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

SAVE OUR SEQUIM, a Washington 501(c)(4) corporation, Petitioner, vs. CLALLAM COUNTY, a municipal corporation, Respondent	File No. CDR20-01 PETITIONER SAVE OUR SEQUIM'S RESPONSE TO JAMESTOWN S'KLALLAM TRIBE'S MOTION FOR SUMMARY JUDGMENT

The Jamestown S'Klallam Tribe's Motion for Summary judgment argues that; 1) the property is zoned outright for the proposed use; 2) the Petitioners lack standing because they live "too far" from the project; 3) the building permit was not appealed; 4) the project no longer contains an illegal inpatient facility; and 5) no "substantial discretion" is required to approve this application, despite its many nuances. The Tribe therefore argues that the City's A–2 permitting process is appropriate for this project. Each of these claims should be denied for the following reasons:

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1. SOS does not dispute the need for treatment facilities in Clallam County.

The Tribe attempts to gain favor with the Examiner by portraying SOS as categorically opposed to the treatment of Opioid Use Disorder (OUD) in Clallam County. This is not the case at all. SOS does not dispute the need for these facilities somewhere in Clallam County. What SOS disputes is the siting of this facility in the proposed location.

Throughout this process, the Tribe has repeatedly cited the Digwalic Center in Anacortes as inspiration for this project. However, the Digwalic Center was intentionally located approximately five miles from the City's business district at the head of Fidalgo Bay. This location is geographically identical to land already owned by the Tribe at the head of Sequim Bay, where they have built a casino and most recently, a hotel. SOS suggests that this is a much better location, especially since the project is designed to also serve Jefferson County.

In the Swinomish Tribe's application for the Digwalic Center project, which was processed as an Essential Public Facility by the City of Anacortes, the Center was described as follows:

> "The facility is very well located for use as a medical substance use treatment program. It is located along the Highway 20 corridor, outside the core commercial and residential areas of Anacortes. Such location will help prevent community concern about proximity to homes, schools or retail business, while at the same time provide privacy to patients who will visit the facility regularly for their appointments. … The location is also easy to access from Highway 20, accessible to both Anacortes and Mount Vernon." (Exhibit A at 5, 6)

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If the Jamestown S'Klallam Tribe had taken this approach, which respected both the concerns of the community and the privacy of the patients, this project would not have been appealed by SOS, and construction could well be underway.

2. SOS has More than Sufficient Standing to Challenge this Decision:

Turning to the substance of the Tribe's Motion for Summary Judgment, they first attempt to argue that SOS "lacks standing because the Project does not affect them", even though by their own admission SOS "fomented public interest in opposition to the Project based on their concern regarding the treatment of people suffering from OUD". (Tribe's Motion at 20, 21). SOS is therefore a party of record whose interests were among those the City was required to consider in this proceeding. SOS has received donations from hundreds, if not thousands, of Sequim citizens deeply concerned about the siting of this project. 2,600 SOS members and supporters signed a petition opposing the project in its proposed location and presented it to the City Council in December, 2019. According to an article in the February 21, 2020 Peninsula Daily News, the City has received over 500 public comments on this project, and an August 21, 2019 article in the same publication notes that 1,300 people, the majority of whom were SOS members and supporters, showed up at a public meeting on the project (SOS Motion for Partial Summary Judgment at 12).

In support of their challenge to SOS's standing, the Tribe cites Thompson v City of Mercer Island, 193 Wn. App. 653, 375 P. 2d 681(2016), which is completely irrelevant because Thompson was a LUPA case involving a party's failure to exhaust their administrative

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remedies. This is not a LUPA case yet and SOS is in the process of exhausting its administrative remedies via this appeal.

The Tribe also cites to Chelan County v. Nykreim, 146 Wn. 2d. 904, 52 P. 3d 1 (2002), in which a neighbor waited for a full year before challenging a Boundary Line Adjustment. That is also not at issue in this dispute for similar reasons. KS Tacoma Holdings, LLC v. Shorelines Hearings Board, 166 Wn App. 117, 272 P. 3d 876 (2012), also cited by the Tribe, involved an interpretation of the Shoreline Management Act, which is also not an issue here.

The Tribe fails to mention that SMC 20.01.140(3) requires the City to provide mailed notice to property owners within 300', in addition to the posting and publication requirements required by State law. SMC 20.01.140(3) also requires the City to notify people they believe 'may be affected by the proposed action', or those who 'request such notice in writing', such as SOS and many of its members. This code section contains no geographic limitations:

> 3. Mailing. The notice of application shall be mailed to:
>
> a. The applicant and the applicant's representative;
> b. Owners of property within a radius of 300 feet of the edge of the property that is the subject of the application;
> c. Other people the review authority believes may be affected by the proposed action or who request such notice in writing. (emphasis added)

The Tribe has also ignored the project documents, specifically the Procedural and Substantive Determinations, which were published and sent to SOS under SMC 20.01.140(3), and which state as follows, respectively:

> "Appeals: Appeal of Administrative Interpretations and Decisions. Administrative interpretations and administrative type A-1 and Type A-2 decisions may be appealed, by applicants or parties of record, to the hearing examiner per SMC 20.01.240(A). .."

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"APPEALS: this decision may be appealed by filing an appeal consistent with SMC 20.01.240 within 21 days after the decision to the Department of Community Development, located at 152 W. Cedar St…"

The Tribe also fails to mention the definition of standing contained in LUPA, which grants standing to people whose interests the local government is required to consider. That definition appears in RCW 36.70C.060(2)(b), which provides as follows:

> **RCW 36.70C.060**
> **Standing.**
> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> > (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
> >
> > > (b) <u>That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision</u>; (Emphasis added)

Under the Tribe's theory, only immediate neighbors who are somehow physically affected by the proposal have standing to appeal. By that logic, no environmental or public interest group could ever challenge a land use decision unless one member lives next door, rendering SEPA and RCW 36.70B meaningless. The Tribe's position is also ironic in that it envisions providing treatment for the entire region, while suggesting that only adjacent neighbors may challenge it.

As a party of record entitled to notice under the SMC, the project documents and LUPA, SOS clearly has standing to file this appeal. The Tribe's argument in this regard should be rejected.

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3. SOS properly and timely appealed the Procedural and the Substantive Determinations, and the City accepted those Appeals:

The Tribe next attempts to argue that the entire appeal is moot because SOS did not appeal the Building Permit. In support of this argument, the Tribe cites Ward v. Board of Cty. Comm'rs, Skagit Cty, 86 Wn App. 266, 936 P. 2s 42(1997), West v. Stahley, 155 Wn. App 691, 229 P. 3d 943 (2010), and again to Chelan County v. Nykreim, 146 Wn. 2d. 904, 52 P. 3d 1 (2002). But none of these cases stand for this proposition that the failure to appeal a building permit undermines the underlying land use approvals. The Ward case involved a variance and special use permit to operate a business from the Plaintiffs' residence. The West case involved an untimely appeal by a pro se to the Olympia Hearing Examiner that was filed after a Land Use Petition had already been filed. And as mentioned above, the Nykreim case involved a challenge to a Boundary Line Adjustment that occurred more than a year after the deadline had passed. None of these cases stand for the proposition that the failure to appeal a ministerial building permit voids two previous procedural and substantive appeals that were timely filed and accepted by the City. [1] The Tribe's mootness argument in this regard is meritless and should be rejected out of hand.

4. The Property is not 'Zoned Outright' to Accommodate this Facility, and City Council approval is required regardless of how it is characterized:

[1] As mentioned in SOS's Motion for Summary Judgment, SOS also appealed the A-2 Substantive Determination to the City Council under SMC 20.01.030(A), table 1, but that appeal was rejected by the City.

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The Tribe also submits in its Motion that the property is zoned outright to permit outpatient clinics and regional essential public facilities. Supporting this claim, the Tribe states that:

> "the virtue of the Property is its proximity to Highway 101 and distance from other retail and residential areas, which accommodates patients' needs to easily access the facility without interfering with nearby uses". (Tribe's Motion at 6,7).

