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THE HEARING EXAMINER OF THE CITY OF SEQUIM

RE: CDR20-001

Consolidated Administrative Appeals of
January 24, 2020 Notice of Determination of
Procedure Type: May 15, 2020 Director's
Report and Staff Decision; and May 11,
2020 MDNS for Jamestown S'Klallam Tribe
Outpatient Clinic

INTERLOCUTORY ORDER
CANCELLING APPEAL HEARING

NOTE: AS THIS ORDER WAS IN THE LAST HOUR OF COMPLETION THE EXAMINER WAS NOTIFIED THAT THE CITY COUNCIL HAD JUST AMENDED ITS REGULATIONS TO AUTHORIZE THE EXAMINER TO HEAR APPEALS OF MDNS THRESHOLD DETERMINATIONS. CONSEQUENTLY, A HEARING WILL LIKELY STILL BE HELD IN FRONT OF THE EXAMINER AND A NEW HEARING DATE WILL BE SCHEDULED. THIS ORDER JUST MEMORIALIZES THE REASONS THE SEPTEMBER 28, 2020 HEARING WAS CANCELLED.

The appeal hearing scheduled for September 28, 2020 through September 30, 2020 is cancelled due to absence of subject matter jurisdiction. The Hearing Examiner does not have jurisdiction over consolidated A-2 permits that include an MDNS appeal. The City's permitting framework unfortunately has several conflicting provisions on who has appellate authority over MDNS appeals. Overall however, it is clear that the City's permit processing framework is designed to retain City Council jurisdiction and/or appellate jurisdiction on all significant projects involving substantial discretion.

1 SEPA review is arguably the most discretionary form of permit review authority
2 available to the City Council.

3 Specifically, the City's permit processing standards have three conflicting
4 provisions on the issue. One provision requires the City Council to hear the appeal,
5 another provision requires the Hearing Examiner to hear the appeal and a third
6 provision authorizes both the Hearing Examiner and City Council to hear the appeal.

7 Given these conflicting provisions it is understandable that people have different
8 opinions on how to apply them. However, resolving these conflicts is fairly
9 straightforward when the overall legislative intent of the ordinance is considered. The
10 City's permit review system is structured to assign all decision making on significant,
11 discretionary decisions to the City Council. As the subject appeal conclusively
12 demonstrates, MDNS appeals can involve a high degree of discretion and the
13 development is certainly significant from both a public interest and, arguably, an
14 environmental impact perspective. The City Council's intent on this issue is reinforced
15 by SMC 20.01.040B, which provides that if there is a question as to the appropriate type
16 of review procedure, the higher procedure type will apply. Technically, the conflicts at
17 issue are whether the City Council or Hearing Examiner serves as the appellate
18 authority within the same type of procedure, called "A-2." However, the concept still
19 applies, i.e. if there is ambiguity about which decision-making forum has jurisdiction,
20 the higher forum should have it. In this case, the higher forum between the Hearing
21 Examiner and City Council is the City Council.
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23
24 **Evidence Relied Upon**
25 **(all listed documents include all attachments and supporting declarations)**

- 26 1. Notice of Determination of Procedure Type for File No.CDR20-001 dated
27 January 24, 2020.
- 28 2. Director's Report and Staff Decision for Design Review of Jamestown
29 S'Klallam Tribe Outpatient Clinic dated May 15, 2020.

- 1 3. Mitigated Determination of Non-significance on MAT clinic issued March 25,
2 2020 and revised May 11, 2020.
- 3 4. Notice of Appeal filed by SOS dated February 12, 2020 (appealing Ex. 1).
- 4 5. Notice of Appeal filed by SOS dated June 5, 2020 (appealing Ex. 2 and 3).
- 5 6. Notice of Appeal filed by Parkwood dated February 7, 2020 (appealing Ex. 1)
- 6 7. Notice of Appeal filed by Parkwood dated June 4, 2020 (appealing Ex. 2 and 3)
- 7 8. Notice of Appeal filed by Jamestown S'Klallam Tribe dated June 1, 2020
8 (appealing Ex. 3).
- 9 9. SOS Motion for Partial Summary Judgement dated September 2, 2020.
- 10 10. Parkwood's Dispositive Motion dated September 2, 2020.
- 11 11. Jamestown S'Klallam Motion for Summary Judgement dated September 2,
12 2020.
- 13 12. Jamestown S'Klallam Tribe Response to Dispositive Motions dated September
14 14, 2020.
- 15 13. City Response to Dispositive Motions dated September 14, 2020.
- 16 14. SOS Reply to Jamestown S'Klallam Tribe Response dated September 16, 2020.
- 17 15. SOS Reply to City Response dated September 16, 2020.
- 18 16. Parkwood Consolidated Reply dated September 16, 2020.
- 19 17. SOS and Parkwood Supplemental Response dated September 18, 2020.
- 20 18. City Additional Briefing dated September 18, 2020.

