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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,

Appellant,

vs.

CITY OF SEQUIM,
a Washington Municipal Corporation,

Respondent.

File No. CDR20-001

APPELLANT SAVE OUR SEQUIM'S
MEMORANDUM IN RESPONSE TO
CITY OF SEQUIM'S "EMERGENCY"
ORDINANCE

On Sunday, September 20 at 10:13 PM, Hearing Examiner Phil Olbrechts issued the following preliminary ruling via email to the parties to this appeal:

“The hearing scheduled for September 28-30, 2020 is cancelled. I do not have jurisdiction over consolidated permit hearings that include a SEPA appeal. I will be issuing an interlocutory order that outlines the legal basis of this conclusion within the next few days. I will subsequently issue a final decision that addresses the other jurisdictional arguments made by the parties, to avoid remands in case a reviewing court disagrees with my determination.”

“Given that one of my objectives as an examiner is to manage an efficient review process, I am disappointed I have to make this ruling. Unfortunately, there is little room for reasonable disagreement on the jurisdictional issue. If I were to retain jurisdiction, a reviewing court would very likely overturn my final decision and remand

1 the appeal back to the City Council to do the entire process over again. Ultimately,
2 correcting course at this time is the only way to prevent what would otherwise be an
3 even more significant unnecessary loss of time and money for all parties. If my ruling
4 is contrary to the wishes of the City Council, the Council may still have the option of
5 amending its code to delegate decision making responsibility on SEPA appeals to the
6 hearing examiner. Procedural rules, which likely includes appellate jurisdiction, is (sic)
7 not subject to the vested rights doctrine. *See Graham Neighborhood Ass'n v. F.G.*
8 *Associates*, 162 Wn. App. 98 (2011).”

9 “Despite one poorly written SMC section to the contrary, the City’s permit processing
10 framework overall is designed to limit Hearing Examiner review to ministerial permits
11 and minor permitting decisions. The City Council has reserved all significant
12 discretionary decision making to itself. When SEPA came out in the 1970s the courts
13 early on expressly recognized that SEPA can be used to change ministerial permits into
14 discretionary ones, by giving decision makers broad authority to mitigate
15 environmental impacts. This is likely why not one but two SMC permit processing
16 provisions expressly assign SEPA appellate review to the City Council.”

17 “As to arguments brought up by the City and Tribe, the Parkwood and SOS appeals
18 were properly consolidated with a final underlying government decision, i.e. the City’s
19 design review decision. SEPA has never been construed as requiring a threshold
20 appeal to be consolidated with the last permit for a proposal. Threshold appeals are
21 routinely processed and resolved prior to the application of building permits. Case law
22 upholds this practice. Finally, as determined in the Puyallup case and as demonstrated
23 in other SMC provisions, references to a “DNS” encompass an “MDNS.” These and
24 other arguments will be fully addressed in my interlocutory order.” (Emphasis added)

25 Importantly, however, this order did not address two remaining issues; 1) whether or
not SOS and Parkwood had legal standing to file the appeal; and 2) whether or not the
proposed project qualifies as an Essential Public Facility (EPF). The Examiner has yet to
formally rule on these two issues.

In response to this ruling, the City of Sequim hastily cobbled together an “emergency
ordinance” declaring that the Hearing Examiner has sole authority to hear appeals of A-1 and
A-2 permitting decisions, and passed it in an “emergency hearing”, held at 6:30 PM on

1 Saturday, September 26, with no public testimony allowed. The ordinance was passed less
2 than two hours before the Examiner issued his written findings on the jurisdictional issue. The
3 Ordinance and supporting documents are attached to this Memorandum as Exhibit A.

4 What the City is again “disregarding”¹, as it has throughout this dispute, is that if there
5 is any ‘question’ about the proper procedure, SMC 20.01.040(B) requires that the higher letter
6 procedure be used.

7
8 **20.01.040 Determination of proper type of procedure.**

9 B. Determination of Director. The director shall determine the proper procedure for all
10 development applications. If there is a question as to the appropriate type of procedure,
11 the director shall resolve it in favor of the higher procedure type letter as defined in
SMC [20.01.030](#). (Ord. 2000-006 § 3)

12 In this case, the Examiner has yet to rule on the claims of SOS and Parkwood that this
13 facility is an Essential Public Facility (EPF), and as such, SMC 20.01.030, Table 2 requires
14 that it be approved by the City Council under the C-2 permitting process. With this in mind,
15 the “emergency ordinance” is nothing more than the City again disregarding sections of the
16 Code that disfavor this project.

17 The City’s first justification for the “emergency” was the pendency of the Examiner’s
18 written findings on jurisdiction, which were released less than two hours after the Ordinance
19 was passed. The City was also attempting to beat the pending substantive rulings on standing
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¹ The City is already on record stating that they are willing to ‘disregard’ sections of the Code “under
legal direction”. City’s Motion to Dismiss at 28,

1 and the classification of the project as an Essential Public Facility (EPF). This intent was
2 clearly illustrated in the “problem/issue statement” in Agenda Bill 20-079:

3 “this code revision is being brought before Council on an emergency interim controls
4 basis due to the pending appeals regarding the Jamestown S’Klallam Tribe’s proposed
5 medication assisted treatment (MAT) clinic.”

