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 REPLY IN SUPPORT OF JAMESTOWN S'KLALLAM TRIBE'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

Despite the number of parties and motions before the Examiner, each dispositive issue is straightforward and ripe for a summary judgment ruling in the Tribe's favor.[1] The Project Opponents have presented no evidence that the Project will harm them or their property. They thus lack standing to assert their appeals even though they are parties of record. Further, the Project Opponents have not identified how the resolution of their appeals will have any effect on the Project since the Tribe can act on its building permit, a final land use decision that has become invulnerable to attack or modification. The Project Opponents' appeals are thus moot. The Project Opponents' appeals should be dismissed on either of these procedural grounds.

[1] This brief uses the same abbreviations as used in the Tribe's previously submitted briefing.

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Should the Hearing Examiner reach the merits of their appeals, resolving those issues is as simple as recognizing the Clinic is an outpatient clinic that is permitted outright on the Property, and the City followed the same A-2 procedure that it applies to other outpatient clinics in Sequim. The Project Opponents have presented no evidence that the Project is phased, involves an inpatient facility, or requires a special use permit for any other reason. All their evidence and argument regarding a second phase refers to an abandoned proposal the Tribe submitted to the state, not any application submitted to the City. Beyond their procedural defects, the Project Opponents' appeals of the Determination and Design Review Approval should be dismissed on their merits.

Notably, SOS and Parkwood did not respond to the Tribe's motion to dismiss their appeals of the MDNS. The Tribe's motion to dismiss those appeals is thus unopposed and should be granted. The Project Opponents' appeals should be dismissed in their entirety.

II. EVIDENCE RELIED UPON

This brief relies upon 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 by reference; the Jamestown S'Klallam Tribe's Response to Dispositive Motions ("Tribe Resp. to Disp. Mots."), which is incorporated by reference; the Jamestown S'Klallam Tribe's Response to Motion for Issuance of Subpoenas ("Tribe Resp. to Mot. for Subpoenas"); the Jamestown S'Klallam Tribe's Response to Motion to Stay ("Tribe Resp. to Mot. to Stay"); the Declaration of Andy Murphy ("Murphy Decl."), including its Exhibits H ("Parkwood A2 Appeal"), J ("Parkwood MDNS Appeal"), K ("SOS A2 Appeal"), L ("SOS MDNS Appeal"), and M ("Bilow Appeal"); the Second Declaration of Andy Murphy ("Second Murphy Decl."); the Declaration of Brent Simcosky ("Simcosky Decl."); the Declaration of Paul Cunningham ("Cunningham Decl."); the Second Declaration of Paul Cunningham ("Second Cunningham Decl."); Appellant Parkwood's Dispositive Motion ("Parkwood MSJ"); Mr. Bilow's Response to Jamestown S'Klallam Tribe's Motion for Summary Judgment ("Bilow Resp. to Tribe MSJ");

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Mr. Bilow's Response to City Motion to Dismiss ("Bilow Resp. to City MTD"); Petitioner Save Our Sequim's Response to Jamestown S'Klallam Tribe's Motion for Summary Judgment ("SOS Resp. to Tribe MSJ"); Petitioner Save Our Sequim's Response to City of Sequim's Motion to Dismiss ("SOS Resp. to City MTD"); and Appellant Parkwood's Consolidated Response ("Parkwood Resp.").

III. ARGUMENT

As a preliminary matter, the Tribe's summary judgment motion should be granted because the Project Opponents submitted no evidence opposing it. The absence of evidence from the Project Opponents means there are no material disputes of fact. Tribe MSJ at 15 (citing *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000)). There is no point in holding a hearing to resolve disputes of fact if the Project Opponents lack evidence to support their claims or defenses. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). This was their chance to come forward with evidence, and they did not take advantage of the opportunity. The Tribe's motion sought dismissal of every issue raised by the Project Opponents in their Notices of Appeal, and each issue should be dismissed on this briefing.

