

## Wynetta Bivens

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**To:** Christy O'Flaherty  
**Subject:** RE: Planning Commision Comments

**From:** donald scanlon <[donscan@donscan.org](mailto:donscan@donscan.org)>  
**Sent:** Wednesday, April 10, 2019 2:57 PM  
**To:** Tukwila City Clerk <[TukwilaCityClerk@TukwilaWA.gov](mailto:TukwilaCityClerk@TukwilaWA.gov)>  
**Subject:** Planning Commision Comments

I plan to attend the planning commission meeting Thursday night. In case I can't make it please enter these comments.

My concern is with the deletion of item 8 under section 18.45.110. This states culverts shall be upgraded when being re-developed or when new development occurs. I don't see anything like this in the new section 18.45.110. The new draft is only focused on piping streams. It doesn't address when and where streams should be opened up or improved. I would like to see the old item eight be retained.

Don Scanlon

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EXHIBIT 1 DATE 4/11/19  
PROJECT NAME Critical Areas Code Update  
FILE NO L18 - 0056

April 10, 2019

VIA HAND DELIVERY

City of Tukwila Planning Commission  
City of Tukwila  
6300 Southcenter Blvd., #100  
Tukwila, WA 98188

Re: **Comments on Proposed Critical Areas Code Update L18-0056**

Dear Planning Commissioners:

This firm represents Segale Properties LLC (“Segale”). As you are likely aware, Segale controls the large Tukwila South property, abutting the Green River. In 2009, Segale and the City entered into a long-term Development Agreement governing the future building on the Tukwila South property. After years of construction to install all necessary infrastructure and re-grade the property for development, the Tukwila South lands are finally ready to be marketed and are being actively reviewed for ground lease and/or sale for commercial and residential buildings and development.

In addition to the Development Agreement, on June 8, 2009, the City Council approved the entire Tukwila South property as a Sensitive Area Master Plan Overlay District. Segale implemented a Sensitive Areas Master Plan (“SAMP”) that addressed the entire 512-acre Tukwila South site, authorizing alterations and mitigation of sensitive areas, in a comprehensive plan that overall improved water quality, fish and wildlife habitat and hydrology beyond what would have occurred through the strict application of the provisions of the Sensitive Areas Ordinance. The SAMP assured protection of the Tukwila South lands’ sensitive areas and buffers by locating them in Native Growth Protection Areas (“NGPAs”), and SAMP Condition 18 required that the NGPA protections be assured via recorded instruments on the real property title. Tukwila South also is in the process of being subdivided with final plats being recorded on a phased basis, and each final plat locates NGPA areas in a protected tract.

The NGPAs are mapped on Exhibit 3 to the Development Agreement. Exhibit 3 plainly labels the NGPAs as “Non-Development areas,” in contrast to the remainder of the Tukwila South lands which are the “Development Areas,” and Section 3.2 of the Development Agreement authorizes 100% of the Development Areas to be cleared and graded, and up to 85% of the Development Areas served by each stormwater facility to be covered with impervious surfaces. Likewise, Section 5.1 of the Development

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Agreement confirms protection of the NGPAs. The Development Agreement also vested the build out of the Tukwila South project to the 2009 Tukwila Municipal Code, including all of Title 18, which included the City's Sensitive Areas Ordinance.

What this means is that during the term of the Development Agreement the City's proposed amendment to the Critical Areas Code will not apply to the Tukwila South lands. In addition, the SAMP is a standalone approval that has no term, and the recorded and set boundaries for protected NGPA versus developable lands will continue to apply even after the Development Agreement term expires. Nonetheless, Segale is keenly interested in the Critical Areas Ordinance ("CAO") update, as well as the CAO interplay with the also pending SMP updates. Below, we provided comments on the CAO update.

We ask that you carefully review the following provisions of the CAO update, respond to our questions, and we recommend that you include our requested revisions.

1. Assurance that created and enhanced mitigation areas are not penalized with new larger buffers.

The SAMP for Tukwila South lands authorized the construction of a significant new off-channel habitat area in the Green River, including the creation of new wetland areas, and the rehabilitation and enhancement of other existing wetlands. Those areas and their associated buffers are protected by NGPAs. Segale seeks clear assurance from the City that the NGPA boundaries applied to these newly created mitigation areas will not be later expanded due to increases in the CAO regulatory buffer widths. We believe that is the City's intent, we believe the SAMP precludes the City from expanding those buffers but it is not clearly stated in the new CAO update that increased buffer widths will not be imposed on those previously set NGPAs. One option to provide this clarification would be to add a subsection to SMC 18.45.160, *Critical Area Master Plan Overlay*, to read: "The boundaries of critical areas and associated buffers, which critical areas were created or enhanced pursuant to an approved Critical Area Master Plan or Sensitive Area Master Plan are not subject to expansion due to the later adoption of increased buffer widths into this Critical Areas Ordinance, the Shoreline Overlay regulations or any updates thereto."

2. 18.45.190. Time Limitation. Appeals and Vesting

Because of the SAMP overlay, and the implemented SAMP actions and mitigation, the City's addition of a vesting regulation to the new CAO is not relevant to Tukwila South. However, as a matter of public policy, we reviewed the proposed language. The addition of the vesting regulation at TMC 18.45.190.C is characterized in the Summary of Key Revisions as merely a "housekeeping" amendment. With a few clarifying revisions, we would agree. However, without these revisions, this regulation might be read as a sea change in vesting doctrine that could severely punish landowners in the City of Tukwila.

By way of background, it is important to recognize that subdivisions, binding site plans, and similar development proposals are designed to create lots and development sites for future buildings. It is at the preliminary subdivision and site plan stage of permit review, that critical area impacts are

assessed and evaluated, and sensitive areas are generally set aside in protected tracts. In fact, TMC 18.45.170, *Critical Areas Tracts and Easements*, requires that critical areas on a development site be protected in a tract or easement that must remain undeveloped in perpetuity. Importantly, applications for building permits cannot be made until after a subdivision or binding site plan is approved, because under RCW 19.27.095(2)(a), one cannot apply for a building permit without a legal parcel. This means that one cannot file and vest a building permit application for a new home or commercial building in a new subdivision, until after the final plat has been recorded. It is also generally the case that buildings in a subdivision are not all constructed immediately or all at once, but rather over the course of at least five years.

As drafted, it is not clear that the new vesting provision assures a landowner who applies for and designs a preliminary plat to protect critical areas in tracts, can apply for later building permits relying on those tