FOSTER PEPPER PLLC

# 2017 Real Estate/Land Use Briefing:

## Essential Industry Updates

PRESENTATION MATERIALS
November 9, 2017

Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101
www.foster.com

FOSTER PEPPER PLLC

# 2017 Real Estate/Land Use Briefing:
## Speaker Biographies

Thank you for participating in Foster Pepper's **2017 Real Estate/Land Use Briefing: Essential Industry Updates**. Short speaker biographies are included and you can learn more by visiting www.foster.com.

**Speaker Biographies** (in alphabetical order):

- Joe Brogan
- Jeremy Eckert
- John Fandel
- Gary Fluhrer
- Steve Gillespie
- Joanne Kalas
- Laura Karassik
- Mike Kuntz
- Ken Lederman
- Nathan Luce
- Scott Osborne
- Jacquie Quarré
- Pat Schneider
- Sabina Shapiro
- Jack Zahner

**Lunch Speaker Biographies**

- Susan McLain, Chief of Staff, Office of Planning and Community Development
- Brennon Staley, Strategic Advisor, Office of Planning and Community Development

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**Joseph A. Brogan**
Member
Land Use, Planning & Zoning Practice Chair
206.447.6407
joe.brogan@foster.com

Joe has more than 25 years of experience in local, state and federal permitting, enforcement matters and water rights. He works closely with consultants, developers, lenders, real estate investors and agency officials. Joe previously worked for city and county agencies and EPA Region 10, as well as serving under two gubernatorial administrations as Regulatory Performance Advisor to the Washington State Department of Ecology.

**Jeremy Eckert**
Member
206.447.6284
jeremy.eckert@foster.com

Jeremy counsels private and public clients on land use, environmental, real estate, water law and municipal law issues. He has represented clients with matters including water rights sales and acquisitions, shoreline permitting, real estate development and acquisition, transportation planning, environmental compliance, contaminated properties, economic development, conservation and liquor law compliance.

**John Fandel**
Member
Real Estate Practice Chair
206.447.8969
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John has more than 25 years of experience with commercial leasing, including work with local, national, international, institutional and telecommunications industry clients, such as data center tenants, shopping center owners, national retailers, and office property landlords and tenants, as well as owners and developers of mixed-use real estate projects.

**Gary Fluhrer**
Member
206.447.8896
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Gary has more than 40 years of experience representing local, national and international investors and developers doing business in the Northwest. His practice focuses on the development, leasing, financing, acquisition and disposition of real estate projects, portfolio and multistate acquisitions, and workouts of distressed projects. He has worked with a variety of developers and investors, including commercial and residential developers, clients in the hospitality, industrial and healthcare industries.

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**Steve Gillespie**
Member
206.447.5942
steve.gillespie@foster.com

Steve focuses on land use and environmental litigation and entitlements. He advises many of Seattle's major institutions (hospitals, universities and colleges) in their master planning efforts as well as in obtaining and defending their project-level permits. He has represented both public and private clients at all stages of the permitting process. Steve also practices general litigation with Foster Pepper's Real Estate group.

**Joanne Kalas**
Associate
206.447.8982
joanne.kalas@foster.com

Joanne focuses her practice on counseling clients on environmental litigation, transactions and regulatory compliance. She has experience handling complex environmental litigation and addressing issues related to site remediation, environmental cost recovery, contaminated property transactions and compliance involving CERCLA, RCRA, TSCA, CWA and state and municipal environmental laws and regulations.

**Laura Karassik**
Member
206.447.2727
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Laura counsels clients on all aspects of commercial real estate transactions, including acquisition, sale, leasing and development, with an emphasis on financing of commercial real estate. She has worked with commercial and residential developers and investors, including those in the health care and hospitality industries.

**Mike Kuntz**
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Mike counsels clients on real estate transactions and real estate finance. His practice emphasizes commercial and residential development and finance, primarily representing commercial and residential developers and development interests. He has substantial experience in affordable housing/tax credit development and financing, as well as privately-held company, general business and business organizations matters.

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**Ken Lederman**
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206.447.6267
ken.lederman@foster.com

Ken provides counseling and litigation support on environmental issues in real estate transactions and property redevelopment. A former Assistant Attorney General for the Washington State Department of Ecology, Ken has successfully facilitated the remediation and redevelopment of dozens of contaminated properties. He helps developers, businesses and landowners with due diligence reviews and site investigation/remediation strategies, as well as with negotiating contractual provisions and transactional indemnities regarding environmental liability.

**Nathan Luce**
Associate
206.447.7264
nathan.luce@foster.com

Nathan's practice focuses on representing buyers, sellers and lenders in acquisitions, dispositions, development and financing of commercial, retail and multi-family projects. He also has experience representing landlords and tenants in the drafting and review of leases for a wide range of commercial projects, including office buildings, shopping centers, restaurants and retail stores.

**Scott Osborne**
Of Counsel
206.447.6293
scott.osborne@foster.com

Scott has more than 40 years of experience in real estate financing, workouts, acquisition, development and sale, and as counsel to closely held companies. His practice includes the representation of developers, lenders, institutional owners and tenants in various types of real estate projects, including high-rise office buildings, industrial facilities, condominiums, residential developments, retail shopping centers and apartments.

**Jacquie Quarré**
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206.447.6206
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Jacquie focuses her practice on counseling clients on land use, environmental and energy development matters. She advises public and private clients on negotiating local and state regulatory processes and related litigation, including MTCA and CERCLA cost recovery, insurance and regulatory matters.

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**Patrick J. Schneider**
Member
206.447.2905
pat.schneider@foster.com

Pat has more than 30 years of experience assisting private companies, public entities and individual landowners in negotiating local and state regulatory processes. Pat was the lead land use attorney for the City of Seattle, as well as serving as a senior land use attorney for King County. He helped draft the Land Use Petition Act and reforms to both the Growth Management Act and the State Environmental Policy Act.

**Sabina Shapiro**
Member
206.447.1993
sabina.shapiro@foster.com

Sabina focuses on general real estate law. She has substantial experience representing buyers, sellers and borrowers in acquisitions, dispositions, development, leasing and financing of commercial, retail and multi-family projects.

**Jack Zahner**
Member
206.447.2886
jack.zahner@foster.com

Jack concentrates on insurance coverage from the policyholder's perspective. He has successfully resolved significant insurance disputes including large first-party property losses, as well as third-party liabilities and lawsuits stemming from environmental contamination, consumer class actions, intellectual property and construction defect claims.

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November 9, 2017

# 2017 Real Estate/Land Use Briefing

## Essential Industry Updates

| | |
|---|---|
| **7:30 – 8:00 a.m.** | **Registration and Networking** |
| **8:00 – 8:05 a.m.** | **Welcome – Program Overview** |
| **8:05 – 8:40 a.m.** | **Recent Developments: Land Use**<br>*Patrick Schneider, Steve Gillespie and Jacquie Quarré* |
| **8:40 – 9:00 a.m.** | **Seattle: What's New with Mandatory Housing Affordability and Design Review?**<br>*Jeremy Eckert* |
| **9:00 – 9:15 a.m.** | **Impacts of the *Hirst* Decision**<br>*Joe Brogan* |
| **9:15 – 9:30 a.m.** | **Practical Insurance Tips for Common Real Estate Disputes**<br>*Jack Zahner* |
| **9:30 – 9:45 a.m.** | **Break** |
| **9:45 – 10:25 a.m.** | **Environmental Update: Contamination Issues Relevant to Property Development in Washington**<br>*Ken Lederman and Joanne Kalas, with Clifford Schmitt of Farallon Consulting* |
| **10:25 – 11:35 a.m.** | **Real Estate Update**<br>- Legislative and Case Law Update<br>*Scott Osborne and Nathan Luce*<br>- Recent Developments in Lending<br>*Gary Fluhrer and Laura Karassik*<br>- Recent Developments in Multifamily Housing<br>*Mike Kuntz and Sabina Shapiro* |
| **11:35 a.m. – 1:00 p.m.** | **Lunch Speakers**<br>*Susan McLain, Chief of Staff for the Office of Planning and Community Development, and Brennon Staley, Strategic Advisor for the Office of Planning and Community Development* |
| **1:00 p.m.** | **Closing Remarks** |

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## Essential Industry Updates

November 9, 2017

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# Agenda

- Welcome – Program Overview
- Recent Developments: Land Use
- Seattle: What's New with Mandatory Housing Affordability and Design Review?
- Impacts of the *Hirst* Decision
- Practical Insurance Tips for Common Real Estate Disputes
- Environmental Update
- Real Estate Update
- Lunch Speakers:
  - Susan McLain, Chief of Staff for the Office of Planning and Community Development
  - Brennon Staley, Strategic Advisor for the Office of Planning and Community Development
- Closing Remarks

# Recent Developments: Land Use

Speakers:
Patrick Schneider
Steve Gillespie
Jacquie Quarré

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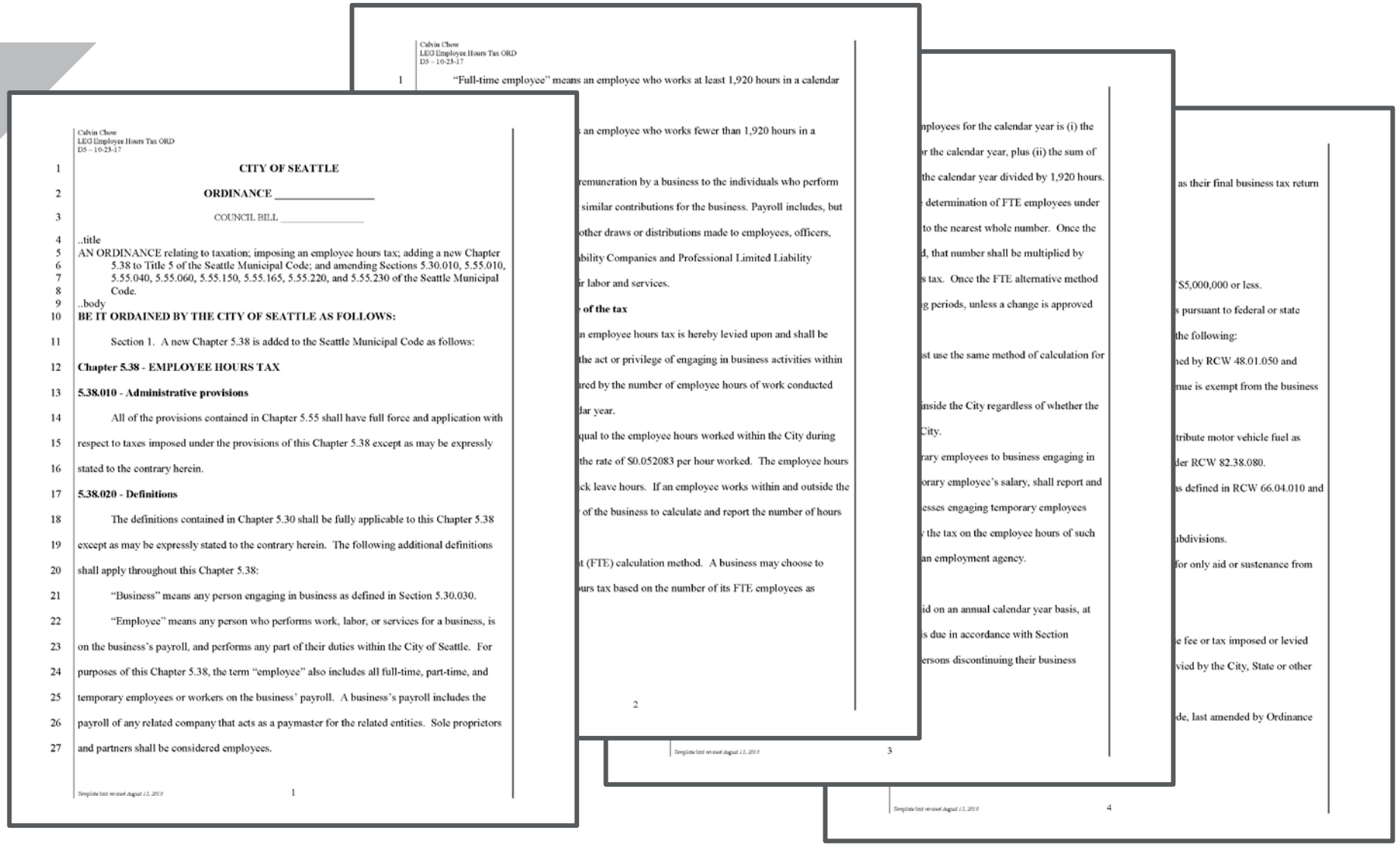
# Agenda

1. City of Seattle Head Tax Ordinance
2. City of Seattle Impact Fee Proposal
3. SEPA
4. *Chelan Basin Conservancy v. GBI Holding Co.*
5. LUPA, Damages, and Fees


$100!
$100!
$100!

# City of Seattle Head Tax Ordinance



Calvin Chow
LEG Employee Hours Tax ORD
D5 – 10-23-17

**CITY OF SEATTLE**

**ORDINANCE _____**

COUNCIL BILL _____

..title
AN ORDINANCE relating to taxation; imposing an employee hours tax; adding a new Chapter 5.38 to Title 5 of the Seattle Municipal Code; and amending Sections 5.30.010, 5.55.010, 5.55.040, 5.55.060, 5.55.150, 5.55.165, 5.55.220, and 5.55.230 of the Seattle Municipal Code.

..body
**BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

Section 1. A new Chapter 5.38 is added to the Seattle Municipal Code as follows:

**Chapter 5.38 - EMPLOYEE HOURS TAX**

**5.38.010 - Administrative provisions**

All of the provisions contained in Chapter 5.55 shall have full force and application with respect to taxes imposed under the provisions of this Chapter 5.38 except as may be expressly stated to the contrary herein.

**5.38.020 - Definitions**

The definitions contained in Chapter 5.30 shall be fully applicable to this Chapter 5.38 except as may be expressly stated to the contrary herein. The following additional definitions shall apply throughout this Chapter 5.38:

"Business" means any person engaging in business as defined in Section 5.30.030.

"Employee" means any person who performs work, labor, or services for a business, is on the business's payroll, and performs any part of their duties within the City of Seattle. For purposes of this Chapter 5.38, the term "employee" also includes all full-time, part-time, and temporary employees or workers on the business' payroll. A business's payroll includes the payroll of any related company that acts as a paymaster for the related entities. Sole proprietors and partners shall be considered employees.

Template last revised August 15, 2016

1

Calvin Chow
LEG Employee Hours Tax ORD
D5 – 10-23-17

"Full-time employee" means an employee who works at least 1,920 hours in a calendar

an employee who works fewer than 1,920 hours in a

remuneration by a business to the individuals who perform
similar contributions for the business. Payroll includes, but
other draws or distributions made to employees, officers,
bility Companies and Professional Limited Liability
r labor and services.

**of the tax**

n employee hours tax is hereby levied upon and shall be
the act or privilege of engaging in business activities within
ured by the number of employee hours of work conducted
dar year.
qual to the employee hours worked within the City during
the rate of $0.052083 per hour worked. The employee hours
ck leave hours. If an employee works within and outside the
of the business to calculate and report the number of hours

t (FTE) calculation method. A business may choose to
urs tax based on the number of its FTE employees as

Template last revised August 15, 2016

2

nployees for the calendar year is (i) the
r the calendar year, plus (ii) the sum of
the calendar year divided by 1,920 hours.
determination of FTE employees under
to the nearest whole number. Once the
d, that number shall be multiplied by
s tax. Once the FTE alternative method
g periods, unless a change is approved

st use the same method of calculation for

inside the City regardless of whether the
City.
rary employees to business engaging in
orary employee's salary, shall report and
esses engaging temporary employees
the tax on the employee hours of such
an employment agency.

id on an annual calendar year basis, at
s due in accordance with Section
ersons discontinuing their business

Template last revised August 15, 2016

3

as their final business tax return

$5,000,000 or less.
s pursuant to federal or state
the following:
ed by RCW 48.01.050 and
nue is exempt from the business

tribute motor vehicle fuel as
der RCW 82.38.080.
as defined in RCW 66.04.010 and

ubdivisions.
for only aid or sustenance from

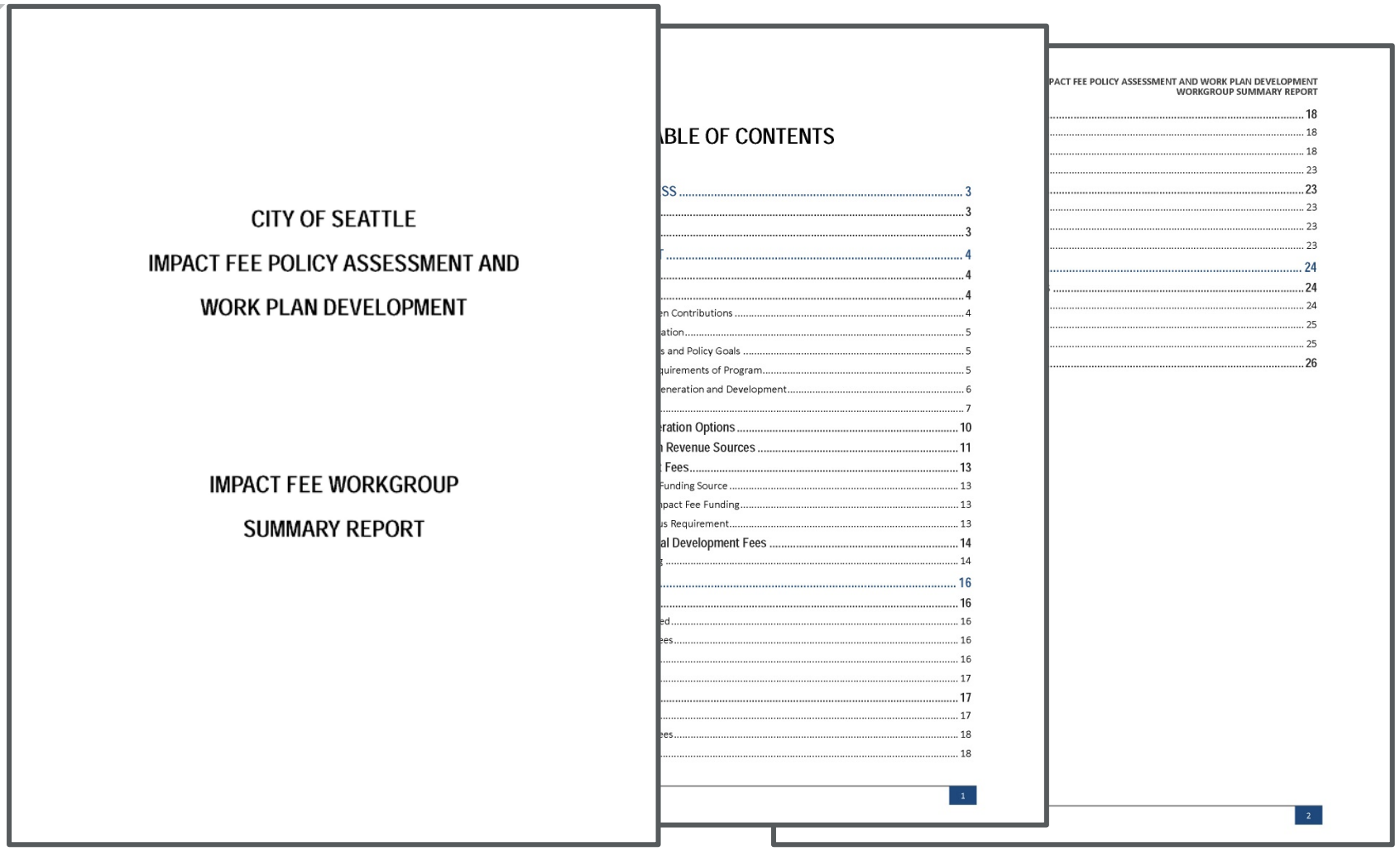
e fee or tax imposed or levied
vied by the City, State or other

de, last amended by Ordinance

Template last revised August 15, 2016

4

# City of Seattle Impact Fee Proposal



CITY OF SEATTLE

IMPACT FEE POLICY ASSESSMENT AND

WORK PLAN DEVELOPMENT

IMPACT FEE WORKGROUP

SUMMARY REPORT

ABLE OF CONTENTS



1

PACT FEE POLICY ASSESSMENT AND WORK PLAN DEVELOPMENT
WORKGROUP SUMMARY REPORT



2

# SEPA

## a) Affordable Housing

i. City of Seattle Requirement for EIS Study of Economic Impacts

ii. City of Seattle Substantive Policy Regarding Affordable Housing

iii. City of Seattle EIS to Study Impacts of Additional Accessory Dwelling Units

## b) The New "Substantive" SEPA

RCW 43.21C.020 provides:

(2) In order to carry out the policy set forth in this chapter, it is the **continuing responsibility** of the state of Washington and all agencies of the state to . . .
(a) Fulfill the responsibilities of each generation as **trustee** of the environment for succeeding generations . . . .

(3) The legislature recognizes that each person has a **fundamental and inalienable right** to a healthful environment and that each person has a **responsibility** to contribute to the preservation and enhancement of the environment.

# SEPA


*Lands Council v. Washington State Parks Recreation Comm'n* (2013)

"Over 40 years ago, with the adoption of SEPA, we first read in Washington law that each generation is trustee of the environment for succeeding generations. We read also that it is the 'continuing responsibility' of the state and its agencies to act so we may carry out that trust. SEPA demands that this trust be more than merely a stirring maxim or artful slogan. Instead, it is the **quickening principle** in the application of the statute."

Image courtesy of: http://www.mtspokane.com/mt-spokane-state-park

# SEPA

*Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.* (2015)


*Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office* (2017)

SEPA's policies include "'the responsibilities of each generation as **trustee of the environment** . . . . we recognized this notion of **trusteeship** to be the '**quickening principle**' of SEPA."

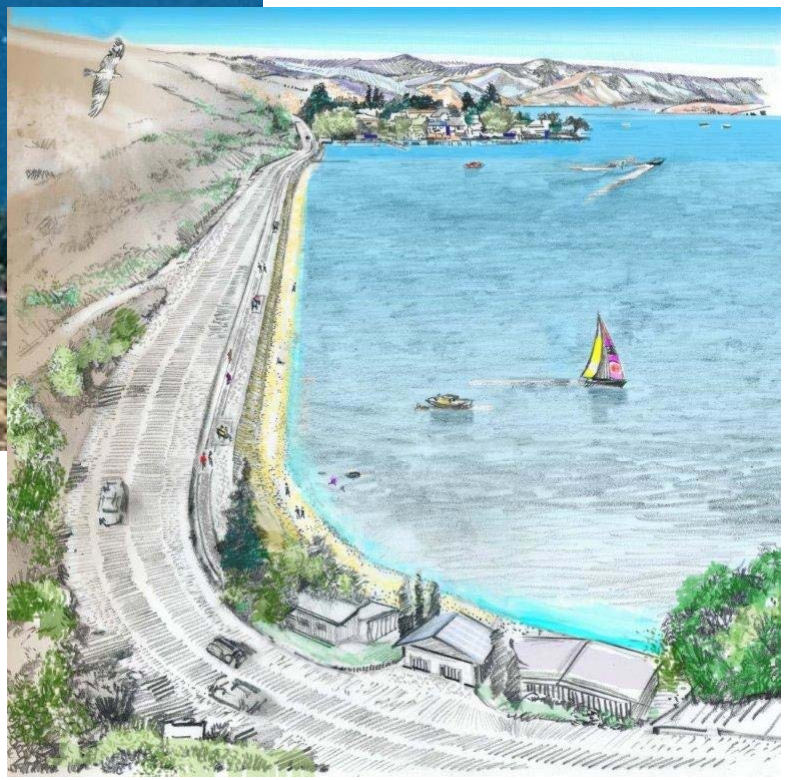
Images courtesy of: https://www.bp.com/en_us/bp-us/what-we-do/refining.html and https://washingtonlandscape.blogspot.com/2013/03/sb5805-pit-to-pier-gravel-and-landslides.html

# SEPA

c) SEPA and Greenhouse Gas Emissions

d) SEPA and City of Seattle's Transportation System (bus and bike lanes)

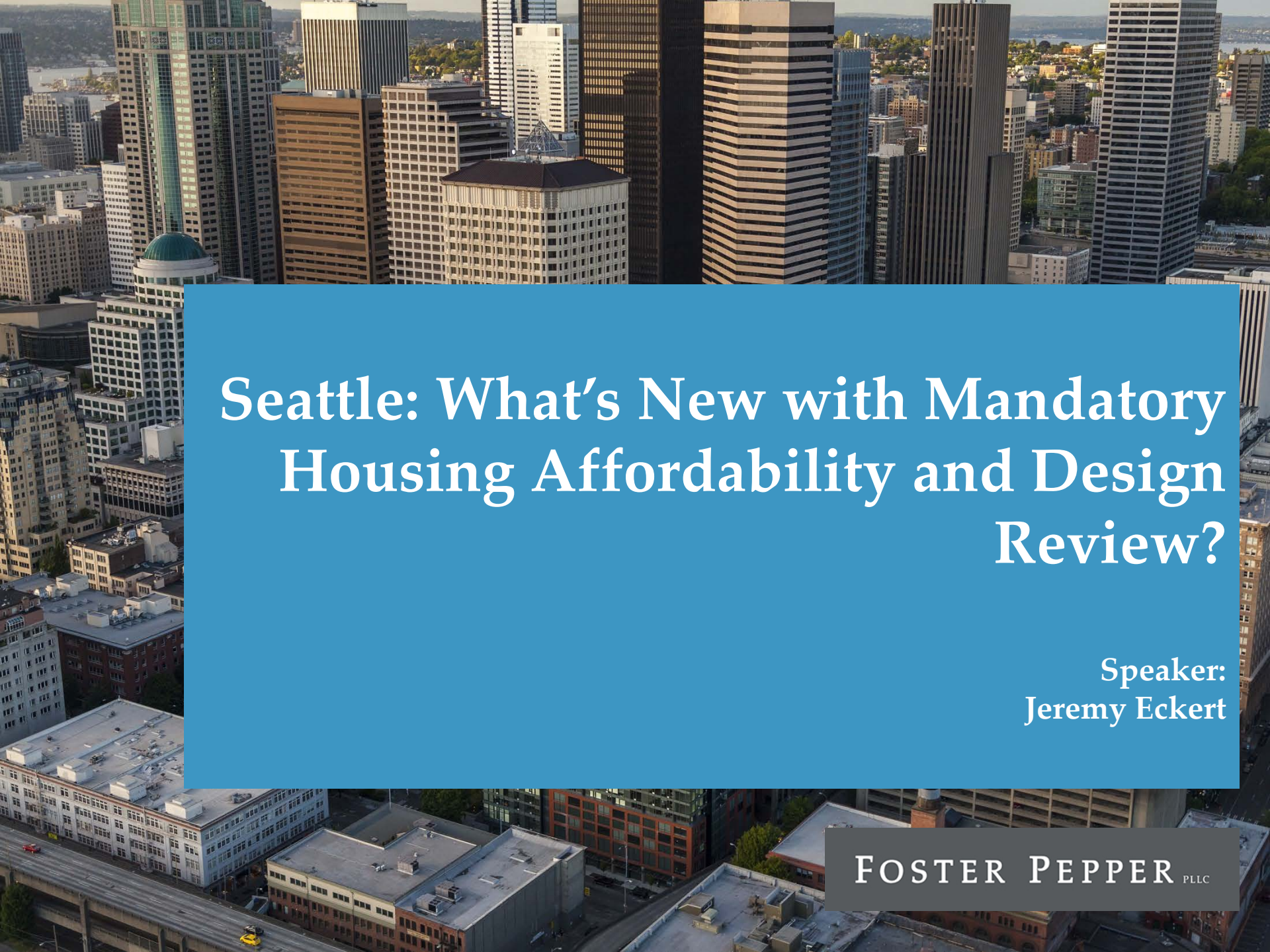
# *Chelan Basin Conservancy v. GBI Holding Co.*



Images courtesy of: http://www.chelanbasinconservancy.org/

# LUPA, Damages, and Fees

1. *Maytown Sand & Gravel v. Thurston County*
2. *Community Treasures v. San Juan County*



# Seattle: What's New with Mandatory Housing Affordability and Design Review?

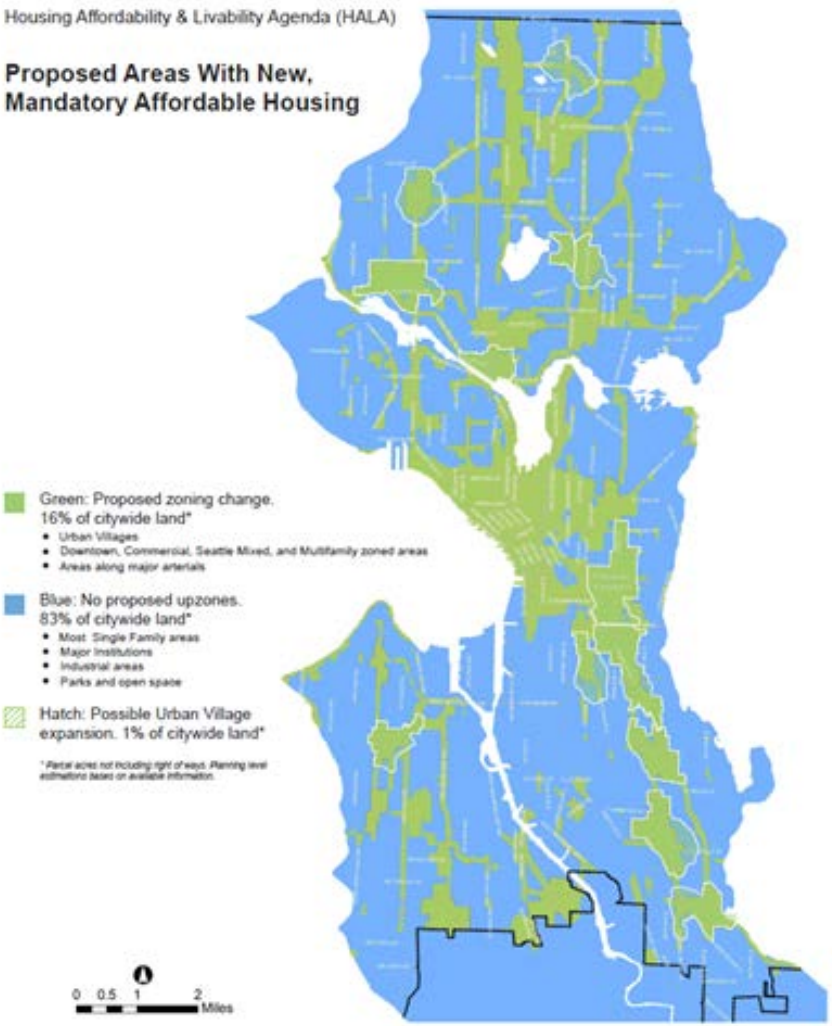
**Speaker:**
**Jeremy Eckert**

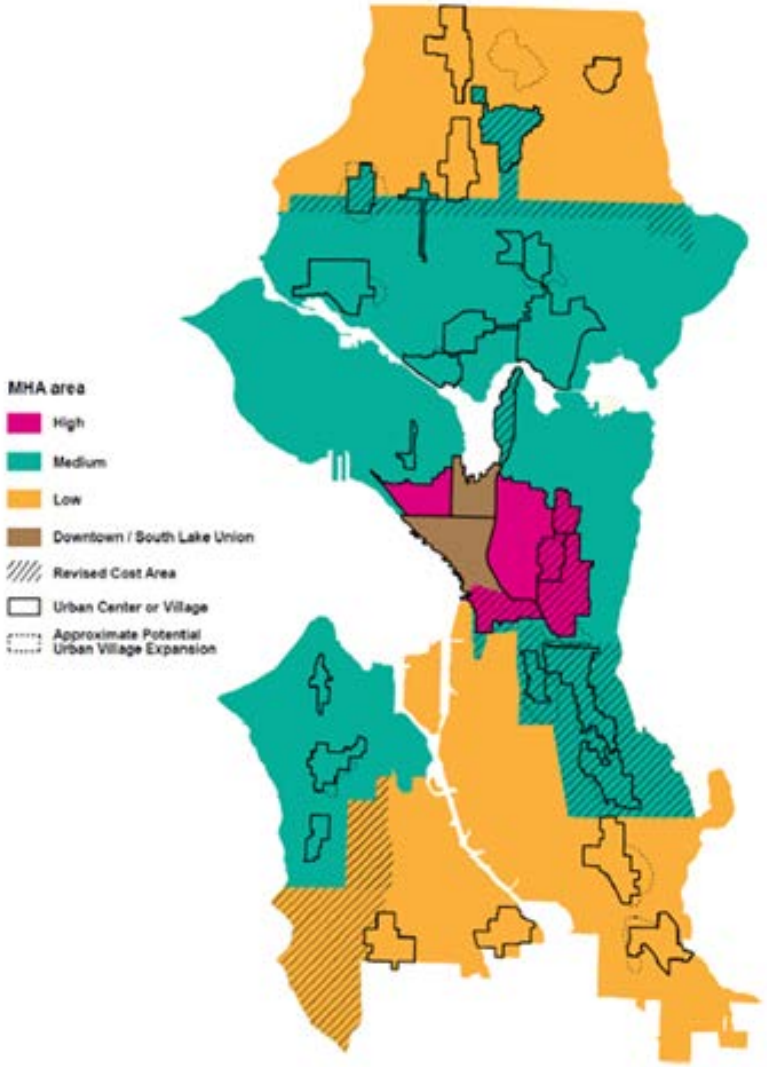
FOSTER PEPPER PLLC

# Agenda

- Mandatory Housing Affordability
- Design Review Update
- Parking / Frequent Transit Service
- Short-Term Housing Regulations

