CITY OF SEQUIM

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NOTICE OF DETERMINATION OF PROCEDURE TYPE FOR FILE NO. CDR20-001 JAMESTOWN S'KLALLAM TRIBE MAT CLINIC BUILDING PERMIT, SEPA & DESIGN REVIEW

DATE: 1/24/2020

Introduction: According to the Sequim Municipal Code (SMC)20.01.040(B) "[t]he director shall determine the proper procedure for all development applications. If there is a question as to the appropriate type of procedure, the director shall resolve it in favor of the higher procedure type letter as defined in SMC 20.01.030."

The act of classifying an application is a Type A-1[1] action and such permit classification "... shall be subject to reconsideration and appeal at the same time and in the same way as the merits of the application in question." (SMC 20.01.040(A))

Decision: After reviewing the Medical Assisted Treatment (MAT) clinic application and supporting materials submitted by the Jamestown S'Klallam Tribe, I find that there is no question as to the appropriate type of procedure the application will be subjected to, and therefore I find the permit, as submitted, falls under the City's A-2[2] permit process. The Jamestown S'Klallam Tribe is proposing to build a medical clinic in the River Road economic Opportunity Area (RREOA)[3] According to Table 18.33.031 Business and Employment District Uses "[a]mbulatory and outpatient care services (physicians, outpatient clinics, dentists" are uses that are permitted outright[4]. Therefore, the Tribes proposed Medically Assisted Treatment (MAT) clinic is a permitted use because it meets the definition of a medical clinic in the City's zoning code[5]. My decision is based on a review of the City's code, state and federal law and past practices.

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[1] A Type A-1 process is an administrative process that does not require public notice (SMC 20.01.030(B)).
[2] A Type A-2 process is an administrative process which requires public notice (SMC 20.01.030(B))
[3] The City's Economic Opportunity Areas were designated in 2015, well before the passage of President Trump's Tax and Jobs Act that created the process by which each State Governor could designate Economic Opportunity Zones. The RREOA provides no financial or tax incentive or benefit to developers or investors in the zoning district.
[4] A permitted (P) use is one that is permitted outright, subject to all the applicable provisions of this title and relevant portions of the Sequim Municipal Code
[5] "Clinic" means a building designed and used for the diagnosis and treatment of human outpatients excluding overnight care facilities (SMC 18.08.020).

Discussion: The Tribe's MAT clinic application consists of a building permit, design review and State Environmental Policy Act (SEPA). A building permit is a Type 1[6] application, SEPA review is considered a Type 2[7] application, therefore, the Type 2 process is used for the subject application.[8] The C-1, C-2 or C-3 permit types in Table 2 below do not contain a process within which the Tribes MAT clinic fits, unless one considers the application to be a "special use".[9] As discussed below, the subject application is not a special use or Essential Public Facility (EPF) because, first, the facility is not an "in-patient substance abuse facility"[10], second, it is not "difficult to site", and third, the courts have a long history of requiring local government to treat drug treatment clinics and offices as they treat other medical clinics and offices.

Table 2

Application Type					
Type A-1	**Type A-2**	**Type B**	**Type C-1**	**Type C-2**	**Type C-3**
Building and other construction permit	SEPA determination	Variances	Major use permit	Comprehensive plan amendment	Final subdivision map
Sign permit	Minor subdivision		Shoreline permit	Special use permit	Dedication of public easements and rights-of-way
Boundary line adjustment	Minor conditional use permit			SMC land use related text amendment	Acceptance of public improvement
Minor amendments to PRDs	ESA and wetland permits			Site-specific rezone	
Home occupation				Planned residential developments Major amendments	
Street use				Annexation	
ESA, shoreline and wetland exemptions				Street vacation	
				Preliminary major subdivisions	
				Preliminary binding site plan	

Arguments have been made that the Tribe's proposed MAT clinic is an essential public facility and, therefore, should be processed according to the City's C-2 permitting process. The theory is that the City's code lists "alcoholism or drug treatment centers" as uses "[t]he council may permit … in districts from which they are now prohibited by this title".[11] Because the SMC does not include a definition of "drug treatment centers" one needs to look to the applicable sections of the Revised Code of

[6] SMC 20.010.020T. "Type A-1 process" means a process which involves an application that is subject to clear, objective and nondiscretionary standards that require the exercise of professional judgment about technical issues and therefore does not require public participation

[7] SMC 20.010.020U. "Type A-2 process" means a process which involves an application that is subject to objective and subjective standards that require the exercise of limited discretion about non-technical issues and about which there may be a limited public interest.