Findings of Fact

- 21 1. SOS Appeals. SOS appeals two City decisions approving the construction of a
22 medication-assisted treatment (MAT) clinic, specifically (1) a determination that
23 consolidated permit review is subject to the City's A-2 land use review process (Ex. 1);
24
25

1 and (2) the design review approval along with its associated MDNS (Ex. 2). The first
2 appeal was filed on February 12, 2020 and the second on June 5, 2020. SOS's
3 challenge to the MDNS asserts that its mitigation measures are inadequate to address
4 impacts to public services.

5
6 2. Parkwood Appeals. Parkwood also filed two appeals of the same decisions as
7 SOS. It's appeal of Ex. 1, the permit classification decision, was filed on February 7,
8 2020 and its appeal of Ex. 2, design review and MDNS, was filed on June 5, 2020.
9 Parkwood's challenge to the MDNS is based upon the assertion that its environmental
10 review is incomplete because it fails to consider the impacts of subsequent phases of the
11 proposal, generally referring to impacts to public services and "*the impact that siting an*
12 *inpatient hospital at the facility creates.*"

13
14 3. Jamestown S'Klallam Tribe Appeal. The Tribe appealed the MDNS on June 1,
15 2020, asserting that the mitigation measures were not necessary to mitigate project
16 impacts. As shown in Ex. 8, the Tribe did not specify the decision-making forum in its
17 notice of appeal.

18
19 4. Appeal to City Council. Both Packwood and SOS tried to file their appeals with
20 the City Council, and City staff refused to file the appeals on the basis that jurisdiction
21 was with the hearing examiner. SOS tried to file its appeal on June 4, 2020 and was
22 rejected on the basis that appeals to Council are only allowed for appeals of DNSs, not
23 MDNSs. According to SOS and Packwood briefing, SOS and Packwood took the
24 position at the time they filed their appeals that "*it is the City Council who properly has*
25 *jurisdiction to adjudicate these appeals.*" Appellant SOS and Parkwood Supplemental
26 Briefing, Page 3; Ex. H to SOS Motion for Summary Judgment. Parkwood and SOS
27 concurrently filed their appeals with the hearing examiner "*[i]n an abundance of*
28 *caution.*" *Id.*

1 5. Building Permit. The City issued the building permit for the MAT clinic on
2 June 30, 2020. Murphy Dec., Ex. P to Ex. 11. The deadline to appeal the building
3 permit was July 21, 2020. No party appealed the building permit. Murphy Dec., Ex. Q
4 to Ex. 11.

5
6 6. Dispositive Motions. Both SOS and Parkwood filed dispositive motions
7 challenging the jurisdiction of the hearing examiner to hold a hearing and issue a final
8 decision on their appeals. Both present two arguments against jurisdiction: (1) City
9 staff erroneously failed to classify the proposed use as an essential public facility, the
10 applications of which are subject to the exclusive jurisdiction of the City Council; and
11 (2) even if the use was properly classified, the City's permit processing framework
12 mandates City Council review for project hearings that include MDNS appeals.

13
14 7. Appeal Hearing. The appeal hearing for the above-captioned matter was
15 scheduled for September 28-30, 2020 and was cancelled by email order dated
16 September 20, 2020 in anticipation of this Order.

17 18 **Legal Analysis**

19 The Hearing Examiner does not have jurisdiction over the five appeals
20 consolidated into this appeal process because they involve multiple appeals to the
21 MDNS. The City's permit processing framework assigns exclusive jurisdiction of
22 SEPA appeals to the City Council. As noted at the beginning of this Order, the City's
23 permit processing framework is designed to reserve all significant discretionary
24 decision making to the City Council. Hearing Examiner jurisdiction, by contrast, is
25 limited to ministerial and minor permit decision making. Case law recognizes that
26 SEPA serves to convert ministerial decisions to discretionary decisions. The City
27 Council recognized this SEPA function, by specifically assigning ministerial decisions
28 coupled with SEPA review to its exclusive appellate jurisdiction.
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1 The legal analysis below starts off in Section A by deriving overall legislative
2 intent, which is to retain final decision-making authority over significant discretionary
3 permitting decisions. The next three sections, Sections B-D, address the three SMC
4 sections that address Council verses Examiner jurisdiction over MDNS appeals,
5 specifically SMC 20.01.030 Tables 1 and 2 which clearly grants that authority to the
6 Council; SMC 20.01.240A, which can be read as giving concurrent jurisdiction to both
7 the Council and the Examiner; and SMC 20.01.090F, which can be read as giving
8 exclusive jurisdiction to the Examiner. Section E address City and Tribe arguments that
9 the SOS and Packwood SEPA appeals should be dismissed because they were not
10 consolidated with an appeal of the building permit. As outlined in Section E, SOS and
11 Packwood properly perfected their appeal by consolidating it with an appeal of the
12 design review approval for the project. Appeal of the building permit was not required.

14 A. SMC 20.01.030 Establishes Legislative Intent to Retain Council
15 Jurisdiction over all Significant Discretionary Permits. Of all the conflicting provisions
16 governing administrative appellate jurisdiction over MDNSs, the SMC 20.01.030 tables
17 provide the best indication of overall legislative intent because the tables specifically
18 address the permit review procedures for almost every development permit required by
19 City regulations and then specifically identifies how each such permit is to be reviewed.
20 From these tables it is clear that the City Council intended to create a permitting system
21 that retains all final decision making on significant discretionary permits and approvals
22 to itself.

