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

SAVE OUR SEQUIM, a Washington
501(c)(4) corporation and PARKWOOD
MANUFACTURED HOUSING
COMMUNITY, LLC,
a Washington Limited Liability Company,

Appellant,

vs.

CITY OF SEQUIM,
a Washington Municipal Corporation,

Respondent.

File No. CDR20-001

APPELLANTS SAVE OUR SEQUIM AND
PARKWOOD'S CONSOLIDATED
SUPPLEMENTAL RESPONSE FOR
JURISDICTION OF MDNS APPEALS

SUPPLEMENTAL RESPONSE

The Hearing Examiner has requested supplemental briefing from the parties on the narrow issue of whether SMC 20.01.240A, in conjunction with *City of Puyallup v. Pierce County*¹, requires this appeal be heard by the Sequim City Council. Appellants Save our

¹ *City of Puyallup v. Pierce County*, 8 Wn. App. 323, 438 P.3d 174 (2019).

1 Sequim (“SOS”) and Parkwood Manufactured Housing Community, LLC, (“Parkwood”)
2 submit this joint response to demonstrate that the City Council has appellate jurisdiction for all
3 Determinations of Non-Significance (“DNS”), including Mitigated Determinations of Non-
4 Significance (“MDNS”) according to the clear direction of the Sequim Municipal Code
5 (“SMC”), the State Environmental Protection Act (RCW 43.21(C) et seq.) (“SEPA”) and
6 applicable case law.
7

8 **The SMC vests appellate jurisdiction on DNS appeals to the Sequim City Council.**

9 The Examiner should remand SOS’s and Parkwood’s appeals of the MDNS to the
10 Sequim City Council under the controlling provisions of the SMC. The City and Tribe² have
11 argued that the Examiner has jurisdiction to hear these appeals under SMC 20.01.090(F) (“If a
12 Type A-2 decision is appealed, an open record public hearing will be held before the hearing
13 examiner consistent with the requirements of SMC 20.01.200”). SMC 20.01.090(F) is an
14 overbroad, blanket provision that would apply if a more-specific code provision did not
15 control. That is not the case here.
16

17 SMC 20.01.030(A) Table 2 lists four distinct types of development permit applications
18 that are subject to A-2 classification: (1) **SEPA Determination**; (2) Minor Subdivision; (3)
19 Minor Conditional Use Permit; and (4) ESA and Permit Wetlands. SMC 20.01.030(A), at
20 Table 2 (emphasis added). The City issued its SEPA Determination – a MDNS – on May 15,
21 2020. No party disputes that Appellants SOS and Parkwood timely appealed that SEPA
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25 ² “City” refers to the City of Sequim and “Tribe” refers to the Jamestown S’Klallam Tribe, as they have been referred to previously in earlier briefing submitted to the Examiner.

1 Determination. “Appeal Authority” for A-2 Decisions is vested in the **City Council**. SMC
2 20.01.030(A), at Table 1 (emphasis added).

3 Despite the apparent conflict between the direction of the Tables in SMC 20.01.030(A)
4 and the language in SMC 20.01.090(F), the clear and unequivocal language of the SMC has
5 resolved any conflict regarding appellate authority over SEPA Determinations resulting in a
6 DNS. SMC 20.01.240 governs the procedure for the processing of appeals under this chapter
7 of the SMC. SMC 20.01.240(A) provides:

9 A. Appeal of Administrative Interpretations and Decisions.
10 Administrative interpretations and administrative Type A-1 and
11 Type A-2 decisions may be appealed, by applicants or parties of
12 record, to the hearing examiner. **Determinations of**
13 **nonsignificance may be appealed to the city council.** An
14 appeal of a determination of significance must follow Chapter
15 43.21C RCW and Chapter 197-11 WAC. SMC 20.01.240(A)
16 (emphasis added).

17 Appellants SOS and Parkwood, understanding that the City Council was responsible to
18 adjudicate the appeal of the City’s SEPA Determination, timely filed their appeals with the
19 City Council. In an abundance of caution, both Appellants also filed their appeals with the
20 Examiner, and each has consistently asserted that it is the City Council who properly has
21 jurisdiction to adjudicate these appeals. The City outright rejected and returned Appellant’s
22 appeals to the City Council, without legal justification, and forced these appeals to be
23 considered preliminarily by the Examiner. That rejection, unsupported by factual or legal
24 reasoning, was erroneous.