This statement is patently false – the property is kitty-corner from a large mall that includes a Costco, a Home Depot, a Starbuck's coffee store and a host of smaller retail businesses. It is also one block away from the "Vintage at Sequim", a senior apartment complex, and a neighborhood of 14 single family detached homes borders the property directly to the East. The Property is therefore not 'distanced from other retail and residential areas', it is immediately adjacent to them.

Aside from this misrepresentation, the Tribe also claims that this facility falls under the "Ambulatory and outpatient care services" description in Table 18.33.030. [2] But this facility is far more than a legally-confirming 'ambulatory outpatient care service' facility, it is a drug rehabilitation and detoxification center that requires specialty licenses and that operates under a very strict and unique regulatory regime.

This notion is confirmed in the grant agreement under which the State funding was provided to this project. In that agreement, the project is described as the:

> "construction of a 17,000 square foot outpatient medical clinic that will be licensed through the Washington State Department of Health and the Substance Abuse and Mental Health Services Administration (SAMSHA) as an (OTP) Opioid Treatment

[2] Sequim's use tables are actually codified under SMC 18.33.031.

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Program with intensive wrap-around services of primary care, dental care and behavioral and substance abuse counseling." (Simcosky declaration, Exhibit B at 23)

Based on this description alone, the Project does much more than provide "Ambulatory outpatient care services". It is much more accurately described as an "alcoholism or drug treatment center" or as a "detoxification center", which are required to be processed as EPF's under SMC 18.56.030(j).

As an EPF, this project can only be approved after the applicant receives an "essential public facilities and special property use permit" that must be "granted by the city council" under SMC 18.56.040, which reads as follows:

> **18.56.040 Permit required.**
> Essential public facilities and special property uses shall be allowed within certain use zones after obtaining an essential public facilities and special property use permit granted by the city council. (Ord. 97-019 § 4, Exh. B)

EPF's approved under this section must meet a rigorous and robust set of criteria codified in SMC 18.56.060, which reads in full as follows:

> **18.56.060 Permit – Criteria.**
> An essential public facilities and/or special property use permit <u>granted by the council</u> shall be subject to the following criteria:
>
> A. There shall be a <u>demonstrated need for the essential public facilities</u> and/or special use <u>within the community at large</u> which <u>shall not be contrary to the public interest</u>.
>
> B. The essential public facility and/or special use shall be <u>consistent with the goals and policies of the comprehensive plan</u>, and <u>applicable ordinances</u> of the city.
>
> C. The council shall find that the essential public facility and/or special use shall be located, planned and developed in such a manner that the essential public facility and/or special use is <u>not inconsistent with the health, safety, convenience or general welfare of persons residing or working in the city</u>. The council's findings shall address, but not be limited to the following:

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> 1. The generation of noise, noxious or offensive emissions, or other nuisances which may be injurious or detrimental to a significant portion of the city.
>
> 2. The availability of public services which may be necessary or desirable for the support of the special use. These may include, but shall not be limited to, availability of utilities, transportation systems, including vehicular, pedestrian, and public transit systems, and education, police and fire facilities, and social and health services.
>
> 3. The adequacy of landscaping, screening, yard setbacks, open spaces or other development characteristics necessary to mitigate the impact of the special use upon neighboring properties.
>
> 4. Proposed uses which exceed the bulk, dimensional, height, density and/or use standards of the zoning district within which they propose to locate, must demonstrate that the proposed variance is essential to the establishment of the public facility and/or special use; i.e., a variance in height may be granted for a water tower, but not to provide an architectural element. (Ord. 97-019 § 4, Exh. B) (emphasis added)

Any criteria that call for a finding of fact requiring a "demonstrated need", "within the community at large", that shall "not be contrary to the public interest", and that must be "consistent with the goals and policies of the comprehensive plan and applicable ordinances", and "not inconsistent with the health, safety, welfare of persons residing or working in the city", and that does not create a nuisance which may be "injurious or detrimental to a significant portion of the city" is the antithesis of a ministerial act, which SMC 20.01.020(N) defines as:

> N. "Ministerial" means an action that allows for little description and requires adherence to previous decisions or adopted rules and regulations.

This project is anything but that.

In its Motion, the Tribe also concedes that this project could also be considered an EPF because it is regional in nature, however they fail to acknowledge that all EPF's require an

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essential public facilities and special use permit under the aforementioned SMC 18.56.040, which is a C-2 decision under SMC 20.01.030(A), Table 2d, which is reproduced below:

Table 2

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

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The Tribe also believes that the Substantive Determination was properly classified as an A-2 decision. If that is the case, SMC 20.01.030(A), Table 1 provides that the City Council has "appeal authority" over A-2 decisions. Table 1 is reproduced below:

Table 1

Procedural Steps	**Application Process**					
	Type "A" Actions *Administrative*		*Type "B" Actions Hearing Examiner*	*Type "C" Actions Planning Commission and City Council*		
	Type A-1	**Type A-2**	**Type B**	**Type C-1**	**Type C-2**	**Type C-3**
Recommendations by:	N/A	N/A	Staff	Staff	Planning Commission	Staff
Notice of Application	No	Yes	Yes	Yes	Yes	No
Public Meeting/ Workshop	—	—	—	—	Planning Commission	—
Open Record Public Hearing	See Note[a]	See Note[a]	Yes Hearing Examiner	Yes Planning Commission	Yes City Council	No
Final Decision-making Body	Staff[b]	Staff[b]	Hearing Examiner[b]	Planning Commission	City Council	City Council
Appeal Authority	Hearing Examiner[c] City Council	City Council[d]	Clallam County Superior Court	City Council	Clallam County Superior Court	Clallam County Superior Court

As opposed to the City, the Tribe recognizes the existence of SMC 20.01.040(B), which provides that in the event of a question regarding which procedure to use, the City <u>must default to the higher procedure letter</u>. SMC 20.01.040(B) reads as follows:

> **20.01.040 Determination of proper type of procedure.**
> B. Determination of Director. The director shall determine the proper procedure for all development applications. If there is a question as to the appropriate type of procedure,

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the director **shall** resolve it in favor of the higher procedure type letter as defined in SMC 20.01.030. (Ord. 2000-006 § 3)

In this case, the 'questions' involve whether or not the project is an essential public facility, and if so, whether or not it has to obtain an "essential public facilities and special property use permit granted by the city council", whether it is an "alcoholism or drug treatment center, detoxification center", which also must be approved by the City Council under SMC 18.56.030, or whether it is simply an "ambulatory and outpatient care services" facility under SMC 18.33.031, which the Tribe believes is an A-2 decision, which is appealable to the City Council under SMC 20.01.030(A), Table 1.

Under SMC 20.01.040(B), however, the Director **must** resolve these questions in favor of the higher procedure type letter, which in this case is the C-2 process. The use of the word 'shall' in this section mandates this result.

Stated more simply, neither the City nor the Tribe can keep this matter away from the City Council, either serving as the "Final Decision-Making Body" for a C-2 decision or as the "Appeal Authority" for the A-2 decision under SMC 20.01.030(A), Table 1.

5. The Absence of an Inpatient Facility does not convert this application into one eligible for the A-2 administrative permitting process:

In their Motion for Summary judgment, the Tribe first argues that they "obtained funding to construct only the Clinic, and not any other phase that was formerly associated with the project". (Tribe's Motion at 5). In support of this claim, the tribe has attached only the Declaration of Brent Simcosky saying that the Tribe has abandoned the Phase 2 inpatient facility, and the grant agreement referenced therein. But nothing in that document, or any

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other document on the record, indicates that the Tribe has formally withdrawn their proposal for the Phase 2 inpatient facility, and nothing stops them from applying for other grants, or from putting their own funds into the Phase 2 inpatient facility they desire. The Tribe hints at one or more of these alternatives in their Motion when they state that they may "have the need for operational flexibility" (Tribe's Motion at 8), and that the "Community Response plan may deviate", or that they may "put the land into trust", in which case, they can do whatever they wish with it (id.)

In addition, the project documents on the record, which were filed before the grant agreement was executed, still reference Phase 2.

If the Tribe was serious about formally withdrawing this Phase, they would have formally notified the City that it has been abandoned.

