THE HEARING EXAMINER OF THE CITY OF SEQUIM

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

I. INTRODUCTION AND RELIEF REQUESTED

The dispositive issues in the motions filed by SOS and Parkwood are whether the standalone Project on appeal has any phases and whether the outpatient Clinic is an inpatient facility.[1] The answer to both questions is "no," but SOS and Parkwood rely on hearsay from newspaper articles published months before the Tribe filed any applications with the City to "prove" the Project has a second phase with an inpatient component. Their arguments attack a proposal that was submitted to and denied by the state legislature, which described project phases the Tribe has abandoned because those phases were not funded. SOS and Parkwood point to no evidence about the Project on appeal that warrants reversing the City's decisions.

[1] This brief uses the same abbreviations as the Jamestown S'Klallam Tribe's Motion for Summary Judgment.

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The Tribe supports the City's motion to dismiss and agrees it should be granted. The motions filed by SOS and Parkwood should be denied, and the Tribe's concurrently filed motion for summary judgment should be granted.

II. EVIDENCE RELIED UPON

This brief relies upon the Second Declaration of Brent Simcosky ("Second Simcosky Decl."); the Second Declaration of Paul Cunningham ("Second Cunningham Decl."); the Second Declaration of Andy Murphy ("Second Murphy Decl.") and the papers and pleadings on file with the Hearing Examiner, including the Jamestown S'Klallam Tribe's Motion for Summary Judgment ("Tribe MSJ"), which is incorporated herein by reference; the Declaration of Andy Murphy ("Murphy Decl."), including its Exhibits H ("Parkwood A2 Appeal"), J ("Parkwood MDNS Appeal"), K ("SOS A2 Appeal"), and L ("SOS MDNS Appeal"); the Declaration of Brent Simcosky ("Simcosky Decl."); the Declaration of Paul Cunningham ("Cunningham Decl."); Petitioner Save Our Sequim's Motion for Partial Summary Judgment and for Order Remanding Application ("SOS MSJ"); the Declaration of Michael Spence ("Spence Decl."); the Declaration of Jodi Wilke ("Wilke Decl."); Appellant Parkwood's Dispositive Motion ("Parkwood MSJ"); the Declaration of Michael D. McLaughlin in Support of Appellant Parkwood's Dispositive Motion ("McLaughlin Decl."); and the City's Motion to Dismiss Bilow, Parkwood, and Save Our Sequim (S.O.S.) Appeals ("City MTD").

III. BACKGROUND

The Tribe relies on the background stated in the Tribe MSJ. To summarize the most relevant aspects for this brief, the Tribe continued its legacy of providing care to its community by seeking to construct and operate the most complete and cutting-edge treatment facility for Olympic Peninsula residents who suffer from OUD. Tribe MSJ at 4–6. The Tribe and the Public Hospital Districts for Clallam and Jefferson County developed a larger project in concept that involved three phases, and sought $25 million in funding from the State for that broader project. *Id*. at 5–6. The first phase of that broader project was the outpatient clinic that is the Project on

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Appeal. *Id*. at 6. The second phase would have been a facility that provided inpatient treatment on the Property. *Id.* The third phase would have been developed in cities other than Sequim. *Id*.

Out of the $25 million the Tribe requested for all three phases, the State awarded $7.2 million that may be used solely "to construct a 17,000 square foot *outpatient medical clinic*" that was Phase 1 in the original proposal. Simcosky Decl., Ex. B at 1 (emphasis added). The State awarded no funding for the inpatient facility that was Phase 2 or the facilities that would have been Phase 3. Tribe MSJ at 6. Because the Tribe was unable to obtain funding for the other phases in its conceptual proposal, it abandoned those phases. Simcosky Decl. ¶ 3. The Tribe has no plans to build the abandoned phases. *Id*. The budget crisis caused by COVID means the Tribe has not and will not seek funding for future development on the Property for the foreseeable future. Second Simcosky Decl. ¶ 3.

In seeking to prove the contrary, SOS and Parkwood rely upon descriptions of the broader project as originally conceived, primarily hearsay news stories published months before the Tribe submitted its application for the Project to the City. McLaughlin Decl., Ex. 2 (May 8, 2019 article); McLaughlin Decl., Ex. 3 (May 31, 2019 article); SOS MSJ at 2-3 (citing an article not in the record purportedly dated July 22, 2019).

On January 10, 2020, the Tribe submitted applications for a building permit and design review approval for an outpatient clinic. Tribe MSJ at 7. The Property where the Project will be built is zoned to outright permit outpatient clinics and regional EPF. *Id*. (citing SMC Table 18.33.030). City code provides that building permit applications are reviewed under the A-1 process, SEPA determinations are reviewed under the A-2 process, and if there is any question as to which process to follow, the higher process applies. Tribe MSJ at 9. Because the applications were for a building permit that required a SEPA determination, the Director determined the City would review the applications under the A-2 process. *Id*. The City has processed applications to construct outpatient clinics under the A-2 process for at least 32 years. Determination at 5 n.21.

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SOS and Parkwood appealed the Determination by asserting the Project was actually an EPF because of the conceptual Phase 2 that the Tribe abandoned, and thus should have been subject to the C-2 process that applies to special use permits. SOS A2 Appeal; Parkwood A2 Appeal; *see also* Tribe MSJ at 11–12. SOS holds itself out as a 501(c)(4) entity, which was formed to oppose the Project. SOS A2 Appeal at 2; *see also* Wilke Decl. ¶ 4. Parkwood owns property three miles away from the Property and is outside the city limits for Sequim. Tribe MSJ at 10. Both SOS and Parkwood assert their public participation in opposing the Project provides them with standing in their appeals, but they have not identified how the Project would impact them, their residents or members, or their property. *Id*. at 10, 16.

The City subsequently issued an MDNS for the Project, which was incorporated into the Design Review Approval for the Project. Tribe MSJ at 14. SOS and Parkwood appealed the Design Review Approval by repeating the same arguments in their appeals of the Determination. *Id*. The City then approved the building permit application for the Project, but no party appealed that land use decision. *Id*.

SOS and Parkwood have moved for partial summary judgement that the Director erred by not subjecting the Project, which is permitted outright on the Property, to the conditional C-2 review that applies to construction of EPF in zones where they are prohibited. SOS MSJ at 2; Parkwood MSJ at 5. SOS and Parkwood's arguments require the presence of an inpatient facility in the Project, either through the abandoned Phase 2 or because the outpatient Clinic is somehow actually an inpatient facility.

