

From: [Kristina Nelson-Gross](#)
To: [Phil Olbrechts](#)
Cc: [Murphy, Andy](#); [Michael McLaughlin](#); [Spence, Michael A.](#); [Robert Bilow](#); [Bremer, LeAnne M.](#); [Tellina Sandaine](#)
Subject: RE: CDR20-001 City of Sequim's availability and suggested procedures
Date: Friday, October 9, 2020 11:43:03 AM

Good morning Mr. Olbrechts,

As an initial point of order, the City notes that it received an "out of office" reply from Mr. Murphy yesterday, which indicated he would not be back in the office until Oct. 12th. Consequently, I doubt the Tribe will have the opportunity to provide input by the noon deadline. The City hopes that the Examiner will allow time for the Tribe to submit its suggestions, if any, once Mr. Murphy returns.

With that, below are the City's suggestions and availability dates:

- The hearing should generally be conducted in accordance with SMC 20.01.200 with the following modifications:
 - Limit public comment to the specific conditions contained with the MDNS – new/modified conditions only
 - Repetitive/off-topic comments should not be allowed
 - Comments relating to issues that have been resolved by the Hearing Examiner already, e.g., relevance of in-patient facilities to this application, zoning, etc. should not be allowed
 - Due to COVID – the Examiner could allow for written comments that are limited to the new/modified SEPA conditions, specifically identifying the condition at issue; off-topic comments or comments relating to issues already decided by the Examiner, such as zoning or in-patient facilities, should not be considered
 - Limit "live" commenters to 3 minutes each, with each person speaking only once
 - Appellants SOS, Parkwood, and Bilow should be allowed to participate as members of the general public only
 - If members of an organization want to speak, it should select one representative to speak on behalf of the entire organization
 - Expert testimony should be limited to bona fide experts as set forth in ER 702/ ER 703
- The City requests that the Hearing Examiner acknowledge that the SEPA conditions are agreed upon by the City and the Tribe
 - Briefing should be limited to the City and the Tribe only – limit of 10 pages, and the Parties may submit a joint brief
- The City requests a 1 day hearing, given the limited number of issues
- Each party (City and Tribe) has 1 witness each

The City's availability is as follows (noting that there is a break needed to comply with notice requirements)

- 1-day hearing

- 10/29
- 10/30
- 11/2-11/5
- 3-day hearing
 - 11/2-11/4
 - 11/3-11/5

I am unavailable on 11/6 through 11/11. If you would like additional dates beyond those provided here, please let me know but the City is anxious to get this resolved. Once you have picked a date, the City will proceed with its notice process.

Thank you for giving the City the opportunity to provide input on the upcoming proceedings.

Kind regards,

Kristina

From: Phil Olbrechts <olbrechtslaw@gmail.com>
Sent: Thursday, October 8, 2020 11:04 PM
To: Kristina Nelson-Gross <knelson-gross@sequimwa.gov>
Cc: Murphy, Andy <Andy.Murphy@millernash.com>; Michael McLaughlin <michael@mdmwalaw.com>; Spence, Michael A. <mspence@helsell.com>; Robert Bilow <millrow26@gmail.com>; Bremer, LeAnne M. <LeAnne.Bremer@millernash.com>; Tellina Sandaine <tsandaine@sequimwa.gov>
Subject: Re: CDR20-001 Interlocutory Order on Dispositive Motions

Order attached.

On Thu, Oct 8, 2020 at 4:11 PM Kristina Nelson-Gross <knelson-gross@sequimwa.gov> wrote:

Thank you, that is helpful.

From: Phil Olbrechts <olbrechtslaw@gmail.com>
Sent: Thursday, October 8, 2020 4:10 PM
To: Kristina Nelson-Gross <knelson-gross@sequimwa.gov>
Cc: Murphy, Andy <Andy.Murphy@millernash.com>; Michael McLaughlin <michael@mdmwalaw.com>; Spence, Michael A. <mspence@helsell.com>; Robert Bilow <millrow26@gmail.com>; Bremer, LeAnne M. <LeAnne.Bremer@millernash.com>; Tellina Sandaine <tsandaine@sequimwa.gov>
Subject: Re: CDR20-001 MAT Appeal Hearing Cancelled.

