THE HEARING EXAMINER OF THE CITY OF SEQUIM

In re: Consolidated Administrative Appeal of May 15, 2020 Staff Report and Director's Decision; Notice of Determination of Procedure Type and MDNS for Jamestown S'Klallam Tribe Outpatient Clinic.	File Nos. CDR 20-001; CBP 20-0001 JAMESTOWN S'KLALLAM TRIBE'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND RELIEF REQUESTED

The City of Sequim (the "City") has issued a building permit and design review approval for the Jamestown S'Klallam Tribe's (the "Tribe") project to construct an outpatient clinic (the "Clinic" or the "Project") on property zoned to outright permit outpatient clinics (the "Property"). The Clinic will provide outpatient treatment and wrap-around services for residents of Clallam and Jefferson Counties battling Opioid Use Disorder ("OUD"). The cutting edge treatment the Clinic will offer has been tremendously effective and is seen as the gold standard for treating OUD. Every major health provider in the region actively supports the Clinic.

Despite the fact that building permit review is ministerial and cannot involve the exercise of discretion, appellants Save Our Sequim ("SOS"), Parkwood Manufactured Housing Community, LLC ("Parkwood"), and Robert Bilow ("Bilow") (collectively, the "Project Opponents") all appealed the City's determination (the "Determination") that the Project's permit applications should be reviewed administratively under the City's A-2 process. SOS and Parkwood then reiterated their same arguments in appealing the design review approval (the "Design Review Approval") and the revised mitigated determination of nonsignificance (the "MDNS") issued for the Project. The Tribe has separately appealed the MDNS. No party, however, appealed the building permit for the Project.

While there are numerous parties and appeals filed in this case, each issue presented is appropriate to resolve as a matter of law. The Project Opponents' appeals should all be dismissed on procedural and substantive grounds. The Project Opponents lack standing to raise their appeals because they have not alleged how the Project impacts them, and thus they lack an injury in fact. The Project Opponents' property is too far from the Project for them to be impacted by it. They refer to potential impacts the Project may cause, but they have no evidence of those alleged impacts. The Project Opponents' purported interests in the Project are too generalized to render the Project Opponents "aggrieved parties" under Washington law. City code provides that only

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"aggrieved parties" have standing to challenge the Project, which bars the Project Opponents' appeals.

Further, the Project Opponents' appeals are moot. No party appealed the building permit for the Project, and that land use decision has become final. Even if the Project Opponents' prevailed on their challenges to the Determination and Design Review Approval, the Tribe could still act on its unchallenged building permit.

Beyond procedural defects, the Project Opponents' appeals are meritless. The Project Opponents base their arguments on the incorrect assertion that the Project involves construction of an inpatient facility, when the Project application and permit approvals are for construction of an outpatient clinic only. The Project Opponents assert public interest in the Project required the City to process the Tribe's building permit application under the kind of conditional review that the City applies to applications for special use permits, preliminary major subdivisions, and annexation. But that C-2 process applies only if the project at issue is one which "requires the exercise of *substantial discretion* ***and*** about which there is a broad public interest." SMC 20.01.020.W (emphasis added). Under Washington law, issuing a building permit is a ministerial act that requires *no* discretion at all. Associated design review and SEPA review involve, at most, an exercise of limited discretion. Accordingly, because the permits on appeal do not require the exercise of substantial discretion, a C-2 process is not warranted.

SOS and Parkwood also argue that a C-2 process applied because the Project's outpatient clinic is actually an inpatient facility and therefore an Essential Public Facility ("EPF") that is subject to review under SMC 18.56. But that chapter provides the procedure for approving construction of an EPF on property that is not zoned for an EPF. That chapter does not apply to the Property where outpatient medical clinics and regional EPF are both permitted outright. Even if SOS and Parkwood were right that the Project was an EPF (they are not), the City would still process the Project as an A-2 application.

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SOS and Parkwood argue that the City erred by not considering all the phases to the Project. But there is only one phase to the Project, and it is on appeal. While the Tribe described the possibility of a second phase before submitting any applications to the City, that idea was abandoned when the Tribe was unable to obtain funding for the second phase. There are currently no plans, either figurative or literal, for any future phase of development on the Property. The mere notion of potential future development that has not been designed or funded is not enough to convert this single project into a phased development.

The Project Opponents' appeals of the Determination lack legal merit and should all be dismissed. Because SOS and Parkwood raise the same issues in their appeals of the Design Review Approval as their appeals of the Determination, their appeals of the Design Review Approval should also be dismissed.

SOS and Parkwood's appeals of the MDNS should be dismissed for similar reasons. Parkwood based its sole challenge to the MDNS on the incorrect notion that the City failed to consider all the phases for the Project. Parkwood's appeal is meritless because there is only one phase to the Project. SOS's sole basis to challenge to the MDNS was that the City failed to order adequate mitigation for the Project's purported impact to public services. SOS did not raise that issue when commenting on the MDNS, so it lacks standing to raise that issue on appeal.

Moreover, SOS's appeal of the MDNS should be dismissed for the same reason that the Tribe's appeal should be granted: the Project *does not cause* impacts to public services. The City Police Department submitted comments to the City that the Project's impact on public services would be "negligible" based on its review of similar clinics operating in cities similar to Sequim, all of which had no adverse impact on public services. Despite this evidence, the City noted the "potential" for impacts to public services and imposed sweeping conditions on the Project. The Washington State Environmental Policy Act ("SEPA") allows the City to impose conditions only on impacts that are "probable" and supported by evidence, and the City erred by imposing twenty conditions to mitigate "potential" impacts to public services. The City further erred by imposing

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conditions that regulate clinical operations even though the City has no expertise in regulating clinical operations. And the City further erred by disregarding existing state and federal laws that govern the conditions it imposed on the Project. Each of the twenty conditions the City imposed to mitigate impacts on public services violate SEPA as a matter of law and should be struck.

II. EVIDENCE RELIED UPON

This motion relies upon the Declaration of Andy Murphy ("Murphy Decl."), the Declaration of Brent Simcosky ("Simcosky Decl."), and the Declaration of Paul Cunningham ("Cunningham Decl.").

III. BACKGROUND

A. Clallam and Jefferson Counties are in need of facilities that treat Opioid Use Disorder.

The Tribe has a legacy of caring for the health and welfare of its citizens and its surrounding community. For example, the Tribe owns and operates the Jamestown Family Health Clinic (the "Health Clinic"), the premier medical facility in Sequim, which provides expert medical care and family services to both tribal citizens and non-tribal citizens alike. Cunningham Decl. ¶ 3, Simcosky Decl., Ex. A at 4.

The Tribe's legacy of care began a new chapter in response to the opioid epidemic, which has hit Clallam and Jefferson Counties particularly hard. According to the Washington State Department of Health, Jefferson and Clallam Counties have higher fatal overdose rates than the rest of the state. *Id.* at 5. The opioid prescribing rates in Clallam County are 78 percent higher than the state average, and Jefferson County's prescribing rate is 37 percent higher. *Id.* at 6. The higher prescription rates translate to more deaths. Clallam County has the second highest drug overdose death rate in Washington. *Id.* at 5.

Rather than vilify people who are addicted to opioids, the Tribe joined the rest of the medical community in recognizing that OUD is a chronic disease and people suffering from that disease require care and treatment. When the epidemic peaked in 2012, the Tribe partnered with

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the University of Washington to identify and implement best practices for prescribing opioids to improve the habits of medical providers. Simcosky Decl., Ex. D at 1. The Tribe promoted the use of Narcan by clinics and first responders in Clallam County, which caused the overdose death rate to decrease dramatically. *Id*. Even with all this work, there was still too much opioid abuse and too many overdoses in the Olympic Peninsula community. *Id.* at 2.

To combat that persistent harm, the Tribe has provided Medication-Assisted Treatment ("MAT") for OUD patients at the Health Clinic since 2017. Cunningham Decl. ¶ 4; Murphy Decl., Ex. A at 1. MAT is an effective evidence-based treatment for those suffering from OUD. Cunningham Decl. ¶ 4. While the MAT provided in the primary care setting at the Health Clinic is useful, the Olympic Peninsula community is in need of an Opioid Treatment Program ("OTP"). *Id*. OTP include MAT and also provide more specialized care than what a primary care provider can offer, such as prescribing different types of medication and methods of administering those medications. *Id*. An OTP combined with wrap-around services offers the best opportunity for sustained recovery for those with OUD. *Id*.

B. The Tribe obtained funding to construct only the Clinic and not any other phase that was formerly associated with the Project.

The Swinomish Tribe has observed tremendous success by providing wrap-around services and MAT to OUD patients at the state-of-the-art Didgwalic Wellness Center in Anacortes. *See id.*; Simcosky Decl., Ex. D at 2; Murphy Decl., Ex. A at 3–4. Seeing a need for a clinic that would provide similar services to the people of Clallam and Jefferson Counties, the Tribe endeavored to build a world-class, cutting-edge facility to treat people with OUD. The Tribe's project, still in the concept phase, obtained the support all the major health organizations in Clallam and Jefferson Counties, including Olympic Medical Center, Jefferson Healthcare, and Peninsula Behavioral Health in addition to several elected leaders. Simcosky Decl., Ex. D at 2.

