



CITY OF
TUMWATER

**PLANNING COMMISSION
MEETING AGENDA**

**Online via Zoom and In Person at
Tumwater Fire Department
Headquarters, Training Room, 311 Israel
Rd. SW, Tumwater, WA 98501**

**Tuesday, January 23, 2024
7:00 PM**

1. Call to Order
2. Roll Call
3. Changes to Agenda
4. Commissioner's Reports
5. Manager's Report
6. Public Comment
7. Public Hearing
 - [a.](#) Resolution No. R2024-001, Fourth Edition Hazards Mitigation Plan for the Thurston Region
 - [2.](#) Ordinance No. O2023-017, TMC 18.38 FP Floodplain Overlay
 - [3.](#) Attorney General's Advisory Memorandum
4. Next Meeting Date - 02/13/2024
5. Adjourn

Meeting Information

The public are welcome to attend in person, by telephone or online via Zoom.

Watch Online

https://us02web.zoom.us/webinar/register/WN_h1rMcl6iQn-Tg3ihaAs6OQ

Listen by Telephone

Call (253) 215-8782, listen for the prompts, and enter the Webinar ID 894 5139 8851 and Passcode 929681.

Public Comment

The public is invited to attend the meeting and offer comment. The public may register in advance for this webinar to provide comment:

https://us02web.zoom.us/webinar/register/WN_h1rMcl6iQn-Tg3ihaAs6OQ

After registering, you will receive a confirmation email containing information about joining the webinar.

The public may also submit comments prior to the meeting by sending an email to: cdd@ci.tumwater.wa.us. Please send the comments by 1:00 p.m. on the date of the meeting. Comments are submitted directly to the Commission Members and will not be read individually into the record of the meeting.

If you have any questions, please contact Planning Manager, Brad Medrud at (360) 754-4180 or bmedrud@ci.tumwater.wa.us.

Post Meeting

Audio of the meeting will be recorded and later available by request, please email CityClerk@ci.tumwater.wa.us.

Accommodations

The City of Tumwater takes pride in ensuring that people with disabilities are able to take part in, and benefit from, the range of public programs, services, and activities offered by the City. To request an accommodation or alternate format of communication, please contact the City Clerk by calling (360) 252-5488 or email CityClerk@ci.tumwater.wa.us. For vision or hearing impaired services, please contact the Washington State Relay Services at 7-1-1 or 1-(800)-833-6384. To contact the City's ADA Coordinator directly, call (360) 754-4128 or email ADACoordinator@ci.tumwater.wa.us.

What is the Planning Commission?

The Tumwater Planning Commission is a citizen advisory commission that is appointed by and advisory to the City Council on the preparation and amendment of land use plans and implementing ordinances such as zoning. Actions by the Planning Commission are not final decisions; they are Commission recommendations to the City Council who must ultimately make the final decision. If you have any questions or suggestions on ways the Commission can serve you better, please contact the Community Development Department at (360) 754-4180.

Decorum Statement

Welcome to the Planning Commission meeting. We thank you for attending.

The City Council encourages community engagement in local government and provides a variety of ways to participate.

The Chair of the Planning Commission will be responsible for conducting orderly and efficient meetings within the scheduled time. To accomplish that, the Chair will maintain order and decorum and can regulate inappropriate debate, repetitious discussion, and disruptive behavior when needed.

The Chair will recognize those that wish to speak and may limit the time allowed for individual comments. City staff will record questions and comments during the meeting. If an issue or question cannot be addressed during the meeting, City staff will address the issue or respond to the question by following up with the individual.

We respectfully request that attendees refrain from disruptions during the meeting and comply with decorum rules.

Thank you for participating.

TO: Planning Commission

FROM: Erika Smith-Erickson, Land Use and Housing Planner and Brad Medrud, Planning Manager

DATE: January 23, 2024

SUBJECT: Resolution No. R2024-001, Fourth Edition Hazards Mitigation Plan for the Thurston Region

1) Recommended Action:

Conduct a public hearing on Resolution No. R2024-001, hear public testimony, and forward a recommendation for approval to the City Council of the resolution.

2) Background:

The Thurston Region is susceptible to many natural hazards. In order to receive federal mitigation funding and assistance in the event of a natural disaster, the City must develop a plan to reduce impacts to people, property, and the economy.

The City Council adopted the third edition of the *Hazards Mitigation Plan for the Thurston Region* in 2017. The 2017 Plan was based on a multi-jurisdictional process to develop mitigation strategies to reduce the risks of the most destructive hazards that threaten the region. The City is required to update their plan every five years and have it approved by the Federal Emergency Management Agency (FEMA) to maintain eligibility for federal mitigation grant programs. The City has an annex as part of the Plan that identified initiatives that the City will undertake to address hazards present in the City.

Over twenty local agencies in Thurston County have been working together with the Thurston Regional Planning Council (TRPC) to prepare the fourth edition of the Plan since 2022. The Plan is currently being reviewed by FEMA. The TRPC project website is here [4th Edition Hazards Mitigation Plan for the Thurston Region](#).

The Planning Commission discussed the resolution and plan in a work session at their January 9, 2024 meeting and scheduled the public hearing. The public notice for the hearing was published and posted on January 12, 2024.

3) Alternatives:

- ☐ Modify the resolution and recommend City Council approve Resolution No. R2024-001
 - ☐ Recommend City Council reject Resolution No. R2024-001
-

4) Attachments:

- A. Resolution No. R2024-001
- B. Presentation
- C. Tumwater Annex to the Fourth Edition of the *Hazards Mitigation Plan for the Thurston Region*

RESOLUTION NO. R2024-001

A RESOLUTION of the City Council of the City of Tumwater, Washington adopting the 2024 update to the Hazards Mitigation Plan for the Thurston Region.

WHEREAS, the City of Tumwater is vulnerable to the human and economic costs of natural disasters; and

WHEREAS, the Tumwater City Council recognizes the importance of reducing or eliminating those vulnerabilities for the overall good and welfare of the community; and

WHEREAS, the City of Tumwater has been an active participant in the countywide process led by the Thurston Regional Planning Council to establish a comprehensive, coordinated planning process to eliminate or decrease these vulnerabilities; and

WHEREAS, the City of Tumwater has identified, justified and prioritized a number of proposed projects and programs needed to mitigate the vulnerabilities of Tumwater to the impacts of future disasters; and

WHEREAS, these proposed projects and programs have been incorporated into the 2024 update edition of the "Hazards Mitigation Plan for the Thurston Region" that has been prepared and issued for consideration and implementation by the communities of Thurston County;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TUMWATER AS FOLLOWS:

Section 1. The Tumwater City Council hereby accepts and approves its designated portion of the 2024 update to the "Hazards Mitigation Plan for the Thurston Region" attached as Exhibit "A".

Section 2. The agency personnel of the City of Tumwater are requested and instructed to pursue available funding opportunities for implementation of the proposals designated therein.

Section 3. The City of Tumwater will, upon receipt of such funding or other necessary resources, seek to implement the proposals contained in its section of the strategy.

Section 4. The City of Tumwater will continue to participate in the updating and expansion of the "Hazards Mitigation Plan for the Thurston Region" in the years ahead.

Section 5. The City of Tumwater will further seek to encourage the businesses, employers, employees, residents, organizations, and community groups operating within and/or for the benefit of the City of Tumwater to also participate in the updating and expansion of the "Hazards Mitigation Plan for the Thurston Region" in the years ahead.

Section 6. Ratification. Any act consistent with the authority and prior to the effective date of this Resolution is hereby ratified and affirmed.

Section 7. Severability. The provisions of this Resolution are declared separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this Resolution or the invalidity of the application thereof to any person or circumstance, shall not affect the validity of the remainder of the Resolution, or the validity of its application to other persons or circumstances.

Section 8. Effective Date. This Resolution shall become effective immediately upon adoption and signature as provided by law.

RESOLVED this ____ day of _____, 2024.

CITY OF TUMWATER

Debbie Sullivan, Mayor

ATTEST:

Melody Valiant, City Clerk

APPROVED AS TO FORM:

Karen Kirkpatrick, City Attorney

Hazards Mitigation Plan City of Tumwater Annex 2024



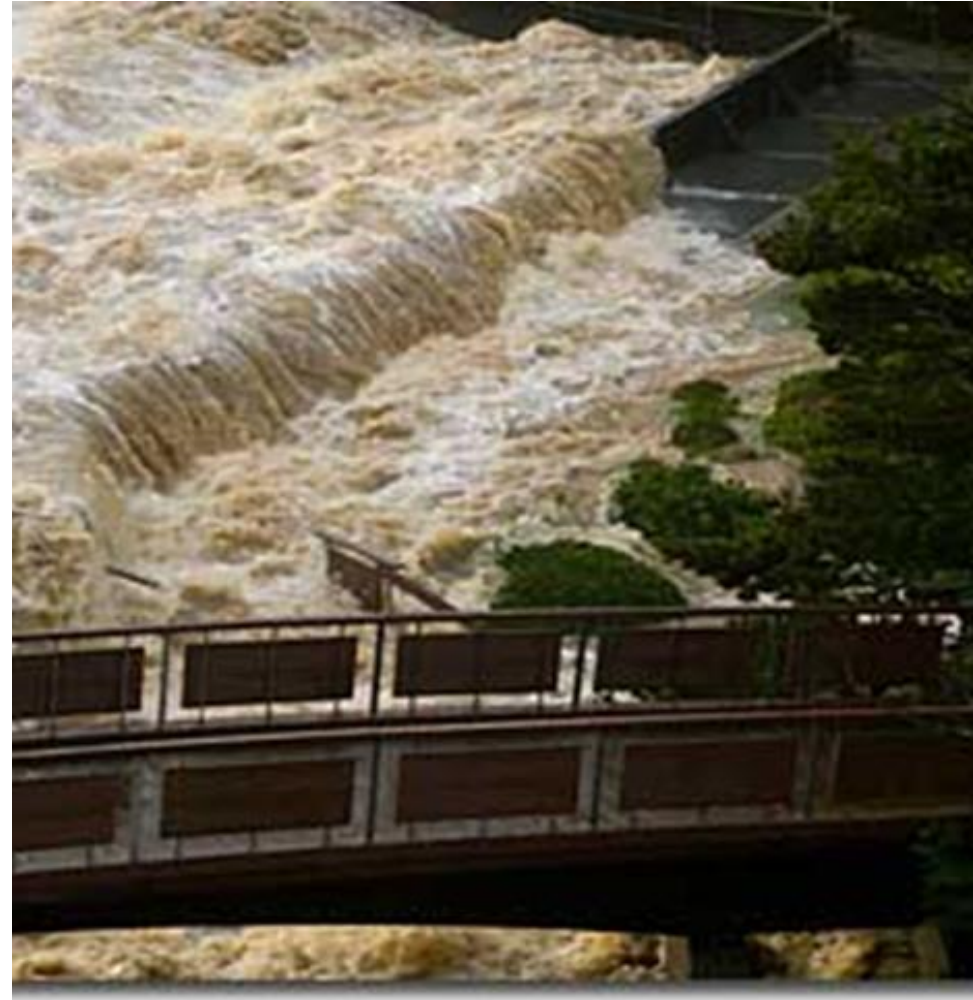
HAZARDS MITIGATION PLAN FOR THE THURSTON REGION



Planning Commission – January 23, 2024

Issue

- Earthquakes, landslides, severe storms, floods, wildland fires, volcanic events, and other hazards cause lengthy disruptions and are costly to communities
- Hazards mitigation planning is intended to identify and implement sustained actions that eliminate long-term risks to life and property



Background

- The Federal Government enacted the Disaster Mitigation Act of 2000
- Jurisdictions must adopt a federally approved Hazards Mitigation Plan to apply for or to receive federal mitigation assistance program grants
- There is a multijurisdictional “Core Plan” for Thurston region and individual jurisdictional plans known as “Annex”
- Plans must be updated every 5 years
- The Hazards Mitigation Plan was last updated in 2017



Local Mitigation Planning Policy Guide

FP 206-21-0002

Released April 19, 2022, Effective April 19, 2023

OMB Collection #1660-0062



FEMA

Overview



The City is susceptible to earthquakes, flooding, landslides, severe weather, and wildfires



The City Annex identifies actions that are specific to the vulnerabilities of its community and is responsible for implementing the actions



The City has identified 20 initiatives to help mitigate and reduce impacts of natural hazards



Categorized by initiative type: public outreach and information, plan coordination and implementation, data collecting and mapping, development regulations, hazard preparedness, hazard damage reduction, and critical facilities and replacement retrofit

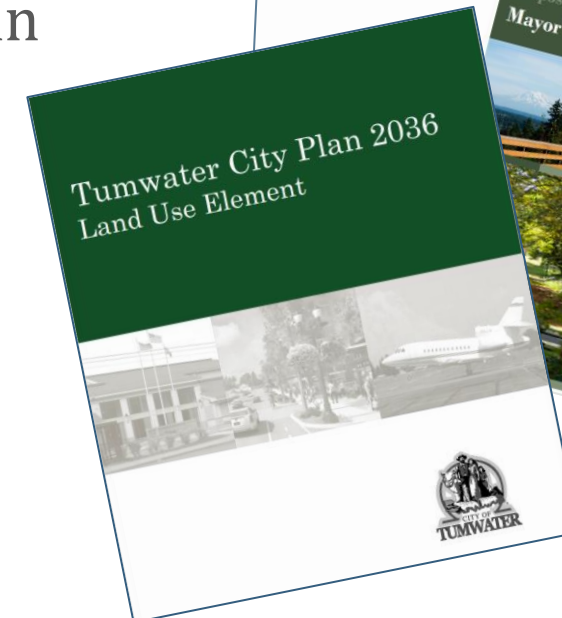
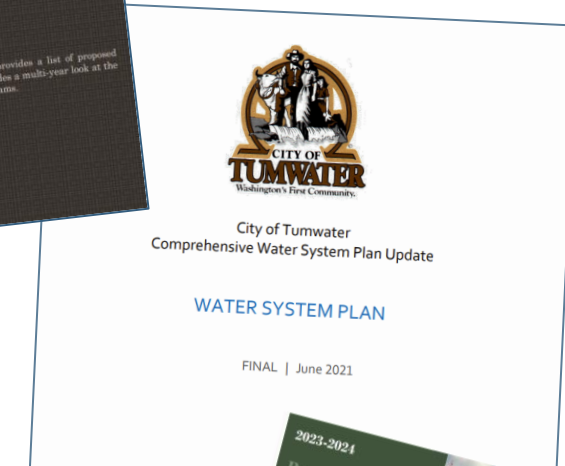
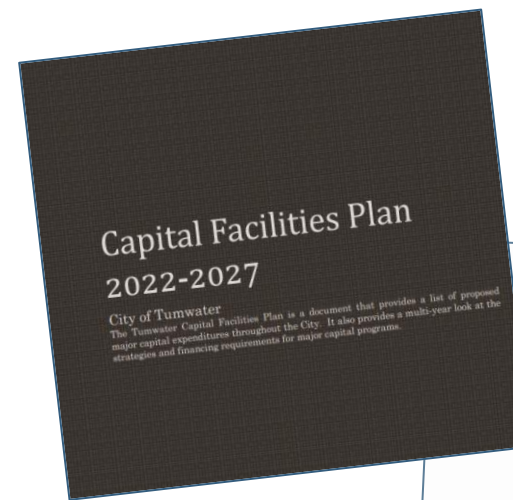


Sample Mitigation Initiative

Initiative identification, benefit cost review score, and title	New, existing, modified, ongoing, or removed during the plan update process
Benefit-cost review score. Higher score is a higher priority Hazard addressed and action category Background and Need description	CW-WH-2: Countywide Multijurisdictional Community Wildfire Protection Plan Benefit-Cost Review Score: 36 Hazard Addressed: Wildland Fire Category: Plan Coordination and Implementation Background and Need: Thurston County wildfire frequency and size have trended upward over the last 15 years. On September 8, 2020, a 268-acre fire in southwest Thurston County, intensified by sustained high speed winds, destroyed two homes and two outbuildings near <u>Mima</u> and Bordeaux Roads SW. The fire forced area residents to evacuate. The incident resulted in Thurston County receiving immediate federal fire management assistance, an uncommon wildfire declaration for communities in Western Washington lowlands. The effects of climate change will make summers warmer, drier, and longer. Climate change combined with the region's growing population will increase the likelihood for more frequent, larger, and perhaps more severe wildfires. Planning is necessary to understand the wildfire risks for current and future households and businesses located in wildland urban interface and intermix areas. In addition, wildfire smoke will adversely impact people who suffer from chronic respiratory diseases or people who are exposed and unable to seek indoor refuge. Building on the momentum of the 2023 Wildfire Ready Neighbors Program partnership and the 2023 Assessing Structural Ignition Potential courses hosted by Thurston County Emergency Management, the region will pursue the development of a multijurisdictional countywide Community Wildfire Protection Plan. The planning process will involve a whole community approach to engage a variety of stakeholders to identify areas of the community, especially underserved communities, that are at greatest risk for wildfire losses and establish a collaborative framework for communities to identify strategies for wildfire response, hazard mitigation, and community education and preparedness.
Relationship to plan goals Implementation details Source for the initiative Progress toward the initiative's implementation	Relates to Plan Goal(s) and Objectives: 3C, 5C, 6A, 6B, 7B, 7D, 7E, 9A, 9B Lead: The Association of Thurston County Fire Chiefs in partnership with the tribes, county, cities, special purpose districts, Wash. Dept. of Natural Resources, the US Forest Service, TRPC, the public, and other stakeholders. Estimated Cost: Medium, \$100,000 to \$300,000 Time Period: 2024-2028 Funding Source: Wash. Dept. of Natural Resources Community Wildfire Defense Grant Source and Date: 2023 Natural Hazards Mitigation Plan Initiative and Implementation Status: This is a new initiative. Information about this initiative's status will be reported during the next plan update.

Integration of City Annex

- Capital Facilities Plan
- Biennial Budget
- 2020 Water System Plan
- Deschutes Flood Reduction Study
- City of Tumwater Comprehensive Plan
- Development Code
- 2023 & 2024 City Work Programs



Plan Structure

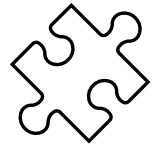
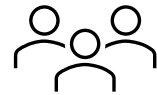


Table of Contents

List of Tables

Adopting Resolution

Community Profile

Summary and Adoption

City Annex Development process

City Risk Assessments

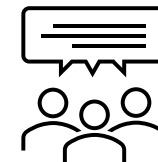
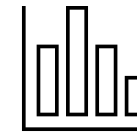
Mitigation Strategy

Benefit Cost Review Results

Public Comment Summary

Appendix A - Community Capability Assessment

Appendix B - NFIP Assessment



Monitoring & Maintenance



The Planning Team is responsible for monitoring and maintaining the plan



The Planning Team will create a process to track and monitor the initiatives and status



The Annex and Regional Plan is a climate resiliency sub-element in 2025 Comprehensive Plan Update



Plan Update

- Several Hazards Mitigation plan workgroup meetings were held
- Multiple opportunities for public engagement
- The draft City Annex was submitted for final public comment November 3-17, 2023
- The Core Plan, City Annex, and plan review tool were submitted to Washington Emergency Management Division (WAEMD) November 27, 2023

Public Outreach Activities	Date
Thurston Regional Planning Council Community Survey	June 1- July 31, 2022
Article in <i>The Olympian</i> regarding the Community Survey	July 11, 2022
City Council Briefing	June 21, 2022
Draft Action Plan Open House and Survey	July 24-August 25, 2023
Planning Commission Briefing	July 25, 2023
Volunteering at Thurston County Fair – Thurston County Emergency Management Booth	July 26, 2023
Planning Commission Briefing	July 25, 2023
General Government Committee Briefing	August 9, 2023
Emergency Preparedness Expo	September 23, 2023
Final Draft Plan Public Comment Period	November 3- November 17, 2023
Final City Annex and Core Regional Plan to Washington Emergency Management Division	November 2023
FEMA Review	November 2023
Planning Commission Work Session	January 9, 2024



Approval Process

- WAEMD 30-day review period ends December 28, 2023
- After WAEMD approval the plan will be sent to FEMA for their 45-day review period
- WAEMD or FEMA may recommend revisions



Approval and Adoption Process

Plan
completed

If plan meets requirements

Submit plan
to State
EMD for
review



EMD
forwards
plan to
FEMA for
review



FEMA
issues
"approvable
pending
adoption"
status



Jurisdiction
adopts plan
and submits
evidence of
adoption



FEMA
issues
approval
letter



First jurisdiction
approved starts
5-year cycle

30 days
State review

45 days
FEMA review

Next Steps

Planning Commission

- Recommendation to the City Council on Resolution 02024-001

General Government Committee

- February 14, 2024



The City of Tumwater's Annex to the Natural Hazards Mitigation Plan for the Thurston Region



November 2023

Table of Contents

Table of Contents	2
List of Tables	5
Adopting Resolution	6
Community Profile	7
Summary and Adoption	9
City Annex Development Process	9
Hazards Mitigation Planning Team	9
Hazards Mitigation Planning Team Development Activities	10
City Stakeholder Involvement	11
Opportunities for Public Participation in the Plan Development	12
Review and Incorporation of Existing Plans, Studies, and Technical Information into the City Annex and Regional Plan Update	13
Technical Reports and Citations Bibliography	13
Integration of City Annex and Regional Plan into other Planning Mechanisms	14
Plan Monitoring and Maintenance	15
Continued Public Involvement	15
City Risk Assessments	16
Flood Risk Assessment	16
Area of Impact	16
Extent	17
Previous Incidents	17
Probability of Occurrence	24
Changes in Development	24
Effects of Climate Change	24
Vulnerability	25
Risk	26
Earthquake Risk Assessment	27
Area of Impact	27
Extent	28
Previous Incidents	28
Probability of Occurrence	31

Annex: City of Tumwater

Changes in Development	31
Effects of Climate Change	32
Vulnerability	32
Risk	34
Landslide Risk Assessment	36
Area of Impact.....	36
Extent	37
Previous Incidents	37
Probability of Occurrence	40
Changes in Development	40
Effects of Climate Change	41
Vulnerability	41
Risk	42
Severe Weather Risk Assessment	43
Area of Impact.....	43
Extent	43
Previous Incidents	44
Probability of Occurrence	48
Changes in Development	48
Effects of Climate Change	49
Vulnerability	49
Risk	50
Wildfire Risk Assessment	51
Area of Impact.....	51
Extent	52
Previous Incidents	52
Probability of Occurrence	53
Changes in Development	53
Effects of Climate Change	53
Vulnerability	53
Risk	54
Mitigation Strategy	56
City Mitigation Initiatives	56

Annex: City of Tumwater

Mitigation Initiative Prioritization Process	56
Mitigation Initiative Format	57
Sample Mitigation Initiative	58
City Mitigation Initiatives	59
Mitigation Initiatives Removed from the City Annex Mitigation Strategy	81
Benefit Cost Review Results	85
Purpose	85
Evaluation Criteria	85
Required Benefit-Cost Review and Prioritization Criteria	85
Optional Benefit-Cost Review and Prioritization Criteria	86
Required Mitigation Action Benefit-Cost Mitigation Review with Prioritization Criteria Ratings and Scores	88
Optional Mitigation Action Benefit-Cost Mitigation Review with Prioritization Criteria Ratings and Scores	89
Cost-Benefit Review and Prioritization Worksheet	90
Public Comment Summary	96
Appendix A – Community Capability Assessment	97
Capability Assessment Worksheets	97
Types of Capabilities	97
Observations and Discussion Form	97
Evaluating Equity in the Capability Assessment	97
Capability Assessment Worksheets	98
Appendix B – National Flood Insurance Program Assessment	109
National Flood Insurance Program Assessment Worksheet	109
Evaluation for National Flood Insurance Program Participation	109

List of Tables

Table 1. Estimated Population Exposure to Flood. 26

Table 2. Estimated Structural Exposure to Flood..... 26

Table 3. Earthquake Displacement and Shelter Needs in the City. 32

Table 4. Structural Rubble Created by Earthquake in the City. 33

Table 5. Damage to Water Systems in the Event of a Cascadia M9.3 Earthquake. 33

Table 6. Estimated Exposure to Wildland Fire for the City. 55

Table 7. Types of Structures Exposed in Wildland Urban Interface in the City. 55

Table 8. City Annex Mitigation Strategy Initiatives. 59

Table 9. Former Mitigation Initiatives Removed from the City Annex Mitigation Strategy. 81

Adopting Resolution

[Will be inserted when adopted]

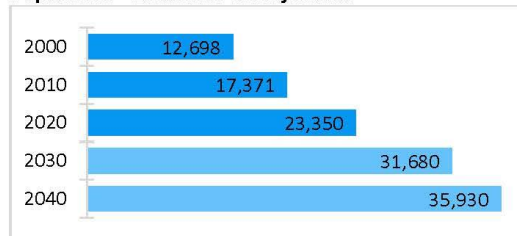
Community Profile

Tumwater

2022 Statistical Profile

Demographics

Population – Estimates & Projections



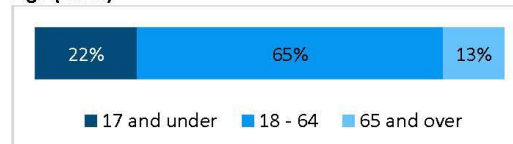
Average Annual Population Growth

2000-2010:	3.2% per year
2010-2020:	3.0% per year

Language Spoken at Home (2016-2020)*

English Only	93.8%
Spanish	3.0%
Korean	0.2%
Chinese	0.2%
Vietnamese	0.8%
Tagalog	0.0%
Other Language	1.9%
TOTAL	100.0%

Age (2010)



Median Age: 37

Race & Ethnicity (2020)

Race

White	76%
Black & African American	3%
American Indian & Alaska Native	1%
Asian	5%
Native Hawaiian & Other Pacific Islander	1%
Other Race	2%
Two or More Races	12%
TOTAL	100%

Ethnicity

Hispanic or Latino	9%
Not Hispanic or Latino	91%
TOTAL	100%

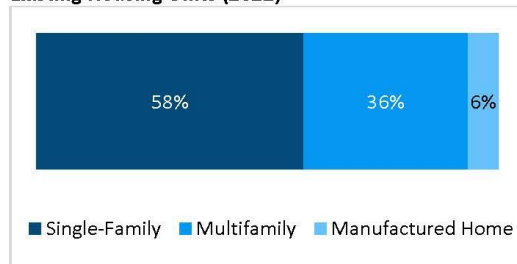
Households & Housing

Households (2020)

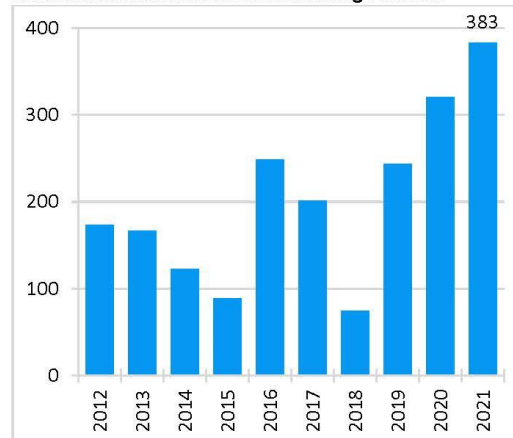
Total Households:	11,488
Average Household Size:	2.39

Median Home Sale Price (2021): \$460,000

Existing Housing Units (2022)



New Residential Units Issued Building Permits



*Estimates based on survey data and may have a large margin of error.

Updated Nov. 2022

Tumwater

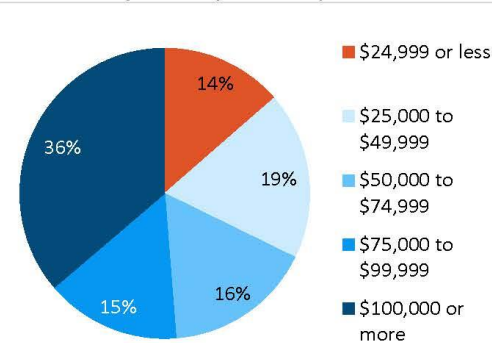
2022 Statistical Profile

Employment & Income

Median Household Income*



Households by Income (2016-2020)*



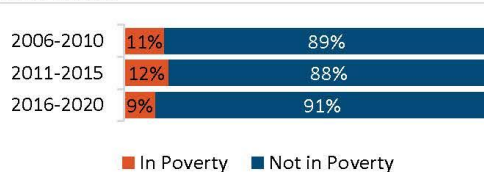
Cost Burdened Households (2016-2020)*



Cost Burdened	2,948
Severely Cost Burdened**	1,318
Not Cost Burdened	6,324
TOTAL Households	9,272

**Severely cost burdened households are a subset of cost burdened households.

Poverty Rate*

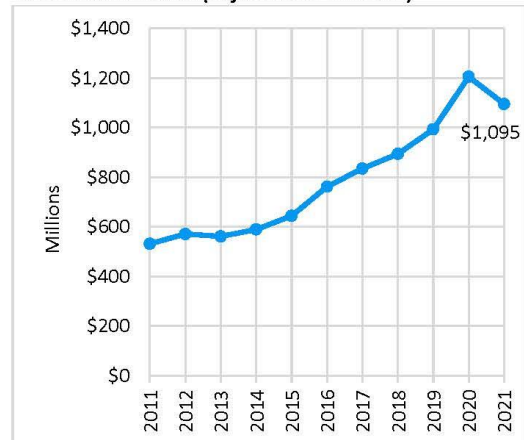


Jobs (2017 Estimate)

Resource, Construction, Utilities	1,890
Manufacturing, Wholesale Trade	2,970
Retail, Accommodation, Food	3,660
Transportation, Warehousing	680
Services	5,630
Finance, Insurance, Real Estate	1,250
Government	10,960
Total Jobs**	27,030

**Numbers may not add due to rounding.

Taxable Retail Sales (adjusted for inflation)



LEARN MORE about statistics, trends, analyses and comparisons for Thurston County and its jurisdictions at The Profile: www.trpc.org/theprofile.



Thurston Regional Planning Council
2411 Chandler Ct SW
Olympia, WA 98502
info@trpc.org
Ph: 360-956-7575

*Estimates based on survey data and may have a large margin of error.

Updated Nov. 2022

Summary and Adoption

The fourth edition of the Natural Hazards Mitigation Plan for the Thurston Region, referred to here as the Regional Plan, is the result of a multi-jurisdictional process to develop a mitigation strategy to reduce the risks of the most destructive hazards that threaten the region. This plan specifically addresses communities and special districts within Thurston County. This regional cooperative approach, led by the Thurston Regional Planning Council, has provided a comprehensive document at minimal cost to the participating regional partners. Thurston County jurisdictions, including special purpose districts, have the option of developing their own more jurisdiction-specific hazards mitigation plans, referred to as an “Annex.” The City has elected to update the City Annex as part of the Regional Plan update process.

The Board of County Commissioners will adopt the Regional Plan and the Thurston County specific Annex. Other jurisdictions will review the document and adopt the Regional Plan and their specific Annex. In adopting the City Annex, the City also adopts the Regional Plan which describes the overarching regional approach to hazards mitigation.

The City Annex describes the City’s planning process and expands upon the Regional Plan by identifying unique characteristics of the City, detailing the City’s hazard risk rating for all appropriate hazards, cataloging the City’s past, current, and proposed mitigation initiatives, and documenting the City’s participation in the National Flood Insurance Program. The City Annex identifies potential City specific projects, designed to mitigate the impacts of those hazards that could be undertaken in the future depending on funding, direction, and need. The projects, known as mitigation initiatives, are developed based on input from each City department.

The Community Development Department has reviewed the City Annex to ensure that it does not conflict with the Comprehensive Plan or create potential conflicts with other City initiatives. The public has also been given opportunities to comment on the Regional Plan and the City Annex.

In order to apply for certain types of state and federal grants the City must have current Hazards Mitigation and Comprehensive Emergency Management plans in place.

City Annex Development Process

Hazards Mitigation Planning Team

The following individuals served as the City’s hazards mitigation planning team.

City Department and Title	Representative
Community Development, Housing and Land Use Planner	Erika Smith-Erickson
Community Development, Planning Manager	Brad Medrud
Community Development, Director	Mike Matlock

Hazards Mitigation Planning Team Development Activities

The following activities supported the development of the City hazards mitigation planning process.

Actions and Activities	Date
Thurston Regional Planning Council Community Survey	June 1 – July 31, 2022
City Council Briefing	June 21, 2022
Thurston Hazards Mitigation Workgroup	September 26, 2022
Thurston Hazards Mitigation Workgroup	October 24, 2022
Thurston Hazards Mitigation Workgroup	November 28, 2022
Thurston Hazards Mitigation Workgroup	January 23, 2023
Long Range Planning Meeting – Staff introduction	March 3, 2023
Thurston Hazards Mitigation Workgroup	March 8, 2023
Review 2017 initiatives and draft new and revised initiatives	March 10, 2023
Email to City Department Directors for status on 2017 initiatives	March 15, 2023
Review of the of status of initiative responses from the 2017 Hazards Mitigation Plan	March 20, 2023
Started benefit cost review worksheet	April 19, 2023
Thurston Hazards Mitigation Workgroup	March 27, 2023
Collaboration with internal staff reviewing the draft initiatives and cost benefit worksheet	May 12, 2023
Email to internal workgroup to go over new proposed initiatives for 2023	May 23, 2023
Meeting with Planning Manager and Community Development Director to review initiatives	May 26, 2023
Discussion with Planning Manager with draft initiatives, prioritization criteria worksheet, and meeting schedules	June 2, 2023
Email to internal workgroup regarding FEMA requirements and capability assessment	June 5, 2023
Meeting with Thurston Regional Planning Council to review two new policy changes to FEMA requirements: capability assessment and review of hazards and actions required for the City	June 8, 2023

Annex: City of Tumwater

Actions and Activities	Date
Internal City Annex workgroup meeting to review 2023 initiatives, capability assessments, benefit cost review worksheet, and timeline for City Annex and Regional Plan Update	June 29, 2023
Planning Commission Briefing	July 25, 2023
Staffing Thurston County Fair – Thurston County Emergency Management Booth	July 26, 2023
Risk assessment criteria discussion with Thurston Regional Planning Council	August 3, 2023
General Government Committee Briefing	August 9, 2023
Final draft of 2023 initiatives sent to Department leads for comment	August 16, 2023

City Stakeholder Involvement

The City stakeholder group worked together to provide an update on the status of the 2017 initiatives, proposed revisions, and helped implement new initiatives. The stakeholder group helped implement other work plans and plan documents relative to hazards mitigation for the capability assessment.

The hazards mitigation planning team briefed the City Council on June 21, 2023, the Planning Commission on July 25, 2023 and General Government Committee on August 9, 2023. They provided comments and asked questions relating to the City Annex and Regional Plan update.

Organization	Representatives
Mayor	Debbie Sullivan
City Council	Councilmembers Angela Jefferson, Charlie Schneider, Eileen Swarthout, Joan Cathey, Leatta Dahlhoff, Michael Althausen, and Peter Agabi
General Government Committee	Councilmembers Michael Althausen, chair, and Joan Cathey and Leatta Dahlhoff
Public Health and Safety Committee	Councilmembers Leatta Dahlhoff, chair, and Angela Jefferson and Peter Agabi
Planning Commission	Elizabeth Robbins (Chair), Meghan Sullivan (Vice Chair), Anthony Varela, Brian Schumacher, Kelly Von Holtz, Terry Kirkpatrick, Grace Anne Edwards, Michael Tobias
Staff Stakeholder Group	Fire, Water Resources & Sustainability, Parks & Recreation, Executive, Transportation &

Annex: City of Tumwater

Organization	Representatives
	Engineering, and Community Development Departments and the GIS Team

Opportunities for Public Participation in the Plan Development

To engage the public and get feedback on the City Annex and Regional Plan update, the City participated in multiple public meetings, open houses and surveys, volunteer events, and the Emergency Preparedness Expo. During the Planning Commission briefing held on July 25, 2023 the Jolt News organization attended and authored an article.

Public comment on the Jolt News article expressed concern with earthquake hazards. Comments from the Planning Commission and General Government Committee were addressed and noted by staff as part of the update. The City posted the open house and survey on Facebook and put up flyers at local businesses and at City Hall at the Community Development Department counter.

The following public outreach activities supported the development of the City's hazards mitigation planning process.

Public Outreach Activities	Date
Thurston Regional Planning Council Community Survey	June 1- July 31, 2022
Article in <i>The Olympian</i> regarding the Community Survey	July 11, 2022
City Council Briefing	June 21, 2022
Draft Action Plan Open House and Survey	July 24-August 25, 2023
Planning Commission Briefing	July 25, 2023
Volunteering at Thurston County Fair – Thurston County Emergency Management Booth	July 26, 2023
Planning Commission Briefing	July 25, 2023
General Government Committee Briefing	August 9, 2023
Emergency Preparedness Expo	September 23, 2023
Final Draft Plan Public Comment Period	November 3- November 17, 2023
Final City Annex and Core Regional Plan to Washington Emergency Management Division	November 2023
FEMA Review	November 2023
Planning Commission Work Session	January 9, 2024

Annex: City of Tumwater

Public Outreach Activities	Date
Planning Commission Hearing	January 23, 2024
GGC Briefing	February 14, 2023
City Council Work Session	February 27, 2024
City Council Consideration	March 5, 2024

Review and Incorporation of Existing Plans, Studies, and Technical Information into the City Annex and Regional Plan Update

Plan	Type
2017 Natural Hazards Mitigation Plan	Initiatives and Historical Events
Thurston County Climate Adaptation and Mitigation Plans	2023 Initiatives
Capital Facilities Plan	2023 Initiatives
2020 Water System Plan	2023 Initiatives
Long Range Planning 2022 and 2023 Work Programs	2023 Initiatives
Comprehensive Plan	City Annex and Regional Plan Update and 2023 Initiatives
Stantec Consulting Ltd. 2023, Deschutes River Flood Reduction Study: Hydraulic and Erosion Analysis and Alternative Report. Retrieved from Water Resources & Sustainability Department's Deschutes Flood Reduction Study.pdf - City of Tumwater .	City Annex and Regional Plan Update and 2023 Initiatives

Technical Reports and Citations Bibliography

Report	Type
Julie Baxter and Karen Helbrecht from FEMA and Stacy Franklin Robinson, Sara Reynolds, Adam Reeder, and Hilary Kendro from the Strategic Alliance for Risk Reduction (STARR). <i>Mitigation Ideas: A Resource for Reducing Risk to Natural Hazards. E-Book, FEMA, 2013.</i>	2023 Initiatives
Department of Homeland Security. National Risk Index, National Risk Index FEMA.gov . Accessed 2023.	Hazard Profiles and Risk Ratings

Report	Type
Zuzak, C., E. Goodenough, C. Stanton, M. Mowrer, A. Sheehan, B. Roberts, P. McGuire, and J. Rozelle. 2023. National Risk Index Technical Documentation. Federal Emergency Management Agency, Washington, DC.	Hazard Profiles and Risk Assessments
Mauger, G.S., J.H. Casola H. A. Morgan, R. L. Strauch, B. Jones, B. Curry, T.M. Busch Isaksen, L. Whitely Binder, M. B. Krosby, and A.K. Snover, 2015. <i>State of Knowledge: Climate Change in Puget Sound</i>. Report prepared for the Puget Sound Partnership and the National Oceanic and Atmospheric Administration. Climate Impacts Group, University of Washington, Seattle. https://doi:10.7915/CIG93777D	Hazard Profiles and Risk Assessments
Climate Mapping for a Resilient Washington. Climate Impacts Group. Climate Mapping for a Resilient Washington, University of Washington, Washington County Climate Projections (uidaho.edu).	Hazard Profiles and Risk Assessments
Halofsky, J. E., Peterson, D. L. & Harvey, B.J. Changing wildfire, changing forests: the effects of climate change on fire regimes and vegetation in the Pacific Northwest, USA. <i>fire ecol</i> 16, 4 (2020). https://doi.org/10.1186/s42408-019-0062-8	Hazard Profiles and Risk Assessments
Weather closures: rain, flooding - Updated Fri., 1:35 p.m. The JOLT News Organization (The Jolt News, 2022), A 501(c)(3) Nonprofit Organization	Risk Assessments
Fox 13 Seattle News. (2022, January 6). Retrieved from Fox 13 Seattle: https://www.fox13seattle.com/news/major-flooding-expected-along-south-thurston-county-rivers	Risk Assessments

Integration of City Annex and Regional Plan into other Planning Mechanisms

The City's Capital Facilities Plan and the biennial budget are both used to implement mitigation initiatives specified by the City Annex. After adoption of the City Annex and Regional Plan, the first step is to seek funding for a project or action that supports a mitigation initiative in the biennial budget. The drafting and adoption of the biennial budget is an open public process available to the public. Community members are encouraged to participate in the shaping of the City's biennial budget. Also, getting an action or project into the Capital Facilities Plan is a way to get it in line for funding and a way to plan for when it will be implemented. The Capital Facilities Plan is updated every other year in a process which encourages public participation.

The Land Use Element is being updated and a new Climate Element will be created through the 2025 Comprehensive Plan periodic update process. Both Elements will include integration of the City Annex and Regional Plan into policies and action items. For example, Policy LU-6.5 of the Comprehensive Plan Land Use Element strongly encourages implementation of the City Annex and Regional Plan to reduce or eliminate the human and economic costs of natural disasters for the overall good and welfare of the

community. The Climate Element will have a resiliency subelement that will incorporate the City Annex and Regional Plan to meet state requirements.

Plan Monitoring and Maintenance

The Planning Division of the Community Development Department is responsible for monitoring and maintaining the plan. The Planning Division has a Planning Manager and a Land Use and Housing Planner, who are leads for the planning team. The City Council, or appropriate Council committee, will be briefed annually on the status of the plan. Annual briefings will keep the plan in the forefront and place the decision makers in a more ready position to update the plan if needed. The agendas and notices for these meetings are posted on the City's website. These meetings are open to the public so there are additional chances for the public to participate in suggesting ideas for ongoing maintenance and updates to the City Annex.

The City also plans to work with Thurston County and Thurston Regional Planning Council in four years to meet the required five year update to the City Annex. The City has participated in updates in this manner on a regular basis since the plan was first adopted in the early 2000s. The planning team will continue to work with the Thurston Regional Planning Council, Thurston County Emergency Management Division, internal and external stakeholders, and follow state legislature to ensure all documented vulnerabilities are still accurate for the City.

The City Annex has incorporated many City updates into its initiatives. Staff will frequently review and track the status of the initiatives throughout the Capital Facilities Plan update, Tree and Vegetation Code update, 2025 Development Code periodic update, Washington Wildland-Urban Interface Code adoption, the 2025 Comprehensive Plan periodic update, Comprehensive Plan amendments, and more. The City Annex and Regional Plan is a climate resiliency sub-element requirement for the City's Comprehensive Plan that will need to be tracked and monitored.

At a minimum, the planning team and hazards mitigation planning team will meet yearly. The leads identified in the initiatives will be responsible for tracking and providing updates on the initiatives. The planning team has created a spreadsheet to track and monitor past and current initiatives. Additional monitoring and updates will be required through the Comprehensive Plan periodic update.

Continued Public Involvement

The City will continue promoting public participation. The Planning Commission will be briefed on the City Annex and Regional Plan update at a public meeting and hold a public hearing. The City Annex and Regional Plan will also be presented at a public meeting of the General Government Committee, a subcommittee of the City Council. The City Council will hold a public work session and a public meeting on the City Annex and Regional Plan as well. Events like this will be used in the future to allow for ongoing public participation.

Specific examples of continuous public involvement include:

1. Community members, businesses, and organizations will have opportunities to provide feedback on hazards mitigation planning between update cycles through Planning Commission meetings, City Council meetings, and the Comprehensive Plan periodic update.
2. Outreach efforts to engage socially vulnerable populations that are most impacted by hazards will be done through methods outlined in the Comprehensive Plan Update Public Engagement Plan.
3. Methods will include:
 - Presentations on the plan's progress at City Sponsored Meetings.
 - Stakeholder meetings for the Comprehensive Plan periodic update including neighborhood associations, chambers of commerce, School Districts, or other community organizations.
 - Periodic online polls or questionnaires.
 - Hosting a booth at public events like a farmer's market, community event, or music festival when applicable.
 - Creating door flyers.
 - Public meetings.
 - Social media posts.
 - Interactive websites, online open house, GIS story map.
4. Public Involvement will be documented with the initiative status worksheet that is maintained by Community Development Department staff.

City Risk Assessments

Flood Risk Assessment

Area of Impact

Same as described in the Regional Plan. The City is mapped with areas of high groundwater south of Tumwater Boulevard and the 100-year floodplain along the Deschutes River and lakes throughout the City and its Urban Growth Area.

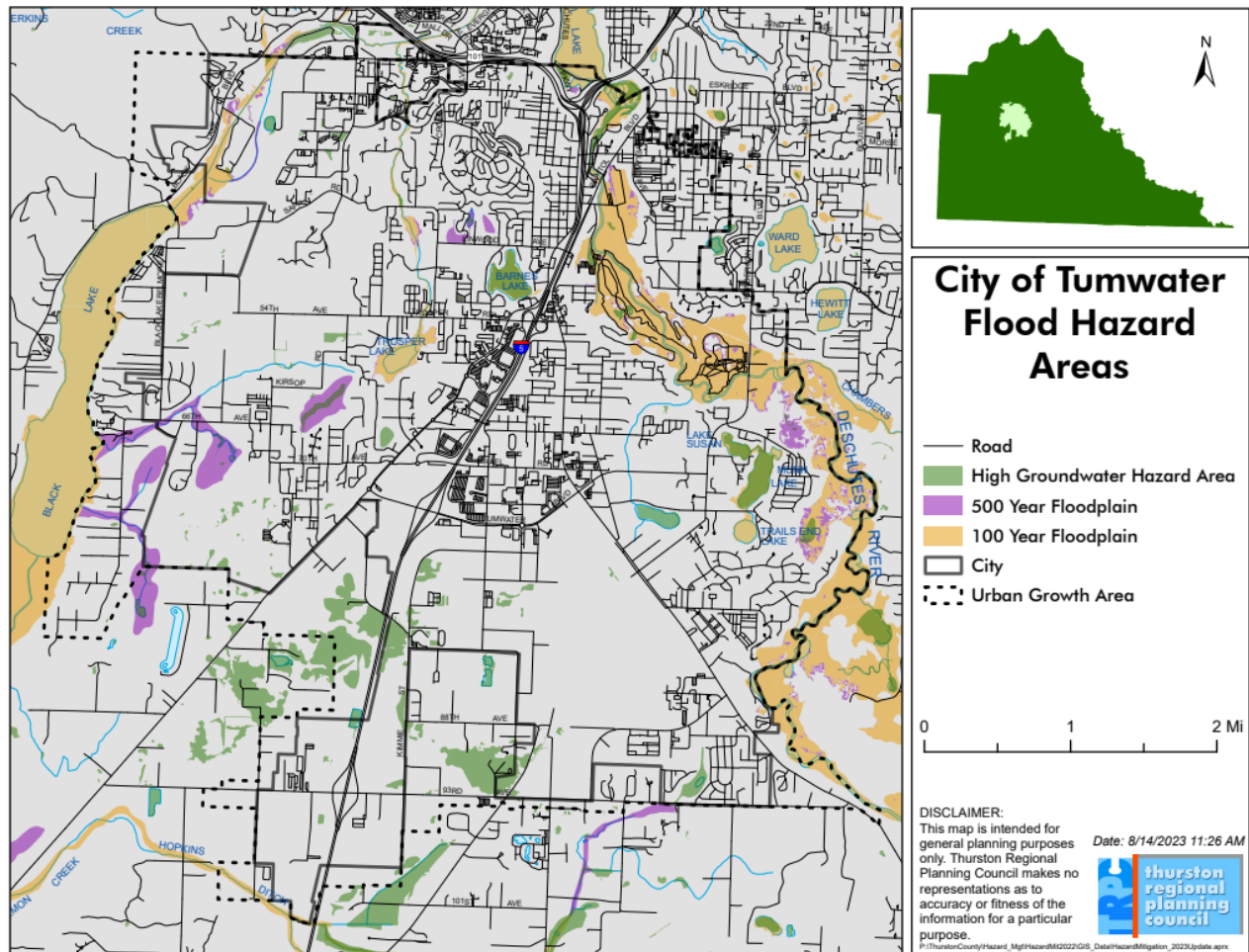


Figure 1. City Flood Hazard Areas.

Extent

The Deschutes River is the fastest rising and falling river in the county, responding quickly to local rainfall and runoff. The river's watershed encompasses a large part of the City. As the Deschutes River enters the urban growth area and the City, the riverbank and surrounding land use becomes more developed, with several residences in the Tumwater Valley around the periphery of the Tumwater Valley Municipal Golf Course. A riprap bank and additional hard banking channels the river through the Tumwater Valley Municipal Golf Course and parts of Tumwater Historical Park before it discharges into Capitol Lake near the Historic Olympia Brewery in the City, just south of Interstate 5. The City has areas of high ground water concern, especially within the Salmon Creek Basin and areas of Kirsop Road.

Previous Incidents

The vast majority of flooding events within the City occur within the Deschutes Valley. According to the National Weather Service records for the Rainier Flood gauge on the Deschutes River, between 1949 and October 2023 there were forty-six events above Flood Stage.

The expansion and development of the former Olympia Brewery properties within the valley led to a significant transformation of the area. Starting in 1953, several acres of riparian floodplain were filled with 133,000 cubic yards of material on which the bottling warehouses were built.¹ The river was partially re-channeled then as well. In 1963 an additional 114,000 cubic yards of material was moved from the adjacent hillside to fill a portion of the valley for a bottling warehouse expansion.² Later, in 1968 a much larger project began which moved two million cubic yards of fill material from the hillside on Cleveland Avenue into the valley. This project raised the level of the valley an average of five feet to make development of the Tumwater Valley Municipal Golf Course and Valley Athletic Club possible.³ A significant watercourse change to the river was also done at this time.

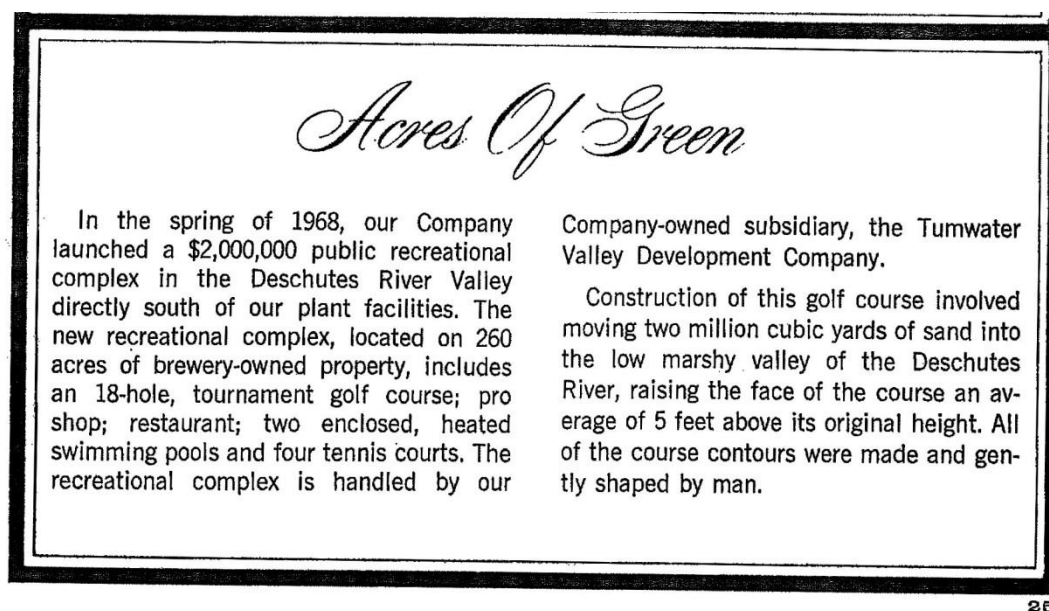


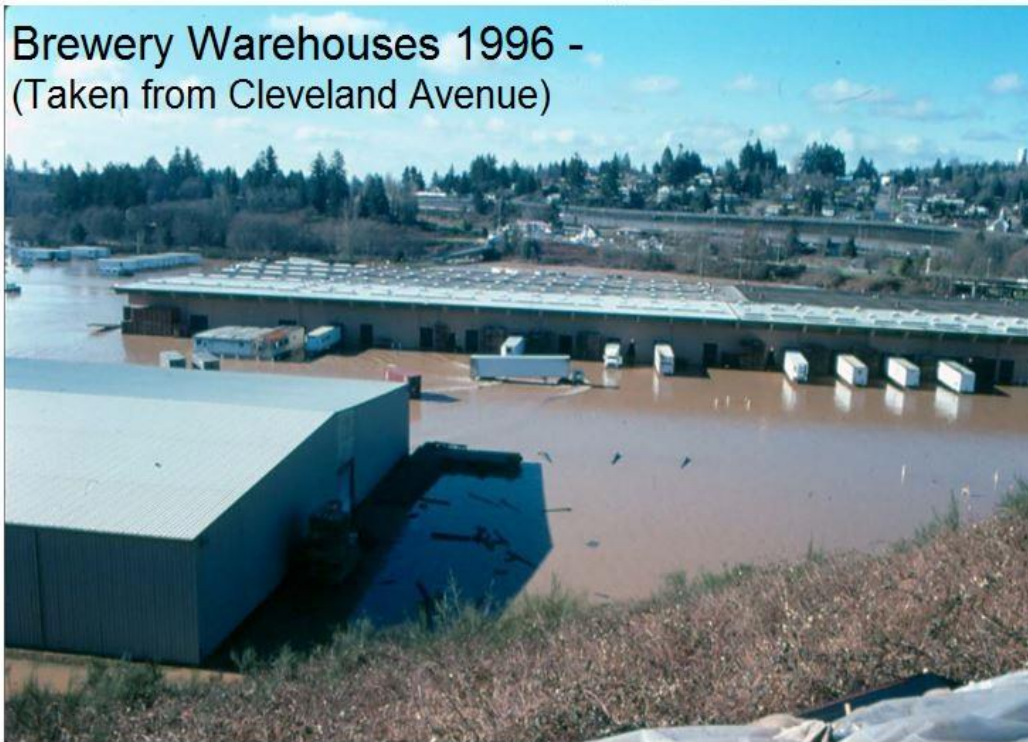
Figure 2. Source: 75th Anniversary Brewery "It's the water" newsletter. p.25 Circa 1971.

The most obvious and visually dramatic examples of flooding in the City generally occur within the Deschutes Valley. City owned properties and facilities such as Pioneer Park, Tumwater Historical Park, the Tumwater Valley Municipal Golf Course, the Palermo well field and water treatment facility, the "M" Street sewer lift station, and other water and sewer infrastructure are located within this flood prone area. Private properties within this area include the bottling plant for the former Olympia Brewery, a few homes in the Palermo neighborhood off of "M" Street, The Valley athletic club, Tumwater Historical Park, which is a private park open to the public, the fish hatchery and associated fish ladder at Tumwater Falls, and the historic Old Brewhouse across from Tumwater Historical Park.

¹ "It's the Water" Brewery newsletter. "A Hill Becomes A Fill." June-July 1953.

² "It's the Water" Brewery newsletter. Aesthetic Excavation Planned. July 1963.

³ 75th Anniversary Brewery "It's the water" newsletter. p.25, circa 1971.



Brewery Warehouses 1996 -
(Taken from Cleveland Avenue)

1996 Tim Walsh, WA DNR



Resident rescuing dog on 58th Avenue - Dec.4, 2007

Several residential structures on 58th Avenue across from Pioneer Park were annexed to the City in January 2016. Since 1999, staff have observed and photographed these homes and properties being flooded on a regular basis.



Pioneer Park is one of several areas that are frequently inundated by floodwater. Water typically flows through the entire parking lot area and some of the sports fields.⁴ Fortunately, the building, which houses the restrooms, has yet to be flooded.⁵ This building is also used as a storage shed for mowers, tractors, and other equipment used for park maintenance.⁶ A sewer lift station is located here as well.⁷ Access to the building and the sewer lift station has not been possible during floods due to the floodwaters surrounding the site and flowing over the access road.⁸

The generator for this sewer lift station is on a concrete pad behind the restrooms. If the power supply is interrupted this generator is to take over so the sewer lines do not backup and overflow. The generator is not elevated except for the mounting brackets and the concrete pad upon which it sits. Consideration should be given to elevating portions of the infrastructure such as the generator when they are located within floodplains.

