OFFICE OF THE HEARING EXAMINER

IN AND FOR THE CITY OF SEQUIM

SAVE OUR SEQUIM, a Washington 501(c)(4) corporation Petitioner, vs. CITY OF SEQUIM, a municipal corporation, Respondent	File No. CDR20-001 NOTICE OF APPEAL

This matter involves the appeal of a proposal to locate a drug rehabilitation facility on real property commonly known as 526 S. 9th Ave., Sequim, WA 98382. This appeal is being filed by Save Our Sequim, a 501(c)(4) corporation in good standing in the State of Washington ("SOS"). SOS is challenging the Director's Report and Staff Decision dated May 15, 2020, in regards to the proposed "Jamestown S'Klallam Tribe Outpatient Clinic" Design Review Application, filed herewith as City of Sequim File No. CDR 20-001. SOS also appealed a companion determination entitled the "Notice of Determination of Procedure Type for File No CDR20-001" on February 12, 2020. All facets of that appeal are incorporated herein by reference.

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1. The Decision Being Appealed:

The Director's Report and Staff Decision dated May 15, 2020, in regards to the proposed "Jamestown S'Klallam Tribe Outpatient Clinic" Design Review Application, filed herewith as City of Sequim File No. CDR 20-001, and all attachments thereto. (the "Substantive Decision") SOS is also appealing the "Notice of Determination of Procedure Type for File No CDR20-001" on February 12, 2020 (the "Procedural Determination").

2. Name and Mailing Address of Appellant and his/her interest(s) in the matter:

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Att: Michael Spence
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Petitioner Save Our Sequim ("SOS") is a 501(c)(4) corporation in good standing in the State of Washington. SOS is supported by over 2,500 residents of Sequim and the surrounding area and representatives have been heavily and intensely involved in the public process surrounding the proposed project since it was first announced on May 6, 2019. Representatives of SOS have provided significant and substantive oral and written testimony in public hearings of the Sequim City Council and have been engaged in extensive advocacy outside of this setting. SOS is not categorically opposed to the siting of a drug rehabilitation facility serving the local community somewhere in the Sequim area, however SOS believes that the proposed location for a regional drug rehabilitation facility is inappropriate in this location for reasons that will be set forth in this appeal. All administrative remedies have been exhausted to date.

3. The specific reasons why the appellant believes the decision to be wrong.

A. The proposed project does not qualify for Sequim's A2 permitting process.

The City has committed error by classifying the proposed project as eligible for the City's A-2 administrative permitting process. In public statements prior to filing the application, the Applicant described the proposed project as a clinic that: (1) addresses Clallam County's opioid problem; (2) uses a comprehensive treatment strategy including physical, mental and dental services; (3) includes a MAT clinic and a 16-bed inpatient psych hospital; and (4) provides chemical dependency counseling, behavioral health, primary care and childcare assistance. Based on this description, the City [1] erroneously believes that the proposed project is a permitted use in Sequim's RREOA District, and that it qualifies for the Type A-2 permitting process, in which the City staff is the final decision-maker.

In the application, the project is described as:

> "a 17,093 square foot outpatient clinic designed to provide a wide range of addiction treatment services to those in the local and surrounding Sequim community. The Building will also offer childcare and provide social services to patients to help facilitate their recovery." (application permit set. P. 1)

Physically, the proposed facility will feature three exam rooms, twelve counseling rooms, four large group rooms that can open to the exterior, three operatories, a pharmacy, three dosing rooms, a "childwatch" area, a conference room and administrative facilities.[2]

Despite these features, the City simply described the project as a "medical clinic" in the Procedural Determination.

In the Substantive Decision, the City acknowledged that the project was much more than a "medical clinic", expressly stating that the project contains the following features:

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[1] Representatives of the City's Department of Community Development have publicly taken this position even before the application was filed

[2] Child Care Centers and Medical Laboratories are conditional uses in the RREOA District.

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> "a medication assisted treatment program which offers FDA-approved dosing, primary care services, consulting services, dental health services and childwatch services while clients are seen." (Substantive Decision, p. 1)

Despite this wide array of services, some of which require highly specialized federal or state licenses, and which operate under specific, detailed and rigorous guidelines, the City has determined that this project is simply a "medical clinic", which the City believes makes it eligible for the A-2 permitting process. SMC 20.01.020(U) describes this process as "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". SMC 20.01.030(A), Table 1 provides that the City staff is the final decision-making body under this process.