In March 2019, the Tribe and the Public Hospital Districts for Clallam and Jefferson County submitted a capital budget request to the Washington State Legislature to obtain $25

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million in capital funding for the construction of an Olympic Peninsula Behavioral Health Campus. *Id.*, Ex. A. The Behavioral Health Campus was originally conceived to include three phases with the first two phases to be built on the Property. *Id.* at 3. Phase 1 was an outpatient clinic modeled on the Didgwalic Wellness Center, which evolved into the Project on appeal. *Id.* Phase 2 would have been an Evaluation and Treatment Center that would have provided inpatient treatment. *Id.* Phase 3 would have been crisis stabilization programs in Port Townsend and Forks. *Id.*

The State granted a portion of the capital budget request. Out of the $25 million requested, the State issued a $7.2 million grant for only Phase 1 as proposed. Simcosky Decl., Ex. B; Murphy Decl., Ex. S. The contract for the grant specifies that funds may be used only "to construct a 17,000 square foot *outpatient medical clinic* [.]" Simcosky Decl., Ex. B at 1 (emphasis added). The Tribe initially expected to contribute $4 million of its own funds to the Project, which was expected to provide adequate funding to construct the Clinic.[1] Simcosky Decl., Ex. D at 3. Because the Tribe did not receive funding for the other phases to the broader project, the Tribe discontinued pursuing those phases. *Id.* ¶ 3. There is no funding for the inpatient clinic that was intended to be Phase 2, no plans have been developed for it (aside from conceptual drawings), and the Tribe has no plans to build that previously discussed phase. *Id.* Should the Tribe eventually identify a way to fund and build an inpatient clinic on the Property, that project will be subject to its own separate permit review process.

C. The Property is zoned to outright permit outpatient clinics and regional essential public facilities.

In May of 2019, the Tribe purchased the Property at 526 S. 9th Ave. in Sequim to site the Clinic. *See* Simcosky Decl., Ex. D at 2–3. The virtue of the Property is its proximity to Highway

[1] Due to the increased cost of construction during COVID, the Tribe now expects to contribute between $7 million and $8 million of its funds to the Project. Simcosky Decl. ¶ 3.

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101 and distance from other retail and residential areas, which accommodates patients' needs to easily access to the facility without interfering with nearby uses. *Id.* at 3. The Property is currently an undeveloped field that is southeast of big box stores including Costco and Home Depot. Murphy Decl., Ex. C ("Design Review Approval") at 1, 3.

In addition to the physical attributes that make the Property favorable for the Clinic, the Tribe chose to purchase the Property because it is zoned to outright permit medical outpatient clinics. The Property is located in the River Road Economic Opportunity Area ("RREOA"), one of Sequim's zoning districts. Design Review Approval at 1. The City created the RREOA to "enhance the city's economic base by providing for an integrated grouping of businesses and buildings of a larger size and scale" that other zoning districts may support. SMC 18.33.020B. "Ambulatory and outpatient care services (physicians, outpatient clinics, dentists)" and "Essential public facilities, state and regional" are permitted outright in the RREOA. SMC Table 18.33.030.

D. The Tribe filed a building permit application for an outpatient clinic that will provide gold-standard care for community members suffering from Opioid Use Disorder.

On January 10, 2020, the Tribe submitted applications for a building permit and associated design review to the City for the Project. Design Review Approval at 2. The SEPA checklist submitted with those applications describes the Project as "the construction of a 16,720 SF medical clinic that will be made up of medication assisted treatment program which offers FDA approved dosing, primary care services, consulting services, dental health care services and childcare services while clients are seen." Murphy Decl., Ex. D at 13.

In response to public interest about the Clinic, the Tribe took a host of steps to ensure that the Project's presence in the community would yield only positive impacts. In addition to participating in public meetings, the Tribe developed a website for the Project that included answers to Frequently Asked Questions from the community. Simcosky Decl. ¶ 3, Ex. C; *see also id.*, Ex. D at 7–8. Going further, the Tribe developed and released a Preliminary Medical Outpatient Clinic and Community Response Plan (the "Community Response Plan") on January

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13, 2020. *Id.*, Ex. D. The Community Response Plan describes how the Tribe plans to promote public safety while involving the public in oversight of the Clinic. For example, the Community Response Plan describes how the Clinic will employ a social navigator to assist patients with social service needs and track patient conduct. *Id.* at 8. That navigator will work directly with Sequim law enforcement to address patient conduct issues. *Id*. Further, the Tribe committed to facilitate regular Clinic program reviews with the Tribe's Health Director, the Clinic's Chief Operating Officer, City staff, City Council, City Police, the Clallam County Sheriff, and other necessary representatives to ensure the Clinic does not cause adverse impacts to the community. *Id.* at 9. The Tribe agreed to hold an annual public meeting to update the community and discuss any issues related to the Clinic. *Id.* at 8.

However, because the Community Response Plan included descriptions of how the Tribe intends to provide medical care at the Clinic, the Tribe was careful not to file the Community Response Plan with the City's Department of Community Development (the "Department") as part of the permit application materials for the Project. Simcosky Decl. ¶ 5. The Tribe carefully developed the Community Response Plan and stands by it, but the Clinic is not yet operational, and it may come to pass that some clinical service aspects may need to deviate from the Community Response Plan in order to provide safe and effective care. *Id*.

In an effort to balance the Tribe's desire to be transparent with the public while also preserving the need for operational flexibility, the Tribe posted the Community Response Plan on the Project's website and provided it to the City Council while providing a public comment during a City Council meeting. *Id*. Barry Berezowsky, the Director of the Department (the "Director"), then asked the Tribe for an electronic copy of the plan so the City could post it on the City's website for the Project as a means to distribute the plan to the public, and the Tribe accommodated that request. *Id.*

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E. The City determined the A-2 review process applied to the Project.

The City has different permit review processes for different types of projects. The relevant process options here are Types A-1, A-2, and C-2. The Type A-1 process applies to "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." SMC 20.01.020.T. City code provides that an application for a "[b]uilding or other construction permit" is reviewed under the A-1 process. Table 2 SMC 20.01.030. The Type A-2 process applies to "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 20.01.020.U. City code provides that an application requiring a SEPA determination is reviewed under the A-2 process. Table 2 SMC 20.01.030. The Type C-2 process "involve applications that require the exercise of substantial discretion and about which there is broad public interest." SMC 20.01.030.W. Applications for annexation, comprehensive plan amendments, preliminary major subdivisions, and special use permits are subject to the C-2 process. Table 2 SMC 20.01.030. "If there is a question as to the appropriate type of procedure, the [D]irector shall resolve it in favor of the higher procedure type letter as defined in SMC 20.01.030." SMC 20.01.040.B.

The Director issued the Determination on January 24, 2020. Murphy Decl., Ex. B (the "Determination"). The Director determined the City would review the Project under the Type A-2 permit process. Determination at 1. The Director recognized the Project was to build a medical clinic in the RREOA, which was permitted outright. *Id.* "Therefore, the Tribes [sic] 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." *Id*. The Director noted the Tribe's building permit application was a Type A-1 application, but because the Project required a SEPA determination, which is subject to the Type A-2 review, the City would apply the Type A-2 process to the Project. *Id.* at 2; *see also* Design Review Approval at 2 ("Due to triggering SEPA

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review, this project is subjected to a A-2 administrative permit review process[.]"). In a rejection of the arguments the Project Opponents make here, the Director determined the Clinic was not an EPF, and thus not subject to a C-2 review, for three reasons: "first, the facility is not an 'in-patient substance abuse facility', 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." Determination at 2.

F. Despite not showing how the Project impacts them, the Project Opponents challenged the Determination by raising arguments that would apply to inpatient clinics.

Parkwood filed its appeal of the Determination on February 7, 2020. Murphy Decl., Ex. H (the "Parkwood A2 Appeal"). Parkwood is a manufactured housing community that is a three-mile drive from the Property. Parkwood A2 Appeal at 2; Murphy Decl., Ex. I. Parkwood's property is outside of the Sequim city limits. Murphy Decl. ¶ 10. Parkwood claims its interest in the Project arises out of the location of its property, concern for its residents and a legal responsibility to protect them, as well as its owner's public comments about the Project. Parkwood A2 Appeal at 2–3; Murphy Decl., Ex. J (the "Parkwood MDNS Appeal") at 2–3.

SOS filed its appeal of the Determination on February 13, 2020. Murphy Decl., Ex. K (the "SOS A2 Appeal").[2] SOS identifies itself as a 501(c)(4) corporation that claims support from Sequim residents and others in the surrounding area. *Id.* at 2; Murphy Decl., Ex. L (the "SOS MDNS Appeal") at 2. SOS does not identify where its members live or how any of its members are allegedly impacted by the Project. SOS provides its interest in this matter arises out of its own public participation in opposition to the Project and the participation of its members. SOS A2 Appeal at 2; SOS MDNS Appeal at 2.

