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DECLARATION OF SERVICE

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

Michael D. McLaughlin, Atty for Parkwood

michael@mdmwlaw.com

Michael Spence, Attorney for S.O.S.

mspence@helsell.com

Robert Bilow

Millrow26@gmail.com

Andy Murphy/LeAnne Bremer, Attys for Tribe

Andy.murphy@millernash.com

Leanne.bremer@millernash.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Sequim, WA this 18th day of September, 2020.



for

Erika Hamerquist, Secretary/Tellina Sandaine, Paralegal

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

RE: CDR20-001)
)
Consolidated Administrative Appeals)
of January 24, 2020 Notice of) File No. CDR20-001
Determination of Procedure Type:)
May 15, 2020 Director's Report and) ADDITIONAL BRIEFING ON
Staff Decision; and May 11, 2020) PERTINENCE OF CITY OF PUYALLUP
MDNS for Jamestown S'Klallam Tribe) V. PIERCE COUNTY AS REQUESTED
Outpatient Clinic) BY HEARING EXAMINER
)
)

I. INTRODUCTION

The Hearing Examiner indicated the Parties may brief the "pertinence" of *Puyallup v. Pierce Cty*, 8 Wn. App.2d 323 (2019), which held that an Mitigated Determination of Non-Significance (MDNS) issued under Washington Administrative Code (WAC) 197-11-340 is the

1 same as a Determination of Non-Significance (DNS) for assuming lead agency status. On its
2 face, the case is of considerable significance because it suggests that the City Council's
3 jurisdiction could be invoked in this matter, rather than the Hearing Examiner's jurisdiction.
4 However, as the City will demonstrate below, the case has no significance in this matter. The
5 City's analysis also harmonizes the various provisions within the Sequim Municipal Code
6 (SMC). Moreover, SMC 20.01.240(B) requires State Environmental Policy Act (SEPA) appeals
7 to be consolidated with the underlying building permit. It is undisputed that Appellants Save
8 Our Sequim (S.O.S.) and Parkwood Manufactured Housing Community (Parkwood) did not
9 appeal that permit, and therefore, could not invoke any hearing body's jurisdiction on that issue.

10 While the Jamestown S'Klallam Tribe (Tribe) also did not appeal its building permit, the
11 City considers MDNS conditions to be "conditions of approval of the permit decision." SMC
12 16.04.100(G). Here, that permit is the building permit, which is wholly within the Hearing
13 Examiner's jurisdiction. SMC 20.01.030 Table 1. Moreover, the SEPA conditions were attached
14 to a Design Review approval, which is also wholly within the Hearing Examiner's jurisdiction.
15 SMC 18.24.038. The City also distinguishes between an MDNS issued under WAC 197-11-340
16 and WAC 197-11-350, which is the section the City relied upon in issuing its MDNS, thus
17 preserving the Hearing Examiner's authority to issue a decision. Finally, because the City and
18 the Tribe settled the matter, the Hearing Examiner has the authority to modify the Tribe's
19 building permit conditions as stipulated by the City and the Tribe.
20

21 The City joins the Tribe's arguments and authorities in full in its Supplemental
22 Response and offers the additional support as set forth below.

23 //

24 //

1 II. ARGUMENT

2 The Hearing Examiner invited the Parties to brief the pertinence of the *Puyallup v.*
3 *Pierce Cty*, 8 Wn. App.2d 323 (2019) case as it relates to this matter. The City chose to do so
4 and offers the following analysis, which harmonizes the City’s various code provisions. A
5 court’s goal is to “avoid interpreting statutes to create conflicts between different statutory
6 provisions to achieve a harmonious statutory scheme.” *American Legion Post #149 v. Wash.*
7 *State Dept. of Health*, 164 Wn.2d 570, 585 (2008).
8

9 **A. The *Puyallup* case is not applicable because no one appealed the building
10 permit, as required under State law and the SMC.**

11 The City adopted WAC 197-11-680 for SEPA Appeals. SMC 16.04.170. Under WAC
12 197-11-680, local jurisdictions may adopt their own appeal proceedings as follows, emphasis
13 added:

14 the appeal shall consolidate any allowed appeals of procedural and substantive
15 determinations under SEPA with a hearing or appeal on the underlying
16 governmental action in a single simultaneous hearing before one hearing officer
17 or body. The hearing or appeal shall be one at which the hearing officer or body
will consider either the agency's decision or a recommendation on the proposed
underlying governmental action.

