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October 9, 2020

**VIA E-MAIL**  
**OLBRECHTSLAW@GMAIL.COM**

Phil Olbrechts  
Hearing Examiner  
City of Sequim  
152 W Cedar St.  
Sequim, WA 98382

Subject: MDNS appeal of Jamestown Healing Clinic

Dear Mr. Olbrechts:

On behalf of the Jamestown S'Klallam Tribe (the "Tribe"), this letter responds to your October 6, 2020 email regarding the next steps for the resolution of the Tribe's appeal of the MDNS issued for the Jamestown Healing Clinic (the "Project"). You identified several "very preliminary impressions" on how to resolve the Tribe's appeal following the dismissal of the other appellants (the "Project Opponents"), and the Tribe's responses to those impressions are below.

In summary, because the parties to the Tribe's appeal have settled their dispute in a SEPA-compliant manner, there is no need for a hearing of any sort and certainly not one in which non-parties may call witnesses. The Tribe asks the Examiner to incorporate the MDNS conditions as agreed upon by the City and Tribe (the "Settlement") in the final order resolving these consolidated proceedings.

**The Examiner has the authority and responsibility to modify the conditions.**

SMC 2.10.080.B provides you with the authority to modify the MDNS conditions. That code provision empowers you to "approve, deny, or *approve with such conditions, modifications*, and restrictions as the hearing examiner finds necessary to make the application compatible with its environment, the comprehensive plan, other official

policies, objectives, and land use regulatory enactments." Thus, you can approve the MDNS as modified by the Settlement.

The Tribe complied with the City's appeal procedures to challenge certain MDNS conditions for violating SEPA, and you have jurisdiction over the Tribe's appeal. It is thus your responsibility to ensure the MDNS conditions appealed by the Tribe comply with SEPA. See Jamestown S'Klallam Tribe's Motion for Summary Judgment ("Tribe MSJ") at 28–30 (citing *Boehm v. City of Vancouver*, 111 Wn. App. 711, 714, 47 P.3d 137 (2002); *Levine v. Jefferson Cty.*, 116 Wn.2d 575, 580, 807 P.2d 363 (1991)).

**The Settlement resolves the Tribe's appeal and complies with SEPA.**

As described in the Tribe's Notice of Appeal and its Motion for Summary Judgment, the MDNS conditions currently violate SEPA. Tribe MSJ at 27–32. The City imposed conditions to mitigate "potential" impacts from the Project, not the probable significant adverse impacts that SEPA requires. *Id.* at 28–30. Further, the "potential" impact the City identified as the basis for twenty MDNS conditions was an impact to public services. *Id.* at 12–14. But the City properly concluded in its SEPA review that the Project would cause, at most, "negligible" impacts to public services. *Id.*

The best evidence of how the Project does not cause probable significant adverse impacts to public services was the City Police Department's review of facilities comparable to the Project located in cities comparable to Sequim. The Police Department found clinics like the Tribe's do not cause adverse impacts but may yield benefits. *Id.* at 13. Negligible impacts are not significant, so the City violated SEPA when it relied on negligible "potential" impacts to impose conditions in the MDNS. Resolving the Tribe's appeal does not require expert testimony at a hearing, but instead requires applying SEPA to the record before the Examiner.

Whether the modifications in the Settlement comply with SEPA is a legal issue. The Settlement complies with SEPA by striking conditions that violate SEPA. Further, the conditions imposed by the Settlement are voluntarily assumed by the Tribe as allowed by WAC 197-11-660(1)(d) ("Voluntary additional mitigation may occur."). As a continuation of its longstanding service to the Sequim community, the Tribe has gone above and beyond what SEPA requires of it. This includes voluntarily posting a \$250,000 bond and annually providing \$100,000 of funding for the City to hire a social navigator to better serve vulnerable members of the Sequim community. Forcing any of the appealed conditions on the Tribe violates SEPA, but the Tribe may assume the conditions it has volunteered in the Settlement.

**A hearing is not required to adopt the Settlement.**

The Settlement is acceptable to the City, the other party to the Tribe's appeal. That means all parties to the last pending appeal in this consolidated matter have resolved their differences. Forcing the parties to hold a hearing regarding their Settlement will unnecessarily prolong and complicate the resolution of this matter. If the Examiner has legal concerns regarding the Settlement, those can be efficiently resolved through briefing.

No other party has standing to participate in the Tribe's appeal, as confirmed by the Examiner's ruling dismissing the Project Opponents' appeals. SMC 20.01.090.F limits appeals of A-2 decisions to the "applicant or other party of record who may be aggrieved by the administrative decision." The Project Opponents and other members of the public lack standing under this provision, so they lack standing to participate in the appeal. Further, because they lack standing in the appeal, they lack grounds to object to the Settlement.

**Non-parties should not be allowed to call witnesses.**

You suggested non-parties should be allowed to call expert witnesses regarding the Settlement, but that would impermissibly prejudice the Tribe (and the City). The Examiner set a schedule that requires witness disclosure along with the substance of the witnesses' testimony. The schedule further allows the Tribe to identify rebuttal witnesses following that initial witness disclosure. This allows the Tribe to prepare an adequate defense. Allowing non-parties to call surprise expert witnesses will prevent the Tribe from fairly preparing its case.

**No further public participation is needed to adopt the Settlement.**

SEPA does not require further public comment before the Examiner may adopt the conditions in the Settlement. SEPA requires additional public comment when the City must reissue a MDNS, but that occurs when there are "[s]ubstantial changes to a proposal" or there is "[n]ew information indicating a proposal's probable significant adverse environmental impacts." WAC 197-11-600(3)(b). The Project has not changed, and it still does not cause probable significant adverse environmental impacts. The City need not reissue the MDNS, so SEPA requires no further public comment on the conditions as revised by the Settlement.

Because SEPA does not require further public comment, the Examiner should not either. The Examiner has correctly concluded he has authority to set rules for this appeal. The

code, both before and after the City Council adopted Ordinance No. 2020-009, provides the Examiner with that authority. Under SMC 20.01.240.B, appeals of SEPA determinations are heard in a public hearing. SMC 20.01.200, which provides the procedures for public hearings, states "[p]ublic hearings shall be conducted in accordance with the hearing body's rules of procedure[.]" Here, that would be the Hearing Examiner's rules. SMC 20.01.200 further describes a format that applies "in general" for public hearings, which includes a place for public comment or public testimony on topics "germane to the matter." Because public comment applies "in general" but not universally, the Hearing Examiner can eliminate public comment.

The Examiner should not hold a hearing to adopt the Settlement, but if he does, the hearing should not include public comment. The Project has already been subject to more than enough public input and no more is required. In addition to the numerous public meetings regarding the Project, the City received 1,358 pages of public comment about the Project generally,<sup>1</sup> and received 282 pages of public comment for the MDNS specifically.<sup>2</sup> Aside from the Tribe, only SOS and Parkwood appealed the MDNS, and their appeals have been dismissed. They should not be able to resurrect their participation in the Tribe's appeal, especially after the Examiner has concluded they lack a fundamental quality to participate in an appeal: standing.

The Tribe appreciates the Examiner's desire to allow the public's voice to be heard, but it cannot come at the expense of the Tribe. The Tribe volunteered the conditions in the Settlement, so they cannot be further modified without the Tribe's consent. WAC 197-11-660 does not allow the City to impose conditions on a project that does not cause environmental impacts unless the applicant volunteers the conditions. If the conditions are modified beyond what the Tribe has volunteered, that would violate WAC 197-11-660. The Tribe voluntarily assumes the conditions it has jointly proposed with the City, and not any others. Public comment on the Settlement conditions would thus not provide a basis to modify the conditions, so public comment would be superfluous to the resolution of the Tribe's appeal. Instead, the Tribe's appeal should be resolved by the Hearing Examiner adopting the conditions as agreed upon by the City and Tribe.

Moreover, because the Project Opponents' appeals have been dismissed, the public comment period would likely become an airing of grievances over the Project in general and the Examiner's decision regarding dismissal, not whether the Settlement complies with SEPA. Public comment on the Settlement will likely turn the proceeding into an

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<sup>1</sup> <https://www.sequimwa.gov/DocumentCenter/View/15588/1All-Public-Comments>

<sup>2</sup> <https://www.sequimwa.gov/DocumentCenter/View/15587/3All-SEPA-Comments>

Phil Olbrechts  
October 9, 2020  
Page 5

unnecessarily long and hostile proceeding with abundant issues discussed that are not "germane to the matter" of the Tribe's appeal. The Examiner can avoid that unnecessary outcome by incorporating the Settlement into his final order.

**The Tribe's availability for a hearing.**

The Examiner has asked for the Tribe's availability for a hearing. Should the Examiner schedule a hearing, the Tribe asks the Examiner to provide the parties with at least two weeks of time to prepare following issuance of the Examiner's final ruling on the dispositive motions. With that timing in mind, the Tribe's counsel or witnesses are not available to participate in a hearing on October 19, 23, 26–28, November 2–4, and 9.

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The Tribe appreciates the opportunity to respond to the Examiner's initial impressions regarding the resolution of the Tribe's appeal. The Tribe looks forward to that resolution, and welcomes the opportunity to address any other questions or concerns the Examiner may have.

Very truly yours,



Andy Murphy

cc: Kristina Nelson-Gross  
Tellina Sandaine  
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LeAnne Bremer