DECLARATION OF SERVICE

On this day I served a copy of the document on which this declaration appears by email transmission to:

Michael D. McLaughlin, Atty for Parkwood
michael@mdmwalaw.com
Michael Spence, Attorney for S.O.S.
mspence@helsell.com
Robert Bilow
Millrow26@gmail.com
Andy Murphy/LeAnne Bremer, Attys for Tribe
Andy.murphy@millernash.com
Leanne.bremer@millernash.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Sequim, WA this 14th day of September, 2020.

Tellina Sandaine

Erika Hamerquist, Secretary/Tellina Sandaine, Paralegal

OFFICE OF THE HEARING EXAMINER
IN AND FOR THE CITY OF SEQUIM

RE: CDR20-001	
Consolidated Administrative Appeals of January 24, 2020 Notice of Determination of Procedure Type: May 15, 2020 Director's Report and Staff Decision; and May 11, 2020 MDNS for Jamestown S'Klallam Tribe Outpatient Clinic	File No. CDR20-001 CITY'S CONSOLIDATED RESPONSE TO: (1) APPELLANT PRO SE BILOW'S "MOTION FOR SUBPOENAS"; (2) APPELLANT PARKWOOD'S DISPOSITIVE MOTION; AND (3) PETITIONER SAVE OUR SEQUIM'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR ORDER REMANDING APPLICATION, AND MOTION TO STAY PROCEEDINGS PENDING PUBLIC RECORDS ACT COMPLIANCE

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

I. INTRODUCTION AND RELIEF REQUESTED

The City of Sequim (City or Sequim) submits this Consolidated Response to the Motions submitted by Appellants Bilow ("Motion" for Subpoenas[1]), Parkwood Manufactured Housing Community, LLC (Parkwood) ("Dispositive Motion"), and Save Our Sequim (S.O.S.) ("Petitioner (sic) [S.O.S.'s] Motion for Partial Summary Judgment and Order for Remanding Application" and "Motion to Stay Proceedings Pending Public Records Act Compliance") (collectively referred to as "Appellants' Motions" for clarity and for judicial economy). Consistent with the City's other briefing on this matter, the City will organize its response by Party due to the nature of Appellants' Motions, for ease of reference, and in its continued attempt to provide a clean and clear record.

The City of Sequim respectfully requests that the Hearing Examiner deny Appellants' Motions in their entirety. While the City agrees that these issues can be resolved with a dispositive motion, the issue(s) before the Hearing Examiner should be resolved in the City's favor. The City is entitled to a decision in its favor as a matter of law as set forth in the City's Consolidated Motion to Dismiss Bilow, Parkwood, and S.O.S. Appeals ("City's Motion to Dismiss") filed and served on September 2, 2020. The City renews its arguments that Appellants lack standing and the matter should be dismissed. The City incorporates by reference the arguments and authorities submitted in its Motion to Dismiss as though fully set forth here, and further responds to each Appellants' Motion(s) as set forth below. The City also incorporates herein by this reference the Tribe's Motion for Summary Judgment to the extent

[1] This "Motion" appears to consist of an email directed to the Hearing Examiner and an attached proposed witness list, which was then "supplemented" by Appellant Bilow's "Supplement to Motion for Subpoenas" at the Hearing Examiner's request. The City refers to the collective documents as Appellant Bilow's "Motion".

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

that Motion seeks dismissal of the claims and appeal challenges by Appellants S.O.S., Parkwood, and Bilow.

II. ISSUES PRESENTED AND BRIEF ANSWER

1. Is the information sought by Appellant Bilow in his Motion for Subpoenas necessary and relevant to these proceedings? **No.** He has provided no good faith basis to demonstrate why he needs the information and how having that information is relevant to this matter and would further his case. Further, it is inappropriate to subpoena the City Attorney when she is legal counsel for the City in these proceedings.
2. Is the Tribe's medication-assisted-treatment clinic (MAT Clinic) an Essential Public Facility (EPF) under the Sequim Municipal Code (SMC)? **No.** Appellant Parkwood and S.O.S.'s arguments that the MAT Clinic is an EPF hinge upon a hypothetical, future phase that is not the subject of the Tribe's application or these appeals. Because all their arguments fail unless the Hearing Examiner finds the MAT Clinic is an EPF — which it should not — Appellants' Motions must be denied, and their collective appeals must be dismissed.
3. Should the Hearing Examiner consider Appellant S.O.S.'s arguments about alleged conflict within the SMC regarding the "proper" appeal authority? **No.** Appellant S.O.S. did not raise this issue in either of its appeals and has therefore waived any argument on that issue or relief available on this point.
4. Should the Hearing Examiner grant Appellant S.O.S.'s Motion to Stay Proceedings? **No.** Appellant has offered no explanation as to why the City's alleged (unsupported and false) noncompliance with the Public Records Act (PRA) prejudices its

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

arguments or is even relevant to this matter. A mere self-serving, generalized assertion that it will be "severely prejudiced" is insufficient to warrant a stay in proceedings. S.O.S. has not identified any specific document or information that might be produced through a PRA disclosure that would have any marginal relevance to the issues in these consolidated appeals.

5. Should the Hearing Examiner reject and refuse to hear any of Appellants' arguments that have not been raised in their appeal briefs? **Yes.** Errors and issues not specified in the appeal are waived, and the appellant bears the burden of identifying those errors with specificity.

III. BACKGROUND

The Tribe submitted its building permit and design review applications for a MAT Clinic on January 10, 2020. Pursuant to City Code, the City's Community Development Director (Director) issued his Notice of Determination of Procedure Type on January 24, 2020 (Typing Decision). Appellants Bilow, Parkwood, and S.O.S. timely appealed the Typing Decision (Typing Appeal(s)). In accordance with the Sequim Municipal Code, the appeals were consolidated and stayed until they could be combined with a decision on the merits of the relevant permits.

On May 11, 2020, the Director issued a Revised Mitigated Determination of Nonsignificance (MDNS) as required under the State Environmental Policy Act (SEPA). Appellants Parkwood and S.O.S. timely appealed that decision (SEPA Appeal(s)); the Tribe timely appealed that decision as well. Appellant Bilow did not appeal the City's SEPA decision.

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City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

IV. EVIDENCE RELIED UPON

The City's Consolidated Response relies upon the pleadings and associated documents filed by the Parties in this matter, the City's Consolidated Motion to Dismiss, and the Declarations of Sara McMillon, Sequim City Clerk, and Kristina Nelson-Gross, Sequim City Attorney.

V. ARGUMENT

A. THE HEARING EXAMINER SHOULD DENY APPELLANT BILOW'S "MOTION" FOR SUBPOENAS BECAUSE THERE IS NO GOOD FAITH BASIS TO SUPPORT THE NEED FOR THE REQUESTED WITNESS TESTIMONY IN WHOLE OR IN PART.

Appellant Bilow has provided no relevant basis to support his subpoena request for testimony by 5 witnesses. (*See generally,* Appellant Bilow's Mot. for Subpoena.) Even though this is an open record hearing, subpoena requests under these circumstances are virtually unheard of because the land use decision has already been made and is based on an established and detailed record. There is no need for the requested witness testimony, and Appellant Bilow has not demonstrated how the requested information is "necessary" for arguing his case.

Appellant Bilow apparently argues[2] in support of issuing subpoenas that because the applicant is a tribe, that mere fact implicates sovereign immunity, which somehow creates substantial discretion; yet, the words "sovereign immunity" *are never used* in Appellant Bilow's four-page appeal. (*See generally,* Appellant Bilow Typing Appeal.) *See also, Cowiche Canyon Conservancy v. Bosely,* 118 Wn.2d. 801, 809 (1992) (assignments of error are waived unless

[2] Appellant Bilow's "Motion for Subpoenas" also seems to ask the Hearing Examiner to rule on whether a perceived "sovereign immunity" issue amounts to "substantial discretion". For that reason, the City addresses Appellant Bilow's argument on that matter, though the City does not fully understand his argument.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

contained in opening brief). Thus, the Hearing Examiner should not consider the "sovereign immunity" issue and should reject Appellant Bilow's arguments and deny his Motion.

In addition to the fact that the question of sovereign immunity is not properly before the Hearing Examiner, Appellant Bilow has failed to identify how knowing 1) why the Director "did not" consider sovereign immunity as a matter of substantial discretion, 2) why the City Manager and Director "jump[ed] immediately" to the A-2 classification, 3) who authored the Director's Typing Decision, and 4) whether the City Attorney and the Director "'forgot' the critical concept of Sovereign Immunity" (sic) when processing the Tribe's permits have **any** relevance to the *legal* issues at hand. (Appellant Bilow Mot. for Subpoena, pp. 5-7.) The vast record speaks for itself, which specifically includes a seven-page Notice of Determination for Procedure Type (Typing Decision) signed by the Director. (Decl. M. Spence, Ex. D.) In fact, the issue of sovereign immunity has no bearing on any of the issues on this appeal, and do not support any perceived need for supplementing the record with new witness testimony.