And regardless of whether the project contains an inpatient facility or not, the undisputable fact remains that as an "alcoholism or drug treatment center, detoxification center", this project is required to obtain an "essential public facilities and special property use permit, which is "granted by the city council" under SMC 18.56.040.

CONCLUSION

The Tribe's Motion for Summary Judgment this appeal should be denied. As a party of record entitled to notice under the Code, SOS has standing to file this appeal, as required by the City Code, the project documents and the Land Use Petition Act. The fact that SOS did not appeal the Building Permit is completely irrelevant because SOS properly and timely appealed both the Procedural Determination and the Substantive Determination, in addition to filing an

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appeal to the City Council that was improperly rejected. The Tribe's claim that the property is 'zoned outright' is incorrect because this facility is more accurately described as an "alcoholism or drug treatment center" or as a "detoxification center", both of which are unequivocally denoted as Essential Public Facilities under the Sequim Municipal Code, and which require an Essential Public Facility and Special Use Permit that can only be 'granted by the city council' through the C-2 quasi-judicial process, which is the "highest-letter procedure type" under SMC 20.01.040(B). This logic is correct whether the project contains an inpatient facility or not. For these reasons, the Tribe's Motion for Summary Judgment should be DENIED.

DATED this 14th day of September, 2020.

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RECEIVED
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Application for Essential Public Facility

Swinomish didgʷálič Wellness Center

Date of application: December 1, 2016

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Introduction

The Swinomish Indian Tribal Community ("Swinomish" or "Tribe") is a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. § 476) and is a party to the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928). The Tribal government is located on the Swinomish Reservation in Skagit County, near La Conner, Washington.

Swinomish, like other regional governments, recognizes a great need in the community to provide treatment services for opiate and opioid addiction. Opioid addiction has reached crisis levels in Skagit County.[1] Swinomish currently operates a successful outpatient-only treatment program that implements a unique treatment model of individualized and coordinated care. While this program provides services only for Tribal members and their families, Swinomish has now decided to expand its program and provide access to the broader community to help address the serious public health crisis of opioid addiction. Expansion requires an additional facility.

In August 2016, Swinomish purchased at a foreclosure auction the property formerly operated as the Bayside Fitness Center, at 8212 South March Point Road. The property is located in a light manufacturing zone of Anacortes.

The March Point facility is an ideal location to provide outpatient medical services for chemical dependency. Conversion of the facility from a fitness center to a medical office will require only interior remodeling, and will not change the footprint of the building. Thus, Swinomish seeks a Conditional Use Permit solely for the change in character of use of the existing facility.

The Swinomish didgʷálič Wellness Center is an "essential public facility" as defined in the Anacortes Municipal Code.[2] AMC 17.06.293 ("'Essential public facility' (EPF) means any public facility or facilities owned or operated by a unit of local or state government . . . *or any other entity that provides a public service as its primary mission, and is difficult to site*. EPFs include those facilities listed in RCW 36.70A.200.) (emphasis added). EPFs constitute a conditional use in all zones. AMC 17.75.060(C)(1). Swinomish is a Tribal government entity; the Wellness Center will provide a public service as its primary mission; and substance abuse treatment facilities are listed in RCW 36.80A.200 and are generally considered difficult to site.

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[1] More information is provided in the Statement of Need, below.

[2] The LM1 zone also likely allows for this proposed use as a conditional use. Offices are listed as a conditional use within LM1. *See* AMC 17.19.040. In at least one other case, the Planning Commission and City Counsel determined that an outpatient medical office meets the definition of "office". *See* Anacortes Planning Commission's Draft Findings of Fact, Conclusions of Law, & Recommendation (December 9, 2015), CUP-2015-0005, available at http://anacortes.granicus.com/MetaViewer.php?view_id=2&clip_id=28&meta_id=1074 (last visited 11/230/16); and Anacortes City Council Meeting Minutes, December 21, 2015, available at: http://anacortes.granicus.com/DocumentViewer.php?file=anacortes_52800da82ef55a921d422e4fbd1bda67.pdf&view=1 (last visited 11/30/16).

Type of EPF

The Swinomish didgʷálič Wellness Center is a Type II or "local" essential public facility serving Skagit County. Type II facilities are defined as facilities that are not Type I facilities, which are "major" public facilities where the provider has statutory authority to site and construct the facility, such as airports or major utilities. AMC 17.75.060(A)(1). The Swinomish Wellness Center will be a relatively small outpatient clinic serving primarily Skagit County (although it will not turn away residents from other counties). Further, the facility is not sited or constructed pursuant to statutory authority. As such, it is clearly a local Type II EPF.

Criteria AMC 17.75.050

Anacortes Municipal Code 17.75.050 sets forth the information required in applications for EPF projects. The criteria are listed below in bold, with Swinomish's responses following each item.

A. A detailed written description of the proposed and potential public services to be provided, including an proposed site plan, the proposed service area of the facility, the source or sources of funding, and identification of any applicable public regulatory agencies or regional state or federal project agency sponsors and the federal or state authority which the agency has been granted for siting decision-making;

Description of public services to be provided. The Swinomish Wellness Center will provide full-service treatment for chemical dependency. Services will be provided on an outpatient basis in a medical office format. A licensed physician will serve as the medical director overseeing nursing staff, mental health counselors, and chemical dependency professionals (CDPs). Like at a doctor's office, clients will come to the facility for an appointment with a care provider and leave after their appointment. The program will provide individualized medical care, preventative care, chemical dependency counseling, mental health counseling, employment, and educational assistance. This coordinated-care approach is key to the success of the program. For example, many individuals' dependency on opiates or opioids originates with chronic pain, caused by underlying medical problems. By providing primary medical care in addition to counseling, health care providers can assist an individual with the underlying causes that led to their addiction.

The program will have a capacity to serve 200-350 patients. Services would include the following:

- Mental health counseling
  - Assessments
  - Individual
  - Group
  - Family
  - Parenting classes
- Primary medical care
  - Preventative care
  - Illness and minor injury treatment
  - Urgent care
  - Referrals
- Medication-assisted therapies, including Suboxone, Vivotrol and methadone

- Shuttle transportation
  - Anacortes
  - Burlington
  - Mount Vernon
  - Oak Harbor
- Case management & referrals
  - Housing
  - Employment
  - Domestic violence referrals
  - Education
  - Referrals for Legal/CPS
- Attended children's waiting area

Site plan. A site plan is attached as **Exhibit A**.

Service Area. The primary service area for this facility will be Skagit County, and in particular the Anacortes and Mount Vernon areas and their surrounding communities. Given the proximity to Oak Harbor and the Washington State Ferry terminal, individuals from northern Island County and/or San Juan County may find it conveniently located. Although it is designed to serve primarily Skagit County, the program will not turn away individuals from other areas if they seek treatment.

Sources of funding. The Swinomish Indian Tribal Community will finance the Wellness Center solely with its own funds to address this serious community need. During operation, the Wellness Center will accept private insurance and Medicaid. Program planners are also evaluating the feasibility of accepting direct payment for services rendered in order to serve patients who lack insurance coverage.

