THE HEARING EXAMINER OF THE CITY OF SEQUIM

RE: CDR20-001 Consolidated Administrative Appeals of January 24, 2020 Notice of Determination of Procedure Type: May 15, 2020 Director's Report and Staff Decision; and May 11, 2020 MDNS for Jamestown S'Klallam Tribe Outpatient Clinic	INTERLOCUTORY ORDER GRANTING IN PART DISPOSITIVE MOTIONS FILED BY THE CITY OF SEQUIM AND THE JAMESTOWN S'KLALLAM TRIBE AND DENYING THE DISPOSITIVE MOTIONS OF PACKWOOD, BILOW AND SOS

Overview

This Order addresses in semi-summary fashion dispositive motions filed by all hearing parties identified above on September 2, 2020. More detail will be provided in the Final Decision issued for the appeals. In summary, this Order finds that Packwood, SOS and Bilow all lack standing and their appeals are dismissed. Should a reviewing court find that one or more parties does have standing, to reduce the need for remand this Order further finds that the proposed methadone assisted treatment ("MAT") clinic does not qualify as an essential public facility and that the City's A-2 process serves as the appropriate process for review.

This Order does not address two remaining major arguments raised by the parties in their dispositive motions. The first is that the SEPA review should have included an analysis of impacts for a potential second phase involving an in-patient facility. That issue raises legal and factual issues that are too complex to try to resolve at this point given the dismissal of the SOS appeal due to standing. The second argument not addressed in this Order is the Tribe's challenge to the MDNS conditions imposed by the City. The Tribe and City at this point have agreed upon modified MDNS conditions to settle their differences. The public review process for that compromise is being worked out in a separate proceeding.

The unavoidable fatal flaw to the numerous arguments presented by project opponents is that they could not identify any reasonably identifiable harm they would suffer due to the approval of the MAT clinic. The Sequim City Council has voluntarily chosen to require that land use appellants must establish injury in order to appeal. Such a requirement didn't have to be adopted and cannot be ignored. The most specific concrete injury that could be found in the dozens of pages of briefing provided by the three project opponents was a reference by Packwood that its mobile home was within three miles of the project site and that therefore MAT clinic could interfere with the availability of emergency vehicles necessary to provide aid to the 55+ aged Packwood residents. Almost all of Sequim's residents live within three miles of the project site and there is no reasonable basis to conclude that the MAT clinic could somehow impair emergency vehicle availability to Packwood when it is located "within three miles" of Packwood. All of the other allegations regarding adverse impact were limited to generally identifying adverse impacts to public services, with no explanation of how or why the MAT clinic could impair the provision of public services to such a degree that it would cause material injury to any Sequim residents.

The proposal doesn't qualify as an essential public facility because it's an outpatient facility. City and state definitions of essential public facilities clearly provide that drug treatment facilities only qualify as essential public facilities when they provide

in-patient services. The MAT clinic as proposed and approved is limited to outpatient services. Project opponents point out that the Tribe at least initially planned on a second phase that provides for a 16-bed inpatient facility. If and when a proposal to expand to in-patient facilities is made, that new proposal would likely have to be processed as an essential public facility. Project opponents also attempted to argue that the City's essential public facilities ordinance, Chapter 18.56 SMC, requires City Council review of the MAT clinic application because it qualifies as a drug treatment center. However, Chapter 18.56 SMC only requires City Council review of a drug treatment center if it is proposed in a zoning district where it would otherwise be prohibited. The MAT clinic is not prohibited in its proposed location, so the City's essential public facilities ordinance does not apply.

Mr. Bilow argues that the City should use a C-2 review process because the MAT proposal meets the code definition of a "C-2" review process. However, a "C-2" process definition applies to applications, not proposals. The SMC assigns review processes such as A-2 and C-2 to specific types of applications, such as building permits and design review applications. The function of the definitions is to clarify what review process applies to applications that have not been specifically assigned a review process. For this appeal, the SEPA determination and design review have both been assigned A-2 review process. There is no need to rely upon the definitions for an alternative review process. Mr. Bilow also takes great stock in the fact that the Tribe may be able to exercise sovereign immunity to avoid some or all of the City's ability to regulate the MAT clinic. This has no relevance to the review process assigned to the proposal. The City's discretion to regulate sovereign immunity, if any, is maximized in the SEPA A-2 process. Assigning C-2 decision making would make no material difference in the City's ability to address sovereign immunity.

As a final issue, project opponents filed supplemental briefing contesting the use of procedural requirements adopted by the City Council after the building permit for the project vested to the City's development standards. Case law is clear that vesting

doesn't apply to procedural standards. Project opponents assert that it would be prejudicial to "change horses" in mid-stride. However, practically speaking there has been no changing of horses since project opponents have been through an A-2 process that has given them ample opportunity to present and defend their dispositive motions through the issuance of this Order. Further, the vested rights doctrine in the State of Washington was based upon the objective of creating a bright line rule that precludes the need to go through the subjective process of ascertaining what level of developer and party investment in existing regulations is necessary to create vested rights.

Legal Analysis

A. The SOS, Bilow and Packwood Appeals Must be Dismissed due to Lack of Standing.

None of the project opponents have standing. None have alleged any specific harm that meets City adopted requirements that they be aggrieved by approval of the design review and permit classification decisions.

