

Memo

TO: Honorable Mayor Dave Kaplan
Honorable City Councilmembers
Tony Piasecki, City Manager
Pat Bosmans, City Attorney
Tim George, Assistant City Attorney

FROM: Michael C. Walter *M CW*

DATE: October 5, 2015

RE: Valley Cities – *Woodmont Recovery Center project* (LUA2014-0038)
Legal opinions: SEPA issues, initial opinions and options

I. SUMMARY OF PROJECT AND CHRONOLOGY

On December 2, 2014, Valley Cities Counseling & Consultation submitted an application for a Conditional Use Permit (“CUP”) and an environmental checklist pursuant to the State Environmental Policy Act (“SEPA”) for construction of the Woodmont Recovery Center (“Project”). The application was assigned application number LUA2014-0038. The Project is for construction of a medical and mental health recovery campus at 26915 Pacific Hwy. South in Des Moines. The campus will be comprised of five buildings constructed in phases: (1) An evaluation and treatment facility for mental health patients with 24 beds; (2) a drug and alcohol detoxification facility with 40 beds; (3) a main office building; (4) a dispensary clinic; and (5) a common meeting facility for AA meetings and other support services. The evaluation and treatment facility is the first phase; the detox facility will be the second phase.

The application was deemed fully complete on December 12, 2014 and notice of a complete application was issued that date. *See* DMMC 18.20.120. On February 2, 2015, the City issued a “Mitigated “determination of Nonsignificance” (“MDNS”) under SEPA. The MDNS included eight conditions to mitigate impacts from the Project. The 15-day comment period on the SEPA determination expired February 17 and, based on several comment letters, the City voluntarily extended the deadline to appeal the decision from February 27 to March 16. No one appealed the Threshold Determination or the conditions which were a part of the MDNS.

The City timely noticed the CUP hearing before the Hearing Examiner, which took place on April 3. A number of citizens appeared at the CUP hearing and many testified. On April 15, the Examiner issued his findings of fact, conclusions of law and decision on the CUP. He approved

the CUP with 11 conditions to mitigate potential impacts from the Project. No one asked the Examiner to reconsider his CUP decision, as allowed by DMMC 18.2 40.240(1), and the deadline for reconsideration expired on April 26. The time to appeal both the SEPA decisions and the CUP decision expired no later than May 6, 2015, with no appeals of either.

Recently, neighbors and community members began complaining about the Project. The City held public information meetings on August 18 and September 16, with hundreds attending. Some citizens are suggesting the City re-open the SEPA process and reverse the finding of a DNS or impose new or additional mitigation on the project. Some apparently want the Project stopped. Others have asked for a moratorium on the project or its permitting. A review of the record of the Project reveals that notices of the SEPA and CUP processes were proper and timely, that the Project was accurately described, and that there have been no changes to the Project or significant new information since the final deadline for appeals passed.

II. EXECUTIVE SUMMARY

A. The Woodmont Recovery Center project cannot be denied, excluded or unreasonably burdened to preclude approval because it is an “Essential Public Facility” under the State Growth Management Act (“GMA”). As such, it has an enhanced status in the permitting and approval process that basically prevents the City from precluding it or denying it. Appropriate mitigation can be imposed. Staff and the Hearing Examiner properly took this important fact into account when evaluating, recommending and approving the Project.

B. The City should consider this project vested to the City's ordinances, regulations and policies in effect as of December 12, 2014. *See*, DMMC 18.20.110.

C. The time to appeal the SEPA MDNS expired at the latest on May 6, with no appeals by any person or party. The SEPA MDNS threshold decision, as well as all mitigation which is a part of it, is final and binding on all phases of the Project. This bar to any appeal applies to anyone attempting to challenge the SEPA decision, including Valley Cities, the City of Des Moines, parties of record and members of the public.