Regulatory agencies. The Swinomish Wellness Center will be credentialed and/or regulated by a number of state and federal agencies. These include:

- Washington State Division of Behavioral Health and Recovery (DBHR)
- Washington State Department of Health (DOH)
- Washington State Board of Pharmacy (WSBP)
- Substance Abuse and Mental Health Services Administration (SAMHSA)
- Drug Enforcement Agency (DEA)
- Indian Health Service (IHS)

B. A written statement of the need, in statistical or narrative form, for the proposed project currently and over the following ten-year period;

The Swinomish Tribe has identified a significant community need for opioid addiction treatment options in Skagit County. The opioid epidemic has reached crisis levels in Skagit County, as it also has in Washington State and nationwide.[3] Opioid overdose

[3] Presidential Proclamation (September 16, 2016), 2016 WL 4937551, available at: https://www.whitehouse.gov/the-press-office/2016/09/16/presidential-proclamation-prescription-opioid-and-heroin-epidemic (last visited 11/30/16).

deaths now exceed automobile accident fatalities in Washington State.[4] Overdose deaths have increased 31% statewide since the early 2000s.[5] In Skagit County, overdose deaths have increased 42%, and opiate evidence in crimes has increased 181% in that same time period.[6] President Obama, Governor Jay Inslee, and Senator Patty Murray have all spoken out recently about this crisis.[7] The Skagit County Population Health Trust has formed a task force called the Opiate Workgroup Leadership Team in order to address this serious public health problem.[8] This week, the U.S. Congress passed sweeping legislation, entitled the Comprehensive Addiction and Recovery Act of 2016, to address the opioid crisis.[9]

Treatment options are limited in Skagit County. There is no substance use treatment center in Anacortes offering medication assisted treatment. (Studies show that medication assisted treatment is more than twice as effective in decreasing overdoses than counseling-only treatment.[10]) There is no clinic offering methadone assisted treatment in Skagit County or the adjacent Whatcom or Island Counties. For some patients who have tried other options unsuccessfully, methadone is the only effective treatment. In the Mount Vernon area, there are three counseling-only treatment centers, and only two treatment centers that offer limited medication assisted treatment. These treatment centers cannot keep pace with the increased need for services in the area.

It is difficult to project opioid addiction trends over the next ten-year period. The Washington Statement Department of Health stated in a 2014 report: "[The] National Healthy People 2010 goals include reducing drug-induced deaths to 1.2 per 100,000 people; the Healthy People 2020 goal is 11.3 per 100,000 (age-adjusted). **Washington did not meet the 2010 goal and will not meet the 2020 goal if present trends continue.**"[11] Based on this statement, it is reasonable to conclude that the need for addiction treatment services will not decrease over the next ten year period and may continue to climb, as Washington State has higher rates of overdose than the US average, and Skagit County has higher rates of overdose than the Washington State average.

C. An inventory of known, existing or proposed facilities, by name and address, within Skagit County, or within the region, serving the same or similar needs as the proposed project;

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[4] Christine Clarridge, *Opioid Overdoses Deadlier Than Car Crashes,* Seattle Times, May 4, 2016, available at http://www.seattletimes.com/seattle-news/crime/as-opioid-epidemic-hits-home-what-officials-are-doing-about-it/.

[5] Statement by Senator Patty Murray, https://medium.com/@PattyMurray/the-opioid-epidemic-317ca1c05ffd#.xyjk3kssp.

[6] University of Washington Alcohol and Drug Abuse Institute, *Opioid Trends Across Washington State*, April 2015, available at http://adai.uw.edu/pubs/infobriefs/ADAI-IB-2015-01.pdf.

[7] Office of the Governor, Executive Order 16-09 (2016), available at http://www.governor.wa.gov/news-media/inslee-launches-executive-order-combat-opioid-crisis.

[8] http://www.skagitbreaking.com/2016/10/27/population-health-trust-will-hear-ways-reduce-opioid-abuse-nov-3/

[9] Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016).

[10] *See* Pierce, Matthias et. al, *Impact of treatment for opioid dependence on fatal drug-related poisoning: a national cohort study in England* (2015), available at http://onlinelibrary.wiley.com/doi/10.1111/add.13193/full; Degenhardt , Louisa et. al, *The impact of opioid substitution therapy on mortality post-release from prison: retrospective data linkage study* (2014), available at http://idhdp.com/media/400743/the-impact-of-opioid-substitution-therapy-on-mortality-post-release-from-prison-retrospective-data-linkage-study.pdf.

[11] Washington State Dept. of Health, *Health of Washington State Report*, available at http://www.doh.wa.gov/Portals/1/Documents/5500/RPF-Drg2014.pdf.

Facility	Services Provided (Same or Similar)
Catholic Community Services 614 Peterson Road Burlington, WA 98233 360-757-0131	Similar but not same. Only suboxone medication assisted treatment.
Swinomish Wellness Program 17337 Reservation Rd. LaConner, WA 98257 Ph (360) 466-1024	Similar but not same. Only suboxone medication assisted treatment. Open only to Native Americans.
Phoenix Recovery Services 1601 East College Way Mount Vernon 98273 360-848-8437	

Other area facilities that provide counseling-only based addiction recovery services:

Sunrise Recovery Services 2500 E. College Way Mount Vernon, WA 98273 Phone (360) 336-3762 or 1-866-634-3039 Fax (360) 336-3815	Counseling only. Does not accept Medicaid.
Follman Agency-Burlington: 910 South Anacortes Street Burlington, WA 98233 (360) 755-1125	Counseling only.
Sea Mar Behavioral Health Clinic 2500 East College Way Suite 100 Mount Vernon 98273 360-428-8912	Counseling only.
Upper Skagit Tribe Chemical Dependency Treatment Program 25959 Community Plaza Way Sedro-Woolley, WA 98284 (360) 854-7070	Counseling only. Only open to Native Americans.
Island Assessment & Counseling Centers 520 E. Whidbey Ave, Suite 205 Oak Harbor, WA 98277 (360) 675-5782	Counseling only.

D. An explanation of the need and suitability for the proposed facility in the proposed city location(s);

The facility is very well located for use as a medical substance use treatment program. It is located along the Highway 20 corridor, outside the core commercial and residential areas

of Anacortes. Such location will help prevent community concern about proximity to homes, schools or retail business, while at the same time provide privacy to patients who will visit the facility regularly for their appointments. The facility is located less than 5 miles from Island Hospital, should any patient require emergency care.

The location is also easy to access from Highway 20, accessible to both Anacortes and Mount Vernon. In particular, it is located across the street from to the March Point Park and Ride Skagit Transit Center, located at 8147 S. March Point Road. The Transit Center is served by bus routes to and from the Ferry Terminals, downtown Anacortes, Mount Vernon, Burlington, La Conner, and Oak Harbor. Thus, even though the location is situated in a manufacturing zone, it is still easily accessible for residents of either Anacortes or Mount Vernon.

The light manufacturing area surrounding the facility already has a mixed-use character, including both industrial and commercial retail businesses, including the Swinomish Tribe's gas station, golf course nearby. Proximity to the Tribe's other businesses would also make it more efficient for the Tribe to meet certain overhead needs, such as facilities and maintenance upkeep, IT services, and security.

E. An assessment of the suitability of the proposed location in the city or another jurisdiction in terms of local, county, regional and/or state needs in order to minimize public costs (where appropriate) and environmental impacts, to discern the suitability of the facility's location in the city or within another jurisdiction, to determine the number of jurisdictions affected or served by the proposed EPF, and to decide what, if any, inter-jurisdictional approach is most appropriate or available;

The proposed location is ideally located to minimize public costs and environmental impacts, in large part due to the fact that no new building is necessary. As mentioned above, Swinomish purchased an existing permitted building and will be making only interior tenant improvements in order to modify it for use as a medical office.

Given the facility's location away from schools, residential areas, and the downtown core commercial district, but at the same time accessibility to public transit and a major highway, Swinomish is unaware of any other location that could be more suitable for a substance use treatment facility. Further, Swinomish does not own any other properties that are more suitable or that would have fewer impacts.

F. An analysis of the environmental, social, economic, financial and infrastructure impacts of the proposed EPF, including an assessment of the proportionate financial impacts on affected jurisdictions, consideration copies of agreements which allocate the financial burdens of the proposed project on the city and other jurisdictions, and the approximate area within which the proposed project could potentially have adverse impacts, such as increased traffic, public safety risks, noise, glare, emissions, or other environmental impacts, and;

Social and economic impacts. At this time, no negative social or economic impacts have been identified. The proposed essential public facility will result in primarily positive social and economic impacts to the Skagit County and Anacortes community. Opiate/opioid addiction can lead to many negative community impacts, including increases in criminal activity, unemployment, homelessness, emergency room admissions, domestic violence, child welfare issues, and higher utilization of social programs. By treating substance abuse, the Swinomish Wellness Center will combat such these negative social and economic impacts. Because the Swinomish Tribe is stepping forward to finance and fund the project in its entirety, no adverse economic impacts to the community are anticipated. Swinomish is taking proactive steps to mitigate any potential impacts. For example, the Wellness Center will oversee a transportation plan designed to ensure patients get to and from their appointments efficiently to prevent long waiting time inside or outside the building. The Wellness Center will also employ security officers and a surveillance system, and will partner with local law enforcement to ensure the safety and security of the facility and immediate vicinity. Additionally, Swinomish has already launched its community relations plan to identify any concerns regarding social impacts and will proactively develop a plan to mitigate any impacts that may be identified in the future.