It is recognized that a large portion of the Sequim population is concerned about the project, as expressed in the 2,600-signature petition and the large numbers of people represented by Packwood and Save Our Sequim. However, the SMC only authorizes parties who can establish that the decisions under appeal will injure them to have standing to appeal. Although there is no question that a substantial portion of the Sequim community is concerned and opposed to the project, no party to this proceeding has identified any cognizable injury that would qualify them as having standing.

Unfortunately, the SMC once again has conflicting provisions on a key provision to the party's standing arguments – specifically whether injury is necessary to establish standing, or whether just qualifying as a party of interest is sufficient. Applying rules of construction dictates that injury is an element of standing. As with the jurisdictional issue addressed in the Examiner's Order Cancelling Hearing, the conflicting provisions are once again between SMC 20.01.090 and SMC 20.01.240A.

SMC 20.01.090E, which applies to appeals of A2 decisions, requires injury for standing – it provides that "*[a]n applicant or other party of record who may be aggrieved by the administrative decision may appeal…*" SMC 20.01.020B defines an "aggrieved party" to include a party of record who will be prejudiced by a land use decision. It is clear that these provisions require a person to be prejudiced in addition to qualifying as a party of record to have standing. ECDC 20.01.240A, by contrast, simply provides that Type A-1 and A-2 decisions may be appealed "*by applicants or parties of record to the hearing examiner*." SMC 20.02.020P defines parties of record to be parties who have participated in the review of the land use decision under appeal by participating in the hearing on the application or providing written comment. The definition does not otherwise require any injury or prejudice. Therefore, SMC 20.01.240A doesn't require any injury or prejudice.

Given the conflict above, rules of statutory construction must be employed. If a statute is susceptible of two or more reasonable interpretations, courts will engage in statutory construction to ascertain and give effect to legislative intent. In doing so, courts construe statutes as a whole, giving effect to all their language, and harmonizing all provisions in their relation to each other. *State v. Plaggemeier,* 93 Wn. App. 472, 478 (1999). Every provision must be viewed in relation to other provisions and harmonized if at all possible. Preference is given a more specific statute only if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized. *Allen v. Dan & Bill's RV Park*, 428 P.3d 376, 383-384 (Wash. Ct. App. 2018). Further, the courts have repeatedly ruled that statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant; however, in special cases the court can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *State v. Evergreen Freedom Foundation*, 1 Wash.App.2d 288, 299 (2018).

Applying the rules of construction above, the SMC conflicting provisions on standing must be interpreted as requiring injury for standing in appeals of A-2

decisions. If injury is not required, this would render the requirement for "aggrieved" in SMC 20.01.090E superfluous and void, since SMC 20.01.090E requires an appellant to both be a party of interest and aggrieved. Further, the requirement for injury in SMC 20.01.090E is the more specific requirement between SMC 20.01.090E and SMC 20.01.240A – SMC 20.01.090E only applies to appeals of A-2 decisions while SMC 20.01.90E applies to appeals both A-1 and A-2 decision. In fact, SMC 20.01.080C does not require a person to be aggrieved to file an appeal of an A-1 decision, it only requires conformance to SMC 20.01.240A. Given these circumstances, the most effective harmonization of the standing requirements is to construe the injury requirement of SMC 20.01.090E as supplementing the general standing requirements of SMC 20.01.240A[1].

The land use petition act, which governs the judicial appeal of this decision, also requires that persons other than the land owner or applicant be "aggrieved" to meet standing requirements and further defines an aggrieved person as a party who is aggrieved by a land use decision, similar to the City's standing requirements. See RCW 36.70C.060(2). As noted by one court, "*[a]n allegedly aggrieved person has standing to file a land use petition if he shows that the land use decision has prejudiced him, or is likely to*." *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 662 (2016). The Thompson court explained that to satisfy the prejudice requirement, a petitioner must establish an injury in fact, which means alleging "*a specific and perceptible har*m." Id.

[1] Ultimately, however, it is acknowledged that there doesn't appear to be any rational reason to have more lenient standing requirements for appeal of A-1 permits over A-2 permits, since the A-1 permits generally are of less significance and public impact overall than A-2 permits. One way to remedy this somewhat irrational result would be to not require injury for either A-1 or A-2 permits. Given that such a result would require voiding out the aggrieved term in SMC 20.01.090E in its entirety, such a construction would clearly be contrary to legislative intent and would not be supportable. The other alternative would

at 662. When appellants allege harm, they must show that the harm "*will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing*." Id. Harm to an appellant must be proved, and not presumed. Id. at 664.

There are not many cases that construe the standing requirement of LUPA, but those that have been issued serve as helpful guides in what type of injuries qualify a party as aggrieved. Most pertinent is the principle that an interest in assuring that a City's code is not violated is not sufficient by itself to confer standing. *See Thompson v. City of Mercer Island*, 193 Wn. App. 653 (2016). In *Thompson*, the appellant argued that the City of Mercer Island failed to comply with its subdivision regulations and other development standards and policies in approving a short plat. The *Thompson* court noted that the Appellant failed to identify any specific injury to his own property and found it insufficient for purposes of standing to simply allege a violation of development standards, reasoning that the appellant's "*abstract interest in having others comply with the law is not enough to confer standing*."