D. There is no legal basis to review, reconsider or alter the SEPA MDNS or the mitigation unless one of the three exceptions in WAC 197-11-340(3)(a) are established by “substantial evidence.” There is no evidence in the record before the Hearing Examiner or in the (on-line) project files relating to the Project that would support re-opening or revising either the SEPA threshold decision (changing the MDNS to a DS) or adding or changing mitigation imposed through the MDNS under any of the three limited exceptions in WAC 197-11-340(3)(a). *However, see Opinion E, below.*

E. The time to appeal the Hearing Examiner's CUP decision expired on May 6, with

no LUPA¹ appeal (or other challenge). Thus, the Examiner's CUP decision, as well as the mitigation which is a part of it, is final, binding and not subject to judicial review. That CUP decision is binding on all phases of the Project. Like the SEPA decision, this bar to appeal applies to anyone attempting to challenge the CUP decision, including Valley Cities, the City of Des Moines, and members of the public.

F. Timely notice of both the SEPA threshold determination and the public hearing for the CUP was provided to all required parties. It appears that the notices for both steps (the SEPA and the CUP) were (1) done timely (both in advance of the deadline dates), (2) were given to the proper people (for example, 600 feet beyond the site boundaries), (3) were properly displayed (signage on the property), and all notices (4) properly described the Project (including the drug detox and treatment center).

G. Based on the record on the SEPA decision and before the Hearing Examiner, I believe the drug detoxification and treatment aspects of the Project, including the use of Methadone to treat opiate addicts, were appropriately disclosed throughout the process. Notices and descriptions of the Project do not appear misleading or missing information that would provide a basis to re-open the SEPA process or the CUP hearing.

H. There is no legally justifiable basis for a moratorium involving this project or property. Adoption or even consideration of a moratorium at this time would likely run afoul of the GMA prohibition against precluding essential public facilities, would appear to be a backdoor effort to stop or delay of the Project, and would violate the Project's vested status.

III. KEY OPINIONS AND ANALYSIS

A. **Woodmont Project is an essential public facility and under State law cannot be precluded or improperly conditioned to preclude siting and development**

RCW 36.70A.200(5), a part of the Growth Management Act, prohibits local government and development regulations that preclude the siting of "essential public facilities."² The Woodmont recovery Center, a mental and medical health treatment and care facility, is an essential public facility as defined by state law. *See*, RCW 36.70A .200.

Local government may not include criteria in their land-use approval processes "which would allow the essential public filler facility to be denied, but may impose reasonable permitting

¹ Appeals of a CUP are governed by the State Land Use Petition Act, RCW ch. 36.70C ("LUPA"). DMMC 18.20.180(2) and DMMC 18.240.250(3). The mandatory deadline to appeal a CUP (or other land use decision) under LUPA is 21 days following the date of the decision. Under RCW 36.70C.040(3), a land use petition is timely "if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issues of the land use decision." Here, the 21-day appeal period under LUPA expired on May 6.

² Essential public facilities are "those facilities that are typically difficult to cite, such as... Mental health facilities,...". RCW 36.70A.200.

requirements and required mitigation of the essential public facilities' adverse impacts." Additionally, Washington courts and the Growth Boards have held that the legislative purposes underlying the importance of siting and allowing the development of essential public facilities would be defeated "if local governments could prevent the construction or operation of [an essential public facility]." *City of Des Moines v. Puget Sound regional Council*, 108 Wash App. 836, 846 (1999).

As an essential public facility, the Woodmont Recovery Center cannot be denied or precluded, and the City's development regulations and permitting requirements (such as mitigation) cannot be so overly onerous as to preclude the facility. The City can, of course, "require mitigation of the [Project's] adverse impact." WCA 365-196-550(3)(b).

B. The City should consider this Project vested as of December 12, 2014

The City should consider this project vested to the City's ordinances, regulations and policies in effect as of December 12, 2014. DMMC 18.20.110, acceptance for vesting, provides in pertinent part:

(1) An application for proposed land-use action shall not serve to vest any development rights until the planning, building and public works director determines the application is complete as specified by this code.

The City issued a "notice of complete application" pursuant to DMMC 18.20.120 on December 12, 2014. Accordingly, that determination effectively deems the project to be vested as of that date, pursuant to DMMC 18.20.110.