I'm still collecting information on how the hearing should be structured, which includes the information due tomorrow. For availability, I would just identify what dates work for a one day hearing and which work for a three day hearing.

On Wed, Oct 7, 2020 at 11:33 AM Kristina Nelson-Gross <knelson-gross@sequimwa.gov> wrote:

Good morning Mr. Hearing Examiner,

Before I submit my response on availability and the other matters you referenced Friday, can you give me an estimate as to how much time you anticipate for the hearing? It will help me with determining availability.

Kind regards,

Kristina

From: Phil Olbrechts <olbrechtslaw@gmail.com>

Sent: Tuesday, October 6, 2020 10:20 PM

To: Murphy, Andy <Andy.Murphy@millernash.com>

Cc: Michael McLaughlin <michael@mdmwlaw.com>; Spence, Michael A. <mspence@helsell.com>; Kristina Nelson-Gross <knelson-gross@sequimwa.gov>; Robert Bilow <millrow26@gmail.com>; Bremer, LeAnne M. <LeAnne.Bremer@millernash.com>; Tellina Sandaine <tsandaine@sequimwa.gov>

Subject: Re: CDR20-001 MAT Appeal Hearing Cancelled.

As the parties are aware I received the last briefing associated with the dispositive motions yesterday. At this point I've resolved most of the substantive issues and simply have to finish memorializing them in a final ruling. A written ruling should be completed within the next couple days. To keep the schedule moving forward I'm letting the parties know that the ruling will find that the SOS, Packwood and Bilow appeals will be dismissed due to lack of standing. The A-2 process will also be found to be the correct review process and the amendments of Ordinance No. NO.2020-009 are found to apply to this proceeding.

The remaining issue to be resolved is the Tribe and City agreed upon SEPA modifications. My very preliminary impressions on how to review those modification are (1) the modifications must address the grounds for appeal filed by the Tribe, (2) a hearing subject to public comment must be held on the modifications, (3) the Tribe and/or City must present evidence that the modifications are consistent with SEPA requirements, (4) I will have the authority and responsibility to modify the terms if necessary to comply with SEPA, and (5) given that public input on the proposal has been significantly reduced due to my rulings on the dispositive motions, my prior limitations on public comment on the Tribe's SEPA appeal should be broadened to give reasonable time for presentation of expert testimony against the proposed modifications. I did notice that Ordinance No. 2020-009 expands examiner authority to set the ground rules for SEPA appeals. This may authorize procedural rules limiting participation to city, applicant and appellant (none in this appeal when my ruling is issued) in SEPA appeals, should they in a case such as this? If any of the parties, including SOS/Packwood/Bilow, have any concerns, suggestions or argument related to these potential ground rules, please email them by noon this Friday, 10/9/20. I would also appreciate the Tribe and City providing their availability for hearing dates by that time as well. I'm assuming that the Tribe and City will be seeking dates that will provide an opportunity for resolution ASAP consistent with applicable

hearing notice requirements.

On Mon, Oct 5, 2020 at 3:51 PM Phil Olbrechts <olbrechtslaw@gmail.com> wrote:

Thank you Mr. Murphy. I should have a written ruling addressing most, if not all, summary judgment motion issues as well as the issues raised in last week's briefing out sometime tomorrow, maybe not until tomorrow evening.

On Mon, Oct 5, 2020 at 3:32 PM Murphy, Andy <Andy.Murphy@millernash.com> wrote:

Mr. Olbrechts,

As Parkwood essentially joined in SOS's brief for Parkwood's opening brief in response to the code changes, the Tribe incorporates its response to SOS's brief as the Tribe's response to Parkwood.