The City of Sequim has committed error by considering the project as simply a "medical clinic" and by processing it under the A-2 permitting process, which is reserved for projects that require limited discretion about non-technical issues and which generate limited public interest. This is not that project.

The appropriate process for this project is the City's C-2 permitting process, which applies to "applications that require the exercise of substantial discretion and about which there is a broad public interest" (SMC 20.01.020(W). SMC 20.01.030 Table 1 provides that the City Council is the final decision-maker on C-2 projects.

2. <u>The proposed rehabilitation facility is not a permitted use in Sequim's RREOA District</u>

As pointed out above, the project will contain a "wide range of addiction treatment services", including childcare, social services, exam rooms, counseling room, large group rooms, operatories, a pharmacy, dosing rooms and a "childwatch" area. In addition, Phase 2 of the project, which is already partially funded by the State of Washington, includes a 16-bed

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inpatient facility. The City has known about this phase from the very beginning, but has chosen to completely ignore the fact that inpatient facilities are expressly prohibited in the RREOA District.

As such, the project is much more than an outpatient medical clinic – it is a full-service drug rehabilitation/detoxification center, including social services, counseling rooms, operatories, a pharmacy, and a "childwatch" area, and which eventually will include an illegal inpatient facility. Drug rehabilitation or detoxification centers are not permitted uses in the RREOA District. The City of Sequim has committed error by considering this project as a "medical clinic" and assuming that as such, it is a permitted use in the RREOA District.

3. The project is an "Essential Public Facility", which requires City Council approval of an Essential Public Facilities and Special Property Use Permit.

As set forth above, the Applicant itself described the project as providing a "wide range of addiction treatment services", including child care, social services and counseling to residents of Sequim and beyond, which the City acknowledged. A project of this scope and reach clearly meets the inclusive definition of an "essential public facility" contained in RCW 36.70(A)200(1), which provides as follows:

> "… those facilities that are typically difficult to site, ***such as*** airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, regional transit authority facilities as defined in RCW 81.112.020, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.RCW." RCW 36.70A.200(1). (Emphasis added)

SMC 18.56.060 provides that Essential Public Facilities can only be approved after the applicant obtains an "Essential Public Facilities and Special Property Use Permit", which must

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be approved by the Sequim City Council through the C-2 permitting process. The City of Sequim has committed error by failing to require an Essential Public Facilities and Special Property Use Permit for this project.

4. The proposed project cannot satisfy the robust and rigorous permit criteria required to site Essential Public Facilities in the City of Sequim.

SMC 18.56.060 imposes a rigorous and robust set of criteria that must be satisfied before the City Council can approve an Essential Public Facility. Those criteria are as follows:

> A. There shall be a demonstrated need for the essential public facilities and/or special use within the community at large which shall not be contrary to the public interest.
>
> B. The essential public facility and/or special use shall be consistent with the goals and policies of the comprehensive plan, and applicable ordinances of the city.
>
> C. The council shall find that the essential public facility and/or special use shall be located, planned and developed in such a manner that the essential public facility and/or special use is not inconsistent with the health, safety, convenience or general welfare of persons residing or working in the city. The council's findings shall address, but not be limited to the following:
>
> > 1. The generation of noise, noxious or offensive emissions, or other nuisances which may be injurious or detrimental to a significant portion of the city.
> >
> > 2. The availability of public services which may be necessary or desirable for the support of the special use. These may include, but shall not be limited to, availability of utilities, transportation systems, including vehicular, pedestrian, and public transit systems, and education, police and fire facilities, and social and health services.
> >
> > 3. The adequacy of landscaping, screening, yard setbacks, open spaces or other development characteristics necessary to mitigate the impact of the special use upon neighboring properties.

The City has committed error by failing to demonstrate a need for the project within the community at large that it not contrary to the public interest. The City has further committed error by finding that the project is consistent with the Comprehensive Plan and

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applicable City ordinances. The City has committed additional error by finding that the project is not inconsistent with the health, safety, convenience or general welfare of persons residing or working in the city.

5. The proposed MDNS conditions fail to address the probable significant environmental impacts to public services associated with the project.