[8] Design review is not a permit, but instead a process to provide guidance and standards for the site and structural development of commercial, industrial, mixed-use and multifamily projects …" SMC 18.24.010

[9] Special uses are treated similarly to essential public facilities in SMC 18.56

[10] WAC 365-196-550viii lists "in-patient facilities, including substance abuse facilities as EPFs.

[11] SMC 18.56.030

Washington (RCW) and the Washington Administrative Code (WAC) for an understanding of what the legislation contemplated this type of essential public facility to be.

According to WAC 365-196-550(a) "[t]he term "essential public facilities" (EPF) refers to public facilities that are typically difficult to site." WAC 365-196-550 lists the types of facilities that are considered essential public facilities in the state. The use most like the SMC referenced "drug treatment centers" is "[i]n- patient facilities, including substance abuse facilities;..."[12] (emphasis added). According to the submitted application the proposed MAT clinic will not provide in-patient services, but instead will provide outpatient treatment typical of other types of medical clinics and/or offices. The fact that the MAT clinic will treat recovering opioid addicts is irrelevant to whether the facility is an EPF under state or local law.

Furthermore, RCW 36.70.200(1) defines EPFs as "those facilities that are difficult to site,..." and it is difficult to conclude the siting a 16,700 square foot medial clinic is "difficult". The City has approved a number of medical clinics over the past 30 years with no difficulty and, except for the outcry by some members of the public, there is no evidence that this drug treatment clinic is more difficult to site than any of the medical clinics previously approved by the City[13] or any other office or commercial building of a similar size, such as Rite Aid (17,272 sq. ft.) or Walgreens (14,470 sq. ft) or the much larger Jamestown Family Clinic[14] (~35,000 sq. ft.).

Finally, even if one could conclude that the proposed MAT clinic was actually an essential public facility subject to the City's conditional use process, at best the City could only condition the approval of the project because state law prohibits local government from precluding the siting of essential public facilities[15] and/or imposing unreasonable conditions that make the project impracticable.[16]

Analysis of the city's and state's essential public facilities language leads me to conclude that the proposed 16,700 square foot MAT clinic does not meet the definition of an EFP and is, instead, only distinguished from any other clinic or office providing medical services by way of the nature of the patient's medical condition and medical therapy.

To further illustrate, SMC 18.56.030(J), upon which some opponents rely states as follows, emphasis added:

> The council may permit the following uses in districts ***from which they are now prohibited*** by this title:
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> J. Group homes, ***alcoholism or drug treatment centers***, detoxification centers, work release facilities for convicts or ex-convicts, or other housing serving as an alternative to incarceration with 12 or more residents.

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[12] WAC 365-196-550(viii)

[13] File Reference number DRB16-001 (Design Review Application) & SEPA 16-006 (SEPA Checklist), Sequim Retina Properties, June 3, 2016; Notice of Environment Review, SEPA File# 09/001, Mitigated Determination of Non-Significance, Jamestown S'Klallam Tribe, 02/10/09; SEPA Checklist, Olympic Memorial Hospital, Sequim Outpatient Clinic, 1988.

[14] Interestingly, the Tribe has advised that this clinic has been using medically assisted treatment at this facility for at least the past 18 months and merely seeks to consolidate services.

[15] RCW 36.70A.200(5)

[16] Cascade Bicycle, 07-3-0010c, FDO at 17.

Notably absent from the opponents' analysis is the simple fact that the City, despite the language in its code, is prevented from enforcing such prohibitions because case law has made clear that jurisdictions cannot discriminate against medical facilities by virtue of what type of medication is prescribed.

For example, arguing that clinic's drug treatment services are distinguishable from diabetes or cancer clinics is a position contrary to well settled case law. As a result of multiple decisions over the past twenty-years, such as the Third Circuits decision in *New Directions*, municipalities are prohibited to treat drug treatment facility's (i.e. methadone clinics) any differently than "ordinary" medical clinics for zoning purposes.[17]

Other cases supporting equal treatment of medical clinics regardless of the actual "treatment" method being provided at the clinic demonstrates this fact.