# MHA 101


Housing Affordability & Livability Agenda (HALA)
Proposed Areas With New, Mandatory Affordable Housing
Green: Proposed zoning change. 16% of citywide land*
Urban Villages
Downtown, Commercial, Seattle Mixed, and Multifamily zoned areas
Areas along major arterials
Blue: No proposed upzones. 83% of citywide land*
Most Single Family areas
Major Institutions
Industrial areas
Parks and open space
Hatch: Possible Urban Village expansion. 1% of citywide land*
* Parcel acres not including right of ways. Planning level estimations bases on available information.
0 0.5 1 2 Miles


MHA area
High
Medium
Low
Downtown / South Lake Union
Revised Cost Area
Urban Center or Village
Approximate Potential Urban Village Expansion

# Cost/Performance Requirements (Outside Downtown/SLU)

***Proposed Requirements for Residential and High-rise Commercial****

| | | Low Area | | Medium Area | | High Area | |
|---|---|---|---|---|---|---|---|
| | | % | $ | % | $ | % | $ |
| Scale of upzone | Standard M suffix | 5% | $7.00 | 6% | $13.25 | 7% | $20.75 |
| | Zones with M1 suffix | *8%* | *$11.25* | *9%* | *$20.00* | *10%* | *$29.75* |
| | Zones with M2 suffix | *9%* | *$12.50* | *10%* | *$22.25* | *11%* | *$32.75* |

***Proposed Requirements for non-high-rise Commercial (up to 95 feet)***

| | | Low Cost | | Medium Cost | | High Cost | |
|---|---|---|---|---|---|---|---|
| | | % | $ | % | $ | % | $ |
| Scale of upzone | Standard M suffix | 5% | $5.00 | 5% | $7.00 | 5% | $8.00 |
| | Zones with M1 suffix | *8%* | *$8.00* | *8%* | *$11.25* | *8%* | *$12.75* |
| | Zones with M2 suffix | *9%* | *$9.00* | *9%* | *$12.50* | *9%* | *$14.50* |

# MHA

**Complete**:

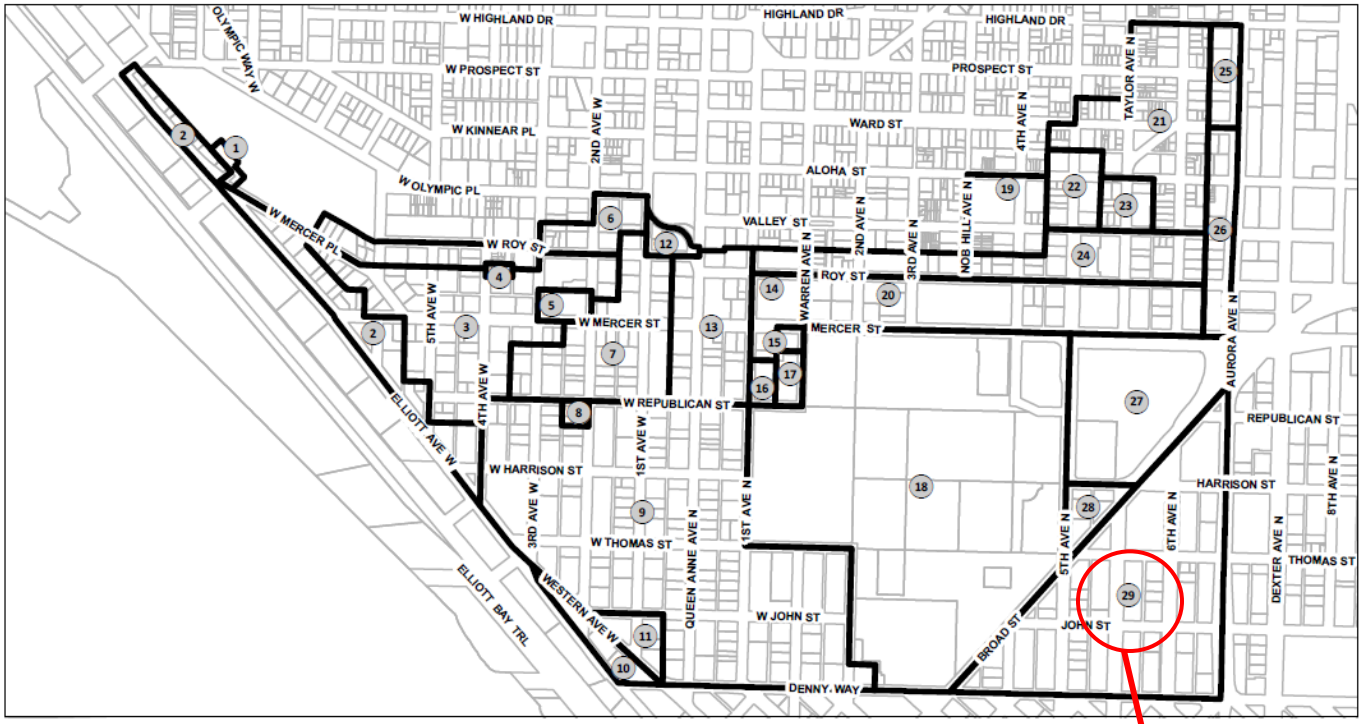
- U District
- Downtown / SLU
- International District
- Central District (along 23rd)
- Uptown

**What's Next:**

- The remaining urban villages & urban centers

# MHA and Due Diligence (for Adopted Rezones)

Attachment A
Version 2




## Uptown Rezone Map

N

No warranties of any sort, including accuracy, fitness, or merchantability accompany this product.
Copyright 2017, All Rights Reserved, City of Seattle
Prepared Tuesday, September 19, 2017
by Seattle City Council Central Staff

0 500 1,000 2,000 Feet

| Label | Rezone | Label | Rezone | Label | Rezone | Label | Rezone |
|---|---|---|---|---|---|---|---|
| 1 | LR3 TO LR3 (M) | 9 | NC3-65 TO SM-UP 85 (M) | 17 | NC3-65 TO SM-UP 65 | 25 | LR3 RC TO LR3 RC (M) |
| 2 | C2-40 TO C2-55 (M) | 10 | C2-40 TO C2-55 (M) | 18 | NC3-85 TO SM-UP 95 (M) | 26 | C1-65 TO SM-UP 85 (M) |
| 3 | MR TO MR (M) | 11 | C2-40 TO SM-UP 85 (M1) | 19 | LR3 TO LR3 (M) | 27 | NC3-85 TO SM-UP 95 (M) |
| 4 | MR TO MR (M) | 12 | NC3P-40 TO SM-UP 65 (M1) | 20 | NC3-40 TO SM-UP 85 (M1) | 28 | NC3-85 TO SM-UP 160 (M) |
| 5 | NC3-65 TO SM-UP 65 | 13 | NC3P-40 TO SM-UP 85 (M1) | 21 | LR3 TO LR3 (M) | 29 | SM-85 TO SM-UP 160 (M) |
| 6 | LR3 TO LR3 (M) | 14 | NC3P-40 TO SM-UP 85 (M1) | 22 | NC2-40 TO SM-UP 65 (M1) | | |
| 7 | NC3-40 TO SM-UP 85 (M1) | 15 | NC3-40 TO SM-UP 85 (M1) | 23 | LR3 RC TO LR3 RC (M) | | |
| 8 | NC3-85 TO SM-UP 85 | 16 | NC3P-65 TO SM-UP 65 | 24 | NC3-40 TO SM-UP 65 (M) | | |

SM-UP 160 (M)
Uptown = High
M Suffix

# Cost / Performance Requirements: Uptown Example

***Proposed Requirements for Residential and High-rise Commercial****

| | | Low Area | | Medium Area | | High Area | |
|---|---|---|---|---|---|---|---|
| | | % | $ | % | $ | % | $ |
| Scale of upzone | Standard M suffix | 5% | $7.00 | 6% | $13.25 | 7% | $20.75 |
| | Zones with M1 suffix | *8%* | *$11.25* | *9%* | *$20.00* | *10%* | *$29.75* |
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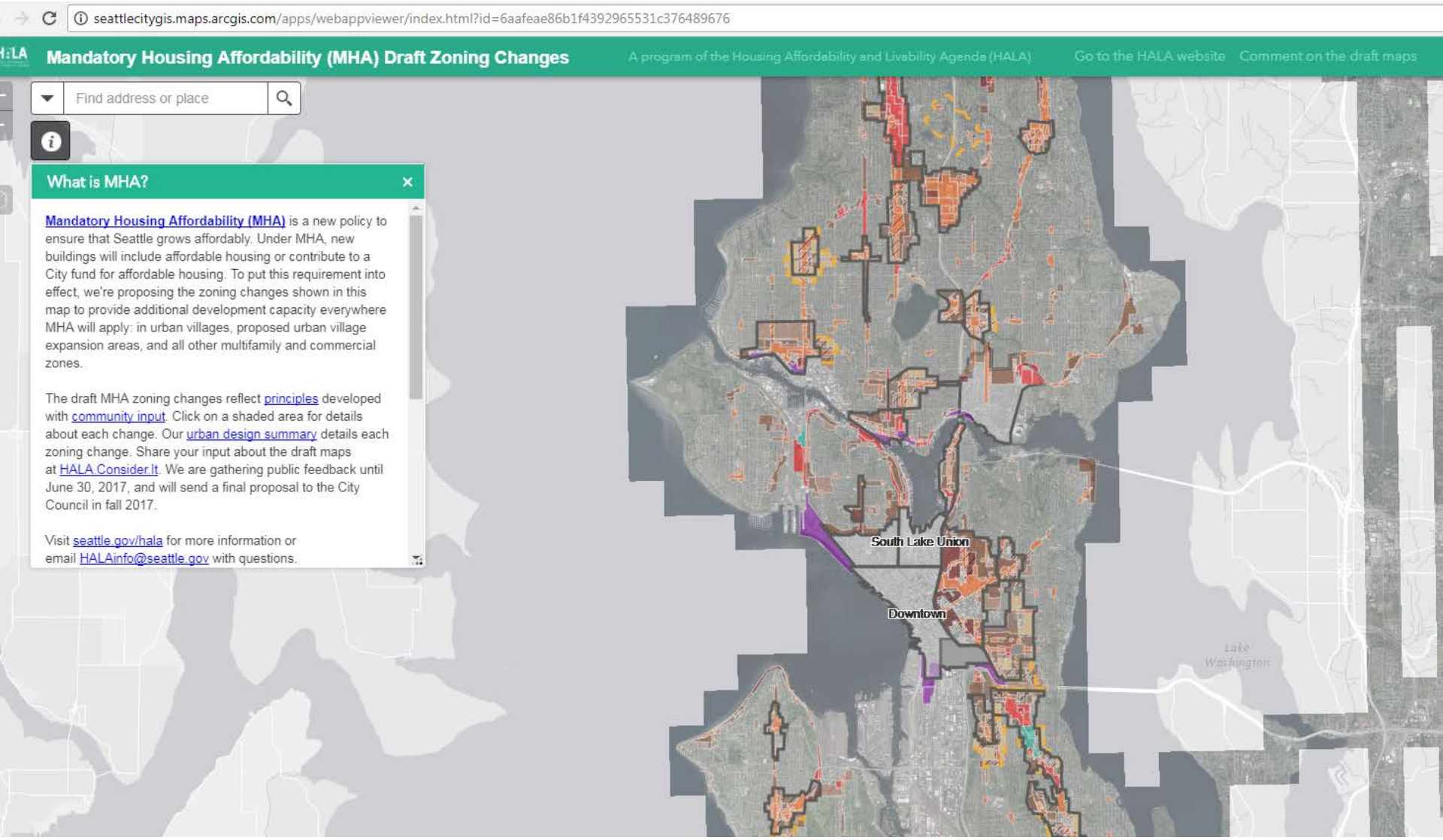
***Proposed Requirements for non-high-rise Commercial (up to 95 feet)***

| | | Low Cost | | Medium Cost | | High Cost | |
|---|---|---|---|---|---|---|---|
| | | % | $ | % | $ | % | $ |
| Scale of upzone | Standard M suffix | 5% | $5.00 | 5% | $7.00 | 5% | $8.00 |
| | Zones with M1 suffix | *8%* | *$8.00* | *8%* | *$11.25* | *8%* | *$12.75* |
| | Zones with M2 suffix | *9%* | *$9.00* | *9%* | *$12.50* | *9%* | *$14.50* |


seattlecitygis.maps.arcgis.com/apps/webappviewer/index.html?id=6aafeae86b1f4392965531c376489676
Mandatory Housing Affordability (MHA) Draft Zoning Changes
A program of the Housing Affordability and Livability Agenda (HALA)
Go to the HALA website
Comment on the draft maps
Find address or place
What is MHA?
Mandatory Housing Affordability (MHA) is a new policy to ensure that Seattle grows affordably. Under MHA, new buildings will include affordable housing or contribute to a City fund for affordable housing. To put this requirement into effect, we're proposing the zoning changes shown in this map to provide additional development capacity everywhere MHA will apply: in urban villages, proposed urban village expansion areas, and all other multifamily and commercial zones.
The draft MHA zoning changes reflect principles developed with community input. Click on a shaded area for details about each change. Our urban design summary details each zoning change. Share your input about the draft maps at HALA.Consider.It. We are gathering public feedback until June 30, 2017, and will send a final proposal to the City Council in fall 2017.
Visit seattle.gov/hala for more information or email HALAinfo@seattle.gov with questions.
South Lake Union
Downtown
Lake Washington

## HALA Strategies

**Mandatory Housing Affordability (MHA)**

▸ MHA Citywide EIS

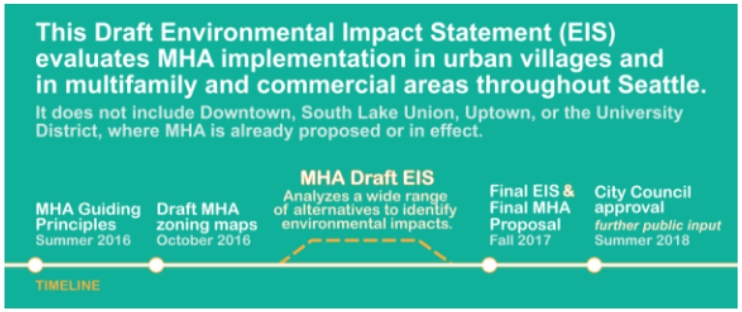
**More Affordable Housing Resources**

**Preservation, Equity, and Anti-Displacement**

**Promote Efficient and Innovative Development**

**State Legislative Agenda**

# MHA Environmental Impact Statement




### Update on the Final EIS

The Draft EIS received a very high number of comments from community members and organizations. We now expect to publish the Final EIS in November 2017. The Final EIS will include a preferred alternative for citywide MHA implementation; supplemental analysis on topics including racial equity and public school enrollment; and responses to the 800+ comments we received.

### Draft EIS Comments

We published the Draft EIS on June 8, 2017. The comment period was extended and closed on August 7.



## Event Calendar

**Upcoming Events from Neighborhoods » HALA**

There are no upcoming events.

See all »

# MHA Draft EIS – Two Rezone Scenarios Analyzed

Appendices

- A **Growth and Equity Analysis**
- B **Summary of Community Input**
- C **MHA Implementation Principles**
- D **Environmental Scoping Report**
- E **Map of MHA Areas**
- F **Summary of Changes to the Land Use Code & MHA Urban Design and Neighborhood Character Study**
- G **Technical Memorandum: MHA EIS Growth Estimates**
- H **Zoning Maps: Alternative 2 and Alternative 3**
- I **Housing Production and Cost: A Review of the Research Literature**
- J **2035 Screenline V/C Ratios**
- K **Environmentally Critical Areas**
- L **Air Quality and Greenhouse Gas Emissions Calculations**

# MHA - What's Next?

- FEIS published today
- Preferred rezone alternative shown
- 1st Qtr 2018: public outreach
- 2nd Qtr 2018: Council review
- August 2018: City Council enacts rezone

# Design Review Update

- Remember my Design Review Update sneak peak from last year's seminar?

# Design Review Update

- Forget everything that I said.

# Design Review Update – Outside of Downtown

**SITE CHARACTERISTICS**

A. Context

B. Scale

C. Special Features

**"Site characteristic" present:**

<8k sf: No design review

8k – 34,999 sf: ADR

35k sf or greater: full DR

**No "site characteristics":**

<8k sf: No design review

8k – 14,999 sf: SDR

15k – 34,999 sf: ADR

35k sf or greater: full DR

# Design Review Update

- Design review opt-out
- Outreach
- Limit on design review board meetings unless….
- Board composition

# Frequent Transit Service

"'Transit service, frequent' means transit service headways in at least one direction 15 minutes or less for at least 12 hours per day, 6 days per week, and transit service headways of 30 minutes or less for at least 18 hours every day." SMC 23.84A.038

# Frequent Transit Service Problem

**Director's Rule authorizing "averaging"**

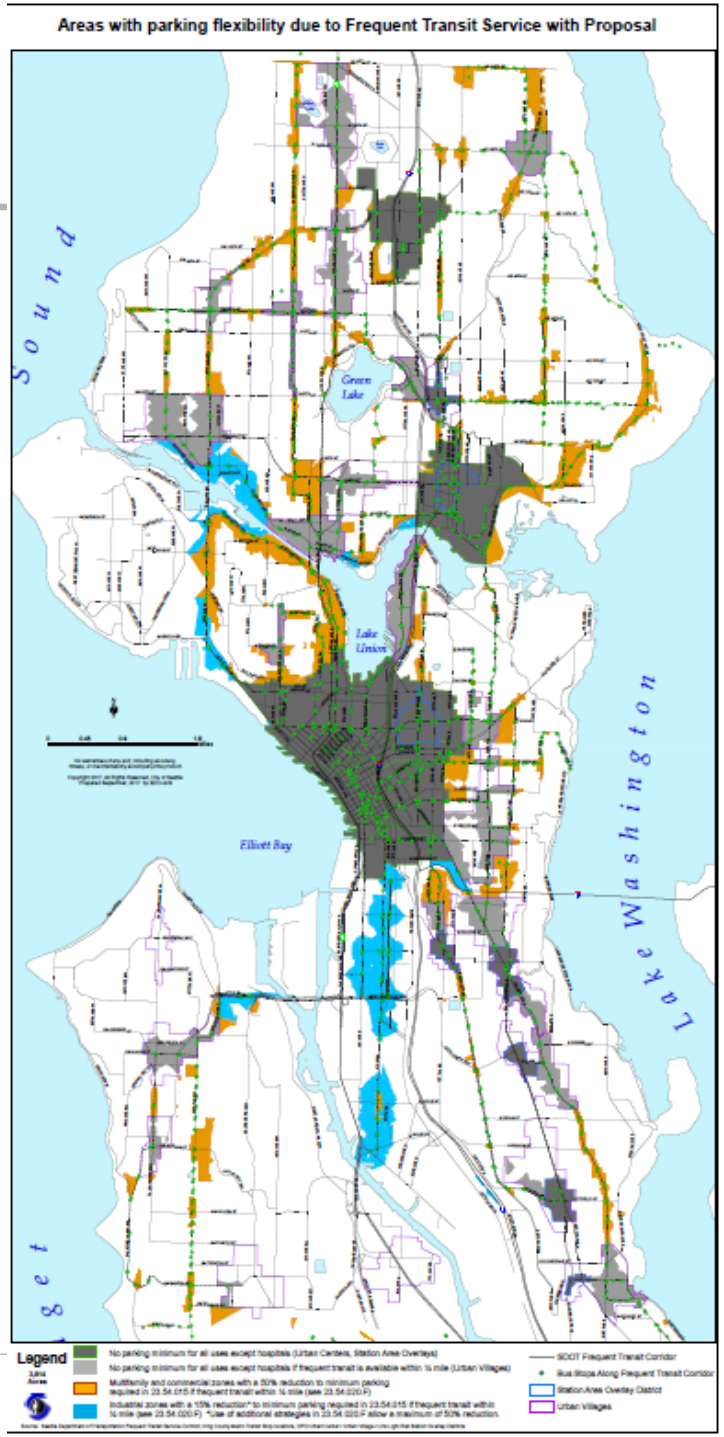
- *Neighbors Encouraging Responsible Development*, MUP-14-006 ("Neither the director nor the Examiner have the authority via statutory construction to add the word 'average' to the term 'headway' in the definition of frequent transit service."

**Relying upon timetables**

- *Appeal of Livable Phinney*, MUP-17-009 ("While analysis of bus schedules might be sufficient in most circumstances, when presented with reliable data showing that service does not meet the definition of frequent transit service well over a third of a time over a period of months, the Department cannot simply ignore such information."

# Frequent Transit Service Fix

- "'Transit service, frequent' means transit service as required by a Director's rule."
- Targeted adoption: 2nd or 3rd Quarter 2018



# Short Term Rentals

**"Short Term Rental":** is a booked stay of 29 consecutive nights or fewer.

**Before Full Council on Monday, 11/13**

- CB 119081 (regulatory licensing)
  - 9/30/2017 (+ 2 rule)
- CB 119083 (tax)

**Pending – Public Hearing on Monday, 11/27**

- CB 119082 (land use, public hearing)

# Impacts of the *Hirst* Decision

**Speaker:**
**Joe Brogan**

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# Practical Insurance Tips for Common Real Estate Disputes

**Speaker:**
**Jack Zahner**

FOSTER PEPPER PLLC

# Today's Topics

1. Settlement, Cracking and Vibration Claims

2. Environmental Contamination

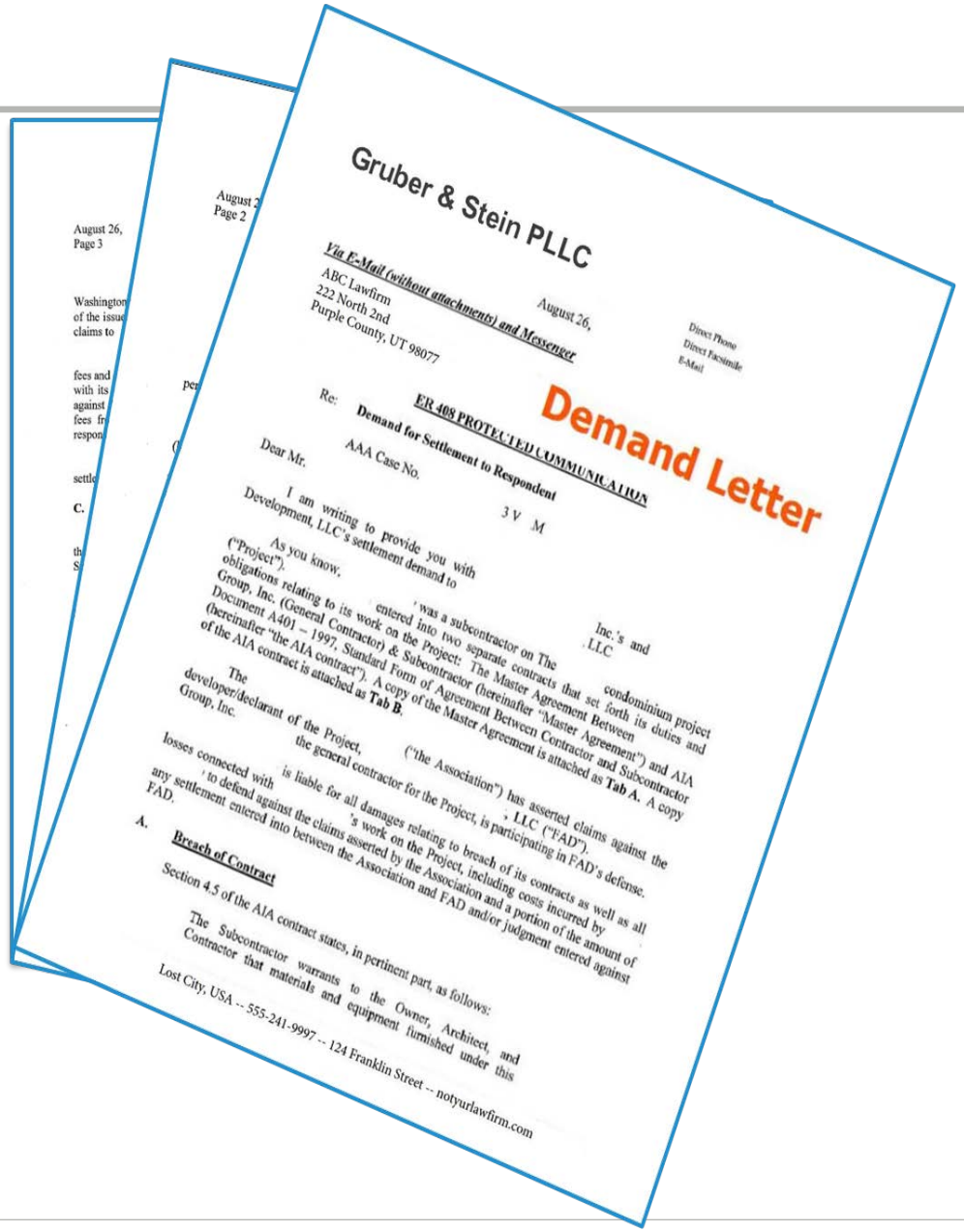
3. Construction Defects

# Settlement, Cracking and Vibration Claims

- Owner / Developer perspective - is there insurance that could defend, settle or pay this claim?

# Demand Letter

- Your project is causing property damage to my adjoining building
- Please stop work immediately or we will seek an injunction



Gruber & Stein PLLC

Via E-Mail (without attachment(s) and Messenger

ABC Lawfirm
222 North 2nd
Purple County, UT 98077

August 26,

Direct Phone
Direct Facsimile
E-Mail

Demand Letter

Re: ER 408 PROTECTED COMMUNICATION
Demand for Settlement to Respondent
AAA Case No.
3 V M

Dear Mr.

I am writing to provide you with Development, LLC's settlement demand to

As you know, ' was a subcontractor on The condominium project ("Project"). entered into two separate contracts that set forth its duties and obligations relating to its work on the Project: The Master Agreement Between Group, Inc. (General Contractor) & Subcontractor (hereinafter "Master Agreement") and AIA Document A401 – 1997, Standard Form of Agreement Between Contractor and Subcontractor (hereinafter "the AIA contract"). A copy of the Master Agreement is attached as **Tab A**. A copy of the AIA contract is attached as **Tab B**.

The ("the Association") has asserted claims against the developer/declarant of the Project, the general contractor for the Project, is participating in FAD's defense. Group, Inc. ' LLC ("FAD").

is liable for all damages relating to breach of its contracts as well as all losses connected with 's work on the Project, including costs incurred by ' to defend against the claims asserted by the Association and a portion of the amount of any settlement entered into between the Association and FAD and/or judgment entered against FAD.