Proximity to a project site can confer standing, but case law suggests that the property must be close enough to a project to be specifically and adversely affected by it. In *Lauer v. Pierce County*, 173 Wn.2d 242, 254 (2011), the Supreme Court found sufficient standing in a LUPA challenge based solely on the fact that the appellants lived adjacent to the subject project site. However, in *Chelan County v. Nykreim*, 146 Wn.2d 904, 935 (2002), the Supreme Court ruled that "neighbors" of a project site who don't adjoin the project site do not have standing if their interest is solely limited to the abstract interest of the general public in having others comply with the law.

Beyond assertions that the City has not complied with procedural or substantive requirements of its development standards, the only adverse impacts asserted by project opponents, specifically by SOS and Packwood, are impacts to public services as asserted in the SEPA portions of their appeals. SOS and Packwood have not yet

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be to require injury for both A-1 and A-2 permits. That interpretation may be viable, but is left for another day.

identified how such impacts would injure them or their members. The only injury that could possibly be inferred from such unsubstantiated assertions is financial, an increase in taxes due to an increase in demand upon police or other government services. This type of harm has not been directly addressed in the standing analysis of a LUPA appeal, but superficially appears to be an avenue for alleging the requisite injury for standing. Washington courts have long recognized the right of an individual or entity to challenge governmental acts based solely upon the litigant's status as a taxpayer. *See Friends of N. Spokane Cnty. Parks v. Spokane Cnty*., 184 Wash. App. 105, 116 (2014). However, a litigant seeking to challenge a discretionary government act, as opposed to an allegedly unlawful act, must show a special injury, i.e. that he or she has a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers. *Id*. at 120. Taxpayer status also requires an unsuccessful demand that the attorney general take action. *See Id.* at 122. The Parkwood and SOS assertions of harm to public services was part of this SEPA claims. SEPA is recognized by the courts as a discretionary decision-making process. *See Polygon Corporation v. Seattle*, 90 Wn. 2d 59, 64 (1978). Parkwood and SOS have not shown any special injury nor any demand upon the Attorney General to take action. They do not qualify for taxpayer standing.

The SOS response to the City's standing arguments is that standing isn't limited to persons who own property adjacent to land use proposals. That wasn't the City's position. The City's position was that SOS hasn't asserted any injury or prejudice necessary to establish standing and that one means of doing so was by establishing adjoining property ownership. At no point did the City assert that adjoining property was the only means of establishing the requisite injury. SOS is correct that it doesn't have to establish adjoining property ownership for standing, but it has to establish some other injury. It hasn't done so.

SOS also asserts that the City is estopped from asserting standing because in its companion judicial challenge assurances were made to the court by the City that SOS would have the opportunity to make its arguments in a LUPA appeal to this Decision.

Setting aside the issue of whether estoppel applies under these circumstances, it is clear from the transcribed statements provided by SOS in its briefing that the City did not waive standing in making this argument to the superior court. The City specifically stated that "*..the City will stipulate that it [project opponents] can raise the same arguments that it's trying to raise here that are* ***properly brought*** *under a LUPA petition*." (emphasis added). As required by RCW 36.70C.060, "*[s]tanding to bring*" a LUPA petition, for those that are not the landowner or applicant, are limited to persons aggrieved by the land use decision. The City's qualification that arguments can be made in a LUPA petition only for those petitions "*properly brought*" excludes those brought by persons without standing, since RCW 36.70C.060 prohibits persons without standing to "bring" a LUPA petition.

In its response to the Tribe's summary judgment motion, SOS asserts harm by identifying that 2,600 members and supporters signed a petition against the project, that it had received donations from "*hundreds, if not thousands*" of concerned citizens, that the City had received over 500 public comments on the project and that 1,300 people, the majority of whom were SOS members and supporters, attended a public meeting against the project. SOS has clearly established that the project is a matter of grave concern to a large portion of the Sequim community. None of this establishes a specific and perceptible harm. Notably lacking in any of the SOS comments on community displeasure is <u>why</u> the public is upset by this project, specifically what is the perceived injury that is the basis of this displeasure? The failure of any appellant to articulate the reasons for community opposition when that information is so clearly and obviously necessary to qualify for standing leaves the very strong impression that the Appellants are fully aware that the prejudice they believe they will suffer is not legally cognizable as a basis for standing.

SOS also identifies in its response to the Tribe's standing arguments that mailed notice of project applications is required for persons living within 300 feet of the project and to persons who may be affected by the proposal. None of these notice requirements

automatically qualifies persons entitled to such notice as injured for purposes of standing analysis. It is fair to conclude that the City Council considered persons entitled to such notice as potentially affected, but this doesn't logically lead to the conclusion that everyone residing within that three hundred feet is actually aggrieved as required for standing.