6 It was furthered by a statement by the City Attorney appearing in the September 29,
7 2020 issue of the Peninsula Daily News (Exhibit B), stating that “it constituted an emergency
8 ordinance because once Olbrechts submits his decision, it would trigger the appeals process”,
9 and that “Oct 5 or 6 may be too late, and the council may have to hear appeals instead of the
10 hearing examiner”. The City is essentially attempting to double-cross the Examiner.

11 The City also appears to believe that an emergency exists because of Washington’s
12 “120-day rule” contained in RCW 36.70B.080(1).² If this is a justification for the emergency
13 nature of this ordinance, it is misplaced, because the 120-day rule applies to the permit process,
14 not any ensuing appeals. Also, the 120-day rule is not mandatory, and local governments are
15 allowed under RCW 36.70B.080(1) to suspend the application by pressing the ‘chess clock’ to
16 gather additional information. That statute provides as follows:

17
18 **RCW 36.70B.080**

19 **Development regulations—Requirements—Report on implementation costs.**

20 (1) Development regulations adopted pursuant to RCW **36.70A.040** must establish and
21 implement time periods for local government actions for each type of project permit
22 application and provide timely and predictable procedures to determine whether a
23 completed project permit application meets the requirements of those development
24 regulations. The time periods for local government actions for each type of complete
25 project permit application or project type should not exceed one hundred twenty days,

² The Preamble to the Ordinance states in part that, "Whereas, the City Council is aware that State law requires land-use decisions to be made promptly and without unnecessary delay, and that the law requires prompt and efficient decisions on land use permit applications;"

1 unless the local government makes written findings that a specified amount of
2 additional time is needed to process specific complete project permit applications or
3 project types.

4 The City's characterization of this situation as an 'emergency' also stretches the state
5 law on emergency legislation beyond its breaking point. RCW 35A.12.130 defines an
6 emergency as 'an emergency necessary for the protection of public health, public safety,
7 public property or the public peace'. There is nothing about amending a land use code to
8 change appellate jurisdiction in the middle of an appeal that affects public health, safety,
9 property or peace. A legislative declaration of zoning emergency is conclusive and must be
10 given effect unless it is on its face obviously false and palpable attempt at dissimulation.

11 *Matson v. Clark Cty. Bd. of Comm'rs*, 79 Wash. App. 641, 904 P.2d 317 (1995)

12 The City also concedes that this ordinance was politically motivated, stating in the
13 preamble as follows:

14 "WHEREAS, the Council has concluded that the political risk of passing an emergency
15 ordinance to clarify the Council's intention to have a Hearing Examiner preside over
16 the MAT clinic in appeals is much less than the legal risk associated with the Council
17 sitting as conflicted decision-makers on the subject appeals" (emphasis in original)

18 Another justification for the "emergency ordinance" is that the City Council would be
19 in violation of Washington's Appearance of Fairness Doctrine if they were to serve as the
20 appellate authority on this appeal. But the City has not pointed to any specific instances where
21 an elected official has publicly stated their support or opposition to the proposed project on the
22 record. And the City Staff only glancingly explained the exceptions to the Doctrine's ban on
23 ex-parte communications contained in RCW 42.36.060 to the Council;

24 **RCW 42.36.060**

1 **Quasi-judicial proceedings—Ex parte communications prohibited, exceptions.**

2 During the pendency of any quasi-judicial proceeding, no member of a decision-
3 making body may engage in ex parte communications with opponents or proponents
4 with respect to the proposal which is the subject of the proceeding unless that person:

5 (1) Places on the record the substance of any written or oral ex parte communications
6 concerning the decision of action; and

7 (2) Provides that a public announcement of the content of the communication and of
8 the parties' rights to rebut the substance of the communication shall be made at each
9 hearing where action is considered or taken on the subject to which the communication
10 related. This prohibition does not preclude a member of a decision-making body from
11 seeking in a public hearing specific information or data from such parties relative to the
12 decision if both the request and the results are a part of the record. Nor does such
13 prohibition preclude correspondence between a citizen and his or her elected official if
14 any such correspondence is made a part of the record when it pertains to the subject
15 matter of a quasi-judicial proceeding.

16 It appears that the City Staff's real concern is that their City Council is not competent
17 to make this decision, as evidenced by their statements in the ordinance and supporting
18 materials that the City Council does not have the "capacity" to make such a major decision,
19 that they are not capable of addressing issues that are "highly technical and legal", and that
20 they are "ill-equipped to facilitate an open record appeal hearing of this magnitude due to their
21 lack of experience, training, and education", and that none of them have "any legal experience
22 to speak of". (Exhibit "A").

23 The City also appears to believe that the *Graham Neighborhood Ass'n v. F.G.*
24 *Associates* case 162 Wn. App. 98 (2011), which was cited by the Examiner in the preliminary
25 ruling, allows them to switch from a quasi-judicial hearing in front of elected officials to an
26 administrative hearing in front of an appointed official in the middle of an appeal, based on a
27 reference to that case in the Examiner's preliminary ruling.

1 SOS respectfully submits that this case does not stand for that proposition. In the
2 *Graham* case, the property owner applied for preliminary plat approval on April 25, 1996. The
3 application was deemed complete one month later. In June, 2005, nine years after the
4 application, Pierce County passed an ordinance providing that plats expired within one year,
5 and sent notice thereof to the property owner. In January 2009, almost 4 years after this notice
6 was sent, and 13 years after the original application, the property owner filed an
7 “environmental worksheet” in the hope that the application could continue. Pierce County took
8 the position that the application was properly “reactivated” and allowed it to continue. The
9 issue therefore was whether or not a nine-year old land-use application that was properly
10 canceled pursuant to a subsequent ordinance could be “reactivated” four years later. The Court
11 of Appeals held that it couldn’t.