A. **Breach of Contract**

Section 4.5 of the AIA contract states, in pertinent part, as follows:

The Subcontractor warrants to the Owner, Architect, and Contractor that materials and equipment furnished under this

Lost City, USA -- 555-241-9997 -- 124 Franklin Street -- notyurlawfirm.com

# Liability Policies

- Developer should look to Developer's own Liability Policies or General Contractor's Liability Policies
  - Obtain a copy of the policy
  - Analyze it
  - Tender / give notice of the claim to the insurer
  - Take steps to defend the claim

# Pro Tip:

- First-Party Property Insurance Policies:
  - Often exclude property damage from settlement cracking and vibration
  - So Developer's Builders Risk Policy or Neighbor's property policy may exclude coverage
- Third-party liability policies will often cover this type of property damage

# Environmental Contamination

## Acquiring or Developing Real Property

- Leaking underground storage tanks:
  - There may be coverage under an insurance regime setup by the State of Washington: PLIA
- Other contamination:  looking to ancient policies, pre-1986
- If you are acquiring the property
  - And the seller has been there since before 1986
  - There you may have a shot at coverage under old CGL policies

# Environmental Contamination (cont.)

## Options:

1. Do not release the seller from liability
2. Escrow / holdback for estimated amount of cleanup
3. Assignment of insured's rights

# Environmental Contamination (cont.)

- The mechanism for coverage:
  - These policies cover the policyholder's liability for property damage to a third-party.
    - Adjoining property is contaminated
    - Groundwater – on or off the property

# Environmental Contamination (cont.)

- These are difficult claims to thread the needle
- Insurers will often fight these claims vigorously

# Construction Defects

- These claims persist
- Most commonly, condominiums, townhomes, non-apartment construction
- CGL coverage for completed operations
- Look for tricky exclusions

# Construction Defects (cont.)

Hypothetical:

- Small, in-fill development
- 6 townhomes
- Townhomes share party walls
- Developer is relying on general contractor's CGL policy for coverage

# Construction Defects (cont.)

## Residential Construction Exclusion:

- Net effect – no insurance coverage for residential construction other than apartments or single family houses

# Practical Insurance Tips: Take-aways

- For claims involving property damage, ask whether you can get "Insurance" to pay to defend or settle the claim. You should consider:
  - Your own policies
  - The General Contractor's policies
  - The subcontractors' policies
  - Your neighbors' policies

# Practical Insurance Tips: Take Aways

If you are the Developer/Owner: be proactive

- Obtain copies of the policies in advance
- Have them analyzed
- Ask the difficult questions
- Look for the traps

# *Break*

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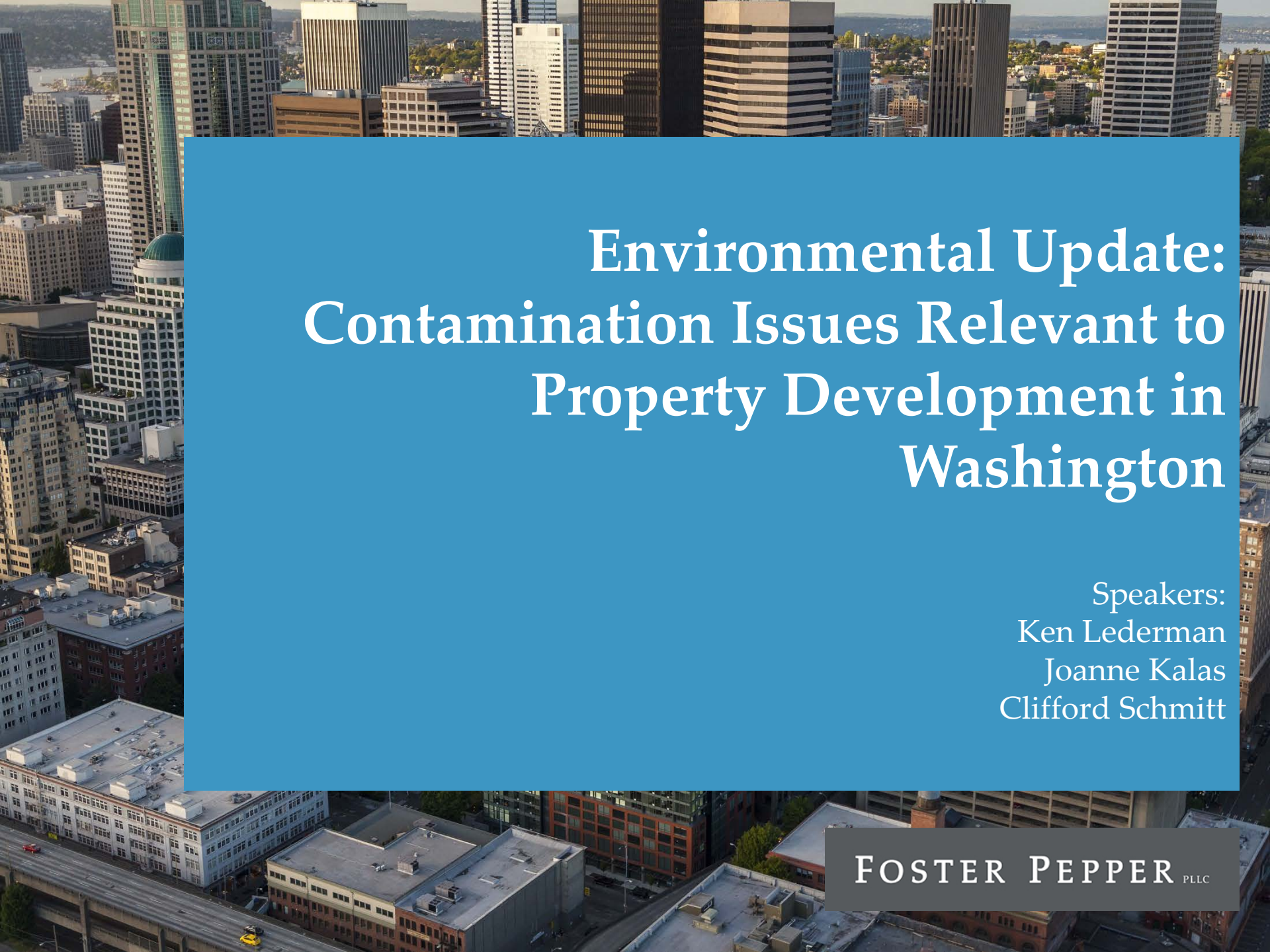


# Environmental Update: Contamination Issues Relevant to Property Development in Washington

Speakers:
Ken Lederman
Joanne Kalas
Clifford Schmitt

FOSTER PEPPER PLLC

# Contamination Issues Relevant to Property Development in Washington

FARALLON CONSULTING

FOSTER PEPPER PLLC


Ken Lederman
Foster Pepper

Joanne Kalas
Foster Pepper

Cliff Schmitt
Farallon Consulting

# Introduction

- **Environmental Due Diligence Overview**
- **Updates:**
  - Pollution Liability Insurance  Agency (PLIA)
  - Vapor Intrusion (VI)

# Environmental Acronyms

**MTCA**

(Model Toxics Control Act)

**NFA**

(No Further Action)

**DOE**

(Department of Ecology)

**PLIA**

(Pollution Liability Insurance Agency)

**UST**

(Underground Storage Tank)

**HOTAP**

(Heating Oil Tank Assistance Program)

**PTAP**

(Petroleum Technical Assistance Program)

**ASAP**

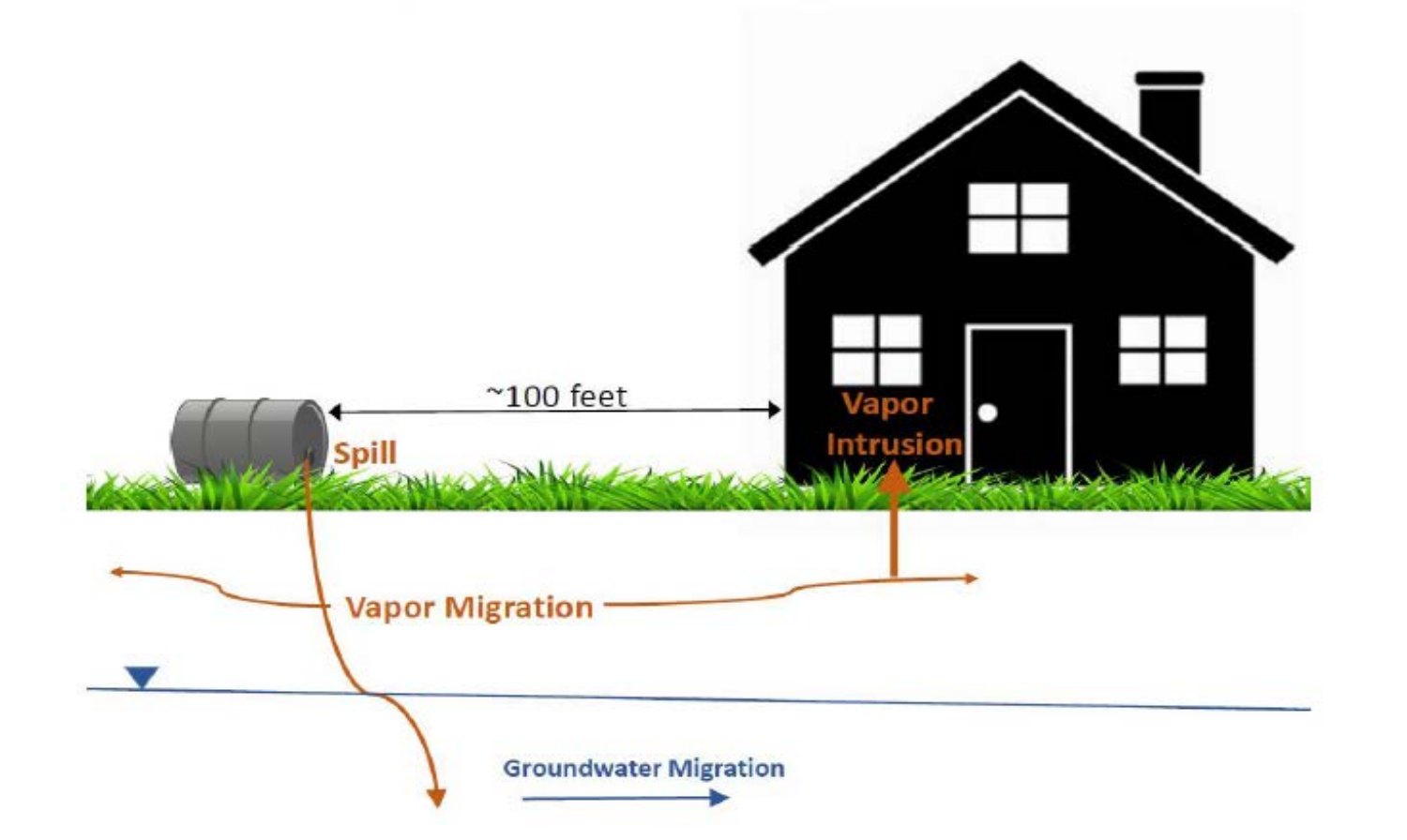
# What is Vapor Intrusion?

- **Vapor Intrusion and Other Terms Defined**
  - Soil Gas/Indoor Air and Vapor Intrusion
- **Liability Issues with Vapor Intrusion**
  - Real Not Hypothetical Exposure
  - Potential for Bodily Injury Claim, MTCA Claim, Tort (Trespass) Claim
  - Crosses Property Boundaries

# Regulatory Overview

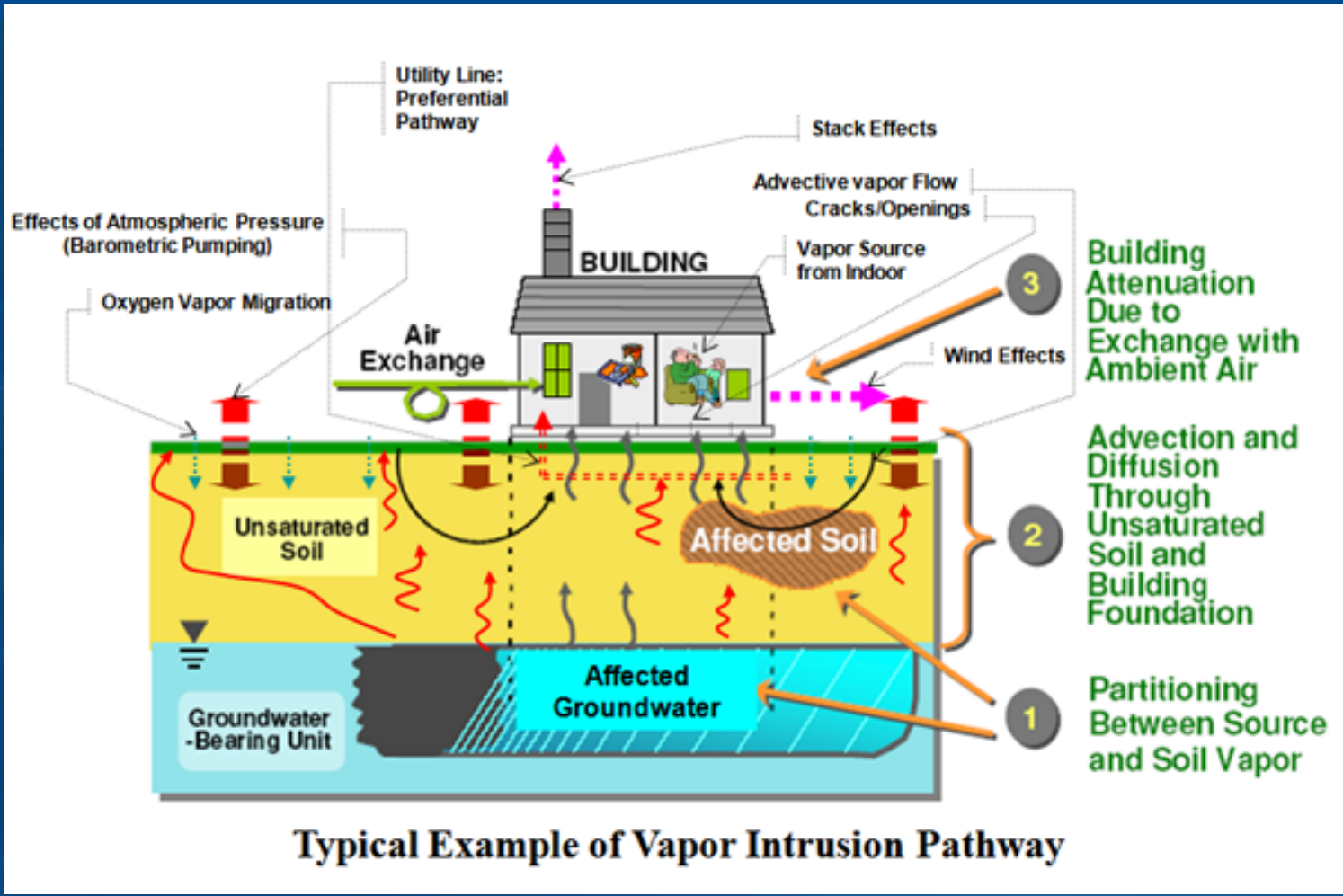
- **Department of Ecology Regulations and Guidance**
- **Tiered Approach for Assessing VI Risk**
  - Review available information
  - Test soil gas and indoor air
  - Implement mitigation measures
- **Trending More Conservative**
  - Complex exposure pathway
  - Screening and cleanup levels trending down
  - Regulatory hot button for closure

# Vapor Mitigation vs. Vapor Intrusion



# Vapor Intrusion

# Vapor Intrusion




Typical Example of Vapor Intrusion Pathway

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# Impact on Development Projects

- Environmental Due Diligence and Project Planning
- Cost of Assessment and Mitigation
- Perceptions of Tenants, Buyers, and Lenders

# Getting Rid of Dirt is Getting Harder

- Petroleum-contaminated Soil
- Solvent-impacted Soil
- Other Contaminants
- “Clean” Soil

# Soil Disposal Impacts on Development

- Testing to Identify Disposal Options
- Capacity Issues
- Active Management During Excavation
- Cost Implications

# Clean Soil Disposal Management Updates

- Requirements for Approvals
- Who's Responsible for Disposal?

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# Thank You

## Questions?

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# Real Estate Update

Speakers:
Scott Osborne
Nathan Luce
Gary Fluhrer
Laura Karassik

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# Secured Financing

1. Loan Documentation: The Demise of LIBOR
2. Proposed Revisions to High Volatility Commercial Real Estate Regulations (H.R. 2148)
3. Bankruptcy Remoteness – Independent Manager/Member Structure

# Significant Case Law and Legislation

## Recent Legislation

- Business Corporation Act – Laws of 2017, ch. 18
- Uniform Voidable Transfers Act (f/k/a Uniform Fraudulent Transfer Act – Laws of 2017, ch. 57
- Evicting Squatters – Laws of 2017, ch. 284

# Significant Case Law and Legislation

## Case Law

- Inverse Condemnation – *Murr v. Wisconsin*
- Purchase Agreements – *United States Postal Service v. Ester*
- Title Insurance – *Centurion Properties v. Chicago Title Ins. Co.*

# Significant Case Law and Legislation

## Case Law

- Foreclosure – *Jordan v. Nationstar Mortgage, L.L.C.*, *Selene RMOF II REO Acquisitions, LLC v. Ward,* and *Umpqua Bank v. Shasta Apartments*
- Landlord – Tenant – *Faciszewski v. Brown* and *R. Thoreson Homes, LLC v. Prudhon*
- Property Insurance – *Kut Suen Lui v. Essex Ins. Co.* and *Zhaoyun Xi v. Probuilders Specialty Ins. Co.*

# Recent Developments in Multifamily Housing

Speakers:
Mike Kuntz
Sabina Shapiro

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# Agenda

1. Low Income Housing Tax Credits
2. Multifamily Housing Tax Credit Programs
3. ARCH (A Regional Coalition for Housing)
4. City of Seattle Rental Agreement Regulation Ordinance
5. City of Seattle Just Cause Eviction Ordinance
6. Landlord Liaison Project
7. Green Pricing

# Low Income Housing Tax Credits

1. Survival was up in the air but survived (at least so far) in the Republican tax proposal.
   a. Survival was at risk due to tax reform generally and bad publicity.
2. Other credits did not fare so well. Credits slated for repeal/termination include:
   a. New Market Tax Credits
   b. Historic Tax Credits
   c. Rehabilitation Tax Credits
3. However, the Republican tax proposal seeks to eliminate private activity bonds.
   a. Private activity bonds are traditionally the bonds issued to support projects financed with the 4% tax credit.
   b. The loss of private activity bonds may spell the death of the 4% credit.
4. Reduction of corporate tax rates will also reduce the value of the credit.
   a. Credits typically purchased by corporations to reduce taxes.
5. The low income tax credit appears to have bi-partisan support in Congress.
   a. Hatch-Cantwell legislation would support and improve the low income housing tax credit, make more credits available and assist in leasing projects. However, a fair amount of the legislation was in support of the 4% credit.

# Other Quick Notes on Tax Reform

1. New Market Tax Credits are proposed for termination
2. Historic Tax Credits are proposed for termination
3. 1031 Exchanges are limited to real property
4. Private activity bonds are repealed
5. No tax exempt bonds for professional stadiums

# Multifamily Property Tax Exemption

1. Was adopted by the State in 2005 (RCW 84.14) and has been implemented by just about every local municipality.
2. Basic Concepts:
    a. Provides a property tax exemption for the value of improvements constructed for multifamily housing within targeted residential areas.
    b. 8-year exemption for market rate housing and 12-year exemption for multifamily housing with an affordable component.
3. Subject to local standards and guidelines; and local jurisdictions can (and have) added additional standards and requirements.
    a. Local standards and guidelines have made the availability of the 8-year exemption very hard to get, and some local jurisdictions do not even offer the 8-year exemption, or have added a limited affordability element to the 8-year exemption (and more stringent affordability requirements for the 12-year exemption).
    b. From what I can tell, every local jurisdiction has implemented the exemption differently.
4. As part of the HALA guidelines, the City of Seattle updated its implementing ordinance in 2015. Among other matters:
    a. The city designated all multifamily zoned property as a targeted residential area.
    b. City program only implements the 12-year exemption with the affordable housing component, and with a stricter affordable housing requirement than the state statute.
5. There are important timing requirements to apply and become qualified for the exemption (must apply before seeking a building permit; pay application fee; complete the project within three years, etc.).
    a. However, the process also allows a developer to effectively “opt out” at the end of construction if, at that time, the developer determines that the benefit of the exemption does not justify the restrictions that apply.

# ARCH (A Coalition for Regional Housing)

1. For King County and the eastside cities, ARCH supports and helps local cities implement affordable housing policies.
    a. Included Bellevue, Bothell, Kirkland, Redmond, Woodinville, Newcastle and all of the other eastside cities.
2. Affordable housing policies are primarily implemented via zoning incentives in the form of density bonuses for inclusion of affordable housing in new multifamily development.
    a. Affordability requirements target families at or below 80% of median income for the area.
3. Participation in the program comes with a long term covenant on the project (commonly referred to as the ARCH covenant).
    a. ARCH covenant imposes the affordability requirements for the “life of the project”

# Changes to Rental Agreement Regulation Ordinance

## 2017 Changes to the City of Seattle's Rental Agreement Regulation Ordinance

- **Security Deposit, Pet Deposit, and Move-in Fee Limits** – New limits on deposits and fees than can be charged at the beginning of a new rental agreement.
- **Payment Plans Required** – Landlords must allow an installment plan to pay a security deposit, a pet deposit, move-in fees, and last month's rent.

# Changes to Rental Agreement Regulation Ordinance

## 2017 Changes to the City of Seattle's Rental Agreement Regulation Ordinance (con't)

- **Security Deposit Returns** – The *Seattle Department of Construction and Inspections* may now investigate and take action if a landlord improperly withholds a deposit return or in other cases where the City's rental agreement regulations are not followed.

# City of Seattle Just Cause Eviction Ordinance

- Requires landlords to have good cause to terminate a month-to-month tenancy
- Specifies only reasons for which a tenant in Seattle may be required to move
- Good causes include:
  - Owner plans major rehabilitation
  - Owner decides to convert the building to a condominium
  - Owner decides to demolish a building or convert it to nonresidential use

# Tenant Relocation License

- Provides benefits for residential tenants who will be displaced by housing demolition, substantial rehabilitation, change of use or removal of use restrictions
- License must be obtained before any master use, demolition or building permit will be issued
- Relocation assistance payment = $3,490 (half paid by City and half paid by property owner)

# Notice of Expiration or Prepayment of Federal Assistance

- All owners of federally assisted housing shall provide at least 12 months' prior written notice of the expiration of a rental assistance contract or prepayment of a mortgage or loan. RCW 59.28.040

# Landlord Liaison Project

King County, the City of Seattle, All Home, and United Way of King County are developing a process to:

- Provide LLP partner landlords with risk reduction funds for eligible tenants after July 1, 2017.
- Provide eligible LLP tenants with assistance after July 1, 2017.
- Create a new program to connect and support property owners and tenants.

# Green Pricing

- Incentives to reduce energy or water consumption
- Discounted loan pricing for properties that are already certified
- Fannie Mae and Freddie Mac

# Lunch Speaker:

Susan McLain, Chief of Staff for the Office of Planning and Development
Brennon Staley, Strategic Advisor for the Office of Planning and Development

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# 2017 Real Estate/Land Use Briefing:

## Essential Industry Updates

November 9, 2017

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# Supplemental Materials Related To:

## Recent Developments: Land Use

# Recent Developments: Land Use

1. City of Seattle Head Tax Ordinance
2. City of Seattle Impact Fee Proposal
3. SEPA
    a. Affordable Housing
        i. City of Seattle Requirement for EIS Study of Economic Impacts
        ii. City of Seattle Substantive SEPA Policy Regarding Affordable Housing
        iii. City of Seattle EIS to Study Impacts of Additional Accessory Dwelling Units
    b. The New "Substantive" SEPA
    c. SEPA and Greenhouse Gas Emissions
    d. SEPA and City of Seattle's Transportation System (bus and bike lanes)
4. *Chelan Basin Conservancy v. GBI Holding Co.*
5. LUPA, Damages, and Fees

# DRAFT City of Seattle Head Tax Ordinance

# CITY OF SEATTLE

## ORDINANCE _____

COUNCIL BILL _____

..title
AN ORDINANCE relating to taxation; imposing an employee hours tax; adding a new Chapter 5.38 to Title 5 of the Seattle Municipal Code; and amending Sections 5.30.010, 5.55.010, 5.55.040, 5.55.060, 5.55.150, 5.55.165, 5.55.220, and 5.55.230 of the Seattle Municipal Code.
..body
**BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

Section 1. A new Chapter 5.38 is added to the Seattle Municipal Code as follows:

**Chapter 5.38 - EMPLOYEE HOURS TAX**

**5.38.010 - Administrative provisions**

All of the provisions contained in Chapter 5.55 shall have full force and application with respect to taxes imposed under the provisions of this Chapter 5.38 except as may be expressly stated to the contrary herein.

**5.38.020 - Definitions**

The definitions contained in Chapter 5.30 shall be fully applicable to this Chapter 5.38 except as may be expressly stated to the contrary herein. The following additional definitions shall apply throughout this Chapter 5.38:

"Business" means any person engaging in business as defined in Section 5.30.030.

"Employee" means any person who performs work, labor, or services for a business, is on the business's payroll, and performs any part of their duties within the City of Seattle. For purposes of this Chapter 5.38, the term "employee" also includes all full-time, part-time, and temporary employees or workers on the business' payroll. A business's payroll includes the payroll of any related company that acts as a paymaster for the related entities. Sole proprietors and partners shall be considered employees.

"Full-time employee" means an employee who works at least 1,920 hours in a calendar year.

"Part-time employee" means an employee who works fewer than 1,920 hours in a calendar year.

"Payroll" means the regular remuneration by a business to the individuals who perform work, labor, services, or make other similar contributions for the business. Payroll includes, but is not limited to, salaries, wages, or other draws or distributions made to employees, officers, partners, or members of Limited Liability Companies and Professional Limited Liability Companies as compensation for their labor and services.

**5.38.030 - Tax imposed – Measure of the tax**

A. Beginning on January 1, 2019, an employee hours tax is hereby levied upon and shall be collected from every person for the act or privilege of engaging in business activities within the City. The tax shall be measured by the number of employee hours of work conducted within the City during the calendar year.

B. The amount of the tax shall be equal to the employee hours worked within the City during the calendar year, multiplied by the rate of $0.052083 per hour worked. The employee hours worked excludes vacation and sick leave hours. If an employee works within and outside the City, it will be the responsibility of the business to calculate and report the number of hours worked within the City.

C. Alternative Full Time Equivalent (FTE) calculation method. A business may choose to calculate its annual employee hours tax based on the number of its FTE employees as follows:

1. Calculation of FTEs. The number of FTE employees for the calendar year is (i) the number of a business' full time employees for the calendar year, plus (ii) the sum of the hours worked by part-time employees in the calendar year divided by 1,920 hours.
2. Tax. Any fractional FTE remaining after the determination of FTE employees under subsection 5.38.030.C.1 shall be rounded up to the nearest whole number. Once the number of FTE employees is thus determined, that number shall be multiplied by $100 to determine the annual employee hours tax. Once the FTE alternative method is used, it must be used for all future reporting periods, unless a change is approved by the Director.

D. Businesses with more than one place of business must use the same method of calculation for all places of business.

E. The tax applies to employee hours worked or FTEs inside the City regardless of whether the place of business is located within or outside of the City.

F. Temporary employment agencies that supply temporary employees to business engaging in business activities within the City, and pay the temporary employee's salary, shall report and pay the tax on all such temporary employees. Businesses engaging temporary employees who are on the business' payroll shall report and pay the tax on the employee hours of such temporary employees, whether or not they are from an employment agency.

**5.38.040 - Employee hours tax – When due**

The employee hours tax shall be reported and paid on an annual calendar year basis, at the same time as the fourth quarter or annual tax return is due in accordance with Section 5.55.040, and on forms as prescribed by the Director. Persons discontinuing their business

activities in Seattle shall report and pay the tax at the same time as their final business tax return is due.

**5.38.050 - Exemptions from the employee hours tax**

A. The following are exempt from the employee hour tax:

1. Any business having annual taxable gross income of $5,000,000 or less.
2. Businesses that are preempted from taxation by cities pursuant to federal or state statutes or regulations, including, but not limited to, the following:
    a. Insurance businesses and their agents as defined by RCW 48.01.050 and 48.17.010, respectively, and whose total revenue is exempt from the business license tax per Chapter 5.45.
    b. Businesses that only sell, manufacture, or distribute motor vehicle fuel as defined in RCW 82.38.020 and exempted under RCW 82.38.080.
    c. Businesses that only distribute or sell liquor as defined in RCW 66.04.010 and exempted in RCW 66.08.120.
    d. Federal and state government agencies and subdivisions.
3. Volunteers and persons providing services in return for only aid or sustenance from religious or charitable organizations.

**5.38.060 - Tax in addition to other license fees or taxes**

The tax imposed herein shall be in addition to any license fee or tax imposed or levied under any other law, statute or ordinance whether imposed or levied by the City, State or other governmental entity or political subdivision.

Section 2. Section 5.30.010 of the Seattle Municipal Code, last amended by Ordinance 125324, is amended as follows:

# City of Seattle Impact Fee Proposal

**Impact fees**

The City of Seattle is moving towards adoption of an impact fee ordinance.

In 1990 the Legislature adopted the Growth Management Act, which included provisions authorizing local governments to impose impact fees. The current version of these provisions is codified at RCW 82.02.050 – 82.02.100, and important State requirements include those set forth at 82.02.050(4):

> *(4) The impact fees:*
> *(a) Shall only be imposed for system improvements that are reasonably related to the new development;*
> *(b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and*
> *(c) Shall be used for system improvements that will reasonably benefit the new development.*

In the early 1990s Seattle developed its first GMA Comprehensive Plan and made a considered decision *not* to impose impact fees on development. The City determined, in effect, that impact fees were not appropriate for a mature city, where the impacts of new development on existing infrastructure would be modest.

Twenty years later, in September, 2014, the Council appropriated money to fund the evaluation and development of an impact fee proposal.

In June, 2015, the City published the report of its impact fee workgroup entitled "Impact Fee Policy Assessment and Work Plan Development: http://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/ImpactFees/ImpactFeeWorkgroupSummary.pdf . This document comprises a reasonably thorough discussion of the legal and practical issues that Seattle must address in order to adopt a lawful impact fee ordinance. These issues will be discussed during the seminar, and some of them are summarized in the bullet points below.

On July 26, 2017, three Councilmembers – Bagshaw, Herbold, and O'Brien – wrote an Opinion in the Seattle Times entitled "Seattle is overdue for developer impact fees." In the body of the article they wrote "We're aiming to have impact fees help fund our schools, manage the demands of an increasingly strained transportation system and meet out need for open space as our population increases by 1,000 plus people a week."

On August 7, 2017 the City Council passed Resolution 31762, identifying the proposed amendments to the Comprehensive Plan that the Council will consider for adoption in 2018, probably in the fall. Section 4 of this Resolution states:

> **Section 4. Impact fee amendments.** The Council requests that the Executive forward any amendments necessary to support implementation of an impact fee program for: public streets, roads, and other transportation

improvements; publicly owned parks, open space, and recreation facilities; and school facilities. This may include amendments to update or replace level-of-service standards or to add impact fee project lists in the Capital Facilities Element and amendments to other elements or maps in the Plan, as appropriate.

The legal and practical issues that will be briefly discussed during the seminar include:

- The City cannot impose impact fees to mitigate impacts that the City also uses its SEPA authority to mitigate: double-dipping is not allowed.

- The City will have to decide what effect to give the United States Supreme Court's decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). This decision, which requires nexus and proportionality between impacts and monetary exactions intended to mitigate impacts, calls into question the State Supreme Court's holding in *City of Olympia v. Drebick*, 156 Wn.2d 289 (2006), which held that the GMA does not "require local governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area."

- The City will have to "establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development" RCW 82.02.060(7). The Court in *Drebick* upheld a service area that comprised the entire City of Olympia, but it is unlikely that a service area that comprises the entire City of Seattle would be upheld as "reasonable."

- Impact fees can only be used to fund the portion of a project that is necessitated by new development, so for each kind of impact fee the City must come up with a process for determining the share of the cost of new infrastructure that is attributable to new development.

- The City is not building many new streets, and impact fees cannot be used to repair existing streets. The City may establish new level-of-service standards, such as standards for bicycles and pedestrians, and impose impact fees for new development's share of the cost of the infrastructure intended to meet these new levels of service.

- School impact fees must be reasonably related to a development in order to reasonably benefit that development. *Wellington River Hollow, LLC. v. King County*, 121 Wn. App. 224 (2002). The relationship between new development and the need for new schools is complicated, since there is no direct relationship between the number of new housing units and the number of school-age children attending Seattle's schools.

- Impact fees cannot be used to address existing deficiencies in the amount of park land available, so the City will need to develop new level-of-service standard for parks as well.

The City will need to do SEPA review of the proposed legislation.

# SEPA

1. Affordable Housing
    a. City of Seattle Requirement for EIS Study of Economic Impacts
    b. City of Seattle Substantive SEPA Policy Regarding Affordable Housing
    c. City of Seattle EIS to Study Impacts of Additional Accessory Dwelling Units
2. The New "Substantive" SEPA
3. SEPA and Greenhouse Gas Emissions
4. SEPA and City of Seattle's Transportation System

# a. Affordable Housing

25.05.440 - EIS contents.

An EIS shall contain the following, in the style and format prescribed in the preceding sections.

A. Fact Sheet. The fact sheet shall include the following information in this order:

1. A title and brief description (a few sentences) of the nature and location (by street address, if applicable) of the proposal, including principal alternatives;
2. The name of the person or entity making the proposal(s) and the proposed or tentative date for implementation;
3. The name and address of the lead agency, the responsible official, and the person to contact for questions, comments, and information;
4. A list of all licenses which the proposal is known to require. The licenses shall be listed by name and agency; the list shall be as complete and specific as possible;
5. Authors and principal contributors to the EIS and the nature or subject area of their contributions;
6. The date of issue of the EIS;
7. The date comments are due (for DEISs);
8. The time and place of public hearings or meetings, if any and if known;
9. The date final action is planned or scheduled by the lead agency, if known. Agencies may indicate that the date is subject to change. The nature or type of final agency action should be stated unless covered in subsection 1 above;
10. The type and timing of any subsequent environmental review to which the lead agency or other agencies have made commitments, if any;
11. The location of a prior EIS on the proposal, EIS technical reports, background data, adopted documents, and materials incorporated by reference for this EIS, if any;
12. The cost to the public for a copy of the EIS.

B. Table of Contents.

1. The table of contents should list, if possible, any documents which are appended, adopted, or serve as technical reports for this EIS (but need not list each comment letter).
2. The table of contents may include the list of elements of the environment (Section 25.05.444), indicating those elements or portions of elements which do not involve significant impacts.

C. Summary. The EIS shall summarize the contents of the statement and shall not merely be an expanded table of contents. The summary shall briefly state the proposal's objectives, specifying the purpose and need to which the proposal is responding, the major conclusions, significant areas of controversy and uncertainty, if any, and the issues to be resolved, including the environmental choices to be made among alternative courses of action and the effectiveness of mitigation measures. The summary need not mention every subject discussed in the EIS, but shall include a summary of the proposal, impacts, alternatives, mitigation measures, and significant adverse impacts that cannot be mitigated. The summary shall state when the EIS is part of a phased review, if known, or the lead agency is relying on prior or future environmental review (which should be generally identified). The lead agency shall make the summary significantly broad to be useful to the other agencies with jurisdiction.

D. Alternatives Including the Proposed Action.

1. This section of the EIS describes and presents the proposal (or preferred alternative, if one (1) or more exists) and alternative courses of action.
2. Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.
    a. The word "reasonable" is intended to limit the number and range of alternatives, as well as the amount of detailed analysis for each alternative.

b. The "no-action" alternative shall be evaluated and compared to other alternatives.

c. Reasonable alternatives may be those over which an agency with jurisdiction has authority to control impacts either directly, or indirectly through requirement of mitigation measures.