IV. ARGUMENT

A. SOS and Parkwood lack standing to bring their motions.

Only "aggrieved parties" may appeal projects under City law, and neither SOS nor Parkwood are aggrieved parties. Aggrieved parties are those that are prejudiced by a Project. SMC 20.01.020.B.1. Appellants must establish how a project harms them or their property to be

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prejudiced by a project. Tribe MSJ at 16 (citing *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662, 375 P.3d 681 (2016)). Harm must be proved and may not be presumed. *Id.*

SOS and Parkwood have not identified any way in which the Project impacts them or their property. They instead rely on their public participation in review of the Project. Tribe MSJ at 10. That participation makes them parties of record, but not aggrieved parties. *Id*. at 15–17. Because SOS and Parkwood have not established how the Project impacts them or their Property, they are not "aggrieved parties" under City Code, and therefore lack standing to assert their appeals. Their motions should be denied, and their appeals should be dismissed.

B. SOS and Parkwood's motions are moot.

The Tribe may build the Clinic regardless of how this appeal is resolved, so SOS's and Parkwood's appeals are moot. While SOS and Parkwood appealed the Determination and the Design Review Approval, no party appealed the approval of the building permit. The building permit thus became a final land use decision that is invulnerable to attack. Tribe MSJ at 17 (citing *Ward v. Bd. of Cty. Comm'rs, Skagit Cty*., 86 Wn. App. 266, 270–72, 936 P.2d 42 (1997); *see also West v. Stahley*, 155 Wn. App. 691, 697, 229 P.3d 943 (2010)). Washington recognizes a strong public policy of favoring final land use decisions; without finality "no owner of land would ever be safe in proceeding with development of his property." *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 931, 52 P.3d 1 (2002). Because the Tribe may act on its building permit, the resolution of SOS's and Parkwood's appeals have no bearing on the outcome of the Project. Thus, the issues raised by SOS and Parkwood are moot, their motions should be denied, and their appeals should be dismissed.

C. The Project does not involve an inpatient facility so the Director's Determination is correct.

Although Parkwood and SOS argue the City should have applied the C-2 process to the Project, Parkwood has repeatedly conceded that the City properly classified the Project under the A-2 process. Parkwood concedes that outpatient care is a permitted use on the Property and

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"would therefore be subject to an A-1 or A-2 permit classification." Parkwood MSJ at 10. Parkwood acknowledged that the "medical clinic" use that is permitted outright for the Property "describes the contemplated activities included in Phase 1 of the project." Parkwood MSJ at 11. There is only one phase to the Project, and it is to construct an outpatient medical clinic. Tribe MSJ at 7. Thus, by its own admissions, Parkwood's motion should be denied. Because Parkwood's concessions are legally and factually correct, SOS's motion should also be denied.

Despite its concessions, Parkwood asserts the Project does not qualify as a "Clinic" because of the conceptual Phase 2 that the Tribe has abandoned. Parkwood MSJ at 6. So does SOS. SOS MSJ at 2–4. SOS has asserted "[n]othing on the record indicates that Phases 2 or 3 have been abandoned." SOS MSJ at 4. The Declaration of Brent Simcosky provides that evidence. Director Simcosky expressly states Phases 2 and 3 of the conceptual proposal have been abandoned. Simcosky Decl. ¶ 3. The record shows the Tribe abandoned the other phases to the broader conceptual project after the State funded only proposed Phase 1 and not any other proposed phase. *Id.*; *see also* Second Simcosky Decl. ¶ 3.

Parkwood claims, without any evidence, that the legislature funded multiple phases of the Project. Parkwood MSJ at 6. That is flat out wrong. The Tribe requested $25 million for three phases of the conceptual project, but the State awarded only $7.2 million—the amount requested for proposed phase 1. Simcosky Decl. ¶ 3. The contract for that $7.2 million grant specifies the funds may be used only to construct an outpatient clinic. Simcosky Decl., Ex. B § 2.

Parkwood claims, again without any evidence, that the Tribe is seeking additional funding for subsequent phases of the Project. Parkwood MSJ at 3. That is also flat wrong. The evidence before the Examiner shows the Tribe has abandoned subsequent phases to the Project, and will not seek funding for the foreseeable future due to the budget crisis caused by the COVID pandemic. Simcosky Decl. ¶ 3; Second Simcosky Decl. ¶ 3.

Rather than cite any evidence in the Project application materials or the City approvals, SOS and Parkwood rely on press accounts from the summer of 2019 that describe the conceptual

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project presented to the State in a funding request. SOS MSJ at 2–4; Parkwood MSJ at 6–7. SOS and Parkwood rely on descriptions of the broader project as originally conceived, not the Project that was funded and submitted to the City. The project described through hearsay in SOS's and Parkwood's exhibits refers to an abandoned project that is not before the Hearing Examiner. The evidence SOS and Parkwood rely upon is insufficient to establish there is no dispute of material fact, and they are entitled to judgment as a matter of law.

Refusing to accept reality, Parkwood cites to the GeoTech report submitted with the Project, which has a small square identifying where the inpatient clinic would have been sited. Parkwood MSJ at 6. That single sheet of paper states on its face that it is based on a "Conceptual Site Plan" prepared by the architects for the Project on June 25, 2019. Second Murphy Decl., Ex. T at 20. The engineers included the drawing Parkwood relies upon to show the exploration locations for its cone penetration tests, not to establish a second phase of the Project. *Id*. at 2 ("A site plan showing the approximate exploration locations is presented following the test of this report in Figure 2"). Identifying exploration locations on a conceptual drawing does not create a second phase to the Project. Tribe MSJ at 25–26; City MTD at 20–23.

The conceptual site plan in the GeoTech report is irrelevant when the actual drawings in the permit applications have no evidence of inpatient facilities. Second Murphy Decl., Ex. U. The architectural drawings for the Clinic show there are no dormitories, no kitchen to prepare meals for inpatients, no lunchroom for patients, exactly one shower and no bathtub. *Id.* The Clinic is designed for its purpose—to diagnose and treat patients with OUD as an outpatient clinic. It is not designed as an inpatient facility

Similarly, SOS relies on a statement in an undated document without any foundation for its authenticity or author to say infrastructure from all three phases will be part of Phase 1. SOS MSJ at 3–4. Those infrastructure improvements refer to what would have occurred if the State approved the broader project as proposed, not the Project on appeal. Second Simcosky Decl. ¶ 4.

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The infrastructure improvements for which the Tribe applied and received approval are tailored solely to the Project on appeal. *Id*.

D. The Clinic does not require a Special Use Permit.

1. The Project is not an EPF under City or State law.

The City has processed outpatient clinics under the A-2 process for decades, but SOS and Parkwood assert this Clinic should be different because it treats patients with OUD. They assert that by treating patients with OUD the outpatient Clinic is actually an EPF under the Growth Management Act. They rely on RCW 36.70A.200(1). SOS MSJ at 9; Parkwood MSJ at 8. That statute provides examples of "inpatient facilities" that may be an EPF, which include substance abuse facilities. WAC 365-196-550(1)(d)(viii) reiterates that "In-patient facilities, including substance abuse facilities" may be EPF, but there is no indication that outpatient clinics are EPF. Furthermore, SOS and Parkwood do not explain why these definitions are relevant when the City definition for EPF omits the language regarding inpatient facilities or substance abuse facilities that SOS and Parkwood rely upon. Tribe MSJ at 21 (citing SMC 18.08.020 ("'Essential public facilities,' mandated by the GMA, include airports, public educational facilities, state and regional transportation facilities, state and local correctional facilities, and other facilities of a state or regional scope.")). Neither SOS nor Parkwood argue the Project meets the City's definition of EPF.

When SOS and Parkwood cite City code, they cite to SMC 18.56. They assert the Clinic falls within the definition of EPF under that chapter and thus required a special use permit instead of a building permit. SOS MSJ at 10–11; Parkwood MSJ at 11. But SMC 18.56 does not define EPF. *See* SMC 18.08.020 (defining EPF). Instead, that chapter identifies certain uses that may be allowed in zoning districts from which they are prohibited. SMC 18.56.010; *see also* Tribe MSJ at 22–23; City MTD at 19. The chapter does not apply to the Project, because the Property is zoned to outright permit outpatient clinics and regional EPF. The Clinic will serve the two counties that comprise the Olympic Peninsula. Community Response Plan at 1. Thus, if the

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Clinic is an EPF (it is not), it would unquestionably qualify as a regional EPF, and therefore be permitted outright on the Property. Indeed, SOS has repeatedly conceded the Clinic is a regional facility. SOS A2 Appeal at 2; SOS MDNS Appeal at 2.

SOS and Parkwood rely on SMC 18.56.030.J in asserting the Project required a special use permit. That section applies only to "uses in districts from which they are now prohibited," which does not apply to regional EPF or outpatient clinics on the Property. SMC 18.56.030. Although the entire provision is irrelevant to the Project, it does explain why the City of Anacortes processed the permit applications for the Didgwalic Wellness Center as an EPF, which SOS alludes to as proof the City erred in not doing the same for the Project. SOS MSJ at 13. The property for the Didgwalic clinic was zoned "Light Manufacturing 1 (LM1)." SOS MSJ, Ex. J at 2. Anacortes did not allow medical clinics in the LM1 zone. AMC 17.19.020.[2] Thus, the Swinomish Tribe submitted a "Conditional Use Permit/Essential Public Facility" application for a local EPF to allow its clinic to be built on property that was not zoned for clinics. *Id*. Like Sequim (and the rest of the state), Anacortes recognizes that EPF are so essential to a community that they may be built in any zone. AMC 17.75.020.B ("The Growth Management Act mandates that no local development regulation may preclude the siting of essential public facilities."). Regardless, the property for the Didgwalic clinic is materially different from the Property, which outright permits outpatient clinics and regional EPF.

Beyond only applying to zones that do not allow EPF, SMC 18.56.030.J does not apply to the Project because, like the GMA definition for EPF, it refers to inpatient facilities. SMC 18.56.030.J provides that "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*" may be permitted in zones

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[2] Anacortes substantially modified its zoning code after the Didgwalic Clinic submitted its permit application. Relevant excerpts from the code to which the Didgwalic Clinic was vested are attached as Ex. V to the Second Murphy Declaration.

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where they are not allowed (emphasis added). By specifying types of "housing serving as an alternative to incarceration with 12 or more residents," the code provisions refers to types of inpatient facilities that may be permitted "in districts from which they are now prohibited" by Title 18. SMC 18.56.030. The provision simply does not apply to outpatient facilities like the Clinic.

Aside from the plain language of the code, applying well-known principles of statutory construction leads to the same result. The statutory construction principle of *noscitur a sociis* "provides that a single word in a statute should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated." *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (internal quotation marks omitted). When interpreting statutory language, "a court should take into consideration the meaning naturally attaching to them from the context, and adopt the sense of the words which best harmonizes with the context." *Id.* (internal punctuation omitted). The associated terms in the code provision and how they are used in the context of siting inpatient facilities that are EPF under state law means that the different uses listed in SMC 18.56.030.J are all housing facilities with 12 or more residents.

Similarly, the series-qualifier canon of statutory construction provides that "there is a presumption that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." *PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue*, 9 Wn. App. 2d 775, 781, 449 P.3d 676, *aff'd*, 468 P.3d 1056 (Wash. 2020) (internal citations and quotations omitted). "This rule applies when two textual signals are present: first, when the modifying phrase makes sense with all items in the series; and second, when the modifying clause appears at the end of a single, integrated list." *Id.* (internal citations omitted). As applied here, the modifying phrase "serving as an alternative to incarceration with 12 or more residents," makes sense as applied to the preceding terms in the provision (Group homes [serving as an alternative to incarceration with 12

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or more residents], alcoholism or drug treatment centers [serving as an alternative to incarceration with 12 or more residents], detoxification centers [serving as an alternative to incarceration with 12 or more residents], work release facilities for convicts or ex-convicts [serving as an alternative to incarceration with 12 or more residents], or other housing serving as an alternative to incarceration with 12 or more residents). And second, the modifier appears at the end of a single, integrated list. *See, e.g.*, *Paroline v. United States*, 572 U.S. 434, 447 (2014) (the catchall clause "any other loss" is "read as bringing within a statute categories similar in type to those specifically enumerated").

SOS and Parkwood ask the Examiner to disregard how the provision refers to certain kinds of inpatient facilities by arguing those descriptions more specifically describe the Project than "Clinic." SOS MSJ at 11–12; Parkwood MSJ at 11–12. The Director disagreed, and his determination is entitled to deference. RCW 36.70C.130(1)(b). Moreover, SOS and Parkwood disregard how the Code treats all outpatient clinics as "Clinics" and has processed them under the A-2 process for decades. "Clinic" expressly refers to the "diagnosis and treatment of human outpatients," SMC 18.08.020, and SMC 18.56.030.J refers to inpatient facilities.

SOS claims dosing rooms and addiction treatment converts the Clinic into a drug rehabilitation center, and thus an EPF under RCW 36.70A.200. But SOS does not explain how the medical treatment to which it objects cannot be provided on an outpatient basis, which is occurring, in part, right now on an outpatient basis at the Health Clinic in Sequim. Cunningham Decl. ¶ 4; Second Cunningham Decl. ¶ 4. Indeed, all the services provided at the Clinic will be on an outpatient basis. Simcosky Decl., Ex. B § 2; Second Cunningham Decl. ¶ 5. Moreover, the Clinic is not a drug rehabilitation center, detoxification center, or substance abuse facility, all of which are inpatient facilities. SMC 18.56.030.J; Second Cunningham Decl. ¶ 6.

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2. Federal law prevents the City from treating the Clinic differently because of the patients it treats and the treatment it provides.