A. The Project Opponents lack standing.

1. The Project Opponents offer no evidence of how the Project impacts them.

The Project Opponents dislike the Project, but they are not harmed by it. Under SMC 20.01.090.E, the Project Opponents must show they are "aggrieved" by the Project before they may challenge it. Aggrieved parties must satisfy three prerequisites, including showing they are prejudiced by the project on appeal. SMC 20.01.020.B; *see also* RCW 36.70C.060(2). To establish prejudice, appellants must show the project causes a "specific and perceptible harm" to the appellant or their property. *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662–63, 375 P.3d 681 (2016). No Project Opponent has presented any evidence that they are impacted by the Project, and they must prove their harm with evidence to have standing. Tribe MSJ at 15–17.

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SOS identifies no prejudice from the Project, but asserts its interest in the matter arises out of receiving donations, signing petitions, attending meetings, and generally opposing the Project. SOS Resp. to Tribe MSJ at 3. SOS provides no evidence for its claims, and none of those claims establish that the Project impacts SOS or its members. SOS thus lacks standing.

Parkwood asserts it has a duty to protect its residents and is prejudiced because its residents have a higher demand for public services. Parkwood Resp. at 3–4. It presents no evidence supporting its claims, and there is no evidence the Clinic will impact public services. Tribe MSJ at 29. Parkwood then claims its interest is in having the City properly apply its code to the Project. Parkwood Resp. at 4. "To have standing, a petitioner's interest 'must be more than simply the abstract interest of the general public in having others comply with the law.'" *Thompson*, 193 Wn. App. at 663 (quoting *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002)). Parkwood lacks standing.

For his part, Mr. Bilow argues he need not establish how he is prejudiced by the Project because he appeals the Determination. According to Mr. Bilow, his appeal is of an A-1 decision, which is subject to review under SMC 20.01.040 and does not require him to be aggrieved by the Project. Bilow Resp. to Tribe MSJ at 3 (referencing Bilow Resp. to City MTD at 11). SMC 20.01.040.A provides that the Determination "shall be subject to reconsideration and appeal at the same time and in the same way as the merits of the application in question." Here, the application in question was processed as an A-2 decision. Thus, because Mr. Bilow's appeal is heard in the "same way" as the A-2 decisions for the Project, he must be "aggrieved" to have standing. SMC 20.01.090.E. He presents no evidence that the Project harms him or his property. Like SOS and Parkwood, he is not aggrieved and thus lacks standing. Moreover, if Mr. Bilow filed an appeal that was subject to the rules for A-1 decisions, he still would not have standing. SMC 20.01.080.C, which governs A-1 decisions and appeals, provides that "[t]he applicant may appeal the decision pursuant to SMC 20.01.240." Mr. Bilow is not the applicant, so he would lack standing.

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SOS attempts to evade Washington's law on standing by asserting the cases the Tribe cited are limited to their facts. SOS Resp. to Tribe MSJ at 3–4. The same standing principles discussed in the land use cases cited by the Tribe govern this land use dispute. *Compare* SMC 20.01.020.B *with* RCW 36.70C.060(2). SOS does not identify why the standing rules that apply to every other land use dispute in the state do not apply to this case.

2. A party of record does not equate to an aggrieved party.

The Project Opponents all rely on their status as parties of record to provide them with standing. SOS Resp. to Tribe MSJ at 3; Parkwood Resp. 2–4; Bilow Resp. to Tribe MSJ at 3 (referencing Bilow Resp. to City MTD at 11–12). But parties of record must be aggrieved by the project on appeal to have standing. SMC 20.01.090.E. The Project Opponents present no evidence that they are aggrieved.

A party of record is not the same thing as an aggrieved party. SMC 20.01.020.P sets forth how to become a party of record, which includes submitting comments about a project. The Tribe has never disputed that the Project Opponents are parties of record. In contrast, the Tribe has consistently disputed the Project aggrieves the Project Opponents. SMC 20.01.020.B describes the three-part test for an "aggrieved party." SMC 20.01.240.A provides that parties of record may appeal A-2 decisions. SMC 20.01.090.E, the code provision that specifically applies to appeals of A-2 decisions, adds to that by providing "a party of record who may be aggrieved by the administrative decision may appeal the decision to the hearing examiner." The code recognizes distinctions between parties of record and aggrieved parties.

