

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
TDHCA Governing Board Approved Draft of
10 TAC §1.17. Alternative Dispute Resolution

Disclaimer

Attached is a draft of proposed new 10 TAC §1.17, Alternative Dispute Resolution, that was approved by the TDHCA Governing Board on June 28, 2018. This action will entail the repeal of the current rule addressing this issue found at 10 TAC §1.17, Alternative Dispute Resolution and Negotiated Rulemaking, and two contemporaneous new rules being proposed to replace it (this rule at 10 TAC §1.17, and a rule for Negotiated Rulemaking at 10 TAC §1.12). This document, including its preamble, is expected to be published in the July 13, 2018, edition of the Texas Register and that published version will constitute the official version for purposes of public comment and can be found at the following link:

<https://www.sos.texas.gov/texreg/index.shtml>.

Public Comment

Public Comment Period: Start: 8:00 a.m. Austin local time on July 16, 2018
End: 5:00 p.m. Austin local time on August 16, 2018

Comments received after 5:00 p.m. Austin local time on August 16, 2018, will not be accepted.

Written comments may be submitted, in hard copy/fax or electronic formats to:

Texas Department of Housing and Community Affairs
Attn: Brooke Boston
Rules Comments
P.O. Box 13941
Austin, Texas 78711-3941
Email: brooke.boston@tdhca.state.tx.us

Written comments may be submitted in hard copy or email formats within the designated public comment period. Those making public comment are encouraged to reference the specific draft rule, policy, or plan related to their comment as well as a specific reference or cite associated with each comment.

Please be aware that all comments submitted to the TDHCA will be considered public information.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
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Preamble for proposed new 10 TAC §1.17. Alternative Dispute Resolution

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC §1.17, Alternative Dispute Resolution. The purpose of the proposed new section is to provide compliance with Tex. Gov't Code 2306.082 and Chapter 2009, to provide greater clarity by considering the issue of Negotiated Rulemaking separately from that of Alternative Dispute Resolution, and to make minor changes for clarity, improved readability and corrected citations.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT. Mr. Irvine also has determined that, for the first five years a rule would be in effect:

1. The proposed rule does not create or eliminate a government program;
2. The proposed rule will not require a change in the number of employees of the Department;
3. The proposed rule will not require additional future legislative appropriations;
4. The proposed rule will result in neither an increase nor a decrease in fees paid to the Department;
5. The proposed rule will not create a new regulation, except that it is replacing a rule being repealed simultaneously to provide for the updating and improved clarity of that rule;
6. The proposed rule will not expand an existing regulation;
7. The proposed rule will not increase the number of individuals subject to the rule's applicability; and
8. The proposed rule will neither positively nor negatively affect this state's economy.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be ensuring a rule that provides for clear guidelines for the Department's alternative dispute resolution procedures. There will not be any economic cost to any individuals required to comply with the new section, because the processes described by the rule have been in place through the rule found at this section being repealed.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES. The Department has determined that there will be no economic effect on small or micro-businesses or rural communities.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held July 16, 2018, to August 16, 2018, to receive input on the new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time AUGUST 16, 2018.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new sections affect no other code, article, or statute.

§1.17. Alternative Dispute Resolution.

(a) Purpose. In accordance with Tex. Gov't Code, §2306.082, and as authorized by Tex. Gov't Code, §2009.051(c), the Department encourages the use of appropriate Alternative Dispute Resolution ("ADR") procedures under Tex. Gov't Code, Chapter 2009 to assist in the fair and expeditious resolution of internal and external disputes under the Department's jurisdiction. These ADR procedures are intended to work in conjunction with the guidelines and rules of the State Office of Administrative Hearings found at Tex. Gov't Code, Chapter 2001; 1 TAC Part 7, Chapter 155; and with Chapter 154, Civil Practice and Remedies Code.

(b) Definitions. For purposes of this rule, terms used herein shall have the following meaning:

(1) Alternative Dispute Resolution ("ADR")--a procedure or combination of procedures described in Chapter 154, Civil Practice and Remedies Code.

(2) Dispute Resolution Coordinator--One or more trained persons employed by the Department, who may not be in the Legal Division, designated by the Executive Director to coordinate and process requests for the ADR procedures.

(3) Mediation--a dispute resolution procedure in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. The mediator may not impose his or her own judgment on the issues for that of the parties (§154.023(a) and (b), Texas Civil Practice and Remedies Code).

(4) Impartial third party--A person who meets the qualifications and conditions of Tex. Gov't Code §2009.053. An Impartial Third Party must possess the qualifications required under the Texas Civil Practice and Remedies Code §154.052 (a minimum of 40 classroom hours of training in dispute resolution techniques), is subject to the standards and duties prescribed by Texas Civil Practice and Remedies Code §154.053 and has the qualified immunity prescribed by Texas Civil Practice and Remedies Code §154.055 for volunteer third parties not receiving compensation in excess of expenses, if applicable. (Tex. Gov't Code §2009.053(d)).

(c) Preliminary Considerations.

(1) The Department encourages communication between Department staff and applicants to the Department programs, and other interested persons, to exchange information and informally resolve disputes.