Moreover, the Typing Decision - which is the subject of Appellant Bilow's appeal - on this matter has already been made, and to allow further "testimony" on the issue of sovereign immunity is patently unreasonable. It also puts the Hearing Examiner in a conundrum because the Hearing Examiner is supposed to be reviewing the Typing Decision on its face, based on the established record which the Director reviewed when making his decision, not with after-the-fact testimony from staff. Allowing this new, additional witness testimony is analogous to allowing a trial court judge to be deposed to explain the judge's reasoning after a written decision has been issued. The reasons for a decision can be gleaned from the established record, as they are here, and the Hearing Examiner should deny Appellant Bilow's Motion for

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

Subpoenas. Appellant Bilow's request is unreasonably burdensome and irrelevant, contrary to CR 26, and need not be admitted. *Cf.* SMC 2.10.030(D).

Alternatively, if the Hearing Examiner chooses to allow City staff[3] to be deposed, which it should not, the Hearing Examiner should 1) not allow the City Attorney to be deposed at all, 2) *limit* the scope in which the City Manager and Director would be required to respond, and 3) require Appellant Bilow to submit his questions in writing and generally consistent with CR 31.

With respect to the City Attorney's deposition, there is no good faith basis for her deposition. The request itself is facially improper and seeks to undermine or invade the attorney-client relationship and confidences of the client — the City of Sequim. There is nothing she can provide that has not already been provided or that cannot be obtained from other City staff, or that could be elicited without invading the attorney-client relationship, work-product protections, or executive privileges. Further, despite Appellant Bilow's claim, the Director (decision-maker Barry Berezowsky) is the City Attorney's client and asking her questions as outlined in Appellant Bilow's Motion for Subpoenas does impinge upon attorney-client privilege. (Decl. K. Nelson-Gross, #2.) The rules of privilege are recognized to the extent recognized by law. SMC 2.10.030(D).

Moreover, Washington's Rules of Professional Conduct (RPC) 3.7, comment 8, makes clear that when this rule is invoked, there is a risk that the opposing party may be seeking to use the rule for an improper purpose — to disqualify the lawyer. (RPC 3.7 cmt 8[4].) Appellant

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[3] The City's arguments focus on City staff because it assumes that the Tribe will separately address this issue as it relates to the Tribe's staff.

[4] [8] When a lawyer is called to testify as a witness by the adverse party, there is a risk that Rule 3.7 is being inappropriately used as a tactic to obtain disqualification of the lawyer. Paragraph (a)(4) is intended to confer discretion on the tribunal in determining whether disqualification is truly warranted in such circumstances. The provisions of paragraph (a)(4) were taken from former Washington RPC 3.7(c).

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

Bilow's request to depose City staff — and particularly the City Attorney — is nothing more than an extension of harassment allegations of collusion and bias espoused by Appellants. (*See, e.g.*, Decl. K. Nelson-Gross, Ex. 2, #28, Ex. 3, #14, Ex. 4.) Appellant Bilow has provided nothing to show that the requested information is "necessary," and the request should be denied as to the City Attorney.

If the Hearing Examiner determines that the information is "necessary" as it relates to the Director and the City Manager, the City offers the Declarations of both, (which were developed for previous litigation[5] referenced by Appellants Parkwood and S.O.S.) to provide additional support for its arguments that depositions are unnecessary. (Decl. K. Nelson-Gross, Exs. 2 and 3.) Specifically, both Declarations reference the reasoning behind the decisions and the emails alluded to in Appellant Bilow's Motion for Subpoenas. (*See,* Appellant Bilow Mot. for Subpoenas, p. 5, section (b).) If, after reading the Declarations from the Director, the City Manager, and the City Attorney, the Hearing Examiner believes additional information is actually necessary for resolution of Appellant Bilow's appeal, the City asks that the Hearing Examiner limit the scope of any testimony provided (through depositions or at the hearing itself), clearly specify the matters in which City staff may be asked to testify, and require Appellant Bilow to submit his questions to City staff, the Hearing Examiner, and other parties in writing, and in advance of any testimony. Conducting any authorized deposition or hearing testimony in this manner will ensure that the questions are relevant, within the proper scope as

[5] If the Hearing Examiner allows the depositions, the City will prepare new Declarations for Mr. Berezowsky and Mr. Bush that essentially contains the same information so that the declarations will constitute "testimony" as required under the Hearing Examiner's Rules of Procedure.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

established by the Hearing Examiner, not unnecessarily burdensome or repetitive, and provide a clean and clear record while promoting judicial economy.

Appellant Bilow also seems to now be asserting that somehow sovereign immunity[6] constitutes substantial discretion. As set forth above and in the City's Motion to Dismiss pp. 13-14, regarding substantial discretion and broad public interest, and pp. 34-35, regarding Appellant's burden to specify the City's alleged errors, the City adopts and incorporates those arguments and authorities as though fully set forth here. Because Appellant Bilow failed to specify the City's alleged failure to consider sovereign immunity in his opening appeal brief, he has waived that right. *Cowiche Canyon Conservancy v. Bosely,* 118 Wn.2d. 801, 809 (1992).

