THE HON. W. BRENT BASDEN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

SAVE OUR SEQUIM, a Washington 501(c)(4) corporation; and PARKWOOD MANUFACTURED HOUSING COMMUNITY, LLC, a Washington Limited Liability Company, Plaintiffs, vs. CITY OF SEQUIM, a Washington Municipal Corporation, Defendant.	NO. 20-2-00304-05 EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION

COMES NOW the Plaintiffs, Save our Sequim, by and through its attorney, Michael A. Spence of Helsell Fetterman LLP, and Parkwood Manufactured Housing Community, LLC, by and through its attorney, Michael D. McLaughlin of McMahon Law Group, PLLC, and hereby Moves the Court for an Emergency Order temporarily restraining and enjoining Defendant from proceeding on any applications under SMC Title 20, including specifically application file Nos. CDR20-001 and CBP20.001 concerning the project commonly referred to as the "Jamestown S'Klallam Healing Clinic."

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I. FACTS

Plaintiffs hereby reallege all facts set forth in the *Complaint for Declaratory, Injunctive, and Mandamus Relief* previously filed in this matter on May 5, 2020, as if fully set forth herein (the "Complaint"), in which the Plaintiffs are challenging the constitutionality of Sequim Municipal Code ("SMC") Sections, 20.01.020(T)-(W), and 20.01.040(A). SMC Section 20.01.040(A) requires that anyone challenging a staff determination regarding which permit process applies must wait until the underlying permit is either approved or denied before mounting that challenge. It reads as follows:

> **1. 20.01.040 Determination of proper type of procedure.**
>
> A. Type of Application. The act of classifying an application shall be a Type A-1 action. 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.

In the case at bar, the City of Sequim determined on January 31, 2020 that the "Healing Clinic" is eligible for administrative approval, however SMC 20.01.040(A) prohibits a challenge to this determination until the underlying permit approval, which happened on May 15, 2020. On that date, the Defendant issued a Notice of Decision for Design Review Application No. CDR 20-001 and Revised MDNS for the Jamestown S'Klallam Tribe Medical Clinic. In that Notice, Defendant approved the application and set an appeal date of June 5, 2020, as the deadline to appeal the application's approval. Confusingly, while that Notice claims to only apply to the Design Review portion of the Healing Clinic project (application No. CDR20-00), and is listed similarly on the City's website, Defendant admits in its Answer that the City approved both the Design Review and Building Permit applications together under this same notice. *See Answer of City of Sequim with Affirmative Defenses*, p. 9 at (i).

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II. EVIDENCE RELIED UPON

This motion is based upon the above-referenced complaint, all documents of record regarding the Jamestown S'Klallam Healing Clinic and the *Declaration of Michael A. Spence* and *Declaration of Michael D. McLaughlin*, filed concurrently with this motion, and upon the case file and records herein.

III. LEGAL AUTHORITY

This Court should enjoin and restrain Defendant from proceeding on application file Nos. CDR20-001, CBP20.001, and all other applications processed under SMC Title 20 until the constitutional challenge to the statutory language of SMC Title 20 has been adjudicated in this action. The Court is authorized to take such action pursuant to CR 65 and RCW 7.24.190. Plaintiffs requests the Court take these actions so that Plaintiffs, Defendant, and all other parties to applications pending under SMC Title 20 do not suffer irreparable harm which will result from proceeding under the existing code.

In this lawsuit, the Plaintiffs assert that the language of SMC Title 20 is vague, overbroad, unconstitutional, and that it constitutes an unconstitutional delegation of authority and an artificial shifting of the burden of proof, and for that reason have filed this present action to protect and preserve their constitutional due process rights and to prevent judicial waste. SMC 20.01.040 authorizes the Community Development Director to determine the procedure type for every development application received by the City.

SMC 20.01.240(A) provides that the act of classifying an application is consider at Type A-1 action, the appeal of which must be consolidated with any appeal as to the merits of the application in question. It also ostensibly limits the right to appeal to the "applicant" or "parties of record", with "parties of record" defined only as parties submitting written comments at an "open

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record hearing" which has not yet happened in the case at bar. SMC 20.01.240(A) and the relevant definitions follow:

> **2. 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.
>
> SMC 20.01.020(P):
>
> P. "Parties of record" means the land use permit applicant, persons who have testified at an open record hearing, and any persons who have submitted written comments concerning the application that form part of the public record that is considered at the open record hearing (excluding persons who only signed petitions or mechanically produced form letters).
>
> SMC 20.01.020(O):
>
> O. "Open record hearing" means a hearing, conducted by a single hearing body or officer, that creates the record through testimony and submission of evidence and information. An open record hearing may be held prior to a decision on a project permit to be known as an "open record predecision hearing." An open record hearing may be held on an appeal, to be known as an "open record appeal hearing," if no open record hearing has been held on the project permit.