In contrast to SOS, Packwood does make an effort to identify specific harm by asserting that its residents frequent the commercial areas of Sequim and that traffic generated by the proposal may affect the readiness of ambulance services. As to impacts to patronizing commercial areas, such injury is not considered sufficient for purposes of standing. As noted in the Design Review decision, the project site is composed of 3.3 acres located in the northwest corner of an 18.1-acre parcel. An aerial photograph of the project site shows the nearest commercial development as the back of a Costco on a lot kitty corner from the northwest corner of the site. Other adjoining uses currently appear to be agricultural lands several acres in size. Given the isolated location of the project site, it's difficult to infer how the proposal could adversely affect the ability of Parkwood to patronize the City's commercial areas. The adjoining farmlands are zoned for commercial development, so it is possible that in the future Packwood residents may be doing their shopping in closer proximity to the proposed use than is possible currently. However, as previously noted, standing injury must be immediate, concrete and specific and a conjectural or hypothetical injury will not confer standing. *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 664 (2016). The potential of future commercial development of the farmlands surrounding the project site is entirely hypothetical at this point, at least to the extent disclosed in the record. Further, even if there were some reasonable basis to conclude that the proposal would somehow interfere with the shopping activities of Parkwood residents, that type of injury would likely not be considered significant enough to confer standing. *See Glickert v. Loop Trolley Transp. Dev. Dist*., No. 4:13cv2170 SNLJ (E.D. Mo. Apr. 28,

2014)(status as patrons of a business district that will allegedly be adversely affected by a proposed trolley route insufficient to qualify for standing in federal court).

In its response, Parkwood also asserts that project and associated traffic may impact the readiness of ambulance services in the area that a Packwood resident may need in a life-threatening emergency. As with the commercial patronage assertion, this assertion also fails as too conjectural or hypothetical for standing. Packwood is not expected to prove its SEPA appeal to prevail on standing, but it must give some reasonable indication that it has something substantive enough to argue about. Parkwood presents no evidence that its facilities are close enough to the project site to be affected by its traffic except asserting at Page 3 of its response brief that it's located "less than (3) three miles away." That radius potentially includes every resident within City limits. Baldly asserting emergency service impacts for a project that will be located miles away presents no reasonable basis to conclude that a litigant may be adversely affected by a development proposal.

Finally, Packwood also asserts that the Examiner is collaterally estopped from addressing standing because the superior court decision issued on its challenge to the MAC clinic concluded that "*the Plaintiffs [Packwood and SOS] will be able to present evidence and argue why they believe the decision is incorrect [in Sequim's local appeals process]*." As noted in a recent appellate court decision, a party asserting collateral estoppel must show, among other elements, that the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding. *Church of Divine Earth v. City of Tacoma*, No. 53804-1-II, p. 17 (Wash. Ct. App. Apr. 14, 2020). There is no indication in the record that standing for this appeal was litigated by the parties in the Packwood's superior court appeal.

Mr. Bilow asserts no injury in response to the City and Tribe standing arguments and none is apparent from the record. For this reason, Mr. Bilow also lacks standing to file his administrative appeals.

B. The Proposed MAT Clinic Does not Qualify as An Essential Public Facility Subject to C-2 Review.

SOS and Packwood both take the position that the MAT clinic should have been subjected to a C-2 review because it qualifies as an essential public facility, which requires a special property use permit and hence C-2 review in the RREOA zone. It is determined that the MAT Clinic was properly construed as a medical clinic use by the City, which is permitted outright in the RREOA zone without need for a special use permit.

In its permit classification decision, the City determined that the MAT clinic qualifies as a medical clinic. Table 18.33.031 SMC identifies ambulatory and outpatient care services, which expressly includes outpatient clinics, as permitted uses in the RREOA zone. "Clinic" is defined by SMC 18.08.020C as "*a building designed and used for the diagnosis and treatment of human outpatients excluding overnight care facilities*.." As described in the Design Review decision, the MAT clinic will provide a medication assisted treatment program which offers FDA approved dosing, primary care services, consulting services, dental health services and child watch services while clients are seen. As defined by the Design Review decision, the proposed MAT clinic is clearly designed for the diagnosis and treatment of opioid addition on an outpatient basis, and thus falls squarely within the definition of clinic, a permitted use in the RREOA zone.

Packwood and SOS take the position that the MAT clinic qualifies as an essential public facility instead of an outpatient clinic. Table 18.33.031 SMC requires a conditional use permit for local essential public facilities in the RREOA zone. State and regional essential public facilities are permitted outright in the RREOA zone. SMC 18.08.020E defines an essential public facility as follows:

> *"Essential public facilities," mandated by the GMA, include airports, public educational facilities, state and regional transportation facilities, state and local correctional facilities, and other facilities of a state or regional scope. For the purpose of this title, wastewater reuse facilities will be considered to be essential public facilities.*

Since the City's definition of essential public facilities references that they are "mandated by the GMA," the RCW definition of essential public facilities is pertinent

in further construing the definition. RCW 36.70A.200(1) defines essential public facilities to include:

> *...Essential public facilities include 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.*

(emphasis added)

Parkwood and SOS both argue that the MAT clinic as proposed only constitutes the first phase of a multi-phase development that will include in-patient services in Phase 2. Under the city and state definitions above, the MAT clinic likely would qualify as an essential public facility if it included in-patient facilities. In their dispositive motions Parkwood and SOS present evidence of plans from the Tribe to add a 16-bed in-patient facility to the MAT clinic in a second phase. The Tribe presented evidence that funding requested for the second phase from the state legislature has been denied and that the Tribe's plans for the second phase have been abandoned because funding sources are limited due to the COVID pandemic. Regardless, the only permits approved for the MAT clinic are for an outpatient facility. Under those permit approvals, the Tribe is only authorized to construct an outpatient facility. If and when the Tribe decides to add an in-patient facility, with that addition it would likely qualify as an essential public facility and then the C-2 process may apply. However, the MAT clinic as proposed and approved does not currently have an in-patient component. Whether the Tribe may add an in-patient component to the proposal in the future is irrelevant to the classification of the building permit and design review decision under appeal.