Even if Appellant Bilow did not waive his right to raise the sovereign immunity issue, he is fundamentally mistaken about when tribal immunity comes into play. Washington is a Public Law 280 (P.L. 280) State through which it assumed general criminal and civil jurisdiction over tribal activities on tribal lands that are not reservation or trust lands. RCW 37.12.010. As a result, as long as the Tribe does not move the land into trust or reservation status, the City has some jurisdiction over its activities, which presumably is why the Tribe sought land use permits from the City. (*See generally,* CDR20-001 and CBP20-001.) If the Tribe was not required to get permits from the City, it makes no sense as to why it would voluntarily apply for unnecessary permits. Unlike the City's Interlocal Agreement (ILA) with the Tribe referenced by Appellant Bilow (Ex. RLB-1), the lands that will be connected to the City's sewer were on tribal trust and reservation lands, and thus sovereign immunity was an issue for the City, which was why the City properly required a waiver. (Decl. K. Nelson-Gross,

[6] City expects the Tribe to expand on this issue more fully as the City is not an expert in tribal law. If necessary, the City will provide more briefing on this matter upon the Hearing Examiner's request.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

#3.) Consequently, the comparison is akin to apples and cows — there is no comparison. For this reason and the reasons set forth above, Appellant Bilow's arguments on sovereign immunity should be stricken and disregarded by the Hearing Examiner.

Other additional matters the City urges the Hearing Examiner to rule upon are as follows:

- Appellant Bilow makes clear that he is not arguing that the MAT Clinic be classified as an EPF. (Appellant Bilow, Mot. for Subpoenas, p. 3.) As such, any arguments that he may raise related to classification of the MAT Clinic as an EPF should be stricken and not considered by the Hearing Examiner.
- Appellant Bilow concedes that "broad public interest" alone is not determinative of a C-2 analysis. (*Id.*) Thus, any arguments to the contrary should be stricken and rejected by the Hearing Examiner.

In sum, the Hearing Examiner should deny Appellant Bilow's Motion for Subpoenas (or any testimony by deposition or live at the hearing) in its entirety. He has made no showing whatsoever about the relevancy, let alone the *necessity*, of the information he seeks and how it relates to his issues or claims, or the arguments related to them. The City also renews its argument that Appellant Bilow lacks standing[7]. One who lacks standing cannot appeal a land use decision at all. *Grundy v. Brack Family Trust*, 116 Wn. App. 625, 633 (2003) *reversed on other grounds,* 155 Wn.2d 1; RCW 36.70C.060. Thus, the Hearing Examiner should deny Appellant Bilow's Motion and dismiss his appeal, each in their entirety.

[7] The City adopts and incorporates its arguments and authorities on pages 4-7 of the City's Motion to Dismiss and the Tribe's Motion for Summary Judgment, pages 15-17 as though fully set forth here.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

B. THE HEARING EXAMINER SHOULD DENY APPELLANT PARKWOOD'S DISPOSITIVE MOTION BECAUSE ALL OF ITS ARGUMENTS FAIL AS A MATTER OF LAW.

The Hearing Examiner should reject the notion that requiring the City's C-2 process would not be an unreasonable burden on the Tribe. (Appellant Parkwood Dispositive Mot., pp. 10-13.) If the City — or the Hearing Examiner — were to require the Tribe to use the C-2 process without an additional finding that the MAT Clinic is an EPF, such determination would be contrary to law (City Code) as set forth in the City's Motion to Dismiss. The City incorporates its arguments and authorities in the City's Motion to Dismiss regarding its A-1 and A-2 processes, pages 16-30, and the Tribe's arguments and authorities in its Motion for Summary Judgment, pages 17-25 as though fully set forth here.

The threshold and dispositive issue before the Hearing Examiner is whether the Tribe's MAT Clinic is an EPF; it is not. (*See generally,* City's Mot. to Dismiss, pp. 16-30, Tribe's Mot. for Summ. J., pp. 17-25.)

Appellant Parkwood makes a strained argument that the City's Essential Public Facility ordinance, SMC 18.56, is "more specific" and therefore controls, over the City's "more generic term" of medical clinic. (Appellant Parkwood Dispositive Mot. p. 11, lns. 13-16.) While Appellant Parkwood's analysis of statutory construction appears to be correct, it still fails to recognize that despite their assertions to the contrary, the City code sections are not in conflict.