18 The City also adopted the definition of an underlying governmental action, which means “the
19 governmental action, such as zoning or permit approvals, that is the subject of SEPA
20 compliance.” SMC 16.04.200, emphasis added.
21

22 The City’s adopted rules for SEPA appeals are set forth below:

23 20.01.240 Appeals.

24 A. Appeal of Administrative Interpretations and Decisions. Administrative
25 interpretations and administrative Type A-1 and Type A-2 decisions may be
appealed, by applicants or parties of record, to the hearing examiner.

Determinations of nonsignificance may be appealed to the city council. An

1 appeal of a determination of significance must follow Chapter 43.21C RCW and
2 Chapter 197-11 WAC.

3 B. Consolidated Public Hearing. *All appeals of SEPA threshold determinations*
4 *made pursuant to Chapter 16.04 SMC as amended (other than determinations of*
5 *significance) are considered together with the decision on the project application*
6 *in a single, consolidated public hearing.*

7 SMC 20.01.240(A) and (B), emphasis added.

8 No Party appealed the underlying building permit. (Tribe Mot. Dismiss, p. 14, Ins. 10-
9 12.) WAC 197-11-680, adopted by the City in SMC 16.04.170, requires substantive and
10 procedural appeals to be heard in one consolidated hearing *with the underlying governmental*
11 *action.* SMC 16.04.170; WAC 197-11-680(3)(v), emphasis added. This provision is not
12 applicable to the Tribe because the City and Tribe settled the Tribe's SEPA challenge, which
13 renders it moot. It is, however, fatal to Appellants S.O.S. and Parkwood.

14 Appellants S.O.S. and Parkwood *could* have invoked City Council jurisdiction if they
15 had appealed the underlying building permit, but they did not. Thus, S.O.S. and Parkwood lack
16 standing for any SEPA appeal because they failed to appeal the underlying permit as required
17 under City Code. SMC 20.01.240(B) and 20.01.180(F) (SEPA determination of nonsignificance
18 may be appealed *consistent with appeal requirements for SEPA determinations* established in
19 this chapter).

20 In addition, even if Appellant S.O.S. had appealed the building permit, which it did not,
21 S.O.S. failed to meet the criteria to perfect its appeal as set forth in SMC 20.01.240 — which
22 requires specifically identifying the errors in the City's decision. The City and the Tribe raised
23 these arguments in their respective Motion to Dismiss and Motion for Summary Judgment.
24 Appellant S.O.S. failed to respond to the SEPA issue as raised by the City and the Tribe, and
25 therefore abandoned that argument and its SEPA appeal.

1 **B. The *Puyallup* case can be harmonized with the City’s interpretation of the SMC**
2 **and has no relevance to the matters before the Hearing Examiner.**

3 City Code distinguishes between a DNS issued under WAC 197-11-340 and one issued
4 under WAC 197-11-350. *See*, SMC 16.04.100(A) (regarding applicability for MDNSs issued
5 under WAC 197-11-350); SMC 16.04.100(F) (mitigated DNSs issued under WAC 197-11-340).
6 In the *Puyallup* case, Pierce County issued its MDNS under WAC 197-11-340. *Id.* at 328. The
7 City, on the other hand, issued its decision in this matter under WAC 197-11-350. (MDNS
8 Review Packet, p. 1.) Thus, following the logic of the *Puyallup* case, had the City issued its
9 MDNS under WAC 197-11-340, the City Council would have jurisdiction to hear a SEPA
10 appeal, presuming that any appeal had been perfected. SMC 20.01.030 Table 1 and
11 20.01.240(A) and (B). Consequently, even though the City adopted the definition of MDNS
12 under WAC 197-11-766, the City Council chose not to hear SEPA appeals unless the decision
13 was a DNS or an MDNS issued under WAC 197-11-340. *See*, SMC 20.01.030 Table 1 and
14 SMC 20.01.240(A). That is not the case here, and this analysis supports the City’s arguments in
15 its Consolidated Response. (City’s Consolidated Resp. p. 18, Ins. 6-16.)