Parkwood cites to case law that provides that piecemeal review of a phased project involving a series of interrelated stopes is impermissible where the project is

dependent upon subsequent phases. See Parkwood Response, p. 7, citing *Murden Cove Pres. Ass'n v. Kitsap* Cty, 41 Wn. App. 515, 526 (1985). *Murden Cove* only applies to SEPA review and has no bearing on the classification of the proposed MAT use. The *Murden* Court's conclusions on piecemeal development were based upon a SEPA regulation, WAC 197-11-060, which identifies the circumstances under which the environmental impacts of a multi-phase development must be considered in a single environmental document. *See id*. For this appeal, even if a future in-patient phase were required for the SEPA review of the MAT clinic under *Murden*, that wouldn't change the classification of the permit review. The MAT clinic's SEPA determination would still qualify as a Type A-2 permit whether or not the in-patient facility is included in the SEPA analysis. Further, the proposed MAT clinic would still qualify as an outpatient clinic for purposes of classifying its present use regardless of whether SEPA review includes an assessment of in-patient impacts. *Murden* is irrelevant to whether or not the MAC clinic qualifies as an outpatient facility for purposes of Table 18.33.031 SMC.

Parkwood also argues that the MAT clinic qualifies as an essential public facility because it meets the criteria for such uses under WAC 365-196-550(2). Parkwood identifies that the criterion are met because the MAT clinic location meets a specific public need, that the services provided at the proposed location can be coordinated with another Tribal facility in the vicinity and that the proposal is controversial. However, as briefed by the Tribe, under federal law the City cannot subject the MAT clinic to zoning review standards and procedures that differ from similarly situated medical clinics that are permitted outright in the RREOA zone. Drug addiction is considered a disability under the Americans with Disabilities Act ("ADA"). See 42 U.S.C. § 12102(2). The third, sixth and ninth federal circuit courts construe zoning laws that single out methadone clinics for different zoning procedures as facially discriminatory under the ADA and the RA. *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 310 (3d. Cir. 2007). In *New Directions*, a Pennsylvania zoning statute singled-out methadone clinics by prohibiting them within 500 feet of

schools, playgrounds and similar sensitive land uses unless the legislative body of the local municipality with zoning authority authorized the clinic by majority vote. The City of Reading used the statute to prohibit a proposed methadone clinic in its jurisdiction. The New Directions court concluded that the zoning statute violates the ADA and RA and remanded for further proceedings.

Significantly, in its legal analysis the *New Directions* court concluded that "*we agree with the Sixth and Ninth Circuits that a law that singles out methadone clinics for different zoning procedures is facially discriminatory under the ADA and the Rehabilitation Act*." 490 F.3d at 305. Given this regulatory and judicial background, it is imperative that the City not construe its zoning procedures in a manner that treats methadone clinics differently from similarly situated medical clinics. In this regard, the City would need to identify legally cognizable zoning impacts that distinguish methadone clinics from other clinics that are permitted outright in the RREOA zone. Importantly, perceived harm from stereotypes and generalized fears do not serve as a basis for distinguishing methadone clinics from clinics permitted outright. See *Bay Area Addiction Research & Treatment*, Inc. v. City of Antioch, 179 F.2d 725, 736-37 (9th Cir. 1999)(under ADA zoning ordinances may make distinctions based upon serious threats to public health and safety if "*these (rare) distinctions are based on sound policy grounds instead of on fear and prejudice*.")

Under cases such as *New Directions* and *Bay Area*, Parkwood's reliance upon the fact that the proposal has drawn significant public opposition is not a legally cognizable basis for distinguishing methadone clinic from clinics permitted outright in the RREOA zone. Despite the clear necessity to identify some harm created by the MAT clinic that could confer standing, both Parkwood and SOS could come up with nothing. Parkwood and SOS have been unable to cite to any concrete evidence of any adverse impacts that could potentially be generated by the proposal, let alone impacts that would distinguish it from other medical clinics permitted outright. There are no "sound policy grounds" to subject methadone clinics to an essential public facility

review process while medical clinics of similar size are permitted outright in the RREOA zone. As noted in the classification decision under appeal, "*[t]he 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 City…*"

Parkwood's other reasons for subjecting the MAT clinic to an essential public facility review process are also unavailing, as they do not establish any difference from other medical clinics permitted outright in the RREOA zone. Private medical clinics that meet a unique need for the area or that work in close association with other medical facilities would still be permitted outright in the RREOA zone as a medical clinic. The fact that the Tribe's facility may arguably qualify as a public facility given the Tribe's status as a sovereign entity has no bearing on the zoning impacts of the proposal, which is all that's pertinent in assessing a proposal's use classification. In short, Parkwood has not identified any impacts of a MAT clinic that would distinguish it from a medical clinic. The only real difference is between an authorized medical clinic and the MAT clinic is public perception, which is precisely the type of discriminatory decision-based decision making that the ADA and RA are designed to prevent.