Section 18.56.030(J) provides as follows: Group homes, alcoholism or drug treatment centers, detoxification centers, work release facilities for convicts or ex-convicts, or other housing serving as an alternative to incarceration with 12 or more residents. SMC 18.56.030(J). While this provision is not explicit, it certainly *implies* that this provision is intended to address some type of *residential use.* Group homes, work release facilities, and "other housing" all

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

encompass some form of residential use by their very nature[8]. Moreover, Appellant Parkwood's *ejusdem generis* rule proves this point. (Appellant Parkwood Dispositive Mot., p. 12, lns. 5-10 ("ejusdem generis rule is generally applied to general and specific words *clearly associated in the same sentence…."*, emphasis added).) There is nothing contained within the language of SMC 18.56.030(J) that demonstrates the City intended to include stand-alone **nonresidential** "drug treatment" or "detoxification centers" or "outpatient substance abuse and mental health facilities" within this category. If the City Council intended for those facilities to be included in the definition, it would have said so; courts do not add or modify the plain language of a statute if the statute is unambiguous. *Dot Foods, Inc. v. Wash. Dep't of Revenue,* 166 Wn.2d 912, 920 (2009).

Further, Appellant Parkwood's *ejusdem generis* rule analysis is inapplicable as argued because the City's definition of medical "clinic" (SMC 18.08.020) and the provisions set forth in SMC 18.56.030(J) do not appear in the same *chapter*, let alone the same sentence. (*Cf.* Appellant Parkwood Dispositive Mot., p. 12, lns. 5-10.) In fact, Appellant Parkwood omitted the rest of the court's holding contained **in the very next sentence** on that issue: "Where the general and specific words are not so connected, the reasoning underlying the ejusdem generis rule loses its force. *Southwest Wash. Chapt., Nat. Elec. Contractors Ass'n v. Pierce Cty.,* 100 Wn.2d 109, 116-117 (1983)(emphasis added). Thus, Appellant Parkwood's arguments that the "specific language" of "drug treatment centers" and "detoxification centers" controls over the general "medical clinic" should be rejected.

[8] Pursuant to SMC 2.10.050(E), the City asks the Hearing Examiner to take judicial notice of the functions of group homes and work release facilities and the residential component of each use.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

Finally, it is irrelevant that the City Council is the decision-making authority for special use permits in the River Road Economic Opportunity Area (RREOA), and that "past spokespersons" for the Tribe discussed the possibility of other Phases. (*See generally,* Appellant Parkwood Dispositive Mot.) As such, the City incorporates its arguments and authorities from pages 16-34 of the City's Motion to Dismiss, and the Tribe's arguments and authorities from its Motion for Summary Judgment, pages 17-25, as though fully set forth here.

The City again incorporates its arguments and authorities regarding Parkwood's lack of standing in pages 4-7 and 15-16 of the City's Motion to Dismiss and the Tribe's Motion for Summary Judgment pages 15-17 as though fully set forth here. The City also notes that in the prior Superior Court litigation, the court opined that it is "somewhat unclear to the court what right is at risk *other than* Plaintiffs'[Parkwood and S.O.S.] assertion that various constitutional rights are not protected by the City's code, or more generally that they are entitled to a process which is fair." (Decl. M. Spence, Ex. I, p. 4, lns. 10-12, emphasis added.) Appellants Parkwood and S.O.S. have offered nothing further to demonstrate their "harm", and therefore lack standing as argued in the City's Motion to Dismiss and again here.

Appellant Parkwood's Dispositive Motion should be rejected and denied for all the reasons set forth above, and the Hearing Examiner should dismiss their appeals for the reasons set forth in the City's Motion to Dismiss and this Consolidated Response.

C. THE HEARING EXAMINER SHOULD DENY APPELLANT S.O.S.'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT, ORDER FOR REMAND, AND STAY OF PROCEEDINGS AS A MATTER OF LAW.

1. Appellant S.O.S.'s Motion for Partial Summary Judgment and Order for Remand must be denied, and its appeals dismissed because the MAT Clinic is not an EPF, which is the "substantive basis" for S.O.S.'s appeals.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

Appellant S.O.S.'s appeals and its Motion for Partial Summary Judgment and Order for Remand (Appellant S.O.S.'s Motion) require the Hearing Examiner to accept its arguments that the MAT Clinic is an EPF. The MAT Clinic is not an EPF for the reasons stated in the City's Motion to Dismiss, which arguments and authorities on pages 16-29 are adopted and incorporated as though fully set forth here. Further, the City adopts and incorporates the Tribe's arguments and authorities as set forth in its Motion for Summary Judgment, pages 15-17, as though fully set forth here. Similar to Appellant Parkwood, Appellant S.O.S. is trying to manufacture a "conflict" within the City's code in order to support its EPF argument. There is no conflict. The City also adopts and incorporates its argument and authorities regarding Appellant Parkwood's assertion that the City's code is in conflict and that specific language controls over the general in Section B above as though fully set forth here.