14 Nothing in this case comes even close to that fact pattern. In this case, the application is
15 still active, a properly and timely filed appeal is currently on the docket, and the adjudicating
16 officer has not even issued a final decision yet on three dispositive prehearing motions. In the
17 middle of this procedural posture, however, the City passed an “emergency ordinance” at 6:30
18 pm on a Saturday night, with no public testimony allowed, changing the appellate process from
19 quasi-judicial to administrative less than one week after receiving a partial ruling on an appeal
20 that was adverse to their position, and only 2 hours before the preliminary order was released.
21 Stated more simply, the City is trying to change horses in midstream in order to sidestep a
22 mandate from their Code requiring them to use the higher-lettered procedure.

1 In essence, the “emergency ordinance” is the legal equivalent of converting from a jury
2 trial to a bench trial after the jury has been empaneled and opening briefs have been submitted.
3

4 **CONCLUSION**

5 This situation is a hot mess created solely by the City. Despite clear and unequivocal
6 language defining this project as an EPF subject to City Council approval under the C-2
7 permitting process, and despite even clearer language requiring the City to defer to the ‘higher
8 letter procedure’, the City is doing everything it can to have this project approved
9 administratively, including defining the project as a simple “medical clinic”, unilaterally
10 rejecting a properly filed appeal to the City Council without explanation, “disregarding”
11 express code language, and now passing a hastily drafted “emergency ordinance”, expressly
12 drafted to supersede the Examiner’s final rulings, at 6:30 p.m. on a Saturday night without any
13 public comment, less than two hours before the Examiner issued his written findings on an
14 interim order.
15

16 At this point, the only clear and defensible path out of this situation is to; 1) declare
17 that this project is an EPF; 2) declare that the “higher letter procedure” (the C-2 process)
18 applies; and 3) remanding this project back to the City with instructions to start over under the
19 C-2 process. Anything short of this directly conflicts with existing, clear and unequivocal code
20 language and well-established case law.
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DATED this 29th day of September 2020.

HELSELL FETTERMAN, LLP



By _____
Michael A. Spence, WSBA #15885
Attorneys for Save Our Sequim

1 **CERTIFICATE OF SERVICE**

2
3 The undersigned hereby certifies that on September 29th, 2020, the foregoing
4 document was sent for service on the following party in the manner indicated below.

5 Kristina Nelson-Gross
6 Sequim City Attorney
7 152 W. Cedar Street
8 Sequim, WA 98382
9 Knelson-gross@sequimwa.gov
10 tsandaine@dequimwa.gov
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- Via Facsimile
- Via Email

20 DATED this 29th day of September, 2020

21 
22 Lisa Blakeney, Legal Assistant

EXHIBIT A

**SEQUIM CITY COUNCIL
AGENDA BILL 20-079**

MEETING DATE: September 26, 2020

FROM: Barry Berezowsky, Community Development Director BB, KNG
 Kristina Nelson-Gross, City Attorney Initials

SUBJECT/ISSUE: Interim Controls Ordinance Regarding Chapter 20.01 Appeals Process

Discussion dates				
CATEGORY	<input type="checkbox"/> City Manager Report	<input type="checkbox"/> Information Only	Time Needed for Presentation	
	<input type="checkbox"/> Public Hearing	<input type="checkbox"/> Consent Agenda	10 Min	
	<input checked="" type="checkbox"/> Other Business			
Reviewed by	Initials		Date	
Charles P. Bush, City Manager	CPB		9/23/20	
Charisse Deschenes, Assistant City Manager	CD		9/24/20	
Sara McMillon, City Clerk	SEM		9/24/20	

PROBLEM/ISSUE STATEMENT

Sequim Municipal Code (SMC) 20.01 (Administration of Land Use and Zoning Applications and Development Regulations) contains provisions that some administrative permit decisions may be appealed to the City Council rather than to a Hearing Examiner or the appropriate court. This conflicts with other provisions of the City’s zoning code regarding the appropriate appeal body for various land use permits. The attached proposed Interim Controls Ordinance amends Table 1 and Table 2 in SMC 20.01.030 (Procedures for processing development project permits) and SMC 20.01.240 (Appeals) to clarify that appeals of Type A-1 and A-2 administrative permit decisions are heard by the Hearing Examiner.

This code revision is being brought before Council on an emergency interim controls basis due to the pending appeals regarding the Jamestown S’Klallam Tribe’s proposed medication-assisted treatment (MAT) clinic.

Alternatively, this is being brought as a standard [non-emergency] interim controls ordinance for the same reasons. The difference between the two ordinances is that the emergency ordinance requires **five** votes to pass and becomes effective immediately,

whereas the standard ordinance only requires four votes to pass and becomes effective five days after publication.