3. This section of the EIS shall:

a. Describe the objective(s), proponent(s), and principal features of reasonable alternatives. Include the proposed action, including mitigation measures that are part of the proposal;

b. Describe the location of the alternatives including the proposed action, so that a lay person can understand it. Include a map, street address, if any, and legal description (unless long or in metes and bounds);

c. Identify any phases of the proposal, their timing, and previous or future environmental analysis on this or related proposals, if known;

d. Tailor the level of detail of descriptions to the significance of environmental impacts. The lead agency should retain any detailed engineering drawings and technical data, that have been submitted, in agency files and make them available on request;

e. Devote sufficiently detailed analysis to each reasonable alternative to permit a comparative evaluation of the alternatives including the proposed action. The amount of space devoted to each alternative may vary. One (1) alternative (including the proposed action) may be used as a benchmark for comparing alternatives. The EIS may indicate the main reasons for eliminating alternatives from detailed study;

f. Present a comparison of the environmental impacts of the reasonable alternatives, and include the no action alternative. Although graphics may be helpful, a matrix or chart is not required. A range of alternatives or a few representative alternatives, rather than every possible reasonable variation, may be discussed;

g. Discuss the benefits and disadvantages of reserving for some future time the implementation of the proposal, as compared with possible approval at this time. The agency perspective should be that each generation is, in effect, a trustee of the environment for succeeding generations. Particular attention should be given to the possibility of foreclosing future options by implementing the proposal;

4. When a proposal is for a private project on a specific site, the lead agency shall be required to evaluate only the no-action alternative plus other reasonable alternatives for achieving the proposal's objective on the same site. This subsection shall not apply when the proposal includes a rezone, unless the rezone is for a use allowed in an existing comprehensive plan that was adopted after review under SEPA. Further, alternative sites may be evaluated if other locations for the type of proposed use have not been included or considered in existing planning or zoning documents.

E. Affected Environment, Significant Impacts, and Mitigation Measures.

1. This section of the EIS shall describe the existing environment that will be affected by the proposal, analyze significant impacts of alternatives including the proposed action, and discuss reasonable mitigation measures that would significantly mitigate these impacts. Elements of the environment that are not significantly affected need not be discussed. Separate sections are not required for each subject (see Section 25.05.430 C).

2. General requirements for this section of the EIS.

a. This section shall be written in a nontechnical manner which is easily understandable to lay persons whenever possible, with the discussion commensurate with the importance of the impacts. Only significant impacts must be discussed; other impacts may be discussed.

b. Although the lead agency should discuss the affected environment, environmental impacts, and other mitigation measures together for each element of the environment where there is a significant impact, the responsible official shall have the flexibility to organize this section in any manner useful to decisionmakers and the public (see Section 25.05.430 C).

c. This subsection is not intended to duplicate the analysis in subsection E and shall avoid doing so to the

fullest extent possible.

3. This section of the EIS shall:
   a. Succinctly describe the principal features of the environment that would be affected, or created, by the alternatives including the proposal under consideration. Inventories of species should be avoided, although rare, threatened, or endangered species should be indicated;
   b. Describe and discuss significant impacts that will narrow the range or degree of beneficial uses of the environment or pose long-term risks to human health or the environment, such as storage, handling, or disposal of toxic or hazardous material;
   c. Clearly indicate those mitigation measures (not described in the previous section as part of the proposal or alternatives), if any, that could be implemented or might be required, as well as those, if any, that agencies or applicants are committed to implement;
   d. Indicate what the intended environmental benefits of mitigation measures are for significant impacts, and may discuss their technical feasibility and economic practicability, if there is concern about whether a mitigation measure is capable of being accomplished. The EIS need not analyze mitigation measures in detail unless they involve substantial changes to the proposal causing significant adverse impacts, or new information regarding significant impacts, and those measures will not be subsequently analyzed under SEPA (see Section 25.05.660 B). An EIS may briefly mention nonsignificant impacts or mitigation measures to satisfy other environmental review laws or requirements covered in the same document (Section 25.05.402 H and Section 25.05.640);
   e. Summarize significant adverse impacts that cannot or will not be mitigated.
4. This section shall incorporate, when appropriate:
   a. A summary of existing plans (for example: land use and shoreline plans) and zoning regulations applicable to the proposal, and how the proposal is consistent and inconsistent with them;
   b. Energy requirements and conservation potential of various alternatives and mitigation measures, including more efficient use of energy, such as insulating, as well as the use of alternate and renewable energy resources;
   c. Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures;
   d. Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.
5. Significant impacts on both the natural environment and the built environment must be analyzed, if relevant (Section 25.05.444). This involves impacts upon and the quality of the physical surroundings, whether they are in wild, rural, or urban areas. Discussion of significant impacts shall include the cost of and effects on public services, such as utilities, roads, fire, and police protection, that may result from a proposal. EIS's shall also discuss significant environmental impacts upon land and shoreline use, which includes housing, physical blight, and significant impacts of projected population on environmental resources, as specified by RCW 43.21C.110(1)(d) and (f), as listed in Section 25.05.444.
6. Analysis of the following social, cultural, and economic issues shall be included in every EIS unless eliminated by the scoping process (Section 25.05.408):
   a. Economic factors, including but not limited to employment, public investment, and taxation where appropriate, provided that this section shall not authorize the City to require disclosure of financial information relating to the private applicant or the private applicant's proposal;
   b. Regional, City, and neighborhood goals, objectives, and policies adopted or recognized by the appropriate local governmental authority prior to the time the proposal is initiated;
   c. The level of detail used in discussing these additional elements should be proportionate to the impacts the proposal may have if approved.

F. Appendices. Comment letters and responses shall be circulated with the FEIS as specified by Section 25.05.560. Technical rep and supporting documents need not be circulated with an EIS (Sections 25.05.425 D and 25.05.440 A11), but shall be readily a to agencies and the public during the comment period.

G. Additional Analysis. The lead agency may at its option include, in an EIS or appendix, the analysis of any impact relevant to the agency's decision, whether or not environmental. The inclusion of such analysis may be based upon comments received during the scoping process. The provision for combining documents may be used (Section 25.05.640). The EIS shall comply with the format requirements of this subchapter. The decision whether to include such information and the adequacy of any such additional analysis shall not be used in determining whether an EIS meets the requirements of SEPA.

(Ord. 114057 § 1(part), 1988: Ord. 111866 § 1(part), 1984.)

status have been designated yet.

d. Special districts have been established to protect certain areas which are unique in their historical and cultural significance, including for example Pike Place Market, Pioneer Square and the International District. These areas are subject to development controls and project review by special district review boards.

e. Archaeologically significant sites present a unique problem because protection of their integrity may, in some cases, eliminate any economic opportunity on the site.

2. Policies.

a. It is the City's policy to maintain and preserve significant historic sites and structures and to provide the opportunity for analysis of archaeological sites.

b. For projects involving structures or sites which have been designated as historic landmarks, compliance with the Landmarks Preservation Ordinance shall constitute compliance with the policy set forth in subsection H2a above.

c. For projects involving structures or sites which are not yet designated as historical landmarks but which appear to meet the criteria for designation, the decisionmaker or any interested person may refer the site or structure to the Landmarks Preservation Board for consideration. If the Board approves the site or structure for nomination as an historic landmark, consideration of the site or structure for designation as an historic landmark and application of controls and incentives shall proceed as provided by the Landmarks Preservation Ordinance. If the project is rejected for nomination, the project shall not be conditioned or denied for historical preservation purposes, except pursuant to paragraphs d or e of this subsection.

d. When a project is proposed adjacent to or across the street from a designated site or structure, the decisionmaker shall refer the proposal to the City's Historic Preservation Officer for an assessment of any adverse impacts on the designated landmark and for comments on possible mitigating measures. Mitigation may be required to insure the compatibility of the proposed project with the color, material and architectural character of the designated landmark and to reduce impacts on the character of the landmark's site. Subject to the Overview Policy set forth in SMC Section 25.05.665, mitigating measures may be required and are limited to the following:

i. Sympathetic facade treatment;

ii. Sympathetic street treatment;

iii. Sympathetic design treatment; and

iv. Reconfiguration of the project and/or relocation of the project on the project site;

provided, that mitigating measures shall not include reductions in a project's gross floor area.

e. On sites with potential archaeological significance, the decisionmaker may require an assessment of the archaeological potential of the site. Subject to the criteria of the Overview Policy set forth in SMC Section 25.05.665, mitigating measures which may be required to mitigate adverse impacts to an archaeological site include, but are not limited to:

i. Relocation of the project on the site;

ii. Providing markers, plaques, or recognition of discovery;

iii. Imposing a delay of as much as ninety (90) days (or more than ninety (90) days for extraordinary circumstances) to allow archaeological artifacts and information to be analyzed; and

iv. Excavation and recovery of artifacts.

I. Housing

1. Demolition, rehabilitation, or conversion

a. Policy background. Demolition or rehabilitation of low-rent housing units or conversion of housing for other uses can cause both displacement of low-income persons and reduction in the supply of housing.

b. Policies

1) It is the City's policy to encourage preservation of housing opportunities, especially for low-income

persons, and to ensure that persons displaced by redevelopment are relocated.

2) Proponents of projects shall disclose the on-site and off-site impacts of the proposed projects upon existing housing, with particular attention to low-income housing.

3) Compliance with legally valid City ordinance provisions relating to housing relocation, demolition, and conversion shall constitute compliance with this housing policy.

4) Housing preservation shall be an important consideration in the development of the City's public projects and programs. The City shall give high priority to limiting demolition of low-income housing in the development of its own facilities.

2. Commercial development - Policy background

a. The housing goal of the Growth Management Act, Chapter 36.70A RCW, encourages the availability of housing to all economic segments of the population. In accordance with the Growth Management Act, the housing element of the City's Comprehensive Plan shall, among other things, make adequate provision for existing and projected needs of all economic segments of the community.

b. SEPA provides that each person has a fundamental and inalienable right to a healthful environment. Affordable housing is a critical component of a healthful environment.

c. Development of new commercial floor area is accompanied by employment growth, including lower-wage jobs. An increase in lower-wage jobs associated with new commercial floor area correlates with an increase in the need for affordable housing.

d. The impact correlated with commercial development on the need for affordable housing falls disproportionately on persons of certain incomes and certain races and ethnicities. The City has a strong interest in mitigating the impacts of development of new commercial floor area in creating a need for affordable housing, particularly to ensure housing for those households earning no higher than 60 percent of median income.

e. Because affordable housing is in short supply in the City and newly constructed housing is generally not affordable, lower-wage employees may be forced to live in less than adequate housing within the City, pay a disproportionate share of their incomes to live in adequate housing in the City, or commute ever increasing distances to their jobs from housing located outside the City when they are unable to locate adequate housing within the City.

f. It is the City's policy that all people have the right to safe, healthy, and affordable housing.

3. Commercial development - Policies

a. The following policies apply to development that is not categorically exempt and that includes more than 4,000 square feet of gross floor area in commercial use, as defined in Section 23.84A.006, through construction of a new structure, construction of an addition, or change of use from residential use to commercial use, in areas for which the provisions of the zone specifically refer to Chapter 23.58B:

1) It is the City's policy to mitigate a portion of the affordable housing impacts of commercial development on low-income people, including people of color.

2) In determining the necessary affordable housing impact mitigation, the decision maker shall consider the need for affordable housing created by the development due to employment growth, including lower-wage jobs, associated with the development.

3) Mitigation measures may include, but are not limited to:

a) Production of affordable housing units on-site or off-site; and

b) Payment to fund affordable housing.

4) Subject to the Overview Policy set forth in Section 25.05.665, the decision maker may condition or deny a commercial development project described in this subsection 25.05.675.I.3.a to mitigate adverse impacts on the need for affordable housing. Compliance with Chapter 23.58B shall constitute compliance with the policies set forth in this subsection 25.05.675.I.3.a.

J. Land use

**City of Seattle EIS to Study Impacts of Additional Accessory Dwelling Units**

In December 2016, the City of Seattle Hearing Examiner, Sue Tanner, sided with the Queen Anne Community Council on an appeal of the determination of non-significance that the Office of Planning & Development had issued for proposed legislation that would ease restrictions on mother-in-law apartments and backyard cottages in Seattle's single family zones.

Tanner wrote in her ruling that the determination wasn't based on information sufficient to evaluate the proposal's potential impacts.

The legislation sponsored by Seattle City Councilmember Mike O'Brien would allow properties to have both an attached accessory dwelling unit (ADU) and detached accessory dwelling unit (DADU) on the same lot, as well as:

- Remove the off-street parking requirement,
- Remove the owner-occupancy requirement after one year,
- Reduce the minimum lot size for a DADU to 3,200-square-feet, and
- Increase the allowable floor area for a DADU from 800 to 1,000-square-feet

The Hearing Examiner's ruling directs the city's Office of Planning and Development to prepare an Environmental Impact Statement on the proposed changes, which is now being done.

Read the Hearing Examiner's decision here: http://www.foster.com/Documents/Event-Documents/Findings-and-Decision-of-the-Hearing-Examiner.

## b. The New "Substantive" SEPA

**The New "Substantive" SEPA**

***Lands Council v. Washington State Parks Recreation Comm'n*, 176 Wn. App. 787, 807–08, 309 P.3d 734, 744–45 (2013).**

The Court of Appeals, Division II held that the Washington State Parks and Recreation Commission violated the State Environmental Policy Act ("SEPA") by taking action to classify 279 acres of Mount Spokane State Park without preparing an Environmental Impact Statement, inviting a "snowball effect and decision by administrative inertia" instead of consideration of environmental consequences before a project picks up momentum as required under SEPA.

> "Over 40 years ago, with the adoption of SEPA, we first read in Washington law that each generation is trustee of the environment for succeeding generations. We read also that it is the "continuing responsibility" of the state and its agencies to act so we may carry out that trust. RCW 43.21C.020(2). SEPA demands that this trust be more than merely a stirring maxim or artful slogan. Instead, it is the quickening principle in the application of the statute. Consistently with the statute's purposes, the Commission's failure to prepare an EIS for the 2011 classification decision violated the terms of SEPA and its rules and was contrary to governing case law."

For a copy of the case, please visit: www.foster.com/Documents/Event-Documents/Lands-Council-v-Washington-State-Parks-Recreation.

***Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.*, 189 Wn. App. 127, 148, 356 P.3d 753, 762–63 (2015).**

The Court of Appeals, Division II held that the Department of Ecology's interpretation of the whole effluent toxicity test as allowing discharges a under a National Pollutant Discharge Elimination System (NPDES) that violate a water quality standard conflicted was an "error of law" because the interpretation conflicted with governing statutes and regulations, including SEPA.

> "The Department's interpretation of its rules and statutes is also inconsistent with its responsibility under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. SEPA 'directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter.' RCW 43.21C.030. Among those policies is the recognition of 'the responsibilities of each generation as trustee of the environment for succeeding generations,' RCW 43.21C.020(2)(a), and the recognition that 'each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.' RCW 43.21C.020(3). Although these policies apply to the State generally, they speak with an insistent voice to the Department of Ecology. *See, e.g.*, RCW 43.21A.010. By condoning violations of its own standards through this permit, the Department has not acted in keeping with this trust."

For a copy of the case, please visit: www.foster.com/Documents/Event-Documents/Puget-Soundkeeper-Alliance-v-State-Pollution-Contr.

***Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 737–38, 399 P.3d 562, 594–95 (2017).**

This case involved a multiparty challenge to Jefferson County's Shoreline Master Program, which was adopted in 2014 and upheld by the Western Washington Growth Management Hearings Board ("Board"). A mining company whose shoreline was designated as a "conservancy" area appealed the Board's final decisions and order upholding the Master Program, claiming that prohibiting mining in conservancy-designated environmental areas (1) violated that Shoreline Management Act ("SMA") and Master Program Guidelines, (2) was not supported by sufficient scientific evidence, and (3) was not given sufficient opportunity for public comment. The court affirmed the Board, but then went one step further to implicate SEPA – a statute and issue not raised by the mining company:

> "In addition, SEPA requires that the laws of the State, including the SMA, be interpreted and administered in accordance with the policies of SEPA. RCW 43.21C.030. Among those policies is the recognition of 'the responsibilities of each generation as trustee of the environment for succeeding generations,' RCW 43.21C.020(2)(a), and the recognition that 'each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 43.21C.020(3). *Accord Puget Soundkeeper All.*, 189 Wn.App. at 148, 356 P.3d 753. In *Lands Council v. Washington State Parks & Recreation Commission*, 176 Wash.App. 787, 808, 309 P.3d 734 (2013), we recognized this notion of trusteeship to be the 'quickening principle' of SEPA. The County acted consistently with these principles and purposes."

For a copy of the case, please visit: www.foster.com/Documents/Event-Documents/Olympic-Stewardship-Foundation-v-State-Environment.

# c. SEPA and Greenhouse Gas Emissions

**SEPA and Greenhouse Gas Emissions:**

On March 28, 2017, President Donald Trump signed an Executive Order that, among other things, (1) directed the Council on Environmental Quality ("CEQ") to rescind its guidance for federal departments and agencies on the consideration of greenhouse gas ("GHG") emissions in National Environmental Policy Act ("NEPA") reviews. And in 2016, the Department of Ecology quietly withdrew the "internal guidance" that it proposed that local governments follow when conducting SEPA reviews.

Stay tuned: neither the right nor the left know what to do.

# d. SEPA and City of Seattle's Transportation System

**SEPA and bus and bike lanes:**

SDOT has been busy making plans to add new bicycle and bus lanes that will substantially change the flow of traffic in downtown Seattle. In general, both bus lanes and bike lanes are categorically exempt from SEPA review: WAC 197-11- 800(2)(b) and (d)(ix). However, WAC 197-11-305 states exceptions, one of which is that a proposal is not exempt if:

> (b) The proposal is a segment of a proposal that includes:
> (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not; or
> (ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction. If so, that agency shall be the lead agency, unless the agencies with jurisdiction agree that another agency should be the lead agency.

*Chelan Basin Conservancy v. GBI Holding Co.*

## 1. What is the public trust doctrine?

The public trust doctrine is a common law doctrine that recognizes the public right to use navigable waters in place for navigation and fishing, and other incidental activities. Under Article 17, section 1 of the Washington State Constitution, the state "has the power to dispose of, and invest persons with, ownership of tidelands and shorelands subject only to the paramount right of navigation and the fishery." Thus, the State can convey rights in tidelands and shorelands, but any right conveyed remains subservient to the public right to use the water in place for navigation.

The legislature can dispose of the public right to use navigable waters in place only to promote the interests protected by the public trust doctrine or to further some other interest if doing so does not substantially impair the public trust resource.

## 2. What is the Savings Clause?

In 1971, the legislature enacted the Savings Clause, RCW 90.58.270, as part of the Shoreline Management Act (SMA). It was intended to legislatively resolve the Washington State Supreme Court's 1969 decision in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), which held that an area of filled land in Lake Chelan violated the public trust doctrine and had to be abated. The Savings Clause gave after-the-fact consent to pre-*Wilbour* improvements to protect them from a public trust challenge.

In 1972, the legislature referred the SMA to the people for ratification and presented it to the people along with an alternative measure, Initiative 43. Both established guidelines for development of Washington's waterways and shorelines, but the SMA provided legislative consent to pre-*Wilbour* fills whereas Initiative 43 did not. The people ratified the SMA and rejected Initiative 43.

## 3. What happened in *Chelan Basin Conservancy v. GBI Holding Co.*?

The case involves three fingers of fill material in Lake Chelan on a property owned by GBI Holding Co. (GBI). In its natural state, GBI's property stood above Lake Chelan's peak water levels and was continuously dry throughout the year. In 1927, a power company completed a dam that artificially raised the water level of the lake. After the dam was installed, GBI's property became seasonally submerged by the lake's artificially elevated waters.

In 1961, GBI added 6 acres of fill material to its property to permanently elevate it above the seasonal water level fluctuations, called the "Three Fingers" because of their shape.

In 1969, the Washington State Supreme Court decided *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), and in 1971 the legislature enacted the Savings Clause to legislatively overrule the potential implications of *Wilbour* on pre-1969 fill material.

In 2010, GBI submitted a permit application to the City of Chelan to develop the Three Fingers. While GBI was going through the permitting process, the Chelan Basin Conservancy

(Conservancy) filed a lawsuit against GBI, seeking the removal of the Three Fingers fill pursuant to the public trust doctrine and *Wilbour*. The parties brought cross-motions for summary judgment. The trial court found that the Savings Clause did not apply and ordered the Three Fingers to be removed.

GBI appealed to the Court of Appeals, Division III, who held that the Savings Clause applied and its bar on public trust claims was enforceable because the Conservancy failed to prove that the Savings Clause violated the public trust doctrine. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 378 P.3d 222, *aff'd in part, rev'd in part*, 188 Wn.2d 692, 399 P.3d 493 (2017).

The Washington State Supreme Court accepted review without limitation and addressed three issues: (1) whether the Savings Clause, RCW 90.58.270, applies to the Three Fingers fill, (2) if so, whether the Savings Clause violates the public trust doctrine, and (3) whether the Conservancy had standing to bring the public trust action. The court determined that the Conservancy had standing.

On the first issue, the court ruled that the Savings Clause authorizes the retention and maintenance of the Three Fingers fill and bars public private nuisance claims on the fill's impairment of navigable waters.

On the second issue, the court remanded the question to the Chelan County Superior Court to make a factual determination of whether the Savings Clause violates the public trust doctrine based on the test set forth in *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989, 994–95 (1987), which asks: (1) whether the state, by the questioned legislation, has given up its right of control over the public interest; and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the public right, or (b) has not substantially impaired it.

In late July 2017, the State of Washington and GBI filed motions for reconsideration with the Washington State Supreme Court. The motions are pending.

**4. What is the significance of *Chelan Basin Conservancy v. GBI Holding Co.* to fill areas?**

*Chelan Basin Conservancy v. GBI Holding Co.* leaves open the question of whether the Savings Clause violates the public trust doctrine and is therefore invalid. If the Savings Clause is invalid, it could render pre-*Wilbour* fill areas subject to claims that the fill areas violate the public trust doctrine and must be removed. This might include areas such as Harbor Island in Seattle (filled in 1909).

For a copy of the case, please visit: www.foster.com/Documents/Event-Documents/Chelan-Basin-Conservancy-v-GBI-Holding-Co.

# LUPA, Damages, and Fees

**LUPA, Damages, and Fees**

The Washington Supreme Court has accepted review of *Maytown Sand & Gravel v. Thurston County*, 198 Wn. App. 560 (2017), with oral argument scheduled for January 25, 2018. The same morning the Court also is hearing oral argument in its review of the unpublished case of *Community Treasures v. San Juan County*, 198 Wn. App. 1032 (2017).

The two cases raise important questions about the applicability of the Land Use Petition Act (LUPA). In *Maytown*, the County is attempting to persuade the Court that an applicant must pursue a LUPA appeal of a local government decision to *issue* a permit before the applicant can seek damages in tort for wrongful conduct during the permitting process. The County's argument asks the Court to commingle land use law and tort law even though LUPA states in multiple ways that it does not apply to actions for damages. The County also is attempting to persuade the Court that attorney fees incurred in dealing with an unlawful permitting process cannot be recovered as damages.

In *Community Treasures* the Court is being asked to decide whether a "land use decision" includes the permitting fees (not impact fees) that an applicant must pay in order to have its application processed.

FOSTER PEPPER PLLC

# Supplemental Materials Related To:

## Seattle: What's New with Mandatory Housing Affordability and Design Review?

*November 9, 2017*

# City Of Seattle Revises Its Design Review Program

**AUTHORS:**
Jeremy Eckert
Michelle Rusk

**RELATED SERVICES:**
Land Use, Planning & Zoning
Real Estate

Last month the City of Seattle revised its Design Review Program. The revisions are significant because most multi-family development is subject to some form of design review, and many projects vest to the land use code through the design review process. Some aspects of the revised program will go into effect starting January 1, 2018 with the majority of the revised program coming into effect July 1, 2018.

## NEW DESIGN REVIEW THRESHOLDS

Under the new program, the following design review thresholds are implemented for projects subject to design review. Thresholds are determined by whether projects are inside or outside downtown and industrial zones. Below, *Table A* sets thresholds for development outside of downtown and industrial zones. A project will be subject to specific thresholds in Part B or Part C, based on whether it possesses certain "Site Characteristic" discussed below in Part A:

| **Table A for 23.41.004<br>Design review thresholds by size of development and specific site characteristics outside of downtown and industrial zones** | | |
|---|---|---|
| If any of the site characteristics in part A of this table are present, the design review thresholds in part B apply. If none of the site characteristics in part A of this table are present, the design review thresholds in part C apply. | | |
| **A.** | **Category** | **Site Characteristic** |
| | A.1. Context | a. Lot is abutting or across an alley from a lot with single- family zoning.<br>b. Lot is in a zone with a maximum height limit 20 feet or greater than the zone of an abutting lot or a lot across an alley. |
| | A.2. Scale | a. Lot is 43,000 square feet in area or greater.<br>b. Lot has any street lot line greater than 200 feet in length. |
| | A.3. Special features | a. Development proposal includes a Type IV or V Council Land Use Decision.<br>b. Lot contains a designated landmark structure.<br>c. Lot contains a character structure in the Pike/Pine Overlay District. |

*November 9, 2017*

# City Of Seattle Revises Its Design Review Program

If the development possesses any of the site characteristics listed above in Part A, the following thresholds will apply and determine the manner of design review:

| | | |
|---|---|---|
| **B.** | Development on a lot containing any of the specific site characteristics in part A of this table is generally subject to the thresholds below. | |
| | **Amount of gross floor area of development** | **Design review type** |
| | B.1. Less than 8,000 square feet | No design review, with notable exceptions[1, 2] |
| | B.2. At least 8,000 but less than 35,000 square feet | Administrative design review |
| | B.3. 35,000 square feet or greater | Full design review, or administrative design review if the applicant elects to provide on-site affordable housing under MHA. |

If the development possesses none of the Site Characteristics listed above in Part A, the following thresholds will apply and determine the manner of design review:

| | | |
|---|---|---|
| **C.** | Development on a lot not containing any of the specific site characteristics in part A of this table is generally subject to the thresholds below. | |
| | **Amount of gross floor area of development** | **Design review type** |
| | C.1. Less than 8,000 square feet | No design review, with notable exceptions[1, 2] |
| | C.2. At least 8,000 but less than 15,000 square feet | Streamlined design review |
| | C.3. At least 15,000 but less than 35,000 square feet | Administrative design review |
| | C.4. 35,000 square feet or greater | Full Design Review |

[1] The following development is subject to streamlined design review: (1) development that is at least 5,000 square feet but less than 8,000 square feet and (2) is proposed on a lot that was rezoned from a Single-family zone to a Lowrise 1 (LR1) zone or Lowrise 2 (LR2) zone, within five years after the effective date of the ordinance introduced as Council Bill 119057. This requirement shall only apply to applications for new development submitted on or before December 31, 2023.

[2] The following development is subject to administrative design review: (1) development that is at least 5,000 square feet but less than 8,000 square feet and (2) is proposed on a lot that was rezoned from a Single-family zone to a Lowrise 3 (LR3) zone, any Midrise zone, Highrise zone, Commercial (C) zone, or Neighborhood Commercial (NC) zone, within five years after the effective date of the ordinance introduced as Council Bill 119057. This requirement shall only apply to applications for new development submitted on or before December 31, 2023.

*November 9, 2017*

# City Of Seattle Revises Its Design Review Program

If the development is situated in a downtown or industrial zone, the following thresholds will apply:

| Table B for 23.41.004<br>Design review thresholds by size of development in downtown and industrial zones | | |
|---|---|---|
| **Zone** | **Amount of gross floor area of development** | **Design review type** |
| A. All DOC1, DOC2, or DMC zones | 50,000 square feet or greater | Full design review |
| B. All DRC, DMR, DH1, DH2, PMM zones outside the Pike Place Market Historical District, IB, or IC zones | 20,000 square feet or greater | Full design review |

## FULL DESIGN REVIEW OPT-OUT FOR PROVIDING ON-SITE AFFORDABLE HOUSING

Under the new program, if a qualifying project elects the MHA performance option to provide on-site affordable housing, it will be subject to Administrative Design Review, not the prescribed Full Design Review. Such a development must exceed 35,000 square feet, possess "Site Characteristics" pursuant to *Table A*, and be situated outside of downtown and industrial zones. City Staff have stated that this option should be available for the "easier" sites that do not contain a characteristic identified in *Table A*, although this authorization was not included in the adopted code. City Staff are preparing a "clean up" code amendment to address this oversight. Once an applicant elects Administrative Design Review, the applicant cannot change from the MHA performance option to the payment option.

## NEW OUTREACH REQUIREMENTS

Under the new changes, all three processes will incorporate a robust community outreach component, requiring, at minimum, outreach through printed, electronic or digital, and in-person methods. Applicants must document their compliance with the community outreach plan, and submit the documentation to the Director, prior to scheduling an early design guidance meeting. The Director will make the compliance documentation available to the public.

## LIMIT ON DESIGN REVIEW BOARD MEETINGS UNLESS …

Other changes include a cap on Early Design Guidance meetings. Under the new program, the maximum number of Early Design Guidance meetings for a project in Full Design Review is two. However, there will be no limit on the number of Early Design Guidance meetings when the project meets certain specifications, or if the Director determines the Design Review Board needs more time for deliberation and evaluation of a project. The specifications that may trigger additional Early Design Guidance meetings include: when the project is abutting or across the street from a lot in a single-family zone, when the development proposal includes a Type IV or V Master Use Permit component (e.g. a contract rezone project), or when departures are requested (unless the applicant elects the MHA performance option described above). Thus, there are numerous opportunities for a project to exceed two Early Design Guidance meetings.

*November 9, 2017*

# City Of Seattle Revises Its Design Review Program

## BOARD COMPOSITION

Additionally, the composition of the Design Review Board has changed. The Design Review Board may now have more than one young adult position, pursuant to the Get Engaged program. The number of young adult positions is not capped, though each design review district may not have more than one young adult member.

## QUESTIONS?

Please contact Jeremy Eckert at 206.447.6284 or Michelle Rusk at 206.447.6279 if you have any questions regarding the changes to the design review program.

For more information about Foster Pepper or to register for other firm communications, visit www.foster.com.

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# Supplemental Materials Related To:

## Impacts of the *Hirst* Decision

# The *Hirst* Decision

To view a copy of the *Hirst* decision, including the opinion from the Washington State Supreme Court, the concurring opinion, and the dissenting opinion, please visit:
www.foster.com/Documents/Event-Documents/Hirst-Decision

MRSC
Local Government Success

# Approaching Your County's Post Hirst Water Resource Responsibilities

October 31, 2016 by Neil Caulkins
Category:

*This is the second post of a four-part series discussing the Washington Supreme Court's recent decision in Whatcom County v. Hirst.*

As I laid out in part one of this series, the Washington Supreme Court made clear in its recent *Hirst* decision that counties have the responsibility under the Growth Management Act (GMA) to make determinations of water availability for development permit approval and cannot defer to Ecology or rely upon the decision of others when making these determinations.

*Hirst* brings to mind three questions: what will a county get in trouble for not doing; what can a county do; and what should a county do?

## What Will a County Get in Trouble for Not Doing?

I think this boils down to a question of GMA compliance. I have real trouble seeing how a county going through a periodic GMA update could be found GMA-complaint if it made no changes to its comprehensive plan or development regulations in response to *Hirst*, such as clarifying how the county will address water availability when reviewing building permit and subdivision applications. The Washington Supreme Court clearly held in *Hirst* that this was a duty of counties under the GMA.

In contrast, for counties not currently going through a periodic GMA update, there likely is some time to consider and develop an approach. Comprehensive plans and development regulations are deemed GMA-compliant upon adoption and remain so until the Growth Management Hearings Board says otherwise. Under RCW 36.70A.290(2), challenges to GMA compliance can only be brought within 60 days of an amendment, or, pursuant to WAC 242-03-220(5), at any time after the failure to act by a deadline imposed by the GMA. The outcome in *Hirst* was specific to Whatcom County and does not trigger an immediate opportunity to challenge another county's comprehensive plan or development regulations that are already adopted and deemed GMA-compliant.