[2] SOS and Parkwood also challenged the Determination in Clallam County Superior Court by bringing an action under the Uniform Declaratory Judgments Act. Murphy Decl. ¶ 21. On July 17, 2020, the court granted the Tribe's motion to dismiss the lawsuit without prejudice because the lawsuit violated the Land Use Petition Act ("LUPA") by prematurely challenging the land use decisions currently on review in this matter. *Id.*

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Mr. Bilow filed his appeal on February 14, 2020. Murphy Decl., Ex. M (the "Bilow Appeal"). Mr. Bilow relies on the location of his home for his standing. Bilow Appeal at 2. But, as he readily admits, Mr. Bilow does not live in Sequim. *Id*. His property is even farther from the Project than Parkwood's. Mr. Bilow lives 3.7 miles from the Property. Murphy Decl., Ex. N.

Each of the Project Opponents argue the Director should have applied the C-2 review process. Parkwood and SOS argued that the Clinic fell within the Growth Management Act's ("GMA") definition of EPF, which provides that EPF "include those facilities that are typically difficult to site, such as … inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities[.]" SOS A2 Appeal at 3 (quoting RCW 36.70A.200(1)) (different emphasis added); Parkwood A2 Appeal at 4–5. Even though the Clinic will provide only outpatient services and will not be an inpatient facility, SOS and Parkwood argue that the scope of wrap-around services the Clinic will provide is so broad that the Clinic is actually an EPF. SOS A2 Appeal at 3–5; Parkwood A2 Appeal at 3–5. SOS argues that the child-care services the Clinic will provide to patients while they receive care and the laboratory equipment the medical staff will use to perform urinalysis tests on patients are actually conditional uses for the Property. SOS A2 Appeal at 4–5. Thus, they argue, SMC 18.56 required the Project to obtain a Special Use Permit that only the City Council can issue. Parkwood A2 Appeal at 7; SOS A2 Appeal at 3–4.

Continuing their argument that the Clinic is an EPF, Parkwood argued the Project did not satisfy the criteria listed in SMC 18.56 for the siting of an EPF. Parkwood A2 Appeal at 7–8. Relatedly, SOS argued that because the Director erred by determining the Clinic was not an EPF, he erred by concluding the Project was not difficult to site and did not involve the exercise of substantial discretion. SOS A2 Appeal at 6–7.

SOS and Parkwood argued that the City erred by only reviewing the Project and not the nonexistent second phase. SOS A2 Appeal at 5; Parkwood A2 Appeal at 3–4. They argued that the Director erred when he determined the Americans with Disabilities Act ("ADA") prohibited

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the City from treating the Clinic differently than other medical clinics because it would provide treatment to people with OUD, a recognized disability. SOS A2 Appeal at 7; Parkwood A2 Appeal at 9–10. In doing so, SOS and Parkwood argued in favor of discriminating against those with disabilities and the facilities that care for them.

For his part, Mr. Bilow argued broad public interest in the Project mandated a C-2 review. Bilow Appeal at 3. Mr. Bilow contends that the Director based the Determination only on SMC Title 18 and not Title 20, which he contends was improper. Bilow Appeal at 2–3.

G. Despite evidence that showed the Project would not impact public services, the City issued an MDNS for the Project that imposes conditions to mitigate "potential" impacts to public services.

The City issued an MDNS for the Project on March 25, 2020. Murphy Decl., Ex. D. The Tribe's SEPA checklist described the Project's impact to public services as negligible: "The project anticipates very little need from police, fire, and EMT services, no more than any other commercial or healthcare clinic provider would anticipate." *Id*. at 24. The Tribe further described that the Project's impact to "[p]ublic services (police, fire, EMT, etc.) are expected to be low, if any annually." *Id.* at 26. In the MDNS, the City agreed that the impacts to public services would be negligible. *Id.* at 6 ("Staff concurs with the checklist description.").

The City based its conclusion regarding how the Project would, at worst, cause negligible impacts to public services in part on the comment it received from the City Police Department, which was excerpted in the MDNS. The Police Department noted that the Tribe's existing clinic had been providing OUD treatment since 2017 and observed that "there has been no appreciable increase in call load since OUD treatment began." *Id.* The Police Department noted that calls for service to the existing clinic that resulted in some type of police report averaged 1.7 per year for the last decade. *Id.* The Police Department concluded that activity reflected "such a de minimis volume of calls for service to even consider them an impact to our workload." *Id.* at 6–7. By including the Police Department's conclusion in the MDNS, the face of the MDNS contains evidence that the Project would not impact public services.

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The full comment submitted by the Police Department went further in showing the Project would not impact public services. The Police Department based its review on all "plans, submittals, and public comments" for the Project. Murphy Decl., Ex. A at 1. The Police Department acknowledged spending "considerable time and effort in researching possible public safety impacts" from the Clinic. *Id.* at 3. They spoke with the Chiefs of Police for five cities that were similar to Sequim and that also had clinics that provide OUD treatment. *Id.* at 4. Each Chief of Police acknowledged the clinics had no impact, negligible impacts, or positive impacts to their respective community. *Id.* at 4–6. The Chief of Police for Anacortes, which is home to the Didgwalic Wellness Center that serves as a model for the Clinic, praised the clinic in his city. *Id.* at 5–6. The Sequim Police Department concluded the Swinomish Tribe's clinic resulted in a "benefit to their community." *Id.* at 6. Ultimately, the Police Department concluded "there will most likely be *negligible impacts* from the Jamestown clinic." *Id.* (emphasis added).

Despite the evidence that the Clinic will not cause significant adverse environmental impacts to public services, and may actually cause benefits, the City imposed twenty conditions on the Project that purport to mitigate the "*potential* for adverse environmental impacts to public services[.]" Murphy Decl., Ex. D at 8–10 (emphasis added). The Tribe submitted a comment objecting to the conditions because they purported to mitigate impacts the Project did not cause. *Id*., Ex. E.

The City issued a revised MDNS on May 11, 2020, that retained the broad, burdensome conditions on the Project to which the Tribe objected. *Id.*, Ex. G. Condition 3 requires the Tribe to follow the "procedures and recommendations" described in its Community Response Plan, even though the Tribe never filed that document with the City as part of the Project application materials and never agreed to be bound to the Response Plan as a permit condition. Simcosky Decl. ¶ 5. The Tribe purposefully avoided filing documents with the City that would improperly limit Clinic operations before the Clinic could even serve its first patient. *Id.*

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Condition 5 includes 19 sub-conditions, all of which purport to mitigate the "potential" impact to public services, but actually go far beyond it. Several conditions target the Tribe's political status and seek to limit how the Tribe can put property into trust while demanding the Tribe waive its sovereign immunity. Conditions 5.j and 5.k. Despite a lack of a lack of clinical expertise, through Condition 5, the City proposes to regulate how the Tribe may provide patient care. Conditions 5.g, 5.h and 5.l. In sum, the City imposed twenty individual conditions to mitigate "potential" impacts to public services after its own Police Department concluded the Project's impact to public services would be "negligible." The Tribe submitted its appeal of the revised MDNS on June 1, 2020. Murphy Decl., Ex. O.

H. Parkwood and SOS appealed the Design Review Approval for the Project and the MDNS by asserting the same arguments raised in their appeals of the Determination, but no one appealed the building permit.

On May 15, 2020, the City approved the Project's design review application by issuing the Design Review Approval, which incorporated the revised MDNS. On June 5, 2020, Parkwood and SOS both appealed the MDNS and Design Review Approval. They reiterated the same arguments raised in their appeals of the Determination for why the Project was an EPF that the City should have reviewed under a C-2 review and why the Project would not meet the criteria for siting an EPF. *See generally* SOS MDNS Appeal; Parkwood MDNS Appeal. Beyond that duplication, Parkwood appealed the MDNS on the sole ground that the City erred by not considering the other (nonexistent) phases to the Project. Parkwood MDNS Appeal at 6. SOS appealed the MDNS solely because the abundant conditions the City imposed did not "adequately address the probable significant adverse environmental impacts of the project on public services in the Sequim area." SOS MDNS Appeal at 7. SOS did not raise that issue in the comment letter it submitted to the City regarding the MDNS. Murphy Decl., Ex. F.

The City issued the building permit for the Project on June 30, 2020. Murphy Decl., Ex. P. The deadline to appeal the building permit was July 21, 2020. *Id.* No party appealed the building permit. Murphy Decl., Ex. Q.

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IV. ARGUMENT

The Pre-Hearing Order in this case allows the parties to file pre-hearing motions. The Tribe asks the Hearing Examiner to apply the summary judgment standards in CR 56 to this motion. The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "A material fact is one upon which all or part of the outcome of the litigation depends." *Hill v. Cox*, 110 Wn. App. 394, 402, 41 P.3d 495 (2002). "A party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case." *Guile v. Ballard Comm'ty Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 69 (1993); *see also Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225–26, 770 P.2d 182 (1989). The "moving party must identify those portions of the record, together with affidavits, if any, which he or she believes generate the absence of a genuine issue of material fact." *Guile*, 70 Wn. App at 22. "[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence" to support those assertions. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000) (citing *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997)).

A. The Project Opponents lack standing because the Project does not affect them.

The Project Opponents have not alleged how the Project affects them, so they lack standing to assert their claims. SMC 20.01.090.E limits appeals of A-2 decisions to the "applicant or other party of record *who may be aggrieved* by the administrative decision" if the appellant complies with SMC 20.01.240. While there is no dispute that the Project Opponents are parties of record, they are not aggrieved by the Project, so SMC 20.01.090.E prohibits their appeals.

