have regard to any representations that were filed at first instance (see Section 51(2)(c) and Section 62(4) of the *Land Use Planning and Approvals Act 1993*). At the full hearing of any appeal, the parties will be afforded an opportunity to be heard as to the extent to which any representations may be considered.

**SUMMONSES:**

1.11 The Tribunal has power to issue summons for the production of documents, the attendance of a witness or both (see Section 104 of the *Tasmanian Civil and Administrative Tribunal Act 2020*). The Tribunal has issued Practice Directions for making an application for a summons. (see Practice Direction 2 at 2.25 to 2.28))

**Summons for the production of documents:**

1.11.1 Any documents that a person seeks to have produced by a summons needs to clearly identified by either name or class of documents. They must also be relevant to the proceedings, and it will be necessary for you to demonstrate their relevance in the application for the summons. The person named as the respondent to the summons must also be the person who has possession or custody of the documents.

**Summons for the attendance of a witness:**

1.11.2Witnesses may be called for one of two reasons. Firstly, they may have authored a document which a party wishes to produce in evidence and, therefore, the author of the information must attend to be questioned about its contents. Secondly, a person may have witnessed events or have factual information which is not contained in documentary evidence.

1.11.3 It is preferable that arrangements be made with the witness in question for them to prepare a written statement of the information within their knowledge. If, however, that is not possible, it may be necessary for a deposition hearing to occur. If a witness who is attending to give evidence agrees, once a summons has been issued, to prepare a written statement of their evidence, you must ensure that statement is provided to all other parties in accordance with the Tribunal’s procedures and timetable for exchange of evidence.

1.11.4 The Tribunal will not issue a summons for an expert witness to prepare an opinion or statement of evidence about the subject of the proceedings. The Tribunal will only issue a summons in relation to pre-existing work that has been undertaken by an expert witness.

1.11.5 Any application for a summons should be made as early in the proceedings as possible. Disclosure of all evidence, including those witnesses who will be giving evidence at a hearing, must occur on the same timetable as the exchange of all evidence for the full hearing. As such, if a witness will require a deposition hearing, then an application for a summons should be made well before the exchange dates for evidence.

**Service of a summons:**

1.11.6 It is the responsibility of the party who made an application for the summons to serve that summons upon the witness in a timely manner. A person who is the subject of a summons must be given sufficient notice in relation to the return date of the summons. A person who has applied for and received a summons should serve it upon the Respondent to that summons as quickly as practicable and usually within 5 days (see the *Tasmanian Civil and Administrative Tribunal Rules* 2021).

In order to serve a summons, you may:

(a) Give it directly to the person, or

(b) Leave it at, or post it to, the person’s residential or postal address – or address of business/employment, whichever is last known to the server of the summons.

1.11.7 If you require a person to attend a hearing by summons, that person is entitled to be paid allowances and expenses for that attendance. The person who applied for and received the summons is liable for those expenses.

1.11.8 Where application is made for persons to attend the Tribunal to be questioned about information within their knowledge, it may be necessary for a deposition hearing to take place if that person cannot or will not provide a written statement of the information within their knowledge. A deposition hearing must occur well in advance of the full hearing. In making an application for a summons to issue for a witness to attend to give evidence, you should advise the Tribunal whether a deposition hearing would be necessary. A deposition hearing permits the person who sought the summons being allowed to question the witness, and for that evidence to be recorded and transcribed. The cost of transcription of the evidence is to be paid by the person who applied for and received the summons. The other parties to the proceedings will be afforded an opportunity to consider the information that was given in the deposition hearing and, if necessary, the witness may be recalled for cross-examination. The recalling of the witness for cross-examination would occur at the full hearing of the Tribunal into the merits of the matter. The person who applied for the witness to give evidence would be liable for all expenses of that witness attending the Tribunal.

**APPENDIX 6A:**

**GUIDELINES - EVIDENCE AND SUBMISSIONS BEFORE THE RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL**

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| **Evidence** | **Submissions** |
| A statement given by a witness | Argument or persuasion - by an advocate |
| Of fact or opinion so as to prove that fact or opinion  e.g. facts - details of a development  e.g. opinion - access for traffic will be unsafe | Argument as to which facts or opinions should be accepted by the Tribunal and as to the effects of those facts and opinions and the law upon the issues before the Tribunal.  Submissions refer to the evidence given or assessed.  Submissions do not contain new facts and are not capable of proving anything. |
| Normally evidence is given first | Normally submissions are made after the evidence has been concluded |
| Normally not given as to construction of an Act, State Policy, Planning Ordinance or other legal instrument | Characteristically as to proper construction (meaning) of an Act, State Policy, Ordinance or other legal instrument, as well as about the effects of facts or opinion |
| May be non-expert or expert |  |
| Expert - as to fact or opinion requiring special skill or knowledge  Facts outside the expertise of the Tribunal  e.g. accepted scientific fact behaviour of sound - behaviour of fume and odour plumes - accepted chemical reactions - accepted physical facts  Opinion - e.g. inferences or conclusions drawn from facts proved by the expert or by other witnesses in the proceedings  e.g. probable overshadowing resulting from a structure - likely behaviour of an odour plume - effect of a development upon heritage significance of a building - likely extent of overshadowing caused by a structure |  |
| While expert opinions must be formed upon stated or proven facts, there are some facts that do not require proof, e.g. dictionaries, generally accepted scientific texts and writings and journals, generally accepted bodies of expert knowledge |  |
| The Tribunal or a court is not obliged to accept expert evidence, even though it remains un-contradicted. |  |
| Experts should not express an opinion upon the ultimate question the Tribunal is to decide.  e.g. In an appeal against the refusal of a permit, an opinion that the permit should be granted. An opinion that there is no apparent planning reason why a permit could not be granted would be acceptable. | Submissions may be made as to what conclusions the Tribunal should reach and the proper form of any order. |
| The limits of evidence - evidence is not receivable if it is not relevant to issues in the proceedings before the Tribunal.  For example, in an appeal against the grant of a permit, residential amenity may be relevant, but the way in which Council reached its decision is not. Matters such as bias of Councillors, or a failure to follow the Council Planning Officer’s advice, are not relevant. It is the decision (i.e. permit or the conditions imposed upon it, the refusal to grant a permit,) which are relevant and not the manner in which Council reached that decision.  The only exception to the above is in the case of issues of jurisdiction, for example, where a requirement of LUPAA has not been complied with. |  |
| Expert witnesses; expert witnesses as advocates; and the form of expert evidence:  Please read the contents of PD15 and PD8.4 of these Practice Directions closely. |  |
| ‘Issues’ The issues in the proceeding are those which have been established by the grounds of appeal as elaborated by the lists of issues presented by the parties to the Tribunal at the first directions hearing, or as otherwise directed by the Tribunal. |  |

**Witnesses Statements of Evidence and Advocates Submissions - Basic Distinctions**