The City Council intended a Hearing Examiner Pro Tempore to hear the Medication Assisted Treatment or MAT Clinic appeals, but after extensive briefing the contracted Hearing Examiner decided that, due to the above conflicting code language, he must decline jurisdiction. **City Councilmembers are concerned that, given imminent deadlines, appearance of fairness issues, and the need to focus on policy-related priorities arising from the COVID-19 emergency, they do not have the time or capacity to conduct an open record appeal hearing that complies with the law.**

ATTACHMENTS

1. [Proposed *Emergency Interim Controls Ordinance Revising Sequim Municipal Code Chapter 20.01*](#)
2. [Proposed standard Interim Controls Ordinance Revising Sequim Municipal Code Chapter 20.01](#)
3. [Exhibit A – Amended Code Language](#)

DISCUSSION/ANALYSIS

The City's decisions on the Jamestown S'Klallam Tribe's MAT clinic project were administrative, and the several appeals filed in the aftermath of the decisions were consolidated and directed to the Hearing Examiner in accordance with SMC Chapter 20.01.

On September 21, 2020, after receiving an extensive briefing on the matter and only days before the scheduled hearing, Hearing Examiner Pro Tempore Phil Olbrechts determined that he did not have decision-making authority on at least one of the issues on appeal — the SEPA MDNS — and that therefore he could not render a decision on the consolidated appeals. The City has not yet received his interlocutory order setting forth his reasoning in detail.

By agreeing to hire a Hearing Examiner to preside over the MAT clinic appeals, the City Council intended the Hearing Examiner to have jurisdiction over those appeals. **The decision by the Hearing Examiner to not invoke jurisdiction surprised not only City staff but also the City Council.**

Staff's opinion is that the City Council is not in a position to hold an open record appeal hearing on such short notice, especially when the issues raised are highly technical and legal. The Council is ill equipped to facilitate an open record appeal hearing of this magnitude due to their lack of experience, training, and education; none of them have any legal experience to speak of. In addition, as demonstrated by the copious amounts of written materials submitted by all parties, this matter has been the subject of intense public debate for the past 15 months, sometimes involving Councilmembers themselves, raising questions regarding appearance of fairness and potential conflict issues.

As such, it is unlikely that the Council as a whole can neutralize appearance of fairness allegations in concert with allegations of politicizing this land use issue and being unduly influenced by public pressure campaigns.

Finally, the Hearing Examiner scheduled three full, consecutive days for this hearing; it is highly unlikely that that Council would be able to conclude its hearing in such an efficient manner because of the multitude and complexity of the issues it would need to rule upon.

Time is of the essence, which is why staff are bringing this to Council as an emergency ordinance. If Council chooses to clarify the City's code, it will need to do so before the Hearing Examiner issues his interlocutory decision.

FINANCIAL IMPLICATIONS

While there are financial implications related to the cost of securing a Hearing Examiner to preside over these appeal hearings, Council already accepted those costs when it transferred the appeals to the Hearing Examiner. Even if Council were inclined to hear the appeals as a "cost savings", there would also be costs associated with the Council hearing this matter related to the Council's need to secure outside legal counsel. More importantly, given the Councilmembers' inexperience, any procedural or substantive missteps they may make while hearing the MAT clinic appeals or rendering their decision(s) could expose the City to significant financial damages.

If Council agrees to "hear the appeals as a cost savings" - outside legal counsel costs to support this effort, best case scenario, ranges from \$42k to \$100k, depending on the expert hired to take on these matters. That is just the cost of securing outside counsel. It is so important for Council to note these are extremely conservative estimates and just include pre-hearing preparation and hearing time. This would also require a Budget Amendment and Council would need to determine the best source of these funds. Financial damages that result from any missteps could result in additional, significant costs that may not be covered by our risk pool.

RECOMMENDATION

Adopt the *emergency* interim controls ordinance revising Table 1 and Table 2 in SMC 20.01.030(A) and text contained in SMC 20.01.240 to clarify and confirm the Council's intent to direct all appeals of Type A-1 and A-2 administrative permit decisions to the Hearing Examiner.

Alternatively, staff recommends that Council adopt the standard interim controls ordinance.

MOTION

I move to adopt the proposed **emergency** interim controls ordinance revising Table 1 and Table 2 in SMC 20.01.030(A) and text in SMC 20.01.240 to direct all appeals of Type A-1 and A-2 administrative permit decisions to the Hearing Examiner.

OR

I move to adopt the proposed interim controls ordinance revising Table 1 and Table 2 in SMC 20.01.030(A) and text in SMC 20.01.240 to direct all appeals of Type A-1 and A-2 administrative permit decisions to the Hearing Examiner.

ORDINANCE NO. 20

AN ORDINANCE OF THE CITY OF SEQUIM, WASHINGTON ADOPTING INTERIM LAND USE REGULATIONS AND OFFICIAL CONTROLS PURSUANT TO RCW 35A.63.220 AND RCW 36.70A.390 BY AMENDING SEQUIM MUNICIPAL CODE CHAPTER 20.01 TO REVISE THE APPEAL PROCESS FOR TYPE A-1 AND A-2 PERMIT DECISIONS; ESTABLISHING A DATE FOR PUBLIC HEARING; ENTERING LEGISLATIVE FINDINGS; DECLARING AN EMERGENCY; AND PROVIDING FOR SEVERABILITY AND IMMEDIATE EFFECTIVE DATE.