Appellant S.O.S. also argues that RCW 71.24.590 "contemplates" conditional use permits for opioid treatment facilities and that cities "may require" conditional use permits with reasonable conditions. (Appellant S.O.S. Mot. for Part. Summ. J. and Order for Remand, p. 10, lns. 4-19.) This argument is meaningless and does nothing to further Appellant S.O.S.'s arguments that the MAT Clinic is an EPF. First, no conditional use permit (CUP) has been applied for, is needed, or is at issue in the appeals before the Examiner. The references to a contemplated CUP is a meaningless strawman argument that should be rejected.

Second, the City's legislative body, the City Council, specifically chose not to employ the CUP process for medical clinics and reserved that process for hospitals and other inpatient facilities, which is not the subject of this application. *See,* SMC 18.33.030(A)(1) and

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

18.08.020[9]. Appellant S.O.S. is asking the Hearing Examiner to impute words and regulations into the Sequim Municipal Code that do not exist. The City adopts and incorporates its arguments and authorities from the City's Motion to Dismiss, pages 16-34 as though fully set forth here. Courts do not add or modify the plain language of a statute if the statute is unambiguous. *Dot Foods, Inc. v. Wash. Dep't of Revenue,* 166 Wn.2d 912, 920 (2009).The Hearing Examiner should reject Appellant S.O.S.'s arguments regarding what is permissive under State law as irrelevant and inapplicable to the regulations codified under the Sequim Municipal Code.

Appellant S.O.S. also tries to draw regulatory parallels between a MAT facility constructed in Anacortes and the Tribe's MAT Clinic proposal in Sequim. (Appellant S.O.S. Mot. for Partial Summ. J. and Order for Remand, p. 13, lns. 1-7.) As with its argument above, this argument is meaningless; Anacortes is a different city with different code provisions, different processes, different substantive standards, different demographics, and different decision-making. The Hearing Examiner should reject this comparison out of hand because that project is not the subject of this appeal, it is not in any way relevant to the issues in these appeals, and because it has no bearing on the Hearing Examiner's decision.

As a preliminary and threshold matter, S.O.S. concedes that the determination of the MAT Clinic as an EPF is the "substantive basis" for their appeals. (Decl. K. Nelson-Gross, Ex. 2, Ex. P.) Appellant S.O.S. also concedes that the determination of whether the project is an EPF is a legal issue. (*See,* Appellant S.O.S. Mot. for Partial Summ. J. and Order for Remand, p.

[9] SMC 18.33.030(A)(1) A permitted (P) use is one that is permitted outright, subject to all the applicable provisions of this title and relevant portions of the Sequim Municipal Code. SMC 18.08.020 defines "clinic" as "a building designed and used for the diagnosis and treatment of human outpatients excluding overnight care facilities."

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

11 ln. 11.) The City also agrees that the issue of whether the Tribe's MAT Clinic project is an EPF under State law is a pure legal issue in which the City should prevail. The City concedes that **if** the project is determined by the Hearing Examiner to be an EPF, which it is not, only the City Council can approve the application under City Code (SMC 18.56.030). Nevertheless, for the reasons set forth above, the MAT Clinic is not an EPF. It does not meet the criteria in State law. *See, e.g.,* RCW 36.70A.200 and WAC 365-196-550. Statutory construction makes clear that EPFs relate to *inpatient* facilities, which is not the subject of these appeals; the MAT Clinic is permitted outright under the SMC 18.33.030(A)(a) and SMC 18.08.020. Moreover, because the MAT Clinic is permitted outright, the City is prohibited under State law from requiring it to go through the EPF process and doing so would violate the Americans with Disabilities/ Rehabilitation Act. (City's Mot. to Dismiss, pp. 15-30.) As a result[10], the Hearing Examiner must deny Appellant S.O.S.'s Motion and dismiss its appeals if the Hearing Examiner determines that the MAT Clinic is not an EPF.

2. Appellant S.O.S.'s arguments regarding the City's A-2 process should be rejected because it failed to raise the issue in either of its appeals and is therefore waived.

Appellant S.O.S. raises for the first time alleged infirmities in the City's municipal code. (Appellant S.O.S. Mot. for Partial Summ. J. and Order for Remand, pp. 15-18.) The Hearing Examiner should reject these arguments because Appellant S.O.S. failed to raise the issue in either of its appeals and has subsequently waived that right. *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d. 801, 809 (1992).Thus, the Hearing Examiner should refuse to consider these arguments outright.

[10] The City again incorporates its arguments and authorities in the City's Motion to Dismiss, pages 16-34 as though fully set forth here.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

Alternatively, if the Hearing Examiner elects to consider these un-appealed arguments and claims, the Hearing Examiner should reject them because the applicable code provisions can be harmonized; therefore, there is no conflict.