24 As the courts recognize, ascertaining legislative intent is accomplished in part by
25 reading a statute within the context of its related provisions and the statutory scheme as
26 a whole. *McLaughlin v. Travelers Commercial Ins. Co.*, 9 Wash. App. 2d 675, 681
27 (2019). An examination of Tables 1 and 2 of SMC 20.01.030 shows a clear and
28 unmistakable pattern of Council retention of final decision-making authority on all
29 significant development permits involving the exercise of substantial discretion.

1 Table 1 identifies six classes of permit review processes, Type A1, A2, B, C1, C2
2 and C3. City staff and the hearing examiner are assigned the final decision-making
3 authority for Type A1, A2 and B permits. The Type A1, A2 and B processes are
4 specifically defined in SMC 20.01.020 to include no or limited discretion. The Type
5 C1, C2 and C3 processes are defined by SMC 20.01.020 to involve “*substantial*
6 *discretion*” and each of those processes involves the City Council with either final
7 decision-making authority or final administrative appeal authority.

8 The general lay out of the six review processes as described in the preceding
9 paragraph alone reveals a strong and well-defined legislative intent to retain
10 discretionary decision making in the City Council. However, a closer look at the
11 footnotes and exceptions in the Type A1, A2 and B processes is even more revealing.
12 For A1 permits, the City Council and Hearing Examiner are both assigned appellate
13 authority. The Hearing Examiner is limited by Table 1 to hearing appeals of staff
14 decisions on building and other construction permits; sign permits and boundary line
15 adjustments. The City Council hears appeals on all other permits, which as shown in
16 Table 2, include appeals of staff decisions on amendments to Planned Residential
17 Developments, street use permits, environmentally sensitive area and shoreline and
18 wetland exemptions. From the types of permits involved, it is again clear that the City
19 Council retained final decision-making authority on permits that could potentially
20 involve substantial discretion and/or broad public interest if anyone were aggrieved
21 enough to file an appeal. The hearing examiner is only left with appellate jurisdiction
22 over highly technical permits that involve limited discretion and will typically not
23 involve much public interest, even at the administrative appeal level.

24
25 The one outlier in the permits listed in Table 2 as A1 and A2 permits is SEPA
26 determinations. Unlike all the other permits subject to A1 and A2 review processes by
27 Table 2, SEPA review involves a broad exercise of discretion. As noted early on by one
28 court reviewing the function of SEPA:
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1 *The essential point is that SEPA requires the City, acting through its city*
2 *council, actually to consider the various environmental factors. The*
3 *change in the substantive law brought about by SEPA introduces an*
4 *element of discretion into the making of decisions that were formerly*
5 *ministerial, such that even if we assume, arguendo, that the issuance of a*
6 *grading permit was, prior to SEPA, a ministerial, nondiscretionary act,*
7 *SEPA makes it legislative and discretionary.*

8 *Polygon Corporation v. Seattle*, 90 Wn. 2d 59 (Wash. 1978).

9 As noted by another court, the state legislature intended SEPA review to focus on gaps
10 and overlaps that may exist in applicable laws and requirements related to a proposed
11 action. *Bellevue Farm Owners v. Shorelines Bd.*, 100 Wn. App. 341 (Wash. Ct. App.
12 2000). To these ends, SEPA can be used to mitigate a long list of environmental
13 impacts created by a proposal. WAC 197-11-444 identifies over 50 “*elements of the*
14 *environment,*” such as traffic, aesthetics and urban services, that may be mitigated if
15 adversely affected by a proposal. WAC 197-11-660 requires that SEPA mitigation
16 measures be based upon adopted SEPA policies. To meet this requirement, SMC
17 16.04.180 adopts numerous policies, including the City’s comprehensive plan,
18 subdivision code, zoning code and building codes. In addition, SMC 16.04.180 adopts
19 broad-ended policies that seek to protect environmental values and functions. In short,
20 SEPA arguably involves more discretion than any other permit approval identified in
21 Tables 1 and 2 since it adopts all the standards and policies applicable to those permits
22 and on top of that adopts even more broad-ended environmental protection policies.
23 The only Sequim development approvals involving more discretion is the exercise of
24 the Council’s legislative function in adopting regulations and policies.

25 Yet despite this broad discretion, Table 1 subjects SEPA determinations to an A2
26 review process, where administrative staff make the initial determinations. The reasons
27 for this are likely two-fold. First, it would not be practical or feasible for the City
28 Council to act as the SEPA responsible official and make initial SEPA determinations
29 itself. The SEPA rules require a formal determination (threshold determination) to be
30

1 made on every nonexempt development permit application filed with the City. Each
2 nonexempt project involves a detailed evaluation of whether a project will create
3 significant adverse environmental impacts and then an analysis of whether those
4 impacts can be adequately mitigated or whether an environmental impact statement
5 needs to be prepared. See WAC 17-11-300 through -390. Making the Council
6 responsible for these determinations would significantly impair the efficiency of permit
7 review and take up an inordinate amount of the Council's time. The second reason the
8 Council can't feasibly take on the responsibility of making SEPA determinations is that
9 it then couldn't adopt a SEPA appeals process, since it would be put in the position of
10 hearing appeals on its own decision making.