SOS claims it has standing because it was entitled to notice of the Project application under SMC 20.01.140(C)(3)(c) (requiring mailing of notice of application to "[o]ther people the review authority believes may be affected by the proposed action or who request such notice in writing."). SOS Resp. to Tribe MSJ at 4. SOS presents no evidence that the City concluded SOS was "affected by the proposed action," but it does acknowledge that SOS and some of its members requested notice. *Id*. SMC 20.01.140(C)(3) describes who is entitled to notice, not who

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is aggrieved. A party of record who requests to receive notice of land use applications does not automatically become aggrieved by a project.

3. The City was not required to consider the interests of Parkwood or SOS.

Skipping over how they must prove the Project harms them to have standing, SOS and Parkwood address the second necessary element for standing: that their "asserted interests are among those the city is required by city code to consider in making a land use decision[.]" SMC 20.01.020.B.2. SOS does not identify what interests of SOS's the City was supposed to consider, so it fails to establish this element of standing. *See* SOS Resp. to Tribe MSJ at 5. Parkwood does not cite any code showing that the City was obligated to consider its asserted interest in addressing its concern for its residents. Parkwood instead asserts another interest that the City should have allegedly considered when processing the Project applications: Parkwood's appeals that are before the Examiner. Parkwood Resp. at 4.

This purported interest does not give Parkwood standing. The Director made the final decisions on the Project applications. SMC 20.01.030 Table 1; SMC 20.01.090.A. The Director does not decide appeals, so he was not required to consider them before making his final decision. Further, appeals come *after* a decision is made, not before, so the Director could not consider Parkwood's appeals when making his decisions. Moreover, Parkwood identifies no code provision showing that the City was obligated to consider its appeals when reviewing and approving the Project applications. Like SOS, Parkwood fails to establish the second element of standing under SMC 20.01.020.B.

4. The Tribe is not estopped from challenging Parkwood's lack of standing.

Parkwood asserts that the Tribe is estopped from making standing arguments because it did not dispute that Parkwood was a party of record in the lawsuit SOS and Parkwood brought to halt the Project. Parkwood Resp. at 5–6. Parkwood does not identify what form of estoppel it seeks to apply, does not identify the elements, and does not apply them. This is a failure to carry its burden of proving the Tribe should be estopped, and thus a basis to deny Parkwood's request.

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The Tribe presumes Parkwood intended to apply judicial estoppel. "A court may properly apply judicial estoppel when the following elements are shown: (1) a party asserts a position that is clearly inconsistent with an earlier position; (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party." *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008) (internal quotations omitted).

Parkwood fails each element. The Tribe has never conceded Parkwood had standing or was an aggrieved party. The Tribe did, however, acknowledge Parkwood was a party of record. *See, e.g.*, Tribe MSJ at 15 ("While there is no dispute that the Project Opponents are parties of record, they are not aggrieved by the Project, so SMC 20.01.090.E prohibits their appeals."). Parkwood provides no evidence that the Tribe agreed Parkwood had standing or was aggrieved, so there is no inconsistency between the Tribe's positions. Parkwood has failed to prove the threshold element for judicial estoppel. Because the Tribe never asserted in court that Parkwood had standing or was aggrieved, the court did not adopt that position. The portion of the court order that Parkwood quotes refers to party of record status, not standing. Parkwood Resp. at 5. Thus, the court did not adopt an inconsistent position of the Tribe's, and Parkwood fails to establish the second element of judicial estoppel. Last, because the Tribe has no inconsistent positions, there is nothing unfair about its motion. Indeed, the portion of the court order that Parkwood quotes provides that Parkwood would "be able to present evidence and argue why they believe the [land use] decision is incorrect" in these administrative proceedings. *Id.* at 5–6. Parkwood is exercising that opportunity right now. The Tribe has not stopped Parkwood from presenting evidence or making argument. The Tribe is, however, describing why all of Parkwood's arguments fail. Parkwood's request to have the Tribe estopped should be denied.