On January 24, 2020, the City's Community Development Director issued a Notice of Determination of Procedure Type for File No. CDR20-001, and declared the application falls within an A-2 classification type. SMC 20.01.020(U) defines an "A-2" process as one 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 limited public interest." Despite portraying the decision as an exercise of "limited discretion," the Notice of Determination engages in an 8-page analysis which includes case law from jurisdictions around the United States dealing with conflicts between various land use regulations and their conflicts with the Americans with Disabilities Act (ADA). The

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Notice further admits what the newspapers and city council meetings have demonstrated since the project was announced; that there is broad public interest in the subject applications.

If the permitting process is allowed to continue in its present posture, the Plaintiffs and others will be forced to file and prepare for two appeals – one on the decision to classify the project as an "A-2" project, and another on the Decision itself – when one possible outcome is that the initial A-2 decision is ruled incorrect, rendering the substantive decision moot. In addition, the Plaintiffs' burden of proof is effectively and unconstitutionally doubled when they are forced to challenge two decisions at the same time, with the initial determination being a threshold decision on whether or not the proper process was used to approve the substantive decision on the underlying application. Stated more simply, if the procedural determination is reversed, the City and the Applicant must start the process over, using the quasi-judicial process set forth in SMC 20.01.100. Reversing a decision after the application's approval, if appropriate, will irreparably harm the applicant because of the decision's probable impact on site selection, financing opportunities, and by otherwise disrupting the timeline for completion of the project.

Another interpretation of the above-referenced code language is that the Plaintiffs have no appeal rights at all because there has been no "open record public hearing" as that term is defined in SMC 20.01.020(O).

In the event the procedural determination is not overturned, and Plaintiffs are forced to challenge the merits of the decision under RCW 36.70C, Plaintiffs are further irreparably harmed because the burden remains shifted due to the deference afforded to the City making the land use decision. *See* RCW 36.70C.130(1)(b) (allowing deference for the construction of a law by a local jurisdiction with expertise). Plaintiffs, no longer on an even playing field, are tasked with proving

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the administrative agency's decision is erroneous under a substantial evidence standard. *Wenatchee Sportsmen v. Chelan Cty*, 141 Wn. 2d 169, 176 (Wash. 2000)

At trial, the Plaintiffs are prepared to present significant evidence indicating that the City's administrative staff was personally predisposed in favor of the project, and that they are intentionally diverting the processing of the project away from the City Council, serving in a quasi-judicial capacity, out of concern that the Council will deny the application. Emails exchanged between the Community Development Director and the City Manager evidence a conclusion prior to the project's announcement that is supportive of approval and anticipates the need to prepare a public relations campaign to fight off any concerns from the general public. (Declaration of Michael Spence at 3)

Of further concern is the City's acknowledgment that the existing code language is outdated, inconsistent with federal law requirements, and inconsistently ignored or misapplied historically. The City Attorney acknowledges the same in a January 2, 2020, email, stating in relevant part:

> [T]he City must also look at our old code in light of the Americans with Disabilities Act (ADA) litigation that has occurred since the City's code was adopted in 1997 and how the City has permitted other medical structures over the past 30 years.

In that statement, the City both acknowledges that the code is outdated and also tacitly admits that in observance of federal concerns the City may not necessarily strictly and objectively apply its code provisions to land use applications, instead following some other unknown, subjective process for evaluating structures it considers to be of a medical nature over the last three decades.

Defendant has, of its own volition, issued two ordinances as recently as February 10, 2020, that acknowledge deficiencies in other areas of the SMC. In Ordinance No. 2020-002, Defendant issued a moratorium on land use applications pertaining to mobile home parks until confusing language in the code could be revised, amended, or otherwise modified. The first basis for issuing

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that moratorium states that it is designed to allow for the "drafting of new land use regulations" in an effort to avoid "creating more problems in the future." Similarly, in Ordinance No. 2020-003, the City instituted interim controls to address confusion under the interpretation of SMC Chapter 17.54, stating that the existing language failed to achieve the City's land use objectives as previously expected. With the inconsistencies and conflicting language in the provisions of SMC Title 20, it is baffling why Defendant fails to consider a similar remedy to address the deficiencies of this section of the code.

Under Washington law, the legislature can constitutionally delegate administrative power. Constitutional delegation of authority requires defining "(a) what is to be done, (b) the instrumentality which is to accomplish it, and (c) the scope of the instrumentality's authority in so doing, by prescribing reasonable administrative standards." *Barry & Barry, Inc. v. Department of Motor Vehicles*, 81 Wn. 2d 155, 158 (Wash. 1972). For delegation to be considered constitutional also requires "that *procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power*." *Id.* at 159. "[A] statute which either forbids or requires the doing of an act in terms so vague that men [and women] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Anderson v. Issaquah*, 70 Wn. App. 64, 75 (Wash. Ct. App. 1993).

