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FETTERMAN

February 12, 2020

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Barry Berezowsky, Community Development Director
City of Sequim
152 W. Cedar St.
Sequim, WA 98382

HAND DELIVERED

Re: Appeals of Notice of Determination of Procedure Type, dated January 24, 2020

Dear Mr. Berezowsky:


As you know, this firm represents Save our Sequim (SOS), a large group of City residents who are deeply concerned about your decision to process the Jamestown S'Klallam Tribe's proposed drug rehabilitation facility using the A-2 process.

Enclosed please find a copy of the Notice of Appeal on behalf of SOS. Enclosed please also find a check for \$600.00 for the Hearing Examiner appeal fee, as directed in your January 24 determination. Per your instructions, this appeal is being filed under SMC 20.01.240(A) and other applicable authorities

We look forward to the full and timely cooperation of your department regarding the processing of this appeal.

I may be reached at mspence@helsell.com or at (206) 689-2167 with any questions or comments.

Very truly yours,


Michael A. Spence

MAS:lrp
Attachments
cc: William Armacost, Mayor, City of Sequim

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

In re:

NOTICE OF DETERMINATION OF
PROCEDURE TYPE FOR FILE NO. CDR20-
001

JAMESTOWN S'KLALLAM TRIBE MAT
CLINIC BUILDING PERMIT, SEPA AND
DESIGN REVIEW

File No.: CDR 20-001

NOTICE OF APPEAL

This matter involves an appeal of the Notice of Determination of Procedure Type for City of Sequim Department of Community Development File No. CDR20-001, involving a proposed drug rehabilitation facility on real property commonly known as 526 S. 9th Ave., Sequim, WA 98382 (the "Determination"). This appeal is being filed pursuant to Sequim Municipal Code (SMC) Section 20.01.240(A), which provides in part that, "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". To the extent it applies, it is also being filed pursuant to SMC Section 20.01.040(A), which provides that "The act of classifying an application shall be a Type

1 A-1 action. Classification of an application shall be subject to reconsideration and appeal at the
2 same time and in the same way as the merits of the application in question.”
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4 **1. The Decision Being Appealed:**

5 Notice of Determination of Procedure Type for File No. CDR20-001, regarding the proposed
6 Jamestown S’Klallam Tribe Mat Clinic Building Permit, SEPA and Design Review dated
7 January 24, 2020. (the “Notice of Determination”). A copy of the Notice of Determination is
8 attached as Exhibit “A” and incorporated herein by reference.
9

10
11 **2. Name and Mailing Address of Appellant and his/her interest(s) in the matter:**

12 **Save Our Sequim**
13 c/o HELSELL FETTERMAN LLP
14 1001 Fourth Ave., Suite 4200
15 Seattle, WA 98154
16 Att: Michael Spence

17 The Petitioner Save Our Sequim (“SOS”) is a 501(c)(4) corporation in good standing in the State
18 of Washington. SOS is supported by over 2,500 residents of Sequim and the surrounding area
19 and representatives have been heavily and intensely involved in the public process surrounding
20 the proposed project since it was first announced on May 6, 2019. Representatives of SOS have
21 provided significant and substantive oral and written testimony in public hearings of the Sequim
22 City Council and have been engaged in significant advocacy outside of this setting. SOS is not
23 categorically opposed to the siting of a drug rehabilitation facility serving the local community
24 somewhere in the Sequim area, however SOS believes that the proposed location for a regional
25 drug rehabilitation facility is inappropriate in this location for reasons that will be set forth in
this appeal. All administrative remedies have been exhausted to date.

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3. The specific reasons why the appellant believes the decision to be wrong.

A. The administrative A-2 permitting process is inappropriate for this application because the proposed project meets the definition of an Essential Public Facility, which can only be approved by the City Council.

Essential Public facilities are defined in Washington’s Growth Management Act as:

“... those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, regional transit authority facilities as defined in RCW 81.112.020, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.RCW.” RCW 36.70A.200(1).
(Emphasis added)

SMC Chapter 18.56 governs the siting of essential public facilities within the City. SMC

Section 18.56.040 requires an “essential public facilities and special property use permit”

which is granted by the City Council before one can be sited in the City:

18.56.040 Permit required.
Essential public facilities and special property uses shall be allowed within certain use zones after obtaining an essential public facilities and special property use permit granted by the city council. (Emphasis added)

The City’s determination that the proposed project qualifies for the administrative A-2

permitting process is inconsistent with this legislation and is therefore in error.