More importantly, SOS's and Parkwood's arguments focus on the type of patient the Clinic will treat on an outpatient basis and the type of care they will receive, even though the wrap-around services combined with OTP provide the best chance of sustained recovery for OUD patients. Cunningham Decl. ¶ 3; *see also* RCW 71.24.585(1)(a) ("all individuals experiencing opioid use disorder should be offered evidence-supported treatments to include federal food and drug administration approved medications for the treatment of opioid use disorders and behavioral counseling and social supports to address them."). SOS and Parkwood ask the Examiner to subject clinics that treat OUD patients to a different process than other clinics in Sequim, but federal law forbids it.

The Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA") protect people with OUD and the facilities that treat them. *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730 (9th Cir. 1999) ("the ADA and the Rehabilitation Act apply to zoning."); *New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 310 (3d Cir. 2007). The Ninth Circuit is one of many circuits that recognize there are few aspects of a disability giving rise to the same level of public fear and misapprehension "as the challenges facing recovering drug addicts," and thus federal law prohibits discrimination based on perceived harm from stereotypes and generalized fears. *Bay Area Addiction*, 179 F.3d 725 at 736–37; *New Directions*, 490 F.3d at 305 ("We agree with the Sixth and Ninth Circuits that a law that singles out methadone clinics for different zoning procedures is facially discriminatory under the ADA and the Rehabilitation Act."); *see also MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 342 (6th Cir. 2002) ("[W]here the discrimination results from unfounded fears and stereotypes that merely because Plaintiff's potential clients are recovering drug addicts, they would necessarily attract increased drug activity and violent crime to the city, such discrimination violates the ADA and Rehabilitation Act."); *THW Grp., LLC v. Zoning Bd. of Adjustment*, 86 A.3d 330, 342 (Pa.

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Commw. Ct. 2014) ("federal law requires that recovering heroin addicts be treated as persons with a disability under the ADA and the federal Rehabilitation Act. Treating methadone clinics differently than other medical clinics violates the ADA.").

Courts around the country recognize that outpatient clinics treating people with substance abuse disorders must be processed on the same footing as other clinics that treat outpatients. *See Discovery House, Inc. v. Metro. Bd. of Zoning Appeals of Marion Cnty*., 701 N.E.2d 577, 579 (Ind. Ct. App. 1998) (proposed methadone clinic fell "squarely under" language of permitted use classification for "[o]ffices for physicians ... and other professions dealing with public health."); *Comprehensive Addiction Treatment Servs., Inc. v. City & Cnty. of Denver*, 795 P.2d 271 (Colo. App. 1989) (proposed methadone treatment facility qualified as an "office," like other medical offices, and was permitted by right in applicable zoning district under city zoning ordinance); *Vill. of Maywood v. Health, Inc*., 104 Ill. App. 3d 948, 953, 433 N.E.2d 951 (1982) ("[T]he methadone clinic provides both physical and mental health care to its patients. The trial court properly concluded that the methadone clinic is an office of professional persons such as health practitioners.").

For example, a Pennsylvania appellate court affirmed a lower court's reversal of a City's decision to process permit applications for a methadone clinic differently from other medical clinics that were permitted outright for the property. *THW Grp.*, 86 A.3d 330. The court applied a definition of "clinic" that is remarkably similar to Sequim's: "a facility (as of a hospital) for diagnosis and treatment of outpatients." *Id*. at 337–338, *see also* SMC 18.08.020 ("'Clinic' means a building designed and used for the diagnosis and treatment of human outpatients excluding overnight care facilities."). The court held that the "daily medication, drug counseling, evaluation of new patients, and addiction related medical testing, including urine and blood testing" offered at the facility meant it provided medical treatment to outpatients. *THW Grp.*, 86 A.3d at 337. Thus, the facility fell within the definition of "clinic" for the zone, and should have been allowed as an outright permitted use. *Id.*

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SOS has previously argued these cases are not binding, but it has not identified any flaw in the rationale of the court decisions. This Examiner should not place himself in the minority opinion regarding how jurisdictions may permit facilities that treat OUD patients. The Director followed the law reflected in these cases by treating the Clinic as it would any other outpatient clinic and reviewing the Project applications under the A-2 process. SOS and Parkwood's efforts to subject the Clinic to governmental discrimination should be denied.

3. The child care and lab components of the Project are part of the principal clinic use or qualify as accessory uses.

SOS takes issue with the child care service and lab equipment in the Clinic, because these too must not be part of an outpatient clinic. SOS MSJ at 12. While child care centers and medical laboratories by themselves are conditional uses in the RREOA, that does not convert the Clinic into an inpatient facility or EPF that would be subject to C-2 review. The child care services and lab equipment in the Clinic are part of the principal use to treat and diagnose patients on an outpatient basis. Cunningham Decl. ¶ 6. Child care at the Clinic is necessary to allow patients to receive consistent medical care without the additional barrier of finding daily child care. *Id*. The lab equipment will be used only for urinalysis, which allows providers to diagnose compliance with treatment plans and modify treatment accordingly. *Id*. The lab equipment at the Clinic is not a full medical laboratory, but is tailored to the medical treatment the Clinic will provide. *Id*. Thus, the child care and lab equipment are essential to diagnose and treat outpatients, and thus part and parcel of the principal Clinic use on the Property. Tribe MSJ at 23–24.

In the alternative, the child care and lab equipment are accessory uses on the Property. Tribe MSJ at 24–25. Neither use is prohibited on the Property, and thus may qualify as an accessory use. *Id*. There is no reason why the child care services and lab equipment convert the Clinic from being anything other than an outpatient clinic that is permitted outright on the Property.

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4. The Sequim City Council has already decided the Project is not difficult to site.

SOS and Parkwood claim the Clinic is difficult to site, and therefore must be an EPF under SMC 18.56. SOS MSJ at 12; Parkwood MSJ at 8–10. The Sequim City Council disagrees. Chapter 18.56 applies only to "specified uses" that "are found to possess characteristics which make impractical their being identified exclusively with any particular zone classification as herein defined." SMC 18.56.020. The City Council decided the Property was appropriate to site outpatient clinics and regional EPF when they created the RREOA. SMC Table 18.33.031. Thus, the City already exercised its discretion regarding the siting of EPF on the Property. Tribe MSJ at 20 (citing *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1954). By outright permitting outpatient clinics and regional EPF in the RREOA, the City Council has determined the Project is not difficult to site on the Property.

Accordingly, even if the Project was an EPF, it would be processed as an A-2 decision under a building permit because the City could not apply the criteria in SMC 18.56. City MTD at 24 n.19 (quoting WAC 365-196-550(5)(d) ("If an essential public facility does not present siting difficulties and can be permitted through the normal development review process, project review should be through the normal development review process otherwise applicable to facilities of its type.")).

E. This appeal is properly before the Hearing Examiner.

Avoiding the merits of their challenges to the Project, SOS asserts appeals of A-2 decisions must be heard by the City Council by citing SMC 20.01.030(A) Table 1. SOS MSJ at 15–18. That table summarizes the appeal procedures set out in specific code provisions elsewhere in the code chapter. As SOS acknowledges, specific provisions takes priority over general when interpreting code. SOS MSJ at 11–12. The code provision that specifically governs the A-2 process provides that the Hearing Examiner presides over appeals of A-2 decisions. SMC 20.01.090.F. SOS does not address this specific and dispositive portion of the code at all.