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B. The Project Opponents' appeals are moot because the Tribe can build the Clinic regardless of how their appeals are decided.

Mootness provides a second independent procedural ground to dismiss the Project Opponents' appeals in their entirety. SOS argues its appeal is not moot because its failure to appeal the Project building permit does not void its pending appeals. SOS Resp. to Tribe MSJ at 6. Parkwood asserts the building permit is the result of errors in the Determination and MDNS. Parkwood Resp. at 16. Mr. Bilow responded by describing the mootness argument as arrogant, but he did not refute the authority cited by the Tribe. Bilow Resp. to Tribe at 3.

None of the Project Opponents' arguments are relevant to the mootness issue because none of them dispute that the building permit is a final, invulnerable land use decision. 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); *West v. Stahley*, 155 Wn. App. 691, 697, 229 P.3d 943 (2010)). The City issued a Notice of Decision of the building permit for the Project on June 30, 2020. Murphy Decl., Ex. P. In that notice, the City specifically stated that the permit decision "may be appealed by filing an appeal consistent with SMC 20.01.240 within twenty-one (21) days after the decision to the Department of Community Development, located at 152 W. Cedar St." No one appealed the building permit decision, and thus it became final and binding; the decision cannot be overturned or challenged in collateral proceedings. *See Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 180–82, 4 P.3d 123 (2000). Further, the Project Opponents identify no condition to the building permit that would stay its validity pending the resolution of their appeals.

"A case is moot if a court can no longer provide effective relief." *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995), *aff'd sub nom. Gentry v. Sinclair*, 693 F.3d 867 (9th Cir. 2012), and *aff'd sub nom. Gentry v. Sinclair*, 705 F.3d 884 (9th Cir. 2013). All of the Project Opponents ask for the Project to be halted and subject to additional review. *See* SOS A2 Appeal at 7–8; Parkwood A2 Appeal at 10; Bilow Appeal at 4; SOS MDNS Appeal at 7–8; Parkwood MDNS Appeal at 6–7. Because the Tribe can act on its building permit, additional

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review will not affect construction of the Project. Tribe Resp. to Disp. Mots. at 5. No effective relief is available to the Project Opponents, so their appeals should be dismissed as moot.

C. Mr. Bilow's appeal should be dismissed for failing to respond to the Tribe's motion.

While Mr. Bilow filed a response, he did not actually respond to the Tribe's arguments. Mr. Bilow's appeal asserts the Director needed to consult Title 20 to make the Determination before looking to Title 18. Bilow Appeal at 3. The Tribe moved for summary judgment that the City's code must be read together, not in isolation and sequentially as Mr. Bilow argues. Tribe MSJ at 18. Mr. Bilow provided no contrary authority. He cited SMC 20.01.010, which provides for an "integrated permit review process[.]" Bilow Resp. to Tribe MSJ at 3 (referencing Bilow Resp. to City MTD at 5). An integrated review does not establish that the Director needed to consider Title 20 in isolation before looking to Title 18 when making the Determination. Mr. Bilow cites no authority that mandates his preferred procedure. His position lacks legal support and should be rejected.

Furthermore, the Tribe moved for summary judgment that the Director made the Determination by referencing SMC 20.01.030 Table 2, which complied with the procedure that Mr. Bilow asserted was correct. Tribe MSJ at 19. Mr. Bilow did not respond to that argument. Thus, the merits of the Tribe's motion to dismiss Mr. Bilow's appeal are unopposed, and the Tribe's motion should be granted.

Instead of responding to the substance of the Tribe's motion, Mr. Bilow's response focuses on the issue of sovereign immunity, which he did not raise in his appeal. *See* Tribe Resp. to Mot. for Subpoenas at 4–5. Mr. Bilow's arguments regarding sovereign immunity are not properly before the Examiner. The untimely sovereign immunity issues Mr. Bilow raises should be disregarded.

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D. A-2 review applies to the Project, not the C-2 review requested by the Project Opponents.