City code does not identify when a party is sufficiently aggrieved by a land use decision to have standing, but LUPA does. "An allegedly aggrieved person has standing to file a land use petition only if he shows that the land use decision has prejudiced him, or is likely to." *Thompson*

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v. City of Mercer Island, 193 Wn. App. 653, 662, 375 P.3d 681 (2016) (citing RCW 36.70C.060(2)(a)). "To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. To show an injury in fact, the petitioner must allege a specific and perceptible harm." *Thompson*, 193 Wn. App. at 662 (internal quotations and citations omitted). When appellants allege a threatened injury, they "must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing." *Id*. Harm to an appellant must be proved, and not presumed. *Id*. at 664.

None of the Project Opponents have identified a "specific and perceptible harm" from the Project, nor have they identified an "immediate, concrete and specific" injury that the Project will cause them. Although Parkwood and Mr. Bilow refer to their property miles away from the Project, their property is too far from the Property to be impacted by the Project, even assuming there will be adverse impacts, which will not be the case. For example, in *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002), four married couples who owned property upstream from the property at issue alleged that their sole interest in the matter was to preserve zoning protections in their district. Unaccompanied by other allegations of specific injuries to the petitioners or their properties, the Supreme Court held their interest was too abstract to confer standing. *Id*. Like the appellants in *Nykreim*, Parkwood and Mr. Bilow have not identified a "specific and perceptible harm" as to how the Project would impact them, so they are not aggrieved by the Project and lack standing to challenge it.

SOS identifies no interests of its own, but instead relies on the interests of its members as purported residents of Sequim. SOS thus relies on associational standing. "An association has standing to bring suit on behalf of its members if it satisfies three requirements: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 138, 272 P.3d 876 (2012) (internal quotations and

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brackets omitted) (holding association lacked standing "because it cannot demonstrate that any of its claimed members have standing in his or her own right."). SOS fails the first element. SOS provides no evidence that any of its members have standing because it does not show how they would be impacted by the Project. Therefore, SOS lacks associational standing.

B. The Project Opponents' appeals are moot because the building permit for the Project is an unchallenged final land use decision.

Mootness provides an independent procedural ground to dismiss the Project Opponents' appeals in their entirety. City code provides a 21-day deadline to appeal the building permit. SMC 20.01.240.F. The building permit was not administratively appealed, so it has become a final decision that is invulnerable to attack. *Ward v. Bd. of Cty. Comm'rs, Skagit Cty.*, 86 Wn. App. 266, 270–72, 936 P.2d 42 (1997); *see also West v. Stahley*, 155 Wn. App. 691, 697, 229 P.3d 943 (2010). Washington recognizes "a strong public policy supporting administrative finality in land use decisions." *Nykreim*, 146 Wn.2d at 931. Without finality of land use decisions "no owner of land would ever be safe in proceeding with development of his property. To make an exception would completely defeat the purpose and policy of the law in making a definite time limit." *Id*. at 931–32 (internal ellipsis omitted). Because the Tribe may act on the building permit regardless of how this appeal is resolved, the Project Opponents' appeals are moot.

C. Only the A-2 process is appropriate for the Project.

The bulk of the Project Opponents arguments relate to the Director's decision to process the Project applications under an A-2 review. Indeed, SOS and Parkwood essentially duplicate the arguments against the Determination in their appeals of the Design Review Approval. Because the City properly applied the A-2 process to the Project, the issues raised by the Project Opponents should be dismissed. If the Examiner rules the Director properly determined the A-2 process applied to the Project, then the only issue that remains unresolved is if the MDNS properly evaluated impacts to public services. As described below, the objections SOS and Parkwood raise against the MDNS should result in dismissal of their appeals.

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1. The City properly applied the A-2 review process to the Project.

The Director properly determined the Project was subject to an A-2 review. The Project is to construct an outpatient clinic, which is an outright permitted use for the Property. Determination at 1. The Tribe submitted a building permit application, which City code identifies as the first type of application subject to an A-1 review. Table 2 SMC 20.01.030; Determination at 2. The design review is ancillary to the building permit review, SMC 18.24.031, and therefore subject to the same type of review as the underlying permit. Determination at 2 n.8; Design Review Approval at 2. And because the Project is larger than 4,000 square feet, it is not categorically exempt from SEPA and must receive a SEPA determination from the City. Determination at 2; Design Review Approval at 13 (citing WAC 197-11-800(1)(b)(iv). The code provides that SEPA determinations are reviewed under an A-2 process. Table 2 SMC 20.01.030. Thus, the decisions on appeal involved two A-1 decisions and one A-2 decision. "If there is a question as to the appropriate type of procedure, the [D]irector shall resolve it in favor of the higher procedure type letter as defined in SMC 20.01.030." SMC 20.01.040.B. The City did just that when it applied the higher A-2 procedure to the Project. That process was correct and should be upheld as a matter of law.

Bilow argues otherwise because the Director purportedly considered the requirements in Title 18 of the code when he allegedly should have made the Determination relying solely on Title 20. Bilow Appeal at 3. Bilow cites no authority for his argument, which contradicts a fundamental rule of statutory construction that code is to be construed as a whole with all provisions of the code "considered in their relation to each other, and, if possible, harmonized to insure proper construction of each provision." *Tommy P. v. Bd. of Cty. Comm'rs of Spokane Cty.*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

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Regardless, the Determination relied on Title 20 without referring inappropriately to Title 18. The very first paragraph of the Director's analysis in the Determination describes how he relied on SMC 20.01.030 Table 2 to determine that the Project would be subject to an A-2 review. Determination at 2. The Director's application of Table 2 in Title 20 was not error.

2. Approving the Project did not require the exercise of substantial discretion.

The bulk of the Project Opponents' arguments to the contrary is that the Project necessarily mandated a C-2 review instead of an A-2 review. Mr. Bilow expressly argues that "broad public interest" in the Project required the City to perform a C-2 review. Bilow Appeal at 3–4. But that argument relies on reading only the second half of the requirements for a C-2 review. A C-2 review applies to "applications that *require the exercise of substantial discretion and* about which there is broad public interest." SMC 20.01.020.W (emphasis added). While there has been public interest in the Project, the City's approval of the decisions on appeal required far less than "substantial discretion," so the C-2 process cannot apply.

The underlying (and unchallenged) permit for the decisions on review is a building permit, which requires the exercise of *no* discretion. The City of Sequim has adopted the International Building Code, 2015 Edition ("IBC"). SMC 15.04.010. IBC Section 105.3.1 deprives the City from exercising any discretion when issuing a building permit. If the permit application complies with the code "the building official *shall issue* a permit therefor as soon as practicable." Murphy Decl., Ex. R (emphasis added). In recognition of how the IBC compels the issuance of building permits that comply with code criteria, the Supreme Court has recognized for many years that issuance of building permits are ministerial acts, and not discretionary. *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963) ("The building department of the city has no discretion to refuse a permit save to ascertain if the proposed structure complies with the zoning regulations. Once that is done and the appropriate fee tendered by the applicant, the building department must issue the building permit."). Instead, the

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Supreme Court has explained that cities exercise discretion when *adopting* zoning codes, not applying them to projects:

> A building or use permit must issue as a matter of right upon compliance with the ordinance. The discretion permissible in zoning matters is that which is exercised in *adopting* the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional.

State ex rel. Ogden v. City of Bellevue, 45 Wn.2d 492, 495, 275 P.2d 899 (1954) (internal citation omitted, italics in original, underlining added).

There are three decisions on appeal, and none of them involve the exercise of substantial discretion. The Director is legally prohibited from exercising discretion when reviewing a building permit application. By designating SEPA determinations as subject to the A-2 process, Table 2 SMC 20.01.030, the City has already determined that the MDNS required "the exercise of limited discretion[.]" SMC 20.01.020.S. The same is true for the design review decision because it is guided by compliance with specific code provisions. Under SMC 18.24.034.B, the City must approve design review applications if the application satisfies the design requirements set forth in SMC 18.24.037. Because the City is obligated to approve a project that complies with the code's design requirements, issuing design review approval does not involve the exercise of substantial discretion. And as the Director himself concluded, a decision which is entitled to deference, RCW 36.70C.130(1)(b), none of the decisions on appeal required the exercise of substantial discretion. Determination at 6.

Because the Director legally could not exercise substantial discretion when making any of the decisions on appeal, the Project Opponents' request to subject the Project to a C-2 review violates state and City law and should be rejected. While the record is replete with support for the Project, there is no dispute that the Project Opponents have fomented public interest in

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opposition to the Project based on their concern regarding the treatment of people suffering from OUD. It is settled law in Washington that a City cannot subject a project to different standards merely because there is public concern or displeasure with a project. *See Levine v. Jefferson Cty.*, 116 Wn.2d 575, 580, 807 P.2d 363 (1991); *Maranatha Min., Inc. v. Pierce Cty.*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990) ("The only opposing evidence was generalized complaints from displeased citizens. Community displeasure cannot be the basis of a permit denial."). And courts from around the Country recognize facilities that serve people with addiction cannot be treated differently. Determination at 4–5 (citing cases). Because reviewing the Project applications could not involve exercising substantial discretion, any effort to rely on "broad public interest" to mandate the C-2 review must fail as a matter of law.