The same rules of statutory construction apply when interpreting municipal ordinances as interpreting state statutes. *Seattle Housing Authority v. City of Seattle,* 3 Wn. App.2d 532, 538-539 (2018). In statutory interpretation, the "fundamental objective is to ascertain and carry out the Legislature's intent." *Id., quoting Citizens All. v. San Juan Cty.,* 184 Wn.2d 428, 435 (2015). When a statute's meaning is clear, courts must give effect to the plain meaning as an expression of legislative intent. *Seattle Housing Authority* at 538. Courts consider the ordinary meaning of words, the basic grammatical rules, and the statutory context to conclude what the Legislature has provided for in the statute and related statutes. *Id.* Courts may also look to a dictionary to determine the plain meaning of an undefined term and construe the statute to give all words effect and avoid absurd results, with no portion rendered meaningless or superfluous. *Id.* at 538-539.

Here, Appellant S.O.S.'s arguments only make sense if they ignore the rest of the City's code and ignore the recognized and well-accepted rules of statutory construction cited above. Again, Appellant S.O.S. failed to read — or simply ignored — the rest of the City's code.

Appellant S.O.S. correctly reproduces the initial portion of the City's code, SMC 20.01.030 Table 1, but that is where its analysis ends. (Appellant S.O.S. Mot. for Partial Summ. J. and Order for Remand p. 17.) Table 1 clearly shows that a hearing examiner is the appeal authority for A-1 decisions for building and construction permits. SMC 20.01.303, Table 1, note c. In addition, the definition of an A-1 process involves an "*application* that is subject to clear

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

standards…" SMC 20.01.020(T). Thus, the City Council would hear A-1 appeals for those issues that do not have an application, which is indisputably not applicable here.

Further, consistent with City code and the Regulatory Reform Act (RCW 36.70B), the City must consolidate all appeals on a single application to be heard at the same time and in the same manner as on the merits of the application. SMC 20.01.040(A).

Regarding A-2 actions, Appellant S.O.S. correctly points out that the City Council is identified as an appeal authority, but consistent with its past practice, that is where its analysis stops. If Appellant S.O.S. read further, it would see that SMC 20.01.090(F) has appeals going to the hearing examiner and that SMC 20.01.240(A) has A-1 and A-2 appeals going to the hearing examiner unless the appeal is an appeal of a Determination of Nonsignificance (DNS), which **does** go to the City Council. None of the appeals now before the Hearing Examiner involve a DNS and, therefore, as a matter of law, are not heard by the City Council[11]. Under current code, the only way the Tribe's MAT Clinic application could be heard by the City Council is pursuant to SMC 20.01.240(C) in which appeals of a hearing examiner decision by parties of record from the hearing are heard in a closed record proceeding by the City Council.

In addition, arguments about hypothetical, future phases should be summarily rejected. Appellant S.O.S., like Appellant Parkwood, continues to rely upon a nonexistent, potential — and speculative — future phase as its basis for arguing the MAT Clinic is an EPF. Appellant S.O.S. ignores relevant language in the Tribe's funding application that is quoted in its own briefing, e.g., "Phase II (which will need supplemental funding)…. *If* funding is secured….

[11] For purposes of the record, Appellant S.O.S. is disingenuous when it says that the City did not explain why it rejected its appeal to the City Council. (Appellant S.O.S. Mot. for Partial Summ. J. and Order for Remand, p. 17 lns. 23-24.) In its own Exhibit H, the City provided its reasons, which are essentially the same as this argument: the appeal was not over a DNS and code provisions are read harmoniously as to avoid conflict. (Decl. M. Spence, Ex. H.)

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

partners will also be seeking *additional funding*….") (Appellant S.O.S. Mot. Partial Summ. J. and Order for Remand, p. 4, emphasis added.) The City incorporates arguments and authorities related to SEPA piecemealing on pages 20-23 of the City's Motion to Dismiss as though fully set forth here. In addition, the City adopts and incorporates the Tribe's arguments and authorities on pages 25-26 of its Motion for Summary Judgment as though fully set forth here. Thus, Appellant S.O.S.'s arguments relating to the Typing Decision, City Code processes, and claimed SEPA "piecemealing" should be rejected.

Finally, the City incorporates its arguments and authorities regarding 1) Appellant S.O.S.'s lack of standing[12], 2) the MAT Clinic as a permissive use within the RREOA, and 3) child watch and laboratories in the City's Motion to Dismiss as though fully set forth here. Further, the City adopts and incorporates the Tribe's arguments and authorities in its Motion for Summary Judgment pages 15-27 as though fully set forth here. For all the foregoing reasons, the Hearing Examiner should reject Appellant S.O.S.'s arguments, deny its Motion, and dismiss its appeals in their entirety.