1. The Director correctly determined the outpatient Clinic is an outpatient clinic.

The evidence before the Examiner shows that the Project on appeal is an outpatient clinic that is permitted outright on the Property as a "clinic." Tribe MSJ at 18; *see also* SMC Table 18.33.031 (providing "outpatient clinics" are among the "ambulatory and outpatient care services" permitted outright in the RREOA); SMC 18.08.020 (defining "clinic"). The Tribe received funding to construct an outpatient clinic, and not any other phase of its original proposal. Simcosky Decl., Ex. B. The Project application materials are for an outpatient clinic, and the City approvals are for an outpatient clinic. The City has processed applications to construct "clinics" under the A-2 process for at least 32 years, and the City correctly applied that process to the Project. Tribe Resp. to Disp. Mots. at 3.

As Parkwood conceded in its dispositive motion, "'ambulatory and outpatient care services' is a permitted use in the RREOA and would therefore be subject to an A-1 or A-2 permit classification" and the term "'medical clinic'…describes the contemplated activities included in Phase 1 of the project." Parkwood MSJ at 10–11. By Parkwood's own concessions, its appeal should be dismissed because the Director properly subjected the Project to A-2 review.

2. There are no phases to the Project.

In arguing to the contrary, SOS and Parkwood originally both relied on the proposed inpatient facility that the Tribe abandoned. *See* Tribe Resp. to Disp. Mots. at 6. All descriptions about Phase 2 submitted by the Project Opponents relate to the proposal submitted to and rejected by the state. The Tribe changed its proposal after the legislature provided funding for just the Project on appeal, and not the other conceptual phases. *Id.* at 3. The Tribe has abandoned the conceptual Phase 2 that SOS and Parkwood rely upon. *See id.* at 6. SOS asserts the Tribe needed to withdraw its proposal for Phase 2 in order to truly abandon it. SOS Resp. to Tribe MSJ

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at 13. But there is no evidence the Tribe submitted a proposal to the City for Phase 2. There is nothing for the Tribe to withdraw.

SOS and Parkwood cling to the idea that Phase 2 is coming by asserting it is described in the Project SEPA materials. Parkwood Resp. at 11; SOS Resp to Tribe MSJ at 13. The evidence cited is a single page from the GeoTech report for the Project. Parkwood MSJ at 6. The engineers who wrote that report used a conceptual site plan from summer of 2019—drawn months before the Tribe submitted applications to the City and months before the grant contract for the Project was signed—to identify where soil samples were taken. Tribe Resp. to Disp. Mots. at 7. Notably, none were taken where Phase 2 was conceived to be sited. Second Murphy Decl., Ex. T at 20. This single figure in an appendix to a technical report is not enough to create a second phase for the Project, particularly when the Tribe has confirmed it abandoned Phase 2 after that drawing was made, and none of the actual architectural drawings for the Project show an inpatient facility. Tribe Resp. to Disp. Mots. at 7.

There is no evidence before the Examiner that subsequent phases to the Project are forthcoming. Instead, the evidence shows that the Tribe will not seek funding for other development on the Property for the foreseeable future. Tribe Resp. to Disp. Mots. at 6. The Tribe asks the Examiner to rule that there is one phase to the Project, and it is to construct an outpatient clinic.

3. The Project required a building permit, not a special use permit.

Both SOS and Parkwood assert the Project should have required a special use permit after completing the review that applies to EPF under SMC 18.56. But the Project is not an EPF. Although the language of RCW 36.70A.200(1)(a) that SOS relies upon provides that "inpatient facilities including substance abuse facilities" may be EPF, SOS claims EPF should be interpreted broadly to capture outpatient facilities. SOS Resp. to City MTD at 7–8. SOS cites WAC 365-196-550 as support for that broad reading, but that regulation reiterates that "In-patient facilities, including substance abuse facilities" may be EPF. There is no textual basis to

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include outpatient facilities as EPF. SOS and Parkwood rely on the uses described in SMC 18.56.030.J to characterize the Clinic as a "drug treatment center" or "detoxification center." SOS Resp. to Tribe MSJ at 8; Parkwood Resp. at 10–11. But all the uses described in that code provision are inpatient facilities, not outpatient clinics like the Project. Tribe Resp. to Disp. Mots. at 8–11.