Parkwood and SOS also argue that a special property use permit is required for the MAT clinic under the City's essential public facilities siting ordinance, Chapter 18.56 SMC. That chapter does not apply to MAT clinics, because it only creates an approval process to place essential public facilities in zoning districts where they would otherwise be prohibited. Since MAT clinics are not prohibited in the RREOA district, Chapter 18.56 SMC does not apply to it.

Unfortunately, Chapter 18.56 SMC is not the model of clarity, so it is understandable that the parties have developed very divergent opinions on how it is to be applied. The purpose clause adds clarity, providing that "*[i]t is the intent of the special use permit section of the zoning code to allow the following uses in districts*

from which they are now prohibited by Chapter 18.20 SMC, or in certain districts as herein provided,…" From this provision it is clear that Chapter 18.56 SMC applies to essential public facilities that are otherwise prohibited in zoning districts as specified in Chapter 18.20 SMC or other "certain districts". It is apparent that Chapter 18.56 SMC was adopted to meet the City's duty under RCW 36.70A RCW to refrain from precluding the siting of essential public facilities. As required by RCW 36.70A.200, Chapter 18.56 SMC enables the siting of essential public facilities that would otherwise be precluded by the city's zoning districts.

It is important to note that the essential public facility purpose clause doesn't include any statement that it also creates a review process for essential public facilities in zoning districts where they are already authorized. In districts where the uses are authorized, of course, they are not precluded and do not violate RCW 36.70A.200. This point is fairly obvious but highlights an understanding that appears to belie the arguments of Packwood and SOS, specifically that RCW 36.70A.200 requires some kind of public hearing process for essential public facilities. It doesn't. As noted by the Central Puget Sound Growth Management Hearings Board, there are just two duties imposed by RCW 36.70A.200: a duty to adopt, in the plan, a process for siting essential public facilities; and a duty not to preclude the siting of essential public facilities in a plan or implementing development regulations. *See Port of Seattle*, 97-3-0014, FDO, at 7. No court opinion or GMA hearings board decision has ever required an essential public facility process to include public hearings. The focus of RCW 36.70A.200 isn't public participation, but rather ensuring that cities don't try to legislate out essential public facilities from their jurisdictions. Even if the MAT clinic qualified as an essential public facility, the City could still designate the A-2 review process for that type of facility to avoid conflicts with the ADA and RA. The City's essential public facility siting process would simply be comprised of the A-2 process for methadone clinics and Chapter 18.56 SMC for everything else.

Implementing the purpose of Chapter 18.56 SMC to authorize essential public facilities in districts where they're precluded, SMC 18.56.030 provides that "*[t]he council may permit the following uses in districts from which they are now prohibited by this title:…*" As noted by SOS in its reply brief on its summary judgment motion, that list includes almost all of the uses identified as essential public facilities in RCW 36.70A.200. In order to prevent Chapter 18.20 SMC from precluding the siting of essential public facilities, the first step is to identify what those precluded uses would be. That is the purpose of the list in SMC 18.56.030.

It is the next section of Chapter 18.56 SMC that creates some ambiguity. SMC 18.56.040 simply provides that "*[e]ssential 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). If the term "certain" is removed from SMC 18.56.040, one could argue that it requires a special property use permit for the citing of all essential public facilities in any zone. However, a closer inspection reveals that it simply mandates that if such a permit is acquired, the use shall be allowed. SMCE 18.56.040 doesn't provide anywhere that a special property use permit is the exclusive means of authorizing an essential public facility. It leaves open the possibility that the essential public facility could be authorized by other means, such as being permitted outright in a zoning district. Written and construed in this way, the duty to not preclude under RCW 36.70A.200 is accomplished – essential public facilities are not precluded anywhere in the city because they're either permitted outright in the zoning district chapters or they're permitted by a special property use permit Chapter 18.56 SMC. The qualifier "certain" in SMC 18.56.040 can reasonably be construed as relating back to the zoning districts referenced in SMC 18.56.030, i.e. if a zoning district precludes an essential public facility listed in SMC 18.56.030, then that essential public facility can be authorized in that "certain" zoning district via the special property use permit authorized by SMC 18.56.040.

Cast in the light above, the City's essential public facilities ordinance clearly does not apply to MAT clinics in the RREOA zone. MAT clinics are not precluded from the RREOA zone so the City's essential public facilities ordinance isn't necessary and isn't designed to authorize it. Even if the MAT clinic qualifies as a drug treatment center listed in SMC 18.56.030, SMC 18.56.040 still doesn't require a special property use permit for it, because such a permit would only be required if the MAT clinic were prohibited by Table 18.33.031. Since it isn't, Chapter 18.56.040 doesn't apply and no special property use permit is necessary.