C. The deadline to appeal the SEPA decision (the Threshold Determination and mitigation) and the Hearing Examiner's CUP decision expired on May 6; any appeals are now time barred

The time to appeal the SEPA Threshold Determination and the Hearing Examiner's CUP decision expired on May 6, and any attempted appeals at this time are clearly time-barred. The time to appeal the SEPA decision expired when the time to appeal the CUP expired. Under WAC 197-11-680(4)(c), "If there is a time limit established by statute or ordinance for appealing the underlying governmental action, then appeals (or portions thereof) raising SEPA issues must be filed within such time period." (The RCW uses the same language: "If there is a time period for appealing the underlying governmental action, appeals under ["RCW 43.21C - State Environmental Policy"] shall be commenced within such time period." RCW 43.21C.075(5)(a). Pursuant to WAC 197-11-799, "underlying governmental action" means the governmental action, such as zoning or permit approval that is the subject of SEPA compliance. In this case, the underlying action is the Examiner's CUP decision.

The State Land Use Petition Act codified at RCW chapter 36.70C ("LUPA") governs appeals of land use decisions, such as the Examiner's CUP decision. *See*, RCW 36.70C.020. With

few enumerated exceptions (none applicable here), LUPA is the exclusive means of judicial review of land use decisions made through either a quasi-judicial process, by administrative procedure, or ministerial permit issuance, including a CUP. RCW 36.70C.020(1) and .030(1). *See also, Nykreim v. Chelan County*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Samuels Furniture v. Ecology*, 147 Wn. 2d 440, 449, 54 P.3d 1194 (2002).

WAC 197-11-680(4)(c) applies to LUPA and “links” any appeals of SEPA decisions to the underlying permit decision (the CUP), and both are subject to LUPA’s appeal deadline. Under LUPA, a land use petition is timely “if it is filed and served on all parties listed in subsection (2) of this section within twenty-one days of the issues of the land use decision.” RCW 36.70C.040(3). Therefore, since the final Hearing Examiner’s CUP decision was issued on April 15, the final day that an appeal of either the SEPA decision or the CUP decision could have been made was May 6, 2015. *See also* analysis in Section E below.

D. There is no basis in the record to withdraw the MDNS or to re-open the SEPA process

Under WAC 197-11-340(3)(a), the lead agency can withdraw a DNS or MDNS if:

- (i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;
- (ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or
- (iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.”

The definition of what constitutes a “significant adverse environmental impact” is presumably subject to the same analyses that a court would undertake in the original threshold decision phase, including using the information received from the checklist. *Citizens for Natural Habitat v. City of Lynnwood*, 107 Wash.App. 1054, at *11 (2001). WAC 197-11-794 defines “significant” as:

- (1) ‘Significant’ as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.
- (2) Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact. The severity of an impact should be weighed along with the likelihood of its occurrence. An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe

if it occurred.

Courts review substantive SEPA decisions under the clearly erroneous standard of review. *Victoria Tower Partnership v. City of Seattle*, 59 Wn.App. 592, 596, 800 P.2d 380 (1979), review denied, 116 Wn.2d 1012 (1991). Similarly, “the appropriate standard by which to review [a governmental determination of ‘no environmental significance’] is the ‘clearly erroneous’ test.”³ *Sisley v. San Juan County*, 89 Wash.2d 78, 84, 569 P.2d 712 (1977) (citing *Norway Hill v. King County Council*, 87 Wash.2d 267, 274-276, 522 P.2d 674 (1976)). “A negative threshold determination is clearly erroneous if, despite supporting evidence, the reviewing court on the record can firmly conclude a mistake has been committed.” *Sisley*, 89 Wash.2d at 84 (internal quotations omitted). See, also: *Victoria Tower*, 59 Wn.App. at 596; “Under this standard, the court does not substitute its judgment for that of the administrative body and may find the decision ‘clearly erroneous’ only when it is left with the definite and firm conviction that a mistake has been committed.” In making this determination, the Court reviews the entire record and “is required to consider the public policy and environmental values of SEPA as well.” *Id.* In other words, a reviewing court is not just looking to see if sufficient evidence exists to support the administrative or governmental decision. *Id.* The courts have held that the record of a DNS threshold determination must “demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.” *Id.* at 85. In my opinion, that standard was met here.