3. The Project is permitted outright, either as a clinic or regional EPF.

In asserting the Project approval required the exercise of substantial discretion, SOS and Parkwood rely on the definition of an EPF under State law, and how SMC 18.56 allegedly requires a special use permit for EPF. Their arguments are fatally flawed because the City's definition of an EPF differs from the State's. The City's definition of an EPF specifically omits the "inpatient facilities" language that the Project Opponents' arguments relies upon. *Compare* SMC 18.08.020 ("'Essential public facilities,' mandated by the GMA, include airports, public educational facilities, state and regional transportation facilities, state and local correctional facilities, and other facilities of a state or regional scope. For the purpose of this title, wastewater reuse facilities will be considered to be essential public facilities.") *with* RCW 36.70A.200(1) ("Essential public facilities include 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

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facilities as defined in RCW 71.09.020."). Inpatient facilities are not EPF under the City's zoning law, and thus do not require a special use permit by the mere virtue of the GMA's definition.

Moreover, the Clinic does not qualify as an EPF under the State definition, which identifies substance abuse facilities as among the type of "*inpatient facilities*" that qualify as EPF. RCW 36.70A.200(1). SOS and Parkwood erroneously assert that all substance abuse facilities must be an EPF, when state law provides that only *inpatient* substance abuse facilities are an EPF. Because the Project is an outpatient clinic it is not a substance abuse facility. But if it was, the Clinic would still fall outside the GMA's definition for an EPF. SOS and Parkwood point to nothing in the Project application materials or the City's approvals that show the Clinic is an inpatient facility.

But if the Project was somehow an EPF, it would still be subject to an A-2 review. The Clinic will serve the people of Jefferson and Clallam Counties, which makes it a regional facility. *See* SOS A2 Appeal at 2 (describing the Project as a "regional drug rehabilitation facility"). Thus, if the Clinic is an EPF, it is a regional EPF. SOS and Parkwood erroneously cite to SMC 18.56 as necessarily applying to all EPFs, but that chapter applies only to zones that do not permit EPFs outright. *See* SMC 18.56.010 ("It is the intent of the special use permit section of the zoning code to allow the following uses in districts from which they are now prohibited…"); SMC 18.56.030 (allowing certain EPF "in districts where they are now prohibited by this title[.]"). That chapter does not apply to the Property, which is zoned to outright permit regional EPF. SMC Table 18.33.031; *see also* WAC 365-196-550(e) ("Cities and counties may not require applicants who operate essential public facilities to use an essential public facility siting process for projects that would otherwise be allowed by the development regulations.").

The City already exercised its discretion when deciding the RREOA is an appropriate location to site a regional EPF, so there is no need for the City Council to exercise additional discretion to evaluate appropriate siting. *See Ogden*, 45 Wn.2d at 495. The special use permits

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issued under SMC 18.56 are subject to the C-2 review. SMC 20.01.030 Table 2. Had the City intended to subject regional EPF in the RREOA to a C-2 review, the City would have designated that use as "Conditional" instead of "Permitted." SMC 18.33.030.A.2 (providing a conditional use for the RREOA "is a Type C-2 discretionary use reviewed through the process set forth in SMC 20.01.100 governing conditional uses."). Because regional EPF are permitted outright for the Property, if the Project was an EPF, then it would not be subject to a conditional review. Instead, it would proceed under a building permit application, and be subject to the same A-2 review the City already performed for the Project.

4. The wraparound services the Clinic will provide do not convert it to an EPF.

Parkwood and SOS take issue with the wraparound services the Clinic will provide—services that have been shown as the gold standard in providing effective medical treatment for OUD—as somehow transforming this outpatient clinic into something else. Parkwood and SOS lament that the Clinic will provide "FDA approved dosing, primary care services, consulting services, dental health services and childwatch services while clients are seen." Parkwood MDNS Appeal at 4; SOS MDNS Appeal at 3–4. But Parkwood and SOS have no explanation for why those medical services cannot be provided on an outpatient basis or are incongruous with ambulatory and outpatient care services permitted outright for the Property. SMC Table 18.33.031. The breadth of medical services the Clinic will offer does not change that those services will be offered only on an outpatient basis.

SOS objects to the Clinic including child-care services for patients while they receive care and the laboratory equipment the Clinic staff will use when diagnosing and treating the patients. SOS MDNS Appeal at 3. SOS asserts that "child care centers" and "medical laboratories" are conditional uses on the Property, so the City erred in applying the A-2 process. SOS A2 Appeal at 4–5.

SOS's view of an outpatient clinic is unreasonably narrow. The laboratory and child-care services are not ancillary from the Clinic, but part and parcel to the medical care its patients will

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receive. SMC 18.08.020 defines a "clinic" as a "building designed and used for the *diagnosis and treatment* of human outpatients, excluding overnight care facilities." (Emphasis added.) The laboratory equipment and child-care services are necessary for the Clinic to effectively diagnose and treat its patients, all of whom will be outpatients. Cunningham Decl. ¶ 6. Laboratory equipment on site allows staff to perform urinalysis tests on the patients to verify they are following treatment plans. *Id*. The laboratory thus enables the Clinic to diagnose whether patients are following their treatment plans and modify treatment accordingly. *Id*. Notably, the lab equipment will be for urinalysis tests exclusively, and the Clinic will send other samples to off-site laboratories for testing. *Id*. In this way, the lab at the Clinic is tailored to the treatment the Clinic will provide, and is not a full-service medical laboratory. *Id*. Child-care services allow for patients to receive treatment without the additional barrier of finding child-care while they receive treatment. *Id*. This is particularly important for the patients the Clinic will treat, where receiving consistent treatment is important to battle OUD and additional barriers to receiving that treatment would reduce the quality and efficacy of care. *Id.* Because child-care and laboratories are integral to the OUD treatment the Clinic will provide, they are part of the principal clinic use, and therefore allowed outright on the Property. *Pres. Our Islands v. Shorelines Hearings Bd.*, 133 Wn. App. 503, 526, 137 P.3d 31 (2006).

Alternatively, the child-care and laboratory uses are accessory uses that do not require additional review. Under City code, "'Accessory' means a use, activity, structure or part of a structure that is subordinate and incidental to the main activity or structure on the subject property," and an "'Accessory use' means a use that is located on the same lot and incidental to a principal use." SMC 18.08.020. If the services the Project Opponents attack are not part of the principal outpatient clinic use, then they are "subordinate and incidental" to that principal use, and therefore accessory uses.

The criteria for accessory uses are set forth in SMC 18.59.010, and, importantly, the accessory use must "[b]e an allowed use in the zoning classification in which they are

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located[.]"[3] SMC 18.59.010.A.1. As SOS itself notes, both laboratories and child-care centers are allowed on the Property as a conditional use. SOS MDNS Appeal at 3 n.2. There is no requirement in the City code for applicants to obtain conditional use permits for accessory uses. *See generally* SMC 18.59. Because laboratory and child-care services are not prohibited on the Property, they are allowed uses, so they qualify as accessory uses. *Lakeside Indus. v. Thurston Cty.*, 119 Wn. App. 886, 897, 83 P.3d 433 (2004). While the child-care services and laboratory equipment are integral components to the medical care the Clinic will provide, if they are accessory uses, they are still allowed. The City did not err in approving the Project.

5. There are no phases to the Project.

The Project Opponents assert that this Project is phased, but this is not a phased project under SEPA. WAC 197-11-060(3)(b) states that "[p]roposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document." This section continues to provide that:

> Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:
>
> > (i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
> >
> > (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

There is no other proposed phase to the Project. The Project Opponents' arguments rely on the abandoned Phase 2 described in the funding request the Tribe submitted nearly a year before it filed its permit applications. When the Tribe was dreaming big about bringing the best

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[3] The Project would satisfy the remaining criteria for an accessory use, which are that the accessory use and structure shall "2. Be operated and maintained under the same ownership and use as the primary use or structure except as provided herein; 3. Be located on the same lot as the related primary use; 4. Not be erected prior to the occupancy of the primary use or structure; and 5. Not be located in a required yard except as provided herein." SMC 18.59.010.A. The Tribe owns the Property where the Clinic will provide its services, the alleged "accessory" uses would be on the Property and within the Clinic, and there is no indication the Project involves a "required yard." *See generally* Design Review Approval.

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and most complete treatment services for OUD to the Olympic Peninsula, its plans included a second phase beyond the Project that would include a clinic providing inpatient services. But when the Tribe did not receive the funding necessary to realize that dream, the second phase was abandoned and is not a part of the Project. In its SEPA checklist, the Tribe disclosed that this Project is a *"standalone development*, although in the future facility expansion or additional services may be added to the residual site, if the needs arise. Currently, *there are no plans to expand or seek future facilities."* Murphy Decl., Ex. D at 13 (emphasis added).