B. The proposed project is not a permitted use in the RREOA District because it is more accurately described as an “alcohol or drug treatment center” and a “detoxification center”, as opposed to a facility providing “ambulatory and outpatient care services (physicians, outpatient clinics, dentists)”.

1 Prior to filing their applications, the Applicant widely described the proposed project as the
2 “Jamestown Healing Campus”, a facility that “addresses this (opioid) problem and serves the
3 health care needs of the North Olympic Peninsula community”, the goal of which is to
4 “decrease opioid overdoses and the illegal diversion of prescription drugs into the community”
5 by “providing chemical dependency counseling, behavioral health, primary care and childcare
6 assistance”.

8
9 However, in response to community opposition by Appellant and others, the Applicant has
10 attempted to rebrand the project as the “Jamestown S’Klallam Tribe Outpatient Clinic”. In the
11 actual application, the Applicant describes the proposed project as “a 17,093 square foot
12 outpatient clinic designed to provide a wide range of addiction treatment services to those
13 in the local and surrounding Sequim community. The Building will also offer childcare
14 and provide social services to patients to help facilitate their recovery.” Physically, the
15 proposed building will feature three exam rooms, twelve counseling rooms, a pharmacy,
16 three individual dosing rooms, four large group rooms that can open to the exterior and a
17 conference room with administrative facilities. It will also feature three “operatories”, a
18 bariatric exam room, a “nurse station lab” and a “child watch” area.

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21 Appellants submit that the proposed project as described is an “alcoholism or drug treatment
22 center”, or as a “detoxification center”. Under SMC 18.56.030(j), these uses can only be
23 permitted by the City Council. In addition, two of the proposed uses of the facility -
24 laboratories and child care centers - are listed as conditional uses in the RREOA District
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1 under SMC 18.33.031. As such, the City's determination that this project qualifies for the
2 administrative A-2 permitting process is erroneous.

3
4 **C. The City's conclusion that the proposed project is exclusively an 'outpatient treatment
5 facility' is incorrect and not supported by the facts or the law.**

6 Prior to filing the applications, the Applicant widely promoted the concept that a 16-bed
7 "inpatient evaluation and treatment psych hospital" will be included in a 'second phase' of the
8 proposed project. This notion is consistent with the Applicant's state funding, which includes
9 funds dedicated to this second phase of the project. The Applicant actually admits this fact in
10 response to Question 7 in their Environmental Checklist, stating that "... In the future facility
11 expansion or additional services may be added to the residual site, if the needs arise."
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14 Despite this funding provision and despite this admission by the Applicant, the City believes
15 that this project is exclusively an 'outpatient clinic'. This decision is erroneous because of the
16 direct link between the first phase outpatient facility and the second phase inpatient facility.

17 Inpatient facilities are not a permitted use in the RREOA District under SMC 18.33.031.

18 Piecemeal review of land use decisions is impermissible where a series of interrelated steps
19 constitutes an integrated plan. The City's conclusion that the proposed project is only an
20 'outpatient facility' is therefore in error.
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23 **D. The City's conclusion that the proposed project is not 'difficult to site' is incorrect and not
24 supported by the facts or the law.**

1 In its Determination, the City states that the proposed project does not qualify as an Essential
2 Public Facility because it is not “difficult to site”. In support of this proposition, the City
3 claims that since it has approved other medical facilities without opposition or difficulty, this
4 project is easy to site and therefore does not qualify as an Essential Public Facility. This
5 position is erroneous because it assumes that this proposed facility is a medical clinic as
6 opposed to an “alcoholism or drug treatment center”, or a “detoxification center”.
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9 Since this facility is more the latter than the former, this determination is erroneous. It is
10 also erroneous because it completely ignores the fact that this project has been extremely
11 controversial in the community, as evidenced by the public outcry, a 2,600 signature petition
12 against the project, the existence of the Appellant and by the filing of this appeal.
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15 E. The City’s conclusion that the review of the proposed project does not involve ‘substantial
16 discretion’ is incorrect and is not supported by the facts or the law.