25 Washington law is clear that a MDNS is considered a DNS for the purposes of
determining applicable appeal procedures under SEPA. *City of Puyallup v. Pierce County*, 8

1 Wn. App. 323, 438 P.3d 174 (2019). In *Puyallup*, a dispute arose between the City of
2 Puyallup and Pierce County as to whether the city could invoke lead agency status to make its
3 own SEPA threshold determination after it was dissatisfied with Pierce County’s MDNS
4 issued on the proposed project. *Id.* at 330. The City filed suit to resolve the jurisdictional
5 dispute. *Id.* The County argued, in part, that because it issued a MDNS and not a DNS, that
6 Puyallup lacked authority under SEPA to assert lead agency status. *Id.* at 343. Pierce County
7 further argued that WAC 197-11-948, which sets forth the procedures for asserting lead agency
8 status, applies only upon review of a DNS and not a MDNS. *Id.* at 345. The Court of Appeals
9 rejected these arguments and sided with Puyallup, holding that an MDNS is merely a type of
10 DNS. *Id.* at 346-351.

11
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13 The County’s arguments in *Puyallup* are akin to the City and Tribe’s arguments
14 regarding the controlling provisions for appellate authority under Title 20 of the SMC in this
15 matter. They argue that a MDNS is distinct from a DNS, and should not be treated as a DNS
16 under the Code. This position is undone by the Court’s holding in *Puyallup*. WAC 197-11-
17 766 defines Mitigated DNS as “**a DNS** that includes mitigation measures and is issued as a
18 result of the process specified in WAC 197-11-350.” (emphasis added). The Court of Appeals
19 confirmed that a MDNS is simply a type of DNS “within the plain language of the regulation
20 and the policy of SEPA.” *Id.* at 346-347.

21
22 The *Puyallup* Court, in issuing its opinion, cited prior caselaw when it found that
23 “SEPA administrative rules define an ‘MDNS’ as ‘a DNS that includes mitigation measures.’”
24 *Id.* at 345 (citing *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17,
25

1 40, 252 P.3d 382 (2011) (quoting WAC 197-11-766)). Just as the City and Tribe have argued
2 here that SMC 20.01.240(A)'s failure to include the word "mitigated" before "determinations
3 of non-significance" indicates a purposeful intention to treat a MDNS differently, the County
4 argued that because WAC 197-11-948 only referenced "DNS," the City had no authority to
5 invoke lead agency status where an MDNS was issued. *Id.* at 344-345. The Court of Appeals
6 rejected this exact argument in *Puyallup*.
7

8 The *Puyallup* Court found that the statutory scheme of SEPA defined a MDNS as a
9 subcategory of DNS under SEPA. *Id.* at 345. The Court of Appeals further identified that
10 SEPA's statutory scheme regularly treated SEPA threshold determinations as binary, resulting
11 either in a DNS or a Determination of Significance ("DS"), citing WAC 197-11-310(5) which
12 distinguished a DNS from a DS but failed to list a MDNS as a separate threshold
13 determination. *Id.* at 347-348. WAC 197-11-350(5) distinguishes only between DNS and
14 DS, and specifically omits any reference to WAC 197-11-350 (MDNS Threshold
15 Determinations). Similarly, WAC 197-11-508 (SEPA register) and WAC 197-11-970
16 (statutory form for Determinations of Non-significance) also intentionally omit a
17 differentiation between MDNSs from DNSs. *Id.* at 349. The City of Sequim has adopted
18 these definitions by incorporating WAC 197-11 rules and definitions into its Environmental
19 Policy. *See* SMC 16.04.020 and 16.04.030(D).
20
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22 SMC 20.01.240(A) is the most specific instruction in the SMC providing guidance on
23 appellate jurisdiction for appeals to determinations of non-significance. "When a general and a
24 specific ordinance cover the same subject matter, the specific controls over the general to the
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1 extent that the two conflict.” *State ex rel. Lige & Wm. B. Dickson Co. v. Cty. of Pierce*, 65
2 Wn. App. 614, 620 n.6, 829 P.2d 217. Further, Tables 1-2 of 20.01.030 also specifically
3 designate the City Council as the Appeal Authority of A-2 permit applications. Table 2’s
4 listing of SEPA determinations, read with the express language of SMC 20.01.240(A), makes
5 it irrefutably clear that the City Council has appellate jurisdiction over DNS appeals. Taken
6 with the Court of Appeals’ holding *Puyallup*, it is undisputed that a MDNS is a DNS
7 procedurally, and the Examiner must remand Appellant’s SEPA appeals to the City Council
8 for appellate review.