WHEREAS, the zoning code in Sequim Municipal Code (SMC) Section 20.01.030 (Procedures for processing development project permits) lists the procedural steps and decision-making and appeal bodies that are appropriate to each permit type; and

WHEREAS, SMC Chapter 20.01 identifies Type A-1 and A-2 permits as administrative permits; and

WHEREAS, the decision to approve the Jamestown S’Klallam Tribe’s proposed medication-assisted (MAT) clinic was an administrative decision; and

WHEREAS, SMC 20.01.030(A), Table 1, identifies the Hearing Examiner as the Administrative Appeal Body for Type A-1 decisions and the City Council as the Administrative Appeal Body for Type A-2 permit decisions; and

WHEREAS, SMC Chapter 20.01.030, Table 1, provides in footnote “a” that if an administrative decision is appealed the hearing body is the Hearing Examiner; and

WHEREAS, SMC 20.01.090 provides that appeals of A-2 decisions going to the Hearing Examiner; and

WHEREAS, SMC Title 18.24.038 provides that “[a]ppeals of any administrative decision shall be heard by the hearing officer” and all “[a]ppeals of the hearing officer’s decision shall be made to the Clallam County superior court”; and

WHEREAS, the City’s interpretation and application of its zoning code, specifically SMC Chapter 20.01 and the appeals provisions of SMC 18.24.038, has been and remains that the Hearing Examiner has jurisdiction over the appeals brought against the Tribe’s MAT clinic project; and

WHEREAS, in originally adopting SMC Chapter 20.01 and the appeals provisions of SMC 18.24.038, and in the City’s intake of the Tribe’s permit applications and the MAT Clinic appeals, the City Council intended for a Hearing Examiner to hear the MAT Clinic appeals; and

WHEREAS, given the above-cited code language and the City’s prior interpretation and application of the permit review and appeal provisions of the City’s

Zoning Code, the City was surprised that the Hearing Examiner decided to not invoke and accept jurisdiction over the MAT Clinic appeals; and

WHEREAS, the City Council is concerned that the numerous contacts it has received about the MAT Clinic from all parties and other interested individuals over a span of 15 months raises significant and potentially irreconcilable appearance of fairness and potential conflict issues that are unlikely to be overcome; and

WHEREAS, the City Council is concerned that the numerous contacts it has received about the MAT Clinic and other concerns referenced in this preamble will likely lead to collateral litigation, ongoing judicial claims and review, and possible remand, thus impacting the Tribe's MAT Clinic permitting and project and the appellants' due process rights; and

WHEREAS, the City Council did not anticipate holding a hearing on a heavily contested matter with numerous potential conflict and appearance of fairness issues, and currently does not have the time or capacity to conduct a hearing that complies with the law; and

WHEREAS, the City Council is ill equipped to hold an open record appeal hearing on this matter due to the large volume of materials and administrative record to review, the highly technical and legal nature of these appeals and issues presented by the appellants; and

WHEREAS, the City Council is aware that State law requires land use decisions to be made promptly and without unnecessary delay, and that the law requires prompt and efficient decisions on land use permit applications; and

WHEREAS, for the above reasons, the City Council is unable to meet these tight deadlines necessary to protect the respective rights of the applicant and appellants, which results in the need for emergency action to make this interim control ordinance effective immediately; and

WHEREAS, it is therefore the Sequim City Council's intention to clarify language in the City's code to make all Type A-1 and A-2 decisions appealable to the Hearing Examiner, who will conduct an open record appeal hearing, with subsequent appeals of those Hearing Examiner decisions going directly to Clallam County Superior Court; and

WHEREAS, by removing the Sequim City Council from all appeals for Type A-1 and A-2 decisions, the City Council may interact with their constituents and advocate on those topics that may be the subject of such decisions without violating the appearance of fairness doctrine or having to disclose potential conflicts of interest; and

WHEREAS, by removing the Sequim City Council from all A-1 and A-2 appeals process, the City Council can focus its time and energies on important and pressing policy needs; and

WHEREAS, by removing the Sequim City Council from all A-1 and A-2 appeals, the Council may focus on transitioning City governmental functions and processes to a virtual platform that is required to ensure the City remains fully operational in a world greatly affected by the COVID-19 pandemic; and

WHEREAS, by removing the Sequim City Council from all A-1 and A-2 appeals, the Council will ensure the City's decision-making processes are efficient, transparent, and fair by removing the possibility for allegations of bias, conflict of interest, appearance of fairness issues, or political influence in administrative City functions; and

WHEREAS, the Council has concluded that the political risk of passing an emergency ordinance to clarify the Council's intention to have a Hearing Examiner preside over the MAT clinic appeals is much less than the legal risk associated with the Council sitting as conflicted decisionmakers on the subject appeals; and

WHEREAS, the City staff and Council believe that adopting these described interim controls is in the best interest of the public and necessary to protect health, safety and welfare of the citizens of the City of Sequim; and

WHEREAS, RCW 36.70A.390 and RCW 35.63.220 and interpretive judicial decisions authorize the City Council to adopt interim controls with an effective period of up to 6 months without first holding a public hearing, so long as a public hearing is held no more than 60 calendar days after the adoption of the interim controls; and

WHEREAS, an interim zoning ordinance and interim official control enacted under RCW 36.70A.390 and RCW 35.63.220 are methods by which local governments may preserve the status quo so that new plans and regulations will not be rendered moot by intervening development and that the new interim controls in such an ordinance are made effective immediately; and

WHEREAS, the subject matter of this Ordinance is eligible for, and not exempt from, the establishment of interim controls; and

WHEREAS, the City Council intends the recitals in this Ordinance to be considered findings of fact in support of the immediate adoption of the described interim controls; and

WHEREAS, the City Council intends that any additional or amended findings made during the meeting at which the proposed interim controls ordinance was heard be incorporated as findings of fact in support of their immediate adoption; and

WHEREAS, it is anticipated that additional or amended findings of fact may be made and incorporated after the public hearing on these interim controls occurs; and

WHEREAS, at a future date the City Council may extend these interim controls for an additional 6 months (up to a total of one year) provided staff has developed a work plan or submitted related studies supporting the longer period and if another public hearing is held and findings of fact are made prior to the renewal; and

WHEREAS, the adoption of this Ordinance is exempt from the requirements of a threshold determination under the State Environmental Policy Act, RCW 43.21C; and

NOW, THEREFORE, the City Council of the City of Sequim do ordain as follows:

Section 1. Interim Controls are Established. The Sequim Municipal Code is immediately amended to establish interim controls as set forth in the attached Exhibit A.