There is no evidence in the City permit files or the record before the Hearing Examiner, to support any of the three exemptions in WAC 197-11-340(3)(a). The permit and SEPA record I reviewed (the on-line City permitting documents under LUA2014-0038) does not reveal any evidence of substantial changes (or any changes) to the Woodmont Project, of any new information, or of any misrepresentation or lack of disclosure regarding the Project or uses proposed. There is nothing in the record that would warrant the City re-opening, withdrawing or modifying either the threshold determination (the MDNS) or the mitigation conditions imposed through the MDNS and the CUP decision.

F. Based on the record, there is no basis to set aside the Hearing Examiner’s CUP decision

There is nothing in the record that would support re-opening or setting-aside the Hearing Examiner’s CUP decision. No one sought reconsideration of or appealed the Examiner’s April 15 CUP decision. As discussed above, the deadline to challenge that decision was no later than May 6 (same as SEPA appeals), through an appeal under LUPA. The CUP decision is now final, binding and valid, and it is not subject to review or collateral attack by anyone.⁴ This includes Valley

³ This standard would also apply if someone challenged the DNS under one of the reasons in WAC 197-11-340(3)(a), lost, and then appealed that decision to a superior court.

⁴ LUPA establishes a mandatory and clearly delineated 21-day deadline for appealing final decisions of local land use authorities. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406, 120 P.3d 56 (2005); *Samuel’s Furniture v. Ecology*, 147 Wn.2d 440, 450, 54 P.3d 1194 (2002); *Wenatchee Sportsman v. Chelan Co.*, 141 Wn.2d 169, 181, 4 P.3d 123 (2000) (Court is precluded from reviewing a land use decision that challenged through LUPA within the 21-

Cities, the City of Des Moines, and parties of record as well as members of the general public.

And, any challenge to the CUP done via SEPA is also time-barred. *See*, analysis above. Additionally, pursuant to RCW 43.21C.080(2)(b):

“Any subsequent governmental action on the proposal for which notice has been given as provided in subsection (1) of this section shall not be set aside, enjoined, reviewed, or otherwise challenged on grounds of noncompliance with the provisions of RCW 43.21C.030(2)(a) through (h) unless there has been a substantial change in the proposal between the time of the first governmental action and the subsequent governmental action that is likely to have adverse environmental impacts beyond the range of impacts previously analyzed, or unless the action now being considered was identified in an earlier detailed statement or declaration of non-significance as being one which would require further environmental evaluation.”

(Emphasis added.) “All later actions necessary to implement [an agency’s decision], *e.g.*, permit approvals, are “subsequent” actions subject to RCW 43.21C.080(2)(b). *Wells v. Whatcom County Water Dist. No. 10*, 105 Wash.App. 143, 153, n.17, 19 P.3d 453 (2001). “Under [RCW 43.21C.080(2)(b)], the CUP process is a ‘subsequent governmental action[.]’” *Id.* at 153. Here, based on the SEPA record and the record before the Hearing Examiner there is no evidence of any change in the original proposal that would create additional adverse environmental impacts not considered by the Hearing Examiner.

G. The record establishes disclosure of a methadone clinic and drug detoxification facility

The record before the Hearing Examiner, including the submittals by the Applicant, the SEPA checklist, the comment letters from the public, the staff report and exhibits, and

day appeal period; once 21-day appeal period expires, the decision becomes “valid” and the opportunity to challenge it is no longer available). As the Court noted in *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006):

To serve the purpose of timely review, LUPA provides *stringent deadlines*, requiring that a petitioner file a petition for review within 21-days of the date of the Land Use Decision. RCW 36.70C.040(3).

Id., 132 Wn.App. 795 (emphasis added). A party’s failure to timely seek relief under LUPA results in a final, binding and valid decision that cannot be collaterally attacked in subsequent litigation, or under other theories claims or causes of action. *See, e.g.: Chelan Co. v. Nykreim, supra.; Wenatchee Sportsmen, supra.; Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006); *Harrington v. Spokane Co.*, 128 Wn.App. 202, 114 P.3d 1233 (2005). Thus, once the LUPA 21-day appeal period has expired, the land use decision becomes “valid” and “final,” and no other claim for relief or cause of action can be made arising out of it. *Wenatchee Sportsmen, supra*, 141 Wn.2d at 182 (emphasis added)

photographs, drawings and other materials adequately disclose, in my opinion, the planned construction and operation of a drug and alcohol detoxification facility which would include a methadone clinic. For example, the SEPA Checklist identifies in at least seven places that the Project will include a drug treatment and drug detoxification facility. The Checklist on at pp 2-3 actually references Methadone treatment in the facility. Submittals by the applicant disclose in various places that the second building, second phase, will include a detoxification and drug treatment facility. The staff report in several places also references the drug detoxification and treatment facility as part of the Project. And, the Examiner's April 3, 2015 CUP decision references and describes the drug treatment and detoxification facility in the summary of the decision, in at least seven findings of fact, and in the final decision.

