

**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                           |  |   |                              |  |
| <b>CATEGORY</b>                            | <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.