⁴ Picture of flooding in parking lot and access road at Pioneer Park, January 8, 2009.

⁵ Picture of flooding near restrooms at Pioneer Park, December 4, 2007.

⁶ Phone conversation with Jeff Vrabel, Tumwater Facilities Manager, June 10, 2009.

⁷ Phone conversation with Steve Craig, Tumwater Public Works Operations Manager, June 15, 2009.

⁸ Phone conversation with Steve Craig, Tumwater Public Works Operations Manager, June 15, 2009.

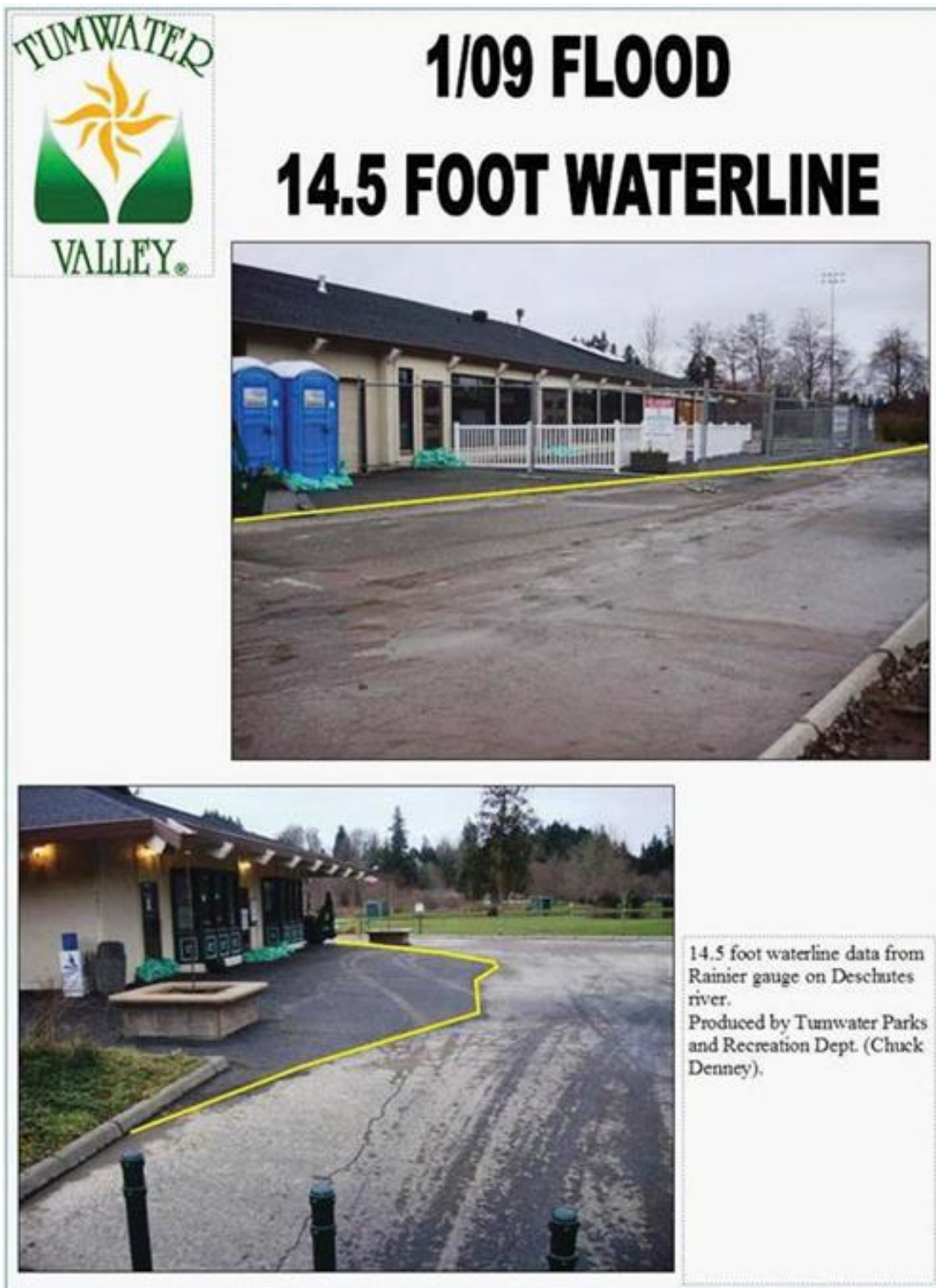


The Palermo neighborhood off "M" Street has several homes within the 1% (100-year) floodplain. The area also contains the Palermo wellfield and water treatment facility and the "M" Street sewer lift station. Floodwaters have not yet flooded the drinking water treatment and wellhead facility but have come close in the past several years.

The sewer lift station at the end of "M" Street is often surrounded by floodwaters but has not been affected by the floodwaters yet. The hatch to the wetwell has already been replaced to limit the inflow of floodwater into the wetwell. In addition, plans to replace manway access to the drywell and increase its height are in process. This would help to avoid the flow of floodwaters into the sewer lift station.⁹

The Tumwater Valley Municipal Golf Course is within the 1% (100-year) floodplain and is flooded almost yearly. Floodwater routinely covers the golf course and gets to within a couple of feet of the door of the clubhouse, which is only inches below the level needed to flood the interior. Chuck Denney, the Parks & Recreation Director, produced a one-page demonstration of the water level at the Tumwater Valley Municipal Golf Course clubhouse in the January 2009 flood. Two photos with yellow lines drawn on them indicate the extent of the water levels near the clubhouse and a citation of the water level at the flood gauge at Rainier on the Deschutes River (14.5 feet).

⁹ Phone conversation with Steve Craig, Tumwater Public Works Operations Manager-June 15, 2009.



With most storms that involve precipitation there are localized areas of flooding on streets. The Transportation & Engineering Department operations crew keeps a list of these areas so they can quickly identify and address this issue when it occurs. In most cases, it is tree leaves and other debris blocking storm drains, which causes the water to back up into the streets. In the December 2008 and 2012

snowstorms it became apparent that the snow and ice on Capitol Boulevard was blocking the storm drains and causing localized flooding for most of the length of Capitol Boulevard.¹⁰



In various areas along both Trosper and Kirsop Roads, localized flooding is a regular occurrence with large storms. The area has little in the way of frontage improvements. There are a series of deep ditches, many disconnected from upstream and downstream conveyance due to impacted or undersized culverts. In a few instances, beaver dams have obstructed conveyance, which is now managed by the City under a permit from the State Department of Fish & Wildlife. In addition, the City's Public Works Department completed a drainage study for the Trosper and Kirsop area in 2011, identifying a number of projects for retrofit to improve both conveyance and water quality. These projects have been added to the City's Capital Facilities Plan, with one project underway in 2015 for Kirsop Road, and others scheduled for 2023.¹¹

Heavy rains, snow melting, and warmer temperatures caused flooding of major streets on January 7, 2022. Tyee Drive between Trosper Road and Kingswood Drive SW was closed due to water over the roadways. Tumwater Valley Drive was closed; a flood watch was in effect for the Deschutes River. The Tumwater Valley Municipal Golf Course and parks near the river experienced minor flooding during this event.

High groundwater flooding is an issue in several areas but mostly concentrated in the southwest portion of the City and its urban growth area. In order to deal with future groundwater flooding impacts the City and Thurston County adopted the Salmon Creek Drainage Basin Plan and its implementing regulations in 2005. The regulations control development within areas impacted by high groundwater flooding. Currently, sixteen properties in the City have flood insurance and only two claims have been paid since 1978 for a total of approximately \$12,514.40. None of the City owned facilities or buildings, including the

¹⁰ Phone conversation with Steve Craig-Tumwater Public Works Operations Manager-June 15, 2009. Photos of Capitol Boulevard taken by Senior Planner David Ginther during 2012 snowstorm.

¹¹ Conversation with Tumwater Public Works Water Resource Division Manager in 2009, December 2015, and review of the June 15, 2009, Request for Statement of Qualifications for drainage studies in the City.

recently remodeled Tumwater Valley Municipal Golf Course clubhouse, which are located in the floodplain, have FEMA flood insurance.

Probability of Occurrence

Same as described in the Regional Risk Assessment. The probability of a flood event in the one hundred year flood plain is high, meaning a flood event is likely in the next 25 years. Flooding in a high groundwater area has a medium probability, an event is likely to occur within one hundred years.

Changes in Development

Development is restricted in the 100-year flood zone, there is no new development in flood hazard areas.

One site that may be redeveloped is the former Olympia Brewery and an “E” street expansion. The Brewery redevelopment and “E” street expansion proposals will require extensive Environmental Impact Studies. The redevelopment areas are in the one hundred year flood plain, shoreline regulatory environment for the Deschutes River which extends to the edge of the one hundred year flood plain.

Review of available studies and regulatory references identify some potential limitations to redevelopment of this area, largely due to the site’s proximity to shoreline, function as a flood plain, and the impact of stormwater. The majority of the site area that is affected by these limitations lies within the Valley and Knoll parcels. The Valley parcel lies within the one hundred-year flood plain of the Deschutes River and within the shoreline buffer areas. Due to periodic flooding and the current Tumwater Municipal Code, grading and construction of new structures will not be allowed. Future uses of the Valley Parcel will need to be tolerant of periodic flooding.

Effects of Climate Change

Both the extent and the frequency of flooding is projected to increase. Heavy rain events are projected to intensify increasing flood risk in all Puget Sound watersheds, including the Deschutes River watershed. Multiple factors combine to drive large increases in flood risk: declining snowpack, intensifying heavy rain events, and rising seas.

Flooding, especially in the Deschutes Valley and areas near the airport have a very high risk index. Flooding will impact existing homes, recreation facilities such as the Valley Athletic Club and parks, and critical infrastructure such as wells and lift stations, and critical facilities such as City Hall, the Headquarters and North End Fire Stations, and the Olympia Regional Airport. Roads and transportation will be impacted as well. Emergency services may not be able to access those in need in cases of extreme water way flooding which is common in the Trosper and Kirsop Road area, and other roads in high ground water areas.

Vulnerability

Impacts to People

If unprepared, people can be caught in fast moving waters and die. Those who have health concerns or do not have transportation are at risk if they are not able to leave in case of an evacuation. Though flooding is rarely related to mortality in Washington State, Flood waters present direct, short-term physical threats to health. In addition, floods can indirectly affect health by conveying biological and chemical agents to drinking, storm, and recreational waters; and by establishing favorable conditions for mold growth. The risk of illness increases as individuals and communities are exposed to pathogens through contact with contaminated waters or mold-filled dwellings.

People living near the Deschutes River by Pioneer Park and residents living near Kirsop and Trosper Road are at risk of flood hazard. There is a high risk of emotional, physical, and psychological stress. Damage to property could be costly and take time, this would impact people's livelihoods. The recovery period is stressful and disruptive for flood victims.

Impacts to Structures

The loss matrix identifies nine buildings exposed to high ground water hazard areas and sixteen buildings in the 100-year flood zone. It is estimated there would be twelve buildings impacted by flood, with a value of \$123,879 worth of damage to the structures and contents. The City owns the parcels in the Tumwater Valley, including the Tumwater Valley Gold Course clubhouse. There are warehouses and maintenance facilities in the Deschutes Valley area, flooding could impact City functions and cause damage to structures.

The following critical infrastructures are located within the one hundred year flood zone or near:

- Pump station off Sapp Road
- Palermo Lift Station
- Pioneer Park

Impacts to Systems

Floodwater can damage or destroy buildings, homes, and their contents. Electric, gas, water, and communication utilities are also at risk of damage and disruption. Swift moving floodwaters can cause erosion and damage or destroy infrastructure including electric, gas, water, and communications utilities. Bridges, roads, and railroads are also vulnerable.

Impacts to Natural, Cultural, and Historic Resources

Unique to the historic brewery site along the Deschutes River are several rich layers of culture and history. The site presents challenges for historic preservation, cultural endowment, environmental sensitivity and mitigation, riparian restoration, recreation, and economic development in the event of a flood. Some of the highlights of natural, cultural, and historic resources include:

Annex: City of Tumwater

- Native American historical and cultural site
- Location where settlers from the Columbia River first settled in Washington State
- Southernmost location of Puget Sound
- Brewery History

Risk

Estimated Exposure to Flood

The Regional Plan used a Flood Modeling and GIS exposure analysis to estimate the number of people who live in areas that are prone to flooding. The City's number of population exposed is low as noted in the table below, but that does not negate the risk or danger.

Table 1. Estimated Population Exposure to Flood.

Number or Population Exposed			
50 year	100 year	500 year	High Groundwater
16	28	34	19

Types of Structures Exposed in Flood

The Regional Plan identifies estimates of buildings exposed to flood and the cost of losses and damages using Hazus Modeling. In the event of a flood there will also be tons of debris created from the hazard event. People, businesses, and more would be disrupted for potentially long periods of time. This will have effects on the economy, people, transportation, and more.

Table 2. Estimated Structural Exposure to Flood.

Number of Structures Exposed to Flood			
50 year	100 year	500 year	High Groundwater
5	16	23	9

Hazard Risk Rating

The City's 50-, 100-, and 500-year flood hazard risk ratings are low, medium, and low, respectively. The high groundwater hazard risk rating is low.

Earthquake Risk Assessment

Area of Impact

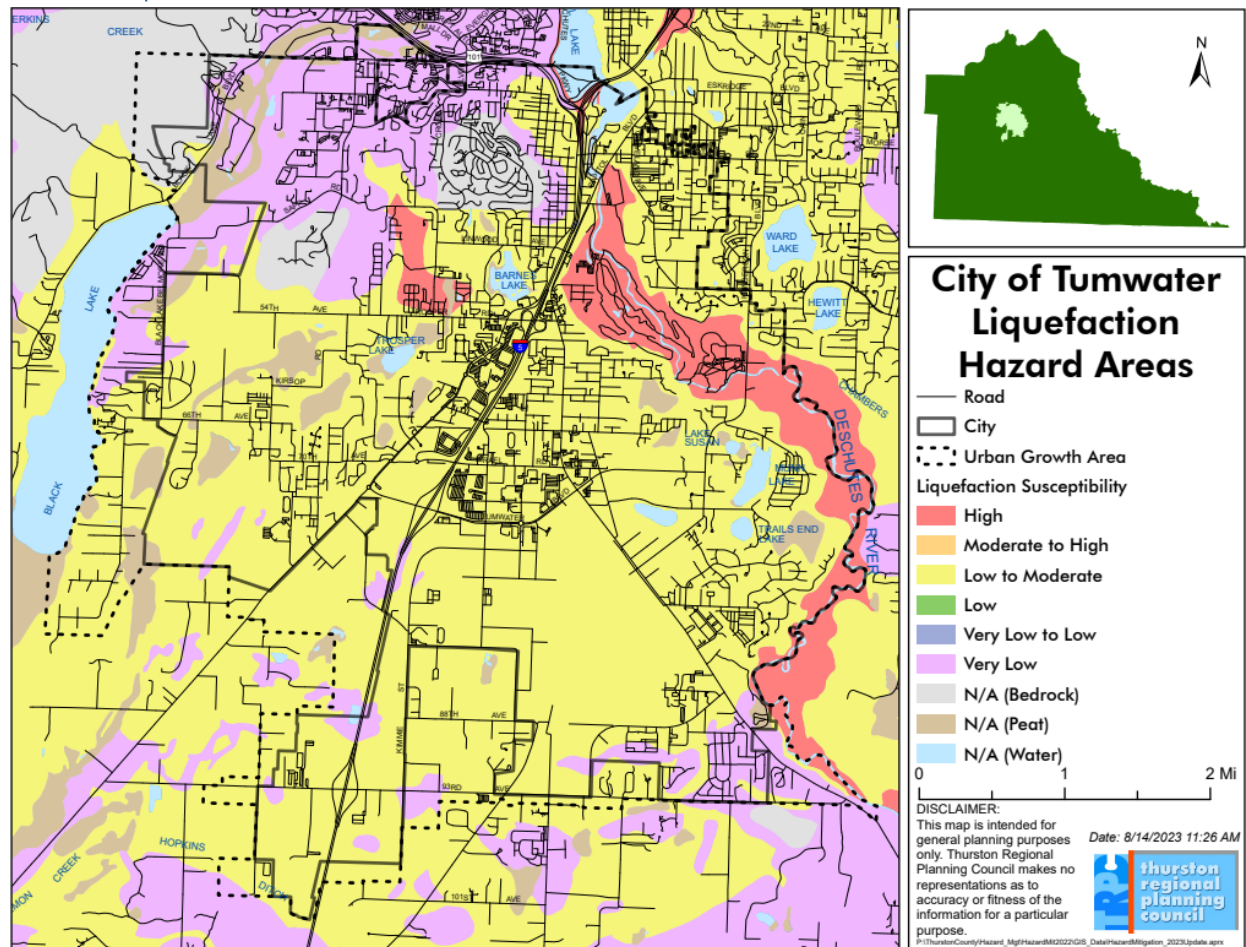


Figure 3. City Liquefaction Hazard Areas.

Generally, the same as described in Chapter 4.2 of Regional Risk Assessment, all areas of the Pacific Northwest are seismically active.

For the risk assessment, three earthquake scenarios were modeled using the natural hazards GIS modeling tool Hazus to assess vulnerabilities, estimate losses, and characterize earthquake hazard risks for Thurston County:

- A Cascadia Subduction Zone Magnitude 9.3 (megathrust earthquake)
- A Nisqually 7.2 (deep intraplate earthquake)
- A Seattle Fault 7.2 (shallow or crustal faulting earthquake)

The entire Deschutes Valley from Henderson Boulevard SE to the former Olympia Brewery has high liquefaction susceptibility. Percival Creek vicinity from Trosper Road SW to Sapp Road SW have areas of moderate to high liquefaction. Liquefaction is a phenomenon that occurs when ground shaking causes loose soil to lose strength and act like viscous fluid. Liquefaction causes two types of ground failure: lateral spread and loss of bearing strength. Lateral spreads develop on gentle slopes and involve the sidelong

movement of large masses of soil as an underlying layer liquefies. Loss of bearing strength results when the soil supporting a structure liquefies. This can cause structures to tip and topple. Liquefaction typically occurs in artificial fills and in areas of loose sandy soils that are saturated with water, such as low-lying coastal areas, lakeshores, and river valleys.

City critical facilities and infrastructure such as water systems and pump stations are located in Earthquake hazard areas. Disruptions in service could have significant impacts on the community and extend recovery times after an event. Damages to infrastructure would be costly and have significant economic losses and burden to vulnerable communities.

There are many socially vulnerable communities located in areas at high risk for earthquakes and liquefaction near Trosper Road and the Deschutes Valley.

Extent

The Pacific Northwest is one of the most geologically active regions in North America, as described in Chapter 4.2 of the Regional Risk Assessment. There are three different source zones to categorize Northwest earthquakes: Cascadia Megathrust, Deep Intraplate, and Crustal Faulting zones.

Previous Incidents

Four of the seven large manufactured and mobile home parks within the City are in areas of high liquefaction hazards or on peat.¹² These include Eagles Landing, Tumwater Mobile Estates, and Western Plaza, which are all located on Trosper Road, and Thunderbird Villa on Dennis Street. The latter three sustained damage during the 2001 Nisqually earthquake.¹³

Tumwater Mobile Estates experienced substantial liquefaction during the earthquake. Part of a private street within the mobile home park collapsed into a pond, taking two unoccupied cars into the water. The sidewalk also ended up in the pond. Private water lines and a natural gas line were ruptured prompting the evacuation of fifty residences in the mobile home park.¹⁴ Evidence of liquefaction in the form of sand boils appeared in several areas of the park.¹⁵

The Western Plaza mobile home park experienced settling due to liquefaction, although it was to a lesser degree than that seen at Tumwater Mobile Estates.¹⁶ Thunderbird Villa on Dennis Street had damage as well. The Fire Department observed at least one home in Thunderbird Villa that had the backyard settle several feet abruptly off the back of the home.¹⁷

¹² Map-Tumwater Mobile & Manufactured Home Parks Liquefaction Soil Hazards.

¹³ Former Tumwater Fire Chief John Carpenter-phone conversations June 3, 9, and 10, 2009.

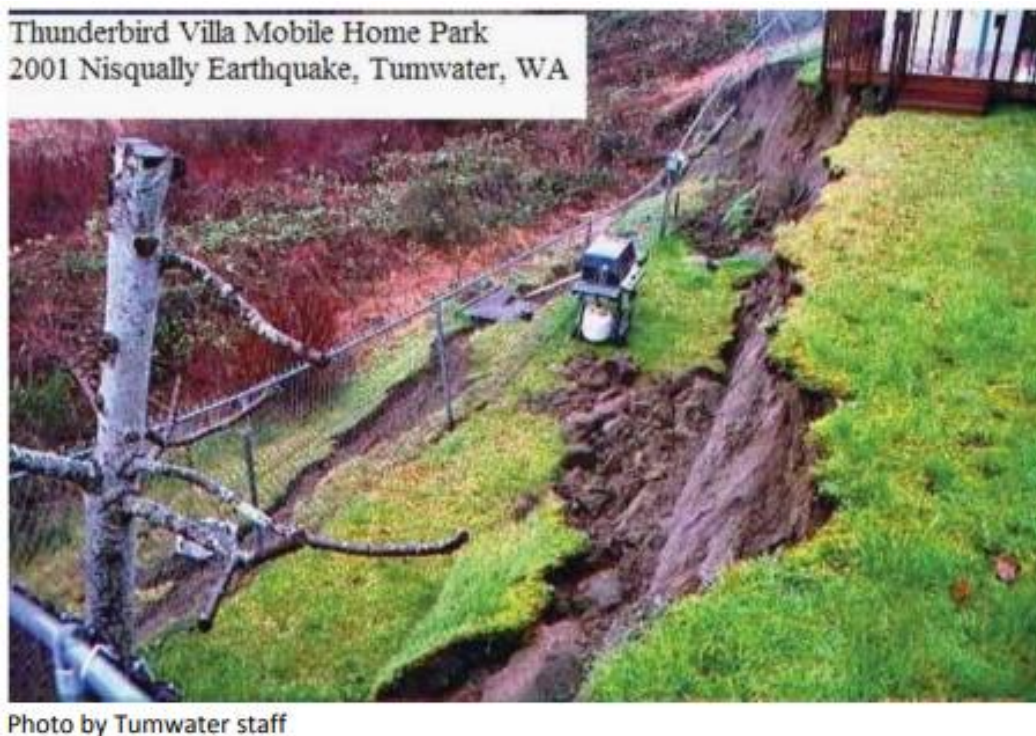
¹⁴ Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

¹⁵ USGS report on 2001 Nisqually Earthquake: <http://pubs.usgs.gov/of/2003/ofr-03-211/NisquallyFinal.html#sunset>
Geo-Earthquake Engineering Reconnaissance report on 2001 Nisqually Earthquake:
http://research.eerc.berkeley.edu/projects/GEER/GEER_Post%20EQ%20Reports/Nisqually_2001/liquefaction/latealspread/index.html#sunset.

¹⁶ Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

¹⁷ Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

Picture by Fire Department of earthquake damage at Thunderbird Villa mobile home park.



The Olympics West assisted living facility, located on the south side of Trosper Road across from the Tumwater Mobile Estates mobile home park, also experienced settling and minor damage even though it is located within an area designated as low to moderate risk.¹⁸ John Carpenter, the former Fire Chief, was inside the building at the time and witnessed the formation of a 10" step in the middle of a formerly flat hallway.¹⁹ It is of particular concern that these types of facilities and mobile and manufactured home parks, which tend to be populated by some of the more vulnerable residents, including the elderly and disabled as well as low income, are located in areas that are highly susceptible to liquefaction.

Even buildings within areas of low to moderate liquefaction susceptibility sustained damage. The Headquarters Fire Station on Israel Road, which houses the Emergency Operations Center, was structurally damaged during the quake. The apparatus bay shifted away from the main building of the Headquarters Fire Station even though the two were structurally joined together.²⁰

Most City buildings had at least some minor damage. Both the Headquarters Fire Station and North End Fire Station, City Hall, the Tumwater Timberland Library, Old Town Center, the historic Crosby House, the

¹⁸ Map-Tumwater Mobile & Manufactured Home Parks Liquefaction Soil Hazards. Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

¹⁹ Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

²⁰ Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

Annex: City of Tumwater

Henderson House Museum, and portions of the Tumwater Valley Municipal Golf Course all were damaged in the earthquake.²¹ There were approximately 173 reports of damage to private property in the City.²²



Figure 1: The Best Western hotel located on the bluff above the Palermo well field had a portion of the rear parking lot settle and start to slide down the hill. (Former Tumwater Fire Chief John Carpenter-phone conversation 6-3/9/10-2009)



Figure 2: The Extended Stay America facility near the Highway 101/Crosby Boulevard interchange had a large retaining wall give way, which broke a water line (Former Tumwater Fire Chief John Carpenter-phone conversation 6-3/9/10-2009)

²¹ Former Fire Chief John Carpenter-phone conversation June 3, 9, and 10, 2009.

Jeff Vrabel, Facilities Manager, phone conversation June 10, 2009.

City Preliminary Damage Assessment Worksheet March 5, 2001.

²² City-wide damage spreadsheet (Excel) sourced from the Fire Department.

Figure 8-10. Hillside slid away from beneath this four-hundred-foot section of a Union Pacific Railway branch line at Tumwater, near Olympia, Washington, during the Puget Sound Earthquake of 1965. A large landslide during the heavy-rainfall winter of 1996-97 also damaged the rail line. Photo by G.W. Thorsen, Washington Division of Geology and Earth Resources.



Figure 3: During the 1965 Puget Sound Earthquake, a large portion of the railroad lines north of the old brewhouse were significantly damaged in an earthquake induced landslide.

After the 2001 Nisqually earthquake, the State Department of Natural Resources mapped liquefaction hazard areas in the City. The entire Deschutes Valley southeast of Capitol Boulevard has been identified as an area of high liquefaction hazard. Aerial photos from the 1930s and the early 1950s²³ show that the area where the brewery warehouses are now located was once part of the Deschutes River channel. The river was relocated, 7.5 acres were filled with 130,000 cubic yards of material from the adjacent hillside along Cleveland Avenue, and the warehouses were built on top of the fill.²⁴

Probability of Occurrence

An earthquake or liquefaction event for the City is medium, meaning it is likely a hazard event will occur within the next one hundred years. There is a 40 to 80 percent chance of a large earthquake occurring in Washington State in the next 50 years.

Changes in Development

There have been no changes or development in high liquefaction areas. The City is trying to work with the existing manufactured home parks to keep housing costs affordable and to ensure homes are connected to utilities which are to be built to current standards.

²³ Henderson House Museum Collection No. 78 and No. 80

²⁴ "It's the Water" Brewery newsletter. "A Hill Becomes A Fill." June-July 1953.

Effects of Climate Change

Earthquakes are not influenced by climate change.

Vulnerability

Impacts to People

In the event of an earthquake, everyone within the City would be exposed. There are immediate life safety impacts from collapsing buildings, liquefaction areas, and roads. There are other near-term impacts such as: disruption to utilities, water contamination, risks to people with disabilities, mental health incidents, and shelter demand for displaced individuals. In the event of an M9.3 scenario, 811 households will be displaced, half of those households will need temporary shelter. All buildings and businesses will be exposed to the earthquake, resulting in damage to structures and contents totaling an estimated \$996,891,653. The City is at High risk for exposure to earthquakes, and the damages could be substantial. The economy would be impacted, and functionality of critical facilities and services, such as City Departments and infrastructure, would have long recovery times.

As identified in previous incidents above, there are communities that are socially vulnerable located in earthquake hazard areas. The FEMA National Risk Index identifies the City as Relatively Low for Social Vulnerability, but there are historic occurrences of earthquakes impacting emergency service facilities, which could impact the health and safety of people. There are also electric substations, and health and medical facilities that would be impacted. Socially vulnerable people living in long term care and special care facilities would be impacted, especially in the Trosper area, where liquefaction has occurred.

Table 3. Earthquake Displacement and Shelter Needs in the City.

Earthquake Household Displacement & Sheltering Needs			
	Cascadia M9.3	Nisqually M7.2	Seattle M7.2
Households Displaced	811	68	15
Individuals Needing Shelter	406	35	8

Impacts to Structures

Earthquakes can cause damage to homes and other buildings. Furniture, appliances, electronics, and other items could be moved and damaged in the event. There is a risk of secondary hazards such as fire or water damage.

Critical facilities such as fire departments, hospitals, police, and other providers could sustain damage to the buildings and equipment. Operations would be disrupted and inoperable until buildings, equipment, and power are restored to a functioning status.

In the event of an earthquake, mass amounts of structural debris will be generated. The table below represents structural debris multiplied by one thousand tons within the City.

Annex: City of Tumwater

Table 4. Structural Rubble Created by Earthquake in the City.

	Cascadia M9.3	Nisqually M7.2	Seattle M7.2
Total Debris (tons)	198.35	24.70	6.59

Impacts to Systems

City facilities and infrastructure are susceptible to damage, as identified in the previous incidents section, above. City Hall and surrounding facilities were built in 1987. The Headquarters Fire Station was built in 2000. Routine inspections and maintenance, as well as upgrades to infrastructure outlined in the mitigation initiatives will help reduce damage and keep critical operations working in the event of earthquake. Updates to infrastructure are needed to ensure they can withstand earthquakes and other hazards; the Capital Facilities Plan addresses the specific systems that need to be updated. Upgrades, such as installing solar power in City Hall and backup generators for water systems are needed to reduce the risks of vital utilities being out of commission for long periods of time.

The City has water systems in the Deschutes Valley. This area is mapped with high risk for earthquakes and liquefaction zone. Below is a table outlining the probability of damage and functionality after an event based on LOTT water systems at T Street and a Wastewater Line on Deschutes Valley Drive in the City. These systems are located near the Palermo Well, a critical facility to the City.

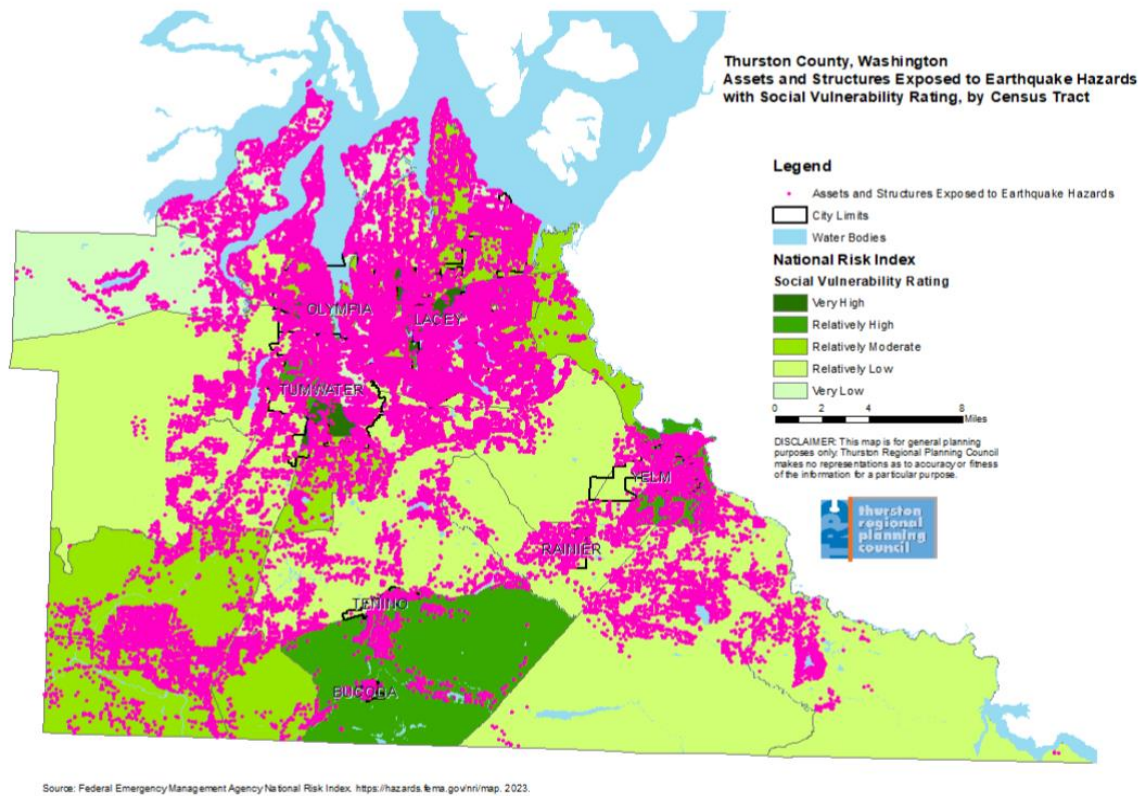
According to the Water Resources & Sustainability Department, more than one third of the City's drinking water comes from the Palermo well field in the Deschutes Valley, which is identified as an area of high liquefaction susceptibility by data provided by the State Department of Natural Resources. Damage to the Palermo wells or related infrastructure could cause a significant disruption in the supply of potable water for the City residents and emergency responses such as firefighting.

Table 5. Damage to Water Systems in the Event of a Cascadia M9.3 Earthquake.

Site	Probability of Complete Damage	Probability of At Least Slight Damage	Probability of at Least Moderate Damage	Functionality (%) at Day1	Functionality (%) at Day 7	Functionality (%) at Day 14
600 T Street-Water reservoir	90.93%	99.98%	98.7%	10.4%	13.5%	16.6%
110 Deschutes Parkway-Wastewater Pipeline	82.04%	99.93%	95.18%	1.3%	6%	8.1%

*Data from CriticalFacilitiesAnalysis_EQ_CascadiaM93.xlsx- Cascadia Fault Earthquake Scenarios

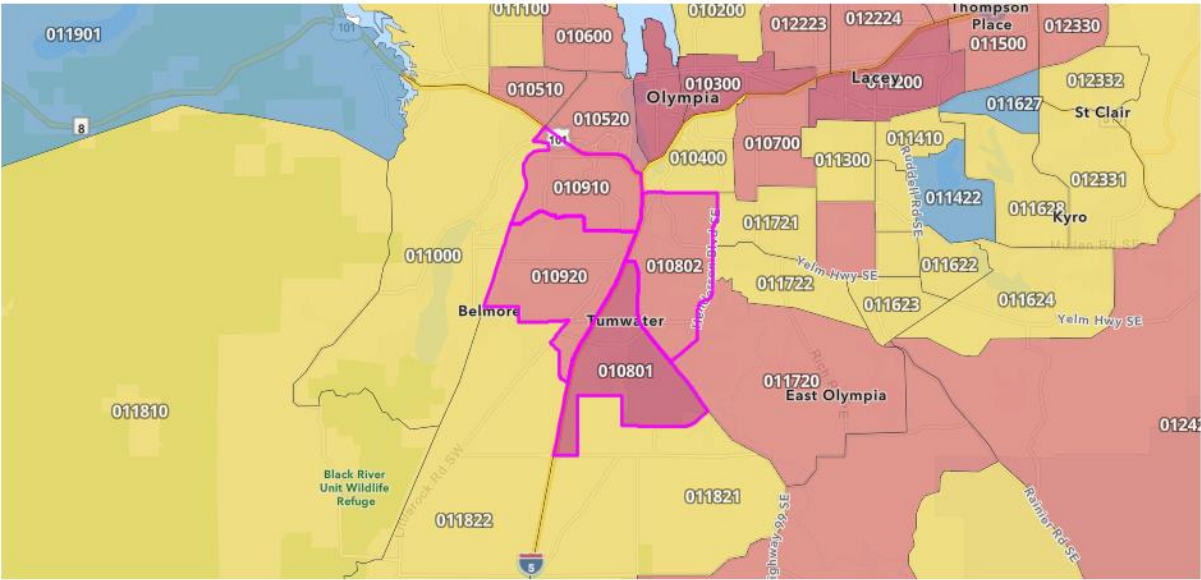
Risk

*Hazard Risk Rating*

Social vulnerability and the hazard risk rating index are summarized in Chapter 4.2 of the Regional Plan. The City's rating for a Cascadia M9.3, Nisqually M7.2, and Seattle M7.2 hazard risk ratings are high, medium, and medium, respectively.

Nationally, the City ranks relatively high/high for risk and social vulnerability in the event of an earthquake.

Risk Index



Risk Index Legend

Very High

Relatively High

Relatively Moderate

Relatively Low

Very Low

No Rating

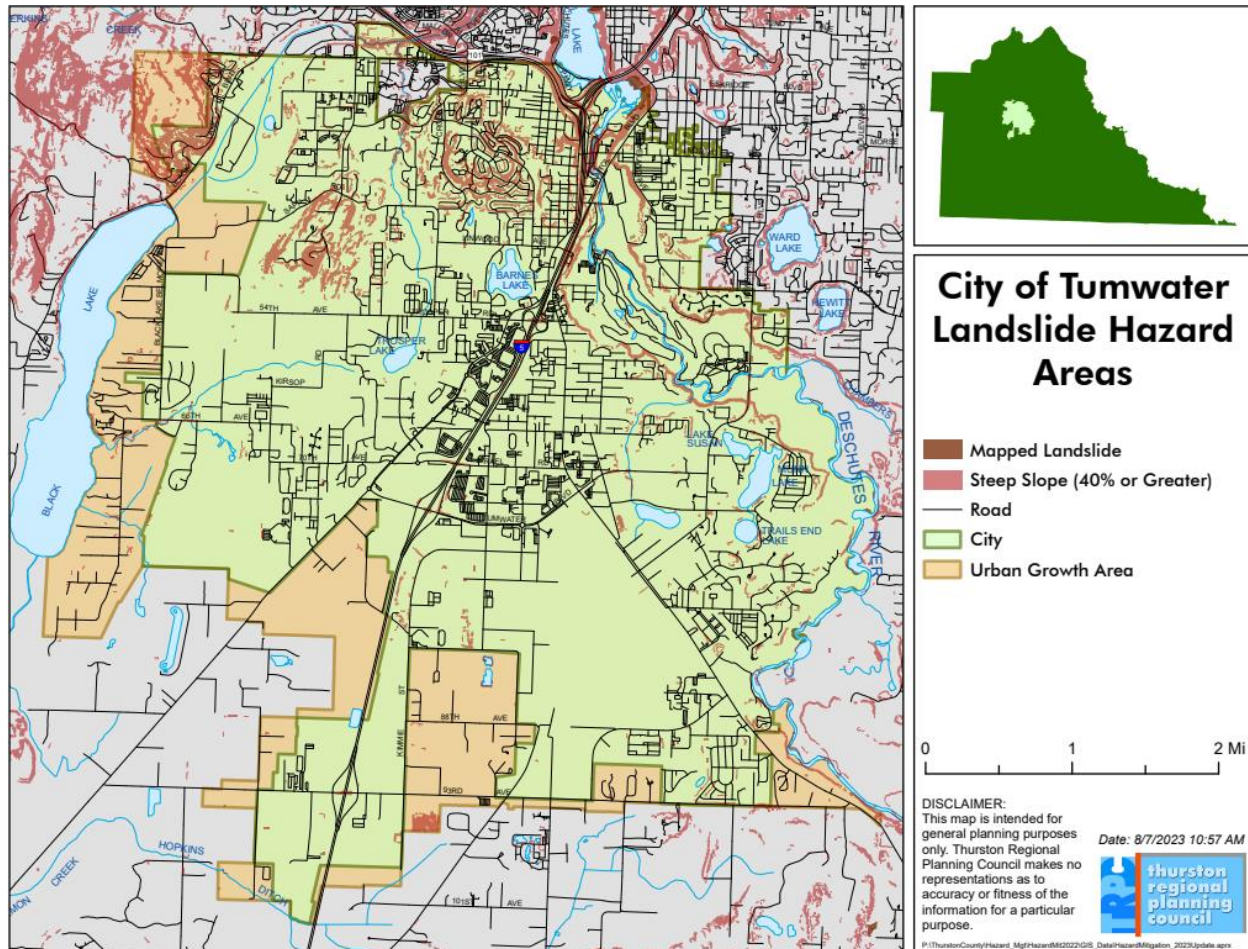
Not Applicable

Insufficient Data

Rank	Community	State	Risk Index Rating	Risk Index Score	National Percentile
1	Census tract 53067010801	WA	Very High	97.5	0 100
2	Census tract 53067010910	WA	Relatively High	95.93	0 100
3	Census tract 53067010920	WA	Relatively High	95.81	0 100
4	Census tract 53067010802	WA	Relatively High	94.88	0 100

Landslide Risk Assessment

Area of Impact



For the purposes of the hazard risk assessment, landslide hazard area is defined as a combination of the following areas:

1. Areas with slopes that are 40 percent or greater (slope was calculated using light detection and ranging or LIDAR using GIS); and
2. State Department of Natural Resources mapped known and historic landslides database

Tumwater Municipal Code 16.20.045(B) defines landslide hazard areas as:

Landslide Hazard Areas. Landslide hazard areas are areas potentially susceptible to landslides based on a combination of geologic, topographic, and hydrologic factors. They include areas susceptible to landslides because of any combination of bedrock, soil, slope (gradient), slope aspect, structure, hydrology, or other factors. Examples of these may include, but are not limited to, the following:

1. *Areas of historic failures such as:*
 - a. *Those areas delineated by the U.S. Department of Agriculture's Natural Resources Conservation Service as having "severe" limitation for building site development.*

- b. Those areas mapped by the Department of Ecology (Coastal Zone Atlas) or the Department of Natural Resources (slope stability mapping) as unstable ("U" or class 3), unstable old slides ("UOS" or class 4), or unstable recent slides ("URS" or class 5).*
 - c. Areas designated as quaternary slump, earthflows, mudflows, lahars, or landslides on maps published by the U.S. Geological Survey or Department of Natural Resources.*
- 2. Areas with all three of the following characteristics:*
 - a. Slopes steeper than fifteen percent; and*
 - b. Hillsides that have intersecting geologic contact with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock; and*
 - c. Springs or ground water seepage.*
- 3. Areas that have shown movement during the Holocene epoch (from ten thousand years ago to present) or that are underlain or covered by mass wastage debris of that epoch.*
- 4. Slopes that are parallel or sub parallel to planes of weakness (such as bedding planes, joint systems, and fault planes) in subsurface materials.*
- 5. Slopes having gradients steeper than eighty percent are subject to rock fall during seismic shaking.*
- 6. Areas potentially unstable because of rapid stream incision, stream bank erosion, and undercutting by wave action.*
- 7. Areas located in a canyon or on an active alluvial fan, presently or potentially subject to inundation by debris flows or catastrophic flooding.*
- 8. Any area with a slope of forty percent or steeper and with a vertical relief of ten or more feet except areas composed of consolidated rock. A slope is delineated by establishing its toe and top and measured by averaging the inclination over at least ten feet of vertical relief.*

Landslide Hazard areas are mapped near Sapp Road, Tumwater Hill, Black Lake Boulevard, and along the Deschutes River.

Extent

Same as described in Chapter 4.4 of the Regional Risk Assessment.

Previous Incidents

The areas within the City that are most susceptible to landslides are shown on the City Steep Slopes map. Most of the steep slopes are in the northern portion of the City and include the bluffs along the Deschutes Valley, portions of Tumwater Hill, areas on Bush Mountain, and some areas west of Black Lake Boulevard including Jones Quarry.

Annex: City of Tumwater

A landslide occurred on Desoto Street near the base of Tumwater Hill in 1999.²⁵ The street lies along a short steep canyon called Desoto Canyon. The landslide occurred during the prolonged and heavy rainfall episode that happened in 1999.



However, the majority of landslides have occurred at the southeast end of Capitol Lake near the historic Old Brewhouse. This area is across the water from Tumwater Historical Park and behind the row of historic homes on Capitol Boulevard.

The following is an excerpt from the Brewery Neighborhood Appendix of the Tumwater Land Use Element:

There have been a number of landslides within this neighborhood. A slide in 1902 demolished several of the brewery buildings that were located east of the Old Brewhouse.²⁶ Slides in this same area have also occurred in 1965, 1996, 2001, and 2008 and have caused significant damage, mainly to infrastructure such as sewer lines.²⁷ The slides in 1965 and 1996 both ruptured main sewer lines resulting in untreated wastewater flowing directly into the Deschutes River and Capitol Lake.

²⁵ Desoto Street landslide (1999)-Picture sourced from City's Public Works Water Resource Division.

²⁶ Source: 75th Anniversary Olympia Brewing Company Booklet ~1971.

²⁷ Source: *Natural Hazards Mitigation Plan for the Thurston Region-2009*.

Annex: City of Tumwater

The 1965 earthquake triggered a landslide in this area that took out the railroad tracks and the sewer line that transported wastewater from the City to the LOTT treatment facility in the City of Olympia.²⁸

Figure 8-10. Hillside slid away from beneath this four-hundred-foot section of a Union Pacific Railway branch line at Tumwater, near Olympia, Washington, during the Puget Sound Earthquake of 1965. A large landslide during the heavy-rainfall winter of 1996-97 also damaged the rail line. Photo by G.W. Thorsen, Washington Division of Geology and Earth Resources.



Another landslide in 1996 in the same area again took out the railroad tracks and the two main sewer lines.²⁹ The 1996 landslide was not triggered by an earthquake but occurred during a prolonged and intense period of precipitation. The wastewater has since been redirected to a new pipe that is located on the other side of the valley along Deschutes Parkway.³⁰

Another landslide in this general vicinity was observed to have occurred during the 2001 Nisqually earthquake.³¹ This landslide was

located slightly further to the north than the two previous landslides, but still south of Interstate 5. No damage to facilities or infrastructure resulted from this landslide.

There have not been any recent landslides since the 2017 City Annex update.

²⁸ 1965 landslide: Washington Emergency Management Division Washington State Hazard Mitigation Plan p.7 of the landslides section. http://www.emd.wa.gov/plans/documents/Tab_7.1.5_Landslide_final.pdf.

²⁹ 1996 landslide: "Sewer line plan upended by quake." Tuesday, March 20, 2001. John Dodge. *The Olympian*.

1996 landslide: Washington Emergency Management Division Washington State Hazard Mitigation Plan. November 2007. Hazard Profile-Landslide. p.9

<http://www.emd.wa.gov/plans/documents/LandslideNov2007Tab5.6.pdf>

³⁰ 1996 landslide: "Sewer line plan upended by quake." Tuesday, March 20, 2001. John Dodge. *The Olympian*.

³¹ 2001 landslide: Landslide was noted in the 2002 Capitol Lake Adaptive Management Plan, "Also the February 2001 Nisqually earthquake caused a large landslide along the eastern shore of the South Basin across from Tumwater Historical Park." <http://academic.evergreen.edu/curricular/sustainabledesign/CLAMPPlan2003-2013.pdf>

Annex: City of Tumwater

The most recent landslide occurred in December 2008, at a location closer to the old brewery building. This slide was in close proximity to a minor sewer lift station and contributed partially to its temporary failure. This minor lift station only serves about twenty residences on and near Capitol Boulevard.³²



In February 2019, an oil spill from the Brewery spilled gallons of toxic sludge into the soil of Tumwater Historical Park's eastern trail. Clean up efforts by the State Department of Ecology repaired the soil, but after heavy rain the repairs were not enough. The soil was eroded, and rain caused segments of the trail to collapse into the Deschutes River. Continued rains only made things worse when the waterfall underneath the Boston Street bridge deteriorated, sending massive volumes of water down onto the east trail. The rush of water broke a fence and caused a rock buttress that holds up the trail to topple down onto the banks of the river.

Probability of Occurrence

The probability of a landslide in the City is high, meaning an event is likely to occur in the next 25 years.

Changes in Development

Tumwater Municipal Code addresses new and redeveloped areas that may be in areas mapped with geologic hazard areas. There are standard setbacks from hazard areas and special technical reports required as part of the development proposal. A geotechnical engineer or geologist must prepare

³² Phone conversation with Steve Craig-Tumwater Public Works Operations Manager-June 15, 2009.

reports. The Development Code will be checked to ensure current state regulations are adopted through the periodic update in 2025.

Effects of Climate Change

With climate change, more frequent and intense rain, decreased summer precipitation, wildfires, and flooding, landslides and erosion frequencies and processes are altered. Warmer air will break down soils, allowing more water to be penetrated, wildfires and loss of vegetation and root systems that stabilize slopes, can affect rates of erosion and increase the chances of landslides.

Vulnerability

Impacts to People

An estimated 223 people within the City live within areas that are at risk of landslides. Landslides could catch people unaware and cause serious injury or death. People could be stranded if roads are blocked and transportation unavailable. People can lose their homes and experience displacement. If serious injury occurs, help and assistance could be extended or not able to reach those in need.

Impacts to Structures

Landslides can damage and destroy homes, property, critical facility structures, and infrastructure. There are seventy-four structures identified in potential landslide hazard areas according to the Regional Plan Table 4.4.3. Tumwater Hill is a highly populated area with residences, duplexes, apartments, a school, and businesses. A landslide could carry structural debris and cause damage to anything in its flow path.

Impacts to Systems

Water, sewers, and other critical infrastructure could be damaged in the case of a landslide. Tumwater Hill and the Deschutes Valley have water systems and transport lines that could be impacted or broken in a landslide. There is also the potential for contamination of water and to the environment. Landslides could block off transportation systems, damage roads and infrastructure needed for emergency services and evacuation, and isolate or strand people.

Impacts to Natural, Cultural, and Historic Resources

There are multiple historical structures and natural resources that could be affected by a landslide. Landslides in the Deschutes Valley could transmit contamination from the Historic Brewery site into the Deschutes River and damage the Tumwater Historical Park.

Annex: City of Tumwater

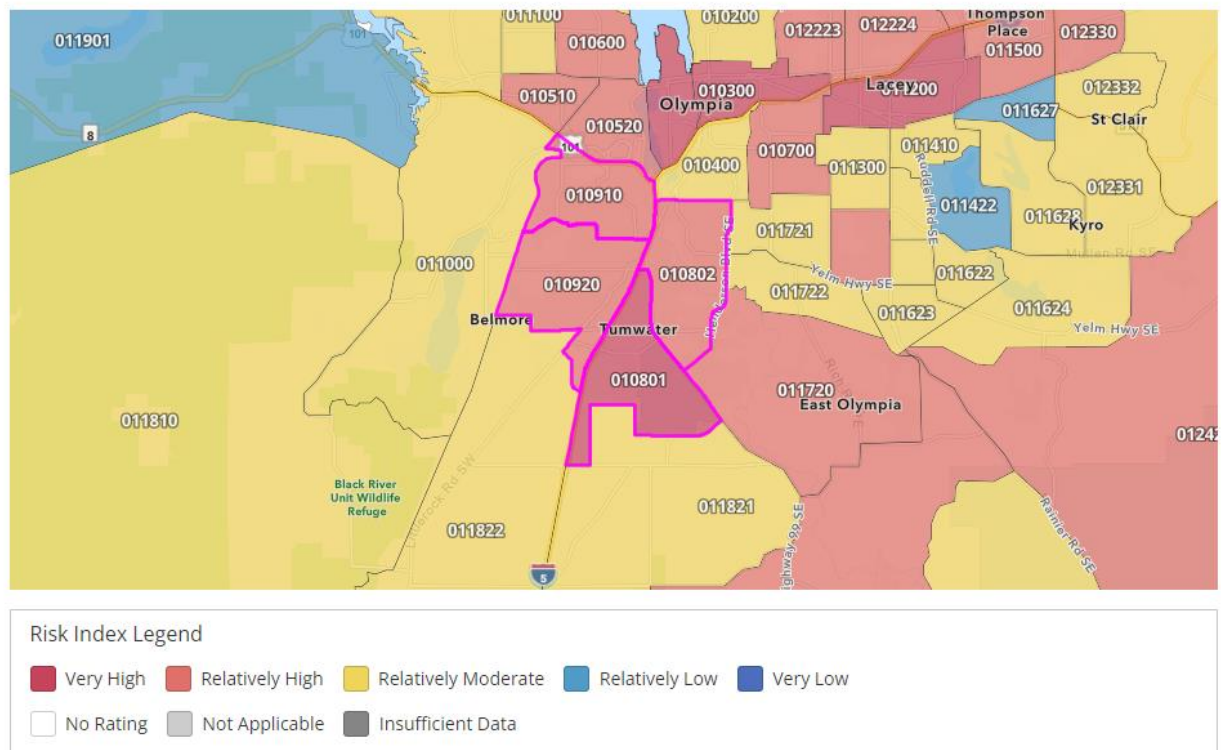
Risk

Hazard Risk Rating

Chapter 4.4 of the Regional Plan describes social vulnerability rating and the risk index for Landslide Hazard Areas. The City's risk index is relatively high to high according to the FEMA National Risk Index report. The overall hazard risk rating for the City is 18.

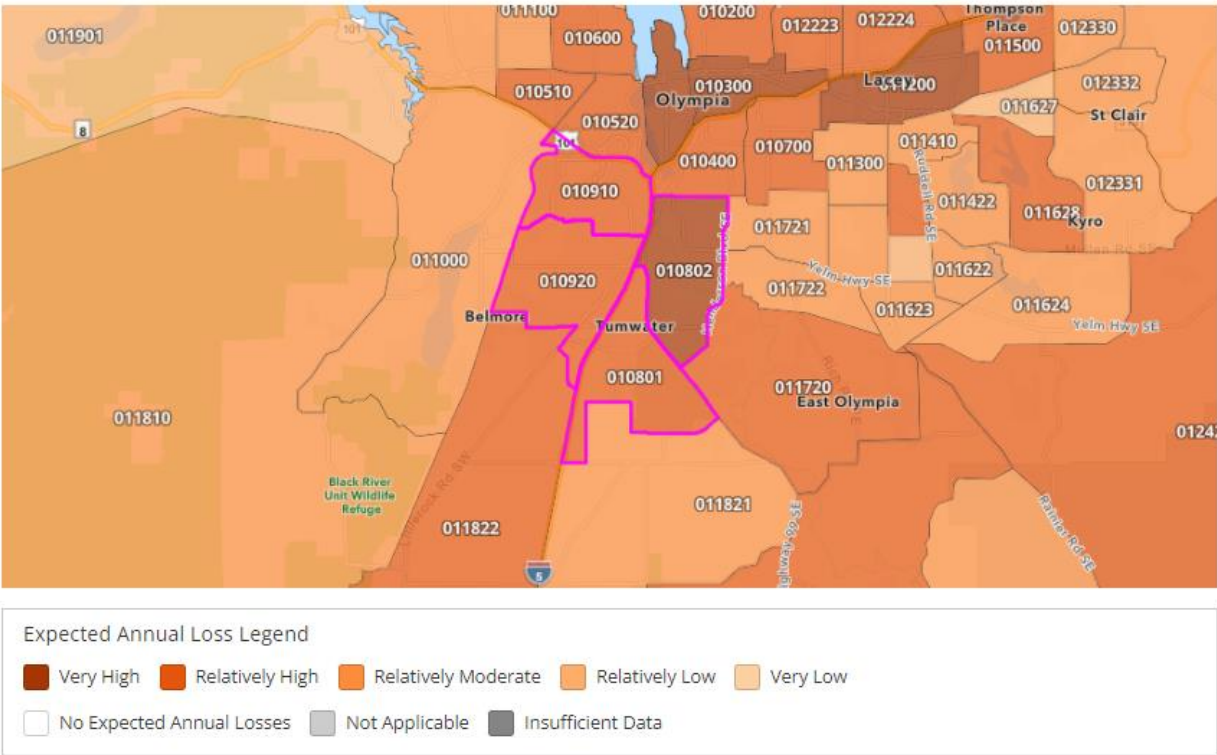
The maps below show the risk index and expected annual loss from landslides.

Risk Index



Expected Annual Loss

Expected Annual Loss measures the expected loss each year due to natural hazards.



Rank	Community	State	EAL Value	Score
1	Census tract 53067010802	WA	\$3,944,128	97.13
2	Census tract 53067010910	WA	\$3,772,236	96.86
3	Census tract 53067010801	WA	\$3,377,825	96.04
4	Census tract 53067010920	WA	\$2,951,985	94.83

Severe Weather Risk Assessment

Area of Impact

In general, all Thurston County communities are affected by extreme heat events, extreme cold events, and other storm activities (winds, rains, and snow). See Chapter 4.6 of the Regional Plan for definitions and statistics.