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Courts interpret codes to avoid conflict, and the relevant provisions in the Code may be harmonized. *Tommy P. v. Bd. of Cty. Comm'rs of Spokane Cty.*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). While the table could be improved to be a more comprehensive summary, the Table's reference to the City Council hearing appeals of A-2 decisions is accurate with respect to appeals of DNS threshold determinations, unlike the MDNS at issue in this case.

SMC 20.01.070.C provides that "Procedures for SEPA determination shall follow Chapter 16.04 SMC, Environmental Policy, as amended, and SMC 20.01.180." SMC 20.01.180.F provides that a "SEPA determination of nonsignificance may be appealed consistent with appeal requirements for SEPA determinations established in this chapter." Within that chapter, SMC 20.01.240A provides that "Determinations of nonsignificance may be appealed to the city council." That provision does not apply to the Project, which received an MDNS, not a DNS. The Code treats MDNS differently from DNS. *See, e.g.*, SMC 16.04.100; SMC 16.04.070 (adopting WAC 197-11-340 for "Determination of nonsignificance (DNS)" and WAC 197-11-350 for "Mitigated DNS"); SMC 16.04.200 (adopting WAC 197-11-734 definition of DNS and WAC 197-11-766 for MDNS). The use of different terms is intentional and reflects the terms should be subjected to different treatment. *Roggenkamp*, 153 Wn.2d at 625 ("Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.").

Under the Code, appeals of MDNS are governed by SMC 16.04.170, which adopted by reference the appeal section of WAC 197-11-680. That WAC provides the appeal of an MDNS shall be consolidated with "a hearing or appeal on the underlying governmental action in a single simultaneous hearing before one hearing officer or body." WAC 197-11-680(3)(a)(v). Here, the underlying government action for the MDNS was the Design Review Approval, which was processed as an A-2 decision. Design Review Approval at 15–17 (incorporating MDNS conditions). SMC 20.01.090.F provides that appeals of A-2 decisions "will be held before the

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hearing examiner[.]" This appeal is properly before the Hearing Examiner and may not be heard by the City Council.

V. CONCLUSION

There is only one phase to this standalone project: an outpatient clinic that is permitted outright for the Property. SOS and Parkwood lack standing to raise their moot challenges, and their motions should be denied on those procedural grounds. Their motions fail on the merits, too. The Director complied with federal law when he subjected the Clinic to the same review process as other outpatient clinics in Sequim, so his decision to follow the A-2 process should be affirmed. SOS and Parkwood's motions should be denied.

DATED this 14th day of September, 2020.

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

Executed at Seattle, Washington, this 14th day of September, 2020.

s/ Brie Geffre
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THE HEARING EXAMINER OF THE CITY OF SEQUIM

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

I. INTRODUCTION AND RELIEF REQUESTED

Delay, delay, delay. Rather than move forward with resolving its appeals, which raise legal issues that do not require additional discovery or documentation from the City, SOS has asked for a stay because the City's privilege log allegedly did not comply with the Public Records Act ("PRA").[1] SOS has used every opportunity to delay the Project from being realized, and this is the latest iteration of its delay tactics. By its own admission, SOS has received abundant documentation from the City in response to its public records requests, and SOS has used those documents in making its arguments to the City Council and to the Hearing Examiner. SOS does not need more information from the City, nor does it explain why a PRA-compliant

[1] This brief uses the same abbreviations as the Jamestown S'Klallam Tribe's Motion for Summary Judgment ("Tribe MSJ").

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privilege log will aid the resolution of its appeals. SOS has not carried its burden of showing a stay is appropriate. SOS's motion to stay should be denied.

II. EVIDENCE RELIED UPON

This response relies on the Declaration of Andy Murphy in Support of Jamestown S'Klallam Tribe's Response to Motion to Stay ("Murphy Stay Decl."), and the papers on file with the Hearing Examiner, including Petitioner Save Our Sequim's Motion for Partial Summary Judgment and for Order Remanding Application ("SOS MSJ").

III. BACKGROUND

SOS has long opposed the Project. On September 20, 2019, SOS submitted at least five public records requests to various City officials and staff members seeking production of "any and all documents" relating to the Tribe and the Project. SOS Mot. to Stay, Ex. A. On October 10, 2019, SOS sent a letter to the City Council asserting that the Project should be classified as an essential public facility ("EPF"), even though the Project application would not be filed for several months. Murphy Stay Decl., Ex. A ("Spence TRO Decl.") ¶ 6. On January 15, 2020, SOS sought to have the City Council compel staff to violate City code and treat the Project like an EPF, even though outpatient clinics are permitted outright for the Property. Spence TRO Decl. ¶ 7. That letter acknowledged SOS had already received a first installment in response to public records requests it had submitted. *Id.*, Ex. 4 at 3. On March 18, 2020, SOS sent another letter to the City Council, again seeking to have it intervene in the processing of the Project application. *Id.*, Ex. 7. That letter quoted various documents SOS received in response to public records requests. *Id.*

Six months passed, during which SOS filed the administrative appeals that are before the Hearing Examiner, and also filed a declaratory judgment action seeking to obtain the same relief it asks from the Hearing Examiner. Murphy Stay Decl., Ex. B. One week after the City issued the Design Review Approval for the Project, SOS and Parkwood, who was a co-plaintiff in the lawsuit, sought a temporary restraining order to halt the Project. In that motion, SOS

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acknowledged "disrupting the timeline for completion of the project" would "irreparably harm" the Tribe. *Id*., Ex. C at 5. The Court denied the TRO motion. *Id*., Ex. D. The Court then granted the Tribe's motion to dismiss for failure to state a claim because SOS's and Parkwood's lawsuit violated LUPA. *Id*., Ex. E.

With the hearing set to commence in less than one month, SOS now asserts the City's privilege log does not comply with the PRA. SOS Mot. to Stay at 2. SOS claims this problematic privilege log accompanied the City's final installment to the public records requests made one year ago. *Id*. SOS does not identify when that final installment was made or why SOS could not raise the issue of alleged noncompliance earlier. SOS does, however, acknowledge that the City has produced "a large number of documents" in response to SOS's records requests. *Id.*

IV. ARGUMENT

SOS has not carried its burden of proving a stay is appropriate. Its sole basis in seeking the stay is the City's alleged violation of the PRA by not providing a detailed privilege log. But the information SOS seeks is not relevant to the issues it has raised on appeal. Whether the Project application materials comply with City Code can be determined by evaluating the application materials, the City's decisions, and the code. Indeed, SOS has already moved for summary judgment to resolve its issues, thereby recognizing the issues are ripe for resolution as a matter of law. Notably, SOS relies upon information it obtained through public records requests in its summary judgment motion. SOS MSJ at 3.