9
10 The SMC further supports this conclusion with the language in SMC 20.01.040
11 (Determination of proper type of procedure). SMC 20.01.040(B) provides:

12
13 B. Determination of Director. The director shall determine the
14 proper procedure for all development applications. If there is a
15 question as to the appropriate type of procedure, the director
16 shall resolve it in favor of the higher procedure type letter as
17 defined in SMC 20.01.030. (Ord. 2000-006 § 3) SMC
18 20.01.040(B) (emphasis added).

19 The above code provision instructs the Director to resolve the procedure type based on
20 the classifications as provided in SMC 20.01.030, including the tables specifying that SEPA
21 determinations are an A-2 process for which the City Council has appellate authority. It makes
22 no reference whatsoever to the language contained in 20.01.090, which is the City’s and
23 Tribe’s sole basis for arguing that all A-2 appeals go to the Office of the Hearing Examiner for
24 review.

25 Further, the Director’s *Notice of Determination of Procedure Type* for this project,
issued January 24, 2020, supports Appellants’ arguments. Even under its own erroneous

1 interpretation of this facility as a “medical clinic” and not an “Essential Public Facility,” the
2 Director recognizes that: (1) the application is subject to SEPA; (2) SEPA review makes the
3 application a Type A-2; and (3) that the A-2 classification type as provided under Table 2 (for
4 which the City Council has appellate authority under Table 1) compels the City to process the
5 Tribe’s application under the A-2 process. *See Generally* p. 2 of the *Notice of Determination*
6 *of Procedure Type*, January 24, 2020. It is nonsensical to disavow the multiple provisions of
7 the SMC which harmonize to vest appeal authority for A-2 SEPA determinations with the City
8 Council, along with the language contained in SEPA, the relevant WAC provisions, and the
9 holding in the *Puyallup* decision, based entirely on a single broad sentence stated in SMC
10 20.01.090(F). The City’s and Tribe’s arguments are without merit, and should be disregarded.
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12
13 In making this argument, neither SOS or Parkwood are waiving or abandoning their
14 argument that another and possibly bigger ‘question’ for purposes of SMC 20.01.040(B) is
15 whether or not the proposed project constitutes an Essential Public Facility, and that under
16 SMC 18.56.040, it must be reviewed under the City’s C-2 permitting process.
17

18 **CONCLUSION**

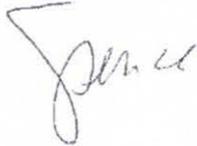
19 Appellate review authority for City decisions on SEPA determinations is properly
20 vested with the Sequim City Council. Appellants in this case have timely appealed the City’s
21 SEPA determination to the City Council directly. The City staff interfered with those appeals
22 and returned them to Appellants. The City cannot cherry pick its own code to avoid the
23 jurisdictional oversight of its own City Council. The Hearing Examiner should remand
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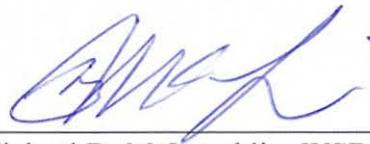
1 Appellants' appeals of the SEPA determination and MDNS to the City Council for appellate
2 review.

3 DATED this 18th day of September 2020.

4 HELSELL FETTERMAN, LLP

MICHAEL D. McLAUGHLIN, PLLC

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9 By _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 18th, 2020, the foregoing document was sent for service on the following party in the manner indicated below.

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