Extent

Same as described in Chapter 4.6 of the Regional Risk Assessment.

Previous Incidents

Lightning has caused damage to the infrastructure in the City several times over the last couple of decades.

In 1991, a deep freeze resulted in several frozen and broken water mains. Most of the water mains that froze were on overpasses. A couple of these frozen water mains were part of construction projects, so the water was not moving inside the pipes, just sitting still. Usually, a minor amount of water movement will prevent water from freezing inside a pipe. Steps have since been taken to prevent water mains from freezing again.

During the December 2008 snowstorm, several apartment complexes in the City had carports collapse. These included the Breckenridge Heights apartments, Indian Creek condominiums (pictured below), and Capitol Heights apartments.³³ The Olympics West Retirement facility on Trosper Road was evacuated due to the threat of roof collapse from heavy snow.³⁴ Other relatively minor damage occurred to the Headquarters Fire Station when the weight of the snow tore the gutters off of the building. No injuries were reported due to the collapses.



Due to the number of trees in the City, power outages are expected during storms. The most recent severe and long lasting power outages were during the December 2006, 2008, and 2012 winter storms. The 2006 windstorm resulted in City facilities without power for several days. A half million-dollar generator was installed at City Hall in 2009 to provide uninterrupted power for both City Hall and the Police Station. In addition, there are generators for most of the City facilities including, but not limited to,

³³ Picture from the Fire Department of collapsed carport at Indian Creek Condos 220 Israel Road in Tumwater on December 25, 2008 and conversation with Fire Department front counter staff.

³⁴ The Olympian newspaper article 12-28-2008 (online). "Riding arenas roof collapses." by Rolf Boone.

the Emergency Operations Center, which is inside the Headquarters Fire Station, the North End Fire Station, the Operations & Maintenance Facility, and several critical components of the water and sewer systems. Most City facilities are now able to function due to the generators.

Besides power outages, the other significant issue from storms is the damage to structures, utilities, and the transportation system from falling trees, as well as the cost of cleanup afterwards. The 2012 storm was a combination of heavy snow and ice, which severely damaged many trees throughout the City. The damage and cleanup costs for removal of tree debris from City streets and properties were approximately \$317,796.56.³⁵ Some of the structure and infrastructure damage included a partially collapsed Headquarters Fire Station wash rack roof (~\$42,000) and part of the computer system for the SCADA sewer and water management system had to be replaced (~\$16,000).³⁶

During the Police Department expansion at City Hall in 2014, the row of ten large fir trees on the west side of the building had their root zones significantly disturbed during construction. These trees are within falling distance of the newly expanded Police Station, which is a critical facility attached to City Hall, as well as the half million-dollar generator, which supplies power to the Police Station and City Hall. This generator also includes a special device to remove power fluctuations. For this reason, all power for City Hall, the Police Station, and the Operations & Maintenance Facility are routed from the Puget Sound Energy lines and through this device first before being distributed on-site. If a tree fell on the generator, it would also damage this special controller and completely interrupt power service on-site.



On May 4, 2017, a wet microburst touched down in parts of the City and the Cities of Olympia and Lacey causing substantial damage in a relatively small area. Many trees and utility poles were broken or blown down in the short but severe storm. Localized urban flooding occurred as well due to the large amount of precipitation that occurred within a short time period. Microbursts happen when air cools quickly inside a thunderstorm, moves to the surface, hits the ground and then spreads horizontally on the ground. Microbursts tend to affect small areas, usually no larger than a few square miles. This weather

³⁵ Project reimbursement worksheet for submittal to FEMA prepared by Fire Department staff 2012.

³⁶ Project reimbursement worksheet for submittal to FEMA prepared by Fire Department staff 2012.

phenomenon produces damage in a starburst pattern. The damaging winds radiate away from the point of impact in straight lines.



Other issues associated with these fir trees in this location are the clogging of the porous asphalt parking lot, fir needles and debris falling into and on cars, and tree sap dripping on to cars. Both of the latter issues can cause visibility issues with windshields on emergency vehicles. Police officers have taken to avoiding utilizing half of the parking lot for this reason and are parking on the grass at the back of the facility at times.

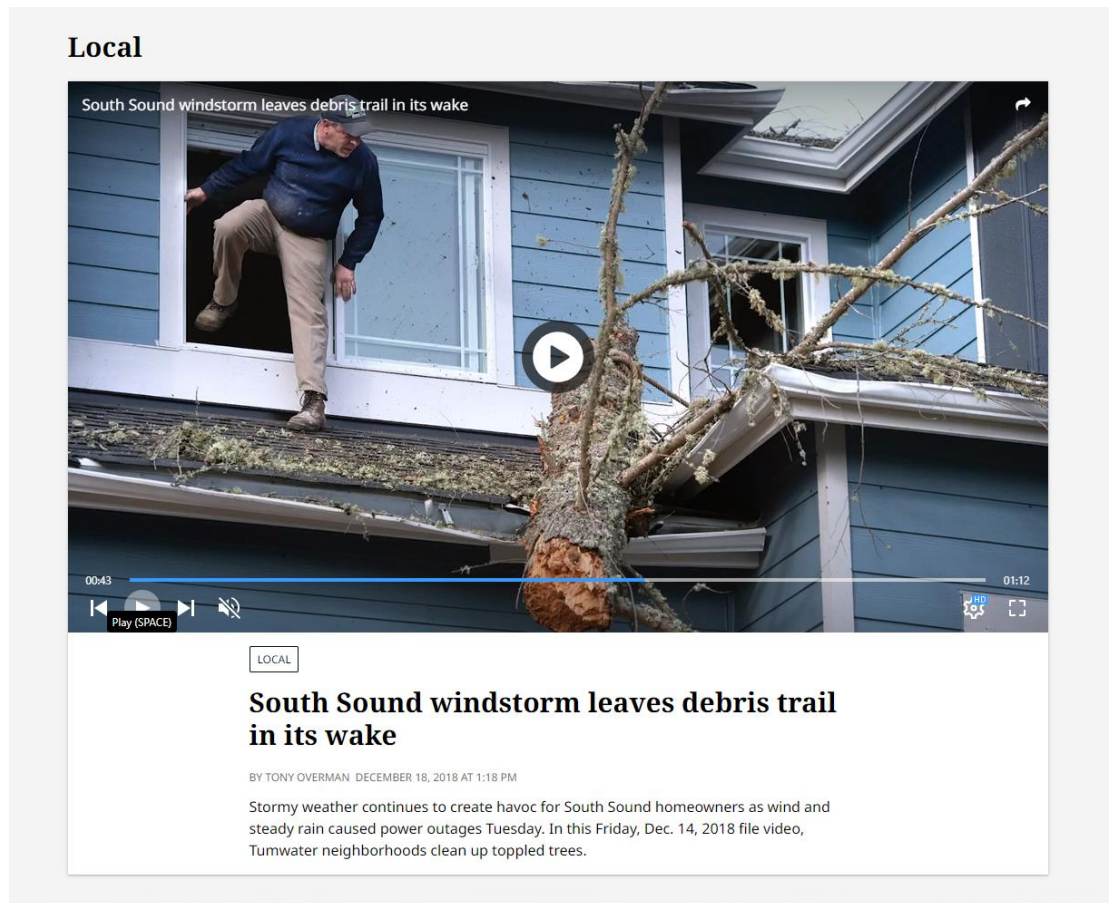




Special care should be taken to have a tree professional inspect these trees on a regular basis. An alternative and more initiative-taking approach would be to remove them before a strong storm occurs and they topple onto a critical facility, the generator that powers the critical facility, or police vehicles or personnel. A first step may be to trim the lower branches to lighten the wind load on the trees.

In a somewhat similar situation, very tall fir trees also surround the Headquarters Fire Station, which contains the Emergency Operations Center. These trees have not been disturbed since the construction of the Headquarters Fire Station in 2000 and have weathered several significant storms in the last decade and a half. However, one tree was hit by lightning in summer 2015 and much of its bark was blown off. The groves of trees on both sides of this critical facility should be assessed every few years as to their health and their ability to weather a severe storm. Monitoring the health of trees within falling distance of critical facilities should be done on a regular basis.

On December 11, 2018 heavy rains and windstorms swept through Puget Sound and caused power outages to about 2,000 Puget Sound Energy customers, mostly in the City. Trees fell, taking down power lines and poles. This left homeowners, businesses, and even students at school without power. Students at Tumwater High School were released early due to the school not having power and lights. Busy intersections were turned into four way stops. This storm was one of many projected throughout that week. The pictures below show City residents trying to clear debris from the windstorm days later on December 14, 2018.



At the end of June 2021, the City experienced a historic heat wave. The heat was caused by a dome of high pressure over the northwest and worsened by climate change. One man in the City died due to the extreme heat, he was found deceased in his apartment. Temperatures were as high as 105 degrees. Many homes in the City are not equipped with air conditioning, the chances of hyperthermia are high, and most of the population is at risk.

Probability of Occurrence

The City matches the regional risk assessment for storms in regard to probability of "high." A high rating means a hazard event is likely to occur within 25 years.

Changes in Development

Any development within the City is subject to storm hazards, especially heat. The City's Building Codes are up to state standards and Washington State Energy Code standards are met. This helps in times of severe cold or heat storm events. The City is working to promote infill to reduce urban sprawl and heat islands caused by hard surfaces, such as concrete. The retention of trees will help keep areas cooler, the City is updating its tree and vegetation code.

Effects of Climate Change

It is projected that over the next thirty years summer temperatures will rise 3.4 degrees, this will impact economic development, agriculture, ecosystems, and human health. Warmer summers are expected to increase concentrations of air pollutants, such as ozone and some vector-borne illnesses, such as West Nile virus. Warmer summer temperatures could decrease opportunities for warm season recreation activities. Warmer summers are expected to reduce summer soil moisture and increase physiological stress for some plants and animals. The elderly, very young, and people with preexisting health conditions are more likely to be affected by warmer summers.

Warmer temperatures set the stage for algal blooms, in 2015, the waters off the west coast from California up to Washington experienced one of the largest observed toxic algal blooms in recent decades when the neurotoxin domoic acid formed and spread. Droughts can concentrate harmful substances in streams or wells. Extended or intense droughts can impact smaller surface water and shallow groundwater systems by significantly reducing the quantity of water available for use. While impacts on individual water supply systems will vary, the projected increase in both flooding and drought could increase risks to drinking water quality and quantity.

Heavy precipitation is expected to increase by ten percent. Floods can introduce hazardous and toxic substances to water ways and threaten public water supplies. Neighborhoods and developments that are low-lying or have problems with drainage will be more vulnerable to flooding. Transportation routes and infrastructure located in low-lying areas, within or near current floodplains or regulatory flood zones, or adjacent to unstable slopes are expected to be more exposed to an increase in heavy precipitation.

Vulnerability

As stated above, the City is vulnerable to the effects of severe weather and storm hazard events. Infrastructure, water systems, waste management, ecosystems, development, economic development, human health, and more can be impacted.

Impacts to People

The elderly, young, and people with existing medical conditions are the most vulnerable to extreme weather events and storms. As temperatures rise, more stress is placed on the body, which increases the risk of heat exhaustion and heat stroke. Prolonged summers can increase pollen and allergens, affecting those with asthma or allergies. During heat waves, there is an increase in the number of emergency calls, hospitalizations, and heat-related deaths. People with pre-existing health conditions, such as diabetes or a suppressed immune system, are also at a higher risk of experiencing health complications. Outdoor laborers are more exposed, placing them at a relatively higher risk as well.

Residents who do not have access to housing, housing with air conditioning or fans, heaters, access or transportation to medical or emergency weather centers, families without medical care, are all at risk. Households that are damaged by storm events are financially burdened, while public safety is at risk. Storm events can leave households displaced due to structural damage. Without power, transportation, heat, access to clean water, cooling centers, and medical care people are burdened emotionally, physically, and financially.

Impacts to Structures

There have been historic incidents where the Headquarters Fire Station, City Hall, and structures have been impacted by severe weather and storm events. It is vital that trees are inspected around critical facilities to reduce damage from trees and limbs falling during a severe storm, so damage to City property such as roofs, vehicles, and buildings are minimized. During winter storm events, water mains can freeze or weight from snow and falling debris can cause physical damage.

Impacts to Systems

During power outages, it is critical the Emergency Operations Center at the Headquarters Fire Station and Police Department at City Hall are still functioning. City staff are looking at resources and funding to secure solar panels in case the main generator at City Hall fails. Power lines and utility lines are susceptible to damage from tree limbs and trees falling. If utilities and communication systems are installed underground, there is less impact on critical communication systems. Homes can remain with power and heat during winter storms and have the ability to communicate with emergency services in case of an emergency.

Impacts to Activities

Outdoor recreation and economic development will be impacted. In a heat event, sports and games may have to be cancelled, people who work outside may not be able to work in extreme heat, dust and allergens will affect air quality and people will have to stay indoors. Parks and outdoor areas will be exposed to drought, waterbodies and areas to swim will have water level decreases and prone to more water quality issues.

Risk

Hazard Risk Rating

Hazard risk ratings are based on social vulnerability ratings and the national risk index as explained in Chapter 4.6 of the Regional Plan. The City has a relatively high to high risk index and broad range of socially vulnerable areas. Those who live in homes without heat and air conditioning or are elderly and have medical conditions are most at risk.

Wildfire Risk Assessment

Area of Impact

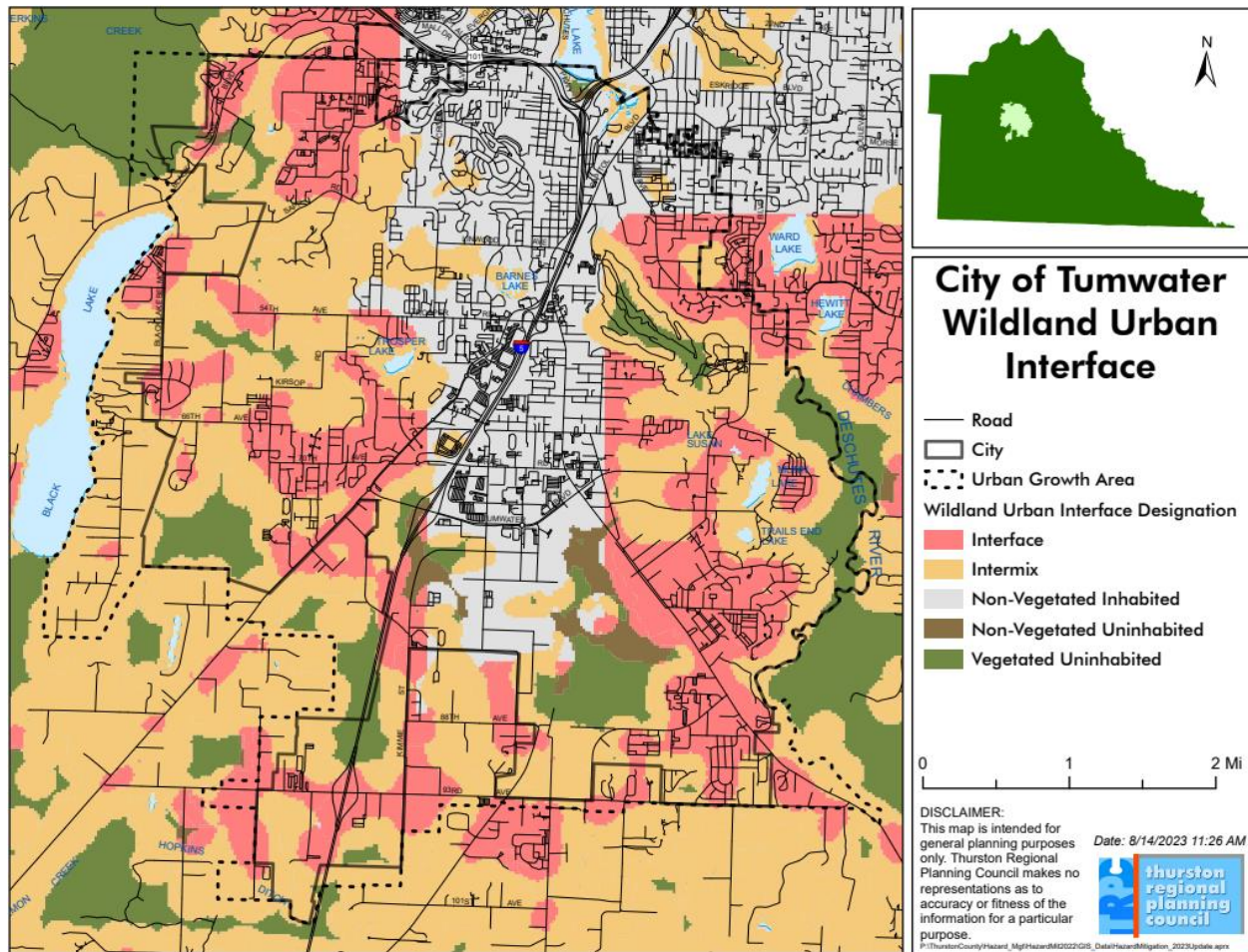


Figure 4. City Wildland Urban Interface

In 2019, the State Department of Natural Resources completed statewide mapping for wildlands and wildland-urban interface areas. For the purposes of the wildfire hazard risk analysis, the hazard assessment area is defined as wildland-urban interface and intermix mapped areas. Approximately two thirds of the City are mapped in the wildland urban interface and intermix areas according to the state mapping.

In general, wildlands are areas covered with 50 percent or higher burnable vegetative cover (Map 4.9.1). There are two major land use characterizations for areas that are prone for wildfires:

1. Wildland-Urban Interface – located on the periphery of urbanized areas where homes, businesses, and other structures meet wildlands. Areas mapped as a wildland-urban interface and intermix include development that is bordered by wildlands on at least one side. Approximately 32 percent of Thurston County’s population is located in areas mapped as a wildland-urban interface.
2. Wildland-Urban Intermix – located between both the urban interface and wildlands. Most wildland-urban intermix areas in Thurston County are near lower density areas further away from

urbanized areas. The urban intermix is where homes and structures intermingle with wildlands. Areas characterized as intermix consists of development or structures that are surrounded on two or more sides by wildlands. Approximately 33 percent of the county's population is located in areas mapped as wildland-urban intermix.

WDNR's Wildland-Urban Intermix map is not a wildfire risk map, but it is a useful planning tool to inform the region's wildland fire risk assessment. Wildland-urban interface and intermix areas are prone to wildfires because they contain people and structures adjacent to wildland vegetation. People are attracted to natural and less developed rural landscapes. Over time, wildlands can convert to intermix as development spreads in unincorporated areas of Thurston County. The wildland-urban interface and intermix communities and the adjacent wildlands are at risk for wildland fire hazards because a fire may originate in the wildland area and spread to structures and dwellings and vice versa.

Extent

Human behavior, weather, fuel, terrain, and road access influence wildland fire behavior and suppression response activity. Chapter 4.9 of the Regional Plan goes into further detail of each factor.

Previous Incidents

According to Table 4.9.1 in the Regional Plan, the City has had nineteen wildfire starts from 2008-2022. A total of 5.9 acres have burned in the incidents.

Table 4.9.1 Total Wildfire Starts and Acres Burned by Fire District, Thurston County, 2008-2022ⁱⁱ

Agency ¹	Total Starts ²	Sum of Acres Burned	Average Acres Burned	Max Acre Burn Event
Bald Hills Fire Department FD 17	17	11.5	0.7	4.5
Bucoda	2	0.5	0.2	0.3
East Olympia FD 6	28	8.1	0.3	2.0
Griffin Fire Department FD 13	17	3.3	0.2	1.0
Lacey FD 3	87	54.2	0.6	4.6
McLane Black Lake FD 9	63	43.2	0.7	8.5
Olympia	14	3.7	0.3	1.4
Outside Taxing Boundaries	37	24.4	0.7	9.7
South Bay FD 8	15	2.3	0.2	0.8
South East Thurston Fire Authority FD 2&4	117	144.2	1.2	29.0
South Thurston Fire and EMS FD 12	42	55.9	1.3	13.0
Tumwater	19	5.9	0.3	1.3
West Thurston Regional Fire Authority FD 1&11	179	859.0	4.8	384.0
Grand Total	637	1216.1	1.9	384.0

Between 2018 and August 2023, the Fire Department responded to eighty-eight natural brush or vegetation fires.³⁷

³⁷ Data provided by the Fire Department, Chief Hurley.

Probability of Occurrence

The probability of a wildfire in the City is low according to the hazard risk rating index. This means a hazard event is not likely to occur within one hundred years.

Changes in Development

With two thirds of the City mapped within a fire hazard area (wildland-urban interface and intermix) most existing development is within a wildfire hazard area. Starting in October 2023 all new and existing developments will have to be reviewed for proximity to vegetation and trees, also known as “defensible space”. There will need to be a protective buffer from residential structures and development, even if they were established prior to the Washington Wildland Urban Interface Code requirements. All development within the wildland hazard areas is at risk as shown on the map.

Effects of Climate Change

Large and severe fires are associated with warm and dry conditions, which are likely to intensify with climate change. Climate related factors such as increased temperatures and drought, hotter and drier summers, drier soils and vegetation, earlier spring melting and reduced snowpack, and decreased summer water availability all contribute to conditions that fuel wildfires. Interactions between fire and other disturbances, such as drought and insect outbreaks, are likely to be the primary drivers of ecosystem change in a warming climate. Reburns are also likely to occur more frequently with warming and drought, with potential effects on tree regeneration and species composition. Hotter, drier sites may be particularly at risk for reburns, or regeneration failure. A reburn occurs when the perimeter of a recent past fire is breached by a subsequent fire.

Vulnerability

The City has many parks, residential communities, and vulnerable populations mapped in the wildland fire hazard area. Approximately 75% of the City is within a wildfire hazard area, the majority of residents, infrastructure, and businesses are at risk and exposed. A wildfire could be devastating to the economy and the health of people and vulnerable populations.

The most vulnerable populations are mapped between East of Interstate 5 and west of Capital Boulevard, from Trosper Road to 88th Avenue according to FEMA national Risk Index Mapping.

Many schools, businesses, and City facilities are located in wildfire hazard areas.

Impacts to People

Approximately 3,499 people are exposed to the Wildland Urban Intermix area, and 11,431 people are exposed to the Wildland Urban Intermix area.³⁸

Wildfires create air pollution and affect air quality. The effects of smoke from wildfires can range from eye and respiratory tract irritation to more serious disorders, including reduced lung function, bronchitis, exacerbation of asthma and heart failure, and premature death. Children, pregnant women, and the elderly are especially vulnerable to smoke exposure. Emissions from wildfires are known to cause increased visits to hospitals and clinics by those exposed to smoke.³⁹

There are many homes in Washington State that are not equipped with Air Conditioning, and during peak wildfire season in the summer, many people rely on opening windows to cool homes in the summer.

Impacts to Structures and Systems

Structures that lack adequate defensible spaces from fire-prone vegetative fuels are at risk of ignition during a fast-moving fire. Wildfires can destroy or cause damage to homes, businesses, schools, vehicles, electric utilities, and critical infrastructure. Wildfires can delay transportation in and around affected areas. Loss of power disrupts communications which in turn can impact a wide range of public and private sector lines of service and business operations.

*Risk**Hazard Risk Rating*

Hazard risk ratings are determined by social vulnerability and ratings and the national risk index as explained in Chapter 4.9 of the Regional Plan. The City's risk ranking for wildland urban interface was medium and low for wildland urban intermix.

³⁸ Data from the Loss Matrix provided by Tetra Tec.

³⁹ Wildland Fire Research: Health Effects Research | US EPA.

Annex: City of Tumwater

Table 6. Estimated Exposure to Wildland Fire for the City.

Estimated Population ⁴⁰	Total Number of Buildings ⁴¹	Total Number of Residential Buildings ²	Total Building Value (Structure & contents) ²	Washington DNR Wildland Urban Interface ⁴²						
				Estimated Exposure						
				Estimated Buildings Exposed ⁴³	Population Exposed	%Population Exposed	Exposed Value Structure ²	Exposed Value Contents ²	Total Value Exposed ²	% Total Value
26,360	9,513	8,408	\$9,362,171,728	4,142	11,431	43.4%	\$1,930,103,308	\$1,495,341,610	\$3,425,444,918	36.6%

Table 7. Types of Structures Exposed in Wildland Urban Interface in the City.

Number of Structures in Wildland Urban Interface (2)							
Residential	Commercial	Industrial	Agriculture	Religion	Government	Education	Total
3,646	433	48	1	1	6	7	4,142

⁴⁰ 2022 population from the State Office of Financial Management, Forecasting and Research Division.⁴¹ Values based on 2022 tax assessor data provided by Thurston County.⁴² Wildland Urban Interface and Intermix data provided by the State Department of Natural Resources.⁴³ Percent of residential buildings exposed multiplied by the estimated population.

Mitigation Strategy

City Mitigation Initiatives

Central to the City Annex and Regional Plan are its recommended projects, programs, and activities the planning partners will implement to provide long-term and sustained benefits that will reduce losses from the impacts of the hazards that are identified in this plan's risk assessment. Each initiative was screened and ranked using a benefit-cost review criteria worksheet. Each initiative will require significant investments in planning, design, and construction or coordination, and may take years to complete. The desired outcomes of this plan's mitigation strategy are that communities:

- Build the necessary capacities to improve their knowledge of hazards and their risks
- Identify actions that will effectively reduce their vulnerabilities from hazards; and
- Implement their mitigation strategies to fulfill the Plan Goals and Objectives

The City Annex contains City specific initiatives. The City Annex identifies actions that are specific to the vulnerabilities of its community. The City is responsible for implementing the actions.

Mitigation Initiative Prioritization Process

During all City Annex and Regional Plan updates, the previous mitigation initiatives were reviewed for current status and relevance. After this was completed, new mitigation initiatives were considered. This process included a review of emerging hazards and initiatives from the other jurisdictions' earlier plans to see if there were items that would also benefit the City.

For the 2023 City Annex and Regional Plan update, several new ideas were selected and crafted into new mitigation initiatives for the City. The hazards mitigation planning team discussed the benefits and costs of each initiative recommended for inclusion in the 2023 City Annex and Regional Plan update. Members of the team provided input based on their experience with an understanding of past disaster events and the ability of the mitigation initiatives to protect public and private property.

The hazards mitigation planning team weighed the significance of the initiatives using the criteria established for the regional planning process. The final scoring of the initiatives against the regional criteria shown below occurred through an iterative, consensus-based process.

- **Hazard Risk Rating:** Does the mitigation initiative address a high, medium, or low-risk hazard?
- **Project Cost:** Is the implementation of the mitigation initiative expected to cost less than \$100K, between \$100K to \$500K, or more than \$500K?
- **Natural Hazards Mitigation Plan Goals and Objectives:** Does the mitigation initiative strongly support at least four policies, at least two policies, or one policy?

- **Social Vulnerability:** Will the action produce a significant and direct benefit for socially vulnerable or underserved communities, or will the action produce a benefit for socially vulnerable or underserved communities, or will the action have minimal benefit?
- **Changes in Development:** Does the action include measures that strongly account for changes in development, or does the action include some measures that account for changes in development, or does the action include minimal measures?
- **Climate Change:** Does the action strongly account for the effects of climate change, or does the action account for the effect of climate change, or does the action minimally account for the effects of climate change?
- **Geographic Impact:** Does the action address hazard risks for the entire affected area of the community, across at least half of the affected area or a very limited portion of the affected area?

The results of the scoring exercise completed by the hazards mitigation planning team appear below.

Mitigation Initiative Format

To support organization, every initiative in the plan follows a consistent format that includes a title, a background and needs description, a brief scope, priority, hazard addressed, project category, related Goals and Objectives, department or project lead, estimated cost, estimated timeline for implementation, potential funding sources, relationship to other community planning documents – if applicable – and implementation status. Refer to the Sample Mitigation Initiative to view the layout of the mitigation initiative content.

Annex: City of Tumwater

Sample Mitigation Initiative

Initiative identification, benefit cost review score, and title	New, existing, modified, ongoing, or removed during the plan update process
Benefit-cost review score. Higher score is a higher priority	
Hazard addressed and action category	
Background and Need description	
Relationship to plan goals	
Implementation details	
Source for the initiative	
Progress toward the initiative's implementation	

CW-WH-2: Countywide Multijurisdictional Community Wildfire Protection Plan**Benefit-Cost Review Score:** 36**Status:** New**Hazard Addressed:** Wildland Fire**Category:** Plan Coordination and Implementation

Background and Need: Thurston County wildfire frequency and size have trended upward over the last 15 years. On September 8, 2020, a 268-acre fire in southwest Thurston County, intensified by sustained high speed winds, destroyed two homes and two outbuildings near Mima and Bordeaux Roads SW. The fire forced area residents to evacuate. The incident resulted in Thurston County receiving immediate federal fire management assistance, an uncommon wildfire declaration for communities in Western Washington lowlands.

The effects of climate change will make summers warmer, drier, and longer. Climate change combined with the region's growing population will increase the likelihood for more frequent, larger, and perhaps more severe wildfires. Planning is necessary to understand the wildfire risks for current and future households and businesses located in wildland urban interface and intermix areas. In addition, wildfire smoke will adversely impact people who suffer from chronic respiratory diseases or people who are exposed and unable to seek indoor refuge.

Building on the momentum of the 2023 Wildfire Ready Neighbors Program partnership and the 2023 Assessing Structural Ignition Potential courses hosted by Thurston County Emergency Management, the region will pursue the development of a multijurisdictional countywide Community Wildfire Protection Plan. The planning process will involve a whole community approach to engage a variety of stakeholders to identify areas of the community, especially underserved communities, that are at greatest risk for wildfire losses and establish a collaborative framework for communities to identify strategies for wildfire response, hazard mitigation, and community education and preparedness.

Relates to Plan Goal(s) and Objectives: 3C, 5C, 6A, 6B, 7B, 7D, 7E, 9A, 9B

Lead: The Association of Thurston County Fire Chiefs in partnership with the tribes, county, cities, special purpose districts, Wash. Dept. of Natural Resources, the US Forest Service, TRPC, the public, and other stakeholders.

Estimated Cost: Medium, \$100,000 to \$300,000**Time Period:** 2024-2028**Funding Source:** Wash. Dept. of Natural Resources Community Wildfire Defense Grant**Source and Date:** 2023 Natural Hazards Mitigation Plan

Initiative and Implementation Status: This is a new initiative. Information about this initiative's status will be reported during the next plan update.

Hazard Mitigation Plan

Annex: City of Tumwater

City Mitigation Initiatives

The City Annex Mitigation Strategy consists of twenty initiatives that, if implemented, will improve the City's ability to perform hazards mitigation planning, respond to natural hazards, and strengthen community resiliency. Seven initiatives were carried over from the previous plan. Five new initiatives were added through the City Annex and Regional Plan update process.

The priority of implementation could vary from the order shown below due to changing hazard conditions, emerging priorities, or the condition of grant funding opportunities.

Table 8. City Annex Mitigation Strategy Initiatives.

Initiative	Status	Benefit-Cost Review Score
Public Outreach and Information		
TUM-MH-22 Mail flood insurance information to owners of properties located within a floodplain and to residents who live in a floodplain	Ongoing	22
Plan Coordination and Implementation		
TUM-FH-36 Continue to be actively involved in inter-jurisdictional flood hazard reduction efforts where the City and other jurisdictions are located within the same basin	Ongoing	36
Data Collection and Mapping		
TUM-WH-33 Update GIS (City Map) maps to show wildland-urban interface and intermix	New	33
Development Regulations		
TUM-WH-42 Update Building Code to wildland-urban interface and intermix requirements	New	42
TUM-WH-38 Develop a wildland-urban interface and intermix Vegetation Management Plan and Planting Species Plan	New	38
TUM-SH-36 Reduce heat islands through street tree, tree preservation, and landscape code updates	New	36
TUM-LH-31 Update Critical Area Code and Development Code and Regulations during the Comprehensive Plan periodic update	New	31

Hazard Mitigation Plan

Annex: City of Tumwater

TUM-SH-30 Reduce damage to utilities by updating City Development Code	New	30
Hazard Preparedness		
TUM-WH-23 Routinely inspecting the functionality of fire hydrants	New	28
TUM-MH-34 Encourage the public to be "Two Weeks Ready" prior to a disaster	Modified	34
TUM-LH-28 Keep a supply of air filters on hand for critical equipment, generators, wells, and vehicles in case of ash fall from a volcanic eruption, fires, or wildfires	Ongoing	28
Hazard Damage Reduction		
TUM-EH-36 Conduct a voluntary non-structural earthquake readiness inspection for all critical facilities on an annual basis	Ongoing	36
TUM-EH-31 Include retrofitting and replacement of critical system elements in Capital Facilities Plan	Modified	31
TUM-WH-27 Maintain vegetation on City Property on heavily wooded hills in the City	Modified	27
TUM-FH-23 Draft a prioritized list of residences the City would acquire (buyout) if state or federal monies are available	Existing	23
TUM-FH-23 Work with stakeholders to reforest corridors along river and stream shorelines.	Existing	23
Critical Facilities Replacement and Retrofit		
TUM-SH-29 Periodically inspect all trees within falling distance of City-owned critical facilities	Existing	29
TUM-FH-33 Investigate funding sources for projects that will reduce or eliminate damage from flooding	Existing	33
TUM-MH-31 Install auxiliary backup power to power the City main Well and water supply	New	31
TUM-MH-30 Install auxiliary power and battery storage at City Hall and Tumwater Timberland Library (secondary Emergency Operations Center)	New	30

Hazard Mitigation Plan

TUM-FH-22: Mail flood insurance information to owners of properties located within a floodplain and to residents who live in a floodplain**Benefit-Cost Review Score:** 36**Status:** Ongoing**Hazard Addressed:** Multi Hazard**Category:** Public Information

Background and Need: Knowledge of flood insurance opportunities and other related information will be helpful for residents and property owners who may not be aware of the options. Preliminary work has been completed to map hazard areas, develop mailing list, and notification. Mailing postponed due to COVID staffing shortage.

Relates to Plan Goal(s) and Objectives: 7f, 8a, 9a, 9b**Lead:** Community Development and Executive Departments**Estimated Cost:** Low on an annual basis.**Time Period:** Fall 2023**Funding Source:** General funds, City**Source and Date:** 2023 City Annex and Regional Plan

Initiative and Implementation Status: In 2023, this existing initiative was revised to become an ongoing action. Originally this initiative was ranked 12 of 18 in 2003 and removed in 2008. Removal from the plan was because the City had no repetitive loss or severe loss properties (Source: FEMA National Flood Insurance Program Report, Washington, May 4, 2009). In addition, since 1978 the City had only two claims paid for a total of \$12,515 (same source as above). This information was not readily available during the initial drafting of the plan in 2003. However, the City annexed an area on 58th Avenue off Henderson Boulevard in the Deschutes Valley with several homes that are frequently flooded. A subcommittee of the City Council decided it would be appropriate to put this mitigation initiative back into the plan due to the aforementioned change of circumstances. Preliminary work has been completed to map hazard areas, develop a mailing list, and create a notification. The mailing was postponed due to COVID-19 staffing shortage.

TUM-FH-36: Continue to be actively involved in inter-jurisdictional flood hazard reduction efforts where the City and other jurisdictions are located within the same basin**Benefit-Cost Review Score:** 36**Status:** Existing**Hazard Addressed:** Flood**Category:** Plan Coordination and Implementation

Background and Need: The City, being located at the mouth of the Deschutes River, is directly affected by activities occurring upstream and "downstream". The City should work closely with upstream jurisdictions as well as the City of Olympia which is "downstream" to ensure that any activities in these other jurisdictions do not adversely affect the City. The City of Olympia is referred to as "downstream" because it controls the lake at the mouth of the Deschutes River with a dam. The lake has been filling in with silt and debris over the past several decades and now has very little storage capacity. Tumwater Historical Park and the historic Old Brewhouse are located at the base of the falls, effectively the mouth of the Deschutes River, which would be significantly impacted by lake level rise during a flooding event. A study was conducted in 2023 to consider flood impacts and mitigation needs for properties in the Deschutes Valley, known as the "Deschutes River Flood Reduction Study 2023."

Relates to Plan Goal(s) and Objectives: 4d, 5c, 6a, 6c, 7b, 7c, 7f**Lead:** Community Development, Water Resources & Sustainability, and Parks & Recreation Departments**Estimated Cost:** Unknown, this initiative would require staff time and inter-jurisdictional collaboration**Time Period:** 2023-2028**Funding Source:** City**Source and Date:** 2023 City Annex and Regional Plan

Initiative and Implementation Status: The City continues to be involved with other jurisdictions in regard to the Deschutes River. The Water Resources & Sustainability and Parks & Recreation Departments both represent the City on the Deschutes River, Capitol Lake, and Budd Inlet TMDL Technical Advisory Group. The scientific research on the river has been completed and the advisory group is working on an action plan to deal with the activities and land uses currently impacting the river. Currently logging and agricultural practices, as well as riparian habitat issues, are impacting the river. Although the focus of the research, the committee, and the eventual action plan is on water quality, it will also result in better quality riparian habitat, more naturally regulated flows in the river, and some positive impacts on the effects of downstream flooding episodes. In addition, the City's Stream Team often works in conjunction with the Thurston Conservation District for riparian habitat restoration projects that involve agricultural uses and lands.

TUM-WH-33: Update GIS (City Map) maps to show Wildland-Urban Interface and Intermix**Benefit-Cost Review Score:** 42**Status:** New**Hazard Addressed:** Wildland Fire**Category:** Data Collection and Mapping

Background and Need: The majority of the City is within the wildland-urban interface and intermix regulatory area. Developers, homeowners, and City staff will need a mapping system to help determine which wildland-urban interface and intermix regulations will apply. Offering GIS hazard mapping online for residents and design professionals creates an opportunity for the City to develop an app map to transfer data to the City's City Annex website and link to state and federal websites.

Relates to Plan Goal(s) and Objectives: 7b, 7e, 7f, 9a, 9b**Lead:** Transportation & Engineering (GIS Team) Department**Estimated Cost:** Low**Time Period:** 2023-2024**Funding Source:** City**Source and Date:** 2023 City Annex and Regional Plan

Initiative and Implementation Status: This is a new initiative. The GIS Team is assisting by adding the wildland-urban interface and intermix areas to the internal staff maps. The GIS Team is creating a vegetation layer and trying to find a solution to allow for staff to select any point on the map and have the app automatically create a 40 acre square buffer around the point, show the buffer, and automatically calculate the percentage of land covered by vegetation and the number of buildings within the buffer.

TUM-WH-42: Update Building Code to Wildland-Urban Interface and Intermix requirements**Benefit-Cost Review Score:** 42**Status:** New**Hazard Addressed:** Wildland Fire**Category:** Development Regulations

Background and Need: Approximately two-thirds of the City is within the wildland-urban interface and intermix area, and at risk for wildfires. To reduce the loss of life and property due to wildfires, the Washington Wildland-Urban Interface Code establishes minimum state requirements for land use and built environment in designated wildland-urban interface and intermix areas. These requirements include specific fire resistant materials for structures and limiting the amount and type of trees and vegetation in “defensible space” within 30 to 100 feet of structures. The Washington Wildland-Urban Interface Code would apply to the wildland-urban interface and intermix area as mapped by the State Department of Natural Resources. The intent is to reduce the amount of fuel for wildfires in areas where there are people and structures.

Relates to Plan Goal(s) and Objectives: 1b, 7d, 8b**Lead:** Community Development Department**Estimated Cost:** Low**Time Period:** 2024 Building Code Update**Funding Source:** City**Source and Date:** Regional Plan, City Work Plan**Initiative and Implementation Status:** This is a new initiative.

TUM-WH 38: Develop a Wildland-Urban Interface and Intermix Vegetation Management Plan and Planting Species Plan**Benefit-Cost Review Score:** 38**Status:** New**Hazard Addressed:** Wildland Fire**Category:** Development Regulations

Background and Need: Critical fire weather frequency occurs between 2 to 7 days a year in Thurston County. A vegetation management plan may reduce the fire hazard severity. By establishing a drought tolerant tree and plant species list and required setbacks and locations for landscaping, there will be a decrease in the chances of landscaping vegetation becoming wildfire fuel. As part of the adoption of the Washington Wildland Urban Interface Code, there are established “fuel models.” The fuel models will evaluate the types of vegetation and size of trees and their proximity to structures, slopes, and defensible space.

Relates to Plan Goal(s) and Objectives: 4a, 4b, 7d, 8b**Lead:** Community Development and Water Resources & Sustainability Departments**Estimated Cost:** Low**Time Period:** 2023-2028**Funding Source:** City**Source and Date:** Regional Plan, City Work Plan**Initiative and Implementation Status:** This is a new initiative.

TUM-SH-36: Reduce heat islands through street tree, tree preservation, and landscape code updates**Benefit-Cost Review Score:** 36**Status:** New**Hazard Addressed:** Storm/Weather**Category:** Development Regulations

Background and Need: As urban areas develop and buildings and roads replace open land and vegetation, urban regions become warmer than their rural surroundings, forming an “island” of heat. By implementing updates to the City’s tree and vegetation, landscape, and street tree codes, proper tree and vegetation planting and maintenance will help reduce the effects of increased ambient and surface temperatures. Increasing tree and vegetation cover lowers surface and air temperatures by providing shade and cooling and reducing the amount of energy needed to cool buildings, resulting in improved reliability of the electric system, particularly during extreme weather events.

Relates to Plan Goal(s) and Objectives: 4a, 4b, 7d, 8b**Lead:** Community Development and Water Resources & Sustainability Departments**Estimated Cost:** Low to Medium; \$100,000 to \$500,000**Time Period:** 2024-2028**Funding Source:** Grants and City Funds**Source and Date:** City Annex and Regional Plan

Initiative and Implementation Status: Since 2021 staff have been working with consultants, the public, The Tree Board, internal staff, Planning Commission, and City Council to move forward with updates to the Urban Forest Management Plan. In June 2023, staff were informed about updates to the Washington Wildland-Urban Interface Code and Development Code. Staff will need to reassess the updated plan and take into consideration Washington Wildland-Urban Interface Code requirements relating to trees and vegetation.

TUM-LH-31: Update Critical Areas Regulations and Development Regulations during the 2025 Comprehensive Plan periodic update**Benefit-Cost Review Score:** 31**Status:** New**Hazard Addressed:** Flood**Category:** Development Regulations

Background and Need: During the 2025 Comprehensive Plan periodic update, staff will review the Critical Area Checklist and Tumwater Municipal Code to ensure flood and geological and landslide hazards are minimized using the most current development regulations. This will ensure any future development or redevelopment of these areas mitigate and avoid risks for landslide hazards. During a Community Assistance Visit, it was determined the City's floodplain ordinance (TMC 18.38 *FP Floodplain Overlay*) is overall in fair standing, with minor updates needed to bring the ordinance into compliance with National Flood Insurance Program and state standards. The City will complete all needed updates and adopt a compliant ordinance in order to close out the Community Assistance Visit.

Relates to Plan Goal(s) and Objectives: 3a, 4c, 8b**Lead:** Community Development Department**Estimated Cost:** Low**Time Period:** 2025**Funding Source:** City**Source and Date:** City Annex and Regional Plan, 2025 Comprehensive Plan periodic update

Initiative and Implementation Status: This initiative is new; the Critical Areas Code and Development Code will be reviewed in the 2025 periodic update.

TUM-SH-30: Reduce damage to utilities by updating City Development Code**Benefit-Cost Review Score:** 30**Status:** Modified**Hazard Addressed:** Storm/Weather**Category:** Development Regulations

Background and Need: By updating land use and environmental regulations to support vegetation management activities that improve reliability in utility corridors, the risk of having critical infrastructure damaged during a storm is reduced. The landscape code and other ordinances will be modified to encourage appropriate plantings near overhead power, cable, and phone lines. Furthermore, as part of the 2023 Development Code housekeeping amendments, staff are proposing a change to the Development Code requiring utilities to be installed underground, unless going through a deviation process. This will help improve reliability of services in the event of a storm or other natural hazard occurrence.

Relates to Plan Goal(s) and Objectives: 1a, 2b, 8b**Lead:** Community Development Department**Estimated Cost:** Low**Time Period:** 2025**Funding Source:** City**Source and Date:** City Annex and Regional Plan

Initiative and Implementation Status: This initiative is new. Revisions to the Development Code will be processed through the 2023 Development Code housekeeping amendments in the Long Range Planning Work Program.

TUM-MH-34: Encourage the public to be "Two Weeks Ready" prior to a disaster.**Benefit-Cost Review Score:** 34**Status:** Modified**Hazard Addressed:** Multi Hazard**Category:** Hazard Preparedness

Background and Need: Being self-sufficient allows individuals and communities to bounce back more quickly after a disaster. When people can take care of themselves and their immediate needs, it frees up resources for larger-scale recovery efforts, such as restoring infrastructure and providing long-term aid to those who require it. Natural disasters often occur with little to no warning, leaving little time for evacuation or preparation. Having a basic understanding of self-sufficiency ensures that individuals are better equipped to handle unexpected situations when they arise. Learning how to be self-sufficient after a disaster often extends to broader preparedness efforts, such as having emergency kits, communication plans, and evacuation routes in place. This long-term preparedness mindset can contribute to safer communities overall. Regular messaging and outreach activities should provide useful information for social service providers, households, businesses, and major employers to improve their understanding of natural hazards and the effects of climate change to help people and organizations minimize losses and how to prepare in case of disaster. At a minimum, the City will be convening an annual fall season in-person Emergency Preparedness Expo, post information on City social media and websites, distribute the Thurston County Flood Bulletin and other local agency e-newsletters, and cross-promotion partnerships with other area agencies and Thurston County Emergency Management.

Relates to Plan Goal(s) and Objectives: 6b, 9a, 9b**Lead:** Community Development, Executive, and Fire Departments**Estimated Cost:** Low**Time Period:** 2023-2028**Funding Source:** City**Source and Date:** City Annex and Regional Plan

Initiative and Implementation Status: This initiative is new. Emergency Preparedness Expos were held in 2018 and 2019 but paused in 2020-2022 as a safety precaution during the COVID Pandemic. The expo will resume in-person in Fall 2023. In 2022 and 2023 staff attended community events to perform outreach on hazards mitigation.

TUM-MH-31: Install auxiliary backup power for the City main well and water supply**Benefit-Cost Review Score:** 31**Status:** New**Hazard Addressed:** Earthquake**Category:** Critical Facilities Replacement / Retrofit

Background and Need: In the case of a natural disaster event, ensuring water supplies to emergency services and the community is critical. Having emergency power backups to the City wells (City well number 15) will ensure that even if the power grid goes out, emergency responders and residents can still have access to water. The 2024-2029 Capital Facilities Plan identifies seismic planning to Well 15 work which includes auxiliary power and review of pipeline network for seismic resiliency.

Relates to Plan Goal(s) and Objectives: 1b, 2b, 2d, 8a, 8b,**Lead:** Water Resources & Sustainability Department**Estimated Cost:** Medium**Time Period:** 2023-2028**Funding Source:** City, Grants**Source and Date:** City Annex and Regional Plan and 2020 Water Plan**Initiative and Implementation Status:** This initiative is new.

TUM-MH-30: Install auxiliary power and battery storage at City Hall (secondary Emergency Operations Center) and Tumwater Timberland Library.**Benefit-Cost Review Score:** 30**Status:** Modified**Hazard Addressed:** Storm/Weather**Category:** Critical Facilities Replacement / Retrofit

Background and Need: City Hall and Tumwater Timberland Library are critical facilities. In the event of a storm, solar power will keep City Hall and the police station functioning during an emergency. The Water Resources & Sustainability Department staff has submitted grant proposals to fund combined solar and storage feasibility assessments at (1) City Hall and (2) the Tumwater Timberland Library. The Tumwater Timberland Library is the City's only cooling center and City Hall is the secondary Emergency Operations Center for the City.

Relates to Plan Goal(s) and Objectives: 1b, 2c, 2d, 3c, 8a, 8c, 9a**Lead:** Water Resources & Sustainability Department**Estimated Cost:** Medium**Time Period:** 2023-2028**Funding Source:** City**Source and Date:** City Annex and Regional Plan, Capital Facilities Plan, Thurston Climate Mitigation Plan**Initiative and Implementation Status:** This initiative is New.

TUM-WH-28: Routinely inspecting the functionality of fire hydrants**Benefit-Cost Review Score:** 28**Status:** New**Hazard Addressed:** Wildland Fire**Category:** Hazard Preparedness

Background and Need: Water is a key factor in suppressing fire. Ensuring fire hydrants are functioning correctly is critical in reducing the spread of wildfires and increasing public safety. There are 1,905 fire hydrants currently mapped within the City. As development occurs, there are more hydrants being installed. Fire hydrants are currently inspected on a semiannual basis.

Relates to Plan Goal(s) and Objectives: 2D, 6C, 7B, 8A**Lead:** Fire and Water Resources & Sustainability Departments**Estimated Cost:** Low**Time Period:** Every year**Funding Source:** Capital Facilities Plan**Source and Date:** City Annex and Regional Plan, 2022 edition of NFPA 291: Recommended Practice for Fire Flow Testing and Marking of Hydrants

Initiative and Implementation Status: This action is new. Hydrant inspections will be completed every year to include cleaning and operating of each hydrant and documenting each inspection in City's Lucity database. Any deficiencies are reported and scheduled to be fixed. An update will be provided in the 2028 City Annex and Regional Plan update.

TUM-VH-28: Keep a supply of air filters on hand for critical equipment, generators, and vehicles in case of ash fall from a volcanic eruption, fires, or wildfires**Benefit-Cost Review Score:** 28**Status:** Ongoing**Hazard Addressed:** Volcanic**Category:** Hazard Preparedness

Background and Need: In order to keep critical facilities operating during a volcanic ash fall situation, emergency operations equipment such as police vehicles, fire trucks, medic one units, the HVAC system for the Emergency Operations Center, and generators supporting critical facilities such as water treatment sites, should have extra filters on hand. Even though volcanic eruptions usually give indications several months in advance, the addition of this mitigation initiative will help to reduce the likelihood of forgetfulness in regard to stocking up on filters beforehand. Continued operation of emergency response equipment and critical facilities during a disaster is very important to the health, safety, and welfare of the residents of the City. Water Resources & Sustainability Department may consider needs for lift stations and other facilities.

Relates to Plan Goal(s) and Objectives: 1d, 2b, 2d, 3b, 5e**Lead:** Fire, Water Resources & Sustainability, and Parks & Recreation Departments**Estimated Cost:** \$100,000**Time Period:** 2024-2028**Funding Source:** City**Source and Date:** 2017 Hazards Mitigation Plan

Initiative and Implementation Status: This initiative was implemented in the 2008 Hazards Mitigation Plan.

TUM-FH-33: Investigate funding sources for projects that will reduce or eliminate damage from flooding, including damage to street, structure, utilities, etc. in flood areas.

Benefit-Cost Review Score: 33

Status: Modified

Hazard Addressed: Flood

Category: Hazard Damage Reduction

Background and Need: Elevating and other means of flood proofing will reduce damages, reduce or eliminate disruption to provision of services (utilities), and allow travel of emergency vehicles as well as daily traffic during periods of flooding.

Relates to Plan Goal(s) and Objectives: 6b, 9a, 9b

Lead: Water Resources & Sustainability Department

Estimated Cost: Unknown

Time Period: 2023-2028

Funding Source: City

Source and Date: City Annex and Regional Plan and Capital Facilities Plan

Initiative and Implementation Status: This initiative is ongoing.

TUM-EH-31: Include retrofitting and replacement of critical system elements in the Capital Facilities Plan**Benefit-Cost Review Score:** 31**Status:** New**Hazard Addressed:** Earthquake**Category:** Hazard Damage Reduction

Background and Need: Repair, replacement, and improvements to existing critical systems and critical infrastructure with seismic retrofits are included as part of the City 2020 Water System Plan. A seismic backbone map was drafted to identify critical structures and the distribution systems that would be used to serve the public after a seismic event. Inspections and assessments of key infrastructure, such as bridges, water towers and pump stations, sewer lift stations, and water and sewer main lines, should be completed in regard to their ability to withstand earthquakes will help to prioritize projects and upgrades. The Water Resources & Sustainability Department noted that formal physical assessments have not yet been completed; however, the City can plan for this in the upcoming biennial budget and Capital Facilities Plan processes. High level recommendations have been incorporated into Comprehensive Plan documents. Bridge inspections are performed for the condition of the bridge, and it is performed every two years. If the condition warrants further analysis, like load ratings or seismic analysis, they are performed separately to address the concern. The current condition of City bridges has not warranted the deeper seismic analysis. A recent load rating was performed on Capitol Street bridge per new federal requirements. This is the only structure in City that meet the specific requirements warranting the load rating.

Relates to Plan Goal(s) and Objectives: 2a, 2b, 2c, 2d, 8b**Lead:** Water Resources & Sustainability Department**Estimated Cost:** Medium**Time Period:** 2025**Funding Source:** Grants and City**Source and Date:** Hazards Mitigation Catalog, Capital Facilities Plan, Comprehensive Plan periodic update**Initiative and Implementation Status:** Some critical assets are inventoried in WebEOC. Implementing this project has been challenged by budget constraints, personnel changes, and COVID 19 response.

TUM-WH-27: Maintain vegetation on heavily wooded hills in the City**Benefit-Cost Review Score:** 27**Status:** Modified**Hazard Addressed:** Wildland Fire**Category:** Hazard Damage Reduction

Background and Need: Tumwater Hill is at high risk for wildfire due to slopes, vegetation and tree cover, and development. Maintaining vegetation next to the new houses in this area and then periodically cutting the remainder brush would help to minimize damage in the event of a localized wildfire. This work is scheduled to be done annually.

Relates to Plan Goal(s) and Objectives: 2c, 5b**Lead:** Parks & Recreation Department**Estimated Cost:** Low**Time Period:** Annually**Funding Source:** City**Source and Date:** 2017 Hazards Mitigation Plan, City Work Plan,

Initiative and Implementation Status: This initiative was modified from 2017 to remove the term “fire break”. City staff do not formally maintain a fire break, but ensure vegetation is cleared from private property and fence lines.

TUM-FH-23: Work with stakeholders to reforest corridors along river and stream shorelines.**Benefit-Cost Review Score:** 23**Status:** Ongoing**Hazard Addressed:** Flood**Category:** Hazard Damage Reduction

Background and Need: Reestablishing a forested edges along river and stream shorelines are one way to help reduce the impacts of flooding. The placement of large woody debris in rivers helps to dissipate the hydraulic energy along the riverbanks. Planting trees and other vegetation also helps to reduce erosion and contributes to long term bank stabilization. Restoration plans are in various stages of formal completion, with work plans ranging from Tumwater Falls to the Henderson Boulevard Bridge. City stakeholders will need to collaborate on efforts to implement the restorative measures.

Relates to Plan Goal(s) and Objectives: 4a, 4b, 9a**Lead:** Parks & Recreation and Water Resources & Sustainability Departments**Estimated Cost:** Medium to High**Time Period:** 2024-2028**Funding Source:** City**Source and Date:** 2017 Hazards Mitigation Plan

Initiative and Implementation Status: Staff is in conversation with LOTT regarding acquisition of the property west of the railroad tracks. The Parks & Recreation Department plans to purchase the property as part of the Capital Facilities Plan. The former brewery property is the last section within the City without full tree cover along the Deschutes River.

TUM-FH-23: Draft a prioritized list of residences the City would acquire (buyout) if state or federal monies are available**Benefit-Cost Review Score:** 23**Status:** Ongoing**Hazard Addressed:** Flood**Category:** Hazard Damage Reduction

Background and Need: Repetitive loss properties negatively impact the property owner as well as the surrounding community. Frequently flooded properties and structures can also become a health and life safety issue for both residents, emergency responders, and the community in general. The City should work with regional, state and federal agencies in determining which residences should be purchased and how the funding for such actions will be acquired.