Despite this express representation that there is no longer another phase even contemplated for the Project, the Project Opponents refuse to believe it. But other than select statements that described the abandoned, preliminary plan to include a second development on the Property, the Project Opponents can point to nothing that proves the Project involves inpatient care or a second phase. It is improper to use a funding request that was denied to commit the developer to that conceptual proposal in perpetuity. Circumstances change, and the Tribe discontinued its exploration of building an inpatient clinic when it became apparent the second phase could not become funded. The Project is not phased, and arguments to the contrary lack evidence and should be rejected. Should the Tribe pursue additional phases in the future, the phases will be subject to additional environmental review and permitting processes.

D. The MDNS appeals from SOS and Parkwood should be dismissed.

For this same reason, Parkwood's appeal to the MDNS fails. The sole basis Parkwood raised when challenging the MDNS was that the City erred by not considering each phase of the project. Parkwood MDNS Appeal at 6. But there is only one phase to the Project. Further, SEPA allows phased review. WAC 197-11-060(5)(b) ("Environmental review may be phased."). Parkwood's challenge to the MDNS fails as a matter of fact and a matter of law.

SOS challenged the MDNS on the sole ground that the City failed to adequately address impacts to public services. SOS MDNS Appeal at 7. This aspect of SOS's appeal should be dismissed because SOS failed to raise the issue in its comment letter for the MDNS. A party

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must submit comments to an agency decision to have standing to challenge those decisions. *See King Cty. v. Washington State Boundary Review Bd. for King Cty.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). And "there must be more than simply a hint or a slight reference to the issue in the record" for an issue to be properly raised. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 723, 47 P.3d 137 (2002). Commenting on some issues does not create standing to appeal others. Under SEPA, a party's standing on appeal is limited to the issues commented upon below. *See* WAC 197-11-545; s*ee also Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997) (stating that APA exhaustion requires that "prior to judicial review of an administrative action, the appropriate issues must first be raised before the agency.") (citing *Boundary Review Bd.*, 122 Wn.2d at 668); *Washington State Dep't of Nat. Res. V. Kitsap Cty.*, SHB 03-018, Order Granting Partial Summary Judgment (Dec. 16, 2003); *Spokane Rock Prods., Inc. v. Spokane Cty. Air Pollution Control Auth.*, PCHB No. 05-127, Order Granting Motion for Summary Judgment and Denying Motion for Reconsideration (Feb. 12, 2006); *PacifiCorp v. City of Walla Walla*, SHB No. 13-023, Order on Motion (Feb. 12, 2014).

Under this precedent, SOS lacks standing to raise its challenge to the MDNS. SOS raised a number of issues in its comment letter to the MDNS, but it did not raise the adequacy of mitigating conditions for impacts to public services. Murphy Decl., Ex. F. It therefore lacks standing to challenge the MDNS conditions now.

SOS's challenge should be dismissed on its merits for the same reasons the Tribe's appeal should be granted. As described above and explained more fully below, the evidence before the City showed there were no probable significant adverse impacts to public services, and thus none to mitigate under SEPA.

E. The Tribe's appeal should be granted because the Project does not cause impacts to public services.

The City imposed sweeping conditions to mitigate an impact the Project will not cause. Conditions 3 and 5, which constitute the vast majority of conditions attached to the MDNS,

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purport to mitigate the "potential for adverse environmental impact to public services[.]" The evidence before the City showed the Clinic will not cause any adverse impact to public services. Consequently, there is no impact to mitigate, and none of the conditions relating to public services are allowed under SEPA. The City again violated SEPA by using its land use authority to regulate clinical operations and disregarding how state and federal law already address the same purported impacts as the conditions. Thus, Conditions 3 and 5 should be struck from the MDNS.

1. The City improperly imposed conditions to mitigate speculative "potential" impacts to public services that the Project will not cause.

The MDNS identifies only "potential" impacts, not any that are "probable." SEPA recognizes a distinction between those terms.

> "Probable" means likely or reasonably likely to occur, as in "a reasonable probability of more than a moderate effect on the quality of the environment" (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative.

WAC 197-11-782 (emphasis added). A purpose of the threshold determination process is to determine if the "proposal is likely to have a probable significant adverse environmental impact," and then evaluate whether those impacts can be mitigated. WAC 197-11-330(1)(b) (emphasis added); *see also* WAC 197-11-060(4)(a) (directing lead agencies to consider "impacts that are likely, not merely speculative."). If there are "no probable significant adverse environmental impacts from a proposal" then there are no impacts to mitigate, and SEPA compels the lead agency to issue a Determination of Nonsignificance. WAC 197-11-340(1).

A "governmental action under SEPA may be 'conditioned or denied *only on the basis of specific, proven significant environmental impacts*.'" *Levine*, 116 Wn.2d at 580 (emphasis in original). When no specific impact can be pointed to, the impacts are speculative, and SEPA review should not address speculative impacts. *Boehm*, 111 Wn. App. at 714; *see also* WAC 197-11-660(1)(b) (requiring mitigation measures to relate to "specific, adverse

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environmental impacts"). The Director disregarded this limitation on his SEPA authority when he imposed conditions addressing the speculative "potential" impacts the Project may cause to public services rather than any impacts supported by evidence.

The evidence before the Director showed the Project *would not* cause impacts to public services. The review performed by the City Police Department is the best evidence of this. The Police Department conferred with Chiefs of Police in five different cities that were similar to Sequim and also had clinics treating OUD. Each Chief of Police concluded the clinics in their cities did not cause significant adverse impacts to public services, and the impacts were at most "negligible." The City Police Department itself concluded "there will most likely be negligible impacts from the Jamestown clinic." Murphy Decl., Ex. A. That is evidence of no significant adverse environmental impact to public services, and the Director agreed with that analysis. Murphy Decl., Ex. G at 22. The Director agreed with the Tribe's descriptions in the SEPA checklist about how the Project would yield negligible, if any, impacts to public services. *Id*. But the Director went on to impose mitigating conditions for the "potential" impacts to public services. This internal inconsistency reflects the Director clearly erred when imposing Conditions 3 and 5.

The City may rely on the Community Response Plan as its basis for imposing the Conditions. But the Tribe purposefully did not file the Community Response Plan with the Project application materials. The Tribe submitted the Community Response Plan to the City Council as part of a public comment so the City and public would be aware of the Tribe's careful planning, but the Tribe would not be permanently bound to the prospective planning document as with the materials it filed with the Project permit applications. Upon the Director's request, the Tribe shared an electronic copy of the Community Response Plan with the City so it could increase transparency into the Tribe's plans by posting the Community Response Plan on the City's website, but the Tribe never agreed the Community Response Plan would become part of its application materials. The City should not be allowed to exploit the Tribe's cooperation and

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commitment to transparency by treating it as a voluntary assumption of conditions. The Tribe made clear it did not voluntarily assume those conditions in its MDNS comment letter to the City.

The City identified only "potential" impacts to public services, none of which are supported by evidence that shows "a reasonable probability of more than a moderate effect" to the environment. As a matter of law, the "potential" impacts the City has identified are too remote and speculative to warrant mitigation under SEPA. The MDNS conditions that purport to mitigate potential impacts are inappropriate and prohibited by SEPA. WAC 197-11-660(1)(d).

2. The City's land use authority does not allow it to regulate clinical services.

Further, many of the conditions impermissibly regulate clinic operations. Again, clinic operations have no impact on public services, so imposing these mitigating conditions is outside the City's authority under SEPA. WAC 197-11-660 (requiring conditions to mitigate an environmental impact). While the City's staff is experienced in administering land use code, they are not clinical experts, and it is improper for them to use land use code to regulate medical services. Condition 3 effectively freezes clinical operations in time, and the Clinic is not free to deviate from the "procedures and recommendations" in the Community Response Plan, even if a new treatment is scientifically proven as effective and desirable but is not yet contemplated. Conditions 5.g and 5.l artificially limit how many patients the Clinic can serve and under what circumstances. The City should defer regulating health clinics to those bodies with expertise.

Other bodies with expertise do regulate the Clinic. The Clinic is licensed through the Washington State Department of Health and the Substance Abuse and Mental Health Services Administration ("SAMHSA") within the U.S. Department of Health & Human Services, which means the Clinic is subject to abundant federal and state regulations. Simcosky Decl., Ex. D at 1; *see also* 42 C.F.R. Part 8; 21 C.F.R. Part 1301; RCW 71.24.560, .585–.95; WAC 246-341-1000–25. To obtain its license to operate the Clinic, the Tribe must obtain approval from the Washington State Department of Health Board of Pharmacy, the federal Center for Substance

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Abuse Treatment, SAMHSA, and the federal Drug Enforcement Administration. WAC 246-341-1005(3). The MDNS does not account for this tremendous amount of existing regulatory oversight that governs Clinic operations, and "whether local, state, or federal requirements and enforcement would mitigate an identified significant impact." WAC 197-11-660(1)(e). That error warrants striking the conditions. Moreover, the City's conditions do not take into account how HIPAA prevents the Clinic from disclosing identifying patient information. 45 C.F.R. § 164.502. Condition 5.h violates HIPAA by requiring the Clinic to disclose to the community navigator which patients leave the Clinic's program. The condition should be struck for violating federal law. In sum, the conditions regulating clinic operations are unworkable, unwise, and should be stricken.