> *An addiction treatment center, which was licensed for detoxification, withdrawal, or maintenance of addicts, was permitted "office" under the zoning ordinance like other medical offices, in which dispensation of drugs was viewed as part of services provided, and the center could not be denied use permit on theory that its "primary purpose" was dispensation of methadone. Comprehensive Addiction Treatment Services, Inc. v. City and County of Denver, 795 P.2d 27 I (Colo. Ct. App. 1989).*
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> *A methadone clinic is a valid use under the authorization for offices for professional persons. Since the methadone clinic has doctors, nurses, and other licensed professionals who assist in physical and mental treatment of the persons in the program, it constitutes a professional office. While excluded as a clinic due to the insufficient number of doctors, it is a permitted use without necessity of any special-use permit. A resolution by the council stating their interpretation of the zoning restriction is not binding by the court as an attempt to regulate judicial decisions. Village of Maywood v. Health, Inc., 104 111. App. 3d 948, 60 111. Dec, 713,433 N.E.2d951 (1st Dist. 1982).*
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> *A methadone maintenance treatment center for heroin addicts in a business district is proper as within the classification of professional offices. Where the treatment center operates only during restricted hours and for nonresident patients, it does not fall outside the classification by being a hospital and constitutes reasonable use within the personal services provisions. A resolution by the council against any treatment center is not effective. L & L Clinics, Inc. v. Town of Irvington, 189 N.J. Super. 332, 460 A.2d 152 (App. Div. 1983)*[18].

Additionally, in Georgia, a court held that the Americans with Disabilities Act (ADA) prohibits local governments from administering licensing and zoning permit procedures in a manner that subjects persons with disabilities to discrimination based on their disability.[19]

In Maryland, Baltimore County's special methadone policy that required methadone programs to undergo a public hearing rather than locate as of right as a medical office was found to have a disproportional

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[17] *New Directions Treatment Services v. City of Reading*, 490 F 3d. 293 (3rd Cir. 2007); *Bay Area Addiction Research and Treatment v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999); *Comprehensive Addiction Treatment Services, Inc. v. City and County of Denver*, 795 P.2d 271 (Colo Ct. App. 1989); *Village of Maywood v. Health, Inc.*, 104 Ill. App. 3d 948, 60 Ill. Dec.713, 433 N.E.2d 951 (1st Dist. 1982)

[18] WESTLAW, Ordinance Law Annotations, Narcotics: Illegal Substances, September 2018 Update

[19] Pack v. Clayton County, Georgia, 1993 WL 837007 (N.D. Ga. 1993)

burden on a protected class of individuals because no other medical facility was required to undergo such a process.[20]

In *THW Group LLC v. Zoning Board of Adjustment*, 86 A 3d. 330 (Pa. Commw. Ct. 2014) following the Third Circuit's holding in *New Directions*, the court acknowledged that, although the courts might sympathize with the concerns of the surrounding community, municipalities are not free to apply different zoning standards to methadone clinics than to other ordinary medical clinics.

Given the clear direction of the courts across the United States, local government cannot treat drug treatment clinics any differently than they treat other medical offices or clinics. When a government has rules or processes that treat drug treatment clinics and offices differently than other clinics, the courts are likely to find such rules and procedures to be facially discriminatory because they have no rational basis and are, therefore, *per se* violations of the ADA and, perhaps, Section 504 of the Rehabilitation Act of 1973. Additionally, because of current federal court decisions prohibiting local governments from treating drug treatment clinic differently than other medical clinics, it stands that, if the proposed MAT clinic is an EPF, then all medical clinics in the City are also EPFs. This, of course, would be an absurd interpretation of Washington State's EPF statute.

In addition to case law, the City of Sequim has historically reviewed medical clinics and offices under the A-2 administrative review process[21]. For the City to now divert from its historic permitting process to intentionally treat the proposed MAT clinic differently than other medical clinics could be viewed as intentional discrimination.

In *Innovation Health Systems v. City of White Plains*, in which an out-patient alcohol and drug treatment program claimed the city had engaged in intentional discrimination by denying it a building permit to locate in a business zone, the Second Circuit relied on evidence that the city had departed from both substantive and procedural norms in denying the building permit and affirmed the lower court's issuance of an injunction, concluding that Innovative Health Systems would prevail on the merits. This case cautions jurisdictions to not make land use decisions that are not based on the jurisdiction's zoning code. The City of White Plains denial of Innovative Health Systems' building permit was found by the Second Circuit to be based on "...little evidence in the record to support the decision on any ground other than the need to alleviate the intense political pressure from the surrounding community brought on by the proponent of the drug-and alcohol- addicted neighbors."[22] Similarly, a 1998 Washington State Supreme Court decision, *Mission Springs v. City of Spokane*, relying upon a Ninth Circuit court decision, held that denying any permit for which the applicant has met the relevant criteria places a jurisdiction and its individual councilors/commissioners at risk of liability for procedural and substantive equal protection violations.