Section 2. Findings. The City Council adopts the recitals set forth above and incorporates those recitals as if fully set forth herein. The City Council also adopts those recitals as findings of fact justifying enactment of this ordinance. The City Council may adopt additional findings when a public hearing is held or when presented with evidence.

Section 3. Duration of Interim Controls. The interim controls established herein are in effect until 6 months from the Effective Date of this Ordinance to **[date]**, and will automatically expire on that date unless repealed, modified, or extended after subsequent public hearing and entry of appropriate findings of fact as provided in RCW 35A.63.220 and RCW 36.70A.390.

Section 4. Public Hearing on Interim Controls. The City Council must hold a public hearing within 60 days of adoption of interim controls. Immediately after the public hearing, the City Council must adopt findings of fact to support continuation of the interim controls, or must repeal or modify the interim controls.

Section 5. Corrections. The City Clerk and the codifiers of this ordinance are authorized to make necessary clerical corrections to this ordinance including, but not limited to, the correction of scrivener's/clerical errors, references, ordinance numbering, section/subsection numbers and any references thereto.

Section 6. Savings Clause. Those portions of Ordinance 2019-004, 2019-006, 2010-006, 2005-022, 2004-015, 2002-014, 2002-014, and 2000-006 which are repealed or amended by this ordinance remain in force and effect until the effective date of this ordinance.

Such repeals and amendments must not be construed as affecting any existing right acquired under the ordinances repealed or amended, nor as affecting any proceeding instituted thereunder, nor any rule, regulation, or order promulgated thereunder, nor the administrative action taken thereunder. Notwithstanding the foregoing actions, obligations under such ordinances or permits issued thereunder and in effect on the effective date of this ordinance continue in full force and effect, and no liability thereunder, civil or criminal, is in any way modified. Further, it is not the intention of these actions to reenact any ordinances or parts of ordinances previously repealed or amended, unless this ordinance specifically states such intent to reenact such repealed or amended ordinances.

Section 7. Severability. If any section, subsection, paragraph, sentence, clause or phrase of this ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, such decision does not affect the validity or constitutionality of the remaining parts of this ordinance.

Section 8. Declaration of Emergency and Effective Date. The City Council hereby declares that an emergency exists necessitating that this Ordinance take effect immediately upon passage by a majority vote plus one of the whole membership of the Council as required by RCW 35A.13.190. Without immediate interim controls transferring certain appeal hearing duties and functions to the City's hearing examiner, the City risks liability if it cannot timely hold appeal hearing(s) in accordance with State law. Therefore, the interim controls must be imposed immediately as an emergency measure to protect the public health, safety and welfare.

PASSED by the City Council of the City of Sequim at _____ meeting held the ____ day of _____, 20__.

William Armacost, Mayor

Attest:

Approved as to form:

Sara McMillon, City Clerk

Kristina Nelson-Gross, City Attorney

Approved Date

Publication Date

Effective Date (Date of Adoption)

EXHIBIT A

20.01.030 Procedures for processing development project permits.

A. Project Permit Application Framework.

Table 1

Procedural Steps	Application Process					
	Type "A" Actions <i>Administrative</i>		Type "B" Actions <i>Hearing Examiner</i>	Type "C" Actions <i>Planning Commission and City Council</i>		
	Type A-1	Type A-2	Type B	Type C-1	Type C-2	Type C-3
Recommendations by:	N/A	N/A	Staff	Staff	Planning Commission	Staff
Notice of Application	No	Yes	Yes	Yes	Yes	No
Public Meeting/ Workshop	—	—	—	—	Planning Commission	—
Open Record Public Appeal Hearing	See Note ^a	See Note ^a	Yes Hearing Examiner	Yes Planning Commission	Yes City Council	No
Final Decision-making Body	Staff ^b	Staff ^b	Hearing Examiner ^b	Planning Commission	City Council	City Council
Appeal Authority	Hearing Examiner ^c City Council	City Council ^d Hearing Examiner	Clallam County Superior Court	City Council	Clallam County Superior Court	Clallam County Superior Court

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^aPublic Appeal hearing only if administrative decision is appealed, open record hearing before hearing examiner. The hearing examiner will prepare appeal hearing rules and procedures in lieu of any city public hearing requirements. Subsequent Appeals of the hearing examiner decision go to Clallam County Superior Court.

^bDenials of permits, boundary line adjustments and variances must be reviewed by the city attorney for legality before becoming final.

^cAppeal authority is the hearing examiner for building and other construction permits; sign permits and boundary line adjustments. Subsequent appeals on these permits to Clallam County Superior Court.

^dSubsequent appeals on city council hearing examiner decisions to Clallam County Superior Court.