Financial and infrastructure impacts. The proposed essential public facility will not result in any financial or infrastructure impacts to the City or County. The facility will not require any additional new construction, except for tenant improvements in an existing permitted building. It is located across the street from an existing transit center providing public transportation, and it is located along the major arterial route of Highway 20. A traffic light already exists at the turnoff from Highway 20.

The only potential additional infrastructure needed to accommodate the proposed facility is a painted cross walk and (potentially) additional striping for pedestrian access from the transit center to the facility. Swinomish staff is currently working with City staff to design safe pedestrian access.

Traffic. Given the Wellness Center's location on Highway 20, no negative traffic impacts are expected. Nevertheless, we are developing a transportation plan designed to prevent any negative traffic impacts and to provide safe and convenient transportation for patients, many of whom lack their own cars or drivers licenses. Many patients are will utilize public transportation, which will be convenient given the presence a park and ride across the street. Additionally, the Swinomish Wellness Center will provide transportation shuttles for individuals who lack access to public transit where they live.

Public safety. The Wellness Center will also implement a security plan designed to prevent and/or mitigate impacts to public safety. The transportation plan plays a key role, as it enables individuals to arrive and leave in a timely manner for their appointments, and prevents loitering around the building. There will also be a full time security staff and digital surveillance system as part of the facility.

Environmental impacts. No other environmental impacts have been identified, and any potential impacts will be mitigated by specific efforts of the Wellness Center. Because

there is no new construction and the facility will be used as a medical office building, we do not foresee any negative impacts involving water, air, wetlands, other critical areas or resource lands, storm water, or noise or light pollution. Utilities usage of water, sewer and electricity will remain essentially the same as the uses by the prior owners of the facility, who operated it as a fitness center.

G. An analysis of the proposal's consistency with the city's comprehensive plan and development regulations, and plans and policies of other affected jurisdictions, including but not limited to Skagit County Countywide Planning Policies;

The Swinomish didgʷálič Wellness Center is consistent with the 2016 Anacortes Comprehensive Plan. The property in question is already developed, and the existing facility requires only interior remodeling to accommodate this minor change in use. No new land use or development is necessary.

The Wellness Center will support Anacortes' values articulated in the Comprehensive Plan related to providing a "supportive and connected community," which includes the specific goal to "[p]rovide high quality health and community services." Anacortes Comprehensive Plan 2016 at I-9. The Plan adopts the following related policies:

- Policy ED-5.4. Support expansion of local medical care facilities as sources of jobs and income, as well as support services to the community. *Id.* at I-37.
- Policy ED-2.14. Encourage commercial businesses that provide professional, financial and medical services to residents and visitors. *Id.* at I-36.

The Wellness Center will support these Plan policies by providing medical care to the community and creating an estimated 20+ local jobs in the medical sector. For all full time positions, the Tribe offers a medical insurance plan, 401(K), and other benefits.

Economic vitality constitutes another important value expressed in the Comprehensive Plan, including the goal of providing diverse economic opportunities and investment in infrastructure and services. *Id.* at I-9. Anacortes has adopted the following related policies:

- Policy ED-1.3. Provide a stable tax base to support the costs of desired public facilities and services.
- Policy ED-1.4. Encourage expansion of existing employers and attraction of new employers that pay wages sufficient to support family households and fund needed public services.
- Policy ED-1.6. Facilitate the retention, growth and new location of small and locally-owned business.
- Policy ED-1.8. Invest in public facilities and services that improve business conditions and quality of life, and are affordable to residents and businesses.

As a local employer, the Wellness Center will support these goals and policies by expanding jobs in the medical sector; by providing pathways for individuals who struggle with addiction to return to the workforce and contribute to the tax base; and by providing public services that improve quality of life for residents and families who currently suffer from the effects of substance use.

The Wellness Center will also support the Comprehensive Plan goal of encouraging more utilization of public transit:

- Policy T-2.7. Decrease the proportion of trips made by single occupant vehicles by increasing alternative transportation choices. *Id.* at I-59.

Finally, the Wellness Center is consistent with the Comprehensive Plan's goal of identifying uses that are compatible with manufacturing in the Light Manufacturing 1 zone. The Zoning Code itself provides several examples of the types of uses that are considered to be compatible with manufacturing: auto and boat sales, plant nurseries, some retail establishments, golf courses, adult entertainment and licensed marijuana enterprises. AMC 17.19.020. As further clarification, the Zoning Code designates the LM1 zone for uses "that do not need water access or proximity to the central business district or to the Commercial Avenue corridor." AMC 17.19.010. The zone is currently of mixed-use character, blending light industrial, retail, and other commercial uses. Within a short distance, there is a golf course, a gas station, a coffee shop, a brewery/restaurant, and business related to auto and boat repair. The Wellness Center is compatible with light manufacturing, because it does not need water access, does not need proximity to the central business district, and will not impair the primary industrial nature of LM1.

H. Documentation of public involvement efforts to date, including public and agency comments received, and plans for future public participation;

The Swinomish didgʷálič Wellness Center has prepared a Community Relations Plan as part of the requirement for certification as an opiate treatment program with the Washington State Department of Behavioral Health and Recovery. The Community Relations Plan is attached as **Exhibit B**.

As reflected in the attached Community Relations Plan, Swinomish has completed the following outreach to date:

- 9/1/16 - Presentation at the Skagit County Population Health Trust meeting
- 9/1/16 – Presentation at the Skagit County Opioid Workgroup Leadership Team (OWLT) inaugural meeting, which includes membership
- 10/17/16 – Community meeting with Parents of Addicts Support Group
- 11/16/16 – Ohana group presentation
- 11/22/16 – Door-to-door meetings with residents and business owners within 300 feet of property.

Swinomish has also received numerous letters of support for the project from the following local governments, agencies and members of general public. These letters are attached as **Exhibit C**.

- Skagit County Population Health Trust
- Sea Mar Community Health Centers
- Beth Pemberton, Anacortes resident
- Cathy Brown, Anacortes resident

- Tarri Feden, Mount Vernon resident
- Judi Evans, Skagit County resident
- Reverend Douglas York, La Conner resident
- Skagit Valley Hospital/Skagit Regional Health
- Mighty to Save Ministries
- Community Action of Skagit County
- Skagit County Department of Public Health
- North Sound Behavioral Health Organization, LLC
- Island Hospital
- Skagit County Fire District 13
- Northwest Washington Indian Health Board
- Swinomish Police Department
- Anacortes School District 103
- Northwest Indian College

I. **Such information as requested by the director as determined necessary to complete the preliminary analysis or to otherwise assist the director and staff to make a recommendation and the city council in making the final determination on the CUP-EPF.**

At this time, the Director has not requested any additional information.

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

SAVE OUR SEQUIM, a Washington 501(c)(4) corporation Petitioner, vs. CLALLAM COUNTY, a municipal corporation, Respondent	File No. CDR20-01 PETITIONER SAVE OUR SEQUIM'S RESPONSE TO CITY OF SEQUIM'S MOTION TO DISMISS

The City of Sequim's Motion to Dismiss contains a hodgepodge of inapplicable legal theories, incomplete or erroneous citations to the law and a blatant admission that they intentionally ignored their own Code in determining that the proposed project is simply a "medical clinic" rather than an Essential Public Facility (EPF), despite a mountain of evidence to the contrary. For these and other reasons, the City's Motion to Dismiss should be rejected in its entirety, the project should be declared an EPF, and the application should be remanded

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to the City with instructions to process it under the "higher procedure letter" as mandated by SMC 20.01.040(B), which in this case is the City's C-2 quasi-judicial process.