Finally, it has been suggested that one sentence in SMC 20.01.020 should be the determining factor elevating the subject application from the A-2 process to the C-2 process. This position is based on an incorrect analysis and understanding of the land use process in general and the City's land use regulations in particular. The language cited from the definition section of SMC 20.01.030W states:

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[20] Smith-Berch, Inc. 68 F. Supp.2d at 621

[21] File Reference number DRB16-001 (Design Review Application) & SEPA 16-006 (SEPA Checklist), Sequim Retina Properties, June 3, 2016; Notice of Environment Review, SEPA File# 09/001, Mitigated Determination of Non-Significance, Jamestown S'Klallam Tribe, 02/10/09; SEPA Checklist, Olympic Memorial Hospital, Sequim Outpatient Clinic, 1988.

[22] Innovative Health Systems *v.* City of White Plains, 931 F. Supp. 222 at 49 (S.D.N.Y. 1996)

"[t]ype C-1, C-2, C-3 processes" means processes which involve applications that require the exercise of substantial discretion and about which there is a broad public interest"[23](emphasis added). While there is no question that the subject project has generated "public interest", the subject application also provides little opportunity to exercise "substantial discretion" due to the fact that the application consists of a building permit which is ministerial, design review which is not listed in the table of application types, but nevertheless required, and SEPA which has its own procedural and substantive limitations and does not offer "substantial discretion. Therefore, how would this definition be applied? It appears some only want the "broad public interest" words to be considered while ignoring the "substantial discretion" language. Frankly, the theory that the degree of "public interest" should be used to determine what type of process a permit should be subjected to falls apart when examined closer. For example, there have been plenty of amendments to the comprehensive plan and/or zoning ordinance that generated little public interest, but still went before the City Council for a decision. Because these amendments did not generate public interest should they have been decided by some other decision-making body such as a hearings examiner or staff? The answer should be, of course not, but this example illustrates the fallacy of such an idea.

It is difficult to imagine the City being able render a decision that wasn't arbitrary and capricious if definitions are used to establish procedural or regulatory guidance and/or policy. How would definitions be calibrated to be consistent, predictable and fairly applied over time? One can only imagine the chaos that would occur when an application, that is being processed, suddenly faces a local groundswell against it. This type of chaos is not supported by Washington State land use law which "requires counties and cities planning under the act to adopt procedures for fair and timely review of project permits under RCW36.70B.020(4),..."[24] to ensure local permitting procedures implement goal 7 of the Growth Management Act.[25] State law requires local governments to create land use permitting processes that achieve consistency and order in procedural requirements, something that is not possible if we relied on definitions instead of predetermined standards and procedures to guide our decision-making process as required by law. [26].

Although definitions are helpful to understand the meaning and intent or certain terms, definitions are not intended to serve in place of a jurisdiction's clear procedural policy. The City's procedural policy directing the "typing" of permit applications is found in SMC 20.01.040 and Table 2, SMC 20.01.030 and is consistent with WAC 365-196-845 by categorizing permits as: (i)Permits that do not require environmental review or public notice, and may be administratively approved; (ii) Permits that require environmental review, but do not require a public hearing; and(iii) Permits that require environmental review and/or a public hearing, and may provide for a closed record appeal. The permit "typing" process outlined in WAC 365-196-845 recognizes jurisdictions administer many different types of permits and these permits can generally be categorized into groups based on process. Each process is assumed to attract a certain level of public interest, although that is just as assumption and not a rule. The permit "typing" process required by the above referenced WAC does not suggest definitions should be used in the permit typing process.

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[23] SMC 20.01.030W

[24] WAC 365-196-845(1)

[25] RCW 36.70A.020(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability

[26] WAC 365-196-845 Local project review and development agreements sets forth the permit process requirements and contains no mention of using a jurisdiction's definitions in the permitting process.

Finally, isolating a portion of one definition from the statute and using it to base a procedural decision on is contrary to the canons of statutory interpretation which requires the reader to give meaning to every word and to consider all parts of the statute together.

Conclusion: Based on the above discussion, I find the Jamestown S'Klallam Tribe's MAT clinic application will follow the A-2 processing path per SMC 20.01.090, design review pursuant to SMC 18.24.033 and SEPA. This process is consistent with the City's past processing practices for other medical clinics and offices and compliant with the ADA and federal case law.

A decision on an A-2 permit application is made by the Director after the application has been reviewed by the City Engineer, Public Works Director, Police Chief and Fire District 3 for consistency with SMC 18.24.

Appeals: Appeal of Administrative Interpretations and Decisions. Administrative interpretations and administrative Type A-1 and Type A-2 decisions may be appealed, by applicants or parties of record, to the hearing examiner per SMC 20.01.240(A). Appeals must be accompanied by the required appeal fee in the amount of $600.00 (SMC 3.68)

Classification of an application shall be subject to reconsideration and appeal at the same time and in the same way as the merits of the application in question (SM 20.01.040).

01/24/20
Date

Barry Berezowsky, Community Development Director