17 The City also claims in its Determination that the C-2 permitting process is inappropriate
18 because this project does not require ‘substantial discretion’ to approve. This position again
19 assumes that the proposed project is a medical clinic as opposed to an “alcoholism or drug
20 treatment center”, or “detoxification center”. Since alcoholism or drug treatment centers or
21 detoxification centers require City Council approval under SMC 18.56.030(j), they are by
22 their nature discretionary. In addition, the characterization of this project as a ‘medical
23 clinic’, or an ‘alcoholism or drug treatment center’ or a ‘detoxification center’, or even as an
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1 'ambulatory or outpatient clinic', also involves substantial discretion. The City's conclusion
2 that 'substantial discretion' is not involved is therefore erroneous.

3

4 F. Neither the Americans with Disabilities Act (ADA) nor the Rehabilitation Act of 1973 bind
5 the City to approve the proposed project in the location contemplated by the Applicant.

6 In its Determination, the City also claims that it is bound to approve this application under the
7 A-2 permitting process by case law interpreting the Americans with Disabilities Act and the
8 Rehabilitation Act of 1973. But none of that case law is applicable to the State of Washington,
9 and none of it stands for the proposition that this project must be approved administratively
10 under the A-2 process. This City's interpretation of the substantive law applicable to this
11 project is also not relevant or applicable. As such, the City is not bound to approve this project
12 administratively under this law and its Determination is erroneous in this regard.
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15 **4. The Desired Outcome or changes to the Decision:**

16 Appellants therefore respectfully request the following relief:

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18 1. That the Examiner enter findings of fact that the proposed project is an Essential Public
19 Facility, which requires City Council approval under the C-2 process or a comparable process.

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21 2. That the Examiner enter findings of fact that the proposed project is not a permitted use in
22 the RREOA District because it is more accurately described as an "alcohol or drug treatment
23 center" and a "detoxification center", than as an "ambulatory and outpatient care services
24 (physicians, outpatient clinics, dentists)".

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3. That the Examiner enter finding of facts that the proposed project also includes a child care center, a laboratory and an inpatient facility, none of which are permitted uses in the RREOA District.

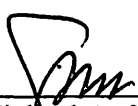
4. That the Examiner enter findings of fact and conclusions of law that the City is not bound to the A-2 permitting process or to the substantive administrative approval by the case law cited in the Determination.

5. That the Examiner remand the Determination back to the City with instructions to process this application under the C-2 permitting process, or under any other process that requires City Council approval.

6. Any other relief the Examiner deems to be just and equitable.

DATED this 12th day of February, 2020

HELSELL FETTERMAN LLP



Michael A. Spence, WSBA No. 15885
Samuel Winninghoff, WSBA No. 46825
David Tran, WSBA No. 50707
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**NOTICE OF DETERMINATION OF PROCEDURE TYPE FOR
FILE NO. CDR20-001
JAMESTOWN S'KLALLAM TRIBE MAT CLINIC BUILDING PERMIT, SEPA
& DESIGN REVIEW**

DATE: 1/24/2020

Introduction: According to the Sequim Municipal Code (SMC)20.01.040(B) "[t]he director shall determine the proper procedure for all development applications. If there is a question as to the appropriate type of procedure, the director shall resolve it in favor of the higher procedure type letter as defined in SMC 20.01.030."

The act of classifying an application is a Type A-1¹ action and such permit classification "... shall be subject to reconsideration and appeal at the same time and in the same way as the merits of the application in question." (SMC 20.01.040(A))

Decision: After reviewing the Medical Assisted Treatment (MAT) clinic application and supporting materials submitted by the Jamestown S'Klallam Tribe, I find that there is no question as to the appropriate type of procedure the application will be subjected to, and therefore I find the permit, as submitted, falls under the City's A-2² permit process. The Jamestown S'Klallam Tribe is proposing to build a medical clinic in the River Road economic Opportunity Area (RREOA)³ According to Table 18.33.031 Business and Employment District Uses "[a]mbulatory and outpatient care services (physicians, outpatient clinics, dentists" are uses that are permitted outright⁴. Therefore, the Tribes proposed Medically Assisted Treatment (MAT) clinic is a permitted use because it meets the definition of a medical clinic in the City's zoning code⁵. My decision is based on a review of the City's code, state and federal law and past practices.