1. Standing is not limited to "adjacent property owners" under the City's own Code, the Project Documents or State Law:

Regarding the Petitioner Save our Sequim (SOS), the City is arguing that an organization of thousands of residents of the Sequim area who have submitted hundreds of public comments and attended several public meetings lack standing because none of them live "adjacent" to the subject property, without any factual support for this claim that no SOS member lives next door.[1]

In making this argument, the City is completely ignoring its own Code, specifically SMC 20.01.140(3), which requires mailed notice to property owners within 300', in addition to the posting and publication requirements required therein. SMC 20.01.140(3)(c) also requires the City to notify people they believe 'may be affected by the proposed action', or those who 'request such notice in writing'. This code section contains no geographic limitations:

> 3. Mailing. The notice of application shall be mailed to:
>
> a. The applicant and the applicant's representative;
> b. Owners of property within a radius of 300 feet of the edge of the property that is the subject of the application;
> c. Other people the review authority believes may be affected by the proposed action or who request such notice in writing. (emphasis added)

[1] If this was true, only 11 property owners would be entitled to appeal this project, including Costco and the State of Washington

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It would make no sense to require mailed notice to property owners within 300 feet, or to those who may be "affected by the proposed action" or who "request such notice in writing", if public participation was limited only to "adjacent" property owners. By that logic, no environmental or public interest group could ever challenge a land use decision, rendering SEPA and RCW 36.70B meaningless, regardless of whether the project was local, regional or even national in scope. The City's position in this regard is therefore not even supported by its own Code.

The City is also ignoring its own project documents, specifically the Procedural and Substantive Determinations, neither of which contain any geographic limitations on the right to appeal. The Procedural Determination states:

> "Appeals: Appeal of Administrative Interpretations and Decisions. Administrative interpretations and administrative type A-1 and Type A-2 decisions may be appealed, by applicants or parties of record, to the hearing examiner per SMC 20.01.240(A). .." (emphasis added)

The Substantive Determination closely mirrors this language:

> "APPEALS: this decision may be appealed by filing an appeal consistent with SMC 20.01.240 within 21 days after the decision to the Department of Community Development, located at 152 W. Cedar St…" (cite)

There can be no doubt that SOS is a party of record whose interests were among those the City was required to consider in this proceeding. SOS has received donations from hundreds, if not thousands, of Sequim citizens deeply concerned about the siting of this project. 2,600 SOS members and supporters signed a petition opposing the project in its proposed location and presented it to the City Council in December, 2019. According to an article in the February 21, 2020 Peninsula Daily News, the City has received over 500 public

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comments on this project, and an August 21, 2019 article in the same publication notes that 1,300 people, the majority of whom were SOS members and supporters, showed up at a public meeting on the project (SOS Motion for Partial Summary Judgment at 12). SOS counsel wrote the City Council at least six letters, and SOS filed multiple public records requests with the City, Clallam County, the Olympic Hospital District, a partner in this project, the Washington State House of Representatives and the Washington State Senate.

The City's position that standing is only granted to "adjacent" property owners is therefore not even supported by its own project documents.

The City's Motion also ignores the definition of standing contained in LUPA, which grants standing to people whose interests the local government is required to consider. That definition appears in RCW 36.70C.060(2)(b), which provides as follows:

> **RCW 36.70C.060**
> **Standing.**
> Standing to bring a land use petition under this chapter is limited to the following persons:
>
> > (2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
> >
> > > (b) <u>That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision</u>; (Emphasis added)

Since SOS is a party of record, its interests are among those that the City is required to consider under the above-referenced authorities. The City's position that standing is only granted to "adjacent" property owners is therefore contrary to State law.

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The City's position in this Motion regarding SOS's standing in this action is also contrary to what they stated in oral argument on the Tribe's motion to dismiss SOS and Parkwood's declaratory judgment lawsuit on July 17, 2020. SOS requested and has received a recording of that hearing, which is available to the Examiner upon request. The City's statement in this regard appears at 9:45:47 a.m., and it states as follows:

> "The City will stipulate that if the court chooses to dismiss this action, an if it does so with prejudice, the City will stipulate that it can raise the same arguments that it's trying to raise here that are properly brought under a LUPA petition. The city is not interested in not giving the plaintiffs their day in court, the city is simply interested in not having to have to fight on two fronts." (declaration of Michael Spence at 1)

The City's position that SOS does not have standing is therefore inconsistent with representations it made under penalty of perjury to the Clallam County Superior Court in a related legal proceeding.

For these reasons, SOS has legal standing to file this appeal. The City's motion in this regard should be dismissed outright.

2. The Project Includes an Interdependent and Illegal Inpatient Facility:

The City argues that this project does not qualify as an EPF because it does not contain an 'inpatient facility' in Phase 1 of the admittedly 3-phase project.[2] However, as pointed out in SOS's Motion for Partial Summary Judgment, the Tribe has already started "infrastructure and site planning" with a portion of the grant funds they received from the State. (SOS Motion for Partial Summary Judgment at 15). In addition, the conceptual site plan prepared by Rice

[2] In its Motion for Summary Judgment, the Tribe claims to have 'abandoned' Phase 2, although nothing on the record shows that the Tribe notified the City in this regard.

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Fergus Miller, which was submitted as a part of the project's SEPA packet, clearly shows the Phase 2 inpatient facility, as well as – for the first time – "future housing" on the eastern portion of the site. (Exhibit A)

The City cites Murden Cove Preservation Assn. v, Kitsap County, 41. Wn. App. 515, (1985), for the proposition that piecemealing of a project is acceptable when the 'first phase of the project is independent of the second phase' (id. At 525). But the Murden Cove case does not apply in this case, because that case involved the difference between a rezone and a PUD – in other words, the difference between a zoning issue and a permitting process issue. That is not even close to the case here.

The court in Murden Cove also made its ruling based on the 'rule of reason', and the following passage is instructional:

> *"Piecemeal review is permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed. Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy., 96 Wn.2d 201, 210, 634 P.2d 853 (1981). Piecemeal review is impermissible where a "series of interrelated steps [constitutes] an integrated plan" and the current project is dependent upon subsequent phases. Cheney v. Mountlake Terrace, 87 Wn.2d 338, 345, 552 P.2d 184 (1976). Further, the assessment of a proposed action's environmental effects must include its direct as well as "reasonably anticipated indirect impacts"; "subsequent development of a similar nature, however, need not be considered in the threshold determination unless there will be some causal connection between this development and one or more of the governmental decisions necessary for the proposal in question. WAC 197-10-060(3*). (Murden Cove at 526)(emphasis added)

In this case, the second phase of this project is not independent from the first – it's an inpatient facility that complements the outpatient facility, and both are designed to treat drug

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addiction. These two phases clearly constitute a "set of interrelated steps" that constitute an "integrated plan" to construct what the Tribe was initially marketing as a "Healing Campus" [3]

As pointed out in SOS's Motion for Partial Summary Judgment, the Phase 2 inpatient facility was part of the initial grant request, its existence was disclosed to the City ten months before the application was filed, the Tribe promoted it widely in their public relations campaign, the City indicated its support for it publicly, and infrastructure and site planning has already occurred. The only thing missing is the funding, and the Tribe is silent over what their plans are if they receive additional funding. The City's position that these facilities are independent of each other, when both involve the treatment of drug addiction, stretches logic (and the law) to the breaking point.

If the City's previous statement stretches law and logic to the breaking point, their argument that the words after "including" in RCW 36.70A.200(1)(a) are "merely examples illustrating what is meant by "inpatient facilities"", citing the Chicago Manual of Style Q & A, stretches logic and the law past the breaking point. For context, RCW 36.70A.200(1)(a) reads in full as follows:

> **RCW 36.70A.200**
> **Siting of essential public facilities—Limitation on liability.**
> (1)(a) The comprehensive plan of each county and city that is planning under RCW 36.70A.040 shall include a process for identifying and siting essential public facilities. Essential public facilities <u>include</u> those facilities that are typically difficult to site, <u>such as</u> 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,

[3] In response to public outcry over this issue, the project was rebranded as an "Outpatient Clinic"

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> and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.