SOS has already received plenty of information from the City, and it has used that information in making repeated appeals to the City Council to improperly intervene and halt the Project. *See, e.g.,* Spence TRO Decl., Exs. 3, 4, 7. Why SOS needs additional documentation goes unexplained, and thus is a failure to carry its burden. SOS did not request discovery, and none was ordered. There is no reason why SOS should be able to rely on an alleged improper document production to delay the hearing.

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SOS's motion says they filed their public records request on September 9, 2020—predicting the future, as they cited a date seven days after they filed their motion—but the date of the records requests it attached to its motion is September 20, 2019. SOS Mot. to Stay at 2; SOS Mot. to Stay, Ex. A. SOS has thus had a full year to resolve this issue. If it was concerned about the City's late and allegedly improper responses, it should have sought a remedy in court. It is too late for them to raise this alleged non-compliance now. The Tribe has an interest in a swift resolution of challenges to its Project, and that resolution should not be further delayed.

V. CONCLUSION

SOS has not established why it needs more public records to make its case, and it waited too long to raise the issue. SOS can seek a remedy from a court for the City's alleged noncompliance with the PRA, but the issues it raised in its appeals are ripe for resolution. The Project has been delayed long enough by SOS, and it is finally time to reach a decision. The motion to stay should be denied.

DATED this 14th day of September, 2020.

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

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THE HEARING EXAMINER OF THE CITY OF SEQUIM

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

I. INTRODUCTION AND RELIEF REQUESTED

Appellant Robert Bilow seeks to compel testimony on topics that are irrelevant to the issues he raised on appeal. His appeal asserted the City erred in not classifying the Tribe's Project as a C-2 application because the Project attracted broad public interest.[1] Mr. Bilow's appeal does not raise any issue regarding the amount of discretion needed to review the Project nor any issue about the Tribe's sovereign immunity, but probing those topics is the sole justification for his requests to subpoena Chair W. Ron Allen and Director of Health Services Brent Simcosky. The issues Mr. Bilow did raise in his appeal relate to code interpretation, not factual disputes. Mr. Bilow's motion should be denied because he failed to carry his burden of establishing the

[1] This brief uses the same abbreviations as the Jamestown S'Klallam Tribe's Motion for Summary Judgment (the "Tribe MSJ").

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relevance of testimony from Chair Allen or Mr. Simcosky, and the issues in Mr. Bilow's appeal do not require fact witnesses.

Furthermore, Mr. Bilow does not seem to appreciate the magnitude of his request. He has asked a municipal Hearing Examiner to compel the attendance of an elected leader of a sovereign nation to testify about the rationale for that nation's policy decisions. Mr. Bilow's request is the equivalent of seeking a subpoena for Oregon Governor Kate Brown or Canadian Prime Minister Justin Trudeau. Mr. Bilow comes nowhere close to justifying a subpoena issued to an elected executive. His request fails because the legislative immunity that applies to the Tribe's sovereign immunity determinations prohibit the Hearing Examiner from issuing the subpoena. Mr. Bilow's motion to issue a subpoena to Chair W. Ron Allen must be denied.

There is no need to compel the attendance of Mr. Simcosky. He will voluntarily appear at the hearing, and Mr. Bilow may ask Mr. Simcosky questions that are relevant to whatever issues Mr. Bilow raised in his appeal that are not resolved by the pending dispositive motions. Mr. Bilow's motion regarding Mr. Simcosky should be denied as moot.

II. EVIDENCE RELIED UPON

This brief relies on the papers on file in this matter.

III. BACKGROUND

The Tribe incorporates the background discussion from the Tribe MSJ. To summarize the facts most relevant to this motion, Mr. Bilow filed an appeal of the Director's Determination to process the Project applications under the A-2 process. Under City Code, the A-2 process applies to applications that are "subject to objective and subjective standards that require the exercise of limited discretion about non-technical issues and about which there may be a limited public interest." SMC 20.01.020.U. The C-2 process that Mr. Bilow asserts should have governed the Project applies to "applications that require the exercise of substantial discretion and about which there is a broad public interest." SMC 20.01.020.W. Mr. Bilow asserted the Director erred by deciding to apply the A-2 process because there "truly is no manner by which one can argue that

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this application has LIMITED PUBLIC INTEREST as opposed to BROAD PUBLIC INTEREST." Bilow Appeal at 3 (emphasis in original). For his second appealable issue, Mr. Bilow asserted, without citation to authority, that the Director erred by looking to Titles 18 and 20 of the code to make his determination, when Mr. Bilow asserts the Director should have consulted Title 20 and then Title 18. *Id*.

Mr. Bilow's appeal does not mention sovereign immunity. He assigns no error to how the Director allegedly did not consider the degree of discretion required to review the Project applications.

On September 2, 2020, Mr. Bilow requested the Hearing Examiner issue subpoenas to W. Ron Allen, the Tribe's Chair, and Brent Simcosky, the Tribe's Director of Health Services, as well as three City officials or employees. That same day, the Hearing Examiner directed Mr. Bilow to supplement his motion "with an explanation of the relevance of each person's testimony and demonstrate the reasonableness of the scope of the subpoena sought." Per the Hearing Examiner's direction, Mr. Bilow filed a supplement to his motion on September 4, 2020 (the "Bilow Supp."). In that supplement, for the first time in these proceedings, Mr. Bilow asserted the Project application "should be classified as a Type C-2 process because of the issue of **SUBSTANTIAL DISCRETION**." Bilow Supp. at 3 (emphasis in original). Again, for the first time in these proceedings, Mr. Bilow asserted that "the single issue of Sovereign Immunity demonstrates that substantial discretion is critical in this matter and mandates that [the Director] should have classified the subject Application as a Type C-2 process[.]" *Id.* at 4. Mr. Bilow asserts the Tribe must waive its sovereign immunity in order for the City to enforce its regulations that apply to the Clinic, which, Mr. Bilow asserts, somehow relates to the amount of discretion required to review the Project Applications. *Id*. at 3–4.

The only portion of Mr. Bilow's supplement that identifies the testimony he seeks to elicit from Chair Allen or Mr. Simcosky provides that Mr. Bilow seeks to probe whether the Tribe will waive its sovereign immunity. "The significance of Sovereign Immunity is my reason for

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requesting issuance of a subpoena to compel attendance by the Jamestown S'Klallam Tribe Chairman, W. Ron Allen primarily, and Brent Simcosky secondarily as the apparent Director of the proposed MAT clinic. Only through Mr. Allen's testimony can the likelihood of a limited waiver of sovereign immunity be resolved." *Id.* Mr. Bilow provides no other description regarding the relevance of the testimony he seeks to compel from Chair Allen or Mr. Simcosky nor the reasonableness in scope of that testimony.