3. The City may not restrict the Tribe's ability to put land into trust.

Conditions 5.j and 5.k improperly place limits on the Tribe's ability to put land into trust. The process by which the Tribe may put land into trust is governed by federal law. 25 C.F.R. § 151.11. That process includes an evaluation of how the City would be impacted. *See* 25 C.F.R. § 151.10(e). Federal law already mitigates any potential impact arising from the Tribe putting land into trust, so the City violated SEPA by adding further mitigating conditions. WAC 197-11-660(1)(e). Aside from the fact that putting land into trust does not relate to the Tribe's nonexistent impact to public services, federal law provides an independent basis to strike Conditions 5.j and 5.k. Furthermore, there is no evidence the Tribe will put the Property into trust, so these conditions improperly mitigate a speculative event, which provides another independent basis to strike the conditions. *Boehm*, 111 Wn. App. at 714.

4. Community concern is not an environmental impact.

It appears the City went overboard in imposing conditions on the Project to appease the appellants and other project opponents. There were several public comments expressing concern for the potential impact to public services, but no evidence submitted that an impact would occur. It is settled law in Washington that community concern is an improper basis to impose

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conditions on a permit; conditions must mitigate an actual environmental impact. *Levine*, 116 Wn.2d at 580; *Maranatha Min.*, 59 Wn. App. at 804.

Mere comments, without evidence of how the Project would negatively impact the environment, cannot form the basis of any mitigating conditions. The Court of Appeals made this abundantly clear in *Levine*, 116 Wn.2d at 581, where Jefferson County imposed mitigative restrictions on a project in response to neighbors' concerns about potential impacts of a project. The Supreme Court of Washington upheld the reversal of those conditions and held there was "no evidence that the perceived ill effects that concerned the neighbors would actually materialize." *Id*. The Court justified its holding because there were "no agency findings of fact indicating that the restrictions reflect actual adverse impacts" and no evidence "the County considered any identifiable policies in attaching mitigative restrictions." *Id*. Here, there is no evidence of an actual adverse impact or a finding that the Project will cause impacts, just unfounded community concerns. Concern is not an impact and does not warrant mitigating conditions.

Because Conditions 3 and 5 do not mitigate a "specific, proven significant environmental impact" to public services caused by the Project, the Tribe's appeal should be granted, and those Conditions should be struck for violating SEPA.

V. CONCLUSION

This entire proceeding should be resolved on this motion. The Project Opponents lack standing to raise their appeals, and their appeals are moot. Their appeals fail on the merits because the City properly determined the Project was subject to an A-2 process as the Project is permitted outright. Public interest alone cannot cause the City to subject an application to a more onerous review, and there is no inpatient component to the Project.

The Tribe's appeal may be granted as a matter of law. The City erred by imposing conditions that address the "potential" for an impact to public services when the evidence it reviewed showed the Project would not impact public services. The "potential" impacts are a far

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cry from the "probable" impacts that must precede conditions imposed under SEPA. The City further erred by using its land use authority to regulate clinic operations and disregarding state and federal law that mitigated the purported impacts targeted by the conditions. As a matter of law, the City lacked authority to impose conditions mitigating nonexistent impacts to public services, and Conditions 3 and 5 should be struck in their entirety.

DATED this 2nd day of September, 2020.

LeAnne Bremer, WSBA No. 19129
Andy Murphy, WSBA No. 46664
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Attorneys for the Jamestown S'Klallam Tribe

4821-9029-4711.9

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2020, a copy of the foregoing document was served upon the attorneys of record in the above cause as follows:

Michael A. Spence Helsell Fetterman LLP 1001 4th Ave Ste 4200 Seattle, WA 98154-1154 mspence@helsell.com Attorney for Save our Sequim	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Michael D. McLaughlin Michael D. McLaughlin, LLC 4114 N 10th St. Tacoma, WA 98406 michael@mdmwalaw.com Attorney for Parkwood Manufactured Housing Community, LLC	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Kristina Nelson-Gross Sequim City Attorney 152 West Cedar Street Sequim, WA 98382 knelson-gross@sequimwa.gov tsandaine@sequimwa.gov olbrechtslaw@gmail.com Attorney for City of Sequim, Washington	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Robert Bilow 195 Sunset Pl. Sequim, WA 98382 millrow26@gmail.com	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email

Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 2nd day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4821-7717-2937.1

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THE HEARING EXAMINER OF THE CITY OF SEQUIM

In re: Consolidated Administrative Appeal of May 15, 2020 Staff Report and Director's Decision; Notice of Determination of Procedure Type and MDNS for Jamestown S'Klallam Tribe Outpatient Clinic.	File Nos. CDR 20-001; CBP 20-0001 DECLARATION OF ANDY MURPHY

I, Andy Murphy, hereby state and declare as follows:

1. I am an attorney representing the Jamestown S'Klallam Tribe (the "Tribe"). I am over eighteen, competent to testify, and have personal knowledge of the facts declared to herein.

2. Attached hereto as **Exhibit A** is a true and correct copy of the comment submitted by the Sequim Police Department regarding the project on appeal.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Notice of Determination of Procedure Type for File No. CDR 20-001 Jamestown S'Klallam Tribe MAT Clinic Building Permit, SEPA & Design Review dated January 24, 2020 (the "Determination").

4. Attached hereto as **Exhibit C** is a true and correct copy of the City of Sequim Department of Community Development Staff Report and Director's Decision for Jamestown S'Klallam Tribe Outpatient Clinic Design Review Application File No. CDR 20-001 dated May 15, 2020 (the "Design Review Approval").

5. Attached hereto as **Exhibit D** is a true and correct copy of the original Mitigated

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Determination of Nonsignificance for the Jamestown S'Klallam Tribe Outpatient Clinic Application File No. CDR 20-001 (the "Original MDNS") issued by the City of Sequim on March 25, 2020.

6. Attached hereto as **Exhibit E** is a true and correct copy of the April 8, 2020 comment letter that I submitted to the City of Sequim on the Tribe's behalf regarding the Original MDNS.

7. Attached hereto as **Exhibit F** is a true and correct copy of the March 24, 2020 comment letter submitted to the City of Sequim on the behalf of Save Our Sequim regarding the Original MDNS.

8. Attached hereto as **Exhibit G** is a true and correct copy of the Revised Mitigated Determination of Nonsignificance for the Jamestown S'Klallam Tribe Outpatient Clinic Application File No. CDR 20-001 (the "Revised MDNS") issued by the City of Sequim on May 11, 2020.

9. Attached hereto as **Exhibit H** is a true and correct copy of the Notice of Appeal filed on February 7, 2020 by Parkwood Manufactured Housing Community, LLC regarding the Determination.

10. Attached hereto as **Exhibit I** is a true and correct copy of a printout from Google Maps that shows the distance between Parkwood's property and the Project site. Based on my review of city maps, Parkwood's property is outside the city limits for the City of Sequim.

11. Attached hereto as **Exhibit J** is a true and correct copy of the Notice of Appeal filed on June 5, 2020 by Parkwood Manufactured Housing Community, LLC regarding the Design Review Approval and Revised MDNS.

12. Attached hereto as **Exhibit K** is a true and correct copy of the Notice of Appeal filed on February 13, 2020 by Save Our Sequim regarding the Determination.

13. Attached hereto as **Exhibit L** is a true and correct copy of the Notice of Appeal dated June 5, 2020 that was filed Save Our Sequim regarding the regarding the Design Review Approval and Revised MDNS.

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14. Attached hereto as **Exhibit M** is a true and correct copy of the Notice of Appeal filed on February 14, 2020 by Robert Bilow regarding the Determination.

15. Attached hereto as **Exhibit N** is a true and correct copy of a printout from Google Maps that shows the distance between Bilow's property and the Project site.

16. Attached hereto as **Exhibit O** is a true and correct copy of the Notice of Appeal dated June 1, 2020 that I submitted on the Tribe's behalf regarding the Revised MDNS.

17. Attached hereto as **Exhibit P** is a true and correct copy of the Notice of Decision for Commercial Building Permit Application No. CBP 20-001 and Revised MDNS; Jamestown S'Klallam Tribe Medical Clinic dated June 30, 2020.

18. Attached hereto as **Exhibit Q** is a true and correct copy of an email exchange I had with City staff on July 24, 2020, which confirmed that no party filed an appeal of the building permit by the July 21, 2020 deadline.

19. Attached hereto as **Exhibit R** is a true and correct copy of an excerpt from the International Building Code, 2015 Edition.

20. Attached hereto as **Exhibit S** is a true and correct copy of the Total Budgeted Funds for Capital Projects in the 24th Legislative District as appropriated in the 2019-21 Capital Budget, 2020 Supplemental as enacted on April 3, 2020, which shows the Tribe was awarded $7.2 million for the Project.

21. SOS and Parkwood challenged the Determination in Clallam County Superior Court by bringing an action under the Uniform Declaratory Judgments Act. On July 17, 2020, the court granted the Tribe's motion to dismiss the lawsuit without prejudice because the lawsuit violated the Land Use Petition Act by prematurely challenging the land use decisions currently on review in this matter.