Best,
Andy

Andy Murphy

Attorney (Pronouns: he/ him/ his)

Miller Nash Graham & Dunn LLP

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From: Michael McLaughlin <michael@mdmwlaw.com>

Sent: Friday, October 2, 2020 1:44 PM

To: Phil Olbrechts <olbrechtslaw@gmail.com>

Cc: Spence, Michael A. <mspence@helsell.com>; Kristina Nelson-Gross <knelson-gross@sequimwa.gov>; Robert Bilow <millrow26@gmail.com>; Murphy, Andy <Andy.Murphy@MillerNash.com>; Bremer, LeAnne M. <LeAnne.Bremer@MillerNash.com>; Tellina Sandaine <tsandaine@sequimwa.gov>

Subject: RE: CDR20-001 MAT Appeal Hearing Cancelled.

Mr. Olbrechts,

I appreciate the congratulations both from you and on behalf of the City regarding my son's

birth.

Parkwood will not be submitting additional briefing concerning the City's interim/emergency ordinance. Instead, it supports and will rely on the legal analysis submitted by Save our Sequim on this issue. Attached is a letter prepared by my client in my absence confirming the same.

Thank you,

Michael D. McLaughlin

Attorney at Law

Michael D. McLaughlin, PLLC

4114 N 10th St
Tacoma WA 98406
PH: (253) 686-9786



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From: Phil Olbrechts <olbrechtslaw@gmail.com>

Sent: Wednesday, September 30, 2020 6:39 AM

To: Michael McLaughlin <michael@mdmwlaw.com>

Cc: Spence, Michael A. <mspence@helsell.com>; Kristina Nelson-Gross <knelson-gross@sequimwa.gov>; Robert Bilow <millrow26@gmail.com>; Andy Murphy <andy.murphy@millernash.com>; LeAnne Bremer <leanne.bremer@millernash.com>; Tellina Sandaine <tsandaine@sequimwa.gov>

Subject: Re: CDR20-001 MAT Appeal Hearing Cancelled.

Congratulations to Mr. McLaughlin. I think the Tribe and City will have to concede that Mr. McLaughlin's good fortune was not designed to delay these proceedings.

Nonetheless, it would not be reasonable to the Tribe to wait until after October 19, 2020 to resolve the jurisdictional issues of this case. More than 120 days have already elapsed since the last set of appeals were filed. Further, SOS likely has the same interests as Packwood in promoting Council jurisdiction over the appeals, so SOS has likely already covered Packwood's arguments in its briefing over the emergency ordinance. In any event, if Packwood would still like to add to the briefing, it can do so by 5 pm this Friday, 10/2/20. Responses due 5 pm 10/5/20 and replies 10/6/20. I will try to at the least

have an abbreviated ruling on all dispositive issues out by 10/7/20. If at that point the appeals haven't all been dismissed and I still otherwise have jurisdiction we'll discuss scheduling shortly thereafter.

I will likely approve any alternate schedule mutually agreed upon by all parties.

On Tue, Sep 29, 2020 at 4:00 PM Michael McLaughlin <michael@mdmwlaw.com> wrote:

Hi Mr. Olbrechts,

My wife went into labor over the weekend and delivered our child yesterday. We were just released from the hospital earlier today and, while I expect my son will be healthy, there were a few minor complications that have required scheduling additional follow-up visits and procedures more than are typically required. In fact, I am at one right now. For this reason, I have been unable to review the City's actions this weekend or prepare a response on Parkwood's behalf by today's deadline.

As I stated in June to the City and during our scheduling call, I am unavailable at this time continuing until Monday, October 19, 2020.

Thank you,

Michael

Sent from my iPhone

On Sep 27, 2020, at 9:58 AM, Spence, Michael A. <mspence@helsell.com> wrote:

Thank you, and sorry to bother you on a Sunday.

Michael A. Spence | Helsell Fetterman LLP

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Seattle, WA 98154

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From: olbrechtslaw@gmail.com <olbrechtslaw@gmail.com>
Sent: Sunday, September 27, 2020 9:56 AM
To: Spence, Michael A. <mspence@helsell.com>
Cc: Kristina Nelson-Gross <knelson-gross@sequimwa.gov>; Robert Bilow <millrow26@gmail.com>; Andy Murphy <andy.murphy@millernash.com>; LeAnne Bremer <leanne.bremer@millernash.com>; Michael McLaughlin <michael@mdmwlaw.com>; Tellina Sandaine <tsandaine@sequimwa.gov>
Subject: Re: CDR20-001 MAT Appeal Hearing Cancelled.