11 In the absence of any practical means to assume initial decision-making
12 responsibility for SEPA review, the City Council did the next best thing and assigned
13 itself appellate authority in Table 1. The assumption of this role gives the City Council
14 final decision-making authority on projects sufficiently large or controversial enough to
15 compel someone to file an appeal. Given that SEPA covers almost all adverse impacts
16 of a project save economic impacts, the Council's SEPA appellate role assures that it
17 can exercise its review authority for projects that have the greatest potential to
18 significantly affect the Sequim community.

19
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21 B. SMC 20.01.030 Tables Clearly and Expressly Require Council Review
22 of MDNS Appeals. SMC 20.01.30 Table 2 classifies a "SEPA Determination" as a
23 Type A-2 permit. An MDSN is a SEPA determination. SMC 20.01.30 Table 1
24 unambiguously assigns the City Council with appellate authority over A-2 decisions.

25
26 C. SMC 20.01.240A Requires Council Review of MDNS Appeals Under
27 General-Specific Rule of Statutory Construction. SMC 20.01.240A is construed as only
28 authorizing the City Council to hear appeals of MDNSs. The Tribe and City offer two
29 arguments against this interpretation. The City asserts that SMC 20.01.240A only
30 mandates Council review of DNS appeals and that a DNS is distinguishable from an

1 MDNS. The Tribe asserts that SMC 20.01.240A authorizes concurrent jurisdiction
2 between examiner and Council on MDNS appeals because, in addition to authorizing
3 Council review of DNSs, it also authorizes examiner review of all administrative
4 determinations.

5 As to the City's argument, as detailed below, the City's SEPA regulations and
6 case law make clear that the "DNS" referenced in SMC 20.01.240A encompasses
7 MDNSs, as MDNSs are one type of DNS. As to the Tribe's argument, statutory rules
8 of construction require that SMC 20.01.240A be construed as limiting MDNS appeals
9 to the City Council in order to harmonize that provision with Table 1, which more
10 specifically mandates Council review.

11
12 1. The SMC 20.01.240A reference to "DNS" encompasses an
13 "MDNS". As previously noted, the City takes the position that SMC 20.01.240A does
14 not authorize Council review of MDNS appeals, because SMC 20.01.240A only assigns
15 that authority for DNSs. This position is not consistent with the City's SEPA
16 regulations or case law.

17 SMC 20.01.240A, provides in pertinent part as follows:

18
19 *...Administrative interpretations and administrative Type A-1 and Type*
20 *A-2 decisions may be appealed, by applicants or parties of record, to the*
21 *hearing examiner. **Determinations of nonsignificance may be appealed***
22 *to the city council...*

23 (emphasis added).

24 The most direct resolution of the meaning of whether "DNS" includes an
25 "MDNS" is its definition. The term is not defined in Chapter 20.01, but is defined in
26 the City's SEPA regulations, Chapter 16.04 SMC. SMC 16.04.200 adopts WAC 197-
27 11-766 by reference, which defines an "MDNS" as "*a DNS that includes mitigation*
28 *measures and is issued as a result of the process specified in WAC 197-11-350.*" By its
29 plain terms, the MDNS definition identifies an MDNS as a DNS. The SMC itself refers
30

1 to an MDNS as a DNS with conditions: SMC 16.04.100, which authorizes an MDNS,
2 provides that an MDNS is created where “*the responsible official may issue a DNS*
3 *based on conditions attached to the proposal by the responsible official or on changes*
4 *to, or clarifications of, the proposal made by the applicant.*”

5 Construing the reference in SMC 20.01.240A as including an MDNS is
6 consistent with the holding of *City of Puyallup v. Pierce Cnty.*, 438 P.3d 176 (2019). In
7 *Puyallup*, a dispute arose between the City of Puyallup and Pierce County as to whether
8 the city could invoke lead agency status to make its own SEPA threshold determination
9 after it was dissatisfied with Pierce County's MDNS issued on a proposed project. *Id.* at
10 330. WAC 197-11-948 authorizes an agency with jurisdiction to assume lead agency
11 status “...upon review of a DNS (WAC 197-11-340)...” Pierce County argued that
12 since it had issued an MDNS and not a DNS that WAC 197-11-948 didn't apply, since
13 it only referenced a DNS. The Court of Appeals didn't agree, finding that “DNS”
14 encompassed an “MDNS.” The Court came to this conclusion relying upon the SEPA
15 definition of “MDNS,” as addressed *supra*. The Court also found that SEPA
16 regulations, specifically WAC 197-11-310(5), 197-11-340, 197-11-508 and 197-11-970
17 all reference “DNSs” and that such references are considered to encompass “MDNSs.”

18 The Puyallup case is particularly enlightening for this appeal since all of the
19 SEPA regulations identified above that were found by the *Puyallup* court to treat DNSs
20 as encompassing MDNSs are SEPA regulations adopted by reference into the SMC.
21 See SMC 16.04.070 (adopting WAC 197-11-310 and -340); SMC 16.04.130 (adopting
22 WAC 197-11-508); and SMC 16.04.220 (adopting WAC 197-11-970).