The City completely ignores the inclusive and expansive phrases "include" and "such as", which make it clear that the list of EPF's is not meant to be exclusive to those uses listed. This notion is confirmed by the language of WAC 365-196-550, which is even more exclusive and expansive than the language in RCW 36.70A.200(1). Specifically, WAC 365-196-550(1)(a) and (2)(c)(i) provide as follows:

> **WAC 365-196-550**
> **Essential public facilities.**
> (1) Determining what facilities are essential public facilities.
>
> > (a) The term "essential public facilities" refers to public facilities that are typically difficult to site. Consistent with county-wide planning policies, counties and cities should create their own lists of "essential public facilities," to include **at a minimum** those set forth in RCW 36.70A.200.
>
> (2) Criteria to determine if the facility is difficult to site. Any one or more of the following conditions is sufficient to make a facility difficult to site. . . .
>
> > (c) The public facility has, or is generally perceived by the public to have, significant adverse impacts that make it difficult to site. . . .
>
> > > (i) Identification of essential public facilities. When identifying essential public facilities, **counties and cities should take a broad view of what constitutes a public facility**, involving the full range of services to the public provided by the government, substantially funded by the government, contracted for by the government, or provided by private entities subject to public service obligations. (emphasis added)

It is not necessary to consult the Chicago Manual of Style to conclude that the phrase, "at a minimum", and the provision requiring Counties and Cities to 'take a broad view of what constitutes a public facility' indicate that the definition of EPF's in RCW 37.70A.200(1) is expansive and inclusive, and EPF's are not confined to the uses listed therein.

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The City also attempts to argue that this project is not an EPF because SMC 18.56.030 only applies when the use is prohibited in a zone.[4] This argument completely ignores SMC 18.56.010, the preamble to SMC 18.56.030, which says that a special use permit is required in prohibited districts, "or in certain districts as herein provided". SMC 18.56.010 provides as follows:

> **18.56.010 Intent.**
> 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 by Chapter 18.20 SMC, or in certain districts as herein provided, where it can be determined that such uses are in the interest of the public health, safety and general welfare and where such uses meet all of the applicable standards set forth herein. (emphasis added)

The City's argument in this regard represents a selective and incomplete citation to their own Code, which fails on its face once the entire Code is read.

3. Administrative Approval of this Project is Inappropriate Because the Siting of it Requires Substantial Discretion:

The City also attempts to argue that its quasi-judicial C-2 permitting process is inapplicable because no "substantial discretion" is involved in processing this project. In support of this claim, the City cites a passage from Mission Springs v. City of Spokane, 134 Wn. 2d 947 (1998), stating that "*neither a grading permit, building permit or any other ministerial permit may be withheld at the discretion of the local official ….:.*" Id. At 961., with no explanation of why an application for a drug rehabilitation facility expressly defined as an EPF under the City's zoning code might be considered ministerial.

[4] The City has decided that this section of the code should be "disregarded under legal direction".

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The proposed rehabilitation center is also expressly defined as an EPF in SMC 18.56.030(j), the City's Essential Public Facilities Ordinance, which declares that "alcoholism or drug treatment centers and detoxification centers" are to be processed as EPF's, subject to City Council approval rather than administrative approval. Regarding this point, the City actually admits the existence of this express language in its Motion, but attempts to distinguish it by making this astonishing statement:

> "The City's Essential Public Facility process (SMC 18.56) it is admittedly outdated and – on its face – appears to require "alcoholism or drug treatment centers, detoxification centers" to be processed as an Essential Public Facility. SMC 18.56.030(J). This provision of the City's code was enacted in 1997 and predates important amendments to the ADA and the RA, as well as a host of important federal court decisions addressing discrimination under the ADA and RA and in zoning and land-use permitting. <u>Accordingly, City staff, under legal direction, have properly disregarded this and other similar provisions in the City's municipal code</u> as they are contrary to ADA/RA law and, if followed, subject the City to significant municipal liability." (City's Motion to Dismiss at 28). (emphasis added)

Stated more simply, the City admits under penalty of perjury that it has intentionally decided to "disregard" express code language declaring this project an EPF, as well as unexplained "other code provisions", without even a hint of explanation, other than it was "under legal direction" because of "important amendments to the ADA and the RA", as well as a "host of important federal court decisions".

The truth is that EPF's are subject to significant discretion under the rigorous and robust criteria set forth in SMC 18.56.060, which requires the City Council to determine whether there was a "demonstrated need for the essential public [facility]", that it not be "contrary to the public interest", that it "shall be consistent with the goals and policies of the comprehensive plan", and that it is "not inconsistent with the health, safety, convenience of

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general welfare of person residing or working in the city". (SMC 18.56.060 A, B and C, respectively) The City's attempt to simply flick this express, direct and unequivocal language away without explanation other than "under legal direction" because of "important amendments" and "important federal court decisions" should be rejected outright. As the City states itself, apparently selectively, "In sum, the City must apply the codes to a project as written, not as others may want them written". (City's Motion, page 14).

In support of this position, the City also attempts to claim that the project is not 'difficult to site", citing Marantha Mining v. Pierce County, 59 Wn. App 795, 804 (1990) and Indian Trail Property Owner's Assn v. City of Spokane, 76Wn. App. 430 (1994) for this proposition. But in Marantha, the proposed mine was "permitted in general use zones under unclassified use permits" (Id. at 797), and in Indian Trail, the site was zoned B-1, which was the proposed use at issue. (Id. At 432) In other words, the projects were consistent with the applicable zoning in those cases.

Here, the project is not allowed under applicable zoning. From the beginning, it has included an illegal inpatient facility that is not allowed in the zone. It also meets the definition of an EPF in express code language the City has intentionally chosen to "disregard under legal direction" that contains a rigorous and robust set of criteria that must be met and approved by the City Council. It also contains laboratory and 'childwatch' facilities' that are both conditional uses in the RREOA District. To say that this project is not "difficult to site" is therefore a gross understatement.

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4. The Sequim Municipal Code clearly and unequivocally requires the City to resolve any "questions" in favor of the higher procedure type.

Throughout this dispute, the City has never addressed the requirements of SMC 20.01.040(B), which unequivocally requires that the Director **shall** resolve any questions regarding a procedure in favor of the higher-lettered procedure. SMC 20.01.040(B) reads in full as follows:

> **20.01.040 Determination of proper type of procedure.**
>
> B. Determination of Director. The director shall determine the proper procedure for all development applications. If there is a question as to the appropriate type of procedure, the director **shall** resolve it in favor of the higher procedure type letter as defined in SMC 20.01.030. (Ord. 2000-006 § 3) (emphasis added)

The existence of this dispute and all of its nuances proves that there is a 'question as to the appropriate type of procedure', as does the existence of express language in SMC 18.56.030(j) declaring that "alcoholism or drug treatment centers, detoxification centers" are to be processed as Essential Public Facilities, which the City has chosen to 'disregard under legal direction', not to mention the express, expansive and inclusive language of RCW 36.70A.200(1) and WAC 365-196-550, defining Essential Public Facilities.

Another significant 'question as to the appropriate type of procedure' involves the conflict between SMC 20.01.090(E) and SMC 20.01.030(A), Table 1. SMC 20.01.090(E) provides that the appeal of an A-2 decision is heard by the Hearing Examiner. It provides as follows:

> **20.01.090 Administrative approvals subject to notice (Type A-2) – Process overview.**

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E. Appeal Procedures. An applicant or other party of record who may be aggrieved by the administrative decision may appeal the decision to the hearing examiner; provided, that a written appeal is filed in conformance with SMC 20.01.240.

On the other hand, SMC 20.01.030(A), Table 1 provides for an appeal to the City Council:

Table 1

Procedural Steps	**Application Process**					
	Type "A" Actions *Administrative*		*Type "B" Actions Hearing Examiner*	*Type "C" Actions Planning Commission and City Council*		
	Type A-1	**Type A-2**	**Type B**	**Type C-1**	**Type C-2**	**Type C-3**
Recommendations by:	N/A	N/A	Staff	Staff	Planning Commission	Staff
Notice of Application	No	Yes	Yes	Yes	Yes	No
Public Meeting/ Workshop	—	—	—	—	Planning Commission	—
Open Record Public Hearing	See Note[a]	See Note[a]	Yes Hearing Examiner	Yes Planning Commission	Yes City Council	No
Final Decision-making Body	Staff[b]	Staff[b]	Hearing Examiner[b]	Planning Commission	City Council	City Council
Appeal Authority	Hearing Examiner[c] City Council	City Council[d]	Clallam County Superior Court	City Council	Clallam County Superior Court	Clallam County Superior Court

To summarize this discrepancy, one section of the Code says that an A-2 decision is appealed to the Hearing Examiner, while another section says that the appeal is to the City Council. This is just one of the questions as to which procedure is appropriate.