As part of the Decision, the City, presumably in coordination with the Applicant, has imposed a series of MDNS conditions designed to address the impacts of the project on public services. These conditions include but are not limited to a monitoring and evaluation program, a "contingency plan", a $250,000 bond, an agreement to reimburse the City for lost tax revenue in the event the property is taken off of the tax rolls, a "good neighbor" agreement, a "social services navigator", a ramp-up plan, a transition plan, a transportation plan, a limited waiver of sovereign immunity, a set of guidelines for patient conduct, on-site security, a complaint line, a plan to mitigate graffiti, a ban on on-site camping, and fencing. The City has committed error by assuming that these conditions adequately address the probable significant adverse environmental impacts of the project on public services in the Sequim area.

4. The Desired Outcome or Changes to the Decision

Petitioner SOS respectfully requests the following relief from the Examiner:

1. An Order striking the Procedural Determination and declaring it invalid and ultra vires.
2. An Order remanding the Procedural Determination back to the City, with instructions to process the application under the C-2 permitting process.
3. An Order finding that the proposed project as described by the Applicant is much more than a simple "medical facility", and that as such, the project fails to qualify as a permitted use in the RREOA District.

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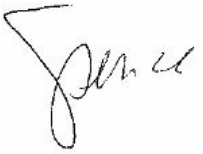
4. An Order finding that the proposed project as described by the Applicant is an Essential Public Facility as defined in RCW 36.70A.200(1).
5. An Order finding that as an Essential Public Facility, the project must obtain an "Essential Public Facilities and Special Property Use Permit" from the City Council under SMC 18.56.060.
6. An Order finding the project as described by the Applicant fails to satisfy the criteria under which an Essential Public Facility can be approved, as set forth in SMC 18.56.060.
7. An Order finding that the proposed MDNS conditions fail to satisfy the impacts of the project on public services.
8. Any other relief the Examiner deems just and equitable.

DATED this 5th day of June, 2020.

HELSELL FETTERMAN LLP



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OFFICE OF THE HEARING EXAMINER

IN AND FOR THE CITY OF SEQUIM

In re: NOTICE OF DETERMINATION OF PROCEDURE TYPE FOR FILE NO. CDR20-001 JAMESTOWN S'KLALLAM TRIBE MAT CLINIC BUILDING PERMIT, SEPA AND DESIGN REVIEW	File No.: CDR 20-001 NOTICE OF APPEAL

This matter involves an appeal of the Notice of Determination of Procedure Type for City of Sequim Department of Community Development File No. CDR20-001, involving a proposed drug rehabilitation facility on real property commonly known as 526 S. 9th Ave., Sequim, WA 98382 (the "Determination"). This appeal is being filed pursuant to Sequim Municipal Code (SMC) Section 20.01.240(A), which provides in part that, "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". To the extent it applies, it is also being filed pursuant to SMC Section 20.01.040(A), which provides that "The act of classifying an application shall be a Type

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A-1 action. 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."

1. The Decision Being Appealed:

Notice of Determination of Procedure Type for File No. CDR20-001, regarding the proposed Jamestown S'Klallam Tribe Mat Clinic Building Permit, SEPA and Design Review dated January 24, 2020. (the "Notice of Determination"). A copy of the Notice of Determination is attached as Exhibit "A" and incorporated herein by reference.

2. Name and Mailing Address of Appellant and his/her interest(s) in the matter:

Save Our Sequim
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Att: Michael Spence

The Petitioner Save Our Sequim ("SOS") is a 501(c)(4) corporation in good standing in the State of Washington. SOS is supported by over 2,500 residents of Sequim and the surrounding area and representatives have been heavily and intensely involved in the public process surrounding the proposed project since it was first announced on May 6, 2019. Representatives of SOS have provided significant and substantive oral and written testimony in public hearings of the Sequim City Council and have been engaged in significant advocacy outside of this setting. SOS is not categorically opposed to the siting of a drug rehabilitation facility serving the local community somewhere in the Sequim area, however SOS believes that the proposed location for a regional drug rehabilitation facility is inappropriate in this location for reasons that will be set forth in this appeal. All administrative remedies have been exhausted to date.

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3. The specific reasons why the appellant believes the decision to be wrong.

A. The administrative A-2 permitting process is inappropriate for this application because the proposed project meets the definition of an Essential Public Facility, which can only be approved by the City Council.