Moreover, in the medical field, "drug treatment centers" and "substance abuse facilities" are what people typically think of as a "rehab facility" where people experiencing addition check in to receive treatment for their addiction. "Unlike the Clinic, they are inpatient facilities." Second Cunningham Decl. ¶ 6. Beyond that, there is no question the Clinic is not a detoxification center, because the "Clinic will not provide detoxification treatment." *Id*. This evidence about the services the Clinic will provide is undisputed. Because there is no evidence the Tribe will provide inpatient or detoxification treatment, there is no evidence the Project is a drug treatment center, detoxification center, or substance abuse facility. The Clinic is an outpatient clinic, not anything else. Because that use is permitted outright on the Property, the City appropriately required a building permit for the Project.

4. Federal law prohibits the City from forcing the Clinic to obtain a special use permit.

Parkwood and SOS object that the scope of outpatient services the Clinic will provide mandates the Clinic be treated as an EPF. SOS Resp. to Tribe at 7, Parkwood Resp. 11–12. But they identify no evidence that the Clinic will provide its services in any manner other than an outpatient basis. The evidence before the Examiner shows that "[a]ll the services the Clinic will offer will be provided exclusively on an outpatient basis." Second Cunningham Decl. ¶ 5. The scope of services the Clinic will provide offers the best chance for sustained recovery for OUD patients, Cunningham Decl. ¶ 4, and it is exactly the type of treatment that is consistent with state policy, RCW 71.24.585(1)(a). Thus, the scope of services to which SOS and Parkwood object is just the best type of outpatient medical treatment for people with OUD.

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Courts around the country recognize that outpatient facilities that treat people with OUD may not be treated differently from other outpatient facilities. Tribe Resp. to Disp. Mots. at 12–14. SOS does not refute this line of cases or their holdings, but it does chide the City for following them. SOS Resp. to City MTD at 10. Parkwood claims the cases do not prevent the City from subjecting an outpatient clinic that is permitted outright on the Property to a conditional review so long as there is a way for the clinic to be approved. Parkwood Resp. at 7. Parkwood disregards the precedent that correctly holds jurisdictions may not subject clinics treating people with OUD to different zoning review processes than other clinics. Tribe Resp. to Disp. Mots. at 13 (citing cases). The Clinic must be subject to the same A-2 process that the City applies to other outpatient clinics. Any other outcome violates federal law. *Id*.

Parkwood claims forcing the Clinic to be processed differently from all other outpatient clinics in Sequim is not discrimination because of how different jurisdictions processed different projects. Parkwood Resp. at 10–14. Although Anacortes approved the Didgwalic clinic as an EPF, that is because the property was not zoned to allow medical clinics. Tribe Resp. to Disp. Mots. at 9. That is materially different from the Property, which is zoned to outright permit outpatient clinics. Parkwood next cites hearsay news reports that are not in the record about how Pierce County purportedly would not approve a substance use disorder facility as a "cultural center." Parkwood Resp. at 14. Aside from how nothing about that project or its review is in the record, that purported county decision has no bearing on the Project, which was properly classified as an outpatient clinic, not a cultural center. Nothing about how Anacortes or Pierce County reviewed other projects for compliance with their code would give the City license to discriminate against the Clinic by making it harder to obtain a permit. The request by SOS and Parkwood to subject to Clinic to discriminatory treatment should be rejected.

