CITY OF SEQUIM

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January 23, 2020

Michael A. Spence, Attorney at Law
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle WA 98154-1154

Re: Jamestown S'Klallam Permit Application

Dear Mr. Spence:

I am in receipt of your January 15, 2020 letter to the Sequim City Council[1], with a copy to me. In that letter you assert a variety of issues as follows: 1) the Community Development Director must resolve any "question" as to the appropriate procedure in favor of the higher procedure type, 2) the Jamestown S'Klallam Tribe's application "requires" City council review and approval, and 3) the Community Development Director is "misunderstanding or … consciously ignoring express language" in the Sequim Municipal Code. I will address them in order.

First, as you correctly state, SMC 20.01.040(B) requires the Community Development Director to follow the procedure for a higher permit type review process if there is a "conflict" as to the proper procedure for processing a permit application. This code language is a common provision in local government regulation and is meant to apply when there is an internal inconsistency or conflict within the code.[2] In such cases, the director is obligated to follow the higher procedure to ensure adequate procedural due process. Contrary to your assertion, merely claiming a different process should be used does not qualify as a "question" or conflict under this code, or frankly any. If, as you claim, the higher procedure must be followed anytime someone "questions" or disagrees with a process, applications would be hindered by unnecessary delay tactics and subject local jurisdictions to delay claims leading to an absurd result and potential municipal liability for delay damages.

[1] I am sure that you are aware of RCW 35A.13.120 regarding council interference with administrative functions and that you are not encouraging Council to interfere with administrative operations.

[2] As you should be aware, this is a common provision in local government regulations and if you can identify jurisdictions that interpret the cited code in the way you describe, I would appreciate seeing that information.

Second, you claim that the Tribe's application requires City Council review, and I respectfully disagree. Staff and I, with other legal consult, have carefully vetted this issue and your arguments, and we are confident that the only appropriate process for the Tribe's application is the A-2 process – an administrative decision made by the Community Development Director. As you know, the City views this application as administrative because it consists of a building permit[3] and SEPA[4] with design review[5] and, therefore, considering the mandates under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA), cannot be treated any differently than any other commercial building permit processed by the City. Despite the language in our code, which was last updated in 1997, case law has made clear that singling out certain people because of the type of their ailment or facilities based on the ailments they treat is prohibited under the above-referenced acts. *See,* e.g., *New Directions Treatment Services v. City of Reading,* 490 F.3d 293 (3d Cir. 2007) (statute unlawfully singled out methadone clinics – and thereby patients – for different treatment); *Comprehensive Addiction Treatment Services, Inc., v. City and County of Denver*, 795 P.2d 271 (1989) (addiction treatment center was an "office" under zoning ordinance like other medical offices and permit could not be denied on theory that the "primary purpose" was dispensing methadone). To date, you have not responded to the City's ADA/RA concerns, and these concerns are one strong reason why the City cannot apply a C-2 (council) process for evaluating the Tribe's permit.

Finally, I am disappointed in your admittedly unfounded allegations that City staff are "misunderstanding or ... consciously ignoring express language in the code". These statements are simply false, unprofessional and irresponsible. As you are aware, planning officials routinely speak with applicants regarding potential projects, often as "drop-in" or other unscheduled contact long before a formal application comes in. The Tribe is no different. City staff treated the Tribe with the same courtesy and respect as we treat all applicants. No one other than your clients are making such allegations[6] and I believe it is inappropriate for you to do so given you have no basis for those statements. If you do in fact get actual information demonstrating such bias or other improper behavior, thank you for agreeing to promptly turn it over to me so I can address it accordingly; but frankly, I am surprised that you would make such remarks without one shred of evidence. Be advised I have no patience for such behavior.

Regarding our alleged failure to respond to your October 10, 2019 letter, as you are well aware, we do not "formally" commit to a particular process for a specific project

[3] Building permits are an A-1 one process.
[4] SEPA is an A-2 process
[5] Design review is not a permit type, but instead an administrative process to ensure good site design and building design are considered in the review process.
[6] Save Our Sequim Facebook members are routinely making baseless accusations regarding the professional integrity of City staff.

until the application has been formally submitted.[7] The reasons for this are obvious: What is actually submitted may be different than what staff expected. If we formally commit to a process, we run the risk of identifying – and being committed to - an inappropriate process in relation to the project as actually submitted. Surely you understand that it would be easy for an unscrupulous developer to present a project during a pre-application meeting, get approval for a less formal procedure, and then actually submit a project that would have required a more formal procedure. Here, Mr. Simkosky reasonably believes the application will be processed as discussed in the pre-application conference because, presumably, the project is consistent with what was discussed at that meeting. As you know, there is nothing improper about an applicant expressing confidence in the procedure under such circumstances, which is at the heart of Washington's vesting laws.

Because of the preceding, I find it difficult to believe that a judge would ignore federal ADA/RA/discrimination law in favor of State Growth Management policies, or that our process is unlawful. If you have on-point case law supporting your propositions, I would like to see it so we could discuss the issue further and perhaps come to an amicable resolution.

Enclosed, please find Mr. Berezowsky's written determination as to the process that will be applied to the Tribe's application. It provides a more thorough analysis of the issues than was discussed here. If you would like to discuss this further, please feel free to contact me at 360.681.6611.

Kind regards,

Kristina Nelson-Gross
City Attorney

KNG:elh
Enc: as stated

[7] Despite City staff stating that the *expected* procedure will be an A-2 process based upon conversations with the applicant, we have consistently held the position that the procedure cannot be confirmed until we receive an actual application.