Essential Public facilities are defined in Washington's Growth Management Act as:

> "… those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, regional transit authority facilities as defined in RCW 81.112.020, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.RCW." RCW 36.70A.200(1). (Emphasis added)

SMC Chapter 18.56 governs the siting of essential public facilities within the City. SMC Section 18.56.040 requires an "essential public facilities and special property use permit" which is granted by the City Council before one can be sited in the City:

> 18.56.040 Permit required.
> Essential public facilities and special property uses shall be allowed within certain use zones after obtaining an essential public facilities and special property use permit granted by the city council. (Emphasis added)

The City's determination that the proposed project qualifies for the administrative A-2 permitting process is inconsistent with this legislation and is therefore in error.

B. The proposed project is not a permitted use in the RREOA District because it is more accurately described as an "alcohol or drug treatment center" and a "detoxification center", as opposed to a facility providing "ambulatory and outpatient care services (physicians, outpatient clinics, dentists)".

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Prior to filing their applications, the Applicant widely described the proposed project as the "Jamestown Healing Campus", a facility that "addresses this (opioid) problem and serves the health care needs of the North Olympic Peninsula community", the goal of which is to "decrease opioid overdoses and the illegal diversion of prescription drugs into the community" by "providing chemical dependency counseling, behavioral health, primary care and childcare assistance".

However, in response to community opposition by Appellant and others, the Applicant has attempted to rebrand the project as the "Jamestown S'Klallam Tribe Outpatient Clinic". In the actual application, the Applicant describes the proposed project as "a 17,093 square foot outpatient clinic designed to provide a wide range of addiction treatment services to those in the local and surrounding Sequim community. The Building will also offer childcare and provide social services to patients to help facilitate their recovery." Physically, the proposed building will feature three exam rooms, twelve counseling rooms, a pharmacy, three individual dosing rooms, four large group rooms that can open to the exterior and a conference room with administrative facilities. It will also feature three "operatories", a bariatric exam room, a "nurse station lab" and a "child watch" area.

Appellants submit that the proposed project as described is an "alcoholism or drug treatment center", or as a "detoxification center". Under SMC 18.56.030(j), these uses can only be permitted by the City Council. In addition, two of the proposed uses of the facility - laboratories and child care centers - are listed as conditional uses in the RREOA District

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under SMC 18.33.031. As such, the City's determination that this project qualifies for the administrative A-2 permitting process is erroneous.

C. The City's conclusion that the proposed project is exclusively an 'outpatient treatment facility' is incorrect and not supported by the facts or the law.

Prior to filing the applications, the Applicant widely promoted the concept that a 16-bed "inpatient evaluation and treatment psych hospital" will be included in a 'second phase' of the proposed project. This notion is consistent with the Applicant's state funding, which includes funds dedicated to this second phase of the project. The Applicant actually admits this fact in response to Question 7 in their Environmental Checklist, stating that ".... In the future facility expansion or additional services may be added to the residual site, if the needs arise."

Despite this funding provision and despite this admission by the Applicant, the City believes that this project is exclusively an 'outpatient clinic'. This decision is erroneous because of the direct link between the first phase outpatient facility and the second phase inpatient facility. Inpatient facilities are not a permitted use in the RREOA District under SMC 18.33.031. Piecemeal review of land use decisions is impermissible where a series of interrelated steps constitutes an integrated plan. The City's conclusion that the proposed project is only an 'outpatient facility' is therefore in error.

D. The City's conclusion that the proposed project is not 'difficult to site' is incorrect and not supported by the facts or the law.

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3. That the Examiner enter finding of facts that the proposed project also includes a child care center, a laboratory and an inpatient facility, none of which are permitted uses in the RREOA District.

4. That the Examiner enter findings of fact and conclusions of law that the City is not bound to the A-2 permitting process or to the substantive administrative approval by the case law cited in the Determination.

5. That the Examiner remand the Determination back to the City with instructions to process this application under the C-2 permitting process, or under any other process that requires City Council approval.

6. Any other relief the Examiner deems to be just and equitable.

DATED this 12th day of February, 2020

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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

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[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:
>
> 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.

---

[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).*
>
> *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).*
>
> *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).

01/29/20
Date

Barry Berezowsky, Community Development Director