In my opinion, based on the SEPA and CUP record, this aspect of the Project was appropriately disclosed throughout the process.

IV. OPTIONS TO REVISE OR SUPPLEMENT MITIGATION

A. Use Condition no. 1 of the hearing examiner's April 15 CUP decision

Condition no. 1 of the hearing examiner's April 15 CUP decision provides as follows:

“Valley Cities shall enter into a separate agreement with the City of Des Moines to mitigate the impacts of public services. This agreement shall be approved by Valley Cities and the City a minimum of five months prior to the City issuance of the certificate of occupancy. Included in this agreement shall be “return to the city of origin” language. Valley Cities shall not receive a certificate of occupancy or final inspections from the City until the agreement has been approved by both parties.”

CUP Decision, pp. 12 – 13, Condition no. 1.

This condition requires Valley Cities and the City to further “mitigate the impacts on public services” through an agreement. Such an agreement must be in place at least five months before the City can issue a certificate of occupancy for the first structure.

If the parties cannot agree on the terms or mitigation of this separate public services agreement, while not explicitly stated, presumably the Hearing Examiner would have authority to resolve the dispute and determine through a supplement to his CUP decision the specific mitigation imposed through this agreement. Once this agreement is resolved by the hearing examiner, it will result in a modification to the April 15 CUP decision which would then trigger a new opportunity for appeal to Superior Court by any party. Such an appeal would be a LUPA appeal under RCW

chapter 36.70C.⁵

Additionally, if a party of record to the CUP decision were to appeal the mitigation agreement made between the City and Valley Cities, that individual would likely be able to file an appeal with the hearing examiner as well. The hearing examiner decision would then be subject to LUPA as stated above.

B. Use Condition no. 11 of the hearing examiner's April 15 CUP decision

Condition no. 11 of the Hearing Examiner's CUP decision provides as follows:

“Within two months following one year after the mental health treatment facility has been operational, the City shall reopen this hearing to determine whether the conditions above mitigate the impacts of the proposal such that the use is not unreasonably incompatible with permitted land uses and surrounding areas. Traffic concerns and the potential need for signal is Asian on Pacific Highway should also be addressed at that time.”

CUP Decision, p. 15, Condition no. 11.

This is a mandatory requirement to “reopen” the Examiner's CUP hearing to determine whether the conditions already imposed fully mitigate the impacts of the proposal “such that the use is not unreasonably incompatible with permitted land uses in surrounding areas.” This renewed hearing will occur 14 months or more after phase 1 of the facility is operational. The parties to the CUP – the City and Valley Cities – as well as the parties of record will have an opportunity to present evidence regarding the operation of the facility and to examine and evaluate whether the conditions already imposed are sufficient to mitigate impacts of the Recovery Center, or if new or supplemental mitigation is required. Presumably this condition provides for fairly broad discretion to impose additional or revised mitigation based on actual evidence of impacts to the community.

C. Use Condition no. 5 of the hearing examiner's April 15 CUP decision

Condition no. 5 of the Examiner's CUP decision provides as follows:

“Parties of record shall be notified of the design review process and be provided an appropriate opportunity to comment on design review. Discussion of appropriate fence height along residential boundary should specifically be addressed during the design review process.”

CUP Decision, pp. 14, Condition no. 5.

Pursuant to this condition of the CUP decision, those parties who participated in the SEPA comment period or the CUP decision process must be notified of this design review process and provided an opportunity to “comment on design review” and associated/related mitigation. This is yet another opportunity to evaluate impacts and impose, if warranted, additional or revised mitigation to address those design-related impacts. Comments should be strictly limited to the criteria for design styles and design review.