Relates to Plan Goal(s) and Objectives: 1b, 3a, 7e, 8c**Lead:** Community Development, Water Resources & Sustainability, and Executive Departments**Estimated Cost:** High**Time Period:** Unknown**Funding Source:** City**Source and Date:** 2017 Hazards Mitigation Plan

Initiative and Implementation Status: Ranked 13 of 18 in 2003 and removed in 2008. Removal was because the City had no repetitive loss or severe loss properties (Source: FEMA National Flood Insurance Program Report, Washington, May 4, 2009). In addition, since 1978 the City had only two claims paid for a total of \$12,515 (same source as above). This information was not readily available during the initial drafting of the plan in 2003. However, City has annexed an area on B 74 58th Avenue off Henderson Boulevard in the Deschutes Valley with several homes that are frequently flooded. A committee of the City Council decided it would be appropriate to put this mitigation initiative back into the plan due to the aforementioned change of circumstances.

TUM-EH-34: Conduct a voluntary non-structural earthquake readiness inspection for all critical facilities on an annual basis**Benefit-Cost Review Score:** 34**Status:** Ongoing**Hazard Addressed:** Earthquake**Category:** Critical Facilities Replacement / Retrofit

Background and Need: It is in the best interest of the City to ensure that all critical facilities are prepared for the possibility of an earthquake. An annual inspection should be done. As new staff, new equipment, and workstation and office changes occur it is possible that the earthquake damage preventative measures (such as retaining straps for books shelves, computers, or other equipment, etc.) can be lost or left unused. An annual inspection would help to keep these preventative measures in place. Furthermore, the Water Resources & Sustainability Department is planning for a water and wastewater assessment in the 2024-2025 Capital Facilities Plan.

Relates to Plan Goal(s) and Objectives: 2c, 3b**Lead:** Fire and Parks & Recreation Departments**Estimated Cost:** Low**Time Period:** 2023, annually.**Funding Source:** City General Funds**Source and Date:** 2017 Hazards Mitigation Plan

Initiative and Implementation Status: Ranked 1 of 18 in the 2003 City Annex and Regional Plan and 1 of 8 in the 2008 City Annex and Regional Plan update. This initiative has never been implemented yet. In 2008 it was changed to B 55 specifying that an annual inspection should be done. Minor change in 2017 to mention supplies could be part of the estimated cost.

TUM-SH-29: Periodically inspect all trees within falling distance of City-owned critical facilities**Benefit-Cost Review Score:** 29**Status:** Modified**Hazard Addressed:** Storm/Weather**Category:** Critical Facilities Replacement / Retrofit

Background and Need: The Water Resources & Sustainability Department has been awarded a grant to have a formal inspection and evaluation of trees on City property. A consultant will identify maintenance needs and potential hazardous trees. Periodically Inspect all trees within falling distance of the four City-owned critical facilities (Headquarters and North End Fire Stations, the Operations & Maintenance Facility, and City Hall), related equipment such as generators, and utilities such as power and communication lines within the immediate vicinity to determine if they pose a hazard to the facility or operation of the facility during a storm. Tree roots were partially covered with pervious asphalt during the 2014 Police Department expansion. Trees have been evaluated by City arborist and are currently healthy.

Relates to Plan Goal(s) and Objectives: 1B, 2A, 2B, 2D, 5B, 6A, 6B, 7D, 8A, 9A, 9B**Lead:** Water Resources & Sustainability and Parks & Recreation Departments**Estimated Cost:** Low**Time Period:** 2023 – 2024**Funding Source:** City and Grant Funding**Source and Date:** City Work Plan

Initiative and Implementation Status: This initiative has been modified. Staff are in the process of writing contracts with a private consultant to perform the formal evaluation. The evaluation is slated to be completed by April 20, 2024.

Annex: City of Tumwater

Mitigation Initiatives Removed from the City Annex Mitigation Strategy

The City Annex and Regional Plan update process removed three initiatives from the City Annex Mitigation Strategy because they are no longer relevant

Additional details about why an initiative was removed are shown in each initiative's implementation status in the pages that follow.

Table 9. Former Mitigation Initiatives Removed from the City Annex Mitigation Strategy.

Initiative	Status	Former Ranking
Hazard Damage Reduction		
TUM-FH-15 Consider and investigate methods and options of construction of a short floodwall around the Tumwater Valley Municipal Golf Course clubhouse or floodproofing the structure to FEMA standards to stop the infiltration of floodwaters during a flood event.	Removed	3 of 13
TUM-FH-10 Draft a prioritized list of residences the City would elevate above the base flood elevation, if state or federal monies are available.	Removed	10 of 13
Data Collection and Mapping		
TUM-FH-14 Install or upgrade flood elevation gauges on the Deschutes River.	Removed	6 of 13

TUM-FH-15: Consider and investigate methods and options of construction of a short floodwall around the Tumwater Valley Municipal Golf Course clubhouse or floodproofing the structure to FEMA standards to stop the infiltration of floodwaters during a flood event

Hazard Addressed: Flood

Status: Removed

Category: Hazard Damage Reduction

Background and Need: The Tumwater Valley Municipal Golf Course clubhouse is located within the 1% (100-year) floodplain according to the most recent Flood Insurance Study and Flood Insurance Rate Map. The building has not yet been flooded but the floodwaters came within a few inches of the door in the January 2009 flood event when the Deschutes River crested at 14.5 feet at the Rainier gauge. A several million-dollar remodel of the building was completed in early 2009. Due to the significant dollar investment in the building, a flood wall surrounding the building that could prevent flood damage or upgrading the structure to include floodproofing should be seriously considered. Evaluation of these options should include costs, benefits, impacts to nearby properties including the Tumwater Valley Athletic Club, as well as impacts to the floodplain as a whole.

Relates to Plan Goal(s) and Objectives: Regional Plan Goals 2, 3. Regional Plan Objectives 2C, 3B

Lead: Parks & Recreation Department

Estimated Cost: Unknown

Time Period: 2017-2021

Funding Source: City

Source and Date: 2008 City Annex and Regional Plan

Initiative and Implementation Status: This initiative was the third ranked priority in the previous plan. The clubhouse is not considered a critical facility or infrastructure. There is no mitigation benefit for the structure.

TUM-FH-10: Draft a prioritized list of residences the City would elevate above the base flood elevation, if state or federal monies are available.

Hazard Addressed: Flood

Status: Removed

Category: Hazard Damage Reduction

Background and Need: Repetitive loss properties negatively impact the property owner as well as the surrounding community. Frequently flooded properties and structures can also become a health and life safety issue for both residents, emergency responders, and the community in general. The City should work with regional, state and federal agencies in determining which residences should be elevated and how the funding for such actions will be acquired.

Relates to Plan Goal(s) and Objectives: Goal 3. Objective 3A.

Lead: Community Development, Transportation & Engineering, and Executive Departments.

Estimated Cost: Unknown. This is not a specific project. It involves continued participation in intergovernmental work and planning that are related to flood hazards.

Time Period: 2017-2022

Funding Source: City

Source and Date: 2023 City Annex and Regional Plan

Initiative and Implementation Status: This initiative was the 10th ranked priority in the previous plan. This initiative was removed because there are no City Work plans prioritizing elevating residences. Information on flood insurance and emergency preparedness will be shared with properties within the flood zone through other initiatives outlined in the 2023 City Annex and Regional Plan.

TUM-FH-14: Install or upgrade flood elevation gauges on the Deschutes River.**Hazard Addressed:** Flood**Status:** Removed**Category:** Data Collection and Mapping

Background and Need: Previously the flood gauge at the "E" Street bridge was an older type which had to be read manually. It has since been updated to provide data every 15 minutes. However, flood state information based on this gauge is not readily provided by USGS or NOAA, unlike the gauge at Rainier. This initiative was created because readings at the Rainier gauge do not always accurately reflect what is occurring twenty miles downstream in the City's portion of the Deschutes River. For example, the January 2009, flood was one foot lower than the December 2007 flood at the Rainier gauge, however, photographs at Henderson Boulevard in the City showed the water levels were higher in the 2009 flood than in the 2007 flood. A gauge at the "E" Street bridge that linked data immediately to a public website such as USFS or NOAA would help in obtaining accurate records of flood levels in the City which would be important for making decisions regarding future land use and zoning, infrastructure locations and designs, future critical facilities, etc.

Relates to Plan Goal(s) and Objectives: Regional Plan Goal 7. Regional Plan Objective 7A**Lead:** Water Resources & Sustainability Department**Estimated Cost:** \$20,000 per gauge and \$4,000 per year for operating costs**Time Period:** 2017-2022

Funding Source: Department of General Administration, City of Olympia, and the City. In regard to the funding for an upgraded electronically monitored gauge at the "E" Street bridge, reportedly the USGS would be interested in installing an upgraded gauge provided the local governments pay for the installation and operation of the gauge. It appears there is some interest by the Washington State Department of General Administration, and the City of Olympia to possibly partner with the City for a new gauge. The General Administration would be interested due to their need to control the water level in Capitol Lake with the dam. A gauge would be able to be integrated into a telemetry system to automatically open and close the B 63 dam, as necessary. Also, the City of Olympia has a vested interest in making sure that Capitol Lake does not flood a portion of downtown Olympia.

Source and Date: 2017 City Annex and Regional Plan

Initiative and Implementation Status: This was the sixth ranked initiative in the previous plan. This initiative has not been implemented. The gauge at the E Street Bridge was slightly upgraded so the data does not have to be read manually, Staff state the gauge is working and functioning, no additional upgrades are needed at this time. The gauge at E street is up to USGS standards.

Benefit Cost Review Results

Purpose

The City must perform a benefit-cost review for each hazard mitigation action or project that it is considering for inclusion in a new or updated mitigation strategy. The City's hazards mitigation planning team must consider the benefits that would result from a mitigation action versus the cost to implement it. This is intended as a planning-level assessment of whether the costs are reasonable compared to the probable benefits, unlike a more comprehensive Benefit-Cost Analysis.⁴⁴ Cost estimates do not have to be exact but can be based on a range of values or the City's experience or judgement. Benefits include losses avoided, such as the number and value of structures and infrastructure protected by the action and the population protected from injury and loss of life. Qualitative benefits such as quality of life can also be estimated as part of the review process.

Evaluation Criteria

The City's hazards mitigation planning team must evaluate each proposed mitigation project or action as providing a high, medium, or low benefit using the benefit-cost review and prioritization criteria. There are eight required criteria that the planning partners must use to evaluate actions. There are four additional optional criteria that the City's hazards mitigation planning team may find useful to refine the process. The City's hazards mitigation planning team needs to agree upon the other criteria that will be used to analyze the mitigation actions. Other criteria used should be annotated in the worksheet. Descriptions of the required and optional criteria follow.

Required Benefit-Cost Review and Prioritization Criteria

1. **Hazard Risk Rating:** The City must have at least one mitigation strategy per high-risk hazard. It is acceptable to identify actions or projects for medium and low risk hazards. However, actions that address high risk hazards should be a community priority.
2. **Project Cost:** Actions or projects should produce benefits that exceed the cost to implement the project over its life cycle.
3. **Natural Hazards Mitigation Plan Goals and Policies:** how strongly does the action support the City Annex and Regional Plan's goals and policies?
4. **Life/Safety** – What type of benefits will an action or project have on the safety of residents, businesses, and properties within the community?
5. **Social Vulnerability⁴⁵:** The City has a responsibility to ensure that the Plan's mitigation strategy complies with all applicable legal requirements related to civil rights, to ensure nondiscrimination.

⁴⁴ An in-depth Benefit-Cost Analysis using FEMA's BCA module criteria is not required for the plan but is required when applying for Hazard Mitigation Assistance grant funding.

⁴⁵ "Social vulnerability" is understood as the potential for loss within an individual or social group, recognizing that some characteristics influence an individual's or group's ability to prepare, respond, cope or recover from an event. These

Compliance can help achieve equitable outcomes through the mitigation planning process for all communities, including underserved communities and socially vulnerable populations. The City can use the CDC/ATSDR Social Vulnerability Index (SVI) interactive mapping tool to assess affected populations within communities:

https://www.atsdr.cdc.gov/placeandhealth/svi/interactive_map.html

The City can refer to other sources of data or tools such as the Washington Tracking Network to assess social vulnerability and health disparities:

<https://fortress.wa.gov/doh/wtn/WTNIBL/>

6. **Changes in Development:** Does any of the following affect the City's projects or actions: 1) Construction completed since the last plan was approved; 2) Planned development or changes under consideration; or 3) Conditions that may affect the risks and vulnerabilities of the City (declining populations or projected increases in population, or foreclosures)? This could also include changes in local policies, standards, codes, regulations, land use regulations and other conditions that influence development patterns in a community.
7. **Climate Change:** Climate change is expected to increase the frequency, duration, and intensity of natural hazards, such as wildfires, extreme heat, drought, storms, heavy precipitation, and sea level rise. Impacts are expected to be felt more frequently by the mid-21st Century. These variations create new risks to local governments and challenge pre-existing mitigation plans. Impacts will threaten communities with most at-risk populations by exacerbating the impacts of disasters on underserved and socially vulnerable populations who already experience the greatest losses from natural hazards.
8. **Geographic Impact:** The area that will benefit from the proposed action. The location of a hazard is defined as the unique geographic boundaries within the planning area, or assets outside of geographic boundaries that may be affected by the identified hazard. The City should mitigate risks wherever they occur within a community.

Optional Benefit-Cost Review and Prioritization Criteria

9. **Capacity Building:** Will the action expand the City's capacity or expertise to plan for, implement, and evaluate the near- and long-term effectiveness of the proposed action or project? If outside expertise is necessary, how much will this increase the cost and complexity of implementing and operating the action or project? For example, grant writing, grant award administration and reporting, design and engineering, etc.

characteristics can overlap within populations to create heightened vulnerability, which may be compounded by infrastructure deficiencies within communities and historic or existing discriminatory government policies.

"Underserved communities" refers to populations sharing a particular characteristic, as well as geographic communities that have been systematically denied a full opportunity to participate in aspects of economic, social and civic life.

Hazard Mitigation Plan

- 10. Other Strategic Plan Goals:** Does the action support other strategic planning goals? For example, comprehensive plans, school, fire, and utility strategic plans, transit development plan, etc.
- 11. Co-Benefits:** In addition to an action's primary purpose to reduce losses from a hazard, an action can also produce environmental, economic, or social benefits to a community. For example, removing structures from a flood plain can mitigate impacts to residential property, but also can restore the natural function of a flood plain, improve fish and wildlife habitat, and create passive recreational open space opportunities for community members. Some mitigation actions could incorporate features that support art, education, and historic preservation co-benefits.
- 12. Grant Eligibility:** Is the action eligible for FEMA's Hazard Mitigation Assistance grant programs or other federal or state grant programs? Does the hazards mitigation planning team believe the project will be competitive for grant funding? Will the project's need to be funded using local revenues and decrease its likelihood of being implemented?

Annex: City of Tumwater

Required Mitigation Action Benefit-Cost Mitigation Review with Prioritization Criteria Ratings and Scores

REQUIRED CRITERIA	HIGH BENEFIT		MEDIUM BENEFIT		LOW BENEFIT		NO BENEFIT	
	Description	Pts	Description	Pts	Description	Pts	Description	Pts
1. Hazard Risk Rating	Action addresses a High-Risk Hazard	5	Action addresses a Medium-Risk Hazard	3	Action addresses a Low-Risk Hazard	1	Action Addresses a no-risk hazard	0
2. Project Cost	Low cost, less than \$100K	5	Medium cost, \$100K - \$500K	3	High cost, more than \$500K	1	Cost far exceeds the anticipated benefits	0
3. Natural Hazards Mitigation Plan Goals and Policies	Action strongly supports at least four policies	5	Action supports at least two policies	3	Action supports one policy	1	Action does not support plan policies	0
4. Life and Safety	Action will produce significant and lasting public safety benefits for residents, businesses, and property	5	Action will produce public safety benefits	3	Action will produce minimal public safety benefit	1	Action has no public safety benefits	0
5. Social Vulnerability	Action will produce a significant and direct benefit for socially vulnerable or underserved communities	5	Action will produce a benefit	3	Action will have minimal benefit	1	Action does not benefit socially vulnerable or underserved communities	0
6. Changes in Development	Action includes measures that strongly account for changes in development	5	Action includes measures that account for changes in development	3	Action includes minimal measures that account for changes in development	1	Action does not account for changes in development	0

Hazard Mitigation Plan

Annex: City of Tumwater

REQUIRED CRITERIA	HIGH BENEFIT		MEDIUM BENEFIT		LOW BENEFIT		NO BENEFIT	
	Description	Pts	Description	Pts	Description	Pts	Description	Pts
7. Climate Change	Action strongly accounts for the effects of climate change on the hazard it addresses	5	Action accounts for the effects of climate change...	3	Action minimally accounts for the effects of climate change...	1	Action does not account for the effects of climate change...	0
8. Geographic Impact	Action addresses hazard risks for the entire affected area of the community	5	Action address risks across at least half of the affected area	3	Action address risk for a very limited portion of the affected area	1	Action does not address risks within the affected area	0

Optional Mitigation Action Benefit-Cost Mitigation Review with Prioritization Criteria Ratings and Scores

9. Capacity Building	Action will strengthen the City's capacity and expertise to implement the initiative and future initiatives	5	Action will assist the City's internal capacity and expertise	3	Action will have minimal effect on the City's capacity and expertise	1	Action will require outside technical expertise	0
10. Other Strategic Plan Goals	Action strongly supports the City's other strategic plan goals	5	Action supports the City's other strategic plan goals	3	Action minimally supports the City's other strategic plan goals	1	No support for the City's other strategic plan goals	0
11. Co-Benefits	Action will produce at least two co-benefits	5	Action will produce at least one co-benefit	3	Action minimally produces some co-benefit	1	Action is unlikely to produce any co-benefits	0

Annex: City of Tumwater

12. Grant Eligibility	The entire project is eligible for FEMA Hazard Mitigation Assistance grants or other federal or state grant programs	5	Most of the project is eligible for grant programs	3	Some of the project may be eligible for grant programs	1	The project is not eligible for grant programs	0
------------------------------	--	---	--	---	--	---	--	---

Cost-Benefit Review and Prioritization Worksheet

Jurisdiction Name:		City of Tumwater												
Mitigation Project	Required Criteria								Optional					
	1. Hazard Risk Rating	2. Project Cost	3. HMP Goals and Policies	4. Life and Safety	5. Social Vulnerability	6. Changes in Development	7. Climate Change	8. Geographic Impact	9. Capacity Building	10. Other Strategic Plan Goals	11. Co-Benefits	12. Grant Eligibility	Total Score	
Public Outreach and Information														
Mail flood insurance information to owners of properties located within a floodplain and to residents who live in a floodplain		1	5	3	1	1	0	3	5	1	1	1	0	22

Hazard Mitigation Plan

Annex: City of Tumwater

Jurisdiction Name:		City of Tumwater												
Mitigation Project	Required Criteria									Optional				
	1. Hazard Risk Rating	2. Project Cost	3. HMP Goals and Policies	4. Life and Safety	5. Social Vulnerability	6. Changes in Development	7. Climate Change	8. Geographic Impact	9. Capacity Building	10. Other Strategic Plan Goals	11. Co-Benefits	12. Grant Eligibility	Total Score	
Plan Coordination and Implementation														
Continue to be actively involved in inter-jurisdictional flood hazard reduction efforts where the City and other jurisdictions are located within the same basin		1	5	5	5	3	3	5	5	1	1	1	1	36
Data collection and Mapping														
Install or upgrade flood elevation gauges on the Deschutes River		1	5	3	5	3	1	3	5	1	1	1	0	29
Update GIS (City Map) maps to show wildland-urban interface and intermix		3	5	5	3	3	3	3	5	1	1	1	0	33
Development Regulations														
Update Building Code to wildland-urban interface and intermix requirements		3	5	5	5	3	5	3	5	1	3	3	1	42

Hazard Mitigation Plan

Annex: City of Tumwater

Jurisdiction Name:		City of Tumwater												
Mitigation Project	Required Criteria										Optional			
	1. Hazard Risk Rating	2. Project Cost	3. HMP Goals and Policies	4. Life and Safety	5. Social Vulnerability	6. Changes in Development	7. Climate Change	8. Geographic Impact	9. Capacity Building	10. Other Strategic Plan Goals	11. Co-Benefits	12. Grant Eligibility	Total Score	
Develop a wildland-urban interface and intermix Vegetation Management Plan and Planting Species Plan	3	5	5	3	3	5	5	5	1	1	1	1	38	
Reduce heat islands through street tree, tree preservation, and landscape code updates	3	3	5	3	3	5	5	5	1	1	1	1	36	
Minimize vegetation removal in steep slopes and critical areas	3	5	3	3	3	3	3	5	1	1	1	0	31	
Modify Street Tree, Tree Preservation, and Landscape codes to require appropriate planting near overhead power, cable, and phone lines	3	3	5	5	3	3	0	5	1	1	1	0	30	
Hazard Preparedness														
Inspect Fire Hydrants	5	5	1	5	3	1	0	5	1	1	1	0	28	
Encourage the public to be prepared to be self-sufficient for the first 72 hours after a disaster.	5	5	5	3	3	1	3	5	1	1	1	1	34	

Hazard Mitigation Plan

Annex: City of Tumwater

Jurisdiction Name:		City of Tumwater											
Mitigation Project	Required Criteria									Optional			
	1. Hazard Risk Rating	2. Project Cost	3. HMP Goals and Policies	4. Life and Safety	5. Social Vulnerability	6. Changes in Development	7. Climate Change	8. Geographic Impact	9. Capacity Building	10. Other Strategic Plan Goals	11. Co-Benefits	12. Grant Eligibility	Total Score
Keep a supply of air filters on hand for critical equipment, generators, and vehicles in case of ash fall from a volcanic eruption, fires, or wildfires	3	5	5	3	3	0	1	5	1	1	1	0	28
Install auxiliary generator to power City main well and water supply	5	3	5	3	3	3	1	5	1	1	1	0	31
Install solar power and battery storage at City Hall and Tumwater Timberland Library (secondary Emergency Operations Center)	5	3	5	3	3	3	1	5	1	1	1	0	30
Hazard Damage Reduction													
Include retrofitting and replacement of critical system elements in Capital Facilities Plan	5	1	5	5	3	3	1	5	1	1	1	0	31
Establish fire breaks next to residences on heavily wooded hills in the City	3	1	3	3	3	3	3	5	1	1	1	0	27
Work with landowners to reforest corridors along river and stream shorelines.	1	5	3	1	1	1	3	5	1	1	1	0	23

Hazard Mitigation Plan

Annex: City of Tumwater

Jurisdiction Name:		City of Tumwater											
Mitigation Project	Required Criteria								Optional				
	1. Hazard Risk Rating	2. Project Cost	3. HMP Goals and Policies	4. Life and Safety	5. Social Vulnerability	6. Changes in Development	7. Climate Change	8. Geographic Impact	9. Capacity Building	10. Other Strategic Plan Goals	11. Co-Benefits	12. Grant Eligibility	Total Score
Draft a list of residences the City would elevate above the base flood elevation, if state or federal monies are available	1	5	3	1	1	1	3	5	1	1	1	0	23
Draft a prioritized list of residences the City would acquire (buyout) if state or federal monies are available	1	5	3	1	1	1	3	5	1	1	1	0	23
Have a professional assess infrastructure for earthquake vulnerability	5	3	5	5	3	3	3	5	1	1	1	1	36
Investigate funding for projects that will reduce damage to streets, structures, utilities, etc. in flood areas prone to flooding	1	5	5	5	3	3	3	5	1	1	1	0	33
Critical Facilities Replacement and Retrofit													
Conduct a voluntary non-structural earthquake readiness inspection for all critical facilities on an annual basis	5	5	5	3	3	1	3	5	1	1	1	1	34
Periodically Inspect all trees within falling distance of the four City-owned critical facilities	3	5	5	3	1	1	3	5	1	1	1	0	29

Hazard Mitigation Plan

Annex: City of Tumwater

Benefit points: High=5; Medium=3; Low=1; No benefit=0

Public Comment Summary

The City received one comment from the community during the Final Draft Plan Public Comment period of November 3 to 17, 2023.

The public comment was an email received by Paul Brewster (Senior Planner, Thurston Regional Planning Commission) November 11, 2023 on the City of Tumwater Annex. The comment expressed concern with existing development in liquefaction areas, and whether or not residents living within the liquefaction areas were notified. The comment read as follows:

*"I have serious concerns about **notification and potential actions to consider addressing existing development**. I live in Tumwater and am a homeowner in a 55+ manufactured home park, and am low income. In June 2017 the City of Tumwater produced document 'Resolution No. R2017-013 (copy attached below) which honestly shocked me. I had never seen it. It was an excellent report with maps and photos. It identified **4 mobile home parks in a high liquefaction hazardous zone, and identified all our homes here in Eagle's Landing of one of those 4 parks and further identifies a significant water issue for us**. Was the City's report after the 4 parks were identified given to the **owners** of these four parks? Were they notified in 2017? None of our leases or sign-in documents ever disclosed this information to us and I have not found one homeowner here who realizes we are in a high liquefaction hazardous zone. Or has ever seen the document.*

*You now are producing a 2023 update. Will the final report be buried in a file cabinet or will any of us **affected** by your excellent information be notified at all? Or property owners notified of the most hazardous areas? We need this information more public."*

Appendix A – Community Capability Assessment

Capability Assessment Worksheets

Types of Capabilities

There are four mitigation worksheets. The worksheets are intended for notes about relevant capabilities within the City. Each type of capability may include laws, regulations, policies, programs, staff, or funding and may go beyond traditional mitigation. The City's hazards mitigation planning team may find other capabilities that help make the City more resilient.

1. Planning and regulatory
2. Administrative and technical
3. Financial
4. Education and outreach

Observations and Discussion Form

Each worksheet includes an 'Observations and Discussion' form. It includes a series of questions to help the City document which authorities, policies, programs, funding, and resources the City has to accomplish hazards mitigation. The discussion must account for building codes, land use and development codes, ordinances and regulations that are key to reducing risk. It must also describe ways the City expands and improves its capabilities.

Evaluating Equity in the Capability Assessment

Consider low-income, communities of color, people with disabilities, people who lack English proficiency, people with insecure housing, and others who may be disenfranchised from economic, social, and civic life. Are there barriers to accessing resources in the community? By reducing barriers to socially vulnerable and underserved populations, the City can support a whole-community approach to hazards mitigation. Use the following questions to bring equity into the City's capability assessment.

- Which communities and populations lack resources to improve their resilience?
- What gaps might exist that decrease an underserved community's ability to access resources and plan for risk reduction?
- Do any capabilities disproportionately benefit wealthy areas or neighborhoods?
- Do any capabilities actively increase the vulnerability of underserved and socially vulnerable populations and communities?
- How can the City think differently about leveraging non-monetary and non-traditional resources and partners to support underserved communities?

Annex: City of Tumwater

Capability Assessment Worksheets

1. Planning and Regulatory

Evaluation for Planning and Regulatory Capabilities

- What is the legal framework for land use planning in the City?
- What kinds of plans does the City have? Which are used most often?
- Are there any specific laws or ordinances that mitigate hazards?
- How does the City regulate growth and development?
- How does the City protect community lifelines such as well heads, wastewater treatment facilities, and other critical facilities, including dams and levees?

Plans	In Place? Y or N	Notes - Does the plan address hazards? Can the plan be used to implement mitigation actions? When was it last updated? Cite specific sections or language that supports hazards mitigation. Note if there are gaps.
Comprehensive Plan	Yes	Plan identifies and addresses avoiding critical areas in Conservation Element. The Plan was last completely updated in 2016. Planning started for 2025 update. The update is expected to address the relationship with City Annex and Regional Plan as required by 2023 state law as a subelement of the new Climate Element. The Plan is amended on an annual basis. The last Plan amendment was in 2022.
Capital Facilities Plan	Yes	Plan identifies specific City projects for funding in six-year cycle, includes projects that address hazards and can include specific mitigation actions. The Plan was last updated in 2021 as part of the Comprehensive Plan annual amendment process. The Plan is amended on a biennial basis. Next update will be in 2023 as part of the Comprehensive Plan annual amendment process.
Climate Adaptation and Mitigation Plans	Yes	Plans address how the City will address climate change through actions for adaptation and mitigation. The Thurston Climate Adaption Plan was adopted in 2018 and the Thurston Climate Mitigation Plan was adopted in 2021. A new state required Climate Element will be added to the Comprehensive Plan as part of the 2025 periodic update.
Community Wildfire Protection Plan	No	Currently planning in conjunction with Thurston County and the Thurston Regional Planning Council.
Comprehensive Emergency Management Plans	Yes	Plan last updated 2017. Planning has started for 2023 update. The Plan identifies hazards mitigation as an area for further plan development (p. 8), but specific actions not outlined.

Annex: City of Tumwater

Plans	In Place? Y or N	Notes - Does the plan address hazards? Can the plan be used to implement mitigation actions? When was it last updated? Cite specific sections or language that supports hazards mitigation. Note if there are gaps.
Comprehensive Flood Management Plan	Yes	Thurston County Flood Hazard Mitigation Plan was completed in 2013. The Plan identifies specific hazard mitigation measures and assigns a priority to implement.
Continuity of Operations Plan	No	It is currently unclear whether the City has a city wide Continuity of Operations Plan or if individual departments have them.
Economic Development and Resiliency Plan	Yes	Plan last completely updated in 2019. Planning started for 2025 update. Update is expected to address resiliency.
Habitat Conservation Plan	No	Bush Prairie Habitat Conservation Plan is being prepared. There is no specific date for completion. The Plan does not address hazards.
Stormwater Management Plan	Yes	Plan was completed in 2022. Plan does not address hazards.
Transportation Plan	Yes	The Transportation Plan was last completely updated in 2016 as part of the Comprehensive Plan periodic update. Planning started for 2025 periodic update. Update is expected to address relationship with City Annex and Regional Plan as required by state law.

Land Use Planning and Ordinances	Y or N	Notes - Is the ordinance an effective measure for reducing hazard impacts? Is it adequately administered and enforced? Cite specific language or sections of ordinances or codes that support hazards mitigation, if applicable. Note if there are gaps.
Acquisition of land for open space, public recreation, or conservation	Yes	The City purchases property for open space and public recreation and will be purchasing property for habitat protection under the Bush Prairie Habitat Conservation Plan.
Building Codes	Yes	Building Codes were last updated in 2021. Includes building, fire, residential, mechanical, plumbing, property maintenance, and energy conservation codes, all of which address life, health, and safety. Planning has started for 2024 update. Update is expected to include adoption of the 2021 Washington Wildland-Urban Interface Code.
Flood Insurance Rate Maps	Yes	The floodplain in the City is regulated through the floodplain overlay chapter of the zoning code (TMC 18.38), the Building Code, as well as portions of critical areas and shoreline regulations. The existing floodplain maps can be seen on the Official FEMA Flood Insurance Rate Maps for the City as well as on the City's zoning map. FEMA is currently nearing the end of the process for updating the floodplain map for portions of the City including the

Annex: City of Tumwater

Land Use Planning and Ordinances	Y or N	Notes - Is the ordinance an effective measure for reducing hazard impacts? Is it adequately administered and enforced? Cite specific language or sections of ordinances or codes that support hazards mitigation, if applicable. Note if there are gaps.
		Deschutes Valley. The City will be required to adopt the new floodplain maps and study in the next few months.
Floodplain ordinance	Yes	The floodplain in the City is regulated through the floodplain overlay chapter of the zoning code (TMC 18.38). The State Department of Ecology completed a Community Assistance Visit with the City in 2023, which identified specific updates to the floodplain overlay chapter of the zoning code (TMC 18.38) which will be completed as part of the Development Code periodic update in 2025.
Natural hazard specific or Critical Areas Ordinance	Yes	Critical areas are regulated by TMC Title 16 <i>Environment</i> , which were last updated in 2019 and will be updated as part of the Development Code periodic update in 2025.
Subdivision ordinance	Yes	Land divisions are regulated by TMC Title 17 Land Divisions, which were last updated in 2022.
Zoning ordinance	Yes	Zoning is regulated by TMC Title 18 Zoning, which includes the City floodplain overpay regulations (TMC 18.38), aquifer protection regulations (TMC 18.39), and environmental performance standards (TMC 18.40). Regulations will be updated as part of the state required Development Code periodic update in 2025.

Plans and Regulations Capabilities Observations and Discussion

- a. *What specific sections of the City's plans, land use regulations, building codes, and ordinances support the City's ability to reduce risks and implement the City's mitigation actions?*

See chart for specific information.

- b. *Are there any gaps in the City's plans, regulations, or ordinances that may prevent the City from supporting the City's mitigation actions?*

See chart for specific information.

- c. *How can the City's plans and regulations be expanded or modified to improve the City's understanding of hazards and vulnerabilities? How can they be improved to reduce risks?*

The City is currently updating its Comprehensive Plan which must include a resiliency subelement as part of the new state required Climate Element. The Hazards Mitigation Plan for the Thurston Region can serve the purpose of the resiliency subelement.

- d. *What type of development regulation mitigation initiatives, if any, could support the integration of hazards mitigation planning policies and programs?*

As the City updates its Comprehensive Plan, the City will further its work in this area. If work on the Comprehensive Plan periodic update results in policy recommendations to update the City's development regulations related to hazards mitigation, such code updates will be considered for incorporation into the City's Annex.

Annex: City of Tumwater

2. Administrative and Technical

Evaluation for Administrative and Technical

- Who will be responsible for implementing mitigation actions?
- Have available staff been trained to support mitigation?
- Are outside technical expertise or resources needed?
- Do government agencies and departments regularly coordinate and problem-solve?
- Are agreements in place between participants or between participants and other organizations that provide regular administrative or technical assistance?
- Does the City work with nongovernmental organizations who also work in mitigation?
- Which staff and abilities are available to help carry out the City's mitigation plan?
- If the City does not have staff, consider how county, regional, and state partners can assist the City.

Administrative	In Place Y or N	Notes - Is staffing adequate to enforce regulations? Are staff trained in hazards and mitigation? Is coordination between agencies and staff effective?
Chief Building Official	Y	The City has a City-wide Emergency Management Committee. The Building Official or designee participates in the Emergency Management Committee, which coordinates training. The Building official issues Flood Certificates. In the event someone builds in the flood zone, they will need to meet the applicable code and receive a flood certificate.
Civil Engineer	Y	The City has engineers in the Transportation & Engineering and Water Resources & Sustainability Departments. Engineering staff participate in the City-wide Emergency Management Committee. Engineering staff assist with designing and constructing city capital projects which may include projects that address mitigating for natural hazards.
Community Development Director	Y	The Community Development Director oversees the Community Development Department staff, including the Planning staff. They help enforce regulations in the Development Code such as floods and other critical areas. They also help create and implement City plans such as the City Annex and Regional Plan and the Comprehensive Plan.
Emergency Manager	N	The City has a City-wide Emergency Management Committee.

Annex: City of Tumwater

Floodplain Administrator	Y	The Planning Manager acts as the Floodplain Administrator for the City.
GIS Manager	Y	The GIS Team helps map critical facilities, infrastructure, critical areas, and more. This helps staff implement and enforce regulations.
Planning Commission		The Planning Commission are briefed in the City Annex and Regional Plan update process.
Technical	In Place Y or N	Notes – Has capability been used to assess or mitigate risk in the past? Will the City use it to implement the City's current action plan?
Grant Writing	Y	Staff have applied for many grants to help with assessments, retrofitting of critical facilities and infrastructure, purchasing of resources, and more. The current plan will be used to help facilitate funds and grant opportunities further.
Hazard data and information	Y	Hazard data and information was used in previous plans and in the current plan. Furthermore, it is used to help identify priorities for the Capital Facilities Plan update cycle.
GIS Analysis	Y	GIS mapping helps assist staff in recognizing areas that are prone to flooding, landslides, high ground water, and soon to be wildfire hazard areas.
Mutual Aid Agreements		The City's Comprehensive Emergency Management Plan contains a listing of mutual aid agreements available to the City. The City has mutual aid agreements associated with fire, emergency medical services, and police services, water interties, emergency management, including the Thurston County Emergency Management Committee. The Homeland Security Region 3 Omnibus agreement covers emergency management planning, mitigation and response for Thurston, Mason, Lewis, Pacific and Grays Harbor Counties.

Administrative and Technical Capabilities Observations and Discussion

- a. *What specific administrative and technical strengths does the City have to support hazards mitigation?*

Staff are proficient in writing and applying for grant opportunities. Staff ensure the City code and regulations are up to date- meeting state and federal standards.

- b. *Are there any gaps in administrative or technical capabilities to support the City's understanding of hazards and vulnerabilities?*

An emergency manager could potentially be established.

- c. *How can the City expand or improve its administrative and technical capabilities to reduce risks or the City's mitigation actions?*

Potentially by establishing more frequent meetings with each department to talk about funding, public outreach, and initiative updates.

- d. *What type of plan coordination and implementation mitigation initiatives, if any, could enhance the City's technical and administrative capabilities?*

As the City completes its Comprehensive Plan periodic update with the Climate Element, there may be additional items to include in the City Annex and Regional Plan.

Annex: City of Tumwater

3. Financial

Evaluation for Financial

- What financial resources can the City program for mitigation activities?
- What resources have the City used in the past?
- What grant programs can the City pursue to fund the City's mitigation actions?
- Can the City cover the 25 percent match for a federally grant funded mitigation project?
- How do the City's mitigation projects get programmed into the City's Capital Facilities Plan?
- Are there any financial policies to direct available funds to mitigation projects?

Funding Resources	In Place Y or N	Notes - Has the funding resource been used in the past and for what type of activities? Could it be used to fund future mitigation actions?
Capital Improvements Project Funding	Yes	The Capital Facilities Plan used to implement mitigation initiatives specified by the Annex.
Community Development Block Grant	Yes	No.
Non-FEMA Federal Funding Programs	Yes	No.
Impact Fees	Yes	The City has parks and transportation impact fees which fund projects related to growth.
State Funding Programs	Yes	The City received funding to update the City's Shoreline Master Program and has able for state grant funding to develop a Climate Element, which will include a resiliency subelement.
Utility Fees	Yes	Utility fees are utilized for upgrades and retrofitting projects.

Financial Capabilities Observations and Discussion

- a. *What specific financial strengths does the City have to support hazards mitigation?*

The City has some staff availability to apply for grants and low interest loans.

- b. *Are there any gaps in financial capabilities to support the City's understanding of hazards and vulnerabilities?*

Other than general financial limitations all local governments face and share, the City does not have any specific gaps.

- c. *How can the City expand or improve its financial capabilities to implement the City's mitigation actions?*

Not known.

- d. *What type of actions can the City take, if any, to secure funding to make the community more resilient?*

Apply for more opportunities and form partnerships with others.

Annex: City of Tumwater

4. *Education and Outreach*

Evaluation for Education and Outreach

- What outreach programs does the City use to share important information?
- What venues does the City use for outreach activities? Could they be used to promote risk reduction?
- What new or additional outreach efforts could get the most public participation and support for risk reduction?

Programs or Activities	In Place Y or N	Notes – How widespread and effective are these programs in the City’s community?
Hazard awareness campaigns such as Firewise, Storm Ready, Flood Awareness Month, School Programs, or Public Events	Yes	Much of this work occurs at the regional level through Thurston County staff. The Water Resources & Sustainability Department staff do general outreach to the community about flooding.
Local News Media	Yes	The local news media is present at most Planning Commission, General Government Committee, and City Council meetings. Communication Department staff is skilled at using local and social media.
Organizations that represent or advocate for socially vulnerable and underserved populations	Yes	The City is undertaking great efforts in working with socially vulnerable and underserved populations through the Housing Action Plan, Regional Plan and City Annex, 2025 Comprehensive Plan periodic update, 2023 Capital Facilities Plan, the 2020 Water System Plan, and more. Equity is a primary focus when any plans or updates are being proposed. The City has hired consultants to establish an “Equity Toolbox.”
Social Media	Yes	The City utilizes many platforms of social media. The Countywide survey and Thurston County Fair event were shared to the City Facebook page. Staff will be utilizing social media more during the Comprehensive Plan periodic update, especially the Climate Element and Resiliency Subelement, which is correlated to the Regional Plan and City Annex.

Public Outreach and Education Capabilities Observations and Discussion

- a. *What specific public outreach and education capabilities and strengths do the City have to support hazards mitigation?*

Staff involvement with the hazards mitigation planning team, the Fire Department works with emergency management and the public, and the City's Communications Department helps with public outreach, sharing of information and upcoming events, and mailing of critical information and upcoming public events. The City also has the ability to utilize Planning Commission, General Government Committee, and City Council meetings to share information and updates with the public.

- b. *Are there any gaps in the City's capabilities to engage the public about natural hazards and the City's vulnerabilities?*

Yes, a formal internal hazards mitigation planning team could be established. It will be easier to get involved with other departments to identify public engagement opportunities and the ability to share implementation statuses of the initiatives.

- c. *How can the City expand or improve its public education and outreach activities?*

Potentially by identifying a City staff member to lead or organize an internal workgroup, who will also be responsible for sharing updates on the City's Natural Hazards Mitigation Plan webpage and posting to social media. The City could develop a general communication plan around hazards mitigation to identify vulnerable populations and develop targeted outreach.

- d. *What type of mitigation actions can the City take, if any, to engage the City's constituents and stakeholders about the natural hazard risks or mitigation actions?*

The City could have a mitigation action around identifying vulnerable populations.

Appendix B – National Flood Insurance Program Assessment

National Flood Insurance Program Assessment Worksheet

Evaluation for National Flood Insurance Program Participation

- Who is the floodplain manager? Is this their primary or a secondary role? Does this person have adequate training and capacity for their role?
- Is the FIRM and FIS report in an accessible location? Does the community (or state) promote public access to floodplain information?
- How does the community support map change requests? These could be requests during the Risk MAP process or through Letters of Map Amendment or Revision.
- Does the community collect updated floodplain data or modeling? Is this shared with partners and with FEMA?
- How does the community issue development permits in the special flood hazard area? Who is responsible for permitting?
- How are floodplains regulated in new subdivisions?
- Does the community maintain elevation records? Does it track the number of buildings in the special flood hazard area?
- How does the community enforce its floodplain rules? Does enforcement include monitoring compliance and acting to correct violations?
- How does the community educate the public on floodplain management and the availability of flood insurance, in and out of the floodplain?

Annex: City of Tumwater

National Flood Insurance Program Topic	Response	Source of Information	Notes – If the City were unsure or answered “no” to any of these questions, consider short- and long-term action items to address them.
Staff Resources			
Who is responsible for floodplain management in the City? Do they serve any roles other than Community Floodplain Administrator?	The City’s Planning Manager also serves in the role of the City’s Floodplain Administrator.	City Floodplain Administrator	
Is the Community Floodplain Administrator or National Flood Insurance Program Coordinator a Certified Floodplain Manager?	No.	City Floodplain Administrator	
Is floodplain management an auxiliary function?	Yes.	City Floodplain Administrator	
Explain National Flood Insurance Program administration services (e.g., permit review, GIS, inspections, engineering capability).	The floodplain review process is handled by the Community Development Department. All major permits go through a preliminary development review before vesting and permit application. Many of these permits go in front of the Development Review Committee for review. The City’s flood permit is a part of the building permit. The City currently utilizes a digital permitting and record keeping system. Upon formal application of permit, development engineering,	City Floodplain Administrator	

Hazard Mitigation Plan

Annex: City of Tumwater

National Flood Insurance Program Topic	Response	Source of Information	Notes – If the City were unsure or answered “no” to any of these questions, consider short- and long-term action items to address them.
	permitting, and building staff review the submittal, while the Building Official reviews permits for floodplain considerations. The City’s Building Official oversees the Elevation Certificate process.		
Insurance Summary			
How many National Flood Insurance Program policies are in the community? What is the total premium and coverage?	Sixteen policies are in place with a total coverage of \$3,717,000 and \$6,885 in total written premium and Federal Policy Fee	Community Assistance Visit summary and State Mitigation Strategist through Paul Brewster at Thurston Regional Planning Council	
How many claims have been paid out in the community? What is the total amount of paid claims? How many of the claims were for substantial damage?	There have been two paid losses worth \$12,514.40 and zero substantial damage claim to date.	Community Assistance Visit summary	
How many structures (residential and non-residential) are exposed to flood risk within the community?	Twenty-two non-residential, forty-six residential, and eighteen are unknown. Total: eighty-six	GIS Team	
Are there any repetitive or severe repetitive loss structures in the community?	None.	GIS Team	

Hazard Mitigation Plan

Annex: City of Tumwater

National Flood Insurance Program Topic	Response	Source of Information	Notes – If the City were unsure or answered “no” to any of these questions, consider short- and long-term action items to address them.
Describe any areas of flood risk with limited NFIP policy coverage.	None.	Floodplain Administrator	
How does the community teach property owners or other stakeholders about the importance flood insurance?	The City mailed all property owners with Special Flood Hazard Areas on their property information about Thurston Lakes Map updates.	Floodplain Administrator	
What digital sources (like the FEMA Map Service Center, National Flood Hazard Layer) or non-regulatory tools does the community use?	The City maintains digital copies of DFIRM maps and Flood Insurance Study Reports at City Hall, and they are available to the public. The DFIRM map coverage has also been integrated into the City’s official zoning map which is available online and at City Hall.	Floodplain Administrator	
Compliance History			
Is the community currently suspended from the National Flood Insurance Program?	No.	Floodplain Administrator	
Are there any outstanding compliance issues? (i.e., current violations)?	No.	Floodplain Administrator and Community Assistance Visit summary	
How does the community identify substantially damaged or improved structures? What is the process to make sure these	At the time of a Development Permit Application submittal, City staff are notified that a property is in a Special Flood Hazard Areas via the City’s GIS System. During	Floodplain Administrator	

Hazard Mitigation Plan

Annex: City of Tumwater

National Flood Insurance Program Topic	Response	Source of Information	Notes – If the City were unsure or answered “no” to any of these questions, consider short- and long-term action items to address them.
structures are brought into compliance?	plan review is the time for determination of mitigating flood damage.		
When was the most recent Community Assistance Visit or Community Assistance Contact?	The City completed its Community Assistance Visit in the spring 2023.	City Floodplain Administrator	
Is a Community Assistance Visit or Community Assistance Contact scheduled or needed?	Not at this time.	City Floodplain Administrator	A Community Assistance Visit was conducted May 1, 2023. The last Community Assistance Contacts were completed by FEMA in 2020.
Regulation			
When did the community enter the National Flood Insurance Program?	1978	Community Status Book	
Are the FIRMs digital or paper?	Digital	City Floodplain Administrator	
How does the community enforce local floodplain regulations and monitor compliance?	Tumwater Municipal Code Chapter 18.38 <i>FP Floodplain Overlay</i> applies to the special flood hazard area within the City as well as the City’s Shoreline Master Program in the case of shorelands of the state, such as the Deschutes River. If there are any conflicts between the Shoreline Master Program and the Floodplain Overlay Regulations that apply in	City Floodplain Administrator and Tumwater Municipal Code, and Shoreline Master Program	The City’s Flood Damage Prevention Ordinance found in Tumwater Municipal Code Chapter 18.38 <i>FP Floodplain Overlay</i> was reviewed during the Community Assistance Visit. The City’s ordinance was overall in fair standing, with minor updates needed to bring the ordinance into compliance with NFIP and State of Washington standards. It was discussed during the

Hazard Mitigation Plan

Annex: City of Tumwater

National Flood Insurance Program Topic	Response	Source of Information	Notes – If the City were unsure or answered “no” to any of these questions, consider short- and long-term action items to address them.
	shoreline jurisdiction, the requirements of Shoreline Master Program apply.		Community Assistance Visit that the City will complete all needed updates as part of the 2025 Development Code periodic update process and adopt a compliant ordinance in order to close out the CAV.

TO: Planning Commission

FROM: Erika Smith-Erickson, Land Use and Housing Planner, and Brad Medrud, Planning Manager

DATE: January 23, 2024

SUBJECT: Ordinance No. O2023-017, TMC 18.38 FP Floodplain Overlay

1) Recommended Action:

Read attachments, discuss as part of a work session on the ordinance, and schedule public hearing for February 13, 2024 Planning Commission meeting.

2) Background:

Close to three hundred towns, cities, counties, and tribes within the State of Washington participate in the Federal Emergency Management Agency's (FEMA) National Flood Insurance Program (NFIP). Continued enforcement of the City's floodplain management regulations (TMC 18.38 FP Floodplain Overlay) allows FEMA to make federally backed flood insurance available to property owners within the City of Tumwater. As a condition of participation in the NFIP, communities are required to adopt and enforce flood hazard reduction regulations that meet the minimum requirements of the NFIP.

In May 2023, City staff completed a FEMA floodplain community assistance visit (CAV) with State Department of Ecology staff to review the City's participation in the National Flood Insurance Program. It was determined that TMC 18.38 *FP Floodplain Overlay* should be updated to reflect current FEMA standards.

On November 8, 2023, FEMA notified the City of the final flood determinations for Thurston County, Washington, and Incorporated Areas, which includes the City of Tumwater. The FEMA flood hazard determinations for the City are considered final. The Flood Insurance Study (FIS) report and Flood Insurance Rate Maps (FIRM) covering the City will be effective May 8, 2024.

Prior to the May 8, 2024, effective date of the FIS and FIRM, the City must amend its existing floodplain regulations to be more consistent with the Model Ordinance for Floodplain Management under the NFIP, the Endangered Species Act, and to maintain its eligibility in the NFIP. The Planning Commission received a briefing on the ordinance at their January 9, 2024 meeting.

3) Alternatives:

☐ None

4) Attachments:

- A. Staff Report
- B. Ordinance No. O2023-017
- C. Presentation

STAFF REPORT

Date: January 23, 2024
To: Planning Commission
From: Erika Smith-Erickson, Land Use and Housing Planner, and Brad Medrud,
Planning Manager



Ordinance No. O2023-017 – TMC 18.38 FP – Floodplain Overlay

On November 8, 2023, the Federal Emergency Management Agency (FEMA) notified staff of the final flood determinations for Thurston County, Washington, and Incorporated Areas, which includes the City of Tumwater. The FEMA flood hazard determinations for the City are considered final. The Flood Insurance Study (FIS) report and Flood Insurance Rate Maps (FIRM) will be effective May 8, 2024.

Prior to the May 8, 2024 effective date of the FIS and FIRM, the City must amend its existing floodplain regulations to be more consistent with the Model Ordinance for Floodplain Management under the National Flood Insurance Program (NFIP), the Endangered Species Act, and to maintain its eligibility in the NFIP.

The Planning Commission received a briefing on the ordinance at their January 9, 2024 meeting.

Contents

Summary	2
Background	2
Floodplain Overlay Amendments	3
1. Definitions	3
2. Special Flood Hazard Areas	7
3. Flood Hazard Data	8
4. Floodplain Development Permit Required	8
5. Floodplain Development Permit	9
6. Duties of the Floodplain Administrator	11
7. Records	11
8. Development and Subdivisions	13

9. Flood Protection Standards 14

10. Nonresidential construction 16

11. Manufactured Homes 17

12. Detached Accessory Structures 18

13. Storage of Materials and Equipment..... 18

14. Floodway Standards..... 19

15. Penalties..... 20

Public Approval Process 21

Public Notification..... 22

Staff Conclusions..... 22

Staff Recommendation 23

Effects of the Proposed Amendments..... 23

Staff Contacts 23

Summary

The proposed amendments are intended to make alterations to the City’s floodplain ordinance to bring it into compliance with NFIP and Washington state standards.

Background

Close to three hundred towns, cities, counties, and tribes within the State of Washington participate in the NFIP. Continued enforcement of the floodplain management ordinance allows FEMA to make federally backed flood insurance available to property owners within the City of Tumwater.

As a condition of participation in the NFIP, communities are required to adopt and enforce a flood hazard reduction ordinance that meets the minimum requirements of the NFIP.

The purpose of *TMC 18.38 FP Floodplain Overlay* is to:

- “...promote the public health, safety, and general welfare by managing development in order to:*
- A. Protect human life, health and property from the dangers of flooding;*
 - B. Minimize the need for publicly funded and hazardous rescue efforts to save those who are isolated by flood waters;*

- C. Minimize expenditure of public money for costly flood damage repair and flood control projects;*
- D. Minimize disruption of commerce and governmental services;*
- E. Minimize damage to public facilities and utilities such as water and gas mains, electric, telephone and sewer lines, streets, and bridges located in the floodplain;*
- F. Maintain a stable tax base by providing for the sound use of floodprone areas so as to minimize future flood blight areas;*
- G. Encourage those who occupy areas subject to flooding and channel migration to assume responsibility for their actions;*
- H. Qualify the city of Tumwater for participation in the National Flood Insurance Program, thereby giving citizens and businesses the opportunity to purchase flood insurance;*
- I. Maintain the quality of water in rivers, streams, lakes, estuaries, and marine areas and their floodplains so as to protect public water supplies, areas of the public trust, and wildlife habitat protected by the Endangered Species Act;*
- J. Retain the natural channel, shoreline, and floodplain creation processes and other natural floodplain functions that protect, create, and maintain habitat for threatened and endangered species;*
- K. Prevent or minimize loss of hydraulic, geomorphic, and ecological functions of floodplains and stream channels.”¹*

In May 2023, City staff completed a FEMA floodplain community assistance visit (CAV) with State Department of Ecology staff to review the City’s participation in the National Flood Insurance Program. It was determined that TMC 18.38 FP Floodplain Overlay should be updated to reflect current standards.

To maintain eligibility in the NFIP, the City must update its ordinance to meet minimum Federal and State Standards by the time the updated FIS and FIRM become effective on May 8, 2024.

The amendments are a part of the approved 2023 Long Range Planning work program.

Floodplain Overlay Amendments

The following is a summary of the proposed amendments that make up the floodplain overlay code.

1. Definitions

Clarify and add definitions as needed for enhanced interpretation of floodplain regulations.

¹ TMC 18.38.010 Purpose.

Code Section to be amended:

- TMC 18.38.070 – Definitions.

Proposed amendment language:

18.38.070 Definitions.

[...]

“Alteration of watercourse” means any action that will change the location of the channel occupied by water within the banks of any portion of a riverine waterbody.

[...]

“Area of special flood hazard” means the land in the floodplain within a community subject to a 1 percent or greater chance of flooding in any given year. It is shown on the flood insurance rate map (FIRM) as zone A, AO, AH, A1-30, AE, A99, AR (V, VO, V1-30, VE).

“Special flood hazard area” is synonymous in meaning with the phrase “area of special flood hazard”.

[...]

“Development” means any manmade change to improved or unimproved real estate in the special flood hazard area (SFHA), including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of equipment or materials, subdivision of land, removal of more than five percent of the native vegetation on the property, ~~or~~ alteration of natural site characteristics, or storage of equipment or materials.

[...]

“Flood” or “flooding” means a general and temporary condition of partial or complete inundation of normally dry land areas from:

- A. The overflow of inland or tidal waters; and/or
- B. The unusual and rapid accumulation of runoff of surface waters from any source.
- C. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (A) of this definition.

“Flood elevation study (FES)” means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards. Also known as a flood insurance study (FIS).

“Flood insurance rate map (FIRM)” means the official map on which the Federal Emergency Management Agency (FEMA) has delineated both the special flood hazard areas and the risk premium zones applicable to the city of Tumwater.

“Flood insurance study (FIS)” means the official report provided by the Federal Emergency Management Agency that includes flood profiles, the flood insurance rate map (FIRM), and the water surface elevation of the base flood.

[...]

“Floodplain administrator” means the community official designated by title to administer and enforce the floodplain management regulations.

“Flood proofing” means any combination of structural and nonstructural additions, changes, or adjustments to structures which reduce or eliminate risk of flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. Flood proofed structures are those that have the structural integrity and design to be impervious to floodwater below the base flood elevation.

“Floodway” means the channel of a stream or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot at any point. Also referred to as “regulatory floodway”.

“Functionally dependent use” means a use that must be located or carried out close to water, e.g., docking or port facilities necessary for the unloading of cargo or passengers or shipbuilding and ship repair, and does not include long term storage or related manufacturing facilities.

“Highest adjacent grade” means the highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure.

[...]

“Mean sea level” means for the purposes of the National Flood Insurance Program, the vertical datum to which base flood elevations shown on a community's flood insurance rate map are referenced.

[...]

“New construction” means structures for which the “start of construction” commenced on or after the effective date of this chapter and includes any subsequent improvements to such structures. For floodplain management purposes, “new construction” means structures for which the “start of construction” commenced on or after the effective date of a floodplain management regulation adopted by a community and includes any subsequent improvements to such structures.

[...]

“Special flood hazard area (SFHA)” means the land subject to inundation by the base flood. Special flood hazard areas are designated on flood insurance rate maps (FIRMs) with the

letters “A” or “V” including AE, AO, AH, A1-99 and VE. The special flood hazard area is also referred to as the area of special flood hazard or SFHA.

[...}

“Structure” means a walled and roofed building, including a gas or liquid storage tank that is principally above ground, as well as a manufactured home.

[...]

“Substantial improvement” means any repair, reconstruction, rehabilitation, addition, replacement, or other improvement of a structure, the cost of which equals or exceeds fifty percent of the market value of the structure before the “start of construction” of the improvement. This term includes structures which have incurred “substantial damage,” regardless of the actual repair work performed. The term does not include any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions, any alteration of a “historic structure”, provided that the alteration will not preclude the structure's continued designation as a “historic structure.”

[...]

“Zone” means one or more areas delineated on the FIRM. The following zones may be used on the adopted FIRM. The special flood hazard area (SFHA) is comprised of the A and V zones.

“A” means SFHA where no base flood elevation (BFE) is provided.

“A#” means numbered A zones (e.g., A7 or A14), SFHA with a ~~base flood elevation~~ BFE.

“AE” means SFHA with a ~~base flood elevation~~ BFE.

“AO” means SFHA subject to inundation by shallow flooding usually resulting from sheet flow on sloping terrain, with average depths between one and three feet. Average flood depths are shown.

“AH” means SFHA subject to inundation by shallow flooding (usually areas of ponding) with average depths between one and three feet. ~~Base flood elevations~~ BFEs are shown.

“B” means the area between the SFHA and the five-hundred-year flood of the primary source of flooding. It may also be an area with a local, shallow flooding problem or an area protected by a levee.

“C” means an area of minimal flood hazard, as above the five-hundred-year flood level of the primary source of flooding. B and C zones may have flooding that does not meet the criteria to be mapped as a special flood hazard area, especially ponding and local drainage problems.

“D” means area of undetermined but possible flood hazard.

“V” means the SFHA subject to coastal high hazard flooding including waves of three feet or greater in height. There are three types of V zones: V, V#, and VE, and they correspond to the A zone designations.

“X” means the area outside the mapped SFHA.

“Shaded X” means the same as a zone B, above.

2. Special Flood Hazard Areas

The intent of this amendment is to update the FIS areas and FIRM identified by FEMA to the most current versions effective May 8, 2024.

Code Section to be amended:

- 18.38.090 – Special flood hazard areas.

Proposed amendment language:

18.38.090 Special flood hazard area.

A. The special flood hazard area (SFHA) is the area subject to flooding by the base flood and subject to the provisions of this chapter. It is identified by the Federal Emergency Management Agency in a scientific and engineering report entitled, “Flood Insurance Study for Thurston County, Washington and Incorporated Areas,” dated ~~October 16, 2012~~ May 8, 2024 and any revisions thereto, with an accompanying Flood Insurance Rate Map (FIRM) for Thurston County, Washington and Incorporated Areas, dated ~~October 16, 2012~~ May 8, 2024, and any revisions thereto, which are hereby adopted by reference and declared to be a part of this chapter. The flood insurance study and the FIRM are on file at Tumwater City Hall, 555 Israel Road SW, Tumwater, Washington 98501.

B. Upon receipt of a floodplain development permit application, the floodplain administrator shall compare the elevation of the site to the base flood elevation. A development project is not subject to the requirements of this chapter if it is located on land that can be shown to be:

- 1. Outside the protected area; and*
- 2. Higher than the ~~base flood elevation~~ BFE as demonstrated by an elevation certificate.*

The floodplain administrator shall inform the applicant that the project will still be subject to the flood insurance purchase requirements unless the owner receives a letter of map amendment from FEMA.

C. The floodplain administrator shall make interpretations where needed, as to the exact location of the boundaries of the SFHA and the protected area (e.g., where there appears to be a conflict between the mapped SFHA boundary and actual field conditions as determined

by the ~~base flood elevation~~ BFE and ground elevations). The applicant may appeal the floodplain administrator's interpretation of the location of the boundary to the hearing examiner.

3. Flood Hazard Data

This code section amendment is intended to clarify the source of the most current flood data and maps.

Code Sections to be amended:

- TMC 18.38.100 – Flood hazard data.

Proposed amendment language:

18.38.100 Flood hazard data.

- A. The base flood elevation (BFE) for the SFHAs of the city of Tumwater shall be as delineated on the one-hundred-year flood profiles in the Flood Insurance Study for Thurston County, Washington and Incorporated Areas.
- B. The ~~base flood elevation~~ BFE for each SFHA delineated as a "zone AH" or "zone AO" shall be that elevation (or depth) delineated on the flood insurance rate map (FIRM). Where base flood depths are not available in zone AO, the base flood elevation shall be considered to be two feet above the highest grade adjacent to the structure.
- C. The ~~base flood elevation~~ BFE for all other SFHAs shall be as defined in subsection F of this section and 18.38.120(C).
- D. The flood protection elevation (FPE) shall be the base flood elevation plus one foot.
- E. The floodway shall be as delineated on the ~~flood insurance rate map~~ FIRM or in accordance with subsection F of this section and TMC 18.38.120(D).
- F. Where ~~base flood elevation~~ BFE and floodway data have not been provided in special flood hazard areas in accordance with 18.38.090, the floodplain administrator shall obtain, review, and reasonably utilize any ~~base flood elevation~~ BFE and floodway data available from a federal, state, or other source.

4. Floodplain Development Permit Required

This code section amendment is intended to clarify when and where a floodplain development permit is required.

Code Sections to be amended:

- TMC 18.38.130 – Floodplain development permit required.

Proposed amendment language:

18.38.130 Establishment of Floodplain development permit required.

A floodplain development permit ~~shall be obtained~~ is required before construction or development begins within the special flood hazard area (SFHA) established in TMC 18.38.090. The permit shall be for all development as set forth in TMC 18.38.070, Definitions.

5. Floodplain Development Permit

This code section amendment is intended to add new permit application requirements such as elevation certificate information requirements, elevations related to mean sea level, and engineering analysis requirements.

Code Sections to be amended:

- TMC 18.38.140 – Floodplain development permit application.

Proposed amendment language:

18.38.140 Floodplain development permit application.

Application for a floodplain development permit shall be made on forms furnished by the floodplain administrator and shall include, but are not limited to:

[...]

C. If the proposed project includes a new structure, substantial improvement, or repairs to a substantially damaged structure that will be elevated, the application shall include the flood protection elevation (FPE) for the building site and the proposed elevations of the following:

- 1. The top of bottom floor (including basement, crawlspace, or enclosure floor).*
- 2. The top of the next higher floor.*
- 3. The bottom of the lowest horizontal structural member (in V zones only).*
- 4. The top of the slab of an attached garage.*
- 5. The lowest elevation of machinery or equipment servicing the structure.*
- 6. The lowest adjacent (finished) grade next to structure.*
- 7. The highest adjacent (finished) grade next to structure.*

8. *The lowest adjacent grade at the lowest elevation of a deck or stairs, including structural support.*

[...]

E. *If a project will alter the base flood elevation data (BFE) or boundaries of the SFHA, the project applicant shall provide the floodplain administrator with engineering documentation and analysis regarding the proposed change. If the change to the BFE or boundaries of the SFHA would normally require a Letter of Map Change, the project approval shall be conditioned accordingly.*

~~F.~~ *The proposed project must be designed and located so that new structural flood protection is not needed.*

G. *The application shall include a description of the extent to which a stream, lake, or other water body, including its shoreline, will be altered or relocated as a result of the proposed development.*

1. *Bank stabilization measures along salmonid-bearing streams, channel migration zones, and along estuarine and marine shorelines must be minimized to the maximum extent possible. If bank stabilization measures are necessary, bioengineered armoring of streambanks and shorelines must be used.*

2. *Channel Migration. No activity is allowed that limits the natural meandering pattern of the channel migration zone; however, natural channel migration patterns may be enhanced or restored.*

~~H.~~ *The application shall include documentation that the applicant will apply for all necessary permits required by federal, state, or local law. The application shall include written acknowledgment that the applicant understands that the final certification of use or certificate of occupancy will be issued only if the applicant provides copies of the required federal, state, and local permits or letters stating that a permit is not required. The floodplain permit is not valid if those other permits and approvals are not obtained prior to any ground disturbing work or structural improvements.*

~~I.~~ *The application shall include acknowledgment by the applicant that representatives of any federal, state or local unit of government with regulatory authority over the project are authorized to enter upon the property to inspect the development.*

J. *The application shall include the elevation in relation to mean sea level, of the lowest floor (including basement) of all structures recorded on a current elevation certificate with section B completed by the floodplain administrator.*

K. *The application shall include the elevation relation to mean sea level to which any structure has been flood proofed.*

L. *The application shall include, where development is proposed in a floodway, an engineering analysis indicating no rise of the base flood elevation (BFE).*

M. *The application shall include any other such information that may be reasonably required by the floodplain administrator in order to review the application.*

6. Duties of the Floodplain Administrator

This code section amendment is intended to update language from protected area to floodway and add an additional role to the duties of the floodplain administrator.

Code Sections to be amended:

- TMC 18.38.170 – Duties of the floodplain administrator.

Proposed amendment language:

18.38.170 Duties of the floodplain administrator.

Duties of the floodplain administrator shall include, but not be limited to:

[...]

C. Review all floodplain development permits to determine if the proposed development is located in the ~~protected area~~ floodway. If located in the ~~protected area~~ floodway, ensure that the provisions of TMC 18.38.320 through 18.38.400 are met.

D. Ensure that all development activities within the special flood hazard area (SFHA) of the jurisdiction of the city of Tumwater meet the requirements of this chapter.

[...]

G. Submit reports to include the projects for which they issue floodplain development permits, including effects to flood storage, fish habitat, and all indirect effects of development and mitigation provided to FEMA as required for the National Flood Insurance Program (NFIP).

[...]

J. Interpretations as to exact location of the boundaries of the areas of special flood hazards where needed (e.g., where there appears to be a conflict between a mapped boundary and actual field conditions). The person contesting the location of the boundary shall be given a reasonable opportunity to appeal the interpretation. Such appeals shall be granted consistent with the standards of 44 CFR 60.6 of the Rules and Regulations of the NFIP.

7. Records

This code section amendment is intended clarify what information is to be retained and what specific elevations are required for records.

Code Sections to be amended:

- TMC 18.38.180 – Records.

Proposed amendment language:

18.38.180 Records.

A. Where base flood elevation data (BFE) have been obtained pursuant to TMC 18.38.100 and 18.38.120, the floodplain administrator shall obtain, record, and maintain the actual “finished construction” elevations (in relation to mean sea level) of the lowest floor (including basement) of all new or substantially improved structures, for the locations listed in TMC 18.38.140(C), and whether or not the structure contains a basement. This information shall be recorded on a current FEMA Elevation Certificate ~~(FEMA Form 81-31)~~, signed and sealed by a professional land surveyor, currently licensed in the state of Washington.

B. For all new or substantially improved dry floodproofed nonresidential structures, where ~~base flood elevation~~ BFE data has been obtained pursuant to TMC 18.38.100 and 18.38.120, the floodplain administrator shall: ~~obtain~~

1. Obtain, record and maintain the elevation (in relation to the datum of the effective FIRM mean sea level) to which the structure was floodproofed.

2. This information shall be recorded on a current FEMA floodproofing certificate ~~(FEMA FORM 81-65)~~ by a professional engineer currently licensed in the state of Washington.

C. Where elevation data is not available, either through the FIS, FIRM, or from another authoritative source (as required by TMC 18.38.100(F)), the floodplain administrator shall review applications for floodplain development to assure that proposed construction will be reasonably safe from flooding based on the use of historical data, high water marks, photographs of past flooding, etc., where available.

Failure to elevate habitable buildings at least two feet above the highest adjacent grade in these zones may result in higher insurance rates.

D. The floodplain administrator shall obtain, record, and maintain the records for public inspection of the following:

1. Certification required by TMC 18.38.360(1).
2. Records of all variance actions, including justification for their issuance.
3. Improvement and damage calculations.
4. All records pertaining to the provisions of this ordinance.

8. Development and Subdivisions

The proposed amendments clarify which types of land division proposals are subject to the requirements of this section and add requirements for projects over a certain size.

Code Section to be amended:

- TMC 18.38.210 – Development and subdivisions.

Proposed amendment language:

18.38.210 Development and subdivisions.

This section applies to all development and subdivision proposals, Subdivision proposals include short subdivisions, short plats, binding site plans, planned developments, and new and expansions to manufactured housing parks.

A. All proposals shall be consistent with the need to minimize flood damage.

B. ~~The A~~ proposed subdivision must have one or more new lots in the special flood hazard area (SFHA) set aside for open space use through deed restriction, easement, subdivision covenant, or donation to a public agency.

1. In the ~~special flood hazard area~~ (SFHA) outside the protected area, zoning must maintain a low density of floodplain development.

2. In the ~~special flood hazard area~~ (SFHA) outside the protected area in which the current zoning is less than five acres must maintain the current zoning.

3. The density of the development in the portion of the development outside the ~~special flood hazard area~~ (SFHA) may be increased to compensate for the amount of land in the ~~special flood hazard area~~ (SFHA) preserved as open space in accordance with TMC Title 18.

C. If a parcel has a buildable site outside the special flood hazard area, it shall not be subdivided to create a new lot, tract, or parcel within a binding site plan that does not have a buildable site outside the special flood hazard area. This provision does not apply to lots set aside from development and preserved as open space.

D. All proposals shall have utilities and facilities, such as sewer, gas, electrical, and water systems located and constructed to minimize or eliminate flood damage.

E. All subdivision proposals shall ensure that ~~all subdivisions have~~ there is at least one access road connected to land outside the ~~special flood hazard area~~ (SFHA) with the surface of the road at or above the FPE wherever possible.

F. All proposals shall have adequate drainage provided to avoid exposure to water damage.

G. ~~The A~~ final recorded subdivision ~~plot~~ shall include a notice that part of the property is in the SFHA, riparian habitat zone and/or channel migration area, as appropriate.

H. Where subdivision proposals and other proposed developments contain greater than fifty lots or five acres (whichever is the lesser) base flood elevation data (BFE) shall be included as part of the application.

9. Flood Protection Standards

An amendment to clarify standards for construction within specific flood zones.

Code Section to be amended:

- TMC 18.38.184 – Flood protection standards.

Proposed amendment language:

18.38.260 Flood protection standards.

A. In AE and A1-30 zones or other A zoned areas where the base flood elevation data (BFE) has been determined or can be reasonably obtained, A all new structures and substantial improvements of any structure shall have the lowest floor, including basement, elevated at least one foot above the FPE BFE.

B. The structure shall be aligned parallel with the direction of flood flows where practicable.

C. All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage.

D. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.

E. ~~The structure~~ All new construction and substantial improvements, including those related to manufactured homes, shall be anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads including the effects of buoyancy.

~~FD.~~ All materials below the FPE shall be resistant to flood damage and firmly anchored to prevent flotation. Materials harmful to aquatic wildlife, such as creosote, are prohibited below the FPE.

~~GE.~~ Electrical, heating, ventilation, duct work, plumbing, and air-conditioning equipment and other service facilities shall be elevated above the FPE. Water, sewage, electrical, and other utility lines below the FPE shall be constructed so as to prevent water from entering or accumulating within them during conditions of flooding.

HF. Fully enclosed areas below the lowest floor that are subject to flooding shall be used only for parking, storage, or building access and shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement shall either be certified by a registered professional engineer or licensed architect and/or meet or exceed the following minimum criteria:

1. A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided.
2. The bottom of all openings shall be no higher than one foot above grade.
3. Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.

IG. In zones V, V1-30 and VE, new structures and substantial improvements shall be elevated on pilings or columns so that:

1. The bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings or columns) is elevated above the FPE.
2. The pile or column foundation and structure attached thereto is anchored to resist flotation, collapse and lateral movement due to the effects of wind and water loads acting simultaneously on all building components. Wind and water loading values shall each have a one percent chance of being equaled or exceeded in any given year (one-hundred-year mean recurrence interval).
3. The areas below the lowest floor that are subject to flooding shall be free of obstruction.
4. The structure or improvement shall be located landward of the reach of mean high tide.
5. The use of fill for structural support of a structure or addition is prohibited.
6. A registered professional engineer or architect shall develop or review the structural design, specifications and plans for the construction, and shall certify that the design and methods of construction to be used are in accordance with accepted standards of practice for meeting these provisions.

J. New construction and substantial improvement of any residential structure in an Unnumbered A zone for which a BFE is not available and cannot be reasonably obtained shall be reasonably safe from flooding, but in all cases the lowest floor shall be at least two feet above the highest adjacent grade.

K. A garage attached to a residential structure, constructed with the garage floor slab below the BFE, must be designed to allow for the automatic entry and exit of floodwaters.

10. Nonresidential construction

The amendment to this section is to make clear the nonresidential development and standards within certain flood zones.

Code Section to be amended:

- TMC 18.38.270- Nonresidential construction.

Proposed amendment language:

18.38.270 Nonresidential construction.

~~New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall be elevated in accordance with TMC 18.38.260. As an alternative to elevation, a new or substantial improvement to a nonresidential structure and its attendant utility and sanitary facilities may be dry floodproofed in A zones. The project must meet the following:~~

~~A. The structure is not located in zones V, V1-30, or VE; and~~

~~B. Below the FPE the structure is watertight with walls substantially impermeable to the passage of water; and~~

~~C. The structural components are capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and~~

~~D. The plans are certified by a registered professional engineer or licensed architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the floodplain administrator as set forth in TMC 18.38.180(B) and 18.38.190(A)(1).~~

New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall meet the requirements of TMC 18.38.270(A) or (B), below.

A. New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall meet all of the following requirements:

1. In AE and A1-30 zones or other A zoned areas where the base flood elevation data (BFE) has been determined or can be reasonably obtained:

New construction and substantial improvement of any commercial, industrial, or other nonresidential structure shall have the lowest floor, including basement, elevated one foot or more above the BFE, or elevated as required by ASCE 24, whichever is greater. Mechanical equipment and utilities shall be waterproofed or elevated at least one foot above the BFE, or as required by ASCE 24, whichever is greater.

2. If located in an unnumbered A zone for which a BFE is not available and cannot be reasonably obtained, the lowest floor shall be at least two feet above the highest adjacent grade.

3. Fully enclosed areas below the lowest floor that are subject to flooding are prohibited or shall meet the requirements of TMC 18.38.210.

B. If the requirements of TMC 18.38.270(A) are not met, new construction and substantial improvement of any commercial, industrial or other nonresidential structure shall meet all of the following requirements:

1. Be dry flood proofed so that below one foot or more above the base flood level the structure is watertight with walls substantially impermeable to the passage of water or dry flood proofed to the elevation required by ASCE 24, whichever is greater;

2. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and

3. Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the official as set forth in TMC 18.38.180.

11. Manufactured Homes

The amendments proposed specify methods and practices to minimize flood damage.

Code Section to be amended:

- TMC 18.38.280- Manufactured homes.

Proposed amendment language:

18.38.280 Manufactured homes.

All manufactured homes to be placed or substantially improved on sites shall be:

- A. *Elevated on a permanent foundation in accordance with TMC 18.38.260; and*
- B. *Securely anchored to an adequately anchored foundation system to resist flotation, collapse and lateral movement. Methods of anchoring may include, but are not to be limited to, use of over-the-top or frame ties to ground anchors, and shall be installed using methods and practices that minimize flood damage. This requirement is in addition to other applicable anchoring requirements for resisting wind forces.*

12. Detached Accessory Structures

A new section specific to detached accessory structures and standards for developing in the floodway.

Code Section to be added:

- TMC 18.38.285- Detached accessory structures.

Proposed amendment language:

18.38.285 Detached accessory structures.

A. Detached accessory structures used solely for parking of vehicles or limited storage may be constructed such that the floor is below the base flood elevation data (BFE), provided the structure is designed and constructed in accordance with the following requirements:

- 1. In special flood hazard areas other than coastal high hazard areas (Zones A, AE, AH, AO, and A1-30), the structure is not larger than a one-story two-car garage;*
- 2. In coastal high hazard areas (Zones V, VE, V1 30, and VO), the structure is not larger than 100 sq. ft. in area;*
- 3. The portions of the structure located below the BFE must be built using flood resistant materials;*
- 4. The structure must be adequately anchored to prevent flotation, collapse, and lateral movement;*
- 5. Any machinery or equipment servicing the structure must be elevated or floodproofed to or above the BFE;*
- 6. The structure must comply with floodway encroachment provisions in TMC 18.38.360(1);*
- 7. The structure must be designed to allow for the automatic entry and exit of flood waters in accordance with TMC 18.38.240(F);*
- 8. The structure shall have low damage potential;*
- 9. If the structure is converted to another use, it must be brought into full compliance with the standards governing such use; and*
- 10. The structure shall not be used for human habitation.*

13. Storage of Materials and Equipment

A new section proposed for the storage of certain materials in the floodway.

Code Section to be added:

- TMC 18.38.325- Storage of materials and equipment.

Proposed amendment language:

18.38.325 Storage of materials and equipment.

A. The storage or processing of materials that could be injurious to human, animal, or plant life if released due to damage from flooding is prohibited in special flood hazard areas.

B. Storage of other material or equipment may be allowed if not subject to damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

14. Floodway Standards

An amendment to clarify standards for projects within the floodway and state all construction shall comply with all flood hazard reduction provisions of TMC 18.38.

Code Section to be amended:

- TMC 18.38.360 – Floodway standards.

Proposed amendment language:

18.38.360 Floodway standards.

A. In addition to the other requirements of this chapter, a project to develop in the floodway as delineated pursuant to TMC 18.38.100(E) and (F) or 18.38.120(D) shall meet the following criteria:

- 1. Encroachments, including fill, new construction, substantial improvements, and other development is prohibited unless the applicant shall provides a certification by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed development would not result in any increase in flood levels during the occurrence of the base flood discharge.*
- 2. Construction or reconstruction of residential structures is prohibited within designated floodways, except for the following repairs, reconstruction, or improvements to a residential structure which do not increase the ground floor area. The following exceptions must still meet all other requirements in the chapter, including subsection (A)(1) of this section:*

- a. Repairs, reconstruction, or improvements to a residential structure that do not increase the ground floor area, providing the cost of which does not exceed fifty percent of the market value of the structure either:*
- i. Before the repair, or reconstruction is started; or*
 - ii. If the structure has been damaged, and is being restored, before the damage occurred. Any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications that have been identified by a local code enforcement official, and which are the minimum necessary to assure safe living conditions, or to an historic structure, may be excluded from the fifty percent calculations;*
- b. Repairs, replacement, reconstruction, or improvements to existing farmhouses located in designated floodways and located on designated agricultural lands that do not increase the building's total square footage of encroachment and are consistent with all requirements of WAC 173-158-075;*
- c. Repairs, replacement, reconstruction, or improvements to substantially damaged residential dwellings other than farmhouses that do not increase the building's total square footage of encroachment and are consistent with all requirements of WAC 173-158-076; or*
- d. Repairs, reconstruction, or improvements to residential structures identified as historic structures that do not increase the building's dimensions.*
- B. In riverine special flood hazard areas where a floodway has not been delineated pursuant to TMC 18.38.100(E) and (F) or 18.38.120(D), the applicant for a project to develop in the SFHA shall provide a certification by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed development and all other past or future similar developments would not cumulatively result in an increase of flood levels during the occurrence of the base flood discharge by more than one foot.*
- C. If TMC 18.38.360(A)(1) is satisfied or construction is allowed pursuant to TMC 18.38.360(A)(2), all new construction and substantial improvements in the floodway shall comply with all applicable flood hazard reduction provisions of this chapter.*

15. Penalties

A new section establishing penalties for noncompliance with TMC 18.38. This section establishes a fine for violations.

Code Section to be added

- TMC 18.38.450- Penalties for noncompliance.

Proposed amendment language:

18.38.450 Penalties for noncompliance.

A. No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this ordinance and other applicable regulations. Violations of the provisions of this ordinance by failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with conditions), shall constitute a misdemeanor. Any person who violates this ordinance or fails to comply with any of its requirements shall upon conviction thereof be fined not more than one thousand dollars (\$1,000.00) or imprisoned for not more than ninety (90) days, or both for each violation, and in addition shall pay all costs and expenses involved in the case. Nothing herein contained shall prevent the city of Tumwater from taking such other lawful action as is necessary to prevent or remedy any violation.

B. Enforcement under this section is in addition to and does not preclude or limit any other forms of enforcement available to the city including, but not limited to, enforcement under any provision of TMC Chapter 1.10, nuisance actions, actions for injunctions, or any other civil or equitable actions to abate, discontinue, or correct, acts in violation of this code.

Public Approval Process

An Environmental Checklist for a non-project action was prepared on December 13, 2023 under the State Environmental Policy Act (Chapter 43.21C RCW), pursuant to Chapter 197-11 WAC, and a Determination of Non-Significance was issued on December 29, 2023.

The ordinance was sent to the Washington State Department of Commerce on December 14, 2023 for their required 60-day review before the proposed text amendments are adopted, in accordance with RCW 36.70A.106.

The Planning Commission received a briefing on proposed code amendments on January 9, 2024 and will hold a work session on January 23, 2024. A Notice of Public Hearing for the Planning Commission is expected to be issued on February 2, 2024, ten days prior to a public hearing. The notice will be posted, published as a press release, distributed to interested individuals and entities that have requested such notices, and published in *The Olympian*.

The Planning Commission is expected to hold a public hearing on the final proposed amendments on February 13, 2024. Following the public hearing and deliberations, the Planning Commission is expected to recommend that the City Council consider the proposed amendments.

The City Council is scheduled to review the final proposed amendments at a work session on March 12, 2024. The City Council is scheduled to consider final proposed amendments on March 19, 2024.

Public Notification

A Notice of Public Hearing for the expected February 13, 2024 Planning Commission public hearing is expected to be issued, posted, mailed to interested parties, and published in *The Olympian* ten days prior to the public hearing on February 2, 2024, after the Planning Commission is expected to set the public hearing date on January 23, 2024.

Staff Conclusions

1. The proposed text amendments will need to be consistent with the goals of the Washington State Growth Management Act.

- a. The ordinance will need to be consistent with Goal 7 of the Growth Management Act which states:

Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

The ordinance will establish concise requirements for developments and allowed uses in the floodway. It will establish clear permitting application requirements.

- b. This ordinance will need to be consistent with Goal 10 of the Growth Management Act which states:

Protect and enhance the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

The ordinance will establish concise requirements and protections in the floodway.

- c. This ordinance will need to be consistent with Goal 14 of the Growth Management Act which states:

Ensure that comprehensive plans, development regulations, and regional policies, plans, and strategies under RCW 36.70A.210 and chapter 47.80 RCW adapt to and mitigate the effects of a changing climate; support reductions in greenhouse gas emissions and per capita vehicle miles traveled; prepare for climate impact scenarios; foster resiliency to climate impacts and natural hazards; protect and enhance environmental, economic, and human health and safety; and advance environmental justice.

The ordinance will establish concise development regulations to protect development and people from natural flood hazards and protect and enhance the environment.

2. The proposed amendments will need to be consistent with the Conservation Element of the Comprehensive Plan because the proposed amendments address permitting, development regulations, allowable uses, and critical areas.

- a. Goal 2 of the Conservation Element states:

Designate and protect critical areas including wetlands, critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, and fish and wildlife habitat conservation areas in accordance with the Growth Management Act to protect the

functions and values of these areas as well as to protect against threats to health, safety, and property.

- b. Action item C-2.1 of the Conservation Element states:

Include best available science in developing policies and development regulations to protect the functions and values of critical areas and consider conservation or protection measures necessary to preserve or enhance anadromous fisheries, consistent with the Growth Management Act.

3. The proposed amendments will need to be consistent with the Land Use Element by improving and updating the existing regulations for floodways, permitted uses in flood zones, and update the review and approval of applications for development in floodways.

- a. Goal LU-2 of the Land Use Element states:

Ensure development takes place in an orderly and cost-efficient manner in order to best utilize available land and public services, conserve natural resources, protect critical areas, preserve open space, and reduce sprawl.

- b. Goal LU-8 of the Land Use Element states:

Ensure physical limitations of the land are observed during the development process.

4. Based on the above review and analysis, staff will need to conclude that the proposed text amendments are consistent with the requirements of the Washington State Growth Management Act and the Tumwater Comprehensive Plan.

Staff Recommendation

Staff recommend that the Planning Commission review the proposed amendments and provide comments to staff as part of a work session on the ordinance, and schedule a public hearing on the ordinance for the February 13, 2024 Planning Commission meeting.

Effects of the Proposed Amendments

The proposed text amendments would necessitate changes to the Tumwater Municipal Code.

Staff Contacts

Erika Smith-Erickson, Land Use and Housing Planner
City of Tumwater Community Development Department
360-754-4180
esmith-erickson@ci.tumwater.wa.us

Brad Medrud, Planning Manager
City of Tumwater Community Development Department
360-754-4180
bmedrud@ci.tumwater.wa.us

ORDINANCE NO. O2023-017

AN ORDINANCE of the City Council of the City of Tumwater, Washington, amending Chapter 18.38, FP Flood Plain Overlay, of the Tumwater Municipal Code to address updates needed to bring the regulations into compliance with National Flood Insurance Program and State of Washington standards.

WHEREAS, the Legislature of the State of Washington has delegated the responsibility to local governmental units to adopt regulations designed to promote the public health, safety, and general welfare; and

WHEREAS, areas of the City are subject to periodic inundation and channel migration which results in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for protection and relief from flooding and channel migration, and impairment of the tax base, all of which adversely affect the public health, safety, and general welfare; and

WHEREAS, when floodplains and watersheds are developed without taking appropriate care and precautions, flood heights, frequencies, and velocities increase, causing a greater threat to humans, damage to property, destruction of natural floodplain functions, and adverse impacts to water quality and habitat; and

WHEREAS, rivers, streams, lakes, estuarine and marine areas, and their floodplains are major elements of healthy aquatic and riparian habitats and conveyance of flood waters. If watersheds, rivers, streams, lakes, estuaries, floodplains and other systems are not viewed holistically as biological and geomorphologic units, it can lead to serious degradation of habitat and increased flood hazards to people and human development; and

WHEREAS, over the years, natural processes have evolved that manage flood waters and channel flows in the most effective and efficient manner. Disruption of these processes through alterations to land cover, stream channels, wetlands, and other water bodies leads to increased flood hazards, loss of life and property, threats to public health, and loss of habitat; and

WHEREAS, State Department of Ecology staff completed a Federal Emergency Management Agency floodplain community assistance visit with City staff in May 2023 to review the City's participation in the National Flood Insurance Program (NFIP); and

WHEREAS, State Department of Ecology staff and City staff reviewed the City's NFIP community profile; and

WHEREAS, State Department of Ecology staff prepared a field report and completed an ordinance review based on 44 CFR 60, the Washington Model Ordinance and the checklist used to review local ordinances for NFIP compliance; and

WHEREAS, it was determined that Tumwater Municipal Code (TMC) 18.38 *FP Floodplain Overlay* should be updated to reflect current standards; and

WHEREAS, the Federal Emergency Management Agency has produced a new digital Flood Insurance Study and Flood Insurance Rate Map for the Deschutes River that will become effective on May 8, 2024; and

WHEREAS, the City is required to adopt the new digital Flood Insurance Study and Flood Insurance Rate Map for the Deschutes River and to regulate development within flood prone areas by the effective date using up to date regulations; and

WHEREAS, it is timely to amend the City's existing floodplain regulations to be more consistent with the Model Ordinance for Floodplain Management under the NFIP and the Endangered Species Act prior to May 8, 2024; and

WHEREAS, this Ordinance meets the goals and requirements of the Growth Management Act; and

WHEREAS, the proposed amendments to the City's existing floodplain regulations are consistent with the City's Comprehensive Plan; and

WHEREAS, the Attorney General *Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property* (September 2018) was reviewed and utilized by the City in objectively evaluating the proposed amendments; and

WHEREAS, this Ordinance was sent to the Washington State Department of Commerce on December 14, 2023 at least sixty days before the proposed code amendments were adopted, in accordance with RCW 36.70A.106; and

WHEREAS, on December 14, 2023, the Washington State Department of Commerce notified the City of Tumwater that the requirements for State Agency notification for the proposed amendments had been met, as required by RCW 36.70A.106; and

WHEREAS, an Environmental Checklist for a non-project action was prepared under the State Environmental Policy Act (Chapter 43.21C RCW),

pursuant to Chapter 197-11 WAC on December 13, 2023, and a Determination of Non-Significance (DNS) was issued on December 29, 2023; and

WHEREAS, the Planning Commission had a briefing on the code amendments on January 9, 2024, and a work session on the code amendments on January 23, 2024; and

WHEREAS, the Planning Commission held a public hearing on the code amendments on February 13, 2024; and

WHEREAS, following the public hearing and deliberations, the Planning Commission recommended approval of the code amendments by the City Council; and

WHEREAS, the City Council discussed the Planning Commission's recommendation on the code amendments at a work session on March 12, 2024; and

WHEREAS, the City Council considered the proposed code amendments on March 19, 2024; and

WHEREAS, the City Council finds that the provisions of this Ordinance are in the best interest of and protect the health, safety, and welfare of the residents of the City.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF TUMWATER, STATE OF WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Section 18.38.070, Definitions, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.070 Definitions.

Unless specifically defined below, terms or phrases used in this chapter shall be interpreted so as to give them the meaning they have in common usage and to give this chapter its most reasonable application.

“Adversely affect/adverse effect” means effects that are a direct or indirect result of the proposed action, or its interrelated or interdependent actions, and the effect is not discountable, insignificant or beneficial. Discountable effects are extremely unlikely to occur. Insignificant effects relate to the size of the impact and should never reach the scale where a take occurs. Based on best judgment, a person would not: (A) be able to meaningfully measure, detect, or evaluate insignificant effects; or (B) expect discountable effects to occur. Beneficial effects are contemporaneous positive effects without any adverse effects. In the event that the overall effect of the proposed action is beneficial, but is also likely to cause some adverse effects, then the proposed action is considered to result in an adverse effect.

“Alteration of watercourse” means any action that will change the location of the channel occupied by water within the banks of any portion of a riverine waterbody.

“Appurtenant structure” means a structure which is on the same parcel of property as the principal structure to be insured and the use of which is incidental to the use of the principal structure.

“Area of special flood hazard” means the land in the floodplain within a community subject to a 1 percent or greater chance of flooding in any given year. It is shown on the flood insurance rate map (FIRM) as zone A, AO, AH, A1-30, AE, A99, AR (V, VO, V1-30, VE). “Special flood hazard area” is synonymous in meaning with the phrase “area of special flood hazard”.

“Base flood” means the flood having a one percent chance of being equaled or exceeded in any given year (also referred to as the “one-hundred-year flood”). The area subject to the base flood is the special flood hazard area (SFHA) designated on flood insurance rate maps (FIRMs) as zones “A” or “V” including AE, AO, AH, A1-99 and VE.

“Base flood elevation (BFE)” means the elevation of the base flood above the datum of the effective FIRM.

“Basement” means any area of the structure having its floor sub-grade (below ground level) on all sides.

“Channel migration zone” means the area within the lateral extent of likely stream channel movement due to stream bank destabilization and erosion, rapid stream incision, aggradation, avulsions, and shifts in location of stream channels.

“Critical facility” means a facility necessary to protect the public health, safety and welfare during a flood. Critical facilities include, but are not limited to, schools, nursing homes, hospitals, police, fire and emergency operations installations, water and wastewater treatment plants, electric power stations, and installations which produce, use, or store hazardous materials or hazardous waste (other than consumer products containing hazardous substances or hazardous waste intended for household use).

“Development” means any manmade change to improved or unimproved real estate in the special flood hazard area (SFHA), including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, storage of equipment or materials, subdivision of land, removal of more than five percent of the native vegetation on the property, ~~or~~ alteration of natural site characteristics, or storage of equipment or materials.

“Dry floodproofing” means any combination of structural and nonstructural measures that prevent flood waters from entering a structure.

“Elevation certificate” means the official form (~~FEMA Form 81-31~~) used to provide elevation information necessary to ensure compliance with provisions of this chapter and determine the proper flood insurance premium rate.

“FEMA” means the Federal Emergency Management Agency, the agency responsible for administering the National Flood Insurance Program (NFIP).

“Fish and wildlife habitat conservation area” means lands needed to maintain species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created. These areas are designated by the city of Tumwater pursuant to the Washington State Growth Management Act and implementing regulations.

“Flood” or “flooding” means a general and temporary condition of partial or complete inundation of normally dry land areas from:

A. The overflow of inland or tidal waters; and/or

B. The unusual and rapid accumulation of runoff of surface waters from any source.

C. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (A) of this definition.

“Flood elevation study (FES)” means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards. Also known as a flood insurance study (FIS).

“Flood insurance rate map (FIRM)” means the official map on which the Federal Emergency Management Agency (FEMA) has delineated both the special flood hazard areas and the risk premium zones applicable to the city of Tumwater.

“Flood insurance study (FIS)” means the official report provided by the Federal Emergency Management Agency that includes flood profiles, the flood insurance rate map (FIRM), and the water surface elevation of the base flood.

“Flood protection elevation (FPE)” means the elevation above the datum of the effective FIRM to which new and substantially improved structures must be protected from flood damage.

“Floodplain administrator” means the community official designated by title to administer and enforce the floodplain management regulations.

“Flood proofing” means any combination of structural and nonstructural additions, changes, or adjustments to structures which reduce or eliminate risk of flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. Flood proofed structures are those that have the structural integrity and design to be impervious to floodwater below the base flood elevation (BFE).

“Floodway” means the channel of a stream or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot at any point. Also referred to as “regulatory floodway”.

“Functionally dependent use” means a use that must be located or carried out close to water, e.g., docking or port facilities necessary for the unloading of cargo or passengers or shipbuilding and ship repair, and does not include long term storage or related manufacturing facilities.

“Highest adjacent grade” means the highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure.

“Historic structure” means a structure that:

A. Is listed on the National Register of Historic Places, the Washington Heritage Register, or the Washington Heritage Barn Register; or

B. Has been certified to contribute to the historical significance of a registered historic district.

“Hyporheic zone” means a saturated layer of rock or sediment beneath and/or adjacent to a stream channel that contains some proportion of channel water or that has been altered by channel water infiltration.

“Impervious surface” means a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development. Common impervious surfaces include, but are not limited to, roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled, macadam or other surfaces which similarly impede the natural infiltration of stormwater.

“Lowest floor” means the lowest floor of the lowest enclosed area (including basement or crawlspace). An unfinished or flood resistant enclosure, usable solely for parking of vehicles, building access, or storage in an area other than a basement area, is not considered a structure’s lowest floor; provided, that such enclosure is compliant with TMC 18.38.260(F) (i.e., provided there are adequate openings to allow floodwaters into the area).

“Manufactured home” means a structure, transportable in one or more sections, which is built on a permanent chassis and is designed for use with or without a permanent foundation when attached to the required utilities. The term “manufactured home” does not include a “recreational vehicle.”

“Manufactured home park or subdivision” means a parcel (or contiguous parcels) of land divided into two or more manufactured home lots for rent or sale.

“Mean sea level” means for the purposes of the National Flood Insurance Program (NFIP), the vertical datum to which base flood elevations (BFEs) shown on a community's flood insurance rate map (FIRM) are referenced.

“Native vegetation” means plant species that are indigenous to the community’s area and that reasonably could be expected to naturally occur on the site.

“Natural floodplain functions” means the contribution that a floodplain makes to support habitat, including, but not limited to, providing flood storage and conveyance, reducing flood velocities, reducing sedimentation, filtering nutrients and impurities from runoff, processing organic wastes, moderating temperature fluctuations, and providing breeding and feeding grounds, shelter, and refugia for aquatic or riparian species.

“New construction” means structures for which the “start of construction” commenced on or after the effective date of this chapter and includes any subsequent improvements to such structures. For floodplain management purposes, “new construction” means structures for which the “start of construction” commenced on or after the effective date of a floodplain management regulation adopted by a community and includes any subsequent improvements to such structures.

“Protected area” means the lands that lie within the boundaries of the floodway, the riparian habitat zone, and the channel migration area. Because of the impact that development can have on flood heights and velocities and habitat, special rules apply in the protected area.

“Recreational vehicle” means a vehicle:

- A. Built on a single chassis; and
- B. Four hundred square feet or less when measured at the largest horizontal projection; and
- C. Designed to be self-propelled or permanently towable by an automobile or light duty truck; and
- D. Designed primarily for use as temporary living quarters for recreational, camping, travel, or seasonal use, not as a permanent dwelling.

“Riparian” means of, adjacent to, or living on the bank of a river, lake, pond, ocean, sound, or other water body.

“Riparian habitat zone” means the water body and adjacent land areas that are likely to support aquatic and riparian habitat as detailed in TMC 18.38.110(C).

“Special flood hazard area (SFHA)” means the land subject to inundation by the base flood. Special flood hazard areas are designated on flood insurance rate maps (FIRMs) with the letters “A” or “V” including AE, AO, AH, A1-99 and VE. The special flood hazard area is also referred to as the area of special flood hazard or SFHA.

“Start of construction” includes substantial improvement, and means the actual start of construction, repair, reconstruction, rehabilitation, addition, placement or other improvement that occurred before the permit’s expiration date. The actual

start is either the first placement of permanent construction of a structure on a site, such as the pouring of slab or footings, the installation of piles, the construction of columns, or any work beyond the stage of excavation; or the placement of a manufactured home on a foundation. Permanent construction does not include land preparation, such as clearing, grading and filling; nor does it include the installation of streets and/or walkways; nor does it include excavation for a basement, footings, piers, or foundations or the erection of temporary forms; nor does it include the installation on the property of accessory structures not occupied as dwelling units or not part of the main structure. For a substantial improvement, the actual start of construction means the first alteration of any wall, ceiling, floor, or other structural part of a building, whether or not that alteration affects the external dimensions of the building.

“Structure” means a walled and roofed building, including a gas or liquid storage tank that is principally above ground, as well as a manufactured home.

“Substantial damage” means damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would equal or exceed fifty percent of the market value of the structure before the damage occurred. Substantial damage also means flood-related damage sustained by a structure on two separate occasions during a ten-year period for which the cost of repairs at the time of each such flood event, on the average, equals or exceeds twenty-five percent of the market value of the structure before the damage occurred.

“Substantial improvement” means any repair, reconstruction, rehabilitation, addition, replacement, or other improvement of a structure, the cost of which equals or exceeds fifty percent of the market value of the structure before the “start of construction” of the improvement. This term includes structures which have incurred “substantial damage,” regardless of the actual repair work performed. The term does not include any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions, any alteration of a “historic structure”, provided that the alteration will not preclude the structure's continued designation as a “historic structure.”

“Variance” means a grant of relief from the requirements of this chapter which permits construction in a manner that would otherwise be prohibited by this chapter.

“Water typing” means a system for classifying water bodies according to their size and fish habitat characteristics. The Washington Department of Natural Resources’ Forest Practices Water Typing classification system is hereby adopted by reference. The system defines four water types:

A. Type “S” = shoreline: streams that are designated “shorelines of the state,” including marine shorelines.

B. Type “F” = fish: streams that are known to be used by fish or meet the physical criteria to be potentially used by fish.

C. Type “Np” = nonfish perennial streams.

D. Type “Ns” = nonfish seasonal streams.

“Zone” means one or more areas delineated on the FIRM. The following zones may be used on the adopted FIRM. The special flood hazard area (SFHA) is comprised of the A and V zones.

“A” means SFHA where no base flood elevation (BFE) is provided.

“A#” means numbered A zones (e.g., A7 or A14), SFHA with a ~~base flood~~ elevation BFE.

“AE” means SFHA with a ~~base flood elevation~~ BFE.

“AO” means SFHA subject to inundation by shallow flooding usually resulting from sheet flow on sloping terrain, with average depths between one and three feet. Average flood depths are shown.

“AH” means SFHA subject to inundation by shallow flooding (usually areas of ponding) with average depths between one and three feet. ~~Base flood elevations~~ BFEs are shown.

“B” means the area between the SFHA and the five-hundred-year flood of the primary source of flooding. It may also be an area with a local, shallow flooding problem or an area protected by a levee.

“C” means an area of minimal flood hazard, as above the five-hundred-year flood level of the primary source of flooding. B and C zones may have flooding that does not meet the criteria to be mapped as a special flood hazard area, especially ponding and local drainage problems.

“D” means area of undetermined but possible flood hazard.

“V” means the SFHA subject to coastal high hazard flooding including waves of three feet or greater in height. There are three types of V zones: V, V#, and VE, and they correspond to the A zone designations.

“X” means the area outside the mapped SFHA.

“Shaded X” means the same as a zone B, above.

(Ord. O2015-007, Amended, 02/02/2016)

Section 2. Section 18.38.090, Special flood hazard area, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.090 Special flood hazard area.

A. The special flood hazard area (SFHA) is the area subject to flooding by the base flood and subject to the provisions of this chapter. It is identified by the Federal Emergency Management Agency in a scientific and engineering report entitled,

“Flood Insurance Study for Thurston County, Washington and Incorporated Areas,” dated ~~October 16, 2012~~ May 8, 2024 and any revisions thereto, with an accompanying Flood Insurance Rate Map (FIRM) for Thurston County, Washington and Incorporated Areas, dated ~~October 16, 2012~~ May 8, 2024, and any revisions thereto, which are hereby adopted by reference and declared to be a part of this chapter. The flood insurance study (FIS) and the FIRM are on file at Tumwater City Hall, 555 Israel Road SW, Tumwater, Washington 98501.

B. Upon receipt of a floodplain development permit application, the floodplain administrator shall compare the elevation of the site to the base flood elevation (BFE). A development project is not subject to the requirements of this chapter if it is located on land that can be shown to be:

1. Outside the protected area; and
2. Higher than the ~~base flood elevation~~ BFE as demonstrated by an elevation certificate.

The floodplain administrator shall inform the applicant that the project will still be subject to the flood insurance purchase requirements unless the owner receives a letter of map amendment from FEMA.

C. The floodplain administrator shall make interpretations where needed, as to the exact location of the boundaries of the SFHA and the protected area (e.g., where there appears to be a conflict between the mapped SFHA boundary and actual field conditions as determined by the ~~base flood elevation~~ BFE and ground elevations). The applicant may appeal the floodplain administrator’s interpretation of the location of the boundary to the hearing examiner.

(Ord. O2016-009, Amended, 07/09/2016; Ord. O2015-007, Amended, 02/02/2016)

Section 3. Section 18.38.100, Flood hazard data, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.100 Flood hazard data.

A. The base flood elevation (BFE) for the SFHAs of the city of Tumwater shall be as delineated on the one-hundred-year flood profiles in the Flood Insurance Study for Thurston County, Washington and Incorporated Areas.

B. The ~~base flood elevation~~ BFE for each SFHA delineated as a “zone AH” or “zone AO” shall be that elevation (or depth) delineated on the flood insurance rate map (FIRM). Where base flood depths are not available in zone AO, the base flood elevation shall be considered to be two feet above the highest grade adjacent to the structure.

C. The ~~base flood elevation~~ BFE for all other SFHAs shall be as defined in subsection F of this section and 18.38.120(C).

D. The flood protection elevation (FPE) shall be the base flood elevation plus one foot.

E. The floodway shall be as delineated on the ~~flood insurance rate map~~ FIRM or in accordance with subsection F of this section and TMC 18.38.120(D).

F. Where ~~base flood elevation-BFE~~ and floodway data have not been provided in special flood hazard areas in accordance with 18.38.090, the floodplain administrator shall obtain, review, and reasonably utilize any ~~base flood elevation BFE~~ and floodway data available from a federal, state, or other source.

(Ord. O2015-007, Amended, 02/02/2016)

Section 4. Section 18.38.130, Establishment of floodplain development permit, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.130 ~~Establishment of f~~Floodplain development permit required.

A floodplain development permit ~~shall be obtained~~ is required before construction or development begins within the special flood hazard area (SFHA) established in TMC 18.38.090. The permit shall be for all development as set forth in TMC 18.38.070, Definitions.

(Ord. O2015-007, Amended, 02/02/2016)

Section 5. Section 18.38.140, Floodplain development permit application, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.140 Floodplain development permit application.

Application for a floodplain development permit shall be made on forms furnished by the floodplain administrator and shall include, but are not limited to:

A. One or more site plans, drawn to scale, showing:

1. The nature, location, dimensions, and elevations of the property in question;
2. Names and location of all lakes, water bodies, waterways and drainage facilities within three hundred feet of the site;
3. The elevations of the ten-, fifty-, one-hundred-, and five-hundred-year floods, where such data are available;
4. The boundaries of the SFHA, floodway, riparian habitat zone, and channel migration area, delineated in accordance with TMC 18.38.080 through 18.38.120;
5. The proposed drainage system including, but not limited to, storm sewers, overland flow paths, detention facilities and roads;
6. Existing and proposed structures, fill, pavement and other impervious surfaces, and sites for storage of materials;
7. All wetlands;
8. Designated fish and wildlife habitat conservation areas, and habitat areas identified for conservation or protection under state or federal or local laws or regulations (e.g., Endangered Species Act, Magnuson-Stevens Fishery

Conservation and Management Act, Growth Management Act, Shorelines Management Act, Priority Habitat and Species List); and

9. Existing native vegetation and proposed revegetation.

B. If the proposed project involves grading, excavation, or filling, the site plan shall include proposed post-development terrain at one-foot contour intervals.

C. If the proposed project includes a new structure, substantial improvement, or repairs to a substantially damaged structure that will be elevated, the application shall include the flood protection elevation (FPE) for the building site and the proposed elevations of the following:

1. The top of bottom floor (including basement, crawlspace, or enclosure floor).
2. The top of the next higher floor.
3. The bottom of the lowest horizontal structural member (in V zones only).
4. The top of the slab of an attached garage.
5. The lowest elevation of machinery or equipment servicing the structure.
6. The lowest adjacent (finished) grade next to structure.
7. The highest adjacent (finished) grade next to structure.
8. The lowest adjacent grade at the lowest elevation of a deck or stairs, including structural support.

D. If the proposed project includes a new structure, substantial improvement, or repairs to a substantially damaged nonresidential structure that will be dry floodproofed, the application shall include the FPE for the building site, the elevation in relation to the datum of the effective FIRM to which the structure will be dry floodproofed, and a certification by a registered professional engineer or licensed architect that the dry floodproofing methods meet the floodproofing criteria in TMC 18.38.270.

E. If a project will alter the base flood elevation data (BFE) or boundaries of the SFHA, the project applicant shall provide the floodplain administrator with engineering documentation and analysis regarding the proposed change. If the change to the BFE or boundaries of the SFHA would normally require a Letter of Map Change, the project approval shall be conditioned accordingly.

~~F. The proposed project must be designed and located so that new structural flood protection is not needed.~~

G. The application shall include a description of the extent to which a stream, lake, or other water body, including its shoreline, will be altered or relocated as a result of the proposed development.

1. Bank stabilization measures along salmonid-bearing streams, channel migration zones, and along estuarine and marine shorelines must be minimized

to the maximum extent possible. If bank stabilization measures are necessary, bioengineered armoring of streambanks and shorelines must be used.

2. Channel Migration. No activity is allowed that limits the natural meandering pattern of the channel migration zone; however, natural channel migration patterns may be enhanced or restored.

HG. The application shall include documentation that the applicant will apply for all necessary permits required by federal, state, or local law. The application shall include written acknowledgment that the applicant understands that the final certification of use or certificate of occupancy will be issued only if the applicant provides copies of the required federal, state, and local permits or letters stating that a permit is not required. The floodplain permit is not valid if those other permits and approvals are not obtained prior to any ground disturbing work or structural improvements.

IH. The application shall include acknowledgment by the applicant that representatives of any federal, state or local unit of government with regulatory authority over the project are authorized to enter upon the property to inspect the development.

J. The application shall include the elevation in relation to mean sea level, of the lowest floor (including basement) of all structures recorded on a current elevation certificate with section B completed by the floodplain administrator.

K. The application shall include the elevation relation to mean sea level to which any structure has been flood proofed.

L. The application shall include, where development is proposed in a floodway, an engineering analysis indicating no rise of the base flood elevation (BFE).

M. The application shall include any other such information that may be reasonably required by the floodplain administrator in order to review the application.

(Ord. O2015-007, Amended, 02/02/2016)

Section 6. Section 18.38.170, Duties of the floodplain administrator, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.170 Duties of the floodplain administrator.

Duties of the floodplain administrator shall include, but not be limited to:

A. Review all floodplain development permits to determine that the permit requirements of this chapter have been satisfied.

B. Review all floodplain development permits to determine that all necessary permits have been obtained from those federal, state, or local governmental agencies from which prior approval is required, including those local, state or federal permits that may be required to assure compliance with the Endangered Species Act and/or other appropriate state or federal laws.

C. Review all floodplain development permits to determine if the proposed development is located in the ~~protected area~~ floodway. If located in the ~~protected area~~ floodway, ensure that the provisions of TMC 18.38.320 through 18.38.400 are met.

D. Ensure that all development activities within the special flood hazard area (SFHA) of the jurisdiction of the city of Tumwater meet the requirements of this chapter.

E. Inspect all development projects before, during and after construction to ensure compliance with all provisions of this chapter, including proper elevation of the structure.

F. Maintain for public inspection all records pertaining to the provisions of this chapter.

G. Submit reports to include the projects for which they issue floodplain development permits, including effects to flood storage, fish habitat, and all indirect effects of development and mitigation provided to FEMA as required for the National Flood Insurance Program (NFIP).

H. Notify FEMA of any proposed amendments to this chapter.

I. Cooperate with state and federal agencies to improve flood and other technical data and notify FEMA of any new data that would revise the FIRM.

J. Interpretations as to exact location of the boundaries of the areas of special flood hazards where needed (e.g., where there appears to be a conflict between a mapped boundary and actual field conditions). The person contesting the location of the boundary shall be given a reasonable opportunity to appeal the interpretation. Such appeals shall be granted consistent with the standards of 44 CFR 60.6 of the Rules and Regulations of the NFIP.

(Ord. O2015-007, Amended, 02/02/2016)

Section 7. Section 18.38.180, Records, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.180 Records.

A. Where base flood elevation data (BFE) have been obtained pursuant to TMC 18.38.100 and 18.38.120, the floodplain administrator shall obtain, record, and maintain the actual “finished construction” elevations (in relation to mean sea level) of the lowest floor (including basement) of all new or substantially improved structures, for the locations listed in TMC 18.38.140(C), and whether or not the structure contains a basement. This information shall be recorded on a current FEMA Elevation Certificate (~~FEMA Form 81-31~~), signed and sealed by a professional land surveyor, currently licensed in the state of Washington.

B. For all new or substantially improved dry floodproofed nonresidential structures, where ~~base flood elevation~~ BFE data has been obtained pursuant to TMC 18.38.100 and 18.38.120, the floodplain administrator shall ~~obtain~~

1. Obtain, record and maintain the elevation (in relation to ~~the datum of the effective FIRM~~ mean sea level) to which the structure was floodproofed.
2. This information shall be recorded on a current FEMA floodproofing certificate (~~FEMA FORM 81-65~~) by a professional engineer currently licensed in the state of Washington.

C. Where elevation data is not available, either through the FIS, FIRM, or from another authoritative source (as required by TMC 18.38.100(F)), the floodplain administrator shall review applications for floodplain development to assure that proposed construction will be reasonably safe from flooding based on the use of historical data, high water marks, photographs of past flooding, etc., where available.

Failure to elevate habitable buildings at least two feet above the highest adjacent grade in these zones may result in higher insurance rates.

D. The floodplain administrator shall obtain, record, and maintain the records for public inspection of the following:

1. Certification required by TMC 18.38.360(1).
2. Records of all variance actions, including justification for their issuance.
3. Improvement and damage calculations.
4. All records pertaining to the provisions of this ordinance.

(Ord. O2015-007, Amended, 02/02/2016)

Section 8. Section 18.38.210, Subdivisions, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.210 Development and S subdivisions.

This section applies to all development and subdivision proposals. Subdivision proposals include short subdivisions, short plats, binding site plans, planned developments, and new and expansions to manufactured housing parks.