16 Table 2 in SMC 20.01.030 is also instructive because it refers to a SEPA appeal of the
17 threshold determination. In that Table, the only decision within the City Council’s jurisdiction is
18 on a “SEPA determination”. *Id.* No one appealed the MDNS *determination*. (*See*, Tribe’s and
19 Appellant S.O.S. and Parkwood’s SEPA appeals); *see also cf.*, *Puyallup v. Pierce Cty*, at 329-
20 330 (County issued MDNS, whereas City assumed lead status and issued a Determination of
21 Significance (DS).) As a result, any SEPA appeal *other than* a DNS issued under WAC 197-11-
22 340 or an appeal on the threshold determination are A-2 decisions. Thus, the remaining issues
23 are within the Hearing Examiner’s authority. SMC 2.10.070(A); SMC 20.01.030 Table 1; SMC
24 20.01.080; SMC 20.01.090(E); SMC 20.01.240(A).
25

1 Moreover, the City treats MDNS conditions as “conditions of approval of the permit
2 decision.” SMC 16.04.100(G). Here, that permit decision is a building permit — CBP20-001.
3 Additionally, all building and “other construction permit” appeals go to the Hearing Examiner.
4 (SMC 20.01.030 Table 1; SMC 20.01.080 (A-1 appeals go the Hearing Examiner); SMC
5 20.01.090 (A-2) appeals go to the Hearing Examiner.) Thus, MDNS conditions are attached to
6 the building permit, and building permits and associated conditions are wholly within the
7 Hearing Examiner’s authority. SMC sections 2.01.070(A), 20.01.030, 20.01.080, and 20.01.090.
8 The Director is a City official who made a decision on the settlement, which relates to the
9 conditions attached to a building permit. (*See*, Tribe’s Stip. Settlement; SMC 16.04.100(G)).
10 Because the Hearing Examiner has jurisdiction over building permits and “other construction
11 permits” including design review approvals¹, the Hearing Examiner has the authority to modify
12 the Tribe’s building permit in accordance with the City and Tribe’s Stipulated Motion. *See*,
13 SMC 20.01.030; *see also*, SMC 2.10.070². Thus, the Hearing Examiner also has the authority to
14 render a decision on S.O.S. and Parkwood’s Typing and SEPA Appeals and should do so in the
15 City’s favor.
16

17 III. CONCLUSION

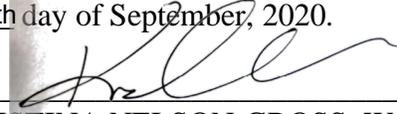
18 The *Puyallup v. Pierce Cty* case has no pertinence in this matter for the reasons set forth
19 above. The Hearing Examiner has authority to render decisions in this matter and to authorize
20
21

22 ¹ Appeals of any administrative decision shall be made to a hearing officer, the costs for which shall be paid by the
23 applicant. Appeals of hearing officer’s decision shall be made to the Clallam County superior court. SMC
24 18.24.038. While this provision references “hearing officer”, it could only refer to a hearing “examiner” because it
25 shifts the costs associated with retaining one to the applicant.

² SMC 2.10.070(A) Appeals. To hear and decide appeals from orders, recommendations, *permits, decisions, or*
determinations made by a city official in the administration or enforcement of the zoning provisions or other land
use regulatory ordinances adopted by the city as set forth in Chapter 20.01 SMC. Appeals must be in writing and
conform to the requirements identified in SMC 20.01.240.

1 the City and Tribe's Stipulated Motion. Nonetheless, if the Hearing Examiner is inclined to
2 decide against the City, the City requests an opportunity for oral argument before a decision is
3 rendered due to the importance of these matters.

4 RESPECTFULLY SUBMITTED this 18th day of September, 2020.



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6 KRISTINA NELSON-GROSS WSBA#42487
City Attorney

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