3. <u>The Hearing Examiner should refuse to consider Appellant S.O.S.'s Motion to Stay Proceedings. Appellant has offered nothing to demonstrate why the City's alleged noncompliance with the Public Records Act (PRA) has any bearing on this matter.</u>

The Hearing Examiner should reject Appellant S.O.S.'s Motion to Stay Proceedings[13]. Appellant S.O.S. is — again — trying to use an incorrect forum to delay the Tribe's MAT Clinic project. (*See* Decl. M. Spence, Ex. I, p. 3, lns. 18-19 (trial court denied Appellant S.O.S.

[12] (*See also,* Decl. M. Spence, Ex. I, p. 4, lns. 10-12 (trial court "unclear" about which rights were at risk.).)

[13] The City would also expect Appellant Parkwood's attorney to object to any stay because any further delay would likely conflict with his wife's birth.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

and Parkwood's emergency TRO/Injunction, holding that "judicial review at this time is premature" because the Land Use Petition Act applied).) Appellant S.O.S.'s Motion and its alleged basis have no place in this litigation. If Appellant S.O.S. has concerns about the City's responses to PRA requests, it should file a separate complaint in Superior Court, which might have jurisdiction to resolve PRA claims. All arguments relating to this matter should be stricken and disregarded by the Hearing Examiner.

Even if the Hearing Examiner had authority to rule on a stay based on a pending PRA request, there is nothing contained in Appellant S.O.S.'s Motion that specifies **how** the City's alleged noncompliance with the PRA harms them in any manner. (*See generally,* Appellant S.O.S. Mot. to Stay Proceedings.) Pursuant to SMC 2.10.050(D), which provides that hearings need not comply with "strict" rules of procedure, but may reference or rely on civil procedure rules in its discretion in accordance with the Hearing Examiner's Rules of Procedure (H), the rule set forth under CR 56(f) is instructive by analogy. Under CR 56(f), a moving party must set forth *specific* facts showing a genuine issue for trial. Similarly, CR 7(b)(1) requires specificity. CR 7(b)(1) (motions must state "with particularity" the grounds therefor…"). For the same reasons as required under the Civil Rules for extension of time to respond to evidence presented for a hearing, the Hearing Examiner should only grant a stay when the moving party has specifically identified how the moving party would be prejudiced and why that party would be prejudiced without that specific information. Appellant S.O.S. has not satisfied the specificity requirement that allows the Hearing Examiner to determine the relevance of this information to this hearing. Generalized, self-serving statements that Appellant S.O.S. is "severely prejudiced" are without merit and should be disregarded and Appellant S.O.S.'s Motion to Stay Proceedings should be **denied.**

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

Alternatively, and continuing in the City's spirit of promoting judicial economy and providing a clean and clear record, the City offers the Declaration of its Clerk, Sara McMillon, as a response to Appellant SOS's argument relating to its PRA request. The City admits no wrongdoing under the PRA and believes it has fully complied with the PRA. (Decl. S. McMillon, #9-12, 14.) The City's redactions satisfy the PRA because when read as a whole[14], the City's responses provide sufficient information to give Appellant S.O.S. the information needed to make a threshold determination as to whether the City complied. (*Id.* #13.) Appellant S.O.S. is simply using this tactic as yet another means to harass the City and/or delay the MAT Clinic. Thus, there is no basis whatsoever to delay these proceedings and Appellant S.O.S.'s Motion to State Proceedings should be denied.

VI. CONCLUSION

Appellants' Motions should be denied in their entirety because they fail as a matter of law or are legally and/or factually irrelevant to this matter, and Appellants lack standing to obtain the relief requested. Appellant Bilow and S.O.S. have offered nothing substantive to demonstrate why their respective Motion for Subpoenas and Motion to Stay Proceedings are necessary. Appellant Parkwood's and S.O.S.'s respective Dispositive Motion and Motion for Partial Summary Judgment and Order for Remand require the Hearing Examiner to determine

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[14] This is another example of Appellants taking facts, statements, and law out of context in an effort to mislead a decision-maker.

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611

the MAT Clinic is an EPF, which it is not for the reasons set forth above. Accordingly, the Hearing Examiner must reject their collective arguments, deny their Motions in their entirety, and dismiss each of the Appellants' appeals.

RESPECTFULLY SUBMITTED this 14th day of September, 2020.

CITY OF SEQUIM

KRISTINA NELSON-GROSS WSBA#42487
City Attorney

City Attorney for the City of Sequim
Kristina Nelson-Gross WSBA#42487
152 West Cedar St., Sequim WA 98382
Telephone: 360-681-6611