¹ A Type A-1 process is an administrative process that does not require public notice (SMC 20.01.030(B)).

² A Type A-2 process is an administrative process which requires public notice (SMC 20.01.030(B))

³ The City's Economic Opportunity Areas were designated in 2015, well before the passage of President Trump's Tax and Jobs Act that created the process by which each State Governor could designate Economic Opportunity Zones. The RREOA provides no financial or tax incentive or benefit to developers or investors in the zoning district.

⁴ A permitted (P) use is one that is permitted outright, subject to all the applicable provisions of this title and relevant portions of the Sequim Municipal Code

⁵ "Clinic" means a building designed and used for the diagnosis and treatment of human outpatients excluding overnight care facilities (SMC 18.08.020).

Discussion: The Tribe’s MAT clinic application consists of a building permit, design review and State Environmental Policy Act (SEPA). A building permit is a Type 1⁶ application, SEPA review is considered a Type 2⁷ application, therefore, the Type 2 process is used for the subject application.⁸ The C-1, C-2 or C-3 permit types in Table 2 below do not contain a process within which the Tribes MAT clinic fits, unless one considers the application to be a “special use”.⁹ As discussed below, the subject application is not a special use or Essential Public Facility (EPF) because, first, the facility is not an “in-patient substance abuse facility”¹⁰, second, it is not “difficult to site”, and third, the courts have a long history of requiring local government to treat drug treatment clinics and offices as they treat other medical clinics and offices.

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 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			City land use related text amendment	Acceptance of public improvement
Minor amendments to PRDs	ESA and wetland permits			Site-specific rezone	Planned residential developments Major amendments
Home occupation				Annexation	
Street use				Street vacation	
ESA, shoreline and wetland exemptions		Preliminary major subdivisions		Preliminary binding site plan	

Arguments have been made that the Tribe’s proposed MAT clinic is an essential public facility and, therefore, should be processed according to the City’s C-2 permitting process. The theory is that the City’s code lists “alcoholism or drug treatment centers” as uses “[t]he council may permit ... in districts from which they are now prohibited by this title”.¹¹ Because the SMC does not include a definition of “drug treatment centers” one needs to look to the applicable sections of the Revised Code of

⁶ SMC 20.010.020T. “Type A-1 process” means a process which involves an application that is subject to clear, objective and nondiscretionary standards that require the exercise of professional judgment about technical issues and therefore does not require public participation

⁷ SMC 20.010.020U. “Type A-2 process” means a process which involves an application that is subject to objective and subjective standards that require the exercise of limited discretion about non-technical issues and about which there may be a limited public interest.

⁸ Design review is not a permit, but instead a process to provide guidance and standards for the site and structural development of commercial, industrial, mixed-use and multifamily projects ...” SMC 18.24.010

⁹ Special uses are treated similarly to essential public facilities in SMC 18.56

¹⁰ WAC 365-196-550viii lists “in-patient facilities, including substance abuse facilities as EPFs.

¹¹ SMC 18.56.030

Washington (RCW) and the Washington Administrative Code (WAC) for an understanding of what the legislation contemplated this type of essential public facility to be.

According to WAC 365-196-550(a) “[t]he term “essential public facilities” (EPF) refers to public facilities that are typically difficult to site.” WAC 365-196-550 lists the types of facilities that are considered essential public facilities in the state. The use most like the SMC referenced “drug treatment centers” is “[i]n-patient facilities, including substance abuse facilities;...”¹² (emphasis added). According to the submitted application the proposed MAT clinic will not provide in-patient services, but instead will provide outpatient treatment typical of other types of medical clinics and/or offices. The fact that the MAT clinic will treat recovering opioid addicts is irrelevant to whether the facility is an EPF under state or local law.

