

City of Mukilteo, Washington  
Private Property Rights – DOE Warning Signals Checklist

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The Department of Ecology recommends that local agencies document the process to assure that the proposed Shoreline Management Program and regulations do not unconstitutionally infringe upon private rights. As guidance, local and state agencies are encouraged to use the “warning signals” checklist contained in the *“Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property”* to determine whether a proposed regulatory action may violate a constitutional requirement.

The Shoreline Management Act addresses the takings issue by identifying the public purposes served by its implementation and by requiring appropriate flexibility in its implementation. Under the SMA, each city and county with "shorelines of the state" must adopt a Shoreline Management Program that is based on state laws and rules but tailored to the specific geographic, economic and environmental needs of the community.

The City of Mukilteo’s proposed Shoreline Master Program and implementing regulations appropriately limits the use of property through traditional development regulations such as setbacks, building height, public access, permitted uses, design guidelines, protection of critical areas, parking, and signage. Where flexibility is needed to accommodate private property rights, the City’s regulations provide for the continuation of legal non-conforming uses, variances, and reasonable use provisions.

**1. Does the regulation or action result in a permanent or temporary physical occupation of private property?**

According to the Attorney General’s Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property, a taking occurs when a regulation or action results in a permanent physical occupation of all or a portion of private property. The courts have narrowly constricted this to apply to “when the government physically occupies the property or provide another person the right to do so.” Other than requirements for allowing access by the public to the shoreline, which do not impair the property owner’s use of their property, the Mukilteo Shoreline Master Program and associated development regulations do not require the occupation of private property by the government or private individuals.

**2. Does the regulation or action deprive the owner of all economically viable uses of the property?**

The Mukilteo Shoreline Master Program and implementing development regulations establishes land uses based on the Shoreline Managements Act’s preferred uses for Shorelines of Statewide Significance, in order of priority are:

- Recognize and protect the state wide interest over local interest;
- Preserve the natural character of the shoreline;
- Protect the resources and ecology of the shoreline;
- Increase public access to publicly owned shoreline areas; and

- Increase recreational opportunities for the public in the shoreline area.

New Title 17B, Waterfront Development and Shoreline Management Regulations, establish permitted, conditional, and special use permits based on zoning designations. Where critical area regulations limit the use of property due to the presence of critical areas and buffers, the Shoreline Regulations allow for buffer averaging, buffer reduction, reasonable use provisions, and variances. This sequencing of steps to determine the buildable area of the land provides property owners with reasonable use of their property while protecting the critical area.

New Title 17B specifically states that the standards and requirements of the City's critical area regulations "are not intended, and shall not be construed or applied in a manner to deny all reasonable use of private property." If an applicant demonstrates to the satisfaction of the Planning Director or his or her designee that strict application of these standards would deny all reasonable use of a property, development may be permitted subject to appropriate conditions. A reasonable use exception is intended as a "last resort" when no plan and/or mitigation can meet the requirements of the City's code.

### **3. Does the regulation or action deny or substantially diminish a fundamental attribute of property ownership?**

The City of Mukilteo's shoreline is divided into "Environment Designations," as required by the Shoreline Management Act. The City has proposed seven (7) designations, each of which reflects distinctly different shoreline areas. These include:

***Urban Waterfront:*** The purpose of the Urban Waterfront Environment Designation is to provide for development and redevelopment of high-intensity, water-oriented commercial and recreational activities, transportation, and essential public facilities, while protecting existing ecological functions and improving ecological functions in areas that have been previously degraded.

***Urban Waterfront Park:*** The purpose of the Urban Waterfront Park Environment Designation is to provide for redevelopment of an urban waterfront park including the western portion of Front Street, including establishment of the park as a key component of community waterfront access.

***Urban Conservancy:*** The purpose of the Urban Conservancy Environment Designation is to protect and improve, wherever possible, the ecological functions of the shoreline in an urban setting, while allowing for the necessary retention and modification of the existing BNSF Railroad lines in order to optimize the freight, passenger, and commuter rail service corridor; stream, stormwater, culverts, and sewer outfalls; existing residences; and a variety of water-oriented public access and recreational activities together with their related structures.

***Urban Railroad:*** The purpose of the Urban Railroad Environment designation is to identify the 100-foot right-of-way for the Burlington Northern Santa Fe railroad along

Mukilteo's shoreline. (The railroad also owns associated tidelands along the western shoreline that is covered under the Aquatic Urban Conservancy environment designation). This designation will provide for high-intensity transportation uses, under Essential Public facilities regulations, while were possible restoring the ecological functions, and allowing for safe public access to the water via underpasses, bridges or pedestrian overpasses/bridges.