23 In its supplemental briefing the City attempts to distinguish the threshold
24 determination issued in the *Puyallup* case with that subject to this appeal on the basis
25 that the *Puyallup* threshold was issued under a different SEPA regulation. The
26 *Puyallup* threshold determination stated it was “*issued under WAC 197-11-340(2).*”
27 438 P.3d at 177. Sequim's threshold determination stated it was issued under WAC
28 197-11-350. See Ex. 3, p. 1.
29
30

1 The City’s asserted distinction between the Puyallup and Sequim threshold
2 determinations is unavailing because there is in fact only one process authorized in the
3 SEPA regulations for creating and issuing an MDNS. WAC 197-11-340 and -350 are
4 part of a two-step process in issuing an MDNS. WAC 197-11-350 identifies how to add
5 mitigation measures to a DNS to make it an MDNS. This regulation is the only SEPA
6 regulation that describes how to add mitigation measures to a DNS and is why an
7 MDNS is defined by WAC 197-11-766 as “*a DNS that includes mitigation measures*
8 *and is issued as a result of the process specified in WAC 197-11-350.*” (emphasis
9 added). WAC 197-11-340 doesn’t identify any process for adding mitigation measures
10 to a DNS, rather it provides that if an MDNS has been created under WAC 197-11-350,
11 then that MDNS (with conditions already added) is subject to the added procedural
12 requirements, such as distribution requirements, of WAC 197-11-340. The procedures
13 in both WAC 197-11-340 and -350 are required to issue an MDNS. The references to
14 WAC 197-11-340 in the *Puyallup* threshold determination and the reference to WAC
15 197-11-350 in the Sequim threshold determination were both referencing the same
16 process. When the MDNS in the Puyallup case was referring to WA 197-11-340 as the
17 basis of its issuance, it was specifically referring to WAC 197-11-340(2), which
18 identifies how an MDNS prepared under WAC 197-11-350 is to be noticed and
19 distributed.
20

21 A final reason why the DNS should be read to encompass MDNSs is that there’s
22 no rational reason not to do so. An MDNS is a project that was found to create impacts
23 to the extent that additional mitigation is necessary while a DNS does not. Especially
24 given the focus of Tables 1 and 2 to assign decision making authority to the Council on
25 the highest impact projects, why would the Council decide to do the opposite for SEPA
26 review and only assume appellate jurisdiction over projects that don’t trigger a need for
27 mitigation?
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1 *Allen v. Dan & Bill's RV Park*, 428 P.3d 376, 383-384 (Wash. Ct. App. 2018), quoting
2 *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wash.2d 416, 425, 799 P.2d 235 (1990)
3 (footnotes omitted).

4
5 As previously noted, Table 2 of SMC 20.01.030 assigns the City Council with appellate
6 jurisdiction over MDNS appeals. This is the equivalent of a “shall” statement since no
7 other decision-making forum is authorized to hear such appeals by Table 2. In contrast,
8 SMC 20.01.240 provides that the examiner “may” hear appeals of all administrative
9 determinations and that the City Council “may” hear appeals of DNSs. Conflict
10 between these provisions is unavoidable in the application to MDNS appeals. If the
11 hearing examiner hears the MDNS appeal under the “may” 20.01.240 administrative
12 determination clause, this directly conflicts with the Table 2 requirement that such
13 appeals shall be heard by the City Council. The provisions cannot be harmonized,
14 therefore, under the *Allen* case quoted above, the specific prevails over the general. The
15 Table 2 “shall” provision specifically applies to SEPA determinations. The SMC
16 20.01.240A provision applies to all administrative determinations. The Table 2
17 provision is the more specific and therefore supersedes SMC 20.01.240A. This result is
18 consistent with the legislative intent expressed in the overall permit process framework
19 to retain significant discretionary decision making to Council review. It is also
20 consistent with SMC 20.01.040B, which provides that if there is a question as to the
21 appropriate type of procedure, the higher procedure type letter will apply.
22

23 Even if there is indeed concurrent jurisdiction between the City Council and
24 hearing examiner over DNS appeals, then the City Council’s jurisdiction in any event
25 may have been properly invoked by Packwood and SOS. If a reviewing court were to
26 find that concurrent jurisdiction applies, there would remain a material question of fact
27 needing an evidentiary hearing as to which forum’s jurisdiction has been properly
28 invoked. It isn’t entirely clear how to resolve competing claims to jurisdiction amongst
29 administrative forums with concurrent jurisdiction. For their own concurrent
30

1 jurisdiction, the federal courts apply a “*first to file rule*,” which allows a district court to
2 transfer, stay or dismiss an action when a similar complaint has been filed in another
3 federal court, subject to various exceptions. *See Alltrade, Inc. v. Unwield Prods., Inc.*
4 946 F.2d 622 (9th Cir. 1991). As identified in Finding of Fact No. 4, Packwood and
5 SOS filed timely MDNS appeals with the City Council on June 5, 2020 and their
6 briefing asserts that they made it clear that they wished to invoke Council jurisdiction
7 and they only filed an appeal with the examiner as back-up. In this case the Tribe filed
8 its appeal on June 1, 2020, four days before Packwood and SOS filed their appeals.
9 However, there is nothing in the record of this proceeding to suggest that the Tribe
10 specified any specific decision-making forum. Since Packwood and SOS were
11 apparently the first to designate a forum, under the federal “first to file” rule they should
12 have been granted their request to have the City Council resolve their appeal.
13