Additionally, a challenge to a specific land use decision under the Land Use Petition Act (LUPA) would not be successful if it claimed a GMA violation based on a county's failure to bring its regulation in line with the *Hirst* decision. In a LUPA case, a Superior Court does not have jurisdiction to decide questions of GMA compliance (*See Woods v. Kittitas County*). Even if a particular land use decision were appealed under LUPA, *Hirst* does not provide a valid basis for overturning a permit decision that otherwise complied with a county's code. Instead, the existing development regulations–even if in conflict with the holding in *Hirst*–are compliant until such time as the Growth Management Hearings Board determines they are not. LUPA has a 21-day appeal period which protects municipalities from later-discovered problems or errors. If no timely appeal is brought, the land use decision is considered lawful, and no damage can be caused by a lawful land use action.

## What Can a County Do?

I think this is a question of legal possibility. One option would be a declaration of a moratorium under RCW 36.70A.390, stating something to the effect of "Hirst says counties need to decide X, we haven't done so, so we're stopping development based upon permit-exempt wells until we can decide X." While a county can certainly legally do this, it would probably be politically nuclear. For example, when Ecology imposed the Upper Kittitas Groundwater Rule (which limits groundwater withdrawals) on Kittitas County, the wailing and gnashing of teeth was tremendous. Had that been imposed by the commissioners upon their own constituents, it would have caused a political bloodbath. So, while counties can declare moratoria, it's probably not a good idea to do so. In any event, I don't think that the failure to declare a moratorium would be an instance of GMA non-compliance (particularly if the county has commenced a study of its water issues, as discussed below).

## So, What Should a County Do?

I think the best practice now is for every GMA county to commence a water study, regardless of whether or not the county currently has indicia of water quality or quantity issues. Every GMA county, as part of the periodic update, will need to say whether they do or do not have water availability problems. If such problems exist, the county must then set forth the county code fixes for those county-specific problems. If a county has no indicia of problems, that study may be very simple–and inexpensive–and a declaration that water is available and development based upon permit-exempt wells can proceed could be GMA-compliant. For those counties where groundwater availability is an issue, there should be a statement as such along with amendments to that county's comprehensive plan provisions and development regulation that specifically address the unique local circumstances.

To be GMA-compliant, a county needs to determine if it has a problem before it can craft a remedy. So, I think that commencing a study may be the most appropriate first step, rather than a moratorium, because a problem cannot be solved until it is understood.

*Stay tuned for part three of this four-part series, where I will discuss what a determination of water availability should look like under Whatcom County v. Hirst.*

**About Neil Caulkins**

Neil Caulkins is the chief civil deputy prosecutor for Kittitas County. He has over 15 years of experience as a municipal attorney and his practice area focuses on land use. He has represented his county in land use cases before the GMA Hearings Board and all levels of the Washington court system, including the Washington Supreme Court. He also drafted all pleadings and provided all argument on behalf of Kittitas County in *Kittitas County v. EWGMHB*, the legal predecessor to *Whatcom County vs. Hirst*

*The views expressed in guest columns represent the opinions of the author and do not necessarily reflect those of MRSC.*

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## Comments

0 comments on Approaching Your County's Post Hirst Water Resource Responsibilities

Blog post currently doesn't have any comments.

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# The Effect of Hirst on Non-GMA Counties and Issues Other Than Water

November 10, 2016 by Neil Caulkins
Category:

*This is the final post of a four-part series discussing the Washington Supreme Court's recent decision in Whatcom County v. Hirst.*

I'd like to use this final post on the *Hirst* decision to consider two additional questions. First, the potential impact of the *Hirst* decision on counties that do not plan under the GMA, and second, whether *Hirst* has application to issues other than water. In short, I believe the decision may have serious implications for counties not planning under the GMA, but I do not see that *Hirst* has application beyond water issues.

## What Does *Hirst* Mean for Non-GMA Counties?

The Planning Enabling Act, at RCW 36.70.330, sets forth the required elements of a comprehensive plan for a jurisdiction that is not planning under the GMA. The land use element of these comprehensive plans must provide for "protection of the quality and quantity of groundwater used for public water supplies." This is virtually identical to the language in one of the GMA provisions at issue in *Hirst* (i.e., RCW 36.70A.070(1)). A challenger could argue that, like in *Hirst*, a county is not meeting its obligation to protect quantity and quality of groundwater, pointing to the language in the Planning Enabling Act rather than the GMA. While it may be a legal jump, I don't think a court would have trouble making it. Further, the provisions at RCW 19.27.097 and RCW 58.17.110 that require an applicant to demonstrate evidence of adequate water supply for development apply throughout the state, not just GMA-planning counties.

Note that the forum for a challenge would be different in a non-GMA county. RCW 36.70.680 requires planning agencies to make recommendations for changes to comprehensive plans and development regulations to comport with the law. RCW 36.70.460 requires planning agencies to render an annual report on the comprehensive plan and accomplishments thereunder. RCW 36.70.410 provides for initiating changes to a comprehensive plan based on changed conditions. The failure of an annual report to indicate needed changes related to *Hirst*, or the failure of a

county to commence making such amendments, would presumably be occasion for legal challenge. If the comprehensive plan or development regulations are challenged, the challenge would have to be brought in superior court.

## Does the *Hirst* decision apply to issues other than water?

I don't think the *Hirst* decision will have an effect on a county's GMA obligations beyond water issues. While RCW 36.70A.020(10) does list the protection of "air" as well as water, that is merely a "goal" of the GMA. The court in *Hirst* clearly stated that it had "never held that local governments are bound by these goals in addition to the enumerated requirements of the Act." In contrast, *Hirst* makes clear that counties are bound by the enumerated requirements of the GMA, which, under RCW 36.70A.070(1) and (5)(c)(iv), include the protection of surface and groundwater. None of the other mandatory GMA requirements raise the questions that water did in terms of the respective roles of the state and local governments in regulating the resource. Hence, at this point it appears safe to say that the implications for local responsibility under this case are limited to water issues.

## Closing Thoughts

I would like to repeat that using a county's current regulations and process prior to a periodic update is legally defensible and should result in no liability. Again, local regulations are deemed GMA-compliant upon adoption and remain so until the periodic update. At that point the *Hirst* decision should guide the update process with regard to water resource planning. Notably in *Hirst*, both the Washington Supreme Court and the Hearings Board affirmatively declined to find invalidity. Hence, Whatcom County may, for the moment, continue to use the regulations that were challenged in *Hirst*, and because the regulations are valid and usable, their use cannot give rise to liability.

The only other challenge that could be brought is an appeal of an individual permit decision. As I stated in my second blog post, a challenge targeting a county's comprehensive plan and development regulations under LUPA would be unsuccessful. A challenge to an individual permit decision under RCW 19.27.097 or RCW 58.17.110, however, could conceivably be brought. Someone opposing the issuance of a building permit or approval of a land division might argue that the applicant has not provided evidence of an adequate water supply, arguing some of the principles addressed in *Hirst* (although as noted at footnote 6 of the *Hirst* decision, RCW 19.27.097 is applied differently in non-GMA counties). Although *Hirst* is a GMA case about a county's comprehensive plan and development regulations, principles may be extended to the individual permit stage. If an individual permit were challenged for not demonstrating adequate water, presumably the remedy would be a remand for a further showing of adequate water.

*For more information on the implications of the Hirst decision, see the three prior posts in this four-part series.*

**About Neil Caulkins**

Neil Caulkins is the chief civil deputy prosecutor for Kittitas County. He has over 15 years of experience as a municipal attorney and his practice area focuses on land use. He has represented his county in land use cases before the GMA Hearings Board and all levels of the Washington court system, including the Washington Supreme Court. He also drafted all pleadings and provided all argument on behalf of Kittitas County in *Kittitas County v. EWGMHB*, the legal predecessor to *Whatcom County vs. Hirst*

*The views expressed in guest columns represent the opinions of the author and do not necessarily reflect those of MRSC.*

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## Legislative and Case Law Update

2017 REAL ESTATE/LAND USE BRIEFING
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*RECENT DEVELOPMENTS*
*IN*
*REAL ESTATE & SECURED LENDING*
*CASE LAW AND LEGISLATION*

Gary Fluhrer
Scott Osborne
Laura Karassik
Nathan Luce

## A. SECURED FINANCING

### 1. Loan Documentation: The Demise of LIBOR.

LIBOR is going away (sort of). Since there are an estimated $300-$800 trillion in LIBOR-denominated loans and contracts, this is a big deal.

To understand why LIBOR is going away, a short history lesson may be helpful. In the 1960s, the London interbank offer rate, "LIBOR," represented the aggregated rates at which individual syndicate banks (or referenced banks) could borrow funds. This was not an objective "index," but changed from transaction to transaction depending on which banks formed the syndicate and the referenced rate. In the 1970s, financial institutions began developing derivative tools, such as interest rate swaps, to offset the LIBOR-rate risk. LIBOR-denominated contracts subsequently increased, but the opaque and inconsistent nature of the rate setting components curbed the derivatives market. Attempting to create a more transparent index, financial institutions turned to the industry trade/lobbying group the British Bankers' Association. The BBA set rates by asking a select group of large, "reputable" banks to submit quotes daily in answer to a question: "At what rate do you think interbank term deposits will be offered by one prime bank to another prime bank for a reasonable market size today at 11 am [London time]?" Subsequently, rather than referencing an undefined "prime bank," the BBA changed the question: "At what rate could you borrow funds, were you to do so by asking for and then accepting interbank offers in a reasonable market size just prior to 11 a.m. [London time]?" The LIBOR rate was then determined by calculating the trimmed arithmetic mean of the responses, i.e. the highest and lowest 25 percent of the responses were discarded (trimmed) and the mean of the remaining responses became the rate. This would then be repeated for every currency and maturity so that more than 100 rates were produced every business day. Haubrich, Joseph G., 2001. *"Swaps and the Swaps Yield Curse,"* December 1, 2001, Federal Reserve Bank of Cleveland.

These submission question changes did not entirely quell market concerns about transparency and possible rate manipulation. During the financial crisis, Barclays' activities with respect to its submissions were particularly suspicious. Subsequent investigations established that: "Barclays based its LIBOR submissions on the requests of Barclays' swaps traders…to

benefit Barclays' derivatives trading positions" and "[d]uring the…financial crisis..., Barclays lowered its LIBOR submissions in order to manage what it believed were inaccurate and negative public and media perceptions that Barclays had a liquidity problem." *In the Matter of: Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.*, Order Instituting Proceedings Pursuant to Section 6(c) and 6(d) of the Commodity Exchange Act, as Amended, Making Findings and Imposing Remedial Sanctions, U.S. Commodity Futures Trading Comm'n (June 27, 2012). Additional investigations uncovered industry-side manipulation, and additional fines were assessed against Barclays, Citi, UBS, the Royal Bank of Scotland, Deutsche Bank, JPMorgan, Lloyds Bank, Rabobank, ICAP, Bank of America and RP Martin. *Libor-rigging fines: a timeline*, The Guardian (April 23, 2015).

In the aftermath of the scandal, Martin Wheatley, Managing director of the Financial Services Authority and CEO of the Financial Conduct Authority, was asked to review matters relating to the setting and usage of LIBOR, including whether LIBOR should be eliminated. The Wheatley report rejected the idea of terminating LIBOR, concluding that with many reforms, including those intended to promote independent review and administration and to facilitate the use of transparent LIBOR submission transaction date, "the issues identified with LIBOR, while serious, can be rectified."

Following the Wheatley Review, LIBOR is now supervised by the U.K.'s Financial Conduct Authority and is administered by an independent private corporation, the ICE Benchmark Administration. ICE, using a waterfall calculation methodology, has more closely linked LIBOR to actual market transactions. *Roadmap for ICE LIBOR.* (March 18, 2016). However, even with these and other reforms, the FCA announced in July that, as of the end of 2021, it would no longer be involved in regulating LIBOR. The cause for withdrawal was the decline in unsecured interbank borrowing exemplified by the fact that in "one currency-tenor combination, for which a benchmark reference rate is produced every business day using submissions from around a dozen panel banks, these banks, between them, executed just fifteen [qualifying] transactions…in the whole of 2016." See *The future of LIBOR, July 27, 2017*, Andrew Bailey Chief Executive of the FCA. Bailey stated that, after the FCA's withdrawal in 2021 of its power and authority to persuade or oblige panel banks to submit daily quotes, ICE could continue to produce LIBOR "if they wanted to, and were able to do so", but that the FCA would not guaranty LIBOR's continuance as a dynamic benchmark.

Around the world, regulatory bodies are beginning the development of alternate benchmark rates. The Alternate Reference Rate Committee ("ARRC"), a Federal Reserve sponsored group, is leading this effort in the U.S. In June, the ARRC voted to replace LIBOR with a benchmark based on the "Broad General Collateral Repo Rate" described by the Federal Reserve Bank of New York. This LIBOR alternative is a work in progress and ARRC intends to "refine its proposed transition plans, developing implementation options for its recommended rate in consultation with the members of its Advisory Group as well as through broader outreach efforts." *The ARRC Selects a Board Repo Rate as its Preferred Alternative Reference Rate.* HTTPS://www.newyorkfed.org/medialibrary/microsites/arrc/files/2017/ARRC-press-release-June-22-17.pdf.[1]

[1] Commentary prepared by Jonathan Thalheimer

Until there is some widely recognized substitute for LIBOR, the issue remains of what to provide in loan documents for a LIBOR definition. Below is a definition used by Fannie Mae in recent transactions.

> **"LIBOR"** shall mean, with respect to each Rate Change Date, the rate (expressed as a percentage per annum and rounded upward, as necessary, to the next nearest l/1000 of 1%) equal to the rate reported for deposits in U.S. dollars, for a one-month period, that appears on Bloomberg Page ICE LIBOR USD I Month (or on Bloomberg Page BBAM1 to the extent such ICE page is not then used, or on such other substitute Bloomberg page that displays rates at which US dollar deposits are offered by leading banks in the London interbank deposit market) as of 1l:00 a.m., London time, on the related Determination Date; provided that, (i) if such rate does not appear on Bloomberg Page ICE LIBOR USD 1 Month (or on Bloomberg Page BBAMI to the extent such ICE page is not then used) as of 1l:00 a.m., London time, on such Determination Date, Lender shall request the principal London office of any four major reference banks in the London interbank market selected by Lender to provide such bank's offered quotation (expressed as a percentage per annum) to prime banks in the London interbank market for deposits in U.S. dollars for a one-month period as of 11:00 a.m., London time, on such Determination Date for the amounts for a comparable loan at the time of such calculation and, if at least two such offered quotations are so provided, LIBOR shall be the arithmetic mean of such quotations and (ii) if fewer than two such quotations in clause (i) are so provided, Lender shall request any three major banks in New York City selected by Lender to provide such bank's rate (expressed as a percentage per annum) for loans in U.S. dollars to leading European banks for a one-month period as of approximately 1l:00 a.m., New York City time on the applicable Determination Date for the amounts for a comparable loan at the time of such calculation and, if at least two such rates are so provided, LIBOR shall be the arithmetic mean of such rates. Notwithstanding anything herein to the contrary, if LIBOR is less than zero (0), LIBOR shall be deemed to be zero (0). Lender's computation of LIBOR shall be conclusive and binding on Borrower for all purposes, absent manifest error.

2. Proposed Revisions to High Volatility Commercial Real Estate Regulations (H.R. 2148).

In July, 2013, the United States banking regulators issued the Final Basel III Regulatory Capital and Market Risk Rule (the "Final Rule") which became effective on January 1, 2014, but not fully implemented until January 1, 2015. The Final Rule categorized all acquisition, development and construction ("ADC") commercial real estate loans as "High Volatility Commercial Real Estate" ("HVCRE"), and imposed additional capital requirements for all HVCRE loans. Traditionally, ADC loans were risk-rated at one hundred percent (100%) but under the Final Rule, all loans that met the HVCRE definition were assigned a new one hundred fifty percent (150%) risk-rating.

The Final Rule applies retroactively to all commercial loans held in the banks' portfolios regardless of the date of origination. Banks were required to re-examine their entire loan portfolio and by March 31, 2015 identify all HVCRE loans and set aside the capital reserves

necessary based on the one hundred fifty percent (150%) risk rating. The net effect of the Final Rule is a substantial increase in the capital reserves required for ADC lending, and increased capital costs for ADC borrowers.

(1) HVCRE Definitions. An HVCRE loan is defined as a loan but is not a "permanent" loan and which finances ADC property. The definition is qualified and excludes those loans used to finance:

(a) one to four family residential projects,

(b) property that would qualify as an investment in a community development project,

(c) agricultural land, or

(d) ADC that satisfies all of the following conditions:

(i) the project's LTV is less than or equal to the applicable maximum supervisory LTV limits (which are generally 80% LTV for commercial, 75% LTV for land development and 65% LTV for raw land),

(ii) the borrower has contributed capital to the project prior to the advancement of any loan proceeds, in the form of cash or unencumbered readily marketable assets, land to be contributed to the project purchased with cash, or certain out-of-pocket development expenses, where the aggregate of such capital contribution is at least fifteen percent (15%) of the real estate project's "as completed" appraised value, and

(iii) the borrower's contributed capital is contractually required to remain in the project throughout the life of the project (or until the loan is converted to permanent financing or repaid).

(2) HVCRE Interpretations. Although the Final Rule created the foregoing exceptions to the HVCRE definition, the Final Rule provided very little interpretive guidance as to the Final Rule's application. In response to such uncertainties, the Board of Governors issued a series of frequently asked questions (the "FAQ").

Under the FAQ, for example, the Board of Governors confirmed that to be exempt from the HVCRE requirements, a borrower must contribute cash or unencumbered, readily marketable assets to the project before any loan proceeds are advanced. Such capital may include out-of-pocket development expenses paid for by the borrower. Soft costs that contribute to the completion and value of the project can count as development expenses, and such soft costs can include interest and other development costs, such as fees and related pre-development expenses. Project costs paid to related parties such as developer fees, leasing expenses, brokerage commissions and management fees may also be included in soft costs provided the costs are reasonable in comparison to the cost of similar services from third parties.

Additionally, the borrower must be contractually obligated under its loan documents to keep all contributed or internally generated capital in the project throughout the life of the project. The life of the project has been clarified to mean until such time as the ADC loan converts to a permanent loan or is repaid, or the project is sold. Conversion to a permanent loan means that the loan is converted to permanent financing in accordance with the banking organization's normal lending terms. The interpretation specifically states that the capital contribution must equal at least fifteen percent (15%) of the project's "as completed" value, and not its "as stabilized" value. The "as completed" value has been interpreted to be the value of the project at the time all development is expected to be completed, and is generally calculated by subtracting the costs to achieve stabilized occupancy from the "as stabilized" value.

As for the requirement that the borrower contributed capital be contractually required to remain throughout the life of the project (or until the loan is converted to permanent financing or repaid), it has been interpreted by the FDIC and the OCC as meaning that all contributed capital must remain with the project and not be distributed. This condition is not limited to only the fifteen percent (15%) of capital that must be contributed before the bank funds any loan proceeds.

(3) H.R. 2148.

On April 26, 2017, Congressman Robert Pittenger, R-N.C., and Congressman David Scott, D-GA, introduced the Clarifying High Volatility Commercial Real Estate Loans bill (H.R. 2148), a bipartisan bill that seeks to clarify capital requirements for HVCRE loans. H.R. 2148 provides a specific, legal definition for ADC loans that fall within the HVCRE regulations and attempts to clarify some of the ambiguity in the Final Rule and the FAQs. Among other clarifications, the bill would exempt loans made prior to January 1, 2015 from HVCRE status, would allow the inclusion of the appraised value of real property, including land, as part of the fifteen percent (15%) contributed capital requirement and would allow a ADC loan to be deemed a "non-HVCRE loan" once the project is completed and cash flow being generated by the real property is sufficient to support the debt services and operating expenses of the real property. On October 12, 2017, the House Financial Services Committee voted 59-1 to approve H.R. 2148.

H.R. 2148 now advances to the full House of Representatives for consideration. The full text of H.R. 2148 is reprinted below.

115TH CONGRESS
1ST SESSION

# H. R. 2148

To amend the Federal Deposit Insurance Act to clarify capital requirements for certain acquisition, development, or construction loans.

IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 2017

Mr. PITTENGER (for himself and Mr. DAVID SCOTT of Georgia) introduced the following bill; which was referred to the Committee on Financial Services

# A BILL

To amend the Federal Deposit Insurance Act to clarify capital requirements for certain acquisition, development, or construction loans.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as "Clarifying Commercial Real Estate Loans".

**SEC. 2. CAPITAL REQUIREMENTS FOR CERTAIN ACQUISITION, DEVELOPMENT, OR CONSTRUCTION LOANS.**

The Federal Deposit Insurance Act is amended by adding at the end the following new section:

**"SEC. 51. CAPITAL REQUIREMENTS FOR CERTAIN ACQUISITION, DEVELOPMENT, OR CONSTRUCTION LOANS.**

"(a) IN GENERAL.—The appropriate Federal banking agencies may only subject a depository institution to higher capital standards with respect to a high volatility commercial real estate (HVCRE) exposure (as defined under section 324.2 of title 12, Code of Federal Regulations, as in effect on the day before the date of the enactment of this section) if such exposure is an HVCRE ADC loan.

"(b) HVCRE ADC LOAN DEFINED.—For purposes of this section and with respect to a depository institution, the term 'HVCRE ADC loan'—

"(1) means a credit facility secured by land or improved real property that, prior to being reclassified by the depository institution as a Non-HVCRE ADC loan pursuant to subsection (d)—

"(A) finances or has financed the acquisition, development, or construction of real property;

"(B) has the purpose of providing financing to acquire, develop, or improve such real property into income-producing real property; and

"(C) is dependent upon future income or sales proceeds from, or refinancing of, such real property for the repayment of such credit facility;

"(2) does not include a credit facility financing—

"(A) the acquisition, development, or construction of properties that are—

"(i) one- to four-family residential properties;

"(ii) real property that would qualify as an investment in community development; or

"(iii) agricultural land;

"(B) the acquisition or refinance of existing income-producing real property secured by a mortgage on such property;

"(C) improvements to existing income-producing improved real property secured by a mortgage on such property, if the cash flow being generated by the real property is sufficient to support the debt service and expenses of the real property, as determined by the depository institution, in accordance with the institution's applicable loan underwriting criteria for permanent financings; or

"(D) commercial real property projects in which—

"(i) the loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio as determined by the appropriate Federal banking agency; and

"(ii) the borrower has contributed capital of at least 15 percent of the real property's appraised, 'as completed' value to the project in the form of—

"(I) cash;

"(II) unencumbered readily marketable assets;

"(III) paid development expenses out-of-pocket; or

"(IV) contributed real property or improvements; and

"(iii) the borrower contributed the minimum amount of capital described under clause (ii) before the depository institution advances funds under the credit facility, and such minimum amount of capital contributed by the borrower is contractually required to remain in the project until the credit facility has been reclassified by the depository institution as a Non-HVCRE ADC loan under subsection (d);

"(3) does not include any loan made prior to January 1, 2015; and

"(4) does not include a credit facility reclassified as a Non-HVCRE ADC loan under subsection (d).

"(c) VALUE OF CONTRIBUTED REAL PROPERTY.—For purposes of this section, the value of any real property contributed by a borrower as a capital contribution shall be the appraised value of the property as determined under standards prescribed pursuant to section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3339), in connection with the extension of the credit facility or loan to such borrower.

"(d) RECLASSIFICATION AS A NON-HVCRE ADC LOAN.—For purposes of this section and with respect to a credit facility and a depository institution, upon—

"(1) the completion of the development or construction of the real property being financed by the credit facility; and

"(2) cash flow being generated by the real property being sufficient to support the debt service and expenses of the real property, in either case to the satisfaction of the depository institution, in accordance with the institution's applicable loan underwriting criteria for permanent financings, the credit facility may be reclassified by the depository institution as a Non-HVCRE ADC loan.".

3. Bankruptcy Remoteness - Independent Manager/Member Structure.

Non-recourse loans typically require the borrower to be a special purpose entity (SPE) including certain "bankruptcy remote" features, such as the requirement to have an "independent manager" or "independent director." In the borrower operating agreement, the vote of the independent manager is required prior to the entity filing for voluntary bankruptcy. Most structures are careful to ensure that the independent manager is truly independent and not a lender affiliate.

Such bankruptcy remote protections in loan documents and borrower operating agreements are not always "bankruptcy proof" or effective in preventing a borrower from filing for bankruptcy. Courts continue to thwart a lender's efforts to control whether its borrower could file bankruptcy.

The court in *In re Lexington Hospitality Group, LLC* (2017 WL 4118117) (Bankr. E.D. Ky. Sept. 15, 2017) denied a secured lender's motion to dismiss a borrower's bankruptcy petition and held that restrictions on filing for bankruptcy in the borrower's operating agreement (in which the consent of an affiliate of lender was required for any bankruptcy filing) were void as contrary to public policy. See In re Lexington Hospitality Group, at *6. Under Lexington Hospitality's original operating agreement (which was amended in connection with the loan and a subsequent forbearance agreement), the company manager was authorized to manage the borrower's day-to-day business and affairs, with no express provision authorizing the manager to commence a bankruptcy. Id at *2.

In connection with, and as a condition of, the loan, Lexington Hospitality amended its operating agreement to require the authorization of an independent manager and a 75% vote of the members before a bankruptcy filing could be authorized by Lexington Hospitality. Lexington Hospitality also granted the lender veto power over the borrower's authority to file for bankruptcy regardless of obtaining approval from the independent manager and 75% of the members, and also transferred 30% of its membership interests to an entity controlled by the lender, rendering it impossible for the borrower to file for bankruptcy without the approval of the lender-affiliated member. Id at *2-3.

When Lexington Hospitality later defaulted on the loan and entered into a forbearance agreement with the lender, Lexington Hospitality agreed to amend its operating agreement to transfer an additional 20% membership interest to an entity affiliated with the secured lender. Id at *4.

Notwithstanding the various lender and bankruptcy remoteness requirements, Lexington Hospitality filed for bankruptcy without consent of the independent manager or all of the members (including the secured lender), which prompted the secured lender to seek to dismiss the bankruptcy case under the theory that Lexington Hospitality did not obtain the appropriate corporate consents. The court found that the borrower's ability to file for bankruptcy protection was frustrated by the reduction in the company manager's membership interests, which made it impossible for the members to achieve a 75% majority without the lender's approval, and also by the lender's veto power. Id at *6-8. Accordingly, the court held that the bankruptcy restrictions favoring the borrower's secured lender were contrary as to public policy and denied the lender's motion to dismiss. Id at *8.

In our previous update, we discussed the Delaware bankruptcy court's holding in *In re Intervention Energy Holdings, LLC,* Case No. 16-11247 (Bankr. Del. 2016). In that case, the court considered an attempt by a lender to dismiss bankruptcy proceedings on the ground the borrower had failed to obtain the consent to the filing required under the borrower's organizational documents. In such instance, the court rejected the lenders' position. *Intervention Energy* involved a structure in which the lender held a non-economic share of membership interest and any bankruptcy filing required the consent of all members. The court

considered the structure to constitute an impermissible waiver of the right to seek bankruptcy protection and contrary to public policy. Following the decision in *In re Intervention Energy Holdings*, it was still unclear as to whether a lender's required consent to file bankruptcy may be valid if the transaction was structured so that a lender was also an equity investor in the borrower. The outcome in *In re Lexington Hospitality* (where the arrangement in which an entity controlled by the lender had a material percentage of the equity interests in the borrower) partially answers this question in that it did not seem to matter that the lender had a meaningful equity investment, rather than a non-economic veto interest. In both of these cases, because the secured lender held a membership interest in the borrower, the courts held the consent of the lender as a member to be void as against public policy.

The holding in *In re Lexington Hospitality Group* continues to reinforce the conclusion that the most effective "bankruptcy remote" provision in loan documents for non-recourse or limited recourse loans is a springing recourse carve-out guaranty rendering the loan fully recourse to the guarantor (preferably a "warm body" with control of the borrower) if a bankruptcy petition is filed. There are a plethora of cases holding that full recourse to a guarantor is not a restraint on bankruptcy, just a contractual obligation of the guarantor describing the consequences to the guarantor/borrower if it elects to file for bankruptcy.

## B. SIGNIFICANT CASE LAW AND LEGISLATION

1. Recent Legislation. The 2017 legislative session was preoccupied with school funding issues. There were few new legislative enactments affecting real estate transactions. Of the measures passed, the most significant were:

> **Business Corporation Act – Laws of 2017, ch. 18**. The Business Corporation Act (Chpt. — RCW) was amended to (i) allow ratification of otherwise defective corporate actions; (ii) forum selection for internal corporate proceedings; (iii) allow transfer of all or substantially all of a parent company's assets to any subsidiary without the requirement of approval of the shareholders; (iv) requires approval of the parent company shareholders of any disposition of all or substantially all of the assets of any subsidiary if the subsidiary represents all or substantially all of the parent company's assets; (v) facilitate mergers of parent companies into wholly owned subsidiaries.
>
> **Uniform Voidable Transfers Act (f/k/a Uniform Fraudulent Transfer Act) – Laws of 2017, ch. 57**. Various technical changes were made to conform with the uniform act; however, Washington has adopted its own definition of "reasonably equivalent value" and has broadened the defenses available to establish the status as a "good faith transferee."
>
> **Evicting Squatters – Laws of 2017, ch. 284**. Establishes a summary procedure to request law enforcement officials to remove unauthorized persons who are occupying property.

2. Case Law. Every year brings a variety of cases dealing with real estate issues. Fortunately, most of the case law is evolutionary rather than revolutionary in nature. Below are several significant cases:

**Inverse Condemnation** - *Murr v. Wisconsin*, 582 U.S. ___ (2017): The Supreme Court once again visited the topic of inverse condemnation and regulatory taking. The outcome was not favorable to property owners. In a somewhat complicated fact pattern, the court upheld regulations allowing local planning authorities to combine adjacent lots for purposes of determining whether regulations have rendered a property undevelopable.

**Purchase Agreements** – *United States Postal Service v. Ester*, 836 F.3$^{d}$ 618 (9$^{th}$ Cir. 2016) – The court enforced a fixed-price option granted to the United States Postal Service providing for a purchase of the downtown Bellevue post office site at a fixed price of $300,000 at the expiration of a 50-year lease. The fair market value of the property was estimated to be $20 million. The court rejected arguments advanced by the landlord challenging the authority of USPS to enter into the lease and exercise the various extension options during the term.

**Title Insurance** - *Centurion Properties v. Chicago Title Ins. Co.*, 186 Wn.2d 58 (2016): The Ninth Circuit requested the Washington Supreme Court to clarify Washington law on the liability of title companies in connection with a claim arising from the title company recording encumbrances resulting in a violation of the terms of a first mortgage and foreclosure. The owner of the property sued the title company, claiming the recording of the encumbrances by the title company was in violation of its duty to the owner. The court rejected the claim and held title companies owe no duty of care toward third parties in connection with the recording of instruments.

**Foreclosure**

*Jordan v. Nationstar Mortgage, L.L.C.*, 185 Wn.2d 876 (2016): In another referral from the federal courts, the Washington Supreme Court was asked whether a lender had the right to change locks on a residence to "secure" the property prior to the completion of the foreclosure process. The court answered in the negative, referencing RCW 7.28.230(1), which provides a lender is not entitled to possession of mortgaged property following default until the foreclosure sale. Washington remains a lien theory state.

*Selene RMOF II REO Acquisitions, LLC v. Ward*, 189 Wn.2d 72 (2017): This case involved the proper procedure for follow in attempting to gain possession of a foreclosed property. The property was occupied by Ward, who claimed she owned the property. The lender had purchased the property at a non judicial foreclosure sale and then sold the property to an affiliate of the loan servicer. The owner then attempted to evict Ward using the unlawful detainer statute. The court confirmed this was the proper procedure, despite the fact Ward was not occupying as a tenant, but rather claiming ownership of the property.

*Umpqua Bank v. Shasta Apartments*, 194 Wn.App. 685 (2016), rev. denied 186 Wn.2d 1026 (2016): Following default, a receiver was appointed to administer the mortgaged property. The court approved the sale of the property free and clear of the mortgage as proposed by the receiver. Neither the borrower nor guarantor objected to the sale. The court held the lender was entitled to seek a deficiency judgment against the guarantor after the sale was completed.