IV. ARGUMENT

A. The requested subpoenas are irrelevant to Mr. Bilow's appeal.

Mr. Bilow's appeal requires no discovery and no witnesses other than City staff. His appeal asserts the City erred by not classifying the Clinic as a C-2 project because the Project attracted broad public interest. The only evidence Mr. Bilow's case requires are the application materials the Director reviewed, the Director's Determination, and, at most, testimony from the Director about how he applied the code. Other evidence, including testimony, is not relevant to Mr. Bilow's appeal. His issues are entirely legal and appropriate to resolve on the pending motions.

Mr. Bilow's purported justification for his requested subpoenas focus on resolving how the Tribe's sovereign immunity somehow requires substantial discretion in reviewing a building permit application. But Mr. Bilow's appeal does not raise the issue of sovereign immunity, nor its relation to substantial discretion, nor how the Director erred in considering the degree of discretion required to process the Project application. Mr. Bilow's appeal is limited to how the Director erred by not subjecting the Project to a more rigorous review because it attracted public interest and the sequence in which the Director should consult different titles of the Code. Substantial discretion is not at issue in Mr. Bilow's appeal.

Mr. Bilow was aware of how sovereign immunity may relate to the Project as early as December 2019, Ex. RLB-3, but he did not include those issues in his notice of appeal. Had he

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raised any other issues in his appeal, the Tribe would have included them in its pending summary judgment motion. It is too late for him to raise new issues now. SMC 20.01.240.F.

Moreover, Mr. Bilow misunderstands the role discretion plays in review of permit applications. The degree of discretion refers to determining an application's compliance with applicable code. *See* Tribe MSJ at 19-21. Issuance of building permits is ministerial and may not involve the exercise of discretion. *Id.* The Tribe submitted a building permit application. The Director was legally prohibited from exercising discretion in reviewing that application. *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963) ("The building department of the city has no discretion to refuse a permit save to ascertain if the proposed structure complies with the zoning regulations. Once that is done and the appropriate fee tendered by the applicant, the building department must issue the building permit."). Mr. Bilow states he does "not claim that the [Project] application should be classified as an essential public facility." Bilow Supp. at 3. Accordingly, it is unclear what type of permit he asserts the City should have issued for the Project, what criteria he asserts should have applied in reviewing the Project, and whether that criteria resulted in a ministerial or discretionary review. That lack of clarity results in a failure to carry his burden of showing the subpoenas are necessary. Regardless, the Tribe's sovereign immunity does not impact the content of the Project applications or their compliance with zoning code. Thus, the Tribe's sovereign immunity has no relationship to the amount of discretion the City exercises when reviewing project applications.

B. Mr. Bilow's appeal presents legal issues that do not require fact witnesses.

Mr. Bilow claims that "Only through Mr. Allen's testimony can the likelihood of a limited waiver of sovereign immunity be resolved." Bilow Supp. at 4. There is no need to call witnesses to determine whether the Tribe will waive its sovereign immunity. It will not. As the Tribe asserts in its appeal of the MDNS, it is improper for the City to require a waiver of sovereign immunity as a condition for the Tribe to receive a permit. The Tribe is entitled to be

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treated like any other applicant, none of which need to sign away governmental protections as a condition to receive a building permit.

Moreover, Mr. Bilow's suggestion that the Clinic will violate City law with impunity unless the Tribe waives its sovereign immunity is a red herring. Disregarding generations of how the Tribe has served the Olympic Peninsula community, including by operating its varied businesses to the highest professional standards, Mr. Bilow asserts testimony is needed to evaluate what will happen if the Tribe starts disregarding City law. Entering a realm of full speculation with no connection to history, the answer is the Clinic would be shut down even without a waiver of sovereign immunity. To retain the state and federal licenses it needs to operate, the Clinic must comply with local law. *See, e.g.,* RCW 71.24.590; WAC 246-341-1010(2)(c); 42 C.F.R. § 8.11(f); 42 C.F.R. § 8.12(b). If the Clinic is out of compliance with local law, state and federal agencies can revoke its licenses, including the DEA license the Clinic requires to receive the medicine that it will provide to its patients. *See* 21 C.F.R. § 1301.11; 21 C.F.R. § 1301.36. Without that receipt of medicine, the Clinic will no longer be able to operate because it will lack the ability to treat its patients. Further, the licensed medical staff would lose their professional licenses if they provided medical care at an unlicensed facility. *See* RCW 18.130.180. In sum, failure to comply with local laws would be fatal to the Clinic. Thus, the Tribe's sovereign immunity does not threaten the public through the Clinic's speculative noncompliance with local laws.

C. Legislative immunity bars Mr. Bilow's request.

Mr. Bilow's motion to compel testimony from Tribal government officials fails on immunity grounds. Testimonial privilege and legislative immunity protect Chair Allen (along with the entire Tribal Council) from inquiry, whether by lawsuit or discovery, into "acts that occur in the regular course of the legislative process and into the motivation for those acts." *U.S. v. Brewseter*, 408 U.S. 501, 525 (1972); *see also Laurel Park Community, Inc. v. City of Tumwater*, No. C09-5312BHS, 2010 WL 1474073 (W.D.Wash. 2010) (holding that city council

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members and city officials were immune from deposition because the inquiry touched legislative acts or the motivations for such acts.). This immunity is absolute. *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 959 (9th Cir. 2010) (citing *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732–33 (1980)).

Legislative immunity extends to legislative activities at all levels of government, including tribal officials such as the Jamestown Tribal Council members. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (legislative immunity applies to all levels of government); *Runs After v. U.S.*, 766 F.2d 347, 354–355 (8th Cir. 1985) (members of tribal council entitled to legislative immunity); *accord Grand Canyon Skywalk Development, LLC v. Hualapai Indian Tribe of Ariz.*, 966 F.Supp.2d 876, 885-886 (D. Ariz. 2013) (tribal council members entitled to legislative immunity for passing ordinance and resolution); *Skokomish Indian Tribe v. Forsman*, No. C16-5639 RBL, 2017 WL 1093294 (W.D. Wash. 2017) ("Suquamish Councilmembers are entitled to legislative immunity because they acted legislatively in promulgating and enforcing the challenged ordinance, and there is no evidence that they engaged in non-legislative functions.").

Mr. Bilow seeks privileged information about legislative decision-making of the Tribe. As a matter of Tribal law, decisions to waive or maintain the Tribe's sovereign immunity from suit are expressly reserved to the law-making or the legislative body of the Tribe. Title 22 of the Jamestown Tribal Code provides that the "exclusive method" for waiving the Tribe's sovereign immunity is by "a resolution duly enacted by the Tribal Council[.]" Sections 22.01.01–.02.[2] Consequently, the Tribal Council's motivations and reasons for deciding not to waive the Tribe's sovereign immunity with respect to the construction and operation of the Clinic are privileged and immune from discovery. Chair Allen, as a member of Tribal Council, is immune from a

[2] Title 22 of Jamestown Tribal Code is publically available here: https://jamestowntribe.org/wp-content/uploads/2018/05/Title_22_Limited-Waivers_8-25-15.pdf (last accessed September 10, 2020).