***Aquatic Urban:*** The purpose of the Aquatic Urban Environment Designation is to allow the removal, maintenance or construction of high-intensity, water-oriented uses that require piers/docks for operations or for access to the water including essential public transportation facilities, industrial uses, recreational, and commercial/mixed-use development. Existing over-water structures within this zone, which is located along the north end of the city limits, include the Mukilteo Ferry Terminal facilities (existing and proposed), NOAA pier, Silver Cloud Pier, POE Fishing & Day Moorage pier and floats, and the public boat launch at Lighthouse Park.

***Aquatic Urban Conservancy:*** The purpose of the Aquatic Urban Conservancy Environment designation is to protect, restore, and improve, wherever possible, the ecological functions of the aquatic environment while allowing for the existing facilities such as stormwater culverts, sewer outfalls, and existing bulkheads protecting private property or BNSF Railroad tracks. This zone includes the marine waters the length of the shoreline south of Lighthouse Park to the south where the Lund's Gulch/Meadowdale Beach Park Tidelands occur south of Norma Beach.

***Urban Lakefront:*** The purpose of the Urban Lakefront Environment designation is to protect, restore, and improve, wherever possible, the ecological functions of the freshwater environment of Lake Serene, while allowing existing single-family development and park and lake recreational uses to continue to occur along with associated docks.

These Environment Designations were developed based on a review of existing development patterns, biological and physical characteristics of the shoreline, and goals and aspirations of the community as expressed through the City's *Comprehensive Plan* and Washington State's *Shoreline Guidelines* (WAC 173-26-211).

These regulations allow property owners to develop their land under the regulations and standards of the City, which have permitted uses and development regulations. City codes do not limit a property owner's right to exclude others from their property or the rights to sell or transfer ownership.

#### **4. Do the regulatory action have a severe impact on the landowner's economic interest?**

Land use codes in general put restrictions on land. It's the basis of current zoning laws: eliminate some profitable uses to simultaneously preserve, protect, or enhance property values by ensuring that adjacent land uses are compatible with each other.

The Mukilteo Shoreline Master Program and associated zoning standards establish either commercial or residential land uses within the 200 foot area of shoreline jurisdiction. These zoning designations are consistent with the City's Comprehensive Plan and community vision. While there may be circumstances where property cannot be developed to its fullest and best use under the proposed development regulations due to the presence of critical areas on the property, or factors relating to the purpose and goals of shoreline management, the City has established variance and reasonable use standards which build flexibility into its code to balance the economic interests of the property owner with the City's public duty to protect the natural environment.

**5. Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?**

Dedication of property as a condition of development is not provided under the proposed Shoreline Master Program. Under certain circumstances, granting of a public access easement may be required. The easement will not otherwise prevent development of the overall property, and the property owner retains the ability to use the land encumbered by the easement in a manner which does not conflict with its use for public access. Under the Shoreline Management Act Cities are required to include a public access element in their Master Programs that make provisions for public access to publicly owned areas, and a recreational element for the preservation and enlargement of recreational opportunities. The overarching policy is that "the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally." Public access and use of the shoreline is also supported, in part, by the Public Trust Doctrine. The essence of the doctrine is that the waters of the state are a public resource owned by and available to all citizens equally for the purposes of navigation, conducting commerce, fishing, recreation and similar uses and that this trust is not invalidated by private ownership of the underlying land.

The Mukilteo Shoreline Management Program envisions a variety of types of public access, including docks, and piers, boat launches, pathways and trails, promenades, street ends, picnic areas, beach walks, viewpoints and others. Requiring public access on privately owned property as a condition of development has been the subject of considerable legal review. Our state Constitution and the U.S. Constitution provide both the authority for conducting the activities necessary to carry out the Shoreline Management Act and significant limitation on that authority. Where public access is required as a permit condition, the courts have stated that there must be a rational and roughly proportionate connection between the project's impact on public access and the public access requirement

The City is proposing that dedication of property through permit conditions or outright purchase of land for park, recreation, or open space will be based on City policy that has been adopted through a public review process. Relevant policies and development

guidelines will be taken from the 2010 Comprehensive Plan, and the Parks and Recreation Plan have been incorporated into this Master Program:

***2010 Comprehensive Plan:*** The Mukilteo Comprehensive Plan contains the City's vision for the future of Mukilteo. Included in this document are the City's goals and policies for land use, parks and recreation, shorelines, economic development, transportation, capital facilities, and potential annexations.

***2007 Parks and Recreation Plan:*** To comply with the Washington State Growth Management Act (GMA), a Parks, Open Space, and Recreation Plan (Park Plan) has been prepared that reflects the goals and policies adopted in the Mukilteo Comprehensive Plan. The Park Plan is a useful tool to articulate the open space and recreational policies presented in the Comprehensive Plan and to help set priorities. Finally, this functional plan provides a foundation from which to establish the capital budget and allocate funds to complete the proposed projects.