Table 2

Application Type					
Type A-1	Type A-2	Type B	Type C-1	Type C-2	Type C-3
Building and other construction permit	SEPA <u>Threshold</u> determination	Variances	Major use permit	Comprehensive plan amendment	Final subdivision map
Sign permit	Minor subdivision		Shoreline permit	Special use permit	Dedication of public easements and rights-of-way
Boundary line adjustment	Minor conditional use permit			SMC land use related text amendment	Acceptance of public improvement
Minor amendments to PRDs	ESA and wetland permits <u>Design Review</u>			Site-specific rezone	
Home occupation				Planned residential developments Major amendments	
Street use					Annexation
ESA, shoreline and wetland exemptions					Street vacation
					Preliminary major subdivisions
		Preliminary binding site plan			

B. Types of Development Permit Applications. For the purpose of project permit processing, all development permit applications are subject to a Type A-1 and Type A-2 process (administrative), Type B process (hearing examiner), or Type C-1, Type C-2 and Type C-3 process (planning commission/city council) as defined in SMC [20.01.020](#). As defined in subsection A of this section, a Type A-1 is an administrative process which does not require public notice; a Type A-2 process is an administrative process which requires public notice; a Type B is a quasi-judicial process which requires a public hearing (the decision-making body for a Type B process is the hearing examiner); Type C-1 processes are quasi-judicial and require public hearings (the decision-making body for Type C-1 processes is the planning commission). Type C-2 are quasi-judicial or legislative and require public hearings (the decision-making body is the city council). Type C-3 are largely ministerial and do not require a public hearing (the decision-making body for Type C-3 is the city council).

C. Exemptions from the requirements of project permit application processing as defined in this chapter are contained in SMC [20.01.070](#).

D. Burden of Proof. During "project permit" or "project permit application" (as defined in SMC [20.01.020\(Q\)](#)) processes as described in this title, the burden of proof is on the proponent or permit applicant. The proponent or applicant must provide convincing evidence to the decision makers that the application conforms to applicable law, including, but not limited to, the Growth Management Act, SEPA, the Sequim Municipal Code, all developmental regulations, and the city's comprehensive plan. The proponent must also present convincing evidence that any significant adverse environmental impacts have been adequately mitigated. (Ord. 2019-004 (Exh. B); Ord. 2019-006 § 1 (Exh. C); Ord. 2010-006 § 1; Ord. 2005-022 § 10; Ord. 2004-015 § 11; Ord. 2002-014; Ord. 2000-006 § 3)

20.01.240 Appeals.

A. Appeal of Administrative Interpretations and Decisions. Administrative 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 appeal of a determination of significance must follow Chapter 43.21C RCW and Chapter 197-11 WAC.

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

C. Appeal of Planning Commission ~~and Hearing Examiner Decisions~~. Decisions of the planning commission ~~or hearing examiner~~ may be appealed, by parties of record from the hearing, to the city council.

D. Recommendations from Planning Commission. The recommendation from the planning commission, after public meetings or workshops, will be the subject of a public hearing at the city council.

E. Procedures for Appeals. Appeals will be conducted, depending on the appeal hearing body, in accordance with the hearing examiner's and city council's rules of procedure and will serve to provide argument and guidance for the body's decision. Appeals to the hearing examiner will also conform to SMC 2.10. ~~The parties to an appeal of a planning commission recommendation may submit timely written statements or arguments.~~

F. Filing. Every appeal shall be filed with the director within 21 days after the date of the decision of the matter being appealed became final. A notice of appeal shall be delivered to the department by mail or personal delivery, and must be received by 4:00 p.m. on the last business day of the appeal period, with the required appeal fee. Appeals of hearing examiner decisions must be given to the Clallam County Superior Court.

G. Contents of the Notice of Appeal to the appropriate Hearing Examiner or the City Council hearing body. The notice of appeal must contain a concise statement identifying:

1. The decision being appealed;
2. The name and address of the appellant and his/her interest(s) in the matter;
3. The specific reasons why the appellant believes the decision to be wrong. The appellant bears the burden of proving the decision was wrong;
4. The desired outcome or changes to the decision; and
5. The appeal fee.

H. Hearing Examiner or City Council Actions on Appeal. Decision following an appeal hearing must include one of the following actions:

1. Grant the appeal in whole or in part.
 2. Deny the appeal in whole or in part.
 3. Remand for further proceedings and/or evidentiary hearing in accordance with SMC 20.01.220.
-

I. Judicial Appeal. Appeals from the final decision of the hearing examiner [for Type A-1, A-2, or B decisions and for](#) the city council on [Type-B](#), Types C-1, C-2 and C-3 procedures and appeals from any other final decisions specifically authorized (subject to timely exhaustion of all administrative remedies) must be made to Clallam County superior court within 21 calendar days of the date the decision or action becomes final, as defined in SMC 20.01.230, unless another time period is established by state law or local ordinance. All appeals must conform with procedures set forth in Chapter 36.70C RCW. The costs of transcribing and preparing all records ordered certified by the court or desired by the appellant for such appeal are borne by the appellant. Prior to the preparation of any records, the appellant must post with the city clerk an advance fee deposit in the amount specified by the city clerk. Any overage will be promptly returned to the appellant. (Ord. 2019-004 (Exh. B); Ord. 2002-014; Ord. 2000-006 § 3)

EXHIBIT B

Sequim council passes ordinance to keep MAT appeal with hearing examiner

City council could hear appeals depending on decision timeline

By Matthew Nash

Tuesday, September 29, 2020 1:30am | [NEWS](#) [CITY COUNCIL](#) [CLALLAM COUNTY](#)

SEQUIM — The Sequim City Council has voted 5-1 to amend the city's code in light of a hearing examiner's comments concerning the process for the Jamestown S'Klallam's application to build a medication-assisted clinic on South Ninth Avenue to treat opioid abuse disorder.