Furthermore, RCW 36.70.200(1) defines EPFs as “those facilities that are difficult to site,…” and it is difficult to conclude the siting a 16,700 square foot medical clinic is “difficult”. The City has approved a number of medical clinics over the past 30 years with no difficulty and, except for the outcry by some members of the public, there is no evidence that this drug treatment clinic is more difficult to site than any of the medical clinics previously approved by the City¹³ or any other office or commercial building of a similar size, such as Rite Aid (17,272 sq. ft.) or Walgreens (14,470 sq. ft) or the much larger Jamestown Family Clinic¹⁴ (~35,000 sq. ft.).

Finally, even if one could conclude that the proposed MAT clinic was actually an essential public facility subject to the City’s conditional use process, at best the City could only condition the approval of the project because state law prohibits local government from precluding the siting of essential public facilities¹⁵ and/or imposing unreasonable conditions that make the project impracticable.¹⁶

Analysis of the city’s and state’s essential public facilities language leads me to conclude that the proposed 16,700 square foot MAT clinic does not meet the definition of an EPF and is, instead, only distinguished from any other clinic or office providing medical services by way of the nature of the patient’s medical condition and medical therapy.

To further illustrate, SMC 18.56.030(J), upon which some opponents rely states as follows, emphasis added:

The council may permit the following uses in districts ***from which they are now prohibited*** by this title:

J. Group homes, ***alcoholism or drug treatment centers***, detoxification centers, work release facilities for convicts or ex-convicts, or other housing serving as an alternative to incarceration with 12 or more residents.

¹² WAC 365-196-550(viii)

¹³ File Reference number DRB16-001 (Design Review Application) & SEPA 16-006 (SEPA Checklist), Sequim Retina Properties, June 3, 2016; Notice of Environment Review, SEPA File# 09/001, Mitigated Determination of Non-Significance, Jamestown S’Klallam Tribe, 02/10/09; SEPA Checklist, Olympic Memorial Hospital, Sequim Outpatient Clinic, 1988.

¹⁴ Interestingly, the Tribe has advised that this clinic has been using medically assisted treatment at this facility for at least the past 18 months and merely seeks to consolidate services.

¹⁵ RCW 36.70A.200(5)

¹⁶ Cascade Bicycle, 07-3-0010c, FDO at 17.

Notably absent from the opponents' analysis is the simple fact that the City, despite the language in its code, is prevented from enforcing such prohibitions because case law has made clear that jurisdictions cannot discriminate against medical facilities by virtue of what type of medication is prescribed.

For example, arguing that clinic's drug treatment services are distinguishable from diabetes or cancer clinics is a position contrary to well settled case law. As a result of multiple decisions over the past twenty-years, such as the Third Circuits decision in *New Directions*, municipalities are prohibited to treat drug treatment facility's (i.e. methadone clinics) any differently than "ordinary" medical clinics for zoning purposes.¹⁷

Other cases supporting equal treatment of medical clinics regardless of the actual "treatment" method being provided at the clinic demonstrates this fact.

An addiction treatment center, which was licensed for detoxification, withdrawal, or maintenance of addicts, was permitted "office" under the zoning ordinance like other medical offices, in which dispensation of drugs was viewed as part of services provided, and the center could not be denied use permit on theory that its "primary purpose" was dispensation of methadone. Comprehensive Addiction Treatment Services, Inc. v. City and County of Denver, 795 P.2d 271 (Colo. Ct. App. 1989).

A methadone clinic is a valid use under the authorization for offices for professional persons. Since the methadone clinic has doctors, nurses, and other licensed professionals who assist in physical and mental treatment of the persons in the program, it constitutes a professional office. While excluded as a clinic due to the insufficient number of doctors, it is a permitted use without necessity of any special-use permit. A resolution by the council stating their interpretation of the zoning restriction is not binding by the court as an attempt to regulate judicial decisions. Village of Maywood v. Health, Inc., 104 Ill. App. 3d 948, 60 Ill. Dec. 713, 433 N.E.2d 951 (1st Dist. 1982).

A methadone maintenance treatment center for heroin addicts in a business district is proper as within the classification of professional offices. Where the treatment center operates only during restricted hours and for nonresident patients, it does not fall outside the classification by being a hospital and constitutes reasonable use within the personal services provisions. A resolution by the council against any treatment center is not effective. L & L Clinics, Inc. v. Town of Irvington, 189 N.J. Super. 332, 460 A.2d 152 (App. Div. 1983)¹⁸.