5. If the Clinic was an EPF, the permit review process would not change.

The Clinic is not an EPF, but if it was, it would be a regional EPF that is outright permitted on the Property. Tribe Resp. to Disp. Mots. at 8–9. Taking a different position from

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what it argued to this Examiner just two weeks ago, Parkwood now claims that the Clinic is a local EPF because it will be built on one parcel. Parkwood Resp. at 7. The argument should be rejected out-of-hand because it directly contradicts the position Parkwood took in its dispositive motion and contradicts statements Parkwood has submitted to the City and Examiner. Parkwood A2 Appeal, Ex. B ("A multiplicity of issues must be investigated prior to proceeding with a regional MAT clinic"). Regardless, the argument fails on its merits. Under Parkwood's logic, no facility could be a regional facility without its brick and mortar physically spreading across a region, which is absurd. Here, there is no dispute that the Clinic will serve the residents of two counties. Tribe Resp. to Disp. Mots. at 8–9. Accordingly, the Clinic is a regional facility, not local. *Id*. Notably, like Parkwood, SOS has conceded the Clinic is a regional facility. *Id*. (citing SOS A2 Appeal at 2; SOS MDNS Appeal at 2).

The Sequim City Council already exercised its discretion in deciding the RREOA is suitable to site regional EPF. Tribe MSJ at 20 (citing *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1954)); *see also* Tribe Resp. to Disp. Mots. at 15. Neither SOS nor Parkwood address the *Ogden* case and its holding that jurisdictions exercise discretion when adopting zoning code as opposed to reviewing project applications for code compliance. In forming the RREOA, and providing that regional EPF in that zone are permitted uses, the City Council has decided no conditional review is needed to approve a regional EPF on the Property. Neither SOS nor Parkwood responds to how SMC 18.30.031 lists the review for regional EPF in the RREOA as permitted instead of conditional. Tribe MSJ at 22–23. The City Council could have easily required regional EPF to go through a C-2 review by marking those uses as conditional in SMC Table 18.33.031. But it did not, which is more evidence that a C-2 review should not apply to the Project.

Despite the fact that the City Council already approved construction of regional EPF on the Property, SOS and Parkwood claim the Project is difficult to site as an EPF, and thus subject to the special use permit process in SMC 18.56. SOS and Parkwood erroneously assert that *all*

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EPF must necessarily be difficult to site and thus must be subject to conditional review. *See* Parkwood Resp. at 14–15; SOS Resp. to Tribe MSJ at 9–10. Because both regional EPF and outpatient clinics are permitted outright on the Property, an application for either use would be subject to the A-2 process the Project already completed. 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."); *see also* WAC 365-196-550(1)(e) ("Cities and counties may not require applicants who operate essential public facilities to use an essential public facility siting process for projects that would otherwise be allowed by the development regulations."). Parkwood and SOS do not address these regulations, which are fatal to their arguments. Thus, contrary to SOS's and Parkwood's arguments, the City was legally prohibited from applying the special use permit process in SMC 18.56 to the Project. *See* SOS Resp. to Tribe MSJ at 8–10; Parkwood Resp. at 14–16.

SOS previously asserted that the lab equipment and child watch components to the Clinic make it difficult to site, and thus should be subject to a C-2 review. Tribe MSJ at 23–25. The Tribe moved for summary judgment that those uses are part of the principal clinic use because they are necessary for the effective diagnosis and treatment of Clinic patients. *Id*. Alternatively, the Tribe moved for summary judgment that those uses were accessory uses and therefore allowed without conditional review. *Id.* SOS did not respond to these arguments. The Tribe's motion is thus unopposed.

SOS and Parkwood rely heavily on SMC 18.56, but the whole chapter does not apply to the Project. The chapter applies exclusively to zones that do not allow EPF. Tribe Resp. to Disp. Mots. at 8–9, 15. Although SOS did not respond to the Tribe's summary judgment motion on this point, in its response to the City's motion, SOS asserted SMC 18.56 applies to "certain districts," but SOS does not identify how that applies to the Project. SOS Resp. to City MTD at 9. Regardless, the linchpin to the EPF arguments raised by SOS and Parkwood is SMC 18.56.030.J.

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That section expressly applies to "uses in districts from which they are now prohibited." That does not apply to the Property, where clinics and regional EPF are permitted outright. Thus, even if the City departed from its historical practice and violated the ADA by treating the Clinic as an EPF, the City would still process a building permit application under A-2 review, not a special use permit under SMC 18.56.