Another question involves the requirement in SMC 18.56.040 that EPF's must obtain an "essential public facilities and special property use permit granted by the city council":

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18.56.040 Permit required.
Essential public facilities and special property uses shall be allowed within certain use zones after obtaining an essential public facilities and special property use permit granted by the city council. (Ord. 97-019 § 4, Exh. B)

Under SMC 20.01.030(A), Table 2, these permits are only available through the City's C-2 process. Table 2 is reproduced below:

Table 2

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

Because of these questions, SMC 20.01.040(B) mandates that they <u>shall</u> be resolved in favor of the higher letter procedure, which in this case is the quasi-judicial C-2 process set forth above.

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CONCLUSION

The proposed drug rehabilitation clearly meets the expansive and inclusive definition of an Essential Public Facility in both the RCW's and the WAC's. As such, SMC 18.56.030(j) requires that it be approved by the City Council sitting in quasi-judicial jurisdiction, rather than by the City Staff as an administrative act. The City has expressly chosen to "disregard" this mandate "under legal direction" in favor of a tenuous and tortured analysis of citizen standing to challenge an action, and with knowledge that the project may contain an interconnected second phase that clearly violates the applicable zoning, which they are attempting to sweep under the rug by distorting the definitions of EPF's and "medical clinics" contained in the Code beyond logical comprehension. In addition, the inconsistency between SMC 20.01.240, requiring an appeal to the Examiner, and SMC 20.01.030(A), Table 1, requiring an appeal to the City Council, constitutes a "question", which must be resolved in favor of the higher letter procedure under SMC 01.040B, which in this case is the C-2 process. For these and other reasons, the City's Motion should be denied

DATED this 14th day of September, 2020.

HELSELL FETTERMAN LLP

Michael A. Spence
WSBA No. 15885
Attorney for Petitioner

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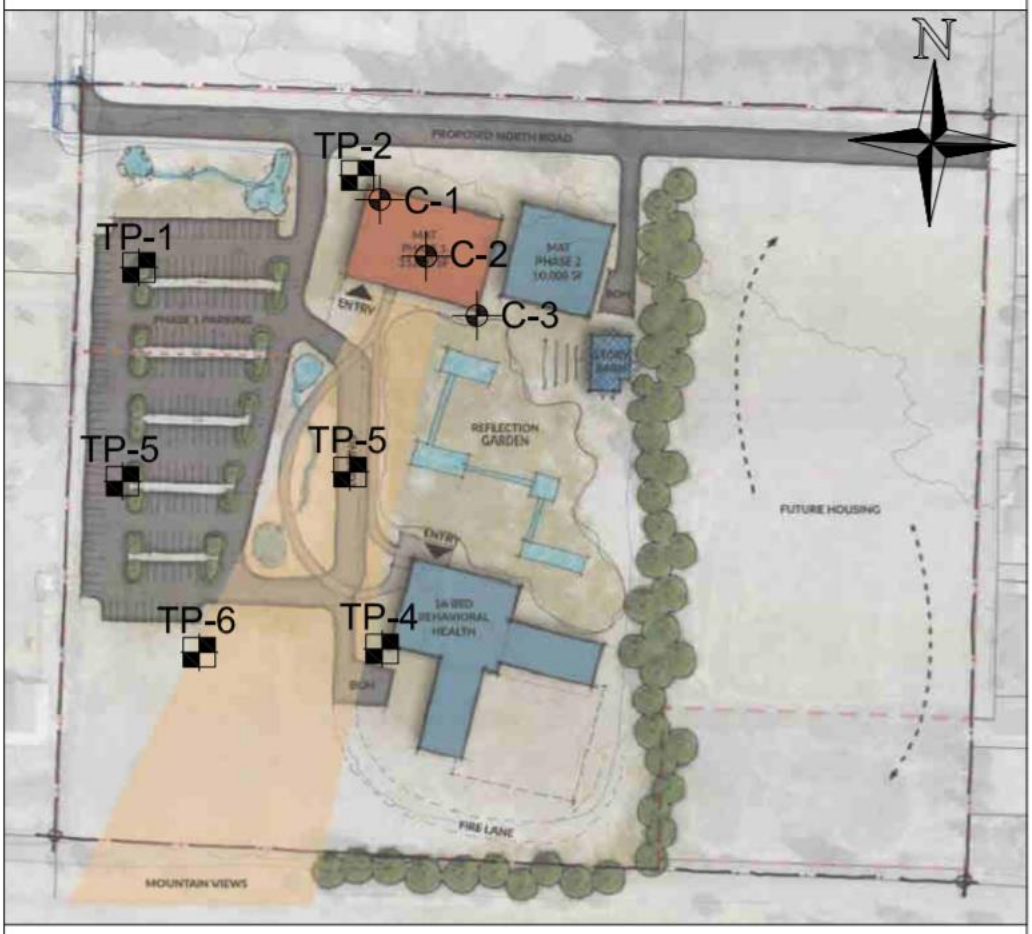
EXHIBIT A



LEGEND

TP-1 Number and Approximate Location of Test Pits

C-1 Number and Approximate Location of Cone Penetration Test (CPT)

Reference: Conceptual Site Plan, prepared by Rice Fergus Miller, dated June 25, 2019.

Site Plan

Proposed MAT Facility	Figure 2
Sequim, WA	
Project Number: 102-19020	Drawn By: V.C. Date: October 2019
Krazan & ASSOCIATES, INC.	Not to Scale

OFFICE OF THE HEARING EXAMINER

IN AND FOR THE CITY OF SEQUIM

SAVE OUR SEQUIM, a Washington 501(c)(4) corporation Petitioner, vs. CLALLAM COUNTY, a municipal corporation, Respondent	File No. CDR20-01 DECLARATION OF MICHAEL SPENCE

MICHAEL SPENCE, under penalty of perjury under the laws of the State of Washington, states and alleges as follows:

I am over the age of 18 years and have personal knowledge of the matters set forth herein

I am the attorney for Petitioner Save our Sequim (SOS)

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On Wednesday, September 9, I caused to be ordered a recording of the August 17, 2020 hearing on the City and Tribe's Motions for Sanctions in Clallam County Superior Court Cause No. 20-2-00304 – 05, a lawsuit seeking a declaratory judgment regarding SMC 20.01.040(B).

Because of delays in recording the hearing, I was only able to get a copy of the CD on Friday, September 11, 2020. This did not give me enough time to obtain a certified transcript.

The quote referenced on page 5 of our Response to the City of Sequim's Motion to Dismiss this action is a true and correct copy of the City's testimony at 9:45:47 a.m. that day.

I am more than happy to provide a copy of the above-referenced CD to anyone who requests it.

DATED this 14th day of September, 2020 in Bainbridge Island, WA.

Michael A. Spence

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

SAVE OUR SEQUIM, a Washington 501(c)(4) corporation Petitioner, vs. CLALLAM COUNTY, a municipal corporation Respondence.	File No.: CDR 20-001 CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 14, 2020, the following documents were sent for delivery on the following party in the manner indicated:

Petitioner Save Our Sequim's Response to Jamestown S'Klallam Tribe's Motion for Summary, and Exhibit A

Petitioner Save Our Sequim's Response to City of Sequim's Motion to Dismiss, and Exhibit A

Declaration of Michael A. Spence

this Certificate of service.

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Michael D. McLaughlin Michael D. McLaughlin, LLC 4114 N. 10th Street Tacoma, WA 98406 michael@mdmwalaw.com	☐ Via first class U. S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☒ Via Email

DATED this 14th day of September, 2020

Lisa Blakeney, Legal Assistant

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