Additionally, in Georgia, a court held that the Americans with Disabilities Act (ADA) prohibits local governments from administering licensing and zoning permit procedures in a manner that subjects persons with disabilities to discrimination based on their disability.¹⁹

In Maryland, Baltimore County's special methadone policy that required methadone programs to undergo a public hearing rather than locate as of right as a medical office was found to have a disproportional

¹⁷ *New Directions Treatment Services v. City of Reading*, 490 F.3d 293 (3rd Cir. 2007); *Bay Area Addiction Research and Treatment v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999); *Comprehensive Addiction Treatment Services, Inc. v. City and County of Denver*, 795 P.2d 271 (Colo. Ct. App. 1989); *Village of Maywood v. Health, Inc.*, 104 Ill. App. 3d 948, 60 Ill. Dec. 713, 433 N.E.2d 951 (1st Dist. 1982)

¹⁸ WESTLAW, Ordinance Law Annotations, Narcotics: Illegal Substances, September 2018 Update

¹⁹ *Pack v. Clayton County, Georgia*, 1993 WL 837007 (N.D. Ga. 1993)

burden on a protected class of individuals because no other medical facility was required to undergo such a process.²⁰

In *THW Group LLC v. Zoning Board of Adjustment*, 86 A 3d. 330 (Pa. Commw. Ct. 2014) following the Third Circuit's holding in *New Directions*, the court acknowledged that, although the courts might sympathize with the concerns of the surrounding community, municipalities are not free to apply different zoning standards to methadone clinics than to other ordinary medical clinics.

Given the clear direction of the courts across the United States, local government cannot treat drug treatment clinics any differently than they treat other medical offices or clinics. When a government has rules or processes that treat drug treatment clinics and offices differently than other clinics, the courts are likely to find such rules and procedures to be facially discriminatory because they have no rational basis and are, therefore, *per se* violations of the ADA and, perhaps, Section 504 of the Rehabilitation Act of 1973. Additionally, because of current federal court decisions prohibiting local governments from treating drug treatment clinic differently than other medical clinics, it stands that, if the proposed MAT clinic is an EPF, then all medical clinics in the City are also EPFs. This, of course, would be an absurd interpretation of Washington State's EPF statute.

In addition to case law, the City of Sequim has historically reviewed medical clinics and offices under the A-2 administrative review process²¹. For the City to now divert from its historic permitting process to intentionally treat the proposed MAT clinic differently than other medical clinics could be viewed as intentional discrimination.

In *Innovation Health Systems v. City of White Plains*, in which an out-patient alcohol and drug treatment program claimed the city had engaged in intentional discrimination by denying it a building permit to locate in a business zone, the Second Circuit relied on evidence that the city had departed from both substantive and procedural norms in denying the building permit and affirmed the lower court's issuance of an injunction, concluding that Innovative Health Systems would prevail on the merits. This case cautions jurisdictions to not make land use decisions that are not based on the jurisdiction's zoning code. The City of White Plains denial of Innovative Health Systems' building permit was found by the Second Circuit to be based on "...little evidence in the record to support the decision on any ground other than the need to alleviate the intense political pressure from the surrounding community brought on by the proponent of the drug-and alcohol- addicted neighbors."²² Similarly, a 1998 Washington State Supreme Court decision, *Mission Springs v. City of Spokane*, relying upon a Ninth Circuit court decision, held that denying any permit for which the applicant has met the relevant criteria places a jurisdiction and its individual councilors/commissioners at risk of liability for procedural and substantive equal protection violations.

Finally, it has been suggested that one sentence in SMC 20.01.020 should be the determining factor elevating the subject application from the A-2 process to the C-2 process. This position is based on an incorrect analysis and understanding of the land use process in general and the City's land use regulations in particular. The language cited from the definition section of SMC 20.01.030W states:

²⁰ Smith-Berch, Inc. 68 F. Supp.2d at 621

²¹ File Reference number DRB16-001 (Design Review Application) & SEPA 16-006 (SEPA Checklist), Sequim Retina Properties, June 3, 2016; Notice of Environment Review, SEPA File# 09/001, Mitigated Determination of Non-Significance, Jamestown S'Klallam Tribe, 02/10/09; SEPA Checklist, Olympic Memorial Hospital, Sequim Outpatient Clinic, 1988.