E. The Hearing Examiner has jurisdiction to hear this appeal.

SOS asserts the City Council should hear this appeal. SOS Resp. to Tribe MSJ at 12. SOS is wrong. This appeal is properly before Hearing Examiner under SMC 20.01.090.E. Contrary to SOS's arguments, there is no conflict between SMC 20.01.090.E and Table 1 SMC 20.01.030, because the City Council hears appeals of DNS, as opposed to the MDNS at issue in this case. SMC 20.01.240A. The Hearing Examiner has jurisdiction to hear this appeal. *See* Tribe Resp. to Disp. Mots. at 15–17.

F. Parkwood's motion for a stay should be denied.

Parkwood used its response to join SOS's motion to stay the hearing. Parkwood Resp. at 16–18. Including a motion in a response is improper and violates the Pre-Hearing Order, which required motions to be filed on September 2, 2020. Parkwood requests the relief of a stay in its response, which is the equivalent of a motion, and is therefore untimely by two weeks.

Furthermore, the motion fails on its merits. Parkwood did not submit the relevant public records requests to the City, so it lacks standing to challenge the City's alleged failure to comply with the PRA. *See* RCW 42.56.550. Regardless, because SOS's motion should be denied, so should Parkwood's for the reasons stated in the Tribe's Response to Motion to Stay, which is incorporated herein by reference. To summarize, both SOS and Parkwood have plenty of evidence to make their cases, which rely on code interpretation and the Project application materials, not other public records. They have already received abundant documents in response to records requests, and do not identify why they need more. Further, the City has explained that

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SOS selectively included documents in its motion to manufacture a PRA violation, and the complete response is PRA-compliant. *See* Decl. of Sara McMillon ¶¶ 12–14.

G. The Tribe's unopposed motion to dismiss the MDNS appeals filed by Parkwood and SOS should be granted.

Both of the MDNS appeals filed by SOS and Parkwood should be dismissed. The Tribe moved for summary judgment that SOS lacked standing to raise its appeal of the MDNS. Tribe MSJ at 26–27. SOS did not respond to that argument. There is thus no dispute that SOS's appeal of the MDNS should be dismissed on standing grounds.

The Tribe moved for summary judgment that the merits of SOS's appeal failed because there was no evidence that the Project would impact public services, the sole basis that SOS challenged the adequacy of the MDNS. Tribe MSJ at 27. SOS did not respond to that argument either or present any evidence that the Project would impact public services. The evidence before the Examiner shows the Project will not impact public services. Tribe MSJ at 29. SOS's appeal of the MDNS should be dismissed on its merits.

Similarly, the Tribe moved for summary judgment dismissal of Parkwood's appeal of the MDNS, which was based on how the Project was allegedly phased. Tribe MSJ. at 26. Parkwood did not respond to that argument, which means the Tribe's motion is unopposed and should be granted. Instead, Parkwood asserted its MDNS appeal was valid because the City should not rely on a checklist from the applicant when performing SEPA review. Parkwood Resp. at 16. Parkwood's objection to the City's review of the SEPA checklist is not in its Notice of Appeal, and thus not properly before the Hearing Examiner. Even if it was, all environmental review under SEPA begins with a checklist. *See* WAC 197-11-100; WAC 197-11-158(2). Parkwood's argument that the City erred in relying on the checklist fails as a matter of law. Its appeal of the MDNS should be dismissed.

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IV. CONCLUSION

The Project Opponents lack standing to raise their moot appeals. They attack a conceptual plan, not the Project on appeal. When looking at the evidence before the Examiner about the Project, there is nothing disputing the Tribe's evidence that the Clinic is an outpatient clinic, and outpatient clinics are permitted outright on the Property. Accordingly, the City correctly processed the Project under A-2 review, as state and federal law prohibits the City from applying conditional review. The Project Opponents submitted no evidence that creates a dispute of material fact, so the Tribe's motion to dismiss the Project Opponents' appeals should be granted.

DATED this 16th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2020, a copy of the foregoing document was served upon the attorneys of record in the above cause as follows:

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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 16th day of September, 2020.

s/ Brie Geffre
Brie Geffre, Legal Assistant

4835-0964-5002.3

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