Packwood and SOS assert that SMC 18.56.030 removes drug treatment centers from the more general umbrella of medical clinics by separating them out as a more specific use. Packwood asserts that the more specific classification of SMC 18.56.030 prevails over the more general medical clinic classification of Table 18.33.031. However, as previously noted, preference is given a more specific statute only if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized. *Allen v. Dan & Bill's RV Park*, 428 P.3d 376, 383-384 (Wash. Ct. App. 2018). In this situation, as outlined above, there is no conflict between Table 18.33.031 and Chapter 18.56.040 so there is no need to apply the general-specific rule of construction. Table 18.33.031 authorizes the MAT clinic so Chapter 18.56 SMC doesn't apply.

As a final matter, SOS argues that the laboratory and child watch areas in the proposed MAT clinic require conditional uses in the RREOC zone. While it may be correct that as primary uses such activities require a conditional use permit, they are not primary or standalone uses for the proposed MAT clinic. The services are ancillary for use by the patrons of the MAT clinic and are not proposed as separate services for the general public. As argued in the City's summary judgment motion, p. 32-33, child watch and laboratory services reasonably could be construed as permitted ancillary services in other medical clinic applications. If and when the Tribe ever broadens its MAT clinic lab and child watch services for other than MAT clinic patrons, at that point

the City can and should require conditional use permits for those services. However, requiring conditional use permits for those services likely would not serve the objectives of the project opponents, since those permits would not involve a review of the drug treatment programs offered by the clinic.

C. The SMC C-2 Definition Does not Compel C-2 Review of the MAT Proposal.

The sole issue raised by Mr. Bilow in his appeal is whether the definition of C-2 review serves as the basis for requiring C-2 review of the MAT clinic proposal. It does not. The C-2 definition simply provides guidance on what review process is for applications required by Sequim's development standards.

As noted in SMC 20.01.010, Chapter 20.01 SMC establishes an "*integrated permit review process*." To this end, Table 2 of Chapter 20.01 assigns an "*application type*" to the permits required by the City's development standards, mostly located in Titles 12 and 15-19. The "*application types*" are listed as A-1, A-2, B, C-1, C-2 and C-3. The process associated with each "*application type*" is identified in Table 1 of Chapter 20.10 SMC. Ascertaining the required review process for a required permit is fairly straightforward applying these two tables. For example, a building permit in Table 2 is identified as a Type A-1 application. Table 2 then identifies that as a Type A-1 application, building permit decisions are made by City staff without a public hearing or public notice and are subject to appeal to the hearing examiner.

In addition to the review processes detailed in Table 2, the application types are also generally defined in the definitions section of Chapter 20.01 SMC. As pertinent to Mr. Bilow's appeal, SMC 20.01.020W defines "Type C-1, C-2, C-3 processes" as "*processes which involve applications that require the exercise of substantial discretion and about which there is a broad public interest*."

The need and purpose for the "*application type*" definitions such as that for C-1 is not expressly identified in Chapter 20.01. However, it is reasonably self-evident that

the definitions can be used for permit applications that are not identified in Table 2. Some permits, such as essential public facility permits required by Chapter 18.56 SMC, are not identified in Table 2. Since Chapter 20.01 SMC was adopted to comply with the processing requirements of the Regulatory Reform Act, and the Regulatory Reform Act applies to all development permit applications (with limited exceptions), it must be concluded that development permits that are not expressly identified in Table 2 must be assigned one of the "application types" identified in Tables 1 and 2. To this end, SMC 20.01.040 identifies a review process and construction guidelines for classifying an application. The "application type" definitions can thus be used in the SMC 20.01.040 classification process to help determine the most appropriate classification for a permit not identified in Table 2.

In this case, Mr. Bilow appeals Sequim's SMC 20.01.040 classification determination that the building permit, SEPA review and design review applications filed by the Jamestown S'Klallam Tribe qualify as Type A-2 application types. Applying the C-2 "application type" definition, Mr. Bilow asserts in his appeal that the MAT applications should have been classified as a C-2 application because "*the project requires substantial discretion and involves broad public interest*."

Although not expressly stated, by necessary implication Mr. Bilow takes the position that the "application type" definitions supersede the permitting classifications made in Table 2. This is because Table 2 classifies a building permit as an A-1 application and SEPA review as an A-2 decision Mr. Bilow ignored these classifications and instead asserts that the permit classifications should have been initially and entirely based upon the C-2 application type decision. There is no basis for reaching this conclusion. Assuming arguendo that Mr. Bilow is correct in his position that the C-2 definition dictates that the MAT applications are C-2 applications, this would render the C-2 definition in direct conflict with Table 2 of Chapter 20.01 SMC because that table requires the permits to be processed as consolidated A-2 applications.