²² *Innovative Health Systems v. City of White Plains*, 931 F. Supp. 222 at 49 (S.D.N.Y. 1996)

“[t]ype C-1, C-2, C-3 processes” means processes which involve applications that require the exercise of substantial discretion and about which there is a broad public interest²³(emphasis added). While there is no question that the subject project has generated “public interest”, the subject application also provides little opportunity to exercise “substantial discretion” due to the fact that the application consists of a building permit which is ministerial, design review which is not listed in the table of application types, but nevertheless required, and SEPA which has its own procedural and substantive limitations and does not offer “substantial discretion. Therefore, how would this definition be applied? It appears some only want the “broad public interest” words to be considered while ignoring the “substantial discretion” language. Frankly, the theory that the degree of “public interest” should be used to determine what type of process a permit should be subjected to falls apart when examined closer. For example, there have been plenty of amendments to the comprehensive plan and/or zoning ordinance that generated little public interest, but still went before the City Council for a decision. Because these amendments did not generate public interest should they have been decided by some other decision-making body such as a hearings examiner or staff? The answer should be, of course not, but this example illustrates the fallacy of such an idea.

It is difficult to imagine the City being able render a decision that wasn’t arbitrary and capricious if definitions are used to establish procedural or regulatory guidance and/or policy. How would definitions be calibrated to be consistent, predictable and fairly applied over time? One can only imagine the chaos that would occur when an application, that is being processed, suddenly faces a local groundswell against it. This type of chaos is not supported by Washington State land use law which “requires counties and cities planning under the act to adopt procedures for fair and timely review of project permits under RCW36.70B.020(4),...”²⁴ to ensure local permitting procedures implement goal 7 of the Growth Management Act.²⁵ State law requires local governments to create land use permitting processes that achieve consistency and order in procedural requirements, something that is not possible if we relied on definitions instead of predetermined standards and procedures to guide our decision-making process as required by law.²⁶

Although definitions are helpful to understand the meaning and intent of certain terms, definitions are not intended to serve in place of a jurisdiction’s clear procedural policy. The City’s procedural policy directing the “typing” of permit applications is found in SMC 20.01.040 and Table 2, SMC 20.01.030 and is consistent with WAC 365-196-845 by categorizing permits as: (i) Permits that do not require environmental review or public notice, and may be administratively approved; (ii) Permits that require environmental review, but do not require a public hearing; and (iii) Permits that require environmental review and/or a public hearing, and may provide for a closed record appeal. The permit “typing” process outlined in WAC 365-196-845 recognizes jurisdictions administer many different types of permits and these permits can generally be categorized into groups based on process. Each process is assumed to attract a certain level of public interest, although that is just an assumption and not a rule. The permit “typing” process required by the above referenced WAC does not suggest definitions should be used in the permit typing process.

²³ SMC 20.01.030W

²⁴ WAC 365-196-845(1)

²⁵ RCW 36.70A.020(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability

²⁶ WAC 365-196-845 Local project review and development agreements sets forth the permit process requirements and contains no mention of using a jurisdiction’s definitions in the permitting process.

Finally, isolating a portion of one definition from the statute and using it to base a procedural decision on is contrary to the canons of statutory interpretation which requires the reader to give meaning to every word and to consider all parts of the statute together.


Conclusion: Based on the above discussion, I find the Jamestown S'Klallam Tribe's MAT clinic application will follow the A-2 processing path per SMC 20.01.090, design review pursuant to SMC 18.24.033 and SEPA. This process is consistent with the City's past processing practices for other medical clinics and offices and compliant with the ADA and federal case law.

A decision on an A-2 permit application is made by the Director after the application has been reviewed by the City Engineer, Public Works Director, Police Chief and Fire District 3 for consistency with SMC 18.24.

Appeals: 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 per SMC 20.01.240(A). Appeals must be accompanied by the required appeal fee in the amount of \$600.00 (SMC 3.68)

Classification of an application shall be subject to reconsideration and appeal at the same time and in the same way as the merits of the application in question (SM 20.01.040).

01/24/20
Date


Barry Berezowsky, Community Development Director