That would be fair given the change in circumstances, but I don't want to create any more delay. Any supplemental briefing will be due by 5 pm Tuesday, 9/29/20, responses 5 pm Wednesday 9/30/20 and replies 5 pm Thursday, 10/1/20. If any parties have conflicts with this schedule (which would be entirely understandable), please let me know. Once I get information on the publication date of the ordinance I'll have a better understanding of how much time we have to resolve prehearing issues before holding the hearing.

On Sun, Sep 27, 2020 at 9:13 AM Spence, Michael A. <mspence@helsell.com> wrote:

Mr. Examiner:

Will you accept a short supplemental brief in response to what the City did yesterday?

Michael A. Spence | Helsell Fetterman LLP

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From: olbrechtslaw@gmail.com <olbrechtslaw@gmail.com>

Sent: Saturday, September 26, 2020 8:26 PM

To: Kristina Nelson-Gross <knelson-gross@sequimwa.gov>

Cc: Robert Bilow <millrow26@gmail.com>; Andy Murphy <andy.murphy@millernash.com>; LeAnne Bremer <leanne.bremer@millernash.com>; Michael McLaughlin <michael@mdmwalaw.com>; Spence, Michael A. <mspence@helsell.com>; Tellina Sandaine <tsandaine@sequimwa.gov>

Subject: Re: CDR20-001 MAT Appeal Hearing Cancelled.

Attached is my order apparently rendered moot by the Council's amendments this evening. I was literally less than an hour from finishing the order when I received the notice. I'm sorry to see the Council had to work on a Saturday evening to address this issue, but as I mentioned earlier it's best this issue be fully addressed now as opposed to on judicial appeal after everyone has spent considerable time and money in what would likely have been found to be the wrong decision making forum. I've still issued the order to provide a full accounting for why I dismissed the September 28 hearing.

I have not yet seen the amendments. Assuming the amendments grant examiner jurisdiction over consolidated SEPA appeals, we will set a new appeal hearing date early next week. I should have my ruling on the remaining dispositive motion issues done by the end of next week. Note that the mootness issue raised by the Tribe is addressed in the attached moot order.

On Sat, Sep 26, 2020 at 7:25 PM Kristina Nelson-Gross <knelson-gross@sequimwa.gov> wrote:

Good evening Mr. Olbrechts,

Please be advised that the City Council held a Special Meeting tonight and passed an interim controls ordinance transferring all A-1 and A-2 appeals to the Hearing Examiner. The ordinance will be effective five days after publication. I will send you a signed copy of the ICO for your records once it is available. Please let me know if you have any further questions.

Kind regards,

Kristina Nelson-Gross
City Attorney
<image001.png>

From: Phil Olbrechts <olbrechtslaw@gmail.com>

Sent: Sunday, September 20, 2020 10:13 PM

To: Robert Bilow <millrow26@gmail.com>

Cc: Andy Murphy <andy.murphy@millernash.com>; Kristina Nelson-Gross <knelson-gross@sequimwa.gov>; LeAnne Bremer <leanne.bremer@millernash.com>; Michael McLaughlin <michael@mdmwalaw.com>; Michael Spence <mspence@helsell.com>; Tellina Sandaine <tsandaine@sequimwa.gov>

Subject: Re: CDR20-001 MAT Appeal Hearing Cancelled.

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 the appeal back to the City Council to do the entire process over again. Ultimately, correcting course at this time is the only way to prevent what would otherwise be an even more significant unnecessary loss of time and money for all parties. If my

ruling is contrary to the wishes of the City Council, the Council may still have the option of amending its code to delegate decision making responsibility on SEPA appeals to the hearing examiner. Procedural rules, which likely includes appellate jurisdiction, is not subject to the vested rights doctrine. *See Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wn. App. 98 (2011).

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

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