14 To further complicate matters, however, the City Council didn’t issue a decision
15 dismissing the Packwood and SOS appeals as outside its jurisdiction. As best as can be
16 ascertained from the record, that decision was made by City staff. It’s unknown
17 whether the staff decision to reject the appeal was appealed to superior court as part of
18 the SOS/Packwood superior court appeal that was dismissed, or whether the right to
19 appeal that decision has lapsed. If the right to appeal the staff decision is still “live”
20 either because the staff decision is construed as ultra-vires¹ or because a timely appeal
21 was filed with superior court, construing SMC 20.01.240A as granting concurrent
22 jurisdiction wouldn’t change the result that the Council had jurisdiction, since
23 Packwood and SOS filed first in that forum.
24

25 3. SMC 20.01.090F Requires Examiner Review for Consistency
26 with Overall Legislative Intent. SMC 20.01.090F conflicts with the SMC 20.01.030
27

28 ¹ The potential that the staff decision to dismiss the Council appeal was ultra-vires raises another issue not
29 investigated for this decision – if staff didn’t have the authority to dismiss the appeal to the City Council,
30 does that decision constitute a local final land use decision subject to the time limits of administrative or
judicial appeal, or does the appeal remain live until resolved by the City Council itself?

1 Tables and SMC 20.01.240A. It provides that “..[i]f a Type A-2 decision is appealed,
2 an open record hearing will be held before the hearing examiner...” This provision
3 directly conflicts with Table 1, which provides that all A-2 appeals are to be heard by
4 the City Council. The general-specific rule does not work here, because both provisions
5 have the same level of detail. For this conflict, SMC 20.01.040B becomes
6 determinative because it provides that if there is a question as to the appropriate type of
7 procedure, the higher procedure type letter will apply. Although SMC 20.01.040B
8 deals with procedure types, given the legislative intent to retain significant discretionary
9 decision making with the City Council, it is appropriate to extend this principle to
10 higher decision-making forums, since the City Council is associated with the highest
11 procedure types of decision making.
12

13 E. Failure to Appeal Building Permit Doesn’t Preclude SEPA Appeal. In
14 its supplemental briefing, the City raised for the first time the argument that the SEPA
15 claims could not be heard because the Appellant’s failed to appeal the building permit
16 issued for the project. The City argues that if the reason for Council jurisdiction is the
17 MDNS appeals, that jurisdiction is lost because SEPA regulations require consolidation
18 of the MDNS with an appeal of the building permit approval. It is concluded that the
19 SEPA appeals of Parkwood and SOS satisfied SEPA consolidation requirements by
20 their consolidation with the design review decision. SEPA regulations did not require
21 the Appellants to consolidate their SEPA appeals with a building permit appeal and for
22 that reason the SEPA claims are still viable and create exclusive City Council
23 jurisdiction.
24

25 As a preliminary matter, it should be noted that the City’s consolidation
26 argument in practical terms qualifies as an 11th hour motion to dismiss. This dismissal
27 request was raised for the first time in the City’s supplemental response, presented well
28 after the pre-hearing deadline for motions to dismiss. However, the Appellants made no
29
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1 objection to the argument and its resolution will not prejudice the Appellants. For these
2 reasons, the issue will be addressed.

3 As a second preliminary matter, it is highly questionable whether dismissal of
4 the SEPA claims would extinguish the jurisdiction of the City Council. Assessing the
5 merits of the City’s consolidation argument is itself an exercise of jurisdiction over a
6 SEPA claim. Looking to federal courts as an analogous situation, a federal court lacks
7 jurisdiction over a claim involving federal law “*only when the claim is ‘so insubstantial,*
8 *implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid*
9 *of merit as to not involve a federal controversy.’” Steel Co. v. Citizens for a Better*
10 *Env’t, 523 U.S. 83, 89 (1998) (jurisdiction lacking on standing grounds) (citing Oneida*
11 *Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974) (jurisdiction*
12 *upheld)).*² As discussed in this Order, from a procedural standpoint at least, there is
13 nothing in the least bit frivolous in the SEPA claims brought forth by the Appellants
14 and, in point of fact, they very likely have been properly perfected. For these reasons,
15 the City Council should be the body determining whether the SEPA appeals were
16 properly consolidated.
17

18 Should a reviewing court find that the examiner does have jurisdiction to
19 consider the motion to dismiss the SEPA claim, it is fairly clear that dismissal is not
20 warranted on the basis of the consolidation argument. The City bases its consolidation
21 argument upon WAC 197-11-680(3)(v), which requires that with limited exceptions not
22 applicable here, “*the appeal shall consolidate any allowed appeals of procedural and*
23 *substantive determinations under SEPA with a hearing or appeal on the underlying*
24 *governmental action in a single simultaneous hearing before one hearing officer or*
25 *body.”*

26 As noted in the City’s supplemental briefing, “underlying governmental action”
27 is defined by SMC 16.04.200 as “*the governmental action, such as zoning or permit*
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29 ² There is no doubt more pertinent law addressing jurisdiction based upon claims that are dismissed, but
30 given the time constraints for issuing this order that that issue has not been researched in any more depth.