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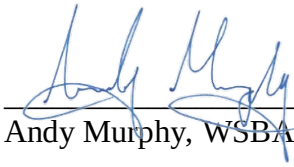
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 2nd day of September, 2020.



Andy Murphy, WSBA No. 46664

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Michael A. Spence Helsell Fetterman LLP 1001 4th Ave Ste 4200 Seattle, WA 98154-1154 mspence@helsell.com Attorney for Save our Sequim	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Michael D. McLaughlin Michael D. McLaughlin, LLC 4114 N 10th St. Tacoma, WA 98406 michael@mdmwalaw.com Attorney for Parkwood Manufactured Housing Community, LLC	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Kristina Nelson-Gross Sequim City Attorney 152 West Cedar Street Sequim, WA 98382 knelson-gross@sequimwa.gov tsandaine@sequimwa.gov olbrechtslaw@gmail.com Attorney for City of Sequim, Washington	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Robert Bilow 195 Sunset Pl. Sequim, WA 98382 millrow26@gmail.com	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email

Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 2nd day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4821-7717-2937.1

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THE HEARING EXAMINER OF THE CITY OF SEQUIM

In re: Consolidated Administrative Appeal of May 15, 2020 Staff Report and Director's Decision; Notice of Determination of Procedure Type and MDNS for Jamestown S'Klallam Tribe Outpatient Clinic.	File Nos. CDR 20-001; CBP 20-0001 DECLARATION OF BRENT SIMCOSKY

I, Brent Simcosky, hereby state and declare as follows:

1. I am over eighteen, competent to testify, and have personal knowledge of the facts declared to herein.

2. I am the Director Health Services for the Jamestown S'Klallam Tribe (the "Tribe"). In addition to overseeing the health care services the Tribe provides, my duties have included being the project manager for the Jamestown S'Klallam Healing Clinic (the "Project" or "Clinic"). I am familiar with the history of the Project, the government approvals necessary for the Project to operate, and how the Clinic will operate.

3. Attached hereto as **Exhibit A** is a true and correct copy of capital budget request the Tribe submitted to the state to obtain funding for a healing campus. The statements within Exhibit A are true and correct to the best of my knowledge. Out of the $25 million requested for three phases, the State issued a $7.2 million grant for only Phase 1 as proposed. Attached hereto as **Exhibit B** is a true and correct copy of the grant agreement for the Project, which shows the

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State only funded Phase 1 of the proposal submitted as Exhibit A. The Tribe initially expected to contribute $4 million of its own funds to the Project, which was expected to provide adequate funding to construct the Clinic. Due to the increased cost of construction during COVID, the Tribe now expects to contribute between $7 million and $8 million of its funds to the Project. However, because the Tribe did not receive funding for the other phases in the proposal, the Tribe discontinued pursuing those phases. There is no funding for the inpatient clinic that was intended to be Phase 2, no plans have been developed for it (aside from conceptual drawings), and the Tribe has no plans to build that previously discussed phase.

4. In response to public interest about the Clinic, the Tribe took a host of steps to ensure that the Project's presence in the community would yield only positive impacts. In addition to participating in public meetings, the Tribe developed a website for the Project that included answers to Frequently Asked Questions from the community. Attached hereto as **Exhibit C** is a true and correct copy of the "Frequently Asked Questions" page from that website. Going further, the Tribe developed and released a Preliminary Medical Outpatient Clinic and Community Response Plan (the "Community Response Plan") dated January 13, 2020, a true and correct copy of which is attached hereto as **Exhibit D**. I am the primary author of the Community Response Plan, and the statements within it are true and correct to the best of my knowledge.

5. Because the Community Response Plan included descriptions of how the Tribe intends to provide medical care at the Clinic, the Tribe was careful not to file the Community Response Plan with the City's Department of Community Development (the "Department") as part of the permit application materials for the Project. The Tribe carefully developed the Community Response Plan and stands by it, but the Clinic is not yet operational, and it may come to pass that some clinical service aspects may need to deviate from the Community Response Plan in order to provide safe and effective care. In an effort to balance the Tribe's desire to be transparent with the public while also preserving the need for operational flexibility, the Tribe posted the

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Community Response Plan on the Project's website. I provided a copy of the Community Response Plan to the City Council while providing a public comment during a City Council meeting on January 13, 2020. Barry Berezowsky, the Director of the Department, then asked me for an electronic copy of the plan so the City could post it on the City's website for the Project as a means to distribute the plan to the public, and I accommodated that request. The Tribe has deliberately not filed the Community Response Plan with the City as part of the Project application materials and never agreed to be bound to the Community Response Plan as a permit condition.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Sequim, Washington this 2nd day of September, 2020.

DocuSigned by:
Brent Simcosky
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Brent Simcosky

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Michael D. McLaughlin Michael D. McLaughlin, LLC 4114 N 10th St. Tacoma, WA 98406 michael@mdmwalaw.com Attorney for Parkwood Manufactured Housing Community, LLC	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Kristina Nelson-Gross Sequim City Attorney 152 West Cedar Street Sequim, WA 98382 knelson-gross@sequimwa.gov tsandaine@sequimwa.gov olbrechtslaw@gmail.com Attorney for City of Sequim, Washington	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
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Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 2nd day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4840-9023-4569.2

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THE HEARING EXAMINER OF THE CITY OF SEQUIM

In re: Consolidated Administrative Appeal of May 15, 2020 Staff Report and Director's Decision; Notice of Determination of Procedure Type and MDNS for Jamestown S'Klallam Tribe Outpatient Clinic.	File Nos. CDR 20-001; CBP 20-0001 DECLARATION OF PAUL CUNNINGHAM

I, Paul Cunningham, hereby state and declare as follows:

1. I am over eighteen, competent to testify, and have personal knowledge of the facts declared to herein.

2. I completed my MD at the University of Washington School of Medicine in 1999. I completed my Family Medicine residency at Swedish Medical Center in Seattle, Washington in 2002, and I completed my Geriatric Fellowship at Swedish Medical Center in 2003. I am board certified in Family Medicine, Geriatrics, and Hospice/Palliative Care. I have spent more than twenty years providing medical care to patients, and I also have experience providing medical oversight of patient care and quality improvement for different medical facilities.

3. I am the Chief Medical Officer ("CMO") for the Jamestown Family Health Clinic (the "Health Clinic"), which is owned and operated by the Jamestown S'Klallam Tribe (the "Tribe"). The Health Clinic is the premier medical facility in Sequim, and provides expert medical care and family services to both tribal citizens and non-tribal citizens alike.

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4. The Health Clinic has provided treatment, including Medication-Assisted Treatment ("MAT"), for patients suffering from Opioid Use Disorder ("OUD") since 2017. MAT is an effective evidence-based treatment for those suffering from OUD. While the MAT provided in the primary care setting at the Health Clinic is useful, the Olympic Peninsula community is in need of an Opioid Treatment Program ("OTP"). OTP include MAT and also provide more specialized care than what a primary care provider can offer, such as prescribing different types of medication and methods of administering those medications. An OTP combined with wrap-around services offers the best opportunity for sustained recovery for those with OUD. The Didgwalic Wellness Center is one example of an OTP with wrap-around services that has shown success in treating patients with OUD.

5. When the Jamestown S'Klallam Healing Clinic (the "Project" or "Clinic") opens, I will oversee the medical treatment provided at the Clinic as its CMO. The Clinic will provide the OTP with wrap-around services needed by the regional community. I am familiar with the design of the Clinic and how it relates to the medical care patients will receive there.

6. I am aware that opponents to the Project have argued that the child care services and laboratory equipment that will be at the Clinic somehow convert the Clinic from being an outpatient medical clinic into something else. As a physician who treats patients with OUD, and the CMO of the Clinic, I view the child care services and laboratory equipment to be a component of the medical care the Clinic will provide, and they are necessary for us to effectively diagnose and treat Clinic patients. Laboratory equipment on site allows staff to perform urinalysis tests on the patients to verify they are following treatment plans. The laboratory thus enables us to diagnose whether patients are following their treatment plans and modify treatment accordingly. Notably, the lab equipment will be for urinalysis tests exclusively, and we will send other samples to off-site laboratories for testing. In this way, the laboratory equipment at the Clinic is tailored to the treatment the Clinic will provide, and is not a full-service medical laboratory. Child-care services allow for patients to receive treatment without

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the additional barrier of finding child-care while they receive treatment. This is particularly important for the patients the Clinic will treat, where receiving consistent treatment is important to battle OUD and additional barriers to receiving that treatment would reduce the quality and efficacy of care. I view the child-care services and laboratory equipment as integral components to the OUD treatment the Clinic will provide.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Sequim, Washington this 2nd day of September, 2020.

DocuSigned by:
Paul Cunningham
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Paul Cunningham

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2020, a copy of the foregoing document was served upon the attorneys of record in the above cause as follows:

Michael A. Spence Helsell Fetterman LLP 1001 4th Ave Ste 4200 Seattle, WA 98154-1154 mspence@helsell.com Attorney for Save our Sequim	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
Michael D. McLaughlin Michael D. McLaughlin, LLC 4114 N 10th St. Tacoma, WA 98406 michael@mdmwalaw.com Attorney for Parkwood Manufactured Housing Community, LLC	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
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Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 2nd day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

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