A. All proposals shall be consistent with the need to minimize flood damage.

B. ~~The A~~ proposed subdivision must have one or more new lots in the special flood hazard area (SFHA) set aside for open space use through deed restriction, easement, subdivision covenant, or donation to a public agency.

1. In the ~~special flood hazard area~~ (SFHA) outside the protected area, zoning must maintain a low density of floodplain development.
2. In the ~~special flood hazard area~~ (SFHA) outside the protected area in which the current zoning is less than five acres must maintain the current zoning.

3. The density of the development in the portion of the development outside the ~~special flood hazard area (SFHA)~~ may be increased to compensate for the amount of land in the ~~special flood hazard area (SFHA)~~ preserved as open space in accordance with TMC Title 18.

C. If a parcel has a buildable site outside the special flood hazard area, it shall not be subdivided to create a new lot, tract, or parcel within a binding site plan that does not have a buildable site outside the special flood hazard area. This provision does not apply to lots set aside from development and preserved as open space.

D. All proposals shall have utilities and facilities, such as sewer, gas, electrical, and water systems located and constructed to minimize or eliminate flood damage.

E. All subdivision proposals shall ensure that ~~all subdivisions have~~ there is at least one access road connected to land outside the special flood hazard area (SFHA) with the surface of the road at or above the FPE wherever possible.

F. All proposals shall have adequate drainage provided to avoid exposure to water damage.

G. ~~The~~ A final recorded subdivision ~~plat~~ shall include a notice that part of the property is in the SFHA, riparian habitat zone and/or channel migration area, as appropriate.

H. Where subdivision proposals and other proposed developments contain greater than fifty lots or five acres (whichever is the lesser) base flood elevation data (BFE) shall be included as part of the application.

(Ord. O2015-007, Amended, 02/02/2016)

Section 9. Section 18.38.260, Flood protection standards, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.260 Flood protection standards.

A. In AE and A1-30 zones or other A zoned areas where the base flood elevation data (BFE) has been determined or can be reasonably obtained, A all new structures and substantial improvements of any structure shall have the lowest floor, including basement, elevated at least one foot above the FPE BFE.

B. The structure shall be aligned parallel with the direction of flood flows where practicable.

C. All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage.

D. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.

E. ~~The structure~~ All new construction and substantial improvements, including those related to manufactured homes, shall be anchored to prevent flotation,

collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads including the effects of buoyancy.

F~~D~~. All materials below the FPE shall be resistant to flood damage and firmly anchored to prevent flotation. Materials harmful to aquatic wildlife, such as creosote, are prohibited below the FPE.

G~~E~~. Electrical, heating, ventilation, duct work, plumbing, and air-conditioning equipment and other service facilities shall be elevated above the FPE. Water, sewage, electrical, and other utility lines below the FPE shall be constructed so as to prevent water from entering or accumulating within them during conditions of flooding.

H~~F~~. Fully enclosed areas below the lowest floor that are subject to flooding shall be used only for parking, storage, or building access and shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement shall either be certified by a registered professional engineer or licensed architect and/or meet or exceed the following minimum criteria:

1. A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided.
2. The bottom of all openings shall be no higher than one foot above grade.
3. Openings may be equipped with screens, louvers, or other coverings or devices provided that they permit the automatic entry and exit of floodwaters.

I~~G~~. In zones V, V1-30 and VE, new structures and substantial improvements shall be elevated on pilings or columns so that:

1. The bottom of the lowest horizontal structural member of the lowest floor (excluding the pilings or columns) is elevated above the FPE.
2. The pile or column foundation and structure attached thereto is anchored to resist flotation, collapse and lateral movement due to the effects of wind and water loads acting simultaneously on all building components. Wind and water loading values shall each have a one percent chance of being equaled or exceeded in any given year (one-hundred-year mean recurrence interval).
3. The areas below the lowest floor that are subject to flooding shall be free of obstruction.
4. The structure or improvement shall be located landward of the reach of mean high tide.
5. The use of fill for structural support of a structure or addition is prohibited.
6. A registered professional engineer or architect shall develop or review the structural design, specifications and plans for the construction, and shall certify

that the design and methods of construction to be used are in accordance with accepted standards of practice for meeting these provisions.

J. New construction and substantial improvement of any residential structure in an Unnumbered A zone for which a BFE is not available and cannot be reasonably obtained the lowest floor shall be at least two feet above the highest adjacent grade.

K. A garage attached to a residential structure, constructed with the garage floor slab below the BFE, must be designed to allow for the automatic entry and exit of floodwaters.

(Ord. O2015-007, Amended, 02/02/2016)

Section 10. Section 18.38.270, Nonresidential construction, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.270 Nonresidential construction.

~~New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall be elevated in accordance with TMC 18.38.260. As an alternative to elevation, a new or substantial improvement to a nonresidential structure and its attendant utility and sanitary facilities may be dry floodproofed in A zones. The project must meet the following:~~

~~A. The structure is not located in zones V, V1-30, or VE; and~~

~~B. Below the FFE the structure is watertight with walls substantially impermeable to the passage of water; and~~

~~C. The structural components are capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and~~

~~D. The plans are certified by a registered professional engineer or licensed architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the floodplain administrator as set forth in TMC 18.38.180(B) and 18.38.190(A)(1).~~

New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall meet the requirements of TMC 18.38.270(A) or (B), below.

A. New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall meet all of the following requirements:

1. In AE and A1-30 zones or other A zoned areas where the base flood elevation data (BFE) has been determined or can be reasonably obtained:

New construction and substantial improvement of any commercial, industrial, or other nonresidential structure shall have the lowest floor, including basement, elevated one foot or more above the BFE, or elevated as required by ASCE 24,

whichever is greater. Mechanical equipment and utilities shall be waterproofed or elevated at least one foot above the BFE, or as required by ASCE 24, whichever is greater.

2. If located in an unnumbered A zone for which a BFE is not available and cannot be reasonably obtained, the lowest floor shall be at least two feet above the highest adjacent grade.

3. Fully enclosed areas below the lowest floor that are subject to flooding are prohibited or shall meet the requirements of TMC 18.38.210.

B. If the requirements of TMC 18.38.270(A) are not met, new construction and substantial improvement of any commercial, industrial or other nonresidential structure shall meet all of the following requirements:

1. Be dry flood proofed so that below one foot or more above the base flood level the structure is watertight with walls substantially impermeable to the passage of water or dry flood proofed to the elevation required by ASCE 24, whichever is greater;

2. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and

3. Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the official as set forth in TMC 18.38.180.

(Ord. O2015-007, Amended, 02/02/2016)

Section 11. Section 18.38.280, Manufactured homes, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.280 Manufactured homes.

All manufactured homes to be placed or substantially improved on sites shall be:

A. Elevated on a permanent foundation in accordance with TMC 18.38.260; and

B. Securely anchored to an adequately anchored foundation system to resist flotation, collapse and lateral movement. Methods of anchoring may include, but are not to be limited to, use of over-the-top or frame ties to ground anchors, and shall be installed using methods and practices that minimize flood damage. This requirement is in addition to other applicable anchoring requirements for resisting wind forces.

(Ord. O2015-007, Amended, 02/02/2016)

Section 12. A new Section TMC 18.38.285, Detached accessory structures, is hereby added to the Tumwater Municipal Code to read as follows:

18.38.285 Detached accessory structures.

A. Detached accessory structures used solely for parking of vehicles or limited storage may be constructed such that the floor is below the base flood elevation data (BFE), provided the structure is designed and constructed in accordance with the following requirements:

1. In special flood hazard areas other than coastal high hazard areas (Zones A, AE, AH, AO, and A1-30), the structure is not larger than a one-story two-car garage;
2. In coastal high hazard areas (Zones V, VE, V1 30, and VO), the structure is not larger than 100 sq. ft. in area;
3. The portions of the structure located below the BFE must be built using flood resistant materials;
4. The structure must be adequately anchored to prevent flotation, collapse, and lateral movement;
5. Any machinery or equipment servicing the structure must be elevated or floodproofed to or above the BFE;
6. The structure must comply with floodway encroachment provisions in TMC 18.38.360(1);
7. The structure must be designed to allow for the automatic entry and exit of flood waters in accordance with TMC 18.38.240(F);
8. The structure shall have low damage potential;
9. If the structure is converted to another use, it must be brought into full compliance with the standards governing such use; and
10. The structure shall not be used for human habitation.

Section 13. A new Section TMC 18.38.325, Storage of materials and equipment, is hereby added to the Tumwater Municipal Code to read as follows:

18.38.325 Storage of materials and equipment.

A. The storage or processing of materials that could be injurious to human, animal, or plant life if released due to damage from flooding is prohibited in special flood hazard areas.

B. Storage of other material or equipment may be allowed if not subject to damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning.

Section 14. Section 18.38.360, Floodway standards, of the Tumwater Municipal Code is hereby amended to read as follows:

18.38.360 Floodway standards.

A. In addition to the other requirements of this chapter, a project to develop in the floodway as delineated pursuant to TMC 18.38.100(E) and (F) or 18.38.120(D) shall meet the following criteria:

1. Encroachments, including fill, new construction, substantial improvements, and other development is prohibited unless the applicant shall provides a certification by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed development would not result in any increase in flood levels during the occurrence of the base flood discharge.

2. Construction or reconstruction of residential structures is prohibited within designated floodways, except for the following repairs, reconstruction, or improvements to a residential structure which do not increase the ground floor area. The following exceptions must still meet all other requirements in the chapter, including subsection (A)(1) of this section:

a. Repairs, reconstruction, or improvements to a residential structure that do not increase the ground floor area, providing the cost of which does not exceed fifty percent of the market value of the structure either:

i. Before the repair, or reconstruction is started; or

ii. If the structure has been damaged, and is being restored, before the damage occurred. Any project for improvement of a structure to correct existing violations of state or local health, sanitary, or safety code specifications that have been identified by a local code enforcement official, and which are the minimum necessary to assure safe living conditions, or to an historic structure, may be excluded from the fifty percent calculations;

b. Repairs, replacement, reconstruction, or improvements to existing farmhouses located in designated floodways and located on designated agricultural lands that do not increase the building's total square footage of encroachment and are consistent with all requirements of WAC 173-158-075;

c. Repairs, replacement, reconstruction, or improvements to substantially damaged residential dwellings other than farmhouses that do not increase the building's total square footage of encroachment and are consistent with all requirements of WAC 173-158-076; or

d. Repairs, reconstruction, or improvements to residential structures identified as historic structures that do not increase the building's dimensions.

B. In riverine special flood hazard areas where a floodway has not been delineated pursuant to TMC 18.38.100(E) and (F) or 18.38.120(D), the applicant for a project to develop in the SFHA shall provide a certification by a registered professional engineer demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed development and

all other past or future similar developments would not cumulatively result in an increase of flood levels during the occurrence of the base flood discharge by more than one foot.

C. If TMC 18.38.360(A)(1) is satisfied or construction is allowed pursuant to TMC 18.38.360(A)(2), all new construction and substantial improvements in the floodway shall comply with all applicable flood hazard reduction provisions of this chapter.

(Ord. O2015-007, Amended, 02/02/2016)

Section 15. A new Section TMC 18.38.450, Penalties for noncompliance, is hereby added to the Tumwater Municipal Code to read as follows:

18.38.450 Penalties for noncompliance.

A. No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this ordinance and other applicable regulations. Violations of the provisions of this ordinance by failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with conditions), shall constitute a misdemeanor. Any person who violates this ordinance or fails to comply with any of its requirements shall upon conviction thereof be fined not more than one thousand dollars (\$1,000.00) or imprisoned for not more than ninety (90) days, or both for each violation, and in addition shall pay all costs and expenses involved in the case. Nothing herein contained shall prevent the city of Tumwater from taking such other lawful action as is necessary to prevent or remedy any violation.

B. Enforcement under this section is in addition to and does not preclude or limit any other forms of enforcement available to the city including, but not limited to, enforcement under any provision of TMC Chapter 1.10, nuisance actions, actions for injunctions, or any other civil or equitable actions to abate, discontinue, or correct, acts in violation of this code.

Section 16. Corrections. The City Clerk and codifiers of this ordinance are authorized to make necessary corrections to this ordinance including, but not limited to, the correction of scrivener/clerical errors, references, ordinance numbering, section/subsection numbers and any references thereto.

Section 17. Ratification. Any act consistent with the authority and prior to the effective date of this ordinance is hereby ratified and affirmed.

Section 18. Severability. The provisions of this ordinance are declared separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section, or portion of this ordinance or the invalidity of the application thereof to any person or circumstance, shall not affect the validity of the remainder of the ordinance, or the validity of its application to other persons or circumstances.

Section 19. Effective Date. This ordinance shall become effective thirty (30) days after passage, approval and publication as provided by law.

ADOPTED this _____ day of _____, 2024.

CITY OF TUMWATER

Debbie Sullivan, Mayor

ATTEST:

Melody Valiant, City Clerk

APPROVED AS TO FORM:

Karen Kirkpatrick, City Attorney

Published:_____

Effective Date:_____

Ordinance No. 02023-017

Floodplain Overlay Amendments

January 23, 2024
Planning Commission Work Session



Background

- Close to three hundred towns, cities, counties, and tribes in the state participate in the Federal Emergency Management Agency's (FEMA) National Flood Insurance Program (NFIP)
- Continued enforcement of the City's floodplain management regulations (TMC 18.38 *FP Floodplain Overlay*) allows FEMA to make federally backed flood insurance available to property owners within the City



Background

- As a condition of participation in the NFIP, communities are required to adopt and enforce flood hazard reduction regulations that meet the minimum requirements of the NFIP
- In May 2023, City staff completed a FEMA floodplain community assistance visit (CAV) with State Department of Ecology staff to review the City's participation in the National Flood Insurance Program
- The CAV determined that TMC 18.38 *FP Floodplain Overlay* should be updated to reflect FEMA current standards

Background

- On November 8, 2023, FEMA notified the City of the final flood determinations for Thurston County, Washington, and Incorporated Areas, which includes the City
- The FEMA flood hazard determinations for the City are considered final
- The Flood Insurance Study (FIS) report and Flood Insurance Rate Maps (FIRM) covering the City will be effective May 8, 2024

Requirement

- Prior to the May 8, 2024, effective date of the FIS and FIRM, the City must amend its existing floodplain regulations to be more consistent with the Model Ordinance for Floodplain Management under the NFIP, the Endangered Species Act, and to maintain its eligibility in the NFIP



Staff Report

The staff report includes:

- Summaries of the fifteen proposed amendments
- The code sections amended or added
- Proposed amendment language

TMC 18.38.017- Definitions

- Clarify and add definitions as needed for enhanced interpretation of floodplain regulations.
- Eight new definitions added:
 - “Alteration of watercourse” means any action that will change the location of the channel occupied by water within the banks of any portion of a riverine waterbody.
 - “Area of special flood hazard” means the land in the floodplain within a community subject to a 1 percent or greater chance of flooding in any given year. It is shown on the flood insurance rate map (FIRM) as zone A, AO, AH, A1-30, AE, A99, AR (V, VO, V1-30, VE). “Special flood hazard area” is synonymous in meaning with the phrase “area of special flood hazard”.
 - “Flood elevation study (FES)” means an examination, evaluation and determination of flood hazards and, if appropriate, corresponding water surface elevations, or an examination, evaluation and determination of mudslide (i.e., mudflow) and/or flood-related erosion hazards. Also known as a flood insurance study (FIS).
 - “Floodplain administrator” means the community official designated by title to administer and enforce the floodplain management regulations.
 - “Flood proofing” means any combination of structural and nonstructural additions, changes, or adjustments to structures which reduce or eliminate risk of flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. Flood proofed structures are those that have the structural integrity and design to be impervious to floodwater below the base flood elevation.
 - “Highest adjacent grade” means the highest natural elevation of the ground surface prior to construction next to the proposed walls of a structure.
 - “Mean sea level” means for the purposes of the National Flood Insurance Program, the vertical datum to which base flood elevations shown on a community's flood insurance rate map are referenced.
 - “Structure” means a walled and roofed building, including a gas or liquid storage tank that is principally above ground, as well as a manufactured home.



18.38.090 – Special flood hazard areas

- Updating language to reflect most current versions of the Flood Insurance Study (FIS) and Flood Insurance Rate Maps (FIRMs) (effective May 8, 2024)
- For consistency with the definitions section, using the acronym “BFE” for Base Flood Elevation

TMC 18.38.100 – Flood hazard data

- For consistency with the definitions section, using the acronym FIRM
- Added reference to TMC 18.38.090 for BFE and Floodway areas when data has not been provided or is not available in the Flood Insurance Study and Flood Insurance Rate Maps

TMC 18.38.130 – Floodplain development permit required

- Revised the section name to be more clear
- Removed passive language
- States a permit is required in special flood hazard areas (SFHAs) defined in TMC 18.39.090

TMC 18.38.140 – Floodplain development permit application

- Updated acronyms to be consistent with the definitions section
- Added 5 subsections:
 - E. If a project will alter the base flood elevation data (BFE) or boundaries of the SFHA, the project applicant shall provide the floodplain administrator with engineering documentation and analysis regarding the proposed change. If the change to the BFE or boundaries of the SFHA would normally require a Letter of Map Change, the project approval shall be conditioned accordingly.
 - J. The application shall include the elevation in relation to mean sea level, of the lowest floor (including basement) of all structures recorded on a current elevation certificate with section B completed by the floodplain administrator.
 - K. The application shall include the elevation relation to mean sea level to which any structure has been flood proofed.
 - L. The application shall include, where development is proposed in a floodway, an engineering analysis indicating no rise of the base flood elevation (BFE).
 - M. The application shall include any other such information that may be reasonably required by the floodplain administrator in order to review the application.



TMC 18.38.180 – Records

- Updated acronyms
- Clarified information required to be obtained for record
- Removed passive language
- Provides a process for floodplain administrator to ensure proposed construction will be safe from flooding when elevation data is not available
- Adds a list of information the floodplain administrator shall obtain and make available to the public



TMC 18.38.210 – Development and subdivisions

- Clarifies short subdivisions, short plats, and binding site plans are subject to TMC 18.38.210
- Updated language to acronyms
- Subdivisions or developments with over 50 lots or 5 acres must provide base flood elevation data with the application

TMC 18.38.184 – Flood protection standards

- In areas where the base flood elevation (BFE) data has been determined or obtained (A zones), all new development must be elevated at least one foot above BFE
- Materials used shall be resistant to flood damage
- Construction methods that minimize flood damage
- All structures, including manufactured homes and substantial improvements, shall be anchored properly
- New construction and substantial improvement of any residential structure in an Unnumbered A zone and BFE isn't available shall be raised two feet above highest adjacent grade
- An attached garage constructed with the floor slab below the BFE, must be designed to allow for the automatic entry and exit of floodwaters



TMC 18.38.270- Nonresidential construction

- Reformatted the whole section
- Created clear standards for non-residential development
- In AE and A1-30 zones or other A zoned areas: New construction and substantial improvement of any commercial, industrial, or other nonresidential structure shall have the lowest floor, including basement, elevated one foot or more above the BFE
- unnumbered A zone for which a BFE is not available : the lowest floor shall be at least two feet above the highest adjacent grade.



TMC 18.38.280- Manufactured homes

- Added clarifying requirements for anchoring of manufactured homes that minimize flood damage
- States other anchoring requirements throughout TMC 18.38 are applicable

TMC 18.38.285- Detached accessory structures

- New section
- Adds standards to allow for structures to be built below the BFE for used solely for parking of vehicles or limited storage
- Different flood zones have different requirements for detached structure such as size, elevation, materials, item stored, and anchoring



TMC 18.38.325- Storage of materials and equipment

- New section
- The storage or processing of materials that could be injurious to human, animal, or plant life if released due to damage from flooding is prohibited in special flood hazard areas
- Storage of other material or equipment may be allowed if not subject to damage by floods and if firmly anchored to prevent flotation, or if readily removable from the area within the time available after flood warning

TMC 18.38.360 – Floodway standards

- Encroachments, including fill, new construction, substantial improvements, and other development is prohibited unless a certification by a registered professional engineer demonstrating development would not result in any increase in flood levels during the occurrence of the base flood discharge
- Clarifies that repairs, reconstruction, or improvements to a residential structure which do not increase the ground floor area may be allowed subject to outlined requirements
- TMC 18.38.360(A)(1) is satisfied or construction is allowed pursuant to TMC 18.38.360(A)(2), all new construction and substantial improvements in the floodway shall comply with all applicable flood hazard reduction provisions of 18.38



TMC 18.38.450- Penalties for noncompliance

- New section

- A. *No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this ordinance and other applicable regulations. Violations of the provisions of this ordinance by failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with conditions), shall constitute a misdemeanor. Any person who violates this ordinance or fails to comply with any of its requirements shall upon conviction thereof be fined not more than one thousand dollars (\$1,000.00) or imprisoned for not more than ninety (90) days, or both for each violation, and in addition shall pay all costs and expenses involved in the case. Nothing herein contained shall prevent the city of Tumwater from taking such other lawful action as is necessary to prevent or remedy any violation.*
- B. *Enforcement under this section is in addition to and does not preclude or limit any other forms of enforcement available to the city including, but not limited to, enforcement under any provision of TMC Chapter 1.10, nuisance actions, actions for injunctions, or any other civil or equitable actions to abate, discontinue, or correct, acts in violation of this code.*



SEPA and Notice of Intent

- Notice of Intent for Ordinance No. 02023-017 was sent to the State Department of Commerce December 14, 2023
- SEPA Checklist for Ordinance No. 02023-017 was completed Dec 13, 2023, and a determination of nonsignificance was issued on December 29, 2023

Suggested Work Session Discussion Topics

1. Review the proposed amendments and new sections within the staff report
2. Are the proposed amendments clear and digestible?
3. Is it easy to determine standards for developing in the floodplain and know what will be required?
4. Provide comments/questions to Staff



Next Steps

Planning Commission

- February 13, 2024 – Planning Commission hearing

City Council

- March 12, 2024 – City Council work session
- March 19, 2024 – City Council consideration

TO: Planning Commission
FROM: Brad Medrud, Planning Manager
DATE: January 23, 2024
SUBJECT: Attorney General's Advisory Memorandum

1) Recommended Action:

Discussion of the Attorney General's Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property.

2) Background:

The State Attorney General is directed under RCW 36.70A.370 to advise state agencies and local governments on an orderly, consistent process that better enables the government to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property or raise substantive due process concerns. This process must be used by local governments that plan under the Growth Management Act (GMA).

As a result of this direction, the Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property (Advisory Memorandum) was prepared. The Attorney General's Office reviews the Advisory Memorandum annually and updates it as necessary.

4) Alternatives:

☐ None.

6) Attachments:

- A. Memorandum from City Attorney
- B. Attorney General's Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property
- C. Presentation

MEMO



Date: January 8, 2024
To: Mayor Sullivan
Tumwater City Council Members
Tumwater Planning Commission Members
From: Karen Kirkpatrick, City Attorney
CC: Mike Matlock, Community Development Director
Brad Medrud, Planning Manager
Subject: Attorney General's Advisory Memorandum and Recommended Process for
Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional
Takings of Private Property

The Attorney General is directed under RCW 36.70A.370 to advise state agencies and local governments on an orderly, consistent process that better enables the government to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property or raise substantive due process concerns. This process must be used by local governments that plan under the Growth Management Act (GMA). As a result of this direction, the *Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property* (Advisory Memorandum) was prepared. The Attorney General's Office reviews the Advisory Memorandum annually and updates it as necessary.

The current version was issued September 2018 and is available at this link:

<http://www.atg.wa.gov/avoiding-unconstitutional-takings-private-property>.

Please review the Attorney General's Advisory Memorandum and use it when considering amendments to the Comprehensive Plan and associated rezones and any other land use actions that come before you.

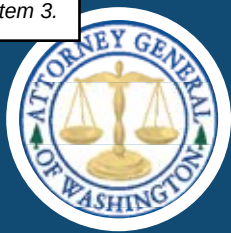
The recommended process outlined in Part 1 of the four-part Advisory Memorandum includes the following:

1. Review and Distribute. In addition to review by the City Attorney, it is recommended that the Advisory Memorandum be distributed to all of the City's decision makers and key staff.
2. Use Warning Signals. The Advisory Memorandum states that local governments should use the "Warning Signals" to evaluate proposed regulatory actions. Examples are listed in Part Three starting on Pg. 14.

CITY ATTORNEY'S OFFICE

3. Develop an Internal Process. Staff and legal counsel have developed an internal process for assessing constitutional issues. This process occurs through adoption of development regulations, land use designations, and confidential attorney-client communications and legal memoranda.
4. Incorporate Constitutional Assessments into the Agency Review Process. The nature and extent of the assessment will depend on the type of regulatory action and the specific impacts on private property. The City assesses constitutional issues through the City Attorney's office. This information is communicated to staff and decision makers via confidential attorney-client communications including confidential attorney-client memoranda and executive sessions.
5. Develop an Internal Process to Respond to Identified Constitutional Issues. The City Attorney prepares an analysis of potential constitutional issues and options based on the Advisory Memorandum, independent analysis, and advice of outside counsel. That analysis is then communicated to staff and decision makers through verbal communication, confidential attorney-client communications and legal memoranda, and executive sessions.

If you have a problem with the above link to the Advisory Memorandum, prefer a printed copy, or have any questions, please contact my assistant, Sharleen Johansen, by phone at 360-701-3748 or email sjohansen@ci.tumwater.wa.us.



STATE OF WASHINGTON OFFICE OF THE ATTORNEY GENERAL BOB FERGUSON



Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property

SEPTEMBER 2018

STATE OF WASHINGTON

OFFICE OF THE ATTORNEY GENERAL

Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property

September 2018

■ Introduction

The Office of the Attorney General is directed under RCW 36.70A.370 to advise state agencies and local governments on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property.

This process must be used by state agencies and local governments that plan under RCW 36.70A.040—Washington's Growth Management Act. The recommended process may also be used for other state and local land use planning activities.¹ Ultimately, the statutory objective is that state agencies and local governments carefully consider the potential for land use activity to “take” private property, with a view toward avoiding that outcome.

RCW 36.70A.370 Protection of Private Property.

(1) The state attorney general shall establish ... an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property....

(2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

...

Purpose of This Document

This ***Advisory Memorandum*** was developed to provide state agencies and local governments with a tool to assist them in the process of evaluating whether proposed regulatory or administrative actions may result in an unconstitutional taking of private property or raise substantive due process concerns. Where state agencies or local governments exercise regulatory authority affecting the use of private property, they must be sensitive to the constitutional limits on their authority to regulate private property rights. The failure to fully consider these

¹ The process used by state agencies and local governments to assess their activities is protected by attorney-client privilege. Further, a private party does not have a cause of action against a state agency or local government that does not use the recommended process. RCW 36.70A.370(4).

constitutional limits may result in regulatory activity that has the effect of appropriating private property even though that outcome may not have been intended. If a court concludes that private property has been “taken” by regulatory activity, it will order the payment of “just compensation” equal to the fair market value of the property that has been taken, together with costs and attorneys fees. In other cases, a government regulation may be invalidated if it is found to violate constitutional substantive due process rights.

Where state agencies or local governments exercise regulatory authority affecting the use of private property, they must be sensitive to the constitutional limits on their authority to regulate private property rights.

This **Advisory Memorandum** is intended as an internal management tool for agency decision makers. It is not a formal Attorney General’s Opinion under RCW 43.10.030(7) and should not be construed as an opinion by the Attorney General on whether a specific action constitutes an unconstitutional taking or a violation of substantive due process. Legal counsel should be consulted for advice on whether any particular action may result in an unconstitutional taking of property requiring the payment of just compensation or may result in a due process violation requiring invalidation of the government action.

Prior editions of this document are superseded by this document.

Organization of This Document

This *Advisory Memorandum* contains four substantive parts. The first part outlines a **Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property** utilizing the other substantive portions of the *Advisory Memorandum*.

The second part, **General Constitutional Principles Governing Takings and Due Process**, presents an overview of the general constitutional principles that determine whether a government regulation may become so severe that it constitutes an unconstitutional taking of private property or violates substantive due process rights. This discussion is derived from cases that have interpreted these constitutional provisions in specific fact situations.

The third part is a list of **Warning Signals**. This section provides examples of situations that may raise constitutional issues. The warning signals are useful as a general checklist to evaluate planning actions, specific permitting decisions, and proposed regulatory actions. The warning signals do not establish the existence of a problem, but they highlight specific instances in which actions should be further assessed by staff and legal counsel.

The fourth part is an **Appendix**, which contains summaries of significant court cases addressing takings law.

■ **Part One: Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property**

1. Review and Distribute This Advisory Memorandum. Local governments and state agencies should review this **Advisory Memorandum** with their legal counsel and distribute it to all decision makers and key staff to ensure that agency decision makers at all levels of government have consistent, useful guidance on constitutional limitations relating to the regulation of private property. Legal counsel should supplement this document as appropriate to address specific circumstances and concerns of their client agency or governmental unit.

2. Use the “Warning Signals” to Evaluate Proposed Regulatory Actions. Local governments and state agencies may use the **Warning Signals** in part three of this **Advisory Memorandum** as a checklist to determine whether a proposed regulatory action may violate a constitutional requirement. The warning signals are phrased as questions. If there are affirmative answers to any of these questions, the proposed regulatory action should be reviewed by staff and legal counsel.

3. Develop an Internal Process for Assessing Constitutional Issues. State agency and local government actions implementing the Growth Management Act should be assessed by both staff and legal counsel. Examples of these actions include the adoption of development regulations and designations for natural resource lands and critical areas, and the adoption of development regulations that implement the comprehensive plan or establish policies or guidelines for conditions, exactions, or impact fees incident to permit approval. A similar assessment, by both staff and legal counsel, should be used for the conditioning or denial of permits for land use development. Other regulatory or administrative actions proposed by state agencies or directed by the Legislature should be assessed by staff and legal counsel if the actions impact private property.

4. Incorporate Constitutional Assessments Into the Agency’s Review Process. A constitutional assessment should be incorporated into the local government’s or state agency’s process for reviewing proposed regulatory or administrative actions. The nature and extent of the assessment necessarily will depend on the type of regulatory action and the specific impacts on private property. Consequently, each agency should have some discretion to determine the extent and the form of the constitutional assessment. For some types of actions, the assessment might focus on a specific piece of property. For others, it may be useful to consider the potential impacts on types of property or geographic areas. It may be necessary to coordinate the assessment with another jurisdiction where private property is subject to regulation by multiple jurisdictions. It is strongly suggested, however, that any government regulatory actions which involve warning signals be carefully and thoroughly reviewed by legal counsel. The Legislature has specifically

Recommended process:

- 1. Review and distribute this Advisory Memorandum to legal counsel, decision makers, and key staff.*
- 2. Use the “Warning Signals” to evaluate proposed regulatory actions.*
- 3. Develop an internal process for assessing constitutional issues.*
- 4. Incorporate constitutional assessments into the agency’s review process.*
- 5. Develop an internal process for responding to constitutional issues identified during the review process.*

affirmed that this assessment process is protected by the normal attorney-client privilege. RCW 36.70A.370(4).

5. Develop an Internal Process for Responding to Constitutional Issues Identified During the Review Process. If the constitutional assessment indicates a proposed regulatory or administrative action could result in an unconstitutional taking of private property or a violation of substantive due process, the state agency or local government should have a process established through which it can evaluate options for less restrictive action or—if necessary, authorized, and appropriate—consider whether to initiate formal condemnation proceedings to appropriate the property and pay just compensation for the property acquired.

■ **Part Two: General Constitutional Principles Governing Takings and Substantive Due Process**

A. Overview

“Police Power.” State governments have the authority and responsibility to protect the public health, safety, and welfare. This authority is an inherent attribute of state governmental sovereignty and is shared with local governments in Washington under the state constitution. Pursuant to that authority, which is called the “police power,” the government has the ability to regulate or limit the use of property.

Government has the authority and responsibility to protect the public health, safety, and welfare.

Police power actions undertaken by the government may involve the abatement of public nuisances, the termination of illegal activities, and the establishment of building codes, safety standards, and sanitary requirements. Government does not have to wait to act until a problem has actually manifested itself. It may anticipate problems and establish conditions or requirements limiting uses of property that may have adverse impacts on public health, safety, and welfare.

Sometimes the exercise of government police powers takes the form of limitations on the use of private property. Those limitations may be imposed through general land use planning mechanisms such as zoning ordinances, development regulations, setback requirements, environmental regulations, and other similar regulatory limitations. Regulatory activity may also involve the use of permit conditions that dedicate a portion of the property to mitigate identifiable impacts associated with some proposed use of private property.

Regulatory Takings. Government regulation of property is a necessary and accepted aspect of modern society and the constitutional principles discussed in this **Advisory Memorandum** do not require compensation for every decline in the value of a piece of private property. Nevertheless, courts have recognized that if government regulations go “too far,” they may constitute a taking of property. This does not necessarily mean that the regulatory activity is unlawful, but rather that the payment of just compensation may be required under the state or federal constitution. The rationale is based upon the notion that some regulations are so severe in their impact that they are the functional equivalent of an exercise of the government’s power of eminent domain (i.e., the formal condemnation of property for a public purpose that requires the payment of just compensation). Courts often refer to this as an instance where regulation goes so far as to acquire a public benefit (rather than preventing some harm) in circumstances where fairness and justice require the public as a whole to bear that cost rather than the individual property owner.

When evaluating whether government action has gone too far, resulting in a taking of specific private property, courts typically engage in a detailed factual inquiry that evaluates the government's intended purpose, the means the government used to accomplish that purpose, and the financial impact on the property, in order to gauge whether the government regulation is such a burden on property that it is the functional equivalent of an appropriation of that property—a regulatory “taking” requiring the payment of just compensation. Severe financial impacts, unclear government purposes, or less intrusive means for accomplishing the identified purpose are factors that can tip the scale in favor of a determination that the government has taken property. The mere presence of these factors does not necessarily establish a taking of property, but may support a taking claim if they are significant enough, either individually or collectively. They should be carefully considered and evaluated, along with the **Warning Signals** in part three of this **Advisory Memorandum**, to determine if another course of action would achieve the government's purpose without raising the same concerns.

A government regulation that is so severe in its impact that it is the functional equivalent of condemnation requires the payment of just compensation.

In some limited cases, courts may find that a taking has occurred without engaging in the detailed factual inquiry discussed above. For example, where government regulation results in some permanent or recurring physical occupation of property, a taking probably exists, requiring the payment of just compensation. In addition, where government regulation permanently deprives an entire piece of property of all economic utility, and where there is no long-standing legal principle such as a nuisance law that supports the government regulation, then a taking probably has occurred, requiring the payment of just compensation.

Substantive Due Process. Washington courts have applied principles of substantive due process as an alternate inquiry where government action has an appreciable impact on property. A land use regulation that does not have the effect of taking private property may nonetheless be unconstitutional if it violates principles of substantive due process. Substantive due process is the constitutional doctrine that legislation must be fair and reasonable in content and designed so that it furthers a legitimate governmental objective. The doctrine of substantive due process is based on the recognition that the social compact upon which our government is founded provides protections beyond those that are expressly stated in the U.S. Constitution against the flagrant abuse of government power. *Calder v Bull*, 3 U.S. 386 (1798).

Courts have determined that substantive due process is violated when a government action lacks any reasonable justification or fails to advance a legitimate governmental objective. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective, (2) use means that are reasonably necessary to achieve that objective, and (3) not be unduly oppressive. Violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation. The U.S. Supreme Court has clarified that substantive due process is a separate constitutional inquiry into the validity of governmental action and is not part of the Fifth Amendment takings analysis. As explained below, Washington courts have not yet formally responded to this clarification.

B. Constitutional Principles Relating to the Regulation of Private Property

Courts have used a number of constitutional principles to determine whether a given government regulation effects a “taking” under the federal or state constitutions and whether it

violates principles of substantive due process. The following paragraphs summarize the key legal and procedural principles.

1. Constitutional Provisions

United States Constitution — Takings Clause and Due Process Clauses. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without the payment of just compensation. Accordingly, the government may not take property except for public purposes within its constitutional authority and must provide just compensation for the property that has been taken. The Fifth and Fourteenth Amendments also provide that no person shall be deprived of property without due process of law.

Washington State Constitution, Article 1, Section 16. Article 1, section 16 of the Washington State Constitution provides, in part, that “[n]o private property shall be taken or damaged for public or private use without just compensation.” In other words, the government may take private property, but must pay just compensation for the private property that is taken.

Article 1, Section 16 also expressly prohibits state and local governments from taking private property for a private use with a few limited exceptions: private ways of necessity and drainage for agricultural, domestic or sanitary purposes. This provision goes beyond the U.S. Constitution, which does not have a separate provision expressly prohibiting the taking of private property for private use. As discussed below, this clause has been interpreted to prevent the condemnation of property as part of a government redevelopment plan where the property is to be transferred to a private entity.

The Washington Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation.”

2. The Exercise of Eminent Domain - Condemnation Proceedings.

Through the exercise of eminent domain, government has the power to condemn private property for public use, as long as it pays just compensation for the property it acquires. Taking land to build a public road is a classic example of when the government must provide just compensation to a private property owner for its exercise of the power of eminent domain.

Government historically acquires property and compensates landowners through a condemnation proceeding in which the appropriate amount of compensation is determined and paid before the land is taken and used by government. The property generally may be condemned only for a public use. Washington’s Constitution has been interpreted narrowly in this regard and prohibits condemnation actions that are part of a plan to transfer property to private developers for redevelopment projects that involve private ownership of the developed property. The only exception to the public use requirement is that private property may be taken for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.

In Washington, property generally may be condemned only for a public use.

The Legislature has enacted a number of statutes specifying which state and local government agencies possess authority to acquire property through condemnation and setting forth the procedures that must be followed during condemnation. See Title 8 RCW. Washington law provides that, in some cases, property may be taken immediately with compensation being determined and paid in a subsequent judicial proceeding or by agreement between the government and landowner. See RCW 8.04.090.

3. Inverse Condemnation.

There may be times where the government does not intend to acquire property through condemnation, but the government action nonetheless has a significant impact on the value of property. In some cases, the government may argue that its action has not taken or damaged private property, while the property owner argues that a taking has effectively occurred despite the fact that a formal condemnation process has not been instituted. This dispute may lead to an “inverse condemnation” claim, and the filing of a lawsuit against the government, in which the court will determine whether the government’s actions have damaged or taken property. If a court determines that the government’s actions have effectively taken private property for some public purpose, it will award the payment of just compensation, together with the costs and attorneys fees associated with litigating that inverse condemnation claim. Inverse condemnation cases generally fall into two categories: those involving physical occupation or damage to property, and those involving the impacts of regulation on property.

a. Physical Occupation or Damage. The government may be required to pay just compensation to private property owners whose land has been physically occupied or damaged by the government on a permanent or ongoing basis. For example, if the construction of a public road blocks access to an adjacent business resulting in a significant loss of business, the owner may be entitled to just compensation for “damage” to the property.

b. Regulatory Takings. In general, zoning laws and related regulation of land use activities are lawful exercises of police powers that serve the general public good. However, the state and federal constitutions have been interpreted by courts to recognize that regulations purporting to be a valid exercise of police power still must be examined to determine whether they unlawfully take private property for public use without providing just compensation. This relationship between takings law and regulation is sometimes explained as looking at whether a regulation has the effect of forcing certain landowners to provide an affirmative benefit for the public, when the burden of providing that benefit is one that actually should be carried by society as a whole.

In general, zoning laws and related regulation of land use activities are lawful exercises of police powers that serve the general public good. However, the state and federal constitutions have been interpreted by courts to recognize that regulations purporting to be a valid exercise of police power must still be examined to determine whether they unlawfully take private property for public use without providing just compensation.

The issue is how to identify just when a specific regulation may exceed constitutional limits. When there is a question of regulatory taking, the inquiry often focuses on the nature and purpose of the government regulation, the means used to achieve it, and the effect of the regulation on legitimate and established expectations for the use of private property.

To better explain when a regulation unlawfully takes property, this section briefly describes three major types of regulatory takings challenges: (1) challenges alleging a categorical taking, (2) challenges that require a court to examine the government's regulatory action and the degree to which it affects investment backed expectations for the use of private property, and (3) challenges to permit conditions that exact some interest in private property.

(1) Challenges Alleging a Categorical Taking. Certain forms of government action are characterized as “categorical” or “per se” takings. In these circumstances the government action is presumptively classified as a taking of private property for public use for which the payment of just compensation is required. The court does not engage in the typical takings analysis involving a detailed factual inquiry that weighs the utility of the government's purpose and the impact experienced by the landowner.

Physical occupations of property are the most well-understood type of categorical taking. When the government permanently or repeatedly physically occupies property, or authorizes another person to do the same, this occupation has been characterized as such a substantial interference with property that it always constitutes a taking requiring the payment of just compensation, even if the amount of compensation is small.

A second form of categorical taking that requires the payment of just compensation without further takings analysis is a regulation that deprives a landowner of all economic or beneficial use of property or that destroys a fundamental property right (such as the right to possess the property, the right to exclude others, or the right to dispose of the property). However, a regulation that prohibits all economically viable or beneficial use of property is not a taking if the government can demonstrate that the proposed use of the property being denied is prohibited by laws of nuisance or other long-standing and pre-existing limitations on the use of property.

Courts have emphasized that these “categorical” forms of taking arise in exceptional circumstances and that the tests are narrowly tailored to deal with these exceptional cases.

(2) Evaluating the Government's Regulatory Action and Its Effect on Particular Private Property. Ascertaining whether a government regulation goes so far as to take private property usually requires a detailed factual investigation into the purpose of the government regulation, the means used to achieve the government's purpose, and the financial impact on the individual landowner. This analysis was set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The majority of regulatory takings cases will be evaluated using this traditional multi-factor analysis—weighing the impact of government regulation, the government's objectives, and the means by which they are achieved.

If government has authority to deny a land use, it also has authority to condition a permit to engage in that use. For example, a local government may condition a

development permit by requiring measures that mitigate identifiable adverse impacts of the development. However, a permit condition that imposes substantial costs or limitations on the use of property, unrelated or out of scale to an identifiable impact, could amount to a taking.

In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, courts weigh the public purpose of the regulatory action in relation to the impact on the landowner's vested development rights. Courts also consider whether the government could have achieved the stated public purpose by less intrusive means. One factor used to assess the economic impact of a permit condition is the extent to which the condition interferes with a landowner's reasonable investment-backed development expectations.

The federal and state constitutions do not require the government to compensate landowners for every decline in property value associated with regulatory activity.

Most courts apply this analysis using a case-by-case factual inquiry into the fairness of the government's actions. Economic impacts from regulation are usually fair and acceptable burdens associated with living in an ordered society. The federal and state constitutions do not require the government to compensate landowners for every decline in property value associated with regulatory activity. However, government action that tends to secure some affirmative public benefit rather than preventing some harm, or that is extremely burdensome to an individual's legitimate expectations regarding the use of property, or that employs a highly burdensome strategy when other less burdensome options might achieve the same public objective, raises the possibility that the action may be a taking of private property. A useful way to approach this principle is to consider whether there is any substantial similarity between a proposed regulatory action and the traditional exercise of the power to condemn property. When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the exercise of eminent domain. In those cases the payment of just compensation will probably be required.

When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the exercise of eminent domain. In those cases the payment of just compensation probably will be required.

Washington courts employ a detailed three-part test for evaluating takings claims. This test was articulated by the Washington State Supreme Court in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). See the **Appendix** in part four of this **Advisory Memorandum** for a discussion of that case.

The first part of Washington's takings analysis evaluates whether one the two categorical, or *per se*, takings exists: a physical occupation or appropriation of property, or a regulation depriving property of all value. Assuming there is no categorical taking, the second part of Washington's takings analysis asks two questions: whether a fundamental property interest is impinged upon, and whether the government's action essentially works to prevent harm rather than seeking to acquire some public benefit. If the answer to both these questions is "no," the takings analysis ends. But if a substantial property interest is

impinged, or if the government action is not manifestly about preventing public harm, the takings test continues. Part three of Washington's takings analysis then asks whether the regulation of property substantially advances a legitimate government interest. If the answer is "no," a taking has occurred. If some legitimate state interest is advanced, the takings analysis concludes with a *Penn Central*-type analysis.

Note: In *Lingle v. Chevron*, 544 U.S. 248 (2005), summarized in the **Appendix**, the United States Supreme Court explained that the question of whether government regulation advances a legitimate state interest (i.e., part three of Washington's takings analysis as set out in *Guimont*) is not relevant to a claim of taking by regulation. Instead, the issue of whether a regulation substantially advances a legitimate government purpose is evaluated under principles of substantive due process (discussed below). Washington's courts have not yet considered whether or how to modify the state's takings analysis in light of this recent U.S. Supreme Court precedent.

(3) Challenges to Permit Conditions That Exact Some Interest in Property.

Sometimes a permit condition will attempt to extract an interest in property as mitigation for the adverse public impact of the proposed development. Courts have referred to these types of conditions as *exactions*. One example could be a permit requirement to grant an access easement. While such exactions are permissible, government must identify a real adverse impact of the proposed development and be prepared to demonstrate that the proposed exaction is reasonably related to that impact. The government also must be prepared to demonstrate that the burden on the property owner is roughly proportional to the impact being mitigated. These principles also apply to so-called "monetary exactions"—permit conditions that require the applicant to spend money as a condition of permitted land use activity. Taxes and permit fees levied under a government's authority to levy such fees and taxes are not at issue here. Rather, the nexus and proportionality principles associated with exactions apply where a monetary obligation is established as a condition of a development permit (e.g., requiring the permit applicant to purchase additional property to create a buffer or to undertake an offsite mitigation project as a condition of development).

The limitations that are placed upon property exactions are further discussed in the **Appendix**, in the case notes relating to the United States Supreme Court decisions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), and in the case notes discussing some of the more recent Washington cases following *Dolan*. See, e.g., *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015 (1999).

4. Substantive Due Process.

Under Washington law, even if a government action does not effect a taking, it may be unconstitutional if it violates principles of substantive due process. Substantive due process invokes the due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution to invalidate flagrant abuses of government power—actions that authorize some manifest injustice or that take away the security for personal liberty or private property that our government was formed to protect. *Calder v Bull*, 3 U.S. 386 (1798). While the remedy

Under Washington law, even if a regulation does not effect a taking, it is subject to substantive due process requirements.

for a government action that works a taking is just compensation, the remedy for a government action that violates substantive due process is invalidation of the violating government action.

a. Substantive Due Process in Land Use Cases. Washington courts have considered both takings claims and substantive due process claims as alternative claims in the same case. In contrast, federal courts sitting in Washington have dismissed Fourteenth Amendment substantive due process claims where a remedy is available by bringing a takings claim under the Fifth Amendment Takings Clause. See *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

Our State Supreme Court’s approach to substantive due process in a land use regulation context was first developed in *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988), and *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990), and refined in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), and *Margola Associates v. Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993). These decisions are summarized in the **Appendix** in part four of this **Advisory Memorandum**. In assessing whether a regulation has exceeded substantive due process limitations and should be invalidated, the court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or “evil” that needs to be remedied for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? Failing to consider and address each of these questions may lead to a substantive due process violation.

The “unduly oppressive” inquiry, which has been the decisive inquiry in most Washington substantive due process cases, involves balancing the public’s interests against those of the regulated landowner. Factors to be considered in analyzing whether a regulation is unduly oppressive include (a) the nature of the harm sought to be avoided; (b) the availability and effectiveness of less drastic protective measures; and (c) the economic loss suffered by the property owner.²

In assessing these factors to determine whether a land-use regulation should be invalidated as a violation of substantive due process, the Washington Supreme Court has directed trial courts to the following considerations:

On the public’s side—the seriousness of the public problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions.

On the owner’s side—the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.

² In *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), which is not a land use case, the Court specifically declined to apply the “unduly oppressive” prong from *Presbytery*, holding that it had no place in rational basis review. *Amunrud* has been followed in at least one reported land use decision. See *Olympic Stewardship Foundation v. State Environmental & Land Use Hearings Office*, 199 Wn. App. 668, 399 P.3d 562 (2017), *review denied*, 189 Wn.2d 1040 (2018). *Amunrud* and *Olympic Stewardship Foundation* are summarized in the **Appendix** in part four of this **Advisory Memorandum**.

b. Substantive Due Process and Retroactive Legislation. A statute or regulation may attempt to impose new standards for previously-authorized conduct or may attempt to remedy newly-discovered impacts from conduct that was previously legal. The requirements of substantive due process do not automatically prohibit such retroactive legislative action so long as it serves a rational purpose. However, retroactive legislation is generally not favored because “elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

In light of the substantive due process principles discussed above, Washington courts tend to apply a stricter standard of rationality to retroactive legislation than to prospective legislation. The fact that legislation may be rational when applied prospectively does not mean it will necessarily be rational when applied retroactively. There must be some independent rational basis for the retroactivity itself. Some of the additional factors to consider when evaluating the retroactivity of legislation include the following:

Whether there is a direct relationship between the conduct of the landowner and the “harm” that is being remedied.

Whether the imposed “cure” is proportional to the harm being caused.

Whether the landowner could have generally anticipated that some form of retroactive regulation might occur. It appears this factor is of greater importance where there is a weak link between the landowner’s conduct and the “cure” being imposed by the government.

These standards are not individually determinative; they operate together to paint a picture that speaks to the “fairness” of retroactive regulation. See *Rhod-A-Zalea & 35th Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998).

5. Remedies.

In the usual condemnation case, the government must pay just compensation to a property owner before the property may be taken and used for a public purpose. Compensation usually is based on the fair market value of the property at the time of the taking.

In an inverse condemnation case, the payment of just compensation is due the property owner if a taking has occurred without compensation first having been paid. Compensation usually is based on the fair market value of the property actually taken, at the time of the taking. The government may also be liable for the payment of interest and the property owner’s legal expenses incurred in obtaining just compensation.

If a court determines there has been a regulatory taking, the government generally has the option of either paying just compensation or withdrawing the regulatory limitation. However, even if the regulation is withdrawn, the government might be obligated to compensate the property owner for a temporary taking of the property during the period in which the regulation was effective.

If a court determines a regulation has taken private property for private use, the court probably will invalidate the regulation rather than ordering compensation. See

Manufactured Housing Communities of Washington v. State, 142 Wn.2d 347, 13 P.3d 183 (2000).

If a court determines there has been a substantive due process violation, the appropriate remedy is invalidation of the regulation. See *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). A prevailing landowner who also proves that the government's actions were irrational or invidious may recover damages and reasonable attorney's fees under the Federal Civil Rights Act, 42 U.S.C. § 1983.

If a court determines there has been a regulatory taking, the government generally has the option of either paying just compensation or withdrawing the regulatory limitation.

If a court determines a regulation has taken private property for private use, the court probably will invalidate the regulation rather than ordering compensation.

If a court determines there has been a substantive due process violation, the appropriate remedy is invalidation of the regulation.

In addition to the causes of action and remedies discussed above, under Washington law, a property owner who has filed an application for a permit may also have a cause of action for damages to obtain relief from government actions that were arbitrary, capricious, or made with the knowledge that the actions were in excess of lawful authority. See RCW 64.40. This statute also provides relief for failure to act within the time limits established by law.

6. Burdens of Proof and Prerequisites to the Filing of a Claim.

A person challenging an action or ordinance generally has the burden of proving that the action or ordinance is unconstitutional. However, in a challenge to a government exaction of land to mitigate for adverse impacts from a proposed land use activity, the burden is on the government to identify a specific impact that needs to be mitigated and demonstrate that the exaction is roughly proportional to the identifiable impact.

A claim that property has been taken may not be brought until the landowner has exhausted all administrative remedies and explored all regulatory alternatives. The landowner generally must submit an application and pursue available administrative appeals of any action that the landowner contends is erroneous and must allow the planning or regulatory agency to explore the full breadth of the agency's discretion to allow some productive use of property. A landowner may need to seek a variance or submit multiple applications to determine the full extent to which the regulatory laws may allow or limit development. However, the landowner should not be made to explore futile options that have no practical chance of providing some meaningful use of the land. Once the government comes forward with evidence that there are regulatory options which might provide for some use of the land, the landowner has a heavy burden to show that pursuing these options would be futile. See *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 768 P.2d 462 (1989).

A claim that property has been taken may not be brought until the landowner has exhausted all administrative remedies and regulatory alternatives.

In some cases a landowner may pursue a “facial challenge” to a law, claiming that the mere enactment of legislation results in a taking or violates due process. These are difficult cases to make because legislation is presumed constitutional and the landowner must demonstrate that under every conceivable set of facts the challenged legislation is constitutionally defective. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

■ **Part Three: Warning Signals**

The following warning signals are examples of situations that may raise constitutional issues. The warning signals are phrased as questions that state agency or local government staff can use to evaluate the potential impact of a regulatory action on private property.

State agencies and local governments should use these warning signals as a checklist to determine whether a regulatory action may raise constitutional questions and require further review.

The presence of a warning signal means there could be a constitutional issue that government staff should review with legal counsel.

The fact that a warning signal may be present does not mean there has been a taking or substantive due process violation. It means only that there *could* be a constitutional issue and that staff should carefully review the proposed action with legal counsel. If property is subject to the regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property? Government regulation or action resulting in a permanent physical occupation of all or a portion of private property generally will constitute a taking. For example, a regulation requiring landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking, even though the landlords suffered no economic loss. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

This is one of two “categorical” forms of property takings. It does not require any investigation into the character of or justification for the government’s actions. Its premise is that a permanent physical occupation is such an unusual and severe impact on property that it will always be treated as an action that requires the payment of just compensation. However, because this is such a strict and narrow test, it applies only when the government physically occupies the property or provides another person the right to do so.

2. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property? If a regulation or action permanently eliminates all economically viable or beneficial uses of the property, it will likely constitute a taking. In this situation, the government can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other pre-existing limitations on the use of the property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

This is the other narrow categorical form of taking that does not balance the government’s interests in regulation against the impact of regulation. However, in this circumstance, unlike the permanent physical occupation analysis, it is necessary to evaluate the regulation’s economic

impact on the property as a whole, and not just on the portion of the property being regulated. Accordingly, it is necessary to assess whether there is any profitable use of the remaining property available. *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed Cir. 1986). The existence of some economically viable use of the property will preclude the use of this categorical test. Furthermore, the remaining use does not necessarily have to be the owner's planned use, a prior use, or the highest and best use of the property. However, the fact that some value remains does not preclude the possibility that the regulatory action might still be a taking of property under other takings tests that balance economic impact against other factors.

A regulation must be analyzed for its economic impact on the property as a whole, not just the portion being regulated.

To ascertain the “whole” parcel being regulated in assessing the impact of regulation, the United States Supreme Court established a three-part test in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). This “objective” test evaluates whether a landowner would reasonably be expected to anticipate that her landholdings would be treated as a unitary whole rather than as separate parcels. The test considers “[1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land.” With regard to the third factor, the analysis should give “special attention to the effect of burdened land on the value of other holdings.” See the **Appendix** for more discussion of this case.

Regulations or actions that require all of a particular parcel of land be left substantially in its natural state should be reviewed carefully.

In some situations, pre-existing limitations on the use of property could insulate the government from takings liability even though the regulatory action leaves the property with no value. For example, limitations on the use of tidelands under the public trust doctrine probably constitute a pre-existing limitation on the use of property that could insulate the government from takings liability for prohibiting development on tidelands. *See Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 983 (9th Cir. 2002); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). A proposed land use that is precluded by principles of nuisance law is another example. However, the U.S. Supreme Court has made it clear that this principle does not apply simply because the property was acquired after a regulation prohibiting some land use was enacted. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). A pre-existing limitation on the use of property must be a long-standing property or land use principle before it will effectively insulate the government from takings liability in those rare cases where the property is left with no value. The pre-existing nature of any regulation that limits the use of property may be an important consideration for other takings tests, however, because it may demonstrate whether the landowner had a reasonable expectation of using the property in some manner. This issue should be carefully evaluated with legal counsel.

3. Does the Regulation or Action Deny or Substantially Diminish a Fundamental Attribute of Property Ownership? Regulations or actions that deny or impair a landowner's ability to exercise a fundamental attribute of property ownership are potential takings which should be analyzed further. The fundamental attributes of property ownership are generally identified as the right to own or possess the property, the right to exclude others from the property, and the right to transfer the property to someone else. *See Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). For example, regulations that prevent property from being inherited have been found to destroy a fundamental property attribute.

4. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property, to Grant an Easement, or to Undertake Some Independent Financial Obligation?

Regulation that requires a private property owner to formally dedicate land to some public use, that extracts an easement, or that imposes some independent financial obligation as a condition of development should be carefully reviewed. The dedication, easement, or financial obligation that is required from the landowner must be reasonable and proportional—i.e., specifically designed to mitigate adverse impacts of a proposed development. A distinction is made here between normal taxes and permit application fees (which may be levied under normal tax and fee authorities) and project mitigation obligations that may impose a financial expense (e.g., requiring the permit applicant to purchase additional land to establish a buffer, or expend money constructing off-site mitigation projects) as a condition of the development permit. For local governments, this duty is mirrored in RCW 82.02.020. Ultimately, the government must demonstrate that it acted reasonably, and that its actions are proportionate to an identifiable problem. Usually, the burden is on the government to identify the problem and demonstrate the reasonableness and proportionality of its regulation in relation to the specific project being conditioned. Where standardized formulas or tables are utilized, they should be based upon a careful analysis of the range of impacts being regulated, and their application to a specific project should be analyzed and documented in relation to the nexus and rough proportionality required for government imposed exactions.

5. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest? Courts have acknowledged that regulations are a necessary part of an ordered society and that they may limit the use of property, thereby impacting its value. Such reductions in value do not necessarily require the payment of compensation under either the federal or state constitutions. Nor do they necessarily violate substantive due process. However, if a regulation or regulatory action is likely to result in a substantial reduction in property value, the agency should consider the possibility that a taking or a violation of substantive due process may occur. If the regulation or regulatory action acts more to provide a public benefit than to prevent a public harm, it should be evaluated using the takings analysis discussed below. If it acts more to prevent a public harm, it is probably not a taking, but should nonetheless be evaluated using the substantive due process analysis discussed below. Because government actions often are characterized in terms of overall fairness, a taking or violation of substantive due process is more likely to be found when it appears that a single property owner is being forced to bear the burden of addressing some societal concern when in all fairness the cost ought to be shared across society.

a. Factors to Consider in a Regulatory Takings Analysis. Regulatory action that deprives property of all value constitutes a taking of that property. Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by considering the economic impact in relation to at least two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's actions—is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective? Following the decision in *Lingle*, this inquiry is likely better understood as an evaluation of the burden of the regulation on the affected private property in relation to the regulatory objective rather than an inquiry into whether the regulation is the best way to accomplish the regulatory objective. Recall that the takings analysis is ultimately geared to ascertain whether the regulation is such a burden on property that it is the functional equivalent of an appropriation of the property, such that compensation should be paid.

Other factors to consider include the presence or absence of reciprocal benefits and the manner in which the costs and benefits of regulations are shared. For example, zoning

regulations may eliminate some profitable uses of property while simultaneously preserving or enhancing property value by limiting development activities (e.g., preventing industrial operations in residential neighborhoods).

As with other analyses of economic impact where a taking is alleged, this evaluation of economic impacts and weighing of other factors is normally applied to the property as a whole, not just the portion subject to regulation.

b. Factors to Consider in a Substantive Due Process Analysis. Substantive due process principles require the government to ensure that its actions are reasonably designed to advance a legitimate state interest. To determine whether the government action is reasonable, a court will consider the relation between the government's purpose and the burden on the landowner. To what extent does the landowner's land contribute to the problem the government is attempting to solve? How far will the proposed regulation or action go toward solving the problem? A court will also want to know if less oppressive solutions are feasible.

Often a key question is the amount by which the value of the owner's property will be decreased by the government's action. In evaluating this loss in property value, a court will look at both the absolute decrease in value of the property and the percentage this decrease comprises of the total value of the property.

Another factor to consider is how the owner's plans for the property are affected by the proposed government action. What uses remain after the proposed action? Is the regulation temporary or permanent? Should the owner have been able to anticipate the regulation? How feasible is it for the owner to alter present or planned uses?

The people of Washington are best served when governments aspire to adopt the fairest possible approaches for accomplishing important public policy purposes.

Conclusion

Ultimately, the people of Washington State are best served when state and local governments aspire to adopt the fairest possible approaches for accomplishing important public purposes. We therefore encourage government decision-makers to seek effective regulatory approaches that fairly consider both the public interests and the interests of private property owners, while using these guidelines to avoid unconstitutional regulation.

Part Four: Appendix

This **Appendix** includes lists of *some* of the principal cases dealing with takings and/or related due process issues and a short summary of the result in each case. These cases provide examples of how federal courts and Washington courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations. There are many takings cases not discussed here, as well as several excellent law review articles on the subject. Cross-referenced decisions that are summarized in this **Appendix** are underlined where cited.

Contents of Appendix

1. Summaries of Significant Takings Cases in the United States Supreme Court (Chronological Order)

Before 1970

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)..... A-6

1970 – 1979

Penn Central Transportation Co. v. New York City,
438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)..... A-6

1980 – 1989

Agins v. City of Tiburon,
447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)..... A-7

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)..... A-7

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,
473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)..... A-7

Macdonald, Sommer & Frates v. Yolo County,
477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)..... A-8

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California,
482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)..... A-8

Hodel v. Irving,
481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987)..... A-8

Keystone Bituminous Coal Association v. DeBenedictis,
480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)..... A-9

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)..... A-9

1990 – 1999

Lucas v. South Carolina Coastal Council,
505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)..... A-10

Yee v. City of Escondido, California,
503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)..... A-10

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)..... A-11

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)..... A-11

2000 – 2009

Palazzolo v. Rhode Island,
533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001) A-12

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)..... A-13

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)..... A-13

San Remo Hotel v. City and County of San Francisco,
545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005)..... A-14

Kelo v. City of New London,
545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)..... A-14

2010 – 2018

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,
560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010)..... A-15

Arkansas Game and Fish Commission,
568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012)..... A-15

Koontz v. St. Johns River Water Management District,
570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)..... A-16

Horne v. Department of Agriculture,
569 U.S. 513, 133 S. Ct. 2053, 186 L. Ed. 2d 69 (2013); ___ U.S. ___, 135 S. Ct. 2419,
192 L. Ed. 2d 388 (2015)..... A-16

Murr v. Wisconsin,
___ U.S. ___, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017)..... A-17

2. Summaries of Significant Washington State Takings Cases (Chronological Order)

1970 – 1979

Maple Leaf Investors, Inc. v. Department of Ecology,
88 Wn.2d 726, 565 P.2d 1162 (1977)..... A-18

Department of Natural Resources v. Thurston County,
92 Wn.2d 656, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1980) A-18

1980 – 1989

Granat v. Keasler,
99 Wn.2d 564, 663 P.2d 830, cert. denied, 464 U.S. 1018 (1983)..... A-19

Buttnick v. City of Seattle,
105 Wn.2d 857, 719 P.2d 93 (1986)..... A-19

<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987), <i>cert. denied</i> , 486 U.S. 1022 (1988).....	A-20
<i>Valley View Industrial Park v. City of Redmond</i> , 107 Wn.2d 621, 733 P.2d 182 (1987).....	A-19
<i>Unlimited v. Kitsap County</i> , 50 Wn. App. 723, 750 P.2d 651, <i>review denied</i> , 111 Wn.2d 1008 (1988)	A-20
<i>Estate of Friedman v. Pierce County</i> , 112 Wn.2d 68, 768 P.2d 462 (1989).....	A-21

1990 – 1999

<i>Presbytery of Seattle v. King County</i> , 114 Wn.2d 320, 787 P.2d 907, <i>cert. denied</i> , 498 U.S. 911 (1990).....	A-21
<i>Sintra, Inc. v. City of Seattle</i> , 119 Wn.2d 1, 829 P.2d 765, <i>cert. denied</i> , 506 U.S. 1028 (1992).....	A-22
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 854 P.2d 1 (1993), <i>cert. denied</i> , 510 U.S. 1176 (1994).....	A-22
<i>Margola Associates v. City of Seattle</i> , 121 Wn.2d 625, 854 P.2d 23 (1993).....	A-24
<i>Guimont v. City of Seattle</i> , 77 Wn. App. 74, 896 P.2d 70, <i>review denied</i> , 127 Wn.2d 1023 (1995)	A-24
<i>Luxembourg Group, Inc. v. Snohomish County</i> , 76 Wn. App. 502, 887 P.2 446, <i>review denied</i> , 127 Wn.2d 1005 (1995)	A-24
<i>Sparks v. Douglas County</i> , 127 Wn.2d 901, 904 P.2d 738 (1995).....	A-25
<i>Ventures Northwest Ltd. Partnership v. State</i> , 81 Wn. App. 353, 914 P.2d 1180 (1996).....	A-25
<i>Schreiner Farms, Inc. v. Smitch</i> , 87 Wn. App. 27, 940 P.2d 274 (1997)	A-25
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	A-26
<i>Snider v. Board of County Commissioners of Walla Walla County</i> , 85 Wn. App. 371, 932 P.2d 704 (1997).....	A-26
<i>Burton v. Clark County</i> , 91 Wn. App. 505, 958 P.2d 343 (1998), <i>review denied</i> , 137 Wn.2d 1015 (1999).....	A-27
<i>Phillips v. King County</i> , 136 Wn.2d 946, 968 P.2d 871 (1998).....	A-27
<i>Kahuna Land Co. v. Spokane County</i> , 94 Wn. App. 836, 974 P.2d 1249 (1999).....	A-28

2000 – 2009

<i>Manufactured Housing Communities of Washington v. State</i> , 142 Wn.2d 347, 13 P.2d 183 (2000).....	A-28
--	------

<i>Eggleston v. Pierce County</i> , 148 Wn.2d 760, 64 P.3d 618 (2003).....	A-29
<i>Edmonds Shopping Center Associates v. City of Edmonds</i> , 117 Wn. App. 344, 71 P.3d 233 (2003).....	A-29
<i>Saddle Mountain Minerals, L.L.C. v. Joshi</i> , 152 Wn.2d 242, 95 P.3d 1236 (2004).....	A-29
<i>In the Matter of Property Located at: 14255 53rd Ave S. Tukwila, King County, Washington</i> , 120 Wn. App. 737, 86 P.3d 222 (2004), review denied, 152 Wn.2d 1032 (2004), cert. denied, 544 U.S. 977 (2005).....	A-30
<i>Paradise Village Bowl v. Pierce County</i> , 124 Wn. App. 759, 102 P.3d 173 (2004), review denied, 154 Wn.2d 1027 (2005).....	A-30
<i>Dickgieser v. State</i> , 153 Wn.2d 530, 105 P.3d 26 (2005).....	A-31
<i>Tiffany Family Trust Corp. v. City of Kent</i> , 155 Wn.2d 225, 119 P.3d 325 (2005).....	A-31
<i>HTK Management, L.L.C. v. Seattle Popular Monorail Authority</i> , 155 Wn.2d 612, 121 P.3d 1166 (2005).....	A-32
<i>City of Des Moines v. Gray Businesses, LLC</i> , 130 Wn. App. 600, 124 P.3d 324, review denied, 158 Wn.2d 1024 (2006).....	A-32
<i>Central Puget Sound Regional Transit Authority v. Miller</i> , 156 Wn.2d 403, 128 P.3d 588 (2006).....	A-32
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006), review denied, 159 Wn.2d 1013 (2007).....	A-33
<i>Wallace v. Lewis County</i> , 134 Wn. App. 1, 137 P.3d 101 (2006).....	A-33
<i>Amunrud v. Board of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	A-33
<i>Clear Channel Outdoor v. Seattle Popular Monorail Authority</i> , 136 Wn. App. 781, 150 P.3d 649 (2007).....	A-33
<i>Public Utility District No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC</i> , 159 Wn.2d 555, 151 P.3d 176 (2007).....	A-34
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008).....	A-34

2010 – 2018

<i>Spokane Airports v. RMA, Inc.</i> , 149 Wn. App. 930, 206 P.3d 364 (2009), review denied, 167 Wn.2d 1017 (2010).....	A-35
<i>Fitzpatrick v. Okanogan County</i> , 169 Wn.2d 598, 238 P.3d 1129 (2010).....	A-35
<i>Union Elevator & Warehouse Co., Inc. v. State ex rel. Department of Transportation</i> , 171 Wn.2d 54, 248 P.3d 83 (2011).....	A-36

<i>Tom v. State</i> , 164 Wn. App. 609, 267 P.3d 361 (2011), <i>review denied</i> , 173 Wn.2d 1025 (2012).....	A-36
<i>Thun v. City of Bonney Lake</i> , 164 Wn. App. 755, 265 P.3d 207 (2011), <i>review denied</i> , 173 Wn.2d 1035 (2012).....	A-37
<i>Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Board</i> , 166 Wn. App. 172, 374 P.3d 1040, <i>review denied</i> , 174 Wn.2d 1007 (2012)	A-37
<i>Cradduck v. Yakima County</i> , 166 Wn. App. 435, 271 P.3d 289 (2012)	A-37
<i>Wolfe v. Department of Transportation</i> , 173 Wn. App. 302, 293 P.3d 1244, <i>review denied</i> , 177 Wn.2d 1026 (2013)	A-38
<i>Keene Valley Ventures, Inc. v. City of Richland</i> , 174 Wn. App. 219, 298 P.3d 121, <i>review denied</i> , 178 Wn.2d 1020 (2013)	A-38
<i>Jackass Mt. Ranch, Inc. v. South Columbia Basin Irrigation District</i> , 175 Wn. App. 374, 305 P.3d 1108 (2013)	A-39
<i>Mangat v. Snohomish County</i> , 176 Wn. App. 324, 308 P.3d 786 (2013), <i>review denied</i> , 179 Wn.2d 1010, 179 Wn.2d 1012 (2014).....	A-39
<i>Lahey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860 (2013).....	A-39
<i>Admasu v. Port of Seattle</i> , 85 Wn. App. 23, 340 P.3d 873, <i>review denied</i> , 183 Wn.2d 1009 (2014)	A-40
<i>Fedway Marketplace West, LLC v. State</i> , 183 Wn. App. 860, 336 P.3d 615 (2014), <i>review denied</i> , 182 Wn.2d 1013 (2015).....	A-40
<i>Kinderace LLC v. City of Sammamish</i> , 194 Wn. App. 835, 379 P.3d 135 (2016), <i>review denied</i> , 187 Wn.2d 1006 (2017), <i>cert. denied</i> , 137 S. Ct. 2328 (2017).....	A-41
<i>Tapio Investment Company I v. State</i> , 196 Wn. App. 528, 384 P.3d 600 (2016), <i>review denied</i> , 187 Wn.2d 1024 (2017).....	A-42
<i>Olympic Stewardship Foundation v. State Environmental & Land Use Hearings Office</i> , 199 Wn. App. 668, 399 P.3d 562 (2017), <i>review denied</i> , 189 Wn.2d 1040 (2018), <i>petition for certiorari docketed</i> , No. 17-1517 (U.S., May 8, 2018).....	A-42
<i>Thun v. City of Bonney Lake</i> , 3 Wn. App. 2d 453, 416 P.3d 743 (2018)	A-43
<i>Maytown Sand and Gravel, LLC v. Thurston County</i> , 2018 WL 3765517, No. 94452-1 (Wash. Aug. 9, 2018).....	A-43

1. Summaries of Significant Takings Cases in the United States Supreme Court (Chronological Order)

Before 1970

***Pennsylvania Coal Co. v. Mahon*,
260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)**

Regulations can “go too far” and may become the functional equivalent of an exercise of eminent domain that requires the payment of just compensation.

This case begins the United States Supreme Court’s development of the concept of regulatory takings. Pennsylvania’s laws had prohibited coal mining that produced severe ground subsidence, which made it commercially impossible to mine coal in certain areas of the state. The Court rejected the notion that the constitutional requirement of just compensation was limited to traditional exercises of eminent domain (formal condemnation proceedings). Instead, the Court noted that regulatory activity can “go too far,” having such an impact on property that it is the functional equivalent of an exercise of eminent domain. The Court did not lay out clear standards as to when a regulatory action “goes too far.”

1970 – 1979

***Penn Central Transportation Co. v. New York City*,
438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)**

Takings claims are evaluated by examining and weighing three factors: (1) the economic impact of the regulatory action on the property; (2) the extent to which legitimate property use expectations exist and have been interfered with; and (3) the extent to which the government has used reasonable means to achieve an important public objective. When undertaking this evaluation the court must consider the impact on the entire property owner’s interest at stake, not just the portion subjected to regulation.

Grand Central Station was declared a landmark under New York City’s historic preservation ordinance. Penn Central, the owner, proposed to “preserve” the original station while building a 55-story building over it. The city denied the construction permit. The Court rejected Penn Central’s takings claim, explaining that the city ordinance served a valid public purpose and, so far as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the station as it was. Responding to Penn Central’s argument that the ordinance would deny it the value of its “pre-existing air rights” to build above the terminal, the Court held that it must consider the impact of the ordinance upon the property as a whole, not just upon “air rights.” The Court also applied a multi-factor test for evaluating a claim that specific government action has “taken” property. Courts must consider and weigh three factors: (1) the economic impact of the regulation on the property; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the governmental action (whether it furthers an important interest and could have been accomplished by less intrusive means).

1980 – 1989

***Agins v. City of Tiburon,*
447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)**

Regulatory actions may be a taking where they fail to advance a legitimate state interest or where they deprive property of all its value.

[In Lingle, the Court abandoned the “substantially advance” test as part of takings analysis, recognizing it instead as an element of substantive due process.]

The city adopted a zoning ordinance that limited property development to no more than five homes per parcel of land. Agins brought a takings claim alleging that the ordinance “completely destroyed the value of the property.” The Court appears to have identified an alternative test for evaluating whether a regulation results in a taking. The Court held that a taking occurs only where the regulation (1) fails to substantially advance a legitimate state interest; or (2) denies an owner all economically viable uses of the land. The Court upheld the ordinance because it advanced a legitimate interest and did not deprive the landowner of all economic value.

***Loretto v. Teleprompter Manhattan CATV Corp.,*
458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)**

A physical invasion of property, no matter how slight, will categorically constitute a taking of that portion of the property occupied for the period of time that it is occupied.

A state statute required landlords to allow the installation of cable television on their property. The owner of an apartment building challenged the statute, claiming a taking of private property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building. The Court held the statute was unconstitutional, concluding that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” The Court reasoned that an owner suffers a special kind of injury when a “stranger” invades and occupies property and that such an occupation is “qualitatively more severe” than a regulation on the use of property.

***Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,*
473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)**

A taking claim is not ripe and must be dismissed in two instances: (1) where the land use decision process has not been pursued, or is incomplete; and (2) where the landowner brings suit in federal court without first seeking compensation at the state level. The federal Just Compensation Clause does not require payment of compensation before a taking occurs, so long as a means of obtaining just compensation is provided.

Over a course of years, the county first granted in part, then ultimately denied applications for permits to develop a golf course and residential area. The applicant alleged a taking. The Court held the claim was premature for two reasons: (1) the applicant had not sought variances that would have allowed it to develop the property according to its proposed plat and thus had not obtained a final decision as to the application of the ordinance to its property; and (2) the applicant had not

used state procedures provided for obtaining just compensation. Tennessee had a statutory scheme allowing persons claiming a regulatory taking to file an inverse condemnation claim; the Court held the statutory scheme provided an adequate procedure for seeking just compensation, and the applicant could not claim a violation of the federal Just Compensation Clause until it used the state procedure and was denied just compensation. The Court also held that the Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, a taking; all that is required is that a “reasonable, certain and adequate provision for obtaining compensation” exists at the time of the taking.

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)

Where a land use planning agency retains some discretion to allow for meaningful use of the property, those opportunities must be explored before alleging that a final disposition exists regarding the permissible uses of the property.

A developer appealed the county’s denial of a “tentative subdivision map,” claiming the denial deprived it of all economic use of its property. Following the reasoning in *Williamson County*, the Court held that until a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed.

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California,
482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)

The remedy for a regulatory taking of property is the payment of just compensation rather than simple invalidation of the regulation. If a regulation found to have “taken” property subsequently is repealed by the government, the property owner may be entitled to compensation for a “temporary taking”—the loss of value during the time the taking existed.

When a flood destroyed a church campground, California responded with a moratorium prohibiting development in the flood plain area. The church sought damages, claiming its property had been taken. California argued that the only remedy available was to challenge the validity of the regulation and seek to have it overturned, but the Court held that just compensation is the appropriate remedy if property was “taken.” The Court also explained that if a statute effected a taking, the state could not avoid paying compensation by repealing the statute; compensation might be required for any loss of value during the time that the taking existed, that is for the “temporary taking.” The Court did not conclude there was a “temporary taking” in this case, only that the Just Compensation Clause allows compensation for a “temporary taking.”

Hodel v. Irving,
481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987)

The destruction of a “fundamental attribute of property” (the right to own, exclude others, dispose of property, or make at least some economic use of the property) will result in a taking.

Portions of the Sioux Indian reservation that had been “allotted” to individual tribal members had become fractionated, sometimes into very small parcels. Good land

often lay fallow, amidst great poverty, because of the difficulties in managing the property. In 1983, Congress passed legislation which provided that any undivided fractional interest constituting less than two percent of a given tract's acreage and earning less than \$100 in the preceding year would revert to the tribe. No compensation was to be provided tribal members whose property was lost under the statute. Tribal members challenged the statute. The Court noted that, under the balancing test traditionally applied to takings challenges, the statute might be constitutional. In this case, however, the character of the government action was "extraordinary" in that it destroyed "one of the most essential" rights of ownership: the right to transfer property, especially to one's family. The Court held that such an action was a taking, regardless of the public interest that might favor the legislation.

Keystone Bituminous Coal Association v. DeBenedictis,
480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)

Takings claims must be evaluated with respect to the entire parcel of land owned by the claimant, not just the portion affected by the regulation. Property may not be segmented into separate legal interests for purposes of evaluating a takings claim.

Pennsylvania enacted a law requiring coal companies to leave certain amounts of coal in place to prevent subsidence of surface property. Keystone claimed a taking, alleging the law would require it leave up to 27 million tons of its coal un-mined, thereby effectively appropriating its coal for a public purpose. Keystone challenged the law on its face, rather than challenging its application in a particular set of facts. The Court held Keystone had a difficult burden of proof because legislation is presumed to be constitutional. The Court explained that legislation properly may regulate an activity to prevent severe impacts to the public, even if the activity has not traditionally been classified as a nuisance. Absent a showing that the legislation had a severe impact on Keystone's entire property (the 27 million tons of coal was about two percent of Keystone's holdings) the Court declined to invalidate the legislation. In response to Keystone's arguments that its coal had been appropriated for a public purpose, the Court reaffirmed that takings law does not compensate a landowner for every loss in value. The Court refused to consider the coal left behind as a separate piece of property and affirmed that takings law evaluates the impact of regulation on the entire property held by the landowner, not just the portion being regulated.

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)

Permit conditions that extract something from a landowner must have some reasonable relationship (some "nexus") to an identifiable impact that the conditions seek to mitigate.

The Nollans sought a permit to replace a bungalow with a larger house on their California oceanfront property. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass along their beach. The Court found this requirement to be a taking. The Court reasoned that it would have been a taking if the government had simply ordered the Nollans to give the public an easement outside of any permit process; the existence of a permit process and the extraction of an easement as a permit condition changes nothing unless the condition is related to some impact

associated with the permit application. Even then, the permit condition is only valid if it substantially advances a legitimate state interest. The Court observed that if the Nollans' proposed house had blocked the public's view of the ocean from the street, a view easement perhaps would have been appropriate. But there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach. Accordingly, the Court held there was no reasonable relationship, or "nexus," between the permit condition and any public interest that might be harmed by the construction of the house. Lacking this nexus, the required easement was a taking of property.

1990 – 1999

***Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)**

A regulation that permanently deprives property of all economic value is a categorical form of taking that does not need to be evaluated using the Penn Central test. If, however, the government can show that the regulated use of property would be barred under fundamental principles of property law or nuisance, there is no categorical taking even if the property is left without economic value.

Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the state enacted legislation to protect its beaches, which prevented development of the lots. The parties stipulated that the parcels had no remaining economic value. The Court held that a regulation which "denies all economically beneficial or productive use of land" is categorically a taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. The Court explained, however, that such categorical takings will be "relatively rare" and the usual approach for determining takings, from Penn Central, will apply in most cases.

***Yee v. City of Escondido, California,* 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)**

Government regulation that affects the use of property, but that does not compel a landowner to involuntarily suffer the presence of the government or a third party, is not a categorical taking under Loretto.

Yee challenged a rent control ordinance for mobile home parks that scaled rents back to 1988 levels and prohibited increases without city approval. Yee argued that the rent control provision, in combination with the state laws limiting the termination of rental agreements, forced the property to be used as a mobile home park with artificially low rents. He contended the result was a categorical taking similar to the physical invasion identified in the Loretto case. Observing that Yee voluntarily rented space to mobile homes and could get out of the business and convert the property to another use at any time, the Court held the ordinance was a regulation of property, not a physical invasion. The Court noted that a conventional regulatory taking analysis under Penn Central might be possible in this circumstance, but refused to apply that analysis because Yee's suit had only been litigated as a physical occupation claim.

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 104 (1994)

Under Nollan, a permit condition that extracts something from a landowner must have some nexus to an identifiable impact. In addition, the scope of the condition must be “roughly proportional” to the impact being mitigated.

The city approved a permit to expand a store and pave a parking lot, on condition that the business owner (1) dedicate a portion of her property for a public greenway along an adjacent stream to minimize flooding that would be exacerbated by the increased impervious surface, and (2) provide for a bicycle path intended to relieve traffic congestion. When the city denied her variance request, she alleged a taking. The Court distinguished most of its prior regulatory takings cases for two reasons: (1) they involved challenges to legislative comprehensive land use regulations, whereas this case involved an adjudicative decision to condition an application for a building permit on an individual parcel; and (2) the conditions imposed here did not simply limit use, but also required that the landowner deed portions of her property to the city. The Court found a sufficient nexus between the permit conditions and the impacts they targeted, under Nollan, then proceeded to consider whether the required dedication was “roughly proportional” to the impacts being mitigated. The Court held no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. Finding that the city had not demonstrated why the floodplain could not be protected without depriving the landowner of her property, the Court held there was no evidence of a reasonable relationship between the business expansion and the required dedication for a public greenway. The Court also found that the bike path could be a reasonable requirement to mitigate the impact of increased traffic caused by the expanded business, but it was troubled by the lack of evidence concerning the magnitude of any traffic impact. The Court remanded for further proceedings.

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)

(1) If a takings claim can be brought in federal court and is raised as a 42 U.S.C. §1983 civil rights claim, a jury may be used to evaluate the government’s regulatory activity.

(2) The “rough proportionality” analysis set forth in Dolan is used only to evaluate regulatory exactions of some interest in property.

After the city repeatedly failed to approve the development of a 37.6-acre parcel of land, based on the need to protect the habitat of an endangered butterfly, the plaintiffs sought compensation in federal court. The takings claim was lodged as a civil rights violation under 42 U.S.C. § 1983. At trial, a jury was used to consider two different takings theories—a categorical Lucas-type taking based upon a complete deprivation of all economically viable uses, and a takings theory based upon the Court’s Agins analysis examining the nature of the government’s actions. (Note: After Lingle, decided in 2005, this second form of takings analysis is no longer used in federal courts). On appeal from a successful verdict, the city argued that it was improper to submit the takings question to a jury. The Court disagreed, noting that the jury was not being asked to scrutinize the question of whether the government’s regulatory decisions were appropriate. The case had been raised as a

civil rights claim and was litigated on the premise that the city's regulations were valid but had been applied inconsistently. The Court specifically refused to decide whether a jury might be used to determine takings claims brought outside of this context. In addition, the Court clarified that the rough proportionality test laid out in Dolan applies only when evaluating whether a property exaction amounts to a taking; it does not apply to regulatory actions that do not exact some property interest from the landowner.

2000 – 2009

***Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)**

(1) The mere fact that a government regulation was enacted before a regulated property was acquired does not mean the regulation will be treated as a background limitation on the use of the property that cuts off a taking claim, although the regulation may be considered in any Penn Central analysis that is performed. Only background limitations that traditionally have limited the use of property will cut off a regulatory takings claim.

(2) Where a regulation denies or limits the use of property, a takings claim will be ripe only if the landowner fully explores available variances or regulatory land use options or demonstrates that it would be futile to do so.

A landowner was denied a permit to fill wetlands as part of a plan to build several waterfront homes. The landowner sued, alleging that the property had no remaining value and had been taken under the “total deprivation of all value” test laid out in Lucas. The planning agency responded (1) that the claim was not ripe because the landowner had not sought a variance; (2) that, because the landowner had acquired the property after the effective date of the regulation, the regulation constituted a preexisting limitation on the use of property, thereby cutting off any taking claim; and (3) that no Lucas claim existed because the evidence showed at least one home could be built on the unfilled portion of the property.

The Court reaffirmed that a case is not ripe where a planning agency retains the discretion to allow some alternate form of valuable development. In this case, while the applicable ordinance allowed for variances based upon a showing of “compelling public purpose,” the planning agency had already indicated that no compelling interest could be shown. On that basis, the Court held the appeal was ripe because it would be futile to make the landowner go through the motions of attempting to obtain a variance.

Agreeing that pre-existing property limitations may cut off a taking where the background limitation on property uses has always existed as a part of the law of property, the Court held this principle should not be used to treat newly enacted regulations as some bright line cut-off of any subsequent claim that the newly enacted regulations amount to a taking. Instead, the fact that a property owner may have acquired property with the knowledge that a previous regulation might preclude certain land uses could be weighed as part of the Penn Central test when evaluating a landowner's legitimate investment expectations. Finding that the entire property retained some value, the Court rejected the Lucas-based takings claim and remanded the case for a determination whether a taking had occurred, using the Penn Central test.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)

This opinion summarizes much of the Court’s prior takings analysis, including the principle that property is not segmented into components for purposes of a takings analysis (the “whole parcel rule”), and confirms that the Penn Central test is the usual test for evaluating takings claims. Categorical takings claims are limited to the narrowly tailored exceptions set forth in Loretto (physical occupation) and Lucas (total deprivation of all economic value).

The Tahoe Regional Planning Agency imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land use plan for the area. Landowners affected by the moratoria filed suit claiming a taking of their property without just compensation, alleging that their properties had been deprived of all value during the moratoria. The Court refused to apply the categorical taking test of Lucas, explaining that a temporary deprivation of all value does not qualify as a taking under Lucas. For example, the normal delay associated with getting a permit does not give rise to a claim for any lost value. The Court held moratoria should be evaluated instead using the Penn Central test, under which a moratorium could be treated as a taking if imposed for a long enough time or in a manner that was disproportionate to the legitimate planning needs of the agency.

The Court affirmed that takings claims normally are evaluated using the Penn Central test. Categorical takings, such as the total deprivation of all value principle laid out in Lucas or the physical invasion principle laid out in Loretto, are rare and narrowly-tailored exceptions to normal takings analysis. The Court also affirmed that takings analysis must not segregate the regulated property into partial interests when evaluating the regulatory impact (e.g., a portion of time when the property may be used, a partial legal interest in the use of the property, or a physical segment of the property being regulated). The property must be considered as a whole when evaluating the impact of regulation.

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 5288, 125 S. Ct 2074, 161 L. Ed. 2d 876 (2005)

The “substantially advances” formula articulated in Agins is not an appropriate test for determining whether a regulation effects a taking of property requiring just compensation, but is instead a principle associated with a substantive due process analysis.

Concerned about the effects of market concentration on retail gasoline prices, the Hawaii Legislature passed a law limiting the rent that oil companies could charge dealers leasing company-owned service stations. Chevron sued, seeking a declaration that the rent cap was a taking of its property. Applying Agins, the district court held that the rent cap effected a taking in violation of the Fifth and Fourteenth Amendments because it did not substantially advance Hawaii’s asserted interest in controlling retail gas prices. The Court reversed, concluding the “substantially advances” formula is not a valid method of identifying compensable regulatory takings. Rather, it prescribes an inquiry in the nature of a due process test, which has no proper place in takings jurisprudence. A plaintiff seeking to challenge a government regulation as a taking of private property may proceed by alleging (1) a Loretto-based physical taking, (2) a Lucas-type total regulatory taking, (3) a Penn Central taking using the traditional inquiry into the nature and effect of the

government regulation, or (4) a land-use exaction violating the Nollan and Dolan reasonable relationship and proportionality standards.

San Remo Hotel v. City and County of San Francisco,
545 U.S. 323 , 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005)

Full Faith and Credit considerations bar a Fifth Amendment takings claim from further litigation in federal court after a state court has analyzed the federal takings issue, found no taking, and denied compensation. It makes no difference that a federal suit would have been dismissed under Williamson County as unripe for failing to first proceed in state court.

The San Remo Hotel was subject to a city ordinance requiring anyone wishing to convert residential hotel units into tourist hotel units to mitigate the loss of residential units by constructing new residential units, rehabilitating old ones, or paying an “in lieu” fee. When the hotel sought to convert all its rooms to tourist units, the city required it to pay a \$567,000 “in lieu” fee after all the units in the hotel were classed as residential. San Remo filed a state court action challenging the classification of its units, and a federal court action asserting that the ordinance worked a taking, both facially and as applied to San Remo. Relying on the ripeness principles in Williamson County, the Ninth Circuit held the as-applied challenge in federal court was not ripe because state court proceedings were available to seek just compensation. The Court of Appeals granted San Remo’s petition that it abstain from deciding the facial challenge until the state court case was resolved. The state court case then was expanded to include both facial and as-applied takings claims.

The California Supreme Court, analyzing the takings claims under both the federal and California constitutions, denied both takings claims. San Remo then attempted to litigate its takings claims in federal court. The federal district court held that both takings challenges were barred by traditional principles of abstention: federal courts do not re-litigate claims resolved in state courts because they are not courts of appeal for such litigation. The U.S. Supreme Court affirmed, invoking the Full Faith and Credit clause of the U.S. Constitution, Art. IV, § 1; the full faith and credit statute, 28 USC 1738; and traditional abstention principles. The Court explained that the fact that state court proceedings are not chosen, but instead are required to ripen federal takings claims, does not eliminate the preclusive effect of the prior determination so long as the state court proceedings fully litigate the takings issues.

Kelo v. City of New London,
545 U.S. 469 , 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)

Under the Fifth Amendment to the U.S. Constitution, the condemnation of private property and its transfer to private developers under a government-approved program for economic rejuvenation is evaluated using a broad definition of “public use” that defers in part to a legislative determination that the program is of public benefit.

The city approved an integrated development plan designed to revitalize its ailing economy. The city purchased most of the property earmarked for the project from willing sellers, but it initiated condemnation proceedings against those owners who refused to sell. These property owners sued in state court, claiming the condemnation of their property as part of a plan to transfer the property to private developers did not constitute a “public use” of their property, as required in the federal Takings Clause. The Connecticut Supreme Court held the condemnation action was valid, and the U.S. Supreme Court affirmed. The Court held a

government action serves a government use as long as it advances a public purpose. Relying on precedents extending back to the 19th century, the Court rejected the argument that “public use” literally means “use by the general public.” The Court looked instead to the state legislative determination as to whether the proposed use was a public use and held that in some circumstances economic development is a valid public use that can justify the condemnation of private property through eminent domain.

2010 – 2018

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,

560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010)

The concept of “judicial takings”—the notion that court decisions affecting the contours of property rights might be viewed as a taking of property if long-held property expectations are upset—remains unresolved.

To protect coastal property owners and the community as a whole from vulnerabilities caused by beach erosion, Florida established a beach renourishment program that placed sand on publically-owned submerged land to help restore damaged beaches. Several Florida beachfront homeowners alleged the program resulted in a taking of their rights of exclusive access, unobstructed view, and future accretion. When the state supreme court upheld the program, the homeowners petitioned the Supreme Court, alleging the state court decision constituted a “judicial taking” of their property. The Court held unanimously that there was no taking in this case, but it deadlocked 4-4 (one Justice recused) on whether to recognize, for the first time in American history, a “judicial taking” doctrine. Because the Court deadlocked, the doctrine was not recognized.

Arkansas Game and Fish Commission v. United States,

568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012)

When the government makes a decision to release water from a retaining dam, it can be sued under the federal Takings Clause for damage to downstream property arising from the “invasion” of water (even if the downstream flooding is temporary in duration), provided the released water causes sufficient damage that is traceable to the decision to release.

From 1993 through 2000, the United States Army Corps of Engineers created a temporary but periodic flood regime for management of a federal wildlife management area in Arkansas. The flood regime caused flooding across the region, which restricted access to and destroyed or degraded thousands of timber trees on land owned by the state. The state sued, alleging that the federal government’s periodic flooding had damaged its property and was subject to the payment of just compensation.

The Court rejected the federal government’s claim that temporary flood waters are categorically exempt from a takings claim. The length and severity of the property interference caused by the flooding is just one factor among many a court must consider when determining whether a specific government action produces a taking. Other factors include the intent behind the action and the degree to which the interference was a foreseeable result of an authorized government action. The case was remanded to the trial court for a full takings analysis consistent with these principles.

Koontz v. St. Johns River Water Management District,
570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)

(1) The Nolan and Dollan requirements—that governments show both a nexus and rough proportionality between its demand on the landowner and the effects of the proposed land use—are not avoided simply because a permit is denied after the landowner refuses to meet the demand. (Unanimous decision.) The merits of imposing the proposed exaction can still be reviewed.

(2) The Nolan and Dollan requirements apply to both property exactions (demanding some interest in the regulated property as a condition of development) as well as monetary exactions (where the demand on the landowner is the expenditure of money on mitigation projects). (5-4 decision)

Koontz wanted to develop wetland property he owned in Florida. During the permitting process, he offered to grant a substantial conservation easement to the District, but the District rejected his proposal, informing him that his permit would be denied unless he agreed to do one of two things: (1) scale back his planned development and give the District a larger conservation easement; or (2) maintain the proposal, but also hire contractors to make improvements to separate land owned by the District.

The Court held that when a government conditions or denies a land use permit based upon a demand for valuable services or an interest in the land, there is an “exaction” and the government must show that there is some nexus and rough proportionality between its demand on the landowner and the effects of the proposed land use. Monetary exactions requiring the expenditure of money to create or acquire mitigation measures were distinguished from normal taxes and permitting fees that the government is authorized to impose in order to fund government operations and which are not subject to an exaction analysis.

Horne v. Department of Agriculture,
569 U.S. 513, 133 S. Ct. 2053, 186 L. Ed. 2d 69 (2013)
___ U.S. ___, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015)

(1) Physical appropriations of property by the government—whether of real property or personal property—always require the payment of just compensation, even if the government provides for retention of some continuing or future economic interest in the appropriated property.

(2) As a factual matter, requiring a raisin grower to turn over a portion of its raisin crop in order to participate in interstate commerce cannot be characterized as a voluntary exchange for a valuable government benefit (in contrast, e.g., to requiring a government license to produce and sell potentially dangerous chemicals).

The U.S. Department of Agriculture determined that a farmer violated an agricultural marketing order designed to stabilize the raisin market. The order was based upon a regulatory plan establishing a “reserve requirement” that precludes raisin growers from selling all of their raisins, thereby restricting supply and maintaining prices at higher levels. The raisins that cannot be sold are to be turned over to the government for later sale or disposal by the government, with any profits returned to the grower. In this case the grower refused to comply, was assessed a substantial penalty, and sued the Department, arguing that the fine was an unconstitutional “taking.”

In its 2013 decision (133 S. Ct. 2053), the Court held that the grower was not required to bring that claim in the Court of Federal Claims, and could bring his “takings” claim in a regular federal district court without first paying the fine. It remanded to the Ninth Circuit to decide the takings claim. The Ninth Circuit observed that the grower had not alleged a standard regulatory taking claim under the *Penn Central* theory. Applying an analysis like that in *Koontz*, the Ninth Circuit concluded that the marketing order was directly related to the need to stabilize markets for raisins, and the reserve amount (adjusted annually) was proportionate to the objective of avoiding an unstable market.

In its 2015 decision (135 S. Ct. 2419), the Supreme Court reversed, holding that the government’s actions constituted a physical taking of personal property because the reserve raisins had to be turned over to the government. A physical taking always requires the payment of just compensation. The fact that the regulatory format provided some possibility of economic return from the reserved raisins did not change the takings analysis, but was relevant only to the amount of just compensation that is due.

The Court also held that the taking cannot be characterized a voluntary exchange for a valuable government benefit. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (disclosure of valuable trade secrets as a condition for licensing sales of potentially dangerous chemicals is not a taking because the impact on the property interest in trade secrets was a reasonable condition for allowing the licensing of dangerous products). In this respect, the Court appears to have drawn a distinction between regulations that appropriate an interest in property whose use is inherently dangerous and not typically allowed and regulations that appropriate other types of property. Government may impose conditions on dangerous uses of property, consistent with regulatory takings or exaction principles, in exchange for approval to conduct the dangerous use. But the government could not require the grower to turn over a portion of its raisin crop without just compensation as a regulatory condition of participating in interstate commerce.

***Murr v. Wisconsin*,**

____ U.S. ____, 137 S. Ct. 1993, 198 L. Ed. 2d 497 (2017)

The “whole parcel” is considered when evaluating the impact and economic effect of land use regulation, and is determined based upon an objective test of whether a landowner would reasonably expect her land holdings to be aggregated or treated separately.

The Murr family owned two adjacent riverfront lots. They decided to sell one lot and retain the other. However, state property regulations precluded sale or development of adjacent riverfront parcels of land held by a common landowner unless each parcel has at least one acre of land suitable for development. Because each lot had less than the required room for development, the separate sale of one parcel was not permitted. Murr sued, alleging all or most of the value of the parcel they wanted to sell had been taken. The Supreme Court affirmed lower court determinations that both the Murr parcels should be evaluated as a whole parcel and that no taking had occurred because the whole parcel retained substantial value.

The Court rejected Murr’s argument that an affected parcel is defined simply by the two parcels lot lines. The Court also rejected the State’s proposed test—whether any state law treats the parcels as a unitary whole. (The state law here treated adjacent riverfront parcels that came to be held in common ownership as having

been effectively “merged” into one parcel.) Instead, the court adopted an “objective” three-part test of whether a reasonable landowner would consider the parcels as separate or unitary. The test evaluates three factors: “[1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land.” With regard to the third factor, the analysis should give “special attention to the effect of burdened land on the value of other holdings.” Applying these factors, the Court concluded that Murr’s two lots should be treated as one for takings analysis. First, Wisconsin property law—specifically, the merger provision—treats the two parcels as one. Second, the landowners reasonably should have anticipated regulation of their contiguous lots because of their “rough terrain,” “narrow shape,” riverfront location, and preexisting federal, state, and local regulations along the river. Third, the lots are more valuable when combined.

2. Summaries of Significant Washington State Takings Cases (Chronological Order)

1970 – 1979

***Maple Leaf Investors, Inc. v. Department of Ecology,*
88 Wn.2d 726, 565 P.2d 1162 (1977)**

A prohibition on construction for human habitation within a floodway is a valid exercise of the state police power, not a taking or damaging of private property.

Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations, which prohibited construction for human habitation within the floodway channel. Seventy percent of the property lay within the floodway channel. Considering a claim that the flood control regulations effected a taking, the Washington Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The court found the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety: the regulations prevented harm to persons who might otherwise live in the floodway, and barred the construction of structures that might break loose during a flood and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the court noted that it was nature, not the government, that placed Maple Leaf’s property in the path of floods. The court rejected the taking claim.

***Department of Natural Resources v. Thurston County,*
92 Wn.2d 656, 601 P.2d 494 (1979), cert. denied, 449 U.S. 830 (1980)**

Restricting development density to protect bald eagle habitat is not a taking, so long as the county allows sufficient density for the owner to make a profitable use of its property.

A developer leasing property from the state sought plat approval from the county for a proposed residential development. The county denied preliminary plat approval, finding the proposed development would interfere with eagle perching and feeding areas. The developer claimed a taking of private property. The Washington Supreme Court held it was not a taking, primarily because the county

had indicated it would approve a less intensive development. (The county commission had found no adverse impact from the development of 11 of the 22 lots proposed by the developer.) The court held there was a strong public interest in protecting the eagles, and there had been no showing that all reasonably profitable uses of the property were foreclosed.

1980 – 1989

Granat v. Keasler,
99 Wn.2d 564, 663 P.2d 830, cert. denied, 464 U.S. 1018 (1983)

A city ordinance that conveyed perpetual occupancy rights to paying tenants effected a taking of property from houseboat moorage owners.

Under a Seattle houseboat ordinance, the only reason a houseboat moorage owner could evict a paying tenant would be to use the moorage site for the owner's own non-commercial residence. A moorage owner appealed the ordinance. The Washington Supreme Court held the ordinance was a taking of private property without just compensation. The court's reasoning followed that of its earlier decision in *Kennedy v. Seattle*, 94 Wn.2d 376, 617 P.2d 713 (1980), where a similar ordinance was invalidated because it effectively conveyed perpetual occupancy rights of a landowner's property to another person.

Buttnick v. City of Seattle,
105 Wn.2d 857, 719 P.2d 93 (1986)

A historical preservation requirement in a city ordinance does not effect a taking if, considering the market value and income producing potential of the subject property, the requirement imposes no unnecessary or undue hardship on the plaintiff.

A Seattle historic preservation ordinance required a building owner conducting repairs to replace a parapet in a manner approximating the original design. The building owner claimed its property was taken without compensation. Following the U.S. Supreme Court's analysis in *Penn Central*, the Washington Supreme Court held the estimated cost of replacing the parapet would not be an undue hardship on the building owner, considering the market value and income-producing potential of the building. The court rejected the taking challenge to the historic preservation ordinance.

Valley View Industrial Park v. City of Redmond,
107 Wn.2d 621, 733 P.2d 182 (1987)

A reasonable delay in obtaining a required development permit does not give rise to a claim for a regulatory taking.

A developer sought to build a phased development on a parcel that was the focus of efforts to conserve agricultural lands, which resulted in several delays during the permit approval process. The Washington Supreme Court found the task of obtaining a regulatory permit usually takes many months, and often several years, and concluded that reasonable delays do not result in a taking of property. The court also reiterated the Washington rule that, although the mere passage of time does not bar a landowner's right to seek just compensation for an alleged taking by inverse condemnation, that right may be subject to statutory time limits.

Orion Corp. v. State,
109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988)

(1) A government prohibition on development actions that is reasonably tailored to protect the public interest in navigable waters under the Public Trust Doctrine does not constitute a regulatory taking.

(2) If a court concludes there is a regulatory taking, the decision lies with the legislative branch to decide whether to (a) cure the taking by amending the regulations, while providing compensation for a temporary taking; or (b) exercise eminent domain to complete a permanent taking, with appropriate compensation for the condemnation.

The Orion Corporation was denied a shoreline permit to build a residential community on tidelands in Padilla Bay. Although the denial was issued pursuant to a county shoreline ordinance, the Washington Supreme Court found the state was the proper defendant for Orion's regulatory takings claim; the court concluded the county was acting as agent for the state when it adopted its shoreline ordinance, because the ordinance became effective only when approved by the state. This case contains extensive discussions of the evolving notion of regulatory takings, although many of the principles discussed have been more fully developed since the time this opinion was issued. In addition to the interesting historical look at the development of the law, the opinion continues to be noteworthy for its conclusions (1) that private interests in navigable waters are burdened by public interests under the Public Trust Doctrine, and (2) the government may prohibit development actions that impair these public interests without effecting a taking and without violating principles of due process so long as the government's actions are reasonably tailored to prevent an impairment of the public's interests in the property.

Unlimited v. Kitsap County,
50 Wn. App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988)

To avoid a taking, an exaction placed on a proposed development must serve a legitimate public purpose, must be reasonable, and must address a problem that arises from the proposed development.

Unlimited sought a planned unit development approval to construct a convenience store on part of its property. The county approved the application subject to two conditions which required Unlimited to (1) dedicate a 50-foot right of way to provide commercial access to the next door property, and (2) dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The Washington Court of Appeals, relying upon the U.S. Supreme Court's decision in *Nollan*, stated that a private property interest can be exacted without compensation only where "the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose." The court ruled that providing commercial access to the adjacent private property benefited a private person, rather than mitigating a public problem, and it found nothing in the proposed development that created a need to extend the arterial. The court held the conditions imposed by the county effected a taking.

Estate of Friedman v. Pierce County,
112 Wn.2d 68, 768 P.2d 462 (1989)

A taking claim is not ripe for judicial review where the government retains some discretion to allow profitable uses of land.

After the county denied a master application for a proposed development, the developer challenged the denial and alleged a taking. The superior court rejected both claims, dismissing the taking claim as not ripe for review because no specific project had been proposed. The Washington Supreme Court affirmed, holding that a taking claim is not ripe for adjudication where a regulatory agency retains some discretion to allow profitable uses of land. Without a final regulatory disposition that clearly shows the economic impact of the regulatory program, it is not possible for the court to assess the extent to which the regulation interferes with reasonable investment-backed expectations. Ripeness is a question for the judge, not the jury. If the regulatory agency raises as a defense the landowner's failure to exhaust administrative remedies, the burden is on the landowner to persuade the court that futility excuses exhaustion. The burden is on the landowner to demonstrate it would be futile to pursue available development alternatives, and this is a substantial burden.

1990 – 1999

Presbytery of Seattle v. King County,
114 Wn.2d 320, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990)

A land use regulation may be challenged either as a taking or as a violation of substantive due process.

Presbytery purchased land on which it intended to build a church. The land contained a significant wetland, which occupied approximately one-third of the 4.5-acre parcel. Several years after the purchase, but before Presbytery had filed any development application, the county adopted an ordinance protecting wetlands, including the wetland on this parcel. Although the ordinance contained a reasonable use exemption, and despite the county's contention that a church could be built on the remaining two-thirds of the parcel, Presbytery alleged the wetlands portion of its property had been taken without just compensation.

This case marked the Washington Supreme Court's first attempt to provide an analytical framework for evaluating regulatory takings that incorporated U.S. Supreme Court cases and allowed for simultaneous or alternative substantive due process challenges. The state court's analysis first considered whether a regulation safeguards the public interest in health, safety, the environment, or fiscal integrity of an area rather than seeking to acquire some benefit for the public. If so, the regulation is not normally a taking. The constitutional validity of such a regulation then would be analyzed by considering whether it violates substantive due process.

If the regulation went beyond safeguarding the public's interests and worked to enhance a public interest, or if it destroyed a fundamental attribute of property ownership (the right to possess, to exclude others, or to dispose of property), then the regulation would be subject to analysis under the federal takings clause. A taking analysis would start by assessing whether the regulation substantially advances a legitimate state interest. If it did not, then there would be a taking. If the regulation does substantially advance a legitimate state interest, then the court

would assess the extent of the economic impact on the property subject to the regulation, employing the test laid out in Penn Central.

The usual remedy for a violation of substantive due process is invalidation of the ordinance. The usual remedy for a taking is just compensation. (But see the decision in Manufactured Housing, summarized below.)

The Presbytery test was re-worked in Guimont v. Clarke in response to subsequent U.S. Supreme Court holdings.

***Sintra, Inc. v. City of Seattle*,
119 Wn.2d 1, 829 P.2d 765, cert. denied, 506 U.S. 1028 (1992) (Sintra I)**

A substantive due process claim rests on a showing that interference with property rights was irrational or arbitrary, not on a showing that no viable use of the property remains. Where money damages are sought for a substantive due process violation under 42 U.S.C. § 1983, there also must be a showing that the land use regulation is invidious or irrational.

This is one in a series of related cases in which the plaintiffs applied to develop and change the use of hotels that previously had been used for low-income housing. In each case, Seattle imposed a housing preservation assessment under its housing preservation ordinance as a condition of development. While the applications were pending, the superior court invalidated this provision of the ordinance as an unconstitutional tax, and the Washington Supreme Court affirmed in *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 25, 735 P.2d 673 (1987).

Sintra filed a lawsuit under 42 U.S.C. § 1983 seeking damages for the imposition of the housing preservation assessment on its proposed development, alleging both a violation of substantive due process and a taking of private property. The superior court dismissed the claim for damages, but the Washington Supreme Court reversed. Applying the Presbytery test, the court found the record insufficient to determine whether a taking had occurred and remanded also for a determination whether the ordinance placed so great an economic burden on the property that no viable use was available. If Sintra could make such a showing, then compensation for a taking would be available. (See Sintra II.)

Turning to the substantive due process claim, the court held that even though the housing preservation ordinance served a legitimate public purpose, it violated substantive due process because it was unduly oppressive, because the burden of providing low-income housing fell entirely on regulated landowners. Consistent with Presbytery, the court invalidated the assessment. To recover damages for this violation, however, the court held the plaintiff must prove the city acted invidiously or irrationally in imposing the assessment on the plaintiffs. The court remanded for a determination whether plaintiffs could make the required showing.

***Guimont v. Clarke*,
121 Wn.2d 586, 854 P.2d 1 (1993), cert. denied, 510 U.S. 1176 (1994)**

This opinion set forth the basic steps used by Washington courts to analyze challenged alleging regulatory takings or violations of substantive due process.

In 1989, the Legislature adopted a statute that required owners of mobile home parks to establish a fund to financially assist tenants in moving their homes should the owner decide to close the park or change the property to another use. The statute was challenged facially by park owners on regulatory takings and substantive due process grounds. In its first takings case since the U.S. Supreme Court's decision

in Lucas, the Washington Supreme Court reviewed its Presbytery analysis and re-worked the analysis slightly to accommodate the Lucas holding. Interpreting U.S. Supreme Court cases, the court mapped out a three-part regulatory takings analysis in Washington.

- (1) The court begins with a threshold analysis, which applies the classic categorical or “*per se*” takings tests, in which the government’s actions are not weighed against their financial impact. The court asks whether the challenged regulation deprives the owner of all economic value (Lucas), causes a physical invasion (Loretto), or otherwise destroys a fundamental attribute of property ownership (the right to own property, exclude others, or dispose of the property). If so, a taking has occurred unless, in a Lucas-type claim, the background property limitation principle applies. If not, the court proceeds to a second threshold analysis.
- (2) The second threshold analysis asks two subsidiary questions. First, does the regulation impinge upon a fundamental attribute of property ownership? (See Hodel and Agins.) Second, does the regulation do more to prevent harm to the public than to acquire some affirmative public benefit? If the regulation does not impinge upon a fundamental attribute of property ownership and if it manifestly prevents harm rather than acquiring a benefit for the public, then no taking exists and the taking analysis concludes. Otherwise, the court proceeds to the third part of the takings analysis. (Note that the harm/benefit test frequently is difficult to apply because it is difficult to distinguish between harm prevention and benefit acquisition.)
- (3) If the regulatory action impinges upon a fundamental attribute of property ownership, or if some public benefit is acquired, the court asks whether the regulatory action substantially advances a legitimate state interest. If the answer is no, the action is a taking. If the answer is yes, the Court then uses the test set forth in Penn Central to evaluate the economic impact of the government’s actions against the purposes and methods used by the government.

In this case there was no taking because the landowners could still evict tenants and change the use of the property. However, the court held the statute violated substantive due process because the potential financial impact of the statute’s relocation reimbursement requirements would be unduly oppressive on park owners.³ While the statute legitimately addressed the problem of declining space for mobile homes, the court concluded that the park owners were not more responsible for the problem than the general public and should not be required to bear the entire responsibility for achieving the stated public goal. Following the test in Presbytery, the court invalidated the Act.

³ The test for substantive due process set out in Presbytery is (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. As in Guimont v. Clarke, the analysis usually turns on the “unduly oppressive” part of the test.

***Margola Associates v. City of Seattle,*
121 Wn.2d 625, 854 P.2d 23 (1993)**

To prove a regulation results in a physical taking, a landowner must show the regulation requires the landowner to submit to the physical occupation of his or her land.

Apartment house owners challenged a city ordinance that required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. Applying the analysis from *Guimont v. Clarke*, the court held the ordinance did not effect a regulatory taking, finding the city had a legitimate interest in ensuring compliance with its housing code and concluding the ordinance neither deprived the owners of all economic value nor amounted to a physical invasion. Relying on the U.S. Supreme Court decision in *Yee*, the Washington Supreme Court rejected the argument that the ordinance's restriction on eviction effectively compelled a physical invasion of property, explaining that the owners had voluntarily rented the units and could continue to evict tenants by paying a small fee, so the owners' right to exclude others was not destroyed. The court also found the small annual fee (one-half of one percent of the average rent) was not an undue burden on the owners and held the owners were not deprived of substantive due process.