1 *approvals, that is the subject of SEPA compliance.*” From the language, the City
2 concluded in its briefing that the building permit constituted the only qualifying
3 “underlying governmental action.” Instead of the building permit, SOS and Packwood
4 consolidated their SEPA appeals with the design review approval of the project. As
5 shall be discussed, the design review approval also qualifies as an “underlying
6 governmental action” and for that reason Packwood and SOS satisfied the consolidation
7 requirements of the SEPA regulations.

8 Design review clearly qualifies as a “zoning or permit approval” under the
9 “underlying governmental action” definition of SMC 16.04.200. SMC 18.24.031A
10 provides in pertinent part that “[n]o building permit shall be issued for any development
11 or construction requiring design review until design approval has been granted.”
12 Further, the design review approval is the “*subject of SEPA compliance*” as required by
13 SMC 16.04.200. SEPA review for the project is based upon the MAT proposal as a
14 whole, not its individual permits. *See, e.g.* WAC 197-11-305, which bases exemption
15 status on the characteristics of a “proposal” and not the permits involved.

16 The City identifies no reason why design review doesn’t qualify as an
17 underlying governmental action and none is apparent from the record. As best as can be
18 ascertained, the City apparently believes that only the last permits approving a proposal
19 qualify as an “underlying governmental action.” Under this rationale, appeals of
20 threshold determinations for projects involving discretionary permits such as
21 conditional use permits, shoreline permits and preliminary plats would have to await
22 building permit approval before any SEPA appeal could be filed. That position is not
23 supported by applicable case law.

24 The most pertinent case addressing the City’s position is *Fremont Neighborhood*
25 *v. City of Seattle*, 160 Wn. App. 1022 (2011). *Fremont* involved a DNS appeal
26 associated with a Seattle City Council decision to approve funding and construction for
27 a new solid waste transfer station. A neighborhood group appealed the threshold
28 determination and then later requested a stay on its appeal asserting that its claims were
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30

1 not ripe for review because construction permits hadn't yet been issued for the project.

2 The court of appeals disagreed as follows:

3
4 *Any appeal under the State Environmental Policy Act (SEPA), chapter*
5 *43.21C RCW, requires that the environmental considerations be linked*
6 *to a specific governmental action. Review of SEPA compliance is timely*
7 *when a government has acted on a proposal. The Washington*
8 *Administrative Code (WAC) 197-11-704 defines "action" as those that*
9 *are approved by an agency. Actions fall within two categories, project*
10 *and nonproject. WAC 197-11-704(2) provides in pertinent part:*

11 *(a) **Project actions.** A project action involves a decision*
12 *on a specific project, such as a construction or*
13 *management activity located in a defined geographic*
14 *area. Projects include and are limited to agency decisions*
15 *to:*

16 *(i) License, fund, or undertake any activity that will*
17 *directly modify the environment, whether the activity will*
18 *be conducted by the agency, an applicant, or under*
19 *contract.*

20 *Thus, where a project action has occurred, the underlying environmental*
21 *determination, whether a DNS or an EIS, may be reviewed for SEPA*
22 *compliance.*

23 *Here, the agency approved the reconstruction of the transfer station. In*
24 *its summary of the proposed project, the City states that the project*
25 *"would replace the existing [facility] with new and additional facilities*
26 *on the existing parcel and an adjacent parcel to the east." The summary*
27 *further states that the threshold determination of nonsignificance applies*
28 *to all actions required to accomplish the project such as the issuance of*
29 *permits. The City Council's decision and ordinance directing the City to*
30 *pursue the demolition and reconstruction of the facility is a decision on a*
specific project. It thereby undertook an "activity that . . . directly
modif[ied] the environment." Project actions include government
approval of site-specific projects that involve construction, such as
county solid waste landfill site selection. Thus, the City's proposal to
reconstruct the transfer station is an action.

1 The *Fremont* analysis is on point with the consolidation undertaken by SOS and
2 Parkwood. Approval of design review qualifies as a project action because project
3 design affects aesthetics, which is an element of the environment. See WAC 197-11-
4 440. Therefore, as expressly stated above, “*the underlying environmental*
5 *determination, whether a DNS or an EIS, may be reviewed for SEPA compliance.*”
6 Under the *Fremont* case, SOS and Packwood had a right to consolidate their DNS
7 appeal with the design review decision.

8 As an alternative to asserting that the SEPA appeals must await approval of the
9 last permits for a project, the City could be applying the Tribe’s³ argument, raised in its
10 initial dispositive motion, that the failure of the Appellants to timely appeal the building
11 permit issued for the MAT project renders the SOS and Packwood appeals moot. In its
12 initial dispositive motion, the Tribe does not cite any case law for this position, simply
13 pointing out that design review is ancillary to building permit review and therefore
14 somehow subsumed by it. See Tribe Dispositive Motion, p. 17.