**Landlord – Tenant**

*Faciszewski v. Brown*, 187 Wn.2d 308 (2017): Under the Seattle Just Cause Eviction Ordinance, a tenant has the right to contest whether the landlord is really terminating the lease in order to allow a relative to occupy the property. The court rejected the landlord's assertion that the filing of a sworn statement attesting to the intention to allow a relative occupy the property could not be contested in the eviction action when the tenant refused to vacate the property.

*R. Thoreson Homes, LLC v. Prudhon*, — Wn.2d. — (2017): Under the Seattle Just Cause Eviction Ordinance, a landlord may terminate a residential tenancy if the landlord intends to sell the property and provides the tenant with at least 60 days written notice. The court held the landlord was not entitled to invoke this provision if the landlord first agrees to sell the property and then delivers the 60-day notice to the tenant.

**Property Insurance**

*Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703 (2016): The owner of a vacant commercial building suffered a loss from a burst frozen pipe. The insurance company denied coverage under a policy provision providing water damage coverage was suspended during any period in which the building was unoccupied for 60 consecutive days. The court agreed with the insurance company and held the owner had no coverage.

*Zhaoyun Xi v. Probuilders Specialty Ins. Co.*, 393 P.3d 748 (2017): Despite a policy exclusion for damage arising from mold, the court held the insurance policy covered the cost of repairing mold damage. The court reasoned the loss was really the result of water damage—a covered peril—which in turn caused the mold. Under the doctrine of "efficient proximate cause" the loss was covered.

FOSTER PEPPER PLLC

# Supplemental Materials Related To:

## Recent Developments in Multifamily Housing

# Recent Developments in Multifamily Housing

1. Low Income Housing Tax Credits
2. Multifamily Housing Tax Credit Programs
3. ARCH (A Regional Coalition for Housing)
4. City of Seattle Rental Agreement Regulation Ordinance
5. City of Seattle Just Cause Eviction Ordinance
6. Landlord Liaison Project
7. Green Pricing

# Low Income Housing Tax Credits

# The Low Income Housing Tax Credit Survives Tax Reform (?)

In connection with the election of Donald Trump as president, there were industry-wide concerns regarding the survival of the low income housing tax credit, both due to the claimed objective of tax reform eliminating a number of tax credits and the general reduction of corporate tax rates (credits are purchased primarily by corporations to reduce taxes, and with an expected reduction in federal tax rates, the value of the tax credit was expected also to adjust downward). At about the same time, there were reports alleging mismanagement and abuse within the industry (the most widely-publicized report, a Frontline report from May of 2017 on the program and its abuses).

However, the lawyers in our office serving the tax credit industry (Jeff Nave, Kate Mathews, Lindsay Coates, and Allison Schwartzman) have stayed extremely busy through 2017, and the industry appears to have adjusted to this risk and continues to supply a significant amount of housing. In addition, there have been some recent positive developments to wit:

1. In the Republican outline of the fundamental principles of the tax reform plan, the low income housing tax credit was one of only two tax credits expressly mentioned as credits to be preserved. The fundamental principles for tax reform published by the Republicans in September included the following statement:

"The framework explicitly preserves business credits in two areas where tax incentives have proven to be effective in promoting policy goals important to the American economy; research and development (R&D) and low income housing. While the framework envisions repeal of other business credits, the committees may decide to retain other business credits to the extent budgetary limitations allow."

Further, the 460 plus page tax bill released by the Republicans on November 2 did not include any direct repeal or limitation on the low income housing tax credit. Other credits, including new market tax credits, historic tax credits and rehabilitation tax credits, were all proposed for elimination.

2. There is pending bi-partisan legislation in Congress that would benefit and further support the low income housing tax credit. The legislation is commonly referred to as the Hatch-Cantwell bill. The basic outline of the legislation is as follows:

> Expand the annual LIHTC allocation by 50 percent allowing for the creation or preservation of up to 1.3 million affordable homes over the next decade, 400,000 more than is possible under current law;
>
> Create a permanent minimum 4 percent LIHTC rate for acquisition and for Housing Bond-financed properties; and
>
> Permit income averaging within LIHTC properties in order to provide more flexibility and responsiveness to local needs.

Preserving Affordable Housing – Provides for a purchase option that will allow nonprofit and government sponsors to acquire LIHTC properties when the current 15-year compliance period expires and keep properties affordable for future generations;

Addressing Extremely Low Income Families – These projects will be eligible to receive a 50 percent credit increase;

Ensuring Energy Efficiency – Allows LIHTC properties to claim clean energy credits and the energy investment tax credit;

Providing Native American Housing – Requires states to consider the needs of Native Americans when allocating the LIHTC and provides additional support to projects located in Native American areas by automatically making them eligible for an additional 30 percent credit increase; and

Ensuring Rural Project Support – Improves the ability to serve rural areas by standardizing tenant income limit rules for projects in rural areas.

3. At the same time, the tax bill released by the Republicans last week also proposed to eliminate private activity bonds. Private activity bond are the bonds traditionally issued in connection with projects financed by 4% credits. Some recent publications suggest that this would be the end of the 4% credit, thus allowing only the 9% credit to survive. One estimate reported that the 4% credit (and private activity bonds that finance 4% credit projects) accounts for approximately 40% of new affordable housing.

So the credit looks like it will survive, but with its challenges, including the potential loss of the 4% credit in its entirety, and the reduction of the value of the credit due to the reduction of corporate tax rates. It will be interesting to see what now happens with the bi-partisan legislation, which in large part provided revisions that benefited the 4% credit.

# Multifamily Housing Tax Credit Programs

# Multi-Family Property Tax Exemption

This program was initially adopted by the State Legislature in 2005 and thereafter implemented by many local municipalities. At the state level, the legislation is codified in RCW 84.14.

The basic terms of the legislation (subject to local implementation) is to provide for a partial property tax exemption for multifamily housing developed in targeted residential areas. The program authorizes an 8 year property tax exemption for market rate multifamily housing in targeted residential areas and a 12 year property tax exemption for new multifamily housing where at least 20% of the units are set aside for tenants with incomes that do not exceed 80% of median income. New multifamily housing includes newly constructed projects, the rehabilitation of multifamily housing that has been vacant for more than 12 months, and the addition of new units to existing projects. The property tax exemption applies to the value of the improvements constructed for such purposes (and thus does not include the land itself).

The exemption requires implementation at the local level, and allows local municipalities to include additional or more restrictive requirements for affordable housing as part of qualifying for the exemption.

Virtually all of the local municipalities have adopted implementing legislation for the exemption, some of the cities and their implementing legislation are as follows:

| | |
|---|---|
| Seattle | Seattle Municipal Code 5.73 (Ordinance No. 118505) |
| Bellevue | Bellevue Code 4.52 (Ordinance 6231) |
| Kirkland | Kirkland Code 5.88 |
| Renton | Renton Code 4-1-220 |
| Mountlake Terrace | Mountlake Terrace Code 3.95 |
| Everett | Everett Code 3.78 |

Each local municipality has implemented the exemption in a slightly different fashion, so you need to check the local ordinance to see how the exemption is applied in that jurisdiction. For example, many jurisdictions have only implemented the 12 year exemption with the affordable housing element and have either not implemented the 8 year exemption at all, or have added a more limited affordable housing element even for the 8-year exemption.

As part of implementation of the HALA policies, the City of Seattle recently revised and updated its ordinances for the property tax exemption. A copy is attached. Among other matters, and to encourage affordable housing, the city designated all property within the city zoned for multifamily housing as a targeted residential area where the exemption is available. At the same time, the Seattle ordinance only implements the 12-year exemption and has increased and tightened the affordability housing requirements.

There are some technical rules that need to be followed to apply for and qualify for the exemption. Applications must be made before building permits are issued for a project, once approved, the project must be constructed within three years, and once constructed, the developer must enter into an agreement subjecting the property to the requirements of the program. The

exemption applies starting in the year after the project is constructed. A form of the application for participation in the program in Seattle is attached.

Note that the manner in which the program is administered, developers in effect can apply and qualify for the exemption and then opt out by not filing the final paperwork after the project is completed. I have had several developer clients who have done this, which allows them to determine at the end of construction if the exemption is or is not economically beneficial in relation to the rents that can be charged for the affordable units.

Once in the program, the project is subject to a series of reporting requirements, potential audits, etc. So the program comes with administrative implementation costs.

It appears to be an open issue as to whether the property tax exemption is or is not successful and how much of an incentive it is for the development of multifamily housing. Obviously it is a business/underwriting exercise to determine if the benefit of the property tax exemption justifies the rental limits applicable to the units set aside for affordable housing and the costs and risks of continued administration and program compliance audit. I am not sure there is a bright line for when this is beneficial and when it is not beneficial. The program in Seattle seems to have been fairly well received and there are a number of projects participating in the program (you can find a list of participating projects on the City of Seattle Department of Housing website. At the same time, the city of Bellevue has had no projects have qualified for the exemption, and I think Kirkland has 5 or 6 projects under the program. Based on some research I did in preparation for this presentation, my impression is that each of the local jurisdictions are struggling to find the right balance in implementing the exemption to further the purposes of encouraging more multifamily housing in targeted areas while not just giving developers a property tax break for a project they likely would have developed in any event.

To view a copy of the ordinance, visit: www.foster.com/Documents/Event-Documents/City-of-Seattle-Ordinance-124877

City of Seattle
Multifamily Property Tax Exemption Application Form

City of Seattle
Office of Housing

# FORM OF APPLICATION

## Multifamily Housing Property Tax Exemption Program

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**Please read the following before filling out the application:**

1. Applications must be submitted any time **prior** to issuance of the first building permit by DPD for the project described in this application. Permits may be picked up any time after the Owner submits an application to the Office of Housing.

2. One copy of the application, including program fee, should be submitted to:

   Office of Housing
   Seattle Municipal Tower
   700 Fifth Avenue, 57th floor
   PO Box 94725
   Seattle, WA 98124-4725

   Current Fee Schedule:$10,000 if fewer than 75% of the total units in the project are required through a regulatory agreement to meet income and rent/sales price requirements, or $4,500 if at least 75% of the total units in the project are required through a regulatory agreement to meet income and rent/sales price requirements.

3. Answers to commonly asked questions:

   A. Affordable unit rent limits represent the maximum that can be charged for rent plus utilities and any recurring mandatory fees.

   B. Optional fees such as parking and pet fees do not count toward the maximum rent for affordable units; recurring mandatory fees such as renter's insurance do count toward the maximum rent.

   C. The mix and configuration of affordable units must be proportional to the mix and configuration of the total units in a project; for example, if studios are 30% of total units, no more than 30% of the affordable units can be studios.

   D. In order to qualify as a bedroom for purposes of determining MFTE unit type, a room must meet the criteria established in SMC Chapter 5.73.020 "Bedroom".

   Questions? Contact Mike Kent at (206) 684-0262 or mike.kent@seattle.gov.

# APPLICATION

## Multifamily Housing Property Tax Exemption

(Pursuant to Chapter 5.73 of the Seattle Municipal Code)

### Applicant's Information

Owner: _____

Address: _____

Phone: _____ FAX: _____

E-mail: _____

Owner's Representative: _____
(if applicable)

Address: _____

Phone: _____ FAX: _____

Email: _____

Contact name and number: _____

*Note: This application is intended to be signed by the building owner of record. The application may be rejected or additional documentation required if the signer is other than the building owner of record.*

### Property Information

Interest in property:
[ ] Fee Simple [ ] Contract purchase [ ] Other (describe) _____

County Assessor's parcel account number(s): _____

_____

Street Address: _____

Legal Description (Attach separate sheet if needed): _____

_____

_____

_____

Seattle City Council District: _____

## Project Information

Project Name or Designation: _____

Brief written description of the project (preliminary schematic design, description of unit finishes, site plan and floor plans of the units and structure must be submitted with this application):

_____

_____

_____

_____

Type of Project (check all that apply):

[ ] Rental
[ ] At least 75% of units are affordable
[ ] Owner-Occupied
[ ] Fewer than 75% of units are affordable

Number of Housing Units Proposed: Rental _____ Owner-occupied _____ Total _____

Floor area: Building total (sq. ft.)_____ For permanent residential occupancy (sq. ft.)*_____

If there are multiple buildings, please list them separately.

*Include residential common areas, circulation and mechanical space, and residential parking in calculation of residential square footage. Exclude housing units offered for rent for periods of less than one month. "Residential parking" includes: *(1) parking required by the Seattle Land Use Code as accessory to residential use; (2) resident parking included in lease or sale price of residential units; (3) parking restricted by agreement to use by residential owners or tenants.*

**Construction costs and permit status:**

Projected total cost of new construction/rehabilitation: $_____

If mixed use, projected cost of residential improvements: $ _____

Estimated construction start date: _____ Estimated completion date: _____

List permits (with permit numbers) and approvals obtained as of the date of tax exemption application:

_____

_____

**Affordability.** At least 25% of units must be income- and rent/sales price-restricted unless the minimum number of 2+ bedroom units, as per the table below, is provided. In projects that meet the minimum 2+ bedroom requirement, at least 20% of units must be income and rent/sales price-restricted.

| Table A for 5.73.040.B<br>Total Dwelling and/or Congregate Residence Units and Corresponding Minimum Units with Two or More Bedrooms | |
|---|---|
| Project Size (Total Units) | Minimum Dwelling Units with two or more Bedrooms |
| Less than or equal to 100 | 4 |
| Between 101 and 150 | 6 |
| Between 151 and 200 | 8 |
| Between 201 and 250 | 10 |
| Between 251 and 300 | 12 |
| More than 300 | 12, plus 2 for every additional 50 Dwelling Units or housing units in a Congregate Residence |

## Rental Unit Information

| A.<br>Unit Type<br>(# BRs) | B.<br>Total # of units | C.<br>Approx. avg. sf. | D.<br>Projected rent price – market rate units | E.<br># of units – affordable (Column B * 25%, unless 2BR rule is met; then 20%) | Maximum rent price – affordable units |
|---|---|---|---|---|---|
| SEDU | | | | | 40% of AMI |
| Congregate Residence | | | | | 40% of AMI |
| Replacement Unit | | | | | 50% of AMI |
| Studio | | | | | 65% of AMI |
| 1BR | | | | | 75% of AMI |
| 2BR | | | | | 85% of AMI |
| 3+BR | | | | | 90% of AMI |
| **Total** | | | | | |

## Owner-Occupied Unit Information

| Unit Type (# BRs) | Total # of units | Approx. avg. sf. | Projected sale price – market rate units | # of units – affordable | Projected sale price – affordable units |
|---|---|---|---|---|---|
| Studio | | | | | |
| 1BR | | | | | |
| 2+BR | | | | | |
| **Total** | | | | | |

## Non-residential Space (if applicable)

Description _____ Floor Area (sq. ft.) _____

**CHECK ALL THAT APPLY:**

[ ] **New Construction.** Will any occupied housing units be demolished? [ ] YES [ ] NO
Were any occupied housing units demolished in the past 18 months on this site? [ ] YES [ ] NO
Date of demolition: _____
# of existing units to be demolished _____ # of units demolished in past 18 months _____

If yes, will any residents be displaced, or have any residents been displaced, as part of this project?
[ ] YES [ ] NO

If yes, have any residents qualified for Tenant Relocation Assistance?
[ ] YES [ ] NO

[ ] **Other City of Seattle Programs.** Do you intend to apply to any other City of Seattle incentive programs? [ ] YES [ ] NO

If yes, please state the incentive program and the status of that application:

_____

_____

[ ] **Rehabilitation of Vacant Units.** # of vacant housing units _____

Date units last occupied: _____ Building [ ] is [ ] is not in compliance with applicable building and housing codes.

- Sign (before a Notary Public) the Rehabilitation of Vacant Building Affidavit (form available from Office of Housing) and attach to this Application if you are rehabilitating a vacant multifamily housing structure.
- Attach verification from the Department of Planning and Development if building is not in compliance with building and housing codes.

[ ] **Rehabilitation of Occupied Units**. Will four or more additional units be created as part of a rehabilitation project? [ ] YES [ ] NO

If yes, will any residents be displaced as part of this project? [ ] YES [ ] NO

## Attachments to Application

Please attach and check the following:

[ ] A brief written description of the units, schematic site plans, floor plans, and unit layouts of the multifamily housing units and the structure(s) in which they are to be located; every unit layout must include detailed information that adequately demonstrates the number of bedrooms, consistent with SMC 5.73.020.

[ ] A current title report.

[ ] Copies of documents evidencing the type of Owner entity or entities and organizational structure, such as operating agreements, incorporation documents or partnership agreements.

[ ] A sample signature block for the Owner entity.

[ ] Evidence of authority of the person or persons signing the application.

[ ] A market study that includes comparable rents in other nearby housing projects.

[ ] Documentation consistent with requirements of the Office of Housing Affirmative Marketing Plan Requirements for Affordable Housing Incentive Programs.

[ ] For rehabilitation of an existing vacant structure, verification from DPD of non-compliance with applicable building and housing codes.

[ ] Application fee of $10,000 for a project with fewer than 75% of its units required by regulatory agreement to meet income and rent/sales-price requirements; or $4,500 for a project with 75% or more of its units required by regulatory agreement to meet income and rent/sales-price requirements. Checks should be made payable to the City of Seattle.

[ ] If applicable, Rehabilitation of Vacant Building Affidavit (form available from Office of Housing), filled out and signed by Owner before a Notary Public.

## Statement of Potential Tax Liability

If the exemption is canceled for non-compliance an additional tax will be imposed that includes: (a) the difference between the tax paid and the tax that would have been owed if it had included the value of the non-qualifying improvements dated back to the date that the improvements became non-qualifying; (b) a penalty of 20% of the difference; (c) interest at the statutory rate on the tax and penalties calculated from the date the tax would have been due without penalty if the improvements had been assessed without regard to the exemptions provided by Chapter 84.14 RCW and Chapter 5.73 SMC.

Owner's initials: _____

## Certification

As owner(s) of the land described in this application, I/We hereby indicate by my/our initials below that I/we are aware of the additional tax liability to which the property will be subject if the exemption authorized by Chapter 84.14 RCW and Chapter 5.73 SMC is canceled.

Owner's initials: _____

## Mix and Configuration Declaration

As owner(s) of the land described in the application, I/We hereby indicate by our initials below that the project will meet the mix and configuration requirements set forth in Sub-Chapter 5.73.040.B.4.

Owner's initials: _____

I/We declare under penalty of perjury under the laws of the State of Washington that the information contained in this Application and any attachments are accurate and correct to the best of my/our knowledge.

_____

Owner's Signature Date

_____

Print Name Title

_____

Owner's Signature Date

_____

Print Name Title

# AFFIDAVIT
## (REHABILITATION OF A VACANT BUILDING)

STATE OF WASHINGTON )
)ss.
COUNTY OF KING )

The undersigned, being first duly sworn on oath, deposes and says:

That the _____ (__) existing dwelling units in the building located at _____, Seattle, Washington 98___ have been vacant for a period of at least 12 months prior to the filing of the undersigned's application for tax exemption under the City of Seattle's Multifamily Housing Property Tax Exemption Program, Chapter 5.73 of the Seattle Municipal Code.

_____

Signature of Owner

_____

Print Name

SUBSCRIBED AND SWORN to before me this _____ day of _____, _____.

_____
Print Name: _____
NOTARY PUBLIC in and for the State
of Washington, residing at _____
My commission expires: _____

# ARCH (A Regional Coalition for Housing)

# ARCH
# (A Regional Coalition for Housing)

(King County and Eastside)

ARCH (A Regional Coalition for Housing) is a partnership among King County and the eastside communities (including Bellevue, Bothell Issaquah, Kenmore, Kirkland, Newcastle, Redmond, Sammamish and Woodinville) to pool resources in support of affordable housing. There are two main elements of the ARCH program, providing grants to support affordable housing, and assisting local governments in coordinating and implementing affordable housing strategies.

In the multifamily development world, the interaction is primarily related to incentive zoning programs adopted by local jurisdictions for affordable housing. This is generally in the form of density bonuses for multifamily projects that contain an element of affordable housing. In designated areas, additional multifamily density is permitted in exchange for committing a portion of the project to affordable housing. Attached are examples of "density bonus" provisions from a couple of local jurisdictions.

The affordability restrictions typically require the units designated for affordability to be at rents (adjusted for bedroom size) targeted at tenants at or below 80% of median income. There are continuing reporting and related requirements to participate in the program.

In exchange for making the affordable housing commitment and getting the density bonus, the developer is required to enter into a covenant with the local government to maintain the affordable housing for the "life of the project." Attached is a form of the covenant used in Bellevue for a fairly recent project.

The lawyers do not get involved much in the program, as participation is determined in large part by the developer and the architect in designing the project and considering the benefits of the density bonus. At the lawyer level, we only get involved at the time the covenant is require to be executed and recorded.

We have attempted to negotiate the covenant with the local jurisdictions in the past, mostly to no avail, as the covenant is required at the end of construction as a condition to issuance of an occupancy permit when the developer has no leverage.

I will note that most of the covenants impose the affordable housing requirements for the "life of the project" which is not otherwise defined either in the covenant, or the local statutes that give rise to the covenant. However, I have been unsuccessful in getting this set for a fixed period (say 30 or 40 years).

The benefit of the program is dependent upon the value of the density bonus in relation to the adverse impacts of the affordability restrictions.

To view a Form of ARCH Covenant, visit: www.foster.com/Documents/Event-Documents/Form-of-ARCH-Covenant

# City of Seattle Rental Agreement Regulation Ordinance

# 2017 Changes to the City of Seattle's Rental Agreement Regulation Ordinance

(http://buildingconnections.seattle.gov/2017/01/17/new-deposit-and-move-in-fee-limits-and-payment-plans/)

**Security Deposit, Pet Deposit, and Move-in Fee Limits** – New limits on deposits and fees that can be charged at the beginning of a new rental agreement include:

- Security deposit plus move-in fees cannot exceed the amount of the first full month's rent
- Pet deposits are limited to 25% of the amount of first full month's rent
- Non-refundable move-in fees are limited to only tenant screening reports, criminal background checks, credit reports, and cleaning fees.
- Total non-refundable move-in fees are limited to 10% of the first full month's rent

**Payment Plans Required** –Landlords must allow an installment plan to pay a security deposit, a pet deposit, move-in fees, and last month's rent. The payment plan must be structured as follows, unless otherwise agreed to by the landlord and tenant

- For rental agreements of 6 months or longer—6 consecutive and equal payments
- For agreements between 30 days and 6 months—4 consecutive and equal payments
- For month-to-month agreements—2 equal installments; except for pet deposits, which can be paid in 3 equal monthly installments.

**Security Deposit Returns** – The requirements for security deposit returns have not changed. However, the *Seattle Department of Construction and Inspections* may now investigate and take action if a landlord improperly withholds a deposit return or in other cases where the City's rental agreement regulations are not followed. Important points in the existing security deposit return requirements are:

- The tenant and landlord must have signed a move-in condition checklist.
- Security deposits must be returned within 21 days of the tenant leaving the property.
- The reasons for withholding any portion of a deposit return must be itemized in writing and provided to the former tenant within 21 days of tenant vacating the property.

The new deposit and move-in fee limits and payment plan requirements do not apply to tenants in an owner-occupied single family dwelling, including attached accessory dwelling units.

# City of Seattle Just Cause Eviction Ordinance

# City of Seattle Just Cause Eviction Ordinance

- Requires landlords to have good cause to terminate a month-to-month tenancy
- Specifies only reasons for which a tenant in Seattle may be required to move
- Good causes include:
    - Owner plans major rehabilitation
    - Owner decides to convert the building to a condominium
    - Owner decides to demolish a building or convert it to nonresidential use

Seattle Department of Construction & Inspections

# Information for Tenants

**TRANSLATIONS**

***For copies of this document in Amharic, Cambodian, Chinese, Korean, Laotian, Oromiffa, Russian, Somali, Spanish, Tagalog, Thai, Tigrinya and Vietnamese, visit SDCI's website at www.seattle.gov/dpd/rentinginseattle or call (206) 684-8467.***

*This summary of Washington state and City of Seattle landlord/tenant regulations must be provided to tenants by owners of residential rental property located in Seattle on at least an annual basis. Please note that City and State laws may not be identical on any particular topic; therefore, both sets of laws should be consulted. For legal advice, please consult an attorney.*

***August 2017***

# Seattle Landlord-Tenant Laws

## OBLIGATIONS OF LANDLORDS

Building owners must provide safe, clean, secure living conditions, including:

- Keeping the premises fit for human habitation and keeping common areas reasonably clean and safe
- Controlling insects, rodents and other pests
- Maintaining roof, walls and foundation and keeping the unit weather tight
- Maintaining electrical, plumbing, heating and other equipment and appliances supplied by the owner
- Providing adequate containers for garbage and arranging for garbage pickup
- When responsible for providing heat in rental units, from September through June maintaining daytime (7:00 a.m.-10:30 p.m.) temperatures at 68°F or above and nighttime temperatures at not less than 58°F
- In non-transient accommodations, providing keys to unit and building entrance doors and, in most cases, changing the lock mechanism and keys upon a change of tenants
- Installing smoke detectors and instructing tenants in their maintenance and operation

Owners are not required to make cosmetic repairs after each tenancy, such as installing new carpets or applying a fresh coat of paint.

## OBLIGATIONS OF TENANTS

Tenants must maintain rental housing in a safe, clean manner, including:

- Properly disposing of garbage
- Exercising care in use of electrical and plumbing fixtures
- Promptly repairing any damage caused by them or their guests
- Granting reasonable access for inspection, maintenance, repair and pest control
- Maintaining smoke detectors in good working order
- Refraining from storing dangerous materials on the premises

## THE JUST CAUSE EVICTION ORDINANCE

This ordinance requires landlords to have good cause in order to terminate a month-to-month tenancy. It specifies the only reasons for which a tenant in Seattle may be required to move, and requires owners to state the reason, in writing, for ending a tenancy when giving a termination notice. A property owner cannot evict a tenant if the property is not registered with the City of Seattle. Unless otherwise noted, an owner must

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give a termination notice at least 20 days before the start of the next rental period. Good causes include:

1. The tenant fails to pay rent within 3 days of receiving a notice to pay rent or vacate.
2. The owner has notified the tenant in writing of overdue rent at least 4 times in a 12-month period.
3. The tenant does not comply with a material term of a lease or rental agreement within 10 days of receiving a notice to comply or vacate.
4. The tenant does not comply with a material obligation under the *Washington State Residential Landlord-Tenant Act* within 10 days of a notice to comply or vacate.
5. The owner has notified a tenant in writing at least 3 times in a 12-month period to comply within 10 days with a material term of the lease or rental agreement.
6. The tenant seriously damages the rental unit (causes "waste"), causes a nuisance (including drug-related activity), or maintains an unlawful business and does not vacate the premises within three days of notice to do so.
7. The tenant engages in criminal activity in the building or on the premises, or in an area immediately adjacent to the building or premises. The alleged criminal activity must substantially affect the health or safety of other tenants or the owner; illegal drug-related activity is one crime specified by the ordinance. An owner who uses this reason must clearly state the facts supporting the allegation, and must send a copy of the termination of tenancy notice to the SDCI Property Owner Tenant Assistance (POTA) Unit.
8. The owner wishes to occupy the premises personally, or the owner's immediate family will occupy the unit, and no substantially equivalent unit is vacant and available in the same building, and gives the tenant written notice at least 90 days prior to the end of a rental period. Immediate family includes the owner's spouse or owner's domestic partner, and the parents, grandparents, children, brothers and sisters of the owner or owner's spouse or owner's domestic partner. SDCI may require a property owner to sign a certification of the intent to have a family member move in if a tenant has reason to believe the owner will not follow through with this reason. It is a violation if the designated person does not occupy the unit for a continuous period of 60 days out of the 90 days after the tenant vacates. A tenant whose tenancy is ended for this reason has a private right of action if he or she feels the owner has failed to comply with these requirements.
9. The owner wishes to terminate a tenant who lives in the same housing unit with the owner or the owner's agent; or the owner desires to stop sharing his or her house with a tenant living in an approved accessory dwelling unit (ADU) in an owner-occupied house.
10. The tenant's occupancy is conditioned upon employment on the property and the employment is terminated.
11. The owner plans major rehabilitation and has obtained required permits and a Tenant Relocation License. A tenant terminated for this reason has a private right of action if he or she feels the owner has failed to comply with these requirements.
12. The owner decides to convert the building to a condominium or a cooperative.
13. The owner decides to demolish a building or to convert it to non-residential use and has obtained the necessary permit and a Tenant Relocation License.
14. The owner desires to sell a single family residence (does not include condominium units) and gives the tenant written notice at least 90 days prior to the end of a rental period. The owner must list the property for sale at a reasonable price in a newspaper or with a realty agency within 30 days after the date the tenant vacates. Property owners may be required to sign a certification of the intent to sell the house if SDCI receives a complaint. There is a rebuttable presumption of a violation if the unit is not listed or advertised, or is taken off the market or re-rented within 90 days after the tenant leaves. A tenant terminated for this reason has a private right of action if he or she feels an owner has failed to comply with these requirements.
15. The owner seeks to discontinue use of a unit not authorized under the Land Use Code, after receiving a Notice of Violation. The owner must pay relocation assistance to tenants who have to move so that the owner can correct the violation. Relocation assistance for low-income tenants is $2,000; for other tenants it is an amount equal to two months' rent.
16. The owner needs to reduce the number of tenants sharing a dwelling unit in order to comply with Land Use Code restrictions (i.e., no more than 8 people per dwelling unit if any are unrelated).
17. The owner must terminate a tenancy in a house containing an approved ADU in order to comply with the development standards for ADUs, after receiving a Notice of Violation of the Land Use Code. (If the violation is that the owner has moved out of the house and has rented both units, one unit must either be reoccupied by the owner or be removed.) The owner must pay relocation assistance to displaced tenants in the amount of $2,000 for low-income tenants, or two months' rent in other cases. SDCI may require a property owner to sign a certification of his or her intent to discontinue the use of the ADU.
18. An Emergency Order to Vacate and close the property has been issued by SDCI and the tenants have failed to vacate by the deadline given in the Order.

**Failure to carry out stated cause:** If an owner terminates a tenant because of (1) the sale of a single family residence is planned, (2) the owner or a family member is to move in, (3) substantial rehabilitation is planned, (4) the number of residents must be reduced to eight, or (5) the owner is discontinuing the use of an ADU after receipt of a notice of violation, and the owner fails to carry out the stated reason for terminating the tenancy, he or she may be subject to enforcement action by the City and a civil penalty of up to $2,500.

**Private right of action for tenants:** If an owner terminates a tenant because of (1) the sale of a single family residence is planned, (2) the owner or a family member is to move in, or (3) substantial rehabilitation is planned, and if the owner fails to carry out the stated reason for terminating the tenancy, the tenant can sue the owner for up to $3,000, costs, and reasonable attorney's fees.

For additional information on the Just Cause Eviction Ordinance, call SDCI at (206) 615-0808 or visit the SDCI website at www.seattle.gov/sdci.

## ACTIONS CONSIDERED TO BE HARASSMENT OR RETALIATION

City law prohibits retaliatory actions against either a tenant or a landlord.

A landlord is prohibited from harassing or retaliating against a tenant by:

1. Changing or tampering with locks on unit doors
2. Removing doors, windows, fuse box, furniture or other fixtures
3. Discontinuing utilities supplied by the owner
4. Removing a tenant from the premises except through the formal court eviction process
5. Evicting, increasing rent or threatening a tenant for reporting code violations to SDCI or the Police Department or for exercising any legal rights arising out of the tenant's occupancy
6. Entering a tenant's unit, except in an emergency, or except at reasonable times *with the tenant's consent* after giving at least two days notice, or a one-day notice when showing units to prospective purchasers or tenants
7. Prohibiting a tenant, or a tenant's authorized agent who is accompanied by that tenant, from distributing information in the building, posting information on bulletin boards in accordance with building rules, contacting other tenants, assisting tenants to organize and holding meetings in community rooms or common areas
8. Increase the monthly housing costs without advance written notice; 30 days for a rent increase of less than 10%, 60 days for a rent increase of 10% or more
9. Increase monthly housing costs where a housing unit does not meet basic standards for habitability

In most instances the law assumes that a landlord is retaliating if the landlord takes any of these actions within 90 days after a tenant reports a violation to SDCI or to the Seattle Police Department, or within 90 days after a governmental agency action, such as making an inspection.