The council first voted during Saturday's special meeting on an emergency version of the ordinance to change the code and then, when that failed, on a regular ordinance.

Mayor William Armacost voted against both versions, while council member Sarah Kincaid abstained on the emergency proposal, saying she did not think it was an emergency, instead of voting no on it.

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The emergency version needed five votes for passage.

How the change impacts the Jamestown S’Klallam Tribe’s proposed medication-assisted treatment (MAT) clinic application depends on when it goes through regulatory channels. That depends on the timing of Hearing Examiner Phil Olbrechts’ final decision.

Olbrechts sent an email Sept. 20 saying he does “not have jurisdiction over consolidated permit hearings that include a (SEPA) appeal” for the application. The decision is not final until Olbrechts issues a temporary interlocutory order.

The council on Saturday voted to revise portions of the Sequim Municipal Code to direct all appeals of Type A-1 and A-2 administrative permit decisions to a hearing examiner.

Appeals to those decisions would then go to Superior Court.

City attorney Kristina Nelson-Gross said the city sought to clarify discrepancies in the code (20.01.030(A) and 20.01.240) that have State Environmental Policy Act (SEPA) determination appeals going to the city council and the rest to a hearing examiner.

“There was internal conflict with the code that the hearing examiner is feeling concerned about,” Nelson-Gross said.

She said city staff disagree with the city-appointed hearing examiner’s opinion, but rather than argue, the ordinance was proposed to fix the code and make all A-1 and A-2 permit appeals go to a hearing examiner.

The ordinance will go into effect five days from publication in the Peninsula Daily News, tentatively set for Oct. 4.

Nelson-Gross said if the council “doesn’t want to hear the appeals, they should (pass the ordinance) under the emergency provision.”

Nelson-Gross said it constituted an emergency ordinance because once Olbrechts submits his decision, it would trigger the appeals process.

She said Oct. 5 or Oct. 6 may be too late, and the council may have to hear appeals instead of the hearing examiner.

Some appellants have testified that, under the Jamestown S’Klallam Tribe’s application, the classification process for appeals should be heard by the city council anyway. City staff has testified that the facility is similar to other clinics and medical buildings and is not classified differently and under staff review.

Barry Berezowsky, Sequim director of community development, approved the tribe’s application in May, and that led to the appeals process and hiring of Olbrechts.

Canceled hearing

Olbrechts canceled a three-day hearing for Sept. 28-30 to hear six appeals about the application, including its classification (city staff review versus city council review), the environmental Mitigated Determination of Nonsignificance (MDNS) SEPA review, and the application as a whole.

Olbrechts said in the email a “reviewing court would very likely overturn my final decision and remand the appeal back to the city council to do the entire process over again.”

Berezowsky said Saturday night the city was required to bundle all of its appeals as one for Olbrechts to hear.

“It’s all or nothing,” he said.

Deputy Mayor Tom Ferrell said Olbrechts’ email was a “curveball” for him, but he still felt a hearing examiner review is the best way to continue.

“I think there is a lot of bias and anger in our community, and this is the most effective way,” he said.

Ferrell also wanted to be fair to the tribe and have the process completed in “a reasonable amount of time.”

He said, “I don’t want to use this as a curveball to bring it back to council.”

Armacost said he voted earlier this year for the council to send appeals to Olbrechts at the late council member Ted Miller’s recommendation, saying the hearing examiner was exceptional.

By voting against the emergency ordinance, Armacost said he “thinks we (councilors) are being anxious” and that he’d like to learn from Olbrechts the legal reasons why he can’t hear the appeal.

“I’d like to hear what he has to say,” Armacost said.

If the process does come back to the city council, Armacost said, they have the experience and business backgrounds to handle it.

Potential

Nelson-Gross said Olbrechts will likely remand the appeals decision back to the city council if his decision comes in before the ordinance changes goes through.

If MAT appeals were to revert to the city council, city staff estimates additional costs of \$42,000 to \$100,000 would be needed for an outside attorney to consult the council on land use prior to the hearing.

Olbrechts had scheduled three full days to hear appeals, and Nelson-Gross anticipates it would take the council longer, possibly seven days, because of a lack of experience with land use decisions.

In their staff notes for Saturday, city staff wrote, “financial damages that result from any missteps could result in additional, significant costs that may not be covered by our risk pool.”

Nelson-Gross said that, in appearance of fairness, if appeals do go to the councilors, they must reveal every contact they’ve had regarding the application, i.e. emails, phone calls, conversations, etc.

She said there isn’t any distrust between staff and councilors regarding this, but “due to the sheer volume” of contacts, there’s a chance for missing a contact.

“That’s cause for significant concern for staff for city liability and personal liability for council,” she said.

Matthew Nash is a reporter with the Olympic Peninsula News Group, which is composed of Sound Publishing newspapers Peninsula Daily News, Sequim Gazette and Forks Forum. Reach him at mnash@sequimgazette.com.



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