The definitions provided under SMC 20.01.020 are too vague, requiring Plaintiffs, Defendant, and applicant's insufficient information to readily determine the proper classification of a land use application under the existing code. Further, as the Community Development Director is the sole deciding authority for classifying each project, and his decision cannot be timely challenged prior to a decision on the merits of the application, both Plaintiffs and

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applicants are denied procedural due process and deprived of safeguards to control arbitrary administrative actions or the abuse of discretionary power until after the damage is completed. Every applicant submitting a project under the existing code language is deprived of their constitutional right to due process to bring a timely and efficient challenge to the classification of their respective applications. Each suffers the same harm of subjective standards, existing outside the outdated code, and for which the required conditions cannot be known in advance.

Defendant's Notice of Decision provides that Plaintiffs may appeal the decision by filing a written appeal and tendering a $600.00 appeal fee within 21 days of the decision. Plaintiffs' have already paid an additional $600.00 appeal cost simply to challenge the classification type, despite both issues being heard at the same hearing. If the requested relief herein is not granted and the Defendants are not restrained and enjoined from further processing of this application under the SMC's existing unconstitutional language, Plaintiffs together with applicants and other parties with interest in all land use applications before the City will be significantly prejudiced legally, constitutionally and financially and will incur significant time and expense litigating the City of Sequim's determinations and decisions on the merits. Without an injunction prohibiting Defendant from proceeding on these applications, Plaintiffs have no adequate remedy to prevent the waste of time and financial resources that will be expended litigating Defendant's land use decisions should the Court ultimately find the language of SMC Title 20 unconstitutional and overbroad.

A decision as to the constitutionality of SMC Title 20 is warranted before Plaintiffs in this action, and all other interested parties in land use applications presently before the City, incur significant financial harm attempting to preserve their rights under the current, subjectively interpreted and enforced provisions of the existing code.

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IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order granting the relief requested in this Motion. Specifically, that Defendants be enjoined and restrained from further proceeding on application file Nos. CDR20-001 and CBP20-001 and all other applications processed under SMC Title 20 until the constitutionality of the applicable code provisions are properly adjudicated and the language is revised, removed, or replaced with constitutional language that provides for the objective processing of land use applications received by the City of Sequim.

A proposed Order is attached.

DATED this 22nd day of May 2020.

Helsell Fetterman LLP

Michael A. Spence, WSBA #15885
Attorney for Save our Sequim

McMahon Law Group, PLLC

Michael D. McLaughlin, WSBA #47041
Attorney for Parkwood Manufactured Housing Community, LLC

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SAVE OUR SEQUIM, a Washington 501(c)(4) corporation; and

PARKWOOD MANUFACTURED HOUSING COMMUNITY, LLC, a Washington Limited Liability Company,

Plaintiffs,

vs.

CITY OF SEQUIM, a Washington Municipal Corporation,

Defendant.

NO. 20-2-00304-05

[PROPOSED]
ORDER GRANTING TEMPORARY RESTRAINT AND PRELIMINARY INJUNCTION

THIS MATTER having come on for hearing on the Plaintiffs' Emergency Motion for Temporary Restraining Order and Injunction and the Court having considered the pleadings filed by the parties, now therefore, it is hereby

ORDERED, ADJUDGED and DECREED that the Plaintiff's Emergency Motion for Temporary Restraining Order and Injunction is GRANTED; it is further

ORDERED, ADJUDGED and DECREED that Defendant is temporarily restrained and enjoined from proceeding further on application file Nos. CDR20-001 and CBP20-001; it is further

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ORDERED, ADJUDGED and DECREED that Defendant is further temporarily restrained and enjoined from accepting new applications or proceeding further on any other existing applications which fall under Sequim Municipal Code Title 20; it is further

ORDERED, ADJUDGED and DECREED that _____

_____

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_____; it is further

ORDERED, ADJUDGED and DECREED that _____

_____

_____

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_____.

DONE IN OPEN COURT this _____ day of June 2020.

_____
Honorable W. Brent Basden

Presented by:

Helsell Fetterman LLP

_____
Michael A. Spence, WSBA #15885
Attorney for Save our Sequim

McMahon Law Group, PLLC

_____
Michael D. McLaughlin, WSBA #47041
Attorney for Parkwood Manufactured Housing Community, LLC

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COPY RECEIVED, APPROVD AS TO FORM:

CITY OF SEQUIM

By_____
Kristina Nelson-Gross, WSBA #42487
City Attorney

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