A tenant is prohibited from harassing or retaliating against a landlord by:

1. Changing or adding locks on unit doors
2. Removing owner-supplied fixtures, furniture, or services
3. Willfully damaging the building

For more information or to file a complaint, call SDCI at (206) 615-0808.

## DEFINITION OF TENANT

With the exception of the Tenant Relocation Assistance Ordinance, a tenant is defined as a person occupying or holding possession of a building or premises pursuant to a rental agreement. This includes residents of transient lodgings who remain in residence for one month or longer. A rental agreement may be oral or in writing.

## DEFINITION OF HOUSING COSTS

Housing costs include rent and any other periodic or monthly fees such as storage, parking, or utilities, paid to the landlord by a tenant.

## INCREASE IN HOUSING COSTS

In the City of Seattle, a landlord must give a tenant 30 days' advance written notice of an increase in housing costs (rent, parking, storage, and other fees associated with the rental) of less than 10%; 60 days' notice is required for increases of 10% or more. An increase can only begin at the beginning of rental period, typically at the beginning of the month.

A landlord cannot increase housing costs for any housing unit that does not meet the minimum habitability standards of the Residential Rental Inspection Program. (http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/s048492.pdf)

Property owners and developers cannot increase housing costs to avoid applying for a Tenant Relocation License where a rental property is going to be demolished, rehabilitated, changed in use, or where use restrictions are going to be removed. (http://www.seattle.gov/dpd/codesrules/commonquestions/tenantrelocation/default.htm)

## THE RENTAL AGREEMENT REGULATION ORDINANCE

The City of Seattle Rental Agreement Regulation Ordinance (SMC Chapter 7.24) regulates certain aspects of residential rental agreements. It requires a landlord to provide sixty (60) days' advance written notice of an increase in housing costs of 10% or more within a twelve (12) month period; prohibits month-to-month rental agreements that require a tenant to stay a minimum period greater than one (1) month or be subject to the loss of deposits or other penalties; limits the amount of security and pet damage deposits, and move-in fees that can be charged to a tenant upon move in; allows a tenant to pay security and pet damage deposits, move-fees, and last month's rent on installment plans; requires a landlord to take and return a deposit pursuant to state law; and to distribute a summary of state and local landlord-tenant laws prepared by the City of Seattle to each prospective tenant, to each tenant upon move-in, and at the time a rental agreement is renewed. A landlord cannot retaliate against a tenant or a prospective tenant for exercising or attempting to exercise the tenant's rights under this Ordinance. The Seattle Department of Construction and Inspections enforces this ordinance. For more information call the Department's Code Compliance Division at (206) 615-0808 or follow this link: http://www.seattle.gov/dpd/codesrules/commonquestions/rentalhousingproblems/default.htm

### Rent Increases

The City of Seattle does not regulate or control rent. However, the Rental Agreement Regulation Ordinance does require a landlord to provide at least sixty (60) days' advance written notice of any increase in housing costs of 10% or more in a twelve (12) month period; increases of less than 10% require an advance written notice of at least thirty (30) days consistent with state law. These notices must include information on how the tenant can access information on the tenant's rights and responsibilities. Housing costs include rent, parking and storage fees, and other periodic fees associated with a tenancy. Failure to provide a required sixty (60) day notice is a violation of SMC 7.24.030.A and SMC 22.206.180.

### Prohibited Rental Agreement Provisions

Month-to-month rental agreements, whether verbal or in writing, cannot require a tenant to stay beyond the initial period of the agreement. A landlord cannot withhold a deposit or impose other penalties solely on the basis that a tenant moves out at the end of the initial rental period.

However, a tenant who desires to terminate a month-to-month tenancy must provide the landlord with a written notice at least twenty (20) days in advance of the end of a rental period. Landlords are not obligated to pro-rate rent when a tenant moves out after the beginning of a rental period.

### Security Deposits

If a landlord wishes to collect a security deposit, the deposit and its amount must be identified in a written rental agreement. The total amount of a security deposit and move-in fees cannot exceed the amount of the first full month's rent. Additionally, the landlord must prepare and provide a tenant with a written checklist or statement describing the condition, cleanliness, and existing damage of the tenant's housing unit at the commencement of the tenancy. This statement must be signed and dated by the landlord and the tenant. The landlord must provide a copy of the checklist to the tenant for the tenant's records, and, upon request, one free replacement copy.

All security deposits must be placed in a trust account and the landlord must provide the tenant with the name, address, and location of the depository. The landlord must inform the tenant of any subsequent changes of the location of the deposit.

Security deposits must be returned in accordance with RCW 59.18.280 at the end of a tenancy.

### Pet Damage Deposits

A landlord can charge a pet damage deposit, but it cannot exceed 25% of the first full month's rent. A pet damage deposit cannot be required for an animal if it serves as an assistance animal to the tenant. However, the tenant is responsible for any damage created by the tenant's assistance animal or the assistance animal of a guest of the tenant. A pet damage deposit may be charged in addition to any security deposit.

An agreement to pay a pet damage deposit must be included in a written rental agreement or in a written addendum to the agreement, identify the amount of the deposit, and allow the tenant to pay the deposit in installments if requested by the tenant.

If the pet's occupancy begins at the commencement of the tenancy, the deposit must be identified in the rental agreement. If the pet's occupancy begins after the commencement of the tenancy, the landlord must provide a written addendum to the rental agreement.

A landlord may not retain any portion of a pet damage deposit for damages not caused by the pet for which the tenant is responsible.

Pet damage deposits must be returned in accordance with RCW 59.18.280 at the end of a tenancy.

### Pet Rent

The payment of rent to keep a pet is allowed.

### Move-in Fees

Move-in fees are by state and city definition non-refundable.

Allowable move-in fees are limited to the cost of obtaining a tenant screening report, criminal background check, or credit report and to pay to clean the rental unit upon termination of a tenancy.

The cost for obtaining a tenant screening report cannot exceed the customary cost for obtaining such a report in the City of Seattle; a Landlord cannot charge a tenant more than the report's actual cost. The landlord must provide the tenant a receipt for any fees charged for obtaining the tenant screening report. The landlord must also provide the tenant the name and address of the reporting agency that prepared the report and the prospective tenant's right to obtain a free copy of it.

If the landlord chooses to charge a non-refundable cleaning fee, the landlord may not deduct additional cleaning fees from the tenant's security deposit at the end of a tenancy.

Landlords are prohibited from charging any one-time fee at the beginning of a tenancy other than a security deposit, pet damage deposit, an authorized non-refundable move-in fee, or last month's rent.

Move-in fees cannot exceed 10% of the first full month's rent except in the case where the actual cost for obtaining a tenant screening report, criminal background check, or credit report exceeds 10%, the cost may be included in the non-refundable fee. However, the total amount of a security deposit and move-in fees cannot exceed the amount of the first full month's rent.

### Summary of Limitations on Security Deposits, Pet Damage Deposits, and Move-In Fees

The total amount of a security deposit and move-in fees cannot exceed the amount of the first full month's rent. Non-refundable move-in fees cannot exceed 10% of the first full month's rent. A pet damage deposit may not exceed 25% of the rent for the first full month.

### Installment Payments

*Security Deposits and Move-In Fees*

If the total amount of a security deposit and non-refundable move-in fees exceeds 25% of the first full month's rent, a tenant may choose to pay the total amount in installments as follows:

- For tenancies that are six (6) months or longer, a tenant may elect to pay in six (6) consecutive and equal monthly installments beginning at the commencement of the tenancy.
- For tenancies between thirty (30) days and six (6) months, a tenant may elect to pay in no more than four (4) equal installments of equal duration at the commencement of the tenancy.
- For tenancies that are month-to-month, the tenant may elect to pay in two (2) equal installments, with the first payment due at the commencement of the tenancy and the second payment due on the first day of the second monthly rental period.

A tenant may propose an alternative installment schedule to which the landlord may agree. If an alternative plan is mutually agreed to, it must be described in a written rental agreement or a written addendum to the agreement. Failure to pay an installment of the security deposit and/or non-refundable fees is a breach of the rental agreement and may subject the tenant to a 10-day comply or vacate notice issued pursuant to RCW 59.12.030(4).

A landlord cannot impose any cost on a tenant for an installment plan.

The requirement to allow an installment plan for the payment of deposits and move-in fees does not apply to tenants who rent a housing unit in a single-family house or attached accessory dwelling unit if the owner resides in the house as the owner's principal residence.

*Last Month's Rent*

Tenants may choose to pay last month's rent in installments.

For tenancies that are six (6) months or longer, a tenant may elect to pay in six (6) consecutive and equal monthly installments beginning on the first month of the tenancy; tenancies between sixty (60) days and six (6) months, the tenant may elect to pay in no more than four (4) equal installments of equal duration beginning at the commencement of the tenancy.

A tenant may propose an alternative installment schedule to which the landlord may agree. If an alternative plan is mutually agreed to, it must be described in a written rental agreement or a written addendum to the agreement.

A landlord cannot impose any cost on a tenant for an installment plan.

The requirement to allow an installment plan for the payment of last month's rent does not apply to tenants who rent a housing unit in a single-family house or attached accessory dwelling unit if the owner resides in the house as the owner's principal residence.

*Pet Damage Deposits*

A tenant may elect to pay a pet damage deposit in three (3) equal monthly installments beginning on the first full month the pet occupies the housing unit. A tenant may propose an alternative installment schedule to which the

landlord may agree. If an alternative plan is mutually agreed to, it must be described in a written rental agreement or a written addendum to the agreement.

If a tenant wants to pay a security deposit, move-in fees, a pet damage deposit, or last month's rent in installments, the tenant must request such a payment plan.

**Summary of Landlord and Tenant Rights**

A landlord must distribute a summary of state landlord tenant law and City of Seattle rental housing codes describing the rights, obligations, and remedies of landlords and tenants under these laws. This requirement can be met by distributing the current version of the Seattle Department of Construction and Inspections Publication *Information for Tenants*. This document must be given to each prospective tenant, to a tenant at the time a rental agreement is offered, and when a rental agreement is renewed. Month-to-month tenants must receive the most current version of this document at least once a year. When a rental agreement is renewed, *Information for Tenants* maybe be distributed electronically. The current version of *Information for Tenants* can be accessed at: awww.seattle.gov/dpd/cms/groups/pan/@pan/documents/web_informational/dpdd016420.pdf

If a landlord fails to distribute the summary in accordance with these requirements, a tenant may terminate the rental agreement by written notice. In addition, the tenant may recover, in a civil action against the landlord, actual damages, attorney fees, and a penalty of up to $500. If a court determines that the landlord deliberately failed to comply with this requirement, the penalty may be up to $1,000.

**Violations**

A violation of the Rental Agreement Regulation Ordinance is subject to a citation in the amount of $500 for an initial violation and $1,000 for each subsequent violation occurring within five (5) years of the first violation. Citations can be appealed to the City of Seattle Hearing Examiner. Violations also are subject to a Notice of Violation after the issuance of two (2) citations.

**Tenant's Private Right of Action**

If a landlord attempts to enforce provisions of a rental agreement which are contrary to:

1. The requirement that a rental agreement contain certain specific provisions;
2. The limitations imposed on security deposits, pet damage deposits, and non-refundable move-in fees; or
3. The requirement to adopt an installment payment plan

The landlord shall be liable to the tenant for:

1. Actual damages incurred by the tenant because of the landlord's attempted enforcement;
2. Double the amount of any penalties imposed by the City of Seattle;
3. Double the amount of any security deposit unlawfully charged or withheld by the landlord;
4. Up to $3,000; and
5. Reasonable attorney fees and court costs.

**Tenant Waiver of Rights or Remedies**

No residential rental agreement, whether oral or written, can waive rights or remedies under the Rental Agreement Regulation Ordinance. However, a landlord and tenant may agree to waive certain specific requirements of the Ordinance. In order to do this, the following conditions must be met:

1. The agreement must specify in writing the specific provisions to be waived;
2. The agreement cannot appear in a standard form, lease, or rental agreement;
3. There can be no substantial inequity in the bargaining positions of the landlord and tenant; and
4. The tenant must be represented by an attorney who has approved the agreement as being in compliance with the requirements of the Ordinance.

**Exceptions**

The provisions of this Ordinance limiting and restricting the amount of charges for security deposits and non-refundable move-in fees, and the payment of security deposits and move-fees on an installment basis do not apply to a tenant who rents a housing unit in a single-family residence if the residence is the principal residence of the property owner.

Also, exempted from regulation are the return or retention of a security deposit, the requirement to provide a unit condition checklist, and the requirement to place a security deposit in a trust account and disclose to the tenant the location of the account. However, the Washington State Residential Landlord-Tenant Act still regulates these requirements.

## OTHER CITY ORDINANCES THAT AFFECT TENANTS AND LANDLORDS

### 1. Open Housing and Public Accommodations Ordinance

This ordinance prohibits discrimination based on race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, participation in the Housing Choice Vouchers Program (Section 8), or disability; requires landlords to rent a housing unit on first-come-first-served basis; and to accept subsidies and alternative sources of income to pay for the tenant's housing costs. Inquiries about this ordinance and complaints of violations should be directed to the Seattle Office for Civil Rights at (206) 684-4500.

### 2. Condominium and Cooperative Conversion Ordinances

When a residential building is being converted to condominium or cooperative units, the Condominium and Cooperative Conversion ordinances require a housing code inspection.

Additionally, in a condominium conversion, a tenant must receive a written 120-day notice of the conversion. If the tenant decides not to buy his or her unit, the tenant may be eligible to receive the equivalent of three (3) months' rent in relocation assistance if the tenant's annual income, from all sources, does not exceed 80 percent of the area median income, adjusted for household size. A household which otherwise qualifies to receive relocation benefits and which includes a member sixty-five (65) years of age or older or an individual with "special needs," as defined in the ordinance, may qualify for additional assistance.

In a cooperative conversion, a tenant must receive a 120-day notice of intention to sell the unit. If the tenant decides not to buy his or her unit, the tenant must be paid $500.00 in relocation assistance.

Relocation assistance is paid directly to the tenant by the property owner or developer. The assistance must be paid no later than the date on which a tenant vacates his or her unit.

For further information, contact SDCI Code Compliance at (206) 615-0808.

### 3. Tenant Relocation Assistance Ordinance

This ordinance applies when tenants are displaced by housing demolition, change of use, substantial rehabilitation, or by removal of use restrictions from subsidized housing. A property owner who plans development activity must obtain a tenant relocation license and a building or use permit before terminating a tenancy. All tenants must receive a 90-day notice of the activity that will require them to move. Eligible low income tenants, whose annual income cannot exceed 50% of the area median income, receive cash relocation assistance. It is a violation of this ordinance to increase housing costs for the purpose of avoiding applying for a Tenant Relocation License. Call SDCI at (206) 615-0808 for more information.

### 4. Repair and Maintenance—Housing and Building Maintenance Code

This ordinance requires owners to meet certain minimum standards and keep buildings in good repair. If an owner does not make necessary repairs, a tenant can report needed repairs by calling SDCI at (206) 615-0808. If an inspector finds code violations, the owner will be required to make needed corrections.

### 5. Third Party Billing Ordinance

This ordinance defines rules for landlords who, by themselves or through private companies, bill tenants for City provided utilities (water, sewer, garbage, electric services) separately from their rent. The ordinance applies to all residential buildings having three or more housing units.

The rules require a landlord or billing agent to provide tenants with specific information about their bills and to disclose their billing practices, either in a rental agreement or in a separate written notice. It is a violation of the ordinance if a landlord imposes a new billing practice without appropriate notice.

A tenant can dispute a third-party billing by notifying the billing agent and explaining the basis for the dispute. This must be done within 30 days of receiving a bill. The billing agent must contact the tenant to discuss the dispute within 30 days of receiving notice of the dispute. A tenant can also file a complaint with the Seattle Office of the Hearing Examiner or take the landlord to court. If the Hearing Examiner or court rules in favor of the tenant, the landlord could be required to pay a penalty.

### 6. Rental Registration and Inspection Ordinance (RRIO)

The purpose of the Rental Registration and Inspection program is to ensure that all rental housing in the City of Seattle is safe and meets basic housing maintenance requirements. Beginning in 2014 all

owners of residential housing in Seattle, with certain limited exceptions, must register their properties with the City. A registration is good for five years. No tenant can be evicted from a property if the property is not registered with the City. With a few exceptions, all properties must be inspected at least once every ten years. These inspections can be conducted by City-approved inspectors or by City housing/zoning inspectors. Information about the RRIO Program can be obtained by calling (206) 684-4110 or going to the program website at www.seattle.gov/RRIO.

# The Washington Residential Landlord-Tenant Act

## Chapter 59.18 RCW.

### GOOD FAITH OBLIGATION

State law requires landlords and tenants to act in good faith toward one another.

Most tenants who rent a place to live come under the Washington State Residential Landlord-Tenant Act. However, certain renters are specifically excluded from the law.

Residents who are generally not covered by the Act are:

- Renters of a space in a mobile home park are usually covered by the state's Mobile Home Landlord-Tenant Act (RCW 59.20). However, renters of both a space and a mobile home are usually covered by the residential law.
- Residents in transient lodgings such as hotels and motels; residents of public or private medical, religious, educational, recreational or correctional institutions; residents of a single family dwelling which is rented as part of a lease of agricultural land; residents of housing provided for seasonal farm work.
- Tenants with an earnest money agreement to purchase the dwelling. Tenants who lease a single family dwelling with an option to purchase, if the tenant's attorney has approved the face of the lease. Tenants who have signed a lease option agreement but have not yet exercised that option are still covered.
- Tenants who are employed by the landlord, when their agreement specifies that they can only live in the rental unit as long as they hold the job (such as an apartment house manager).
- Tenants who are leasing a single family dwelling for one year or more, when their attorney has approved the exemption.
- Tenants who are using the property for commercial rather than residential purposes.

### RIGHTS OF ALL TENANTS

Regardless of whether they are covered by the Residential Landlord-Tenant Act, all renters have these basic rights under other state laws: the Right to a livable dwelling; Protection from unlawful discrimination; Right to hold the landlord liable for personal injury or property damage caused by the landlord's negligence; Protection against lockouts and seizure of personal property by the landlord.

### TYPES OF RENTAL AGREEMENTS

**Month-to-Month Agreement.** This agreement is for an indefinite period of time, with rent usually payable on a monthly basis or other short term period. The agreement itself can be in writing or oral, but if any type of fee or refundable deposit is collected, the agreement must be in writing. [RCW 59.18.260]

A month-to-month agreement continues until the tenant gives the landlord written notice at least 20 days before the end of the rental period. In the situation of a conversion to a condominium or a change in the policy excluding children the landlord must provide 90 days written notice to the tenant. [RCW 59.18.200] The rent can be increased or the rules changed at any time, provided the landlord gives the tenant written notice at least 30 days before the effective date of the rent increase or rule change. [RCW 59.18.140]

**Fixed Term Lease.** A lease requires the tenant to stay for a specific amount of time and restricts the landlord's ability to change the terms of the rental agreement. A lease must be in writing to be valid. During the term of the lease, the rent cannot be raised or the rules changed unless both landlord and tenant agree. Leases for longer than one year must be notarized.

### ILLEGAL DISCRIMINATION

Federal law prohibits most landlords from refusing to rent to a person or imposing different rental terms on a person because of race, color, religion, sex, handicap, familial status (having children or seeking custody of children), or national origin. [Fair Housing Act 42 USC s. 3601 et.seq. 1988] State law recognizes protection to the same individuals as well as for marital status, creed, the presence of sensory, mental, or physical disability. If you think you have been denied rental housing or have been the victim of housing discrimination file a written complaint with the Washington State Human Rights Commission. You may also file a complaint with the federal Fair Housing Section of the Department of Housing and Urban Development or your local city human rights department.

## LIABILITY

Once a tenant has signed a rental agreement, the tenant must continue to pay the rent to maintain eligibility to bring actions under this act. The tenant should also understand what he or she is responsible for in the maintenance of the property. While the landlord is responsible for any damage which occurs due to the landlord's negligence, the tenant must be prepared to accept responsibility for damages he or she causes.

## ILLEGAL PROVISIONS IN RENTAL AGREEMENTS

Some provisions which may appear in rental agreements or leases are not legal and cannot be enforced under the law. [RCW 59.18.230] These include:

- A provision which waives any right given to tenants by the Landlord-Tenant Act or that surrenders tenants' right to defend themselves in court against a landlord's accusations.
- A provision stating the tenant will pay the landlord's attorney's fees under any circumstances if a dispute goes to court.
- A provision which limits the landlord's liability in situations where the landlord would normally be responsible.
- A provision which requires the tenant to agree to a particular arbitrator at the time of signing the rental agreement.
- A provision allowing the landlord to enter the rental unit without proper notice.
- A provision requiring a tenant to pay for all damage to the unit, even if it is not caused by tenants or their guests.
- A provision that allows the landlord to seize a tenant's property if the tenant falls behind in rent.

## PRIVACY—LANDLORD'S ACCESS TO THE RENTAL [RCW 59.18.150]

The landlord must give the tenant at least a two day written notice of his intent to enter at reasonable times. However, tenants must not unreasonably refuse to allow the landlord to enter the rental where the landlord has given at least one-day's notice of intent to enter at a specified time to exhibit the dwelling to prospective or actual purchasers or tenants. The law says that tenants shall not unreasonably refuse the landlord access to repair, improve, or service the dwelling. In case of an emergency, or if the property has been abandoned, the landlord can enter without notice. The landlord still must get the tenant's permission to enter, even if the required advance notice has been given.

## DEPOSITS AND OTHER FEES

### Refundable deposits

Under the Landlord-Tenant Act, the term "deposit" can only be applied to money which can be refunded to the tenant. If a refundable deposit is collected, the law requires:

- The rental agreement must be in writing. It must say what each deposit is for and what the tenant must do in order to get the money back. [RCW 59.18.260]
- The tenant must be given a written receipt for each deposit. [RCW 59.18.270]
- A checklist or statement describing the condition of the rental unit must be filled out. The landlord and the tenant must sign it, and the tenant must be given a signed copy. [RCW 59.18.260]
- The deposits must be placed in a trust account in a bank or escrow company. The tenant must be informed in writing where the deposits are being kept. Unless some other agreement has been made in writing, any interest earned by the deposit belongs to the landlord. [RCW 59.18.270]

### Non-refundable fees

These will not be returned to the tenant under any circumstances. If a non-refundable fee is being charged, the rental agreement must be in writing and must state that the fee will not be returned. A non-refundable fee cannot legally be called a "deposit." [RCW 59.18.285]

## LANDLORD'S RESPONSIBILITIES [RCW 59.18.060]

The landlord must:

- Maintain the dwelling so it does not violate state and local codes in ways which endanger tenants' health and safety
- Maintain structural components, such as roofs, floors and chimneys, in reasonably good repair.
- Maintain the dwelling in reasonably weather tight condition
- Provide reasonably adequate locks and keys.
- Provide the necessary facilities to supply heat, electricity, hot and cold water
- Provide garbage cans and arrange for removal of garbage, except in single family dwellings
- Keep common areas, such as lobbies, stairways and halls, reasonably clean and free from hazards
- Control pests before the tenant moves in. The landlord must continue to control infestations except in single family dwellings, or when the infestation was caused by the tenant
- Make repairs to keep the unit in the same condition as when the tenant moved in—except for normal wear and tear
- Keep electrical, plumbing and heating systems in

good repair, and maintain any appliances which are provided with the rental
- Inform the tenant of the name and address of the landlord or landlord's agent
- Supply hot water as reasonably required by tenant
- Provide written notice of fire safety and protection information and ensure that the unit is equipped with working smoke detectors when a new tenant moves in. (Tenants are responsible for maintaining detectors.) Except for single family dwellings, the notice must inform the tenant on how the smoke detector is operated and about the building's fire alarm and/or sprinkler system, smoking policy, and plans for emergency notification, evacuation and relocation, if any. Multifamily units may provide this notice as a checklist disclosing the building's fire safety and protection devices and a diagram showing emergency evacuation routes.
- Provide tenants with information provided or approved by the Department of Health about the health hazards of indoor mold, including how to control mold growth to minimize health risks, when a new tenant moves in. The landlord may give written information individually to each tenant, or may post it in a visible, public location at the dwelling unit property. The information can be obtained at www.doh.wa.gov/ehp/ts/IAQ/mold-notification.htm.
- Investigate if a tenant is engaged in gang-related activity when another tenant notifies the landlord of gang-related activity by serving a written notice and investigation demand to the landlord. [RCW 59.18.180]
- Provide carbon monoxide detectors.

## TENANT'S RESPONSIBILITIES [RCW 59.18.130]

A tenant is required to:

- Pay rent, and any utilities agreed upon
- Comply with any requirements of city, county or state regulations
- Keep the rental unit clean and sanitary
- Dispose of the garbage properly
- Pay for fumigation of infestations caused by the tenant
- Properly operate plumbing, electrical and heating systems
- Not intentionally or carelessly damage the dwelling
- Not permit "waste" (substantial damage to the property) or "nuisance" (substantial interference with other tenant's use of property)
- Maintain smoke and carbon monoxide detection devices including battery replacement
- Not engage in activity at the premises that is imminently hazardous to the physical safety of other persons on the premises and that entails a physical assault on a person or unlawful use of a firearm or other deadly weapon resulting in an arrest [RCW 59.18.352]
- When moving out, restore the dwelling to the same conditions as when the tenant moved in, except for normal wear and tear

## THREATENING BEHAVIOR BY A TENANT OR LANDLORD (RCW 59.18.352 and 354)

If one tenant threatens another with a firearm or other deadly weapon, and the threatening tenant is arrested as a result of the threat, the landlord may terminate the tenancy of the offending tenant (although the landlord is not required to take such action). If the landlord does not file an unlawful detainer action, the threatened tenant may choose to give written notice and move without further obligation under the rental agreement. If a landlord threatens a tenant under similar circumstances, the tenant may choose to give notice and move. In both cases, the threatened tenant does not have to pay rent for any day following the date of leaving, and is entitled to receive a pro-rated refund of any prepaid rent.

## MAKING CHANGES TO THE MONTH-TO-MONTH AGREEMENT

Generally speaking, if the landlord wants to change the provisions of a month-to-month rental agreement, such as raising the rent or changing rules, the tenant must be given at least 30 days notice in writing. These changes can only become effective at the beginning of a rental period (the day the rent is due). Notice which is less than 30 days will be effective for the following rental period.

If the landlord wishes to convert the unit to a condominium, the tenant must be given a 90-day notice. [RCW 59.18.200]

## MAKING CHANGES TO A FIXED LEASE TERM

Under a lease, in most cases, changes during the lease term cannot be made unless both landlord and tenant agree to the proposed change.

**If the property is sold.** The sale of the property does not automatically end a tenancy. When a rental unit is sold, tenants must be notified of the new owner's name and address, either by certified mail, or by a revised posting on the premises. All deposits paid to the original owner must be transferred to the new owner, who must put them in a trust or escrow account. The new owner must promptly notify tenants where the deposits are being held.

## HOW TO HANDLE REPAIRS

A tenant must be current in the payment of rent including all utilities to which the tenant has agreed in the rental agreement to pay before exercising any statutory remedies, such as repair options. [RCW 59.18.080]

**Required Notice** [RCW 59.18.070] When something in the rental unit needs to be repaired, the first step is for the tenant to give written notice of the problem to the landlord or person who collects the rent.

The notice must include the address and apartment number of the rental; the name of the owner, if known; and a description of the problem. After giving notice, the tenant must wait the required time for the landlord to begin making repairs. Those required waiting times are: 24 hours for no hot or cold water, heat or electricity, or for a condition which is imminently hazardous to life; 72 hours for repair of refrigerator, range and oven, or a major plumbing fixture supplied by landlord; 10 days for all other repairs.

**Tenant's Options** [RCW 59.18.090] If repairs are not started within the required time and if the tenant is paid up in rent and utilities, the following options can be used:

1) Tenant can give written notice to the landlord and move out immediately. Tenants are entitled to a pro-rated refund of their rent, as well as the deposits they would normally get back.
2) Litigation or arbitration can be used to work out the dispute.
3) The tenant can hire someone to make the repairs. In many cases the tenant can have the work done and then deduct the cost from the rent. [RCW 59.18.100] (This procedure cannot be used to force a landlord to provide adequate garbage cans.)

   **An Important Note:** If the repair is one that has a 10-day waiting period, the tenant cannot contract to have the work done until 10 days after the landlord receives notice, or five days after the landlord receives the estimate, whichever is later.

   To follow this procedure a tenant must: Submit a good faith estimate from a licensed or registered tradesperson, if one is required, to the landlord. After the waiting period, the tenant can contract with the lowest bidder to have the work done. After the work is completed, the tenant pays the tradesperson and deducts the cost from the rent payment. The landlord must be given the opportunity to inspect the work. The cost of each repair cannot exceed one month's rent; total cost cannot exceed two month's rent in any 12-month period.

   If a large repair which affects a number of tenants needs to be made, the tenants can join together, follow the proper procedure, and have the work done. Then each can deduct a portion of the cost from their rent.
4) The tenant can make the repairs and deduct the cost from the rent, if the work does not require a licensed or registered tradesperson. The same procedure is followed as for (2) above. However, the cost limit is one half of one month's rent.
5) Rent in Escrow - After notice of defective conditions, and after appropriate government certification of defect, and waiting periods have passed, then tenants may place their monthly rent payments in an escrow account. It is wise to consult an attorney before taking this action.

## ILLEGAL LANDLORD ACTIONS

**Lockouts.** [RCW 59.18.290] The law prohibits landlords from changing locks, adding new locks, or otherwise making it impossible for the tenant to use the normal locks and keys. Even if a tenant is behind in rent, such lockouts are illegal.

A tenant who is locked out can file a lawsuit to regain entry. Some local governments also have laws against lockouts and can help a tenant who has been locked out of a rental. For more information contact your city or county government.

**Utility shutoffs.** [RCW 59.18.300] The landlord may not shut off utilities because the tenant is behind in rent, or to force a tenant to move out. Utilities may only be shut off by the landlord so that repairs may be made, and only for a reasonable amount of time. If a landlord intentionally does not pay utility bills so the service will be turned off, that could be considered an illegal shutoff. If the utilities have been shut off by the landlord, the tenant should first check with the utility company to see if it will restore service. If it appears the shutoff is illegal, the tenant can file a lawsuit. If the tenant wins in court, the judge can award the tenant up to $100 per day for the time without service, as well as attorney's fees.

**Taking the tenant's property.** [RCW 59.18.310] The law allows a landlord to take a tenant's property only in the case of abandonment. A clause in a rental agreement which allows the landlord to take a tenant's property in other situations is not valid. If the landlord does take a tenant's property illegally, the tenant may want to contact the landlord first. If that is unsuccessful, the police can be notified. If the property is not returned after the landlord is given a written request, a court could order the landlord to pay the tenant up to $100 for each day the property is kept — to a total of $1,000. [RCW 59.18.230(4)]

**Renting condemned property.** [RCW 59.18.085] The landlord may not rent units which are condemned or unlawful to occupy due to existing uncorrected code violations. The landlord can be held liable for three months rent or treble damages, whichever is greater, as well as costs and attorneys fees for knowingly renting the property.

**Retaliatory actions.** [RCW 59.18.240 -.250] If the tenant exercises rights under the law, such as complaining to a government authority or deducting for repairs, the law prohibits the landlord from taking retaliatory action. Examples of retaliatory actions are raising the rent, reducing services provided to the tenant, or evicting the tenant. The law initially assumes that these steps are retaliatory if they occur within 90 days after the tenant's action, unless the tenant was in some way violating the statute when the change was received. If the matter is taken to court and the judge finds in favor of the tenant, the landlord can be ordered to reverse the retaliatory action, as well as pay for any harm done to the tenant and pay the tenant's attorney fees.

## ENDING THE AGREEMENT

**Proper Notice to Leave for Leases.** If the tenant moves out at the expiration of a lease, in most cases it is not necessary to give the landlord a written notice. However, the lease should be consulted to be sure a formal notice is not required. If a tenant stays beyond the expiration of the lease, and the landlord accepts the next month's rent, the tenant then is assumed to be renting under a month-to-month agreement.