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subpoena aimed to discover privileged information about legislative decision-making of the Tribe.[3]

V. CONCLUSION

Mr. Bilow seeks irrelevant testimony for issues that he did not raise in his appeal and do not require resolving disputes of fact. His request is fully barred by the Tribe's legislative immunity. Regardless, Mr. Simcosky will voluntarily appear to testify. Mr. Bilow's motion should be denied.

DATED this 14th day of September, 2020.

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[3] In addition to the protection afforded by legislative immunity and testimonial privilege, both Chair Allen and Mr. Simcosky are protected from subpoena requests by several other privileges and immunities, including official immunity, executive privilege, and sovereign immunity, all of which are expressly reserved.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2020, a copy of the foregoing document was served upon the attorneys of record in the above cause as follows:

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

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

Executed at Seattle, Washington, this 14th day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4820-1224-8010.2

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THE HEARING EXAMINER OF THE CITY OF SEQUIM

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

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

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

2. Attached hereto as **Exhibit A** is a true and correct copy of the Declaration of Michael A. Spence in Support of Emergency Motion for Temporary Restraining Order and Injunction dated May 22, 2020 and filed in Clallam County Superior Court under Cause No. 20-2-00304-05 (the "TRO Action").

3. Attached hereto as **Exhibit B** is a true and correct copy of the Complaint for Declaratory, Injunctive, and Mandamus Relief filed in the TRO Action on May 5, 2020.

4. Attached hereto as **Exhibit C** is a true and correct copy of the Emergency Motion for Temporary Restraining Order and Injunction filed in the TRO Action on May 22, 2020.

5. Attached hereto as **Exhibit D** is a true and correct copy of the Memorandum Opinion in the TRO Action dated June 24, 2020.

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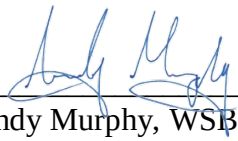
6. Attached hereto as **Exhibit E** is a true and correct copy of the Order Granting Jamestown S'Klallam Tribe's Motion to Dismiss the TRO Action filed on July 17, 2020.

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

Signed at Seattle, Washington this 14th day of September, 2020.



Andy Murphy, WSBA No. 46664

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

Executed at Seattle, Washington, this 14th day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4825-7009-3771.1

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

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

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

2. Attached hereto as **Exhibit T** is a true and correct copy of the October 24, 2019 Geotechnical Engineering Investigation prepared by Krazan & Associates, Inc. for the Tribe and the project on appeal (the "Project").

3. Attached hereto as **Exhibit U** is a true and correct copy of excerpts from the architectural drawings for the Project.

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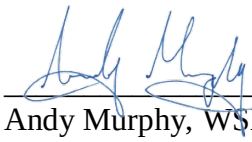
4. Attached hereto as **Exhibit V** are true and correct copies of Anacortes Municipal Code Chapters 17.19 and 17.75, which were in effect in December 2016.

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

Signed at Seattle, Washington this 14th day of September, 2020.



Andy Murphy, WSBA No. 46664

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Kristina Nelson-Gross Sequim City Attorney 152 West Cedar Street Sequim, WA 98382 knelson-gross@sequimwa.gov tsandaine@sequimwa.gov olbrechtslaw@gmail.com Attorney for City of Sequim, Washington	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
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Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 14th day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4842-0816-0203.2

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

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

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

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

3. As I described in my previous declaration, after the state did not fund Phases 2 or 3 as proposed by the Tribe in Exhibit A to my previous declaration, the Tribe abandoned those phases. To reiterate, the inpatient facility that was described in Phase 2 has been abandoned. The Tribe has no plans to seek funding to develop an inpatient facility on the Property, and will not build an inpatient facility on the Property without funding. The budget crisis caused by COVID

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means the Tribe has not and will not seek funding for future development on the Property for the foreseeable future.

4. I have reviewed Exhibit B to Petitioner Save Our Sequim's Motion for Partial Summary Judgment and for Order Remanding Application, which describes how the Tribe would have constructed infrastructure on the Property for all proposed phases during proposed phase 1. Because there is no Phase 2 to the Project, the Tribe will not be building infrastructure for other phases when building the Clinic. While it is possible that future development on the Property (for which there are no plans or intent to build) could use the same roads or tie into the same sewer as the Clinic, those infrastructure improvements are being made specifically for the Clinic and not any other phase. The infrastructure improvements for which the Tribe applied and received approval are tailored solely to the Project on appeal.

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

Signed at Sequim, Washington this 14th day of September, 2020.

DocuSigned by:
Brent Simcosky
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Brent Simcosky

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Kristina Nelson-Gross Sequim City Attorney 152 West Cedar Street Sequim, WA 98382 knelson-gross@sequimwa.gov tsandaine@sequimwa.gov olbrechtslaw@gmail.com Attorney for City of Sequim, Washington	☐ via Hand Delivery ☐ via U.S. Mail ☐ via Facsimile ☐ via E-Service ☒ via Email
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Under the laws of the state of Washington, the undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 14th day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4842-2637-8699.1

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

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

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

3. I am the Chief Medical Officer ("CMO") for the Jamestown Family Health Clinic (the "Health Clinic"), which is owned and operated by the Jamestown S'Klallam Tribe (the "Tribe"). When the Jamestown S'Klallam Healing Clinic (the "Project" or "Clinic") opens, I will oversee the medical treatment provided at the Clinic as its CMO.

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4. As I described in my previous declaration, the Health Clinic has provided treatment, including Medication-Assisted Treatment ("MAT"), for patients suffering from Opioid Use Disorder ("OUD") since 2017. MAT includes providing doses of medicine to patients. The Health Clinic provides treatment for its patients' addiction to opioids. The Health Clinic provides its services on an outpatient basis.

5. All the services the Clinic will offer will be provided exclusively on an outpatient basis. There is no inpatient component to the Clinic.

6. The Clinic will not be a drug treatment center, detoxification center, or substance abuse facility. My understanding is that "drug treatment centers" and "substance abuse facilities" are what people typically think of as a "rehab facility" where people experiencing addiction check-in (sometimes involuntarily) to receive treatment for their addiction. These programs range in length, but are typically 14 or 28 days. Unlike the Clinic, they are inpatient facilities. Detoxification centers provide detoxification treatment to patients who are physically dependent on a substance. Unsupervised detoxification can yield acute symptoms in the patient. Detoxification centers provide medically supervised detoxification treatment that puts the patient into withdrawal from the substance to which they are addicted while mitigating the acute symptoms they would otherwise endure. This detoxification process can take days or weeks. The Clinic will not provide detoxification treatment.

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

Signed at Sequim, Washington this 14th day of September, 2020.

DocuSigned by:
Paul Cunningham
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Paul Cunningham

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Executed at Seattle, Washington, this 14th day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4827-9218-8619.1

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