Where one statute deals with a subject in a general way and another deals with a part of the same subject in a more detailed fashion, the two should be harmonized if possible. *Estate of Sigurdson*, 44 Wn. App. 731 (1986)(citing 2A N. Singer, Statutory Construction § 51.05 (4th ed. 1984)). If the two conflict, however, the more specific statute prevails. State v. Alvarez, 6 Wn. App. 398 (2018). As previously noted, the "application type" definitions can be used to classify permits that haven't been included in Table 2. Limiting the use of the definitions to those circumstances succeeds in harmonizing the definitions with Table 2 in the manner that was likely contemplated by the drafters of the Chapter 20.01. If the provisions are not harmonized in this fashion then the specific must be construed as superseding the general. In this case, the specific is Table 2, because it addresses the review process for several specific types of permits while the C-2 definition has much broader classification standards. Consequently, under either the rule that statutes must be harmonized when possible or under the general-specific rule, the MAT applications should be construed as A-2 applications .

The untenability of Mr. Bilow's position is belied by the underlying premise of his appeal that the classification of a permit application commences with application of Title 20 SMC as opposed to Title 18. It's not possible to do so. As previously noted, the C-2 definition applies to the classification of "applications." A property owner is only required to file an "application" if required to do so by Title 18 or any of the other SMC titles that govern development. Consequently, the necessary first step in ascertaining what type of project review is required for a project is to reference Titles 15-18 to see what, if any, development permits are required for a project. Even if the "application type" decisions supersede Table 2, the permit review criteria of Titles 15-18 serve as an essential guide in applying the definitions, as those criteria demarcate the level of discretion involved in the permits required by Titles 15-18. The level of discretion involved in a permit review is a central element to the definitions of all "application type" definitions.

Mr. Bilow argues in his response to the City's motion and his request for witness subpoenas that the applications are discretionary and hence qualify as Type C-2 applications because the applicant, as a Native American tribe, is not subject to the City's development standards. It may be possible that the Tribe could avoid the City's regulatory authority if it succeeded in having the MAT clinic designated a trust property by the federal government. But whether and to what extent the Tribe could use its sovereign immunity has no relevance to what permit review classification applies to it. As previously noted, the permit review classification definitions are based upon the level of discretion authorized by required development permits. Any sovereign immunity that could be exercised by the Tribe has no bearing on the level of discretion that attaches to a required permit. Further, if Mr. Bilow is simply arguing that a C-2 process is necessary to regulate sovereign immunity, that's not the case either. As outlined in the Examiner's Order Cancelling Hearing, the SEPA determination subject to the A-2 process maximizes the City's discretion to address project impacts. The C-2 review does not give the City any more authority than it already has via its SEPA regulatory authority under the A-2 process.

D. Ordinance No. 2020-009 Applies to this Proceeding.

After the Tribe vested its building permit application for the MAT clinic, the City Council adopted Ordinance No. 2020-009, which amended Chapter 20.01 SMC to clearly provide that the hearing examiner has jurisdiction over SEPA appeals, which would include the MAT clinic SEPA appeal. The courts have clearly ruled that procedural requirements do not vest. *See Graham Neighborhood Ass'n v. F.G. Assoc*., 162 Wn. App. 98 (2011). In supplemental briefing, SOS asserts that Graham is distinguishable because the City "*is trying to change horses in midstream*" to avoid the procedural mandates of its code. Washington's vested rights doctrine, currently codified in RCW 19.27.095 for building permits, was based upon a judicially manufactured vesting scheme designed to create a bright line rule that prevents having

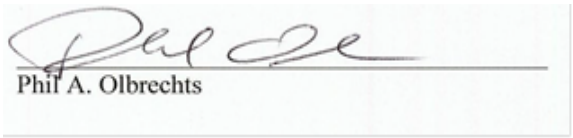
to assess the moves and counter moves of parties to a development review "*to find that date upon which the substantial change in position is made which finally vests the right*." *See Hull v. Hunt*, 53 Wn.2d 125, 130 (1958). Having to carve out exceptions to *Graham* for circumstances where parties have relied upon one set of hearing procedures as opposed to another opens the door to the very type of subjective analysis that Washington's vested right's doctrine was designed to avoid. Further, in practical terms there is no changing of horses in this proceeding. The parties have had full opportunity to participate in the A-2 process through the issuance of this Order. They have not been deprived of any meaningful opportunity to participate due to the adoption of Ordinance No. 2020-009.

Packwood also contested the validity of Ordinance No. 2020-009 in its supplemental briefing. The hearing examiner has no authority to invalidate City ordinances. A hearing examiner's authority is limited to that expressly granted by statute and ordinance and those additional powers impliedly necessary to carry out its responsibilities. *See, LeJeune v. Clallam County*, 64 Wn. App. 257 (1992). The courts have historically strictly applied this standard See, Id. (absent an express code provision, County Commissioners have no authority to reconsider their quasi-judicial decisions); *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 (1984), (hearing examiner has no authority to consider equitable estoppel defense because the examiner was not given this authority by ordinance or statute); *Exendine v. City of Sammamish* 127 Wn. App. 574, 586-87 (2005)(hearing examiners do not have the authority to enforce, interpret or rule on constitutional challenges).

Order

The Packwood, SOS and Bilow appeals are dismissed for lack of standing as outlined in the legal analysis of this Order. The Tribe's dispositive motion regarding the MDNS is rendered moot by its agreement with the City to modified conditions, which will be addressed in additional proceedings held before the Examiner.

ORDERED this 8th day of October 2020.



Sequim Hearing Examiner