A tenant who leaves before a lease expires is responsible for paying the rent for the rest of the lease term. However, the landlord must make an effort to re-rent the unit at a reasonable price. If this is not done, the tenant may not be liable for rent beyond a reasonable period of time.

**Proper Notice to Leave for Leases—Armed Forces Exception.** A lease can be terminated when the tenant is a member of the armed forces (including the national guard or armed forces reserve), if the tenant receives reassignment or deployment orders, provided the tenant informs the landlord no later than seven days after the receipt of such orders. In these circumstances, the tenancy may also be terminated by the tenant's spouse or dependent.

**Proper Notice to Leave for Month-to-Month Agreements.** When a tenant wants to end a month-to-month rental agreement, written notice must be given to the landlord.

The notice must be received at least 20 days before the end of the rental period (the day before the rent is due). The day which the notice is delivered does not count. A landlord cannot require a tenant to give more than 20 days notice when moving out. When a landlord wants a month-to-month renter to move out, a 20-day notice is required. If a tenant moves out without giving proper notice, the law says the tenant is liable for rent for the lesser of: 30 days from the day the next rent is due, or 30 days from the day the landlord learns the tenant has moved out. However, the landlord has a duty to try and find a new renter. If the dwelling is rented before the end of the 30 days, the former tenant must pay only until the new tenant begins paying rent.

**Proper Notice to Leave for Month-to-Month Agreements—Armed Forces Exception.** A month-to-month tenancy can be terminated with less than 20 days written notice when the tenant is a member of the armed forces (including the national guard or armed forces reserve), if the tenant receives reassignment or deployment orders that do not allow for a 20-day notice. In these circumstances, the tenancy may also be terminated by the tenant's spouse or dependent.

**Victim Protection.** A tenant who has given written notice to the landlord that he or she or a household member was a victim of domestic violence, sexual assault or stalking, may immediately terminate a rental agreement when a valid order for protection has been violated or the tenant has notified the appropriate law enforcement officers of the violation. A copy of the order must be made available to the landlord. The tenant must terminate the rental agreement within 90 days of the act or event leading to the protection order or report to appropriate law enforcement. [RCW 59.18.570 - 590]

## RETURN OF DEPOSITS [RCW 59.18.280]

After a tenant moves out, a landlord has 21 days in which to return a deposit, or give the tenant a written statement of why all or part of the money is being kept. It is advisable for the tenant to leave a forwarding address with the landlord when moving out.

The rental unit should be restored to the same condition as when the tenant moved in, except for normal wear and tear. Deposits cannot be used to cover normal wear and tear; or damage that existed when the tenant moved in.

The landlord is in compliance if the required payment, statement, or both, are deposited in the U.S. Mail with First Class postage paid, within 21 days. If the tenant takes the landlord to court, and it is ruled that the landlord intentionally did not give the statement or return the money, the court can award the tenant up to twice the amount of the deposit.

## EVICTIONS

**For not paying rent.** If the tenant is even one day behind in rent, the landlord can issue a three-day notice to pay or move out. If the tenant pays all the rent due within three days, the landlord must accept it and cannot evict the tenant. A landlord is not required to accept a partial payment.

**For not complying with the terms of the rental agreement.** If the tenant is not complying with the rental agreement (for example, keeping a cat when the agreement specifies no pets are allowed), the landlord can give a 10-day notice to comply or move out. If the tenant satisfactorily remedies the situation within that time, the landlord cannot continue the eviction process.

**For creating a "waste or nuisance."** If a tenant destroys the landlord's property, uses the premises for unlawful activity including gang- or drug-related activities, damages the value of the property or interferes with other tenant's use of the property, the landlord can issue a three-day notice to move out. The tenant must move out after this kind of notice. There is no option to stay and correct the problem.

**For violations within drug and alcohol free housing.** If a tenant enrolled in a program of recovery in drug and alcohol free housing for less than two years uses, possesses, or shares alcohol or drugs the landlord can give a three-day notice to move out. If the tenant cures the violation within one day, the rental agreement does not terminate. If the tenant fails to remedy the violation within one day, he or she must move out and the rental agreement is terminated. If the tenant engages in substantially the same behavior within six months, the landlord can give a three-day notice to move out and the tenant has no right to cure the subsequent violation.

**Notice.** In order for a landlord to take legal action against a tenant who does not move out, notice must be given in accordance with RCW 59.12.040.

If the tenant continues to occupy the rental in violation of a notice to leave, the landlord must then go to court to begin what is called an "unlawful detainer" action. If the court rules in favor of the landlord, the sheriff will be instructed to move the tenant out of the rental if the tenant does not leave voluntarily. The only legal way for a landlord to move a tenant physically out of a unit is by going through the courts and the sheriff's office.

## DESIGNATION OF AN INDIVIDUAL TO ACT ON BEHALF OF A TENANT UPON THE DEATH OF THE TENANT (RCW 59.18.590)

A tenant who is the sole occupant of a dwelling unit can designate a person to act on the tenant's behalf upon the death of the tenant independently or at the request of a landlord. The designation must be in writing separate from any rental agreement. It must include the designated person's name, mailing address, an address used for the receipt of electronic communications, a telephone number, and a signed statement authorizing the landlord in the event of the tenant's death (when the tenant is the sole occupant of the dwelling unit) to allow the designated person to access the tenant's dwelling unit, remove the tenant's property, receive refunds of amounts due to the tenant, and to dispose of the tenant's property consistent with the tenant's last will and testament and any applicable intestate succession law, and a conspicuous statement that the designation remain in effect until it is revoked in writing by the tenant or replaced with a new designation. The designated person's right to act on the behalf of the deceased tenant terminates upon the appointment of a personal representative for the deceased tenant's estate or the identification of a person reasonably claiming to be a successor of the deceased tenant pursuant to law.

## ABANDONMENT RELATED TO FAILURE TO PAY RENT [RCW 59.18.310]

Abandonment occurs when a tenant has both fallen behind in rent and has clearly indicated by words or actions an intention not to continue living in the rental.

When a rental has been abandoned, the landlord may enter the unit and remove any abandoned property. It must be stored in a reasonably secure place. A notice must be mailed to the tenant saying where the property is being stored and when it will be sold. If the landlord does not have a new address for the tenant, the notice should be mailed to the rental address, so it can be forwarded by the U.S. Postal Service.

How long a landlord must wait before selling abandoned property depends on the value of the goods. If the total value of property is less than $250, the landlord must mail a notice of the sale to the tenant and then wait seven(7) days. Family pictures, keepsakes and personal papers cannot be sold until forty-five (45) days after the landlord mails the notice of abandonment to the tenant.

If the total value of the property is more than $250, the landlord must mail a notice of the sale to the tenant and then wait forty-five (45) days. Personal papers, family pictures, and keepsakes can be sold at the same time as other property.

The money raised by the sale of the property goes to cover money owed to the landlord, such as back rent and the cost of storing and selling the goods. If there is any money left over, the landlord must keep it for the tenant for one (1) year. If it is not claimed within that time, it belongs to the landlord.

If a landlord takes a tenant's property and a court later determines there had not actually been an abandonment, the landlord could be ordered to compensate the tenant for loss of the property, as well as paying court and attorney costs.

This procedure does not apply to the disposition of property of a deceased tenant. See "Abandonment Related to the Death of a Tenant" below.

## ABANDONMENT RELATED TO EVICTION [RCW 59.18.312]

When a tenant has been served with a writ of restitution in an eviction action, the tenant will receive written notification of the landlord's responsibilities regarding storing the tenant's property that is left behind after the premises is vacant. Tenants will be provided with a form to request the landlord store the tenants's property.

A landlord is required to store the tenant's property if the tenant makes a written request for storage within three (3) days of service of the writ of restitution or if the landlord knows that the tenant is a person with a disability that prevents the tenant from making a written request and the tenant has not objected to storage. The written request for storage may be served by personal delivery, or by mailing or faxing to the landlord at the address or fax number identified on the request form provided by the landlord.

After the Writ of Restitution has been executed, the landlord may enter the premises and take possession of any of the tenant's remaining belongings. Without a written request from the tenant, the landlord may choose to store the tenant's property or deposit the tenant's property on the nearest public property. If the landlord chooses to store the tenant's property, whether requested or not, it may not be returned to the tenant until the tenant pays the actual or reasonable costs of moving and storage, whichever is less within thirty (30) days.

If the total value of the property is more than $250, the landlord must notify the tenant of the pending sale by personal delivery or mail to the tenant's last known address. After thirty (30) days from the date of the notice, the landlord may sell the property, including personal papers, family pictures, and keepsakes and dispose of any property not sold.

If the total value of the property is $250 or less, the landlord must notify the tenant of the pending sale by personal delivery or mail to the tenant's last known address. After seven (7) days from the date of the notice, the landlord may sell or dispose of the property except for personal papers, family pictures, and keepsakes.

The proceeds from the sale of the property may be applied towards any money owed to the landlord for the actual and reasonable costs of moving and storing of the property, whichever is less. The costs cannot exceed the actual or reasonable costs of moving and storage, whichever is less. If there are additional proceeds, the landlord must keep it for the tenant for one (1) year. If no claim is made by the tenant for the recovery of the additional proceeds within one (1) year, the balance will be treated as abandoned property and deposited with the Washington State Department of Revenue.

See RCW 59.18.312.

## ABANDONMENT RELATED TO THE DEATH OF A TENANT (RCW 59.18.595)

When a landlord learns of the death of a tenant who is the sole occupant of a dwelling unit, the landlord must promptly mail or personally deliver a written notice to any known personal representative, designated person, emergency contact person, or known successor to the tenant. The notice must include the name of the deceased tenant and address of the dwelling unit, the approximate date of the tenant's death, the amount of the monthly rent and the date to which it is paid. The notice must include a statement that the tenancy will terminate 15 days from the date the notice is mailed or personally delivered, or the date through which the rent has been paid, whichever is later, unless during this 15 day period a tenant representative makes arrangements with the landlord to pay rent in advance for no more than 60 days from the date of the tenant's death in order to arrange for the removal of the deceased tenant's property, and that the tenancy will be over at the end of the period for which the rent has been paid. The notice must also include a statement that failure to remove the tenant's property before the tenancy is terminated or ends will permit the landlord to enter the dwelling unit and take possession of any property found on the premises, store it in a reasonably secure place, and charge the actual or reasonable costs, whichever is less, for moving and storage of the property, and that after appropriate notice, sell or dispose of the property as provided for in law. A copy of any designation of a person to act on the deceased tenant's behalf must be attached to the notice.

The landlord must turn over possession of the tenant's property to a tenant representative upon receipt of a written request if this request is made prior to the termination or end of the tenancy, or any other date agreed to by the parties. The tenant representative must provide to the landlord an inventory of all the removed property and a signed acknowledgement that the tenant representative has been given possession and not ownership of the property.

If a tenant representative has made arrangements to pay rent in advance, the landlord must mail this second notice to any known personal representative, designated person, emergency contact person, or known successor of the tenant, and to the deceased tenant at the dwelling unit address. This second notice must include the name, address, and telephone number or contact information for the tenant representative who made arrangements to pay rent in advance, the amount of rent paid in advance, and date through which the rent is paid. The notice must include a statement that the landlord may sell or dispose of the property on or after the date through which the rent is paid or at least 45 days after the second notice is

mailed, whichever date comes later, if the tenant representative does not claim or remove the property.

If the landlord places the property in storage, the landlord must mail a second written notice (if this has not already been done) to any known personal representative, designated person, emergency contact person, or known successor of the tenant, and to the deceased tenant at the dwelling unit address. This notice must include a statement that the landlord may sell or dispose of the property on or after a specified date that is at least 45 days after the second notice is mailed, if the tenant representative does not claim and remove the property.

The landlord must turn over possession of the deceased tenant's property to the tenant representative if a written request is made in a timely manner. The tenant representative must pay the actual or reasonable costs, whichever is less, of any moving and storage of the property, and provide to the landlord an inventory of all the removed property and a signed acknowledgement that the tenant representative has been given possession and not ownership of the property.

If a tenant representative does not contact the landlord or remove the deceased person's property in a timely manner, the landlord may sell or dispose of the stored property, except for personal papers and personal photographs. If the fair market value of the property is more than $1,000, the landlord must sell the property in a commercially reasonable manner. All unsold property must be disposed of in a reasonable manner. If the value of the stored property is less than $1,000, the landlord must dispose of the property in a reasonable manner.

The personal papers and photographs that are not claimed by a tenant representative must be retained for 90 days after the sale or disposal of the deceased tenant's property and must either be destroyed or held for benefit of any successor of the deceased tenant.

No landlord or an employee of the landlord may acquire, either directly or indirectly, a deceased tenant's property that is sold or otherwise disposed of. The landlord may apply the proceeds of the sale of the deceased tenant's property toward any money owed to the landlord for the actual and reasonable cost of moving and storing the property, whichever is less. If there is excess income, it must be held by the landlord for one year. If no claim is made on the excess income before the expiration of the one year period, the balance must be deposited with the Washington State Department of Revenue as abandoned property.

The landlord must refund to the tenant representative any unearned rent and give a full and specific statement of the basis for retaining any deposit together with the payment of any refund due to the deceased tenant within 14 days after the removal of the property by the tenant representative.

If a landlord knowingly violates these abandonment provisions, the landlord can be liable to the deceased tenant's estate for actual damages. The prevailing party in any action related to these requirements may recover costs and reasonable attorneys' fees.

## RECEIPTS

A landlord must provide a receipt for any payment made in the form of cash by a tenant. Upon the request of a tenant, a landlord must provide a receipt for any payment made by the tenant in a form other than cash. This includes payment for rent, deposits, fees, parking, storage, or any other costs associated with a tenancy. See RCW 59.18.063.

## COPIES OF DOCUMENTS

If a checklist describing the physical condition of a rental unit is completed pursuant to RCW 59.18.260 and SMC 7.24.030.C, a copy signed by both the landlord and the tenant must be provided to the tenant.

When there is a written rental agreement for a premises, the landlord must provide a fully executed copy to each tenant who signs the agreement. A landlord must provide one free replacement copy of the written agreement if requested by a tenant during the tenancy. See RCW 59.18.065.

## VOTER REGISTRATION INFORMATION

Attached to this publication is information related to registering to vote, and if already registered, how to update your address when you move. For more information go to www.kingcounty.gov/depts/elections.

# Tenant Relocation License

- Provides benefits for residential tenants who will be displaced by housing demolition, substantial rehabilitation, change of use or removal of use restrictions

- License must be obtained before any master use, demolition or building permit will be issued

- Relocation assistance payment = $3,490 (half paid by City and half paid by property owner)

Seattle Department of Construction and Inspections

Tip 123

Seattle Permits

*— part of a multi-departmental City of Seattle series on getting a permit*

# Seattle's Tenant Relocation Assistance Ordinance

*Updated April 1, 2016*

## What is the Tenant Relocation Assistance Ordinance?

This is an ordinance enacted by the Seattle City Council on June 25, 1990, which provides benefits for residential tenants who will be displaced by housing demolition, substantial rehabilitation or alteration, change of use or removal of use restrictions. Benefits include payment of relocation assistance to low income tenants and advance notice of the planned development.

## Who is affected?

The ordinance affects owners of residential property occupied by a tenant if that tenant will have to move because of any of the actions listed above. The Seattle Department of Construction and Inspections (Seattle DCI) cannot issue any permits for housing demolition, change of use or substantial rehabilitation unless the requirements of the ordinance are met.

## What is required?

Owners of property slated for redevelopment or rehabilitation must obtain a Tenant Relocation License from Seattle DCI before any master use, demolition, or building permit will be issued. Application for a license is required at the same time as application for project permits.

## Who is eligible for relocation assistance?

Tenants are eligible for relocation assistance payments of $3,490.00 if they qualify as low income, defined as having a family income of no more than 50 percent of the King County median income. The property owner is responsible for paying half of the relocation assistance, $1,745.00; the City pays the other half.

## How long does it take to get a license?

It usually takes six months to obtain a license. The owner must provide tenants with program information and notice of the project. Tenants have 30 days to apply for relocation assistance. After Seattle DCI evaluates eligibility, a 90-day notice to all tenants is required to be issued and to expire before a Tenant Relocation License can be issued, regardless of whether tenants are eligible for relocation assistance payments. Program forms are provided by the City and there are specific procedures which must be followed; these are explained in the license application materials.

## How to apply for a relocation license.

To apply for a Tenant Relocation License, **make an appointment** with Seattle DCI's Property Owner and Tenant Assistance unit, located on the 19th floor of Seattle Municipal Tower at 700 Fifth Ave., or call (206) 615-0808. Please bring the property legal description, Seattle DCI project number, and a list of tenants' names and telephone numbers when applying for a license.

**REMEMBER:** NO permit can be issued by Seattle DCI if the work it involves will displace tenants UNLESS a Tenant Relocation License has been obtained. To avoid delays in your project, find out if you need a license and apply right away if you do.

## Can a rent increase be used to displace tenants?

It is a violation of the Tenant Relocation Assistance Ordinance to increase a tenant's rent for the purpose of avoiding applying for a Tenant Relocation License.

## Access to Information

Links to electronic versions of the Tenant Relocation Assistance Ordinance at the "Codes & Rules" page of our website at **www.seattle.gov/sdci**. Paper copies of these documents are available from our Public Resource Center, located on the 20th floor of Seattle Municipal Tower at 700 Fifth Ave. in downtown Seattle, (206) 684-8467.

www.seattle.gov/sdci

City of Seattle
Department of Construction and Inspections

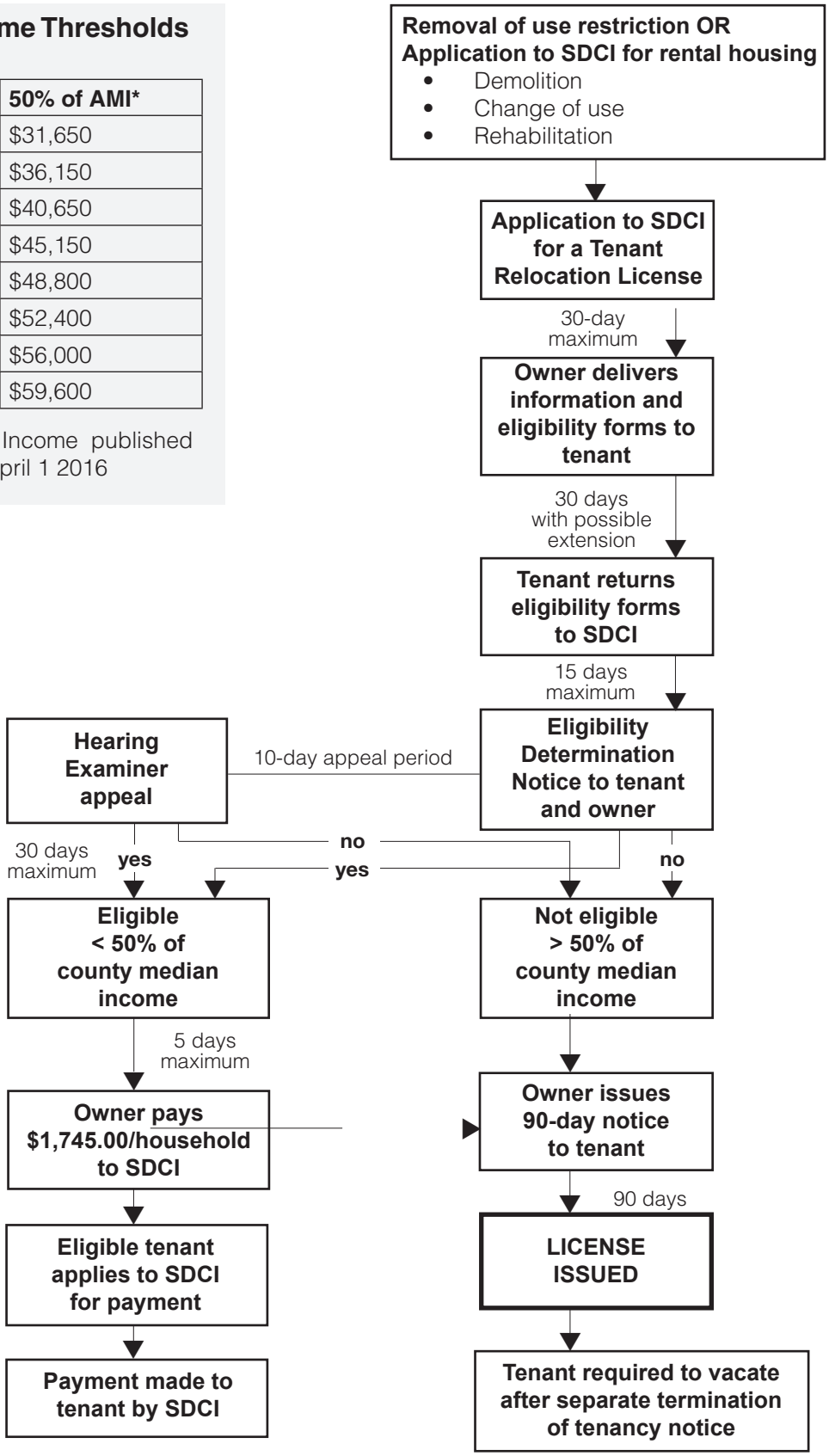
700 5th Avenue, Suite 2000
P.O. Box 34019
Seattle, WA 98124-4019
(206) 684-8600

# Tenant Relocation License

## Eligibility Income Thresholds

| Household Size | 50% of AMI* |
|---|---|
| 1 Person | $31,650 |
| 2 People | $36,150 |
| 3 People | $40,650 |
| 4 People | $45,150 |
| 5 People | $48,800 |
| 6 People | $52,400 |
| 7 People | $56,000 |
| 8 People | $59,600 |

* 50% Area Median Income published by HUD, effective April 1 2016



# Notice of Expiration or Prepayment of Federal Assistance

- All owners of federally assisted housing shall provide at least 12 months' prior written notice of the expiration of a rental assistance contract or prepayment of a mortgage or loan. RCW 59.28.040

**RCW 59.28.040**

**Notice of expiration or prepayment—Owner's duty.**

Except as provided in RCW **59.28.030**, all owners of federally assisted housing shall, at least twelve months before the expiration of the rental assistance contract or prepayment of a mortgage or loan, serve a written notice of the anticipated expiration or prepayment date on each tenant household residing in the housing, on the clerk of the city, or clerk of the county legislative authority if in an unincorporated area, in which the property is located, on any public housing agency that would be responsible for administering tenant-based rental assistance to persons who would otherwise be displaced from this housing, and on the *department of community, trade, and economic development, by regular and certified mail. All owners of federally assisted housing shall also serve written notice of the anticipated expiration or prepayment date on each tenant household that moves into the housing after the initial notice has been given, but before the expiration of the rental assistance contract or prepayment of the mortgage or loan. This notice shall be given before a new tenant is asked to execute a rental agreement or required to pay any deposits.

[ **2002 c 30 § 3; 2000 c 255 § 3; 1995 c 399 § 160; 1989 c 188 § 4.**]

**NOTES:**

***Reviser's note:** The "department of community, trade, and economic development" was renamed the "department of commerce" by 2009 c 565.

# Landlord Liaison Project

# Landlord Liason Project

King County, the City of Seattle, All Home, and United Way of King County are developing a process to:

- Provide LLP partner landlords with risk reduction funds for eligible tenants after July 1, 2017.
- Provide eligible LLP tenants with assistance after July 1, 2017.
- Create a new program to connect and support property owners and tenants.

# Green Pricing

# Green Pricing

- Incentives to reduce energy or water consumption
- Discounted loan pricing for properties that are already certified
- Fannie Mae and Freddie Mac

Conventional, Seniors, Targeted Affordable

PRODUCT SNAPSHOT

# Green Advantage®

## Better Pricing. Larger Proceeds. Energy Savings.

We make it easy to be green. When you commit to reducing energy or water (by at least 15 percent), you can get better pricing and more funding to make these improvements.

Is your property already green certified? Then you can also get these rewards.

### The Freddie Mac Difference

When it comes to multifamily finance, Freddie Mac gets it done. We work closely with our Sellers to tackle complicated transactions, provide certainty of execution and fund quickly. Contact your Freddie Mac Multifamily representative today — we're here to help.

### Borrowers Who Want to Know More

Contact one of our approved Seller/Servicers at:

**FreddieMac.com/multifamily/lenders**

- Works with the majority of Freddie Mac Multifamily loans
- Options include Green Up®, Green Up Plus®, Green Certified, or C-PACE
- The Green Assessment® and Green Assessment Plus® show borrowers how they can save energy or water. We reimburse up to $3,500 of the cost of the report when the borrower closes a Freddie Mac Multifamily loan
- Properties that could be a good fit for Green Advantage are those built in 2000 or earlier (2002 for tax-credit properties)
- We support eligible mixed-use properties

Freddie Mac MULTIFAMILY

FreddieMac.com/multifamily/product/

| | Green Up® | Green Up Plus® |
|---|---|---|
| **Minimum Projected Consumption Reduction** | 15% of energy or water/sewer consumption based on Green Assessment | 15% of energy or water/sewer consumption based on Green Assessment Plus |
| **Underwriting Approach** | Recognize 50% of projected owner-paid energy and/or water/sewer savings based on Green Assessment | Recognize 75% of projected owner-paid energy and/or water/sewer savings based on Green Assessment Plus |
| **Loan Proceeds/ Sizing** | ▪ Debt Coverage Ratio (DCR): -0.05x of policy-compliant DCR. Subject to lesser of 1.20x or program/product limit<br>▪ Loan-to-Value (LTV) ratio: +5.0% of policy-compliant LTV. Subject to greater of 85% or program/product limit | ▪ DCR: -0.05x of policy-compliant DCR. Subject to lesser of 1.20x or program/product limit<br>▪ LTV: +5.0% of policy-compliant LTV. Subject to greater of 85% or program/product limit |
| **As Is DCR/LTV** | ▪ DCR: -0.05x of policy compliant DCR<br>▪ Subject to lessor of 1.20x or product limit<br>▪ LTV: +5.0% of policy compliant LTV<br>▪ Subject to greater of 85% or product limit | ▪ DCR: -0.05x of policy compliant DCR<br>▪ Subject to lessor of 1.20x or product limit<br>▪ LTV: +5.0% of policy compliant LTV<br>▪ Subject to greater of 85% or product limit |
| **As-Improved DCR/LTV (If Applicable)** | ▪ Must meet policy compliant DCR/LTV; no adjustments<br>▪ Based on As-Improved NOI and As-Improved appraised value | ▪ Must meet policy compliant DCR/LTV; no adjustments<br>▪ Based on As-Improved NOI and As-Improved appraised value |
| **Minimum Green Improvement Budget** | $350 per unit | $350 per unit |
| **Time to Complete Green Improvements** | 2 years to complete | 2 years to complete |

| | | |
|---|---|---|
| **Escrow Requirements** | Funds for energy/water efficiency work will be escrowed at 125% of cost and released as work is completed | Funds for energy/water efficiency work will be escrowed at 125% of cost and released as work is completed |
| **Benchmarking Requirements** | Property energy and water usage must be recorded in EPA Portfolio Manager® after closing and continue monthly through the calendar year-end following the fourth anniversary of the loan. | Property energy and water usage must be recorded in EPA Portfolio Manager® after closing and continue monthly through the calendar year-end following the fourth anniversary of the loan. |
| **Required Third-Party Reports** | Green Assessment | Green Assessment Plus |

## Already Green?

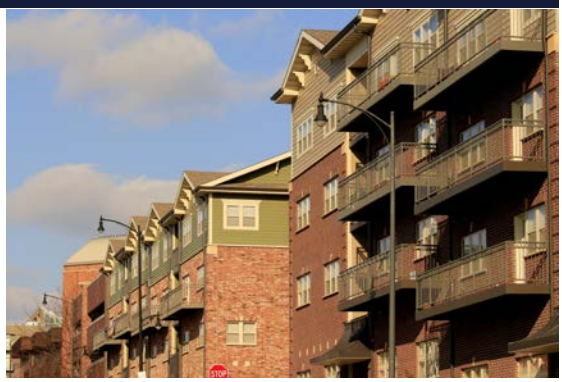
| | |
|---|---|
| **Green Certified** | We give discounted loan pricing for properties — if at least 20% of the property's units are affordable rental units — and has one of these eight industry-standard green building certifications:<br>1. EarthCraft, Greater Atlanta Home Builders Association & South Face<br>2. ENERGY STAR® for Multifamily, EPA<br>3. ENERGY STAR® for Qualified Multifamily High-Rise, EPA<br>4. Green Communities, Enterprise Community Partners<br>5. Green Globes, Green Building Initiative<br>6. GreenPoint Rated, Build It Green<br>7. LEED, US Green Building Council<br>8. National Green Building Standard (NGBS), Home Innovation Research Labs<br>Seller/Servicers should:<br>1. Speak to their Freddie Mac representatives.<br>2. Complete our Affordability Test and select the relevant certification.<br>3. Provide evidence of certification as part of the loan submission to receive our best quote. |
| **Green Rebate** | If your borrower doesn't choose the Green Advantage options, make sure they know they can receive $5000 from Freddie Mac for delivering an EPA ENERGY STAR Score®. |

Fannie Mae

# Green Rewards

Fannie Mae Multifamily offers Green Rewards, a product feature that provides lower pricing, additional loan proceeds, and a free Energy and Water Audit Report to finance smarter, greener property improvements.

Eligible improvements include new ENERGY STAR® appliances, energy-efficient HVACs, low-flow toilets, solar-energy systems, and more.



| | |
|---|---|
| **Lien Priority** | First lien loans, supplemental loans, and second supplemental loans.<br><br>For a second supplemental, 100% of the loan proceeds must go towards green improvement costs. |
| **Availability of Additional Loan Proceeds** | Up to 5% more than a conventional (non-green) DUS Loan. |
| **Energy and Water Audit Report** | 100% paid by Fannie Mae. Report scope equivalent to ASHRAE Level 2 Energy Audit. Loan must close as Green Rewards. |
| **Underwriting** | 75% of the owner and 25% of the tenant projected energy and water cost savings may be included in the Underwritten Net Cash Flow.<br><br>All Green Rewards loans are Pre-Review. |
| **Execution Options** | Green MBS. |
| **Term** | 5 to 30 years. |
| **Interest Rate** | Fixed and variable rate options available. |
| **Loan Amount** | No minimum or maximum. |

## Benefits

- Lower interest rate
- Free Energy and Water Audit Report
- Up to 5% more loan proceeds
- Increased Net Cash Flow by underwriting projected energy and water cost savings
- No minimum investment per unit
- Attract more investors with the market's only Green MBS

## Eligibility

- Conventional and Affordable Housing
- Multifamily, Seniors, Student, Military, and Cooperative
- Borrower must commit to installing capital improvements that target a 20% or more reduction to the whole property's annual energy or water use
- Improvements must be installed within 12 months of loan origination, or 36 months if part of a larger rehab
- Properties may be located anywhere in the U.S.

## For More Information

For more information on Green Rewards and other Green Financing solutions, go to:

fanniemaegreeninitiative.com

| | |
|---|---|
| **Maximum LTV** | Varies by asset class and product type. |
| **Minimum DSCR** | Varies by asset class and product type. |
| **Prepayment Availability** | Flexible prepayment options available including yield maintenance and declining prepayment premium. |
| **Rate Lock** | 30- to 180-day commitments. Borrowers may lock the interest rate using the Early Rate Lock option. The Energy and Water Audit Report must be approved by Fannie Mae five days prior to rate lock. |
| **Accrual** | 30/360 and Actual/360 |
| **Recourse** | Non-recourse execution is available, with standard carve-outs for "bad acts" such as fraud and bankruptcy required. |
| **Escrows** | Costs for green investments escrowed at 100%. |
| **Third-Party Reports** | Standard third-party reports, including Appraisal, Phase I Environmental Assessment, and a Property Condition Assessment, are required. The Property Condition Assessment must include the High Performance Building module (Energy and Water Audit Report). |
| **Assumption** | Loans are typically assumable, subject to review and approval of the new borrower's financial capacity and experience. |
| **Asset Management** | Property improvements must be completed within 12 months. Lenders will verify the completion of the agreed-upon property improvements. Borrower must report the Property's annual Energy Performance Metrics, including ENERGY STAR score. |