15 The Tribe’s position is contrary to the holding of *Chumbley v. Snohomish Cnty.*,
16 386 P.3d 306 (2016). In *Chumbley*, a developer attempted to argue that it could not be required
17 to acquire grading and critical area permits because it had acquired building permit approval
18 and that approval had not been timely appealed. The court disagreed as follows:

19
20 *We reject the respondents' argument that the complaint is an implied challenge*
21 *to or a belated collateral attack on the building permit. The building permit*
22 *was for lot 36. It did not memorialize or imply a decision that permits and*
23 *review under the land disturbing activity and critical areas ordinances was*
unnecessary for work done on lots 60 and 61.

24 Id. at 315.

25
26 ³ It is a little surprising that the Tribe raised the mootness argument, since if it prevails on that argument
27 its appeal would also be vulnerable to dismissal. As declared by the Tribe’s counsel, the Tribe also didn’t
28 appeal the building permit. From the Tribe’s appeal, it appears the Tribe actually failed to appeal any
29 underlying permit decision. See Ex. 8. Since subject matter jurisdiction can be raised at any time, the
30 only reason the Tribe’s SEPA appeal isn’t subject to dismissal now is because it’s been consolidated with
the design review appeals of SOS and Packwood. See *Boise Cascade v. Toxics Coalition*, 68 Wn. App.
447, 452 (1993) (subject matter jurisdiction can be raised at any time, even if not timely raised during
administrative proceedings).

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The same reasoning arguably applies here – issuance of the MAT building permit did not memorialize or imply a decision that another permit approval was no longer necessary. Design review approval is a separate approval required by SMC 18.24.031A. It is acknowledged, however, that *Chumbley* is arguably distinguishable because the SMC may provide for more direct linkage between design review and building permits than grading/critical area permits and building permits in *Chumbley*. As previously noted, SMC 18.24.031A provides that no building permit may issue until design review has been acquired. This creates the implication that a determination had been made in the building permit review process that design review approval had been granted and that this determination can not be collaterally attacked.

The linkage between design review and building permits in this appeal is not found to be a determinative distinction from the *Chumbley* case. The *Chumbley* case was based upon the judicial doctrine of finality, which for land use decisions holds that illegal land use decisions will be allowed to stand if not timely challenged under LUPA. *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 407, 120 P.3d 56 (2005). The salient point of the finality doctrine is that it precludes challenge of the building permit on the issue of design review approval. Since the appeal period has expired on the building permit at this point in time without any administrative appeal, the decision to approve the building permit can no longer be overturned if the approval of design review is overturned on appeal.

Although finality precludes challenge to the building permit, case law on land use judicial finality has never been extended to preclude challenges from one permit to another. Design review approval is a separate approval. Design review is not a part of building permit review. The City’s building codes have not been amended to include design review criteria or approval requirements. Design review isn’t even located in the SMC title that adopts building and construction codes. Design review has it's own separate SMC chapter. Most significantly, the design review decision was made

1 separate from the building permit decision, with its own appeal clause classifying the
2 decision as an A2 decision appealable within 21 days of design review approval, which
3 was well before issuance of the building permit. See Ex. 2, p. 17. Further, as a
4 practical matter approval of the building permit doesn't render the results of the design
5 review appeals moot. If the Applicant proceeds with construction and doesn't comply
6 with the final results of the design review appeals, it can be subject to the City's code
7 enforcement remedies in Chapter 1.13 SMC. If the Tribe chooses to move forward in
8 the face of pending design review appeals, it assumes the risk that it may have to
9 change design as a result of those appeals. Further, if and when the design review
10 appeals make it superior court, project appellants can apply for a stay of project
11 construction pending resolution of those appeals. See RCW 36.70C.100.

12 F. SOS/Packwood Failure to Raise Jurisdictional Issue Doesn't Preclude
13 Consideration. In its supplemental briefing the City noted that SOS had waived its right
14 to argue lack of jurisdiction under Tables 1 and 2 because it hadn't raised the argument
15 in its Notice of Appeal. However, as noted in Footnote No. 3, subject matter
16 jurisdiction can be addressed at any time even if not timely raised in the administrative
17 proceedings by the parties. See *Boise Cascade v. Toxics Coalition*, 68 Wn. App. 447,
18 452 (1993). In pursuant of judicial economy, in order to address the jurisdictional issue
19 sooner rather than later on judicial appeal after time and resources may have been
20 wasted in the wrong administrative forum, this Decision has addressed the subject
21 matter jurisdiction issues now.
22

23 24 **ORDER**

25
26 The hearing examiner has no jurisdiction to hear the above-captioned appeal.
27 Appellate jurisdiction rests with the City Council. The September 28-30, 2020 hearing
28 is cancelled. However, it is recognized that the City Council, as this Order was in the
29 last stages of completion, amended its code to allow for Examiner jurisdiction. The
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1 Examiner has not yet seen the amendments, but it appears likely that under the new
2 amendments this Order will be rendered moot and a new appeal date before the
3 Examiner will be scheduled.

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5 ORDERED this 26th day of September 2020.

6 
7 Phil A. Olbrechts

8 Sequim Hearing Examiner
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