(2) The Department has appeal procedures found at 10 TAC §1.7, and at 10 TAC §10.902. ADR procedures supplement and do not limit any available procedure for the resolution of disputes (Tex. Gov't Code §2009.052(a)). Pursuing an ADR procedure does not suspend or delay application, appeal, or other deadlines. For example, if a tax credit applicant desires to appeal a Department decision using the procedures promulgated under §2306.6715 and also desires to pursue an ADR procedure, the applicant may independently pursue the two procedures. Each procedure will proceed independently of the other. However, ADR does not suspend any statutory deadlines or grant any additional authority to resolve issues beyond statute.

(3) Consistent with Tex. Gov't Code §2306.082(e), the ADR procedure must be requested before the Department's Board makes a final decision on an issue.

(4) Consistent with Tex. Gov't Code §2306.082(f), the ADR procedure may not be used to unnecessarily delay an appeal proceeding, or other deadline.

(d) Appropriateness of ADR

(1) Assessment of the Dispute. In determining whether an ADR procedure is appropriate, the parties to the dispute, including the Department, should consider the following factors:

(A) whether direct discussions and negotiations between the parties have been unsuccessful and/or the parties believe there is a misunderstanding involving the facts or interpretations that could be improved with the assistance of an Impartial Third Party;

(B) whether the use of ADR potentially could use fewer resources and take less time than other available procedures, and that there is a reasonable likelihood that the use of ADR will result in an agreement to resolve the dispute;

(C) whether there is a reasonable likelihood that the use of ADR will result in an agreement to resolve the dispute, and there are potential remedies or solutions that are only available through ADR; and/or

(D) whether the need for a final decision with precedential value is less important than other considerations. (Nothing herein should be construed as creating a presumption that a final decision establishes binding precedent in any given manner).

(2) The parties may also consider additional factors found in the State Office of Administrative Hearings' ADR Model Guidelines for assessing whether a dispute is appropriate for mediation.

(3) Independent of any proposal from interested parties outside the Department, the Department may propose using ADR procedures to interested parties to try to resolve a dispute.

(e) ADR Process

(1) Any applicant for Department programs or other interested person may request the use of an ADR procedure to attempt to resolve a dispute with the Department. The ADR request must be submitted in writing to the Department's Dispute Resolution Coordinator at the mailing address or email address listed on the Department's website. The request for ADR must state the nature of the dispute, the parties involved, any pertinent or impending deadlines, whether all parties agree to refer the dispute to ADR, proposed times and locations, and the preferred type of ADR procedure.

(2) If an applicant or other interested person is uncertain whether to propose the possible use of ADR or is uncertain about any particular aspect of a possible proposal, they should contact the Department's Dispute Resolution Coordinator to discuss the matter.

(3) The ADR Coordinator will notify the person requesting the ADR procedure that an ADR decision is not binding on the state and that the Department will mediate in good faith.

(4) The ADR Coordinator will provide copies of the request received, and all other materials received, to any other parties to the dispute.

(5) The Dispute Resolution Coordinator shall provide a copy of the ADR request to the Executive Director and General Counsel and other applicable internal parties.

(6) The Dispute Resolution Coordinator will assess whether ADR would assist in fairly and expeditiously resolving the dispute and will notify all affected parties within seven calendar days of receiving an ADR request of one of the following determinations:

(A) If the parties, including the Department, cannot agree on whether an ADR procedure should be used or on the particulars of the ADR procedure, the Dispute Resolution Coordinator will notify both parties that agreement to utilize ADR could not be reached;

(B) If the Dispute Resolution Coordinator determines not to refer the dispute to ADR, the Dispute Resolution Coordinator shall state the reasons in writing; or

(C) If the Dispute Resolution Coordinator decides to refer the dispute to ADR, the date for the selected ADR process will be included in the notice.

(f) Selection of Mediator or Impartial Third Party.

(1) The Department designates the State Office of Administrative Hearings ("SOAH") as the primary mediator for Department ADR requests as required by Tex. Gov't Code §2306.082(b).

(2) If the Department and SOAH agree to utilize an Impartial Third Party other than one so designated through SOAH, an Impartial Third Party will be identified.

(3) The selection of an Impartial Third Party is subject to the approval of the parties to the dispute. If the parties do not suggest potential third parties, the Dispute Resolution Coordinator will provide a list of potential third parties from which to choose. If all parties agree to use an Impartial Third Party who charges for ADR services, then the costs for the Impartial Third Party shall be apportioned equally among all parties, unless otherwise agreed by the parties.

(g) Voluntary Agreement. All parties participating must have the authority to reach an agreement to make a final recommendation to resolve the dispute. The Executive Director will abide by an agreed upon solution to the dispute and either approve that agreement or offer that recommendation to the Board, if Board authorization is needed. The decision to reach agreement is voluntary. If the parties reach a resolution and execute a written agreement, the agreement is enforceable in the same manner as any other written agreement of the same nature with the State. A written agreement to which the Department is a signatory resulting from an ADR procedure must be approved by the appropriate authority.

(h) A written agreement to which the Department is a signatory resulting from an ADR procedure is subject to Tex. Gov't Code Chapter 552 concerning open records.

(i) Confidentiality of Records and Communications. The confidentiality of the communications, records, conduct, and demeanor of an impartial third party and parties in an ADR procedure are governed by Tex. Gov't Code §2009.054.

(j) The Department may share the results of its ADR process with other governmental bodies, and with the Center for Public Policy Dispute Resolution at the University of Texas School of Law, which may collect and analyze the information and report its conclusions and useful information to governmental bodies and the legislature.