***Guimont v. City of Seattle,*
77 Wn. App. 74, 896 P.2d 70, review denied, 127 Wn.2d 1023 (1995)**

A prohibition on one type of use does not effect a regulatory taking if other economically viable uses remain available.

While the Washington Supreme Court's review was pending in *Guimont v. Clarke*, the Legislature amended the statute at issue by scaling back the required financial contributions to the relocation program. Instead of challenging the amended statute, the plaintiffs in this case challenged a Seattle ordinance that reserved spaces in mobile home parks solely for mobile homes, excluding "recreational vehicles." Both facial and "as applied" taking claims were alleged, together with a substantive due process claim. The Washington Court of Appeals found the record insufficient to decide the as-applied claims and rejected the facial claims. Applying the *Guimont v. Clarke* analysis, the court held (1) there was no categorical taking because the law did not prevent all economically viable use of the property and because there was no physical invasion (using reasoning similar to that used by the U.S. Supreme Court in *Yee*); (2) no fundamental property attribute was destroyed, derogated, or implicated; (3) the showing of financial impact was insufficient to support a general conclusion that the ordinance unfairly disrupted the landowners' investment-backed expectations; and (4) the legislation advanced a legitimate state interest in dealing with declining opportunities to locate mobile homes that are occupied by elderly and low-income families. The court concluded the ordinance had "minimal" impact on the mobile park owners and did not violate substantive due process.

***Luxembourg Group, Inc. v. Snohomish County,*
76 Wn. App. 502, 887 P.2 446, review denied, 127 Wn.2d 1005 (1995)**

To meet Nollan's "essential nexus" requirement, an exaction of property must address some problem arising from the development under consideration.

As a condition for approving a subdivision, the county required the developer to grant an easement to a neighboring landlocked property owner. The Washington Court of Appeals held the condition was a taking, because there was no essential

nexus between the easement requirement and any adverse impact of the development (see *Nollan*). The court reasoned that the interior parcel would be land-locked regardless of whether the developer's property was subdivided or not.

Sparks v. Douglas County,
127 Wn.2d 901, 904 P.2d 738 (1995)

The government must demonstrate that the exaction it imposes to mitigate development is “roughly proportional” to the impact of the development.

As a condition for approval of a development plat, the county required the developer to dedicate several rights of way for future street improvements. The developer conceded there was a “nexus” between the condition and the identified impact of the proposed development, but challenged the amount of the dedication as a taking, claiming it was not specifically proportional to the identified impact. Applying the “rough proportionality” test of *Dolan*, the Washington Supreme Court concluded the county did not need to show exactly proportional mitigation requirements, just a roughly proportional calculation of impact and mitigation. So long as the county had some valid reasoning and did not rely upon merely conclusory findings, the mitigation condition could be upheld.

Ventures Northwest Ltd. Partnership v. State,
81 Wn. App. 353, 914 P.2d 1180 (1996)

A plaintiff alleging a regulatory taking must be able to demonstrate the alleged deprivation of property actually was caused by the government's regulation or action.

Ventures sought to develop property in a flood plain and applied for permits from both the state and the federal government. The federal permitting process proved difficult and a federal Corps of Engineers permit was denied for several reasons, including opposition by various federal agencies, the state Department of Ecology's refusal to issue water quality certifications, and Ventures' repeated failure to work through various permitting information concerns. While the federal permit decision was pending, the county denied a grading and filling permit. Ultimately, the county began foreclosure proceedings against Ventures' property for nonpayment of assessments and taxes. Ventures filed takings claims against the state and the county. Ventures alleged the state's actions had caused the federal permit process to fail, and it alleged the county's permit denial contributed to its inability to develop its property. The Washington Court of Appeals rejected the claims, explaining that a taking claim must be premised upon “causation in fact”—the plaintiff must be able to demonstrate the alleged loss would not have occurred “but for” the government's actions. The court concluded the federal government had a basis to deny the permits before the state refused to provide the required water quality certification. The court also concluded the county's denial of the permit was reasonable because Ventures failed to satisfy a properly imposed condition and because Ventures failed to show that the permit denial resulted in any loss of economic viability.

Schreiner Farms, Inc. v. Smitch,
87 Wn. App. 27, 940 P.2d 274 (1997)

A restraint on the sale of property is not a taking where it is not accompanied by some physical restriction on the property.

Schreiner Farms operated an 800-acre game farm that bred and raised several exotic animal species, along with native elk. To protect native wildlife from disease, the state adopted regulations banning the importation, possession, or sale of elk, with certain exceptions, including a limited right to continue possession of previously-acquired elk. Schreiner Farms sued for compensation, alleging its elk and other property were taken by the regulations. The Washington Court of Appeals held the regulations did not destroy or derogate a fundamental attribute of property because Schreiner Farms retained the right to possess the elk and could dispose of them so long as they were transported out of state. The regulations imposed a restraint upon the range of options for disposing of the elk (including a bar on in-state sales), but the court, relying on *Andrus v. Allard*, 444 U.S. 51 (1979), held the restraint on sale of elk was not a taking where there was no accompanying physical property restriction, such as a prohibition on possession or transportation of the elk.

***Sintra, Inc. v. City of Seattle*,
131 Wn.2d 640, 935 P.2d 555 (1997) (*Sintra II*)**

A plaintiff who prevails on a regulatory takings claim is entitled to payment of interest on the value of the property taken for the time period between the taking and the ultimate payment of compensation.

After *Sintra I* remanded to the superior court, a jury found a taking had occurred and awarded compensation to Sintra, but the jury denied Sintra's claim for money damages under 42 U.S.C. § 1983 flowing from the city's violation of substantive due process, finding the violation had not proximately caused Sintra any harm. The Washington Supreme Court affirmed.

Sintra II involved questions about the appropriate amount of interest to be paid as part of compensation for a taking. The court explained that just compensation should be sufficient to put the property owner into the same position monetarily as the owner would have been had the property not been taken. The value of just compensation is calculated as of the time the taking occurs. In an inverse condemnation or regulatory taking, however, there is a delay between a taking and the judicial determination that compensation should be awarded, such that the payment of interest is necessary to compensate the owner for the lost use of the monetary value of a taking. The court held that simple interest at the statutory rate should be awarded, unless there is evidence that such an award would not afford just compensation. In this case, the trial court erred by awarding compound interest.

***Snider v. Board of County Commissioners of Walla Walla County*,
85 Wn. App. 371, 932 P.2d 704 (1997)**

A court cannot force a legislative branch of government to exercise the power of eminent domain.

As a condition for approving a preliminary plat for a proposed subdivision, the county required that an existing road be widened, which would require the developer to acquire a right of way from an adjacent landowner. The superior court upheld the determination that a widened road was needed to serve the proposed development, but held it was arbitrary and capricious for the county to require the developer to obtain the right of way. The superior court modified the condition to require the developer to deposit money with the county sufficient to acquire the right of way and construct the necessary improvements, effectively requiring the county to use its eminent domain power to acquire the right of way. The Washington Court of Appeals reversed. It held the original condition was proper

given the impact of the development. More fundamentally, under the doctrine of separation of powers, the court held the superior court lacked the power to modify the condition to require the county to exercise its power of eminent domain.

Burton v. Clark County,
91 Wn. App. 505, 958 P.2d 343 (1998), review denied, 137 Wn.2d 1015 (1999)

To avoid constituting a taking, an exaction placed on a proposed development must solve or tend to alleviate an identified public problem.

As a condition for approving a short plat, the county required the applicant to dedicate right of way and construct a road, curbs, and sidewalks. Applying the principles of *Nollan* and *Dolan*, the Washington Court of Appeals held that, before a government agency may condition a permit using an exaction, it must identify a public problem—not just a problem affecting some private landowners—and must be able to conclude that the proposed development will exacerbate this public problem. The exaction must solve or tend to alleviate the identified problem that is caused by the development and it must do so in a roughly proportional manner. The Washington Court of Appeals found the proposed subdivision would aggravate certain public problems related to traffic congestion problems, but it concluded the road exaction would contribute to the solution of this problem only if it were extended across another undeveloped parcel. Because there was no evidence any such extension might occur, the court held the county had not met its burden of showing the condition would help solve the identified problem.

Phillips v. King County,
136 Wn.2d 946, 968 P.2d 871 (1998)

No inverse condemnation claim lies against a county that issued a permit to a private development that has a design defect leading to surface water flooding of adjacent property, unless the government is acting as a direct participant in the development that caused the flooding.

A developer proposed a drainage plan that constructed a discharge system on adjacent county right-of-way even though its engineers warned of liability to adjacent landowners because of soil conditions. The drainage plan was vested under an old code and did not meet the standards of the existing code. The county approved the plan notwithstanding concerns raised by Phillips, whose property lay on the opposite side of the county right-of-way.

Soon after the drainage system was built, Phillips sued both the developer and the county, claiming the system resulted in flooding of Phillips' property. Phillips alleged the county's approval of the drainage system resulted in an inverse condemnation of a portion of Phillips' property. The Washington Supreme Court rejected the inverse condemnation claim. The court explained that a claim for inverse condemnation from surface water flooding is possible where a county artificially collects and discharges water onto surrounding property in a manner different than from the natural flow, but no inverse condemnation arises (1) where the county merely permitted a development that causes a surface water problem when constructed or (2) where the county later took ownership of the drainage system and the surface water problem was not due to the county's poor maintenance but to the developer's poor design. The court held, however, that when the county allowed the drainage system to be built on county land it potentially became part of the problem by allowing its land to be used in an allegedly improper manner.

The court remanded to the trial court to determine if the county had participated in a surface water invasion of the neighbor's property.

Kahuna Land Co. v. Spokane County,
94 Wn. App. 836, 974 P.2d 1249 (1999)

Conditions imposed on development that are reasonably necessary for public health and safety do not effect a taking. Conditions made necessary by the character of the property are not unduly oppressive and do not violate substantive due process.

As a condition for approving a preliminary plat for a proposed subdivision, the county required the construction of an access road and sewer across an adjacent parcel owned by the federal government. Alleging the cost of this condition was so great it would take all profit from the development, Kahuna claimed a taking of property and was a violation of substantive due process. The Washington Court of Appeals rejected Kahuna's categorical taking claim, applying *Guimont v. Clarke* and finding the property retained value and had not been physical invaded. Finding the access and sewer requirements imposed by the county were reasonably necessary for public health and safety and that no public benefit had been acquired, the court found it unnecessary to undertake a *Penn Central* analysis. The court also rejected the substantive due process claim, concluding the conditions were reasonably necessary to a legitimate public purpose, and the cost of the conditions had more to do with the remoteness of the site than the county's choices as to conditions.

2000 – 2009

Manufactured Housing Communities of Washington v. State,
142 Wn.2d 347, 13 P.2d 183 (2000)

Under the Washington Constitution, private property may be taken only for public use, and not for private use (with certain exceptions). Public benefit, by itself, does not constitute public use.

To address problems facing low income and elderly mobile home tenants as space for mobile homes became increasingly scarce, the Washington Legislature enacted a statute that gave qualified mobile home tenant organizations a right of first refusal to purchase mobile home parks when the landlord decided to sell the land. The mobile home park owners complained that granting a right of first refusal would impair their power to negotiate the best sale of their property and that the enactment of the legislation took their property. The Washington Supreme Court agreed. It first conducted a *Gunwall* analysis⁴ and held the opening portion of article I, section 16, of the Washington Constitution, which prohibits government from taking private property for a "private use," provides greater protection than the federal Constitution.

The court concluded the statute impinged on the "right of first refusal," which the court found to be a significant interest in property. A finding that fundamental property interests have been impinged upon normally leads to a *Penn Central* analysis, under the test set forth in *Guimont v. Clarke*. In this instance, however, the statute transferred the right of first refusal from the mobile home park owner to a third person—the mobile home tenant's association, and the court found this

⁴ *Gunwall v. State*, 106 Wn.2d 54, 720 P.2d 808 (1986).

transfer to be functionally equivalent to the exercise of eminent domain, and therefore a taking of property. Rather than awarding compensation, however (which the statute provided in full measure), the court invalidated the statute, holding that the statute violated the first portion of article I, section 16. The court explained that although the statute might provide a public benefit, mere public benefit does not constitute public use for purposes of article I, section 16.

Eggleston v. Pierce County,
148 Wn.2d 760, 64 P.3d 618 (2003)

Police power and eminent domain power are separate and distinct powers of government. The duty to provide evidence in a criminal case, which involves the police power, does not give rise to a taking of property.

Mrs. Eggleston's home was rendered uninhabitable when county police removed a load-bearing wall to preserve evidence of a crime committed by her adult son. The police action was taken pursuant to a search warrant and an order to preserve evidence. While the court struggled with the severe impact sustained by Mrs. Eggleston, it concluded that some government actions are pure exercises of police powers and cannot be equated with the power of eminent domain. The preservation of evidence for criminal proceedings is such a power. The court left open the possibility that Mrs. Eggleston may have other legal means to address the manner in which the police acted, but concluded that the matter should not be analyzed as a taking of property.

Edmonds Shopping Center Associates v. City of Edmonds,
117 Wn. App. 344, 71 P.3d 233 (2003)

A reasonable exercise of the police power that does not destroy a fundamental attribute of ownership or impose a private burden for a public benefit is not a taking.

The city granted Marty's Public House a gambling permit to expand its card table gambling operation and a building permit to expand its building. Shortly thereafter, the city adopted an ordinance banning cardrooms. Marty's claimed the ordinance was not a legitimate exercise of the police power and effected a taking. The Washington Court of Appeals rejected that claim, holding the regulation of gambling is a reasonable exercise of the police power to protect the public health, safety and welfare, and the ordinance neither destroyed a fundamental attribute of ownership nor imposed a private burden for a public benefit. The court also rejected Marty's substantive due process claim, concluding an ordinance is not unduly oppressive when it regulates only the activity which is directly responsible for the harm and noting that Marty's building could be used for other purposes.

Saddle Mountain Minerals, L.L.C. v. Joshi,
152 Wn.2d 242, 95 P.3d 1236 (2004)

Before a property owner can raise a regulatory taking claim, there must be a final governmental decision regarding the application of the regulation to the property at issue.

In 1993, the city rezoned a parcel owned by Joshi to high density residential, a designation that does not allow mining. Thereafter, Saddle Mountain Minerals purchased the mineral estate in Joshi's parcel. A year later, Joshi began developing the property, using sand and gravel from the property to grade an off-site access road. Saddle Mountain sued Joshi, claiming damages for the off-site use of the sand

and gravel, part of the mineral estate of the property. Joshi defended by arguing that the mineral estate had been destroyed when the zoning was changed and that Saddle Mountain's predecessor should have filed a takings claim against the city.

The Washington Supreme Court rejected Joshi's defense, holding that the city's ordinance did not destroy Saddle Mountain's mineral rights. The court explained (1) it was inappropriate to apply takings law to a dispute between private parties; (2) a takings claim against the city was not ripe because there was no final government decision applying the zoning regulations to the site, since Saddle Mountain had never applied for a variance or waiver from the mining prohibition in the ordinance; and (3) there was no determination by a fact finder of the remaining value of Saddle Mountain's mineral rights.

In the Matter of Property Located at: 14255 53rd Ave S., Tukwila, King County, Washington,
120 Wn. App. 737, 86 P.3d 222 (2004), review denied, 152 Wn.2d 1034 (2004), cert. denied, 544 U.S. 977 (2005)

Government action necessary to avert a public calamity does not give rise to a takings claim.

Washington State declared an emergency when it discovered that plants in a commercial nursery were infested with the citrus longhorned beetle. The unchecked spread of this beetle could have devastating effects on Washington's trees and native forests. The primary control strategy approved by a panel of scientists required the destruction of potential host trees within a certain radius of the infested nursery. Three homeowners whose trees were to be destroyed alleged this control strategy was a taking of their property and that compensation had to be paid in advance of any control activities. The Washington Court of Appeals disagreed, holding (1) the destruction of potential host trees was not a physical invasion leading to a taking claim; (2) government action undertaken to avoid a public disaster is not an appropriation of private property for public use and is not susceptible to a takings analysis; and (3) that there is no private right to maintain property in a condition that would lead to a public nuisance, so that the government may abate the nuisance without facing a taking claim.

Paradise Village Bowl v. Pierce County,
124 Wn. App. 759, 102 P.3d 173, review denied, 154 Wn.2d 1027 (2005)

A regulation that does no more than protect the public against a specific harm does not effect a regulatory taking.

Paradise challenged a county ordinance that eliminated social card gaming unless it was conducted for charitable or non-profit purposes, claiming a taking and a violation of substantive due process. The Washington Court of Appeals rejected both claims. Applying the threshold questions in Guimont v. Clarke, the court concluded (1) the ordinance had not destroyed a fundamental attribute of property, including the ability to make some profitable use of the property, since the plaintiff could continue to use its property as a bowling alley and restaurant; and (2) the ordinance was designed to protect the public, by regulating against social ills associated with unrestricted gambling, rather than to acquire some public benefit. Because the threshold questions were answered in the negative, there was no need to undertake the Penn Central test to evaluate whether there might be a taking based upon the magnitude of the economic impact and the means used to regulate the property.

In rejecting the substantive due process claim, the court concluded an ordinance is not unduly oppressive when it regulates only the activity which is directly responsible for the harm.

Dickgieser v. State,
153 Wn.2d 530, 105 P.3d 26 (2005)

(1) A taking may exist for damage to private property that is reasonably necessary for a public use to proceed.

(2) An alleged governmental tort, such as negligence, does not become a taking simply because the government is the alleged tortfeasor.

Logging on state land resulted in flooding damage to Dickgieser's property, which lay down slope from the state land. Dickgieser claimed the state's actions constituted an inverse condemnation of his property, but the trial court granted summary judgment to the state, ruling that no taking occurred because the logging of state lands was not a public use. The Washington Supreme Court reversed. The court held damage to private property that is reasonably necessary to log state lands is for a public use and requires compensation under article 1, section 16 of the Washington Constitution. The court remanded to the trial court for a determination whether the damage to Dickgieser's property was reasonably necessary for logging of state land, and whether the state's logging activity concentrated and gathered water into artificial channels or drains and discharged it onto Dickgieser's land in quantities greater than or in a different manner than the natural flow.

The court rejected the state's argument that Dickgieser's claim was no more than a negligence claim against the state, finding that Dickgieser in fact had raised a taking claim. The court reiterated, however, that alleged governmental torts, such as negligence, do not become takings simply because the government is the alleged tortfeasor.

Tiffany Family Trust Corp. v. City of Kent,
155 Wn.2d 225, 119 P.3d 325 (2005)

The Legislature may impose time periods and other statutory limits on takings claims.

In 1986, Tiffany entered into a mitigation agreement with the city to pay a proportional amount of the related cost of improvements to nearby roads, to mitigate impacts associated with an application for a conditional use permit. Rather than requiring any payment at the time the permit was granted, however, payment for the improvements was to be made pursuant to the formation of a local improvement district (LID). When the LID was formed in 1998, however, the assessment was 15 times the estimate made in 1986. Tiffany sued, alleging a taking of property, a violation of substantive due process, and a civil rights claim under 42 U.S.C. § 1983. Tiffany asked the court both to declare the assessment void and to award compensation for a taking. The trial court dismissed the claims, ruling that the statutory time period for attacking the assessments had passed, and that Tiffany could not get around that bar by collaterally attacking the assessment using the same arguments disguised as constitutional claims. The Washington Supreme Court affirmed. While LID assessments in excess of special benefits received are prohibited and result in a taking, a property owner who wishes to challenge a LID assessment must do so before the final assessment roll is confirmed, after which the LID is deemed conclusively correct and may not be challenged.

***HTK Management, L.L.C. v. Seattle Popular Monorail Authority,*
155 Wn.2d 612, 121 P.3d 1166 (2005)**

If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will be upheld, even where the court believes an erroneous conclusion has been reached.

The Seattle Monorail Project (SMP) brought an action to condemn a parking garage for use as a monorail station. HTK, owner of the garage, challenged the condemnation. The parties agreed that SMP needed a portion of the property for the station itself and the remainder of the property for staging during construction, after which the excess property would be sold.

As a threshold question, HTK claimed SMP lacked authority to condemn private property. The Washington Supreme Court found that SMP was a creature of the City of Seattle, so that the city's condemnation authority and procedures applied to SMP.

HTK contended SMP should be limited to acquiring a multiyear lease on the portion of the property needed only during construction. The court upheld SMP's finding that it needed the entire property, holding that determinations about the type and extent of property interest necessary to carry out a public purpose are legislative questions to which courts give deference. If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will be upheld, even when there is room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

***City of Des Moines v. Gray Businesses, LLC,*
130 Wn. App. 600, 124 P.3d 324, review denied, 158 Wn.2d 1024 (2006)**

A taking does not arise from the regulation or denial of a property use that is contingent on state or local regulations. Such use is not a part of the bundle of sticks the owner enjoys as a vested incident of ownership, and the regulation or denial of that use does not derogate a fundamental property interest.

When the owner of a mobile home park failed to provide the city with a site plan of its park within the time required by ordinance, the city notified the owner that it would no longer issue permits allowing mobile homes to come onto the site to replace those that moved away. The owner subsequently claimed a regulatory taking, arguing the right to lease vacant spaces was at least as important as the right of first refusal at issue in Manufactured Housing. The Washington Court of Appeals disagreed, holding the right to operate as a mobile home park was not a fundamental attribute of ownership. Manufactured Housing dealt with an owner's inherent right to sell or lease its property to anyone it chooses. By contrast, the right to use and lease property for mobile homes is not inherent, but derived from and limited by state and local laws. The ability to use or lease property for mobile home is not a part of the bundle of sticks the owner enjoys as a vested incident of ownership.

***Central Puget Sound Regional Transit Authority v. Miller,*
156 Wn.2d 403, 128 P.3d 588 (2006)**

Compliance with statutory notice requirements constitutes adequate notice of a public hearing concerning the anticipated condemnation of property.

Sound Transit provided notice of a public meeting to discuss possible sites for condemnation by posting notice and its agenda on its web site, but nowhere else.

One month later, Sound Transit determined to condemn Miller's property. At the public use and necessity hearing for the condemnation, Miller claimed notice of the prior public meeting was inadequate. The Washington Supreme Court rejected Miller's claim, finding Sound Transit had satisfied its statutory notice requirement. Sound Transit was required to use the same methodology as first class cities for giving notice of public meetings where condemnation is discussed.

Peste v. Mason County,
133 Wn. App. 456, 136 P.3d 140 (2006), review denied, 159 Wn.2d 1013 (2007)

To allege successfully that a statute on its face effects a taking by regulating the permissible uses of property, a landowner must show that the mere enactment of the regulation denies all economically viable use of the property.

Peste appealed a down-zoning of his property, claiming a taking and a violation of substantive due process. The Washington Court of Appeals rejected both claims. Relying primarily on *Guimont v. Clarke*, the court examined first whether the downzone on its face destroyed a fundamental attribute of property ownership, in this case the right to make some economically viable use of the property. To prove that a statute on its face effects a taking by regulating the permissible uses of property, the landowner must show that the enactment of the regulation denies the owner all economically viable use of the property. The court concluded Peste presented no evidence showing a facial taking. Peste's as-applied takings claim also failed for lack of evidence. On the record before it, the court rejected Peste's substantive due process claim, finding the downzone was not unduly oppressive.

Wallace v. Lewis County,
134 Wn. App. 1, 137 P.3d 101 (2006)

In some circumstances, the passage of time may bar an inverse condemnation claim.

Neighbors filed nuisance claims against a landowner who operated a tire disposal business, and inverse condemnation and other claims against the county for using the business for tire disposal. The trial court dismissed all claims and the Washington Court of Appeals affirmed. Insofar as the inverse condemnation claim rested on the fact that tires spilled onto one neighbor's property, the court held the tires had been placed on the neighbor's property for so long they created a prescriptive easement, so that the passage of time barred an inverse condemnation claim. The court also held the inverse condemnation claim failed because the county's tire-disposal activities were not related to a public use or a public benefit; the county acted as a private party who contracted with another private party for disposal of its own tires.

Amunrud v. Board of Appeals,
158 Wn.2d 208, 143 P.3d 571 (2006)

The third prong of Presbytery's substantive due process test (whether a regulation is unduly oppressive on the landowner) is not a part of rational basis review.

This is not a land use case. It involves a substantive due process challenge to the revocation of a commercial driver's license for failure to pay child support. However, after concluding that no fundamental interest was at stake so that rational basis review should apply, the majority rejected the dissent's argument that the three-part test from *Presbytery* should be applied: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are

reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. The majority characterized the third prong of that test as an inappropriate addition to rational basis review that has “limited applicability even in land use cases,” rests on an 1894 decision that has been largely superseded, represents a departure from federal jurisprudence. A subsequent decision from Division II of the Court of Appeals, *Olympic Stewardship Foundation*, applied this holding from *Amunrud* in the regulatory takings context.

***Clear Channel Outdoor v. Seattle Popular Monorail Authority*,
136 Wn. App. 781, 150 P.3d 649, review denied, 136 Wn.2d 781 (2007)**

For an owner to be entitled to just compensation for an alleged inverse condemnation, the property interest at issue must be something more than a mere unilateral expectation of continued rights or benefits.

A billboard owner with month-to-month lease had no compensable property interest when the Seattle Popular Monorail Authority ordered the billboard removed after purchasing the property in lieu of and under threat of condemnation.

***Public Utility District No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*,
159 Wn.2d 555, 151 P.3d 176 (2007)**

The state’s power of eminent domain is an inherent attribute of sovereignty that is limited by the constitution. Political subdivisions of the state, including public utility districts, have only the eminent domain power delegated in state statutes, and that power must exercised in strict compliance with those statutes.

The PUD leased land owned by North American, a private company, to locate electrical generators, and indicated its intent to negotiate purchase of the leased land. When purchase negotiations broke down, the PUD Commission approved a resolution authorizing condemnation of the land, and filed a condemnation petition. North American challenged the petition on procedural grounds. The Supreme Court held that the statutory notice requirements in certain sections of Title 35 RCW apply to PUDs and are mandatory, and that the PUD complied with those requirements. The Court refused an invitation to constitutionalize the statutory notice requirements. It also affirmed the trial court’s finding that substantial evidence supported a determination of public use and necessity.

***Brutsche v. City of Kent*,
164 Wn.2d 664, 193 P.3d 110 (2008)**

In an extension of Eggleston, the Court found no taking for damage that occurred when police with a valid search warrant battered doors open with a battering ram even though property owner offered to open the doors with the keys, and no evidence was gathered and no prosecution resulted.

In response to a suspected methamphetamine operation, a King County District Court judge issued a warrant authorizing the search of an abandoned warehouse, several outbuildings, eight semitrailers, and a mobile home on property in Kent owned by Mr. Brutsche. Because of the methamphetamine connection, the search was considered high risk. In executing the warrant, the police gained access to several of the structures by using a battering ram, damaging doors and door jambs in the process. Mr. Brutsche maintained the destruction was unnecessary because he offered his keys to the officer in charge, and offered to escort the officers around the property and open all doors for them. The police found no evidence during their

search, and took no subsequent prosecutor actions. Mr. Brutsche filed a lawsuit alleging trespass and the unconstitutional taking of private property. In denying the taking claim, the Court held that this case was indistinguishable from Eggleston v. Pierce County, 148 Wn.2d 760, 64 P.3d 618 (2003), in which the Court found that the destruction of property by police activity pursuant to a valid warrant is a valid exercise of the police power to conserve the safety, morals, health and general welfare of the public, and is not a taking under Article 1, section 16 of the Washington Constitution. The Court also rejected Mr. Brutsche's claim that the damage to his property constituted a permanent physical occupation of his property under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

2010 – 2018

***Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 206 P.3d 364 (2009), review denied, 167 Wn.2d 1017 (2010)**

A local governmental entity that has not been statutorily delegated eminent domain authority lacks that authority. Eminent authority cannot be delegated from one local governmental entity to another without statutory authority to do so.

The City of Spokane and Spokane County entered into a joint agreement to empower a board to operate, maintain, and develop Spokane International Airport and other airports in the county. The board began work to construct a new air traffic control tower, which would require the removal of buildings leased to RMA, a private company providing aircraft support and maintenance services. After the city and county passed a resolution condemning the leases, the board filed a petition in superior court to condemn RMA's leasehold interests, leading to stipulated order of public use and necessity and a stipulated order for immediate possession and use.

RMA then brought a claim inverse condemnation, along with other claims, contending the superior court lacked subject matter jurisdiction to consider the petition for condemnation because the board lacked the power of eminent domain. The Court of Appeals agreed and dismissed the condemnation action, holding (1) that statutes delegating the state's sovereign power of eminent domain are strictly construed; (2) that any delegation of that power must be express or clearly implied; and (3) that the governing statute, RCW 14.08.200, did not authorize the city and county to delegate their power to condemn to the board.

***Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 238 P.3d 1129 (2010)**

The common enemy doctrine does not bar inverse condemnation claims for damage to property caused by water flowing through a natural watercourse, as can occur when a landowner obstructs a watercourse or natural drainway or prevents water from entering a flood channel.

In 1986, the Fitzpatricks built a log house on their property adjacent to the Methow River. In 2002, that house was washed away when the Methow River changed course during a 2-year storm event. The Fitzpatricks filed an inverse condemnation claim, alleging that emergency work done in 1999 on a flood control project maintained by Okanogan County and the State blocked some of the river's natural side channels, causing the river to change course. The County and State claimed that the common enemy rule barred the law suit. Clarifying its holding in *Halverson v. Skagit County*, 139 Wn. 2d 1, 983 P.2d 643 (1999), the Court found that the common enemy doctrine does not bar inverse condemnation claims for damage to

property caused by water flowing through a natural watercourse, as can occur when a landowner obstructs a watercourse or natural drainway or prevents water from entering a flood channel. The Court then noted that the correct standard for analyzing inverse condemnation actions was that articulated in *Dickgieser*, which looks at whether the damage to the property was a necessary incident to the public use of the state's land. Here, the Court found that the Fitzpatricks provided evidence that the damage may have been a necessary incident to the work done on the dike in 1999, and remanded to the trial court for hearing on that question.

The State also maintained it did not have a sufficient proprietary interest in the dike to render it liable for damages. The court held that issue was to be resolved by the trial court on remand.

***Union Elevator & Warehouse Co., Inc. v. State ex rel. Department of Transportation*, 171 Wn.2d 54, 248 P.3d 83 (2011)**

The Relocation Act, RCW 8.26, which provides relocation benefits for certain condemnation actions, provides only the benefits specified in the statute. While interest may be available in certain regulatory taking claims, it is not available under this statute.

In an earlier appeal, Union Elevator prevailed on its claim of inverse condemnation for loss of feasible access to its grain elevator facility because of a highway project that redesigned and upgraded State Route 395. 96 Wn. App. 288 (1999). After relocating its facility, Union Elevator prevailed in a claim for statutory compensation for new equipment under the Relocation Act, RCW 8.26. 144 Wn. App. 593 (2008). Union Elevator then sought interest on the statutory compensation awarded under RCW 8.26, arguing that it was part of just compensation for inverse condemnation. The Supreme Court rejected that claim, based on the language of the statute and the absence of any statutory waiver of sovereign immunity in the statute, holding that relocation benefits and interest under RCW 8.26 cannot be considered part of the compensation and damages available for inverse condemnation.

***Tom v. State*, 164 Wn. App. 609, 267 P.3d 361 (2011), review denied, 173 Wn.2d 1025 (2012)**

Where a private landowner claims his property, recently rezoned for residential use, is unmarketable because of activity on adjacent government property that had been ongoing for more than a century, there is no taking.

Since 1886, the state had operated an on-site firing range at the state penitentiary in Walla Walla. Tom owned property adjacent to the penitentiary. In 2004, that property was rezoned from agricultural to residential. Tom asked the state to stop using the firing range, but the state declined. Tom then filed an inverse condemnation claim, arguing that his property was unmarketable because of the firing range. The court rejected the claim, noting that no Washington case has ever recognized a compensable taking where the claim arises from a pre-existing government use. The court left open the possibility of a claim for a “new taking” for lost value to property caused by additional or increased government activity occurring after the property has been purchased. The court also held that a rezone, by itself, does not give rise to a cause of action for a new physical taking. It declined to establish a rule that would “allow one government’s regulatory action (a zoning change) to give rise to a new takings claim for another government’s physical activity (firing range noise) that predates the zoning change by almost a century.”

Thun v. City of Bonney Lake,
164 Wn. App. 755, 265 P.3d 207 (2011), review denied, 173 Wn.2d 1035 (2012)

An as-applied takings claim against a municipality generally is not ripe for judicial review until the municipality has issued a final decision and the plaintiff has sought compensation from the municipality.

On the same day a developer submitted a site plan application for a condominium building on Thun's property, the city rezoned most of the property. The new zoning did not allow condominiums. In *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009), the court held the developer's rights did not vest to the prior zoning because the site plan application was not a valid building permit application. In this case, Thun claimed the rezone was an unconstitutional taking under article I, section 16. The court of appeals held the as-applied takings claim was not ripe for review because no building permit application had been filed. The court explained that a plaintiff need not show ripeness to bring a facial takings claim, but in an as-applied claim the plaintiff must show (1) that there has been a final decision by the municipality, and (2) that the plaintiff has sought compensation from the municipality for the alleged taking. Where there is uncertainty or questions that may be resolved by a building permit or variance, the court will decline to find a final decision. More than uncertainty is required to show that exhaustion of administrative remedies would be futile. This decision is notable for having applied the ripeness standards for takings claims brought under the federal constitution to the "final decision" requirement recognized by Washington courts.

Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Board,
166 Wn. App. 172, 374 P.3d 1040, review denied, 174 Wn.2d 1007 (2012)

The plaintiff's claim was dismissed as not ripe because the plaintiff did not show the existence of any set of facts under which a landowner would suffer a taking.

Jefferson County enacted a critical areas regulation requiring property owners to retain all vegetation located in "high-risk" channel migration zones for five of the County's rivers. Olympic Stewardship Foundation alleged violations under the Growth Management Act and claimed the regulation facially violated the nexus and proportionality requirements in RCW 82.02.020 and the Fifth Amendment's Takings Clause.

The Court held that the Foundation failed to preserve its RCW 82.02.020 claim by not raising the issue in the administrative proceeding. The Court rejected the facial takings claim on ripeness grounds: concluding that that the administrative record contained no evidence that the County had made any final decision regarding the application of the vegetation regulation to an individual parcel that contains a high-risk CMZ, the Court held that it was not possible to determine whether the vegetation regulation deprived any individual landowner of all economically beneficial use of his or her parcel or defeated the landowner's reasonable investment-backed expectations sufficient to constitute a taking.

Cradduck v. Yakima County,
166 Wn. App. 435, 271 P.3d 289 (2012)

A county's reasonable restrictions on development that are calculated to avoid property damage and injury in a designated floodplain do not violate the landowner's right to substantive due process of law.

After two significant floods of the Naches River causing substantial property damage, Yakima County updated its maps designating areas at risk from flooding. Relying on new information and new scientific methods, the maps expanded the designated floodways. Cradduck owned a mobile home park within the expanded floodway of the Naches River. She applied for a permit to put a mobile home on a lot in his park. The county denied the application under an ordinance that prohibited new residential construction in floodways. The trial court reversed the denial, finding that the regulation was unduly oppressive, violating Cradduck's right to substantial due process.

The Court of Appeals reversed the trial court and upheld the permit denial. Applying the three-part analysis from *Presbytery of Seattle*, it concluded: (1) the regulation is aimed at protecting life and property from flooding, which is a legitimate public purpose; (2) the development and use of more accurate floodway maps and the restrictions of residential construction in floodways are reasonably necessary because they tend to solve the problem of flood damage to private property and protect public health and safety; (3) the county's restrictions of residential construction are not unduly oppressive, when the public's interest in protecting against a serious flooding threat is weighed against the burden imposed on Cradduck, which is the loss of some income and the requirement to limit an activity that will likely contribute directly to a public problem.

***Wolfe v. Department of Transportation,*
173 Wn. App. 302, 293 P.3d 1244, review denied, 177 Wn.2d 1026 (2013)**

The subsequent purchaser rule bars a cause of action for a taking where the claimed injury is ongoing erosion resulting from a governmental action that occurred before the landowner purchased the property.

In 1986, the state Department of Transportation reconstructed a bridge crossing the Naselle River. Landowners claimed that the reconfiguration of the support piers changed the flow of the river, causing increased erosion of their property, and they alleged inverse condemnation and other claims. The Court of Appeals upheld the trial court's dismissal of the inverse condemnation claim under the subsequent purchaser rule (a purchaser of land cannot sue for a taking or injury that occurred before he acquired title). Wolfe purchased the parcels in 2003 and 2004, well after the bridge reconstruction. The Court rejected Wolfe's contention that continuing erosion constituted new injury, holding that a new taking cause of action requires additional governmental action, which was not present here.

***Keene Valley Ventures, Inc. v. City of Richland,*
174 Wn. App. 219, 298 P.3d 121, review denied, 178 Wn.2d 1020 (2013)**

The plaintiff bears the burden to establish its losses in an inverse condemnation action.

A land development company (KVV) purchased property at the low point in a valley that was being developed in stages. As part of the staged development, the city planned for various water runoff control measures, which had not yet been fully constructed. As the staged development continued water occasionally collect on Johnson's property. KVV sued for inverse condemnation. It prevailed, but the trial court ruled that the damage to the land was temporary because the city could reroute the water and it awarded only nominal damages (one dollar) and denied attorney fees because KVV had failed to prove that it had sustained damage.

The Court of Appeals affirmed, holding that KVV bears the burden to establish its losses in an inverse condemnation action. The plaintiff must establish more than simple interference with property rights—it must demonstrate a temporary or permanent interference that “destroys or derogates” a fundamental ownership interest.

***Jackass Mt. Ranch, Inc. v. South Columbia Basin Irrigation District,*
175 Wn. App. 374, 305 P.3d 1108 (2013)**

Governmental conduct that is not a cause of damage to a plaintiff cannot constitute a taking in an inverse condemnation claim.

After a cherry orchard was damaged by a landslide, the owners of the orchard sued the irrigation district, claiming the landslide was caused by water seepage from a wasteway the district operated. The evidence at trial showed that the seepage resulted from the design and construction of the wasteway, which had been planned, designed, engineered, and constructed by the U.S. Bureau of Reclamation. There was no evidence that the district’s operation of the wasteway caused the taking. The Court of Appeals affirmed the order granting summary judgment to the district.

***Mangat v. Snohomish County,*
176 Wn. App. 324, 308 P.3d 786 (2013), review denied, 179 Wn.2d 1010, 179 Wn.2d 1012 (2014)**

Applicant for a permit to develop real property, who defaulted on the purchase agreement and no longer held any interest in the property to be developed, cannot claim that the permit application itself constitutes “property” for purposes of a taking claim.

Mangat entered into a purchase agreement for land that allowed for the submission of platting and other permit applications prior to the close of the sale. The agreement provided that all platting materials be turned over to the selling landowner if the purchase agreement fell through. Mangat submitted platting applications but later defaulted after financing for the development project fell through. The county then continued to process the permit applications for the benefit of the original landowners. Mangat sued, claiming the permit applications had been “taken” by the county and violated principles of due process. The Court examined Washington statutes and case law addressing permit applications and vested rights and concluded that the permits relate to the land and the landowner, not the applicant. Accordingly, Mangat had no due process rights that were violated and no property that could be “taken.”

***Lahey v. Puget Sound Energy, Inc.,*
176 Wn.2d 909, 296 P.3d 860 (2013)**

A land use permit authorizing development by a private party does not form the basis for an inverse condemnation claim by another party affected by the permitted land use activity.

A group of homeowners sued PSE (under nuisance theories) and the City of Kirkland (under an inverse condemnation claim) alleging damage associated with the harmful effects of electromagnetic energy emanating from a cell tower constructed by PSE and permitted by the City of Kirkland. The trial court dismissed their taking claim against the city on the basis that it should have been raised in a timely Land Use Petition Act (LUPA) challenge. The Supreme Court reversed on

this point, holding that claims for eminent domain damages do not need to be brought under LUPA. Nevertheless, the Court found that the taking claim was properly dismissed. Citing *Phillips v. King County*, the Court held that principles of proximate causation and the public duty doctrine preclude a taking claim based solely on the issuance of a permit, even if the ensuing development allegedly produces some harm. Government permitting that facilitates a third party project involves no appropriation of property for public use, no damage associated with construction of a public project, and no regulation of property use sufficient to state a claim under eminent domain or regulatory takings law.

***Admasu v. Port of Seattle,*
185 Wn. App. 23, 340 P.3d 873, review denied, 183 Wn.2d 1009 (2014)**

An easement granted to allow specific government activities with regard to property eliminates inverse condemnation claims for damage to the property necessarily associated with the permitted activity.

Property owners sought compensation for the diminished value of their properties due to the Port of Seattle's operation of the third runway at the Seattle-Tacoma International Airport, asserting inverse condemnation due to noise and relying on both the federal and state constitutions. The trial court dismissed the claims of one group of property owners because they had conveyed aviation easements to the Port in exchange for noise-proofing services. The Court of Appeals affirmed. This kind of easement allows for "unimpeded aircraft flights over the servient estate[s]." Having granted such easements the landowners effectively waived any right to a taking claim for noise damage.

***Fedway Marketplace West, LLC v. State,*
183 Wn. App. 860, 336 P.3d 615 (2014), review denied, 182 Wn.2d 1013 (2015)**

Landowners hoping to lease retail space to businesses acquiring the right to operate private liquor stores alleged that the State's plan to allow a wider range of business location options damaged their leasing marketplace and thus produced a "taking" of property. Because the State has a genuine police power interest in a limited liquor sales marketplace, the auction of rights to new liquor store businesses, coupled with a policy of allowing bidders to operate in a new location, resulted in no taking requiring just compensation.

Following passage of Initiative 1183, privatizing Washington's liquor sales marketplace, the state Liquor Control Board terminated its leases for state-run liquor store facilities pursuant to contract provisions expressly anticipating this outcome. The state then began to auction rights to operate privately-owned liquor stores at each of the state's pre-existing stores. While Initiative 1183 envisioned that these new enterprises would generally operate in the same locations previously leased by the state, the Board adopted a relocation policy allowing bidders to negotiate a new store lease with the landowner at the same location, or instead to relocate at a different location nearby. The landowners with existing liquor store facilities alleged (1) that, by allowing new store operators to relocate their businesses to other premises, the state had eliminated the landowners' lease negotiation leverage and diminished future lease values; and (2) that the Board's relocation policy produced a benefit to the state in the form of increased bid values because bidders could relocate a liquor store business and avoid having to deal with a single leasehold option. Based on those allegation, the landowners claimed that

the State had “taken” their leasing advantage in order to produce a benefit to the state in the form of higher bid values from prospective liquor store operators.

Applying the first part of the *Guimont* takings analysis, the Court of Appeals found that, in spite of the relocation policy, the landowners fully retained all the value of their original property holdings—the State had not destroyed or diminished any fundamental attribute of their property interests (the rights to possess, dispose, or make economic use of the property). As to whether the challenged government action worked more to prevent harm than acquire some public benefit, the Court rejected the landowner’s claim that the relocation policy was primarily about acquiring some public benefit. Instead, the Court concluded that the Board’s action was part of an overall government plan to provide a limited private marketplace, thereby preventing a proliferation of liquor outlets. While the auction of exclusive rights to operate liquor stores in various locations brought value to the State, it was ultimately connected to a broader recognized police power—regulation of liquor sales. Having answered the first two threshold inquiries in *Guimont* in this manner, no further takings analysis was required.

***Kinderace LLC v. City of Sammamish*, 194 Wn. App. 835, 379 P.3d 135 (2016), review denied, 187 Wn.2d 1006 (2017), cert. denied, 137 S. Ct. 2328 (2017)**

Using a boundary line adjustment to create an undevelopable new parcel does not support a claim that the parcel’s owner has been deprived of all economically viable use of the parcel.

By means of a boundary line adjustment, Kinderace LLC created a new 32,850 square foot parcel of which all but 83 square feet had been designated by the City as environmentally critical areas and buffers. Before the boundary line adjustment and development application, Kinderace used the subject parcel as part of a multi-party development venture, allowing valuable development of a Professional Center to proceed by using the subject parcel as a storm water detention pond. A stream also ran through the subject parcel. After development occurred, Kinderace used a boundary line procedure to isolate the stream area and storm water pond on a new legal parcel separate from the developed upland property.

Kinderace then requested a reasonable use exception that would have allowed it to proceed with a proposed development project on the new parcel. By that time, however, the City’s stream buffers had been enlarged and covered most of the newly configured parcel. The City therefore denied Kinderace’s request, and Kinderace brought a regulatory takings claim against the City, alleging that the denial deprived it of all economically viable use of the parcel—a per se “total taking.”

The Court of Appeals considered this history when rejecting Kinderace’s claim that the boundary line adjustment had created a new discrete parcel of land, with value, all of which had been taken by the denial of a development permit. Relying on the relevant statutes, the court rejected the argument that a boundary line adjustment inherently creates a developable parcel. As to the takings claim, the Court held it was appropriate to consider the prior value Kinderace obtained in using the subject property to develop other property, and that this consideration of value barred Kinderace’s claim that it had been deprived of all economic value associated with the new allegedly undevelopable parcel.

Tapio Investment Company I v. State,
196 Wn. App. 528, 384 P.3d 600 (2016), review denied, 187 Wn.2d 1024 (2017)

Preparatory activities that might lead to an exercise of eminent domain do not themselves effect a taking of property, unless those activities physically or legally interfere with the property's use.

Tapio owned a three-acre office park located near a proposed freeway interchange, which was part of the Department of Transportation's (DOT) ongoing highway expansion project in that area. Even though DOT had not physically or legally interfered with the use of Tapio's property, Tapio brought an inverse condemnation claim arguing that publicity about the freeway project and DOT's acquisition of nearby properties hampered Tapio's leasing activity. Tapio asserted the market value of its office park had been so diminished as to constitute a taking.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of DOT. The Court held that "[l]egal acts that do not interfere, physically or by regulating use of private property, are not takings, and neither the Washington nor federal constitutions have been held to require compensation for depreciation in market value caused by such legal acts." The Court specifically rejected Tapio's argument that DOT's preparatory planning actions had a quasi-regulatory effect requiring application of the *Penn Central* fact specific takings analysis.

The Court also rejected Tapio's alternate and more traditional inverse condemnation claims. Its conclusion is supported by a long line of case law concluding there is no taking based upon lost property value associated with planned construction and possible future exercise of eminent domain, absent facts showing the government has taken actual steps that physically touch property or legally restrict its use.

Olympic Stewardship Foundation v. State Environmental & Land Use Hearings Office,
199 Wn. App. 668, 399 P.3d 562 (2017), review denied, 189 Wn.2d 1040 (2018),
petition for certiorari docketed, No. 17-1517 (U.S., May 8, 2018)

(1) The limitations the Washington Supreme Court imposed on the "unduly oppressive" prong of substantive due process analysis in Amunrud also apply in a land use context.

(2) For purposes of substantive due process, property owners do not have a fundamental right to do what they wish on their property, unencumbered by reasonable regulation.

Three sets of plaintiffs challenged Jefferson County's updated Shoreline Master Program, raising numerous evidentiary and legal challenges to the Program and its adoption of a 150-foot buffer on marine shorelines. The superior court and the Court of Appeals affirmed. Addressing the plaintiffs' argument that the buffer violated substantive due process, the Court of Appeals held that Amunrud v. Board of Appeals had "severely limited" the third prong of the three-part substantive due process test set out in Presbytery and Guimont.⁵ Under Amunrud, if the challenged state action does not affect a fundamental right, the proper standard of review is a rational basis test, and the court may assume the existence of any reasonably

⁵ The three-part test is "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." Guimont, 121 Wn.2d at 609 (quoting Presbytery, 121 Wn.2d at 330).

conceivable necessary state of facts in determining whether there is a rational relationship between the challenged law and a legitimate state interest. The “unduly oppressive” element need not be evaluated where a recognized fundamental interest is not implicated. The court found that the plaintiffs in this case did not argue any recognized fundamental attribute of property ownership was at issue, and thus did not trigger the “unduly oppressive” factor.

***Thun v. City of Bonney Lake,*
3 Wn. App. 2d 453, 416 P.3d 743 (2018)**

The prudential requirement that a landowner must receive a final government decision before filing an as-applied regulatory taking challenge can be waived where the impact of the challenged regulation can be determined.

Thun filed an as-applied regulatory taking claim against the city when it rezoned most of his property to disallow a large condominium complex he planned for the site. The Court of Appeals held that the claim was not ripe for review because there was no final governmental decision regarding the permitted uses of his property, but the court waived the ripeness requirement because it is a prudential requirement, not a jurisdictional requirement, and because Thun provided sufficient information for the court to determine the economic impact of the rezone on his property. The court then reject Thun’s taking claim because he failed to meet the threshold requirement from Guimont by demonstrating that the challenged ordinance went beyond preventing a real public harm that is directly caused by the prohibited use of the property to producing an affirmative public benefit. The Ordinance was adopted in an effort to protect tree cover and manage steep areas that are prone to landslides and erosion; by restricting high density developments on the steep slopes of Thun’s property, the City sought to protect the public from the safety and environmental concern that landslides and erosion present.

***Maytown Sand and Gravel, LLC v. Thurston County,*
2018 WL 3765517, No. 94452-1 (Wash. Aug. 9, 2018)**

A substantive due process challenge to acts occurring during a permitting process can be challenged in a 42 U.S.C. §1983 civil rights claim in state court.

A sand and gravel company sued the County for violation of substantive due process (*inter alia*) in response to delays in the permit process which, the company alleged, were intended to prevent mining on the site and resulted in the failure of the company. Relying primarily on U.S. Supreme Court’s decision in City of Monterey, the Washington Supreme Court held that the substantive due process claim could be brought under 42 U.S.C. § 1983, and rejected the County’s argument that the jury’s verdict for the company was not supported by substantial evidence. Perhaps because the company did not raise a takings challenge, the Court did not cite its cases that analyze regulatory takings and substantive due process, like Presbytery and Guimont. Instead, the Court upheld the use of jury instructions stating that a substantive due process violation occurs when the government take action against a person that is not rationally related to a legitimate public purpose and the plaintiff was deprived of rights in a way that shocks the conscience or interferes with right that are implicit in the concept of ordered liberty.

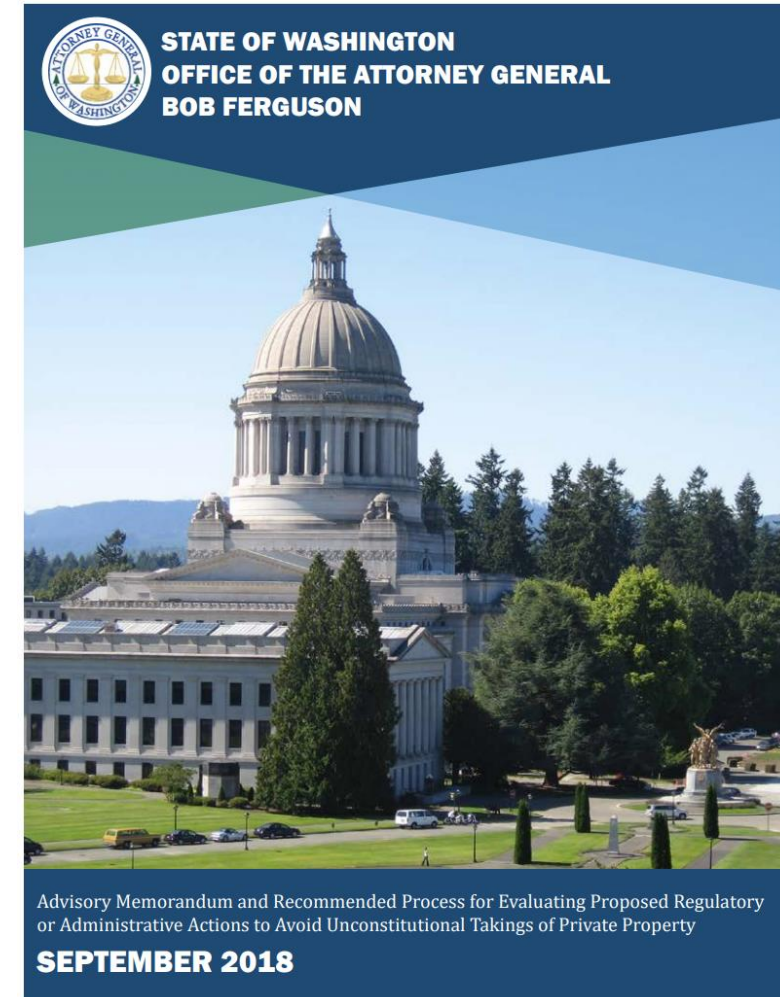
Attorney General's Advisory Memorandum

Planning Commission – January 23, 2024



Intent

Discussion of the Attorney General's
Advisory Memorandum and
Recommended Process for
Evaluating Proposed Regulatory or
Administrative Actions to Avoid
Unconstitutional Takings of Private
Property



Background

- The State Attorney General advises state agencies and local governments on an orderly, consistent process to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property or raise substantive due process concerns
- This process must be used by local governments that plan under the Growth Management Act



Background

- The Attorney General prepared the Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property
- The Attorney General's Office reviews the Advisory Memorandum annually and updates it, as necessary
- City staff uses the memorandum to guide the development of defensible policies and regulations that protect property rights
- It is especially relevant as the Planning Commission considers new and amended policies and regulations that affect land use



General Constitutional Principles

1. Police Power
2. Regulatory Takings
3. Substantive Due Process

Police Power

1. State governments have the authority and responsibility to protect the public health, safety, and welfare
2. This authority is an inherent attribute of state governmental sovereignty and is shared with local governments in Washington under the state constitution
3. Pursuant to that authority, which is called the “police power,” the government can regulate or limit the use of property
4. Examples include abatement of public nuisances, the termination of illegal activities, and the establishment of building codes, safety standards, sanitary requirements, zoning regulations, or environmental protections

Regulatory Takings

1. Government regulation of property is a necessary and accepted aspect of modern society and compensation is not required for every decline in the value of a piece of private property
2. However, if government regulations go “too far,” they may constitute a taking of property
3. This does not necessarily mean that the regulatory activity is unlawful, but rather that the payment of just compensation may be required under the state or federal constitution
4. The rationale is based upon the notion that some regulations are so severe in their impact that they are the functional equivalent of an exercise of the government’s power of eminent domain



Substantive Due Process

1. Substantive due process is the constitutional doctrine that legislation must be fair and reasonable in content and designed so that it furthers a legitimate governmental objective
2. Courts have determined that substantive due process is violated when a government action lacks any reasonable justification or fails to advance a legitimate governmental objective
3. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective, (2) use means that are reasonably necessary to achieve that objective, and (3) not be unduly oppressive



U.S. Constitutional Provisions

Takings Clause and Due Process Clauses

1. The Fifth Amendment provides that private property shall not be taken for public use without the payment of just compensation
2. Accordingly, the government may not take property except for public purposes within its constitutional authority and must provide just compensation for the property that has been taken
3. The Fifth and Fourteenth Amendments also provide that no person shall be deprived of property without due process of law



State Constitutional Provisions

Washington State Constitution, Article 1, Section 16

1. Article 1, section 16 of the Washington State Constitution provides, in part, that “[n]o private property shall be taken or damaged for public or private use without just compensation.”
2. In other words, the government may take private property, but must pay just compensation for the private property that is taken



Warning Signals

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property?
2. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property?
3. Does the Regulation or Action Deny or Substantially Diminish a Fundamental Attribute of Property Ownership?



Warning Signals

4. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property, to Grant an Easement, or to Undertake Some Independent Financial Obligation?
5. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest?

Note: The presence of a warning signal means there could be a constitutional issue that government staff should review with legal counsel



Review Process Followed

To evaluate proposed regulatory or administrative actions to avoid unconstitutional takings of private property, the City:

1. Reviews and distributes Advisory Memorandum
2. Uses “warning signals”, such as the examples in the Advisory Memorandum to evaluate proposed regulatory actions
3. Applies an internal process to assess constitutional issues
4. Incorporates constitutional assessments into the City review process
5. Uses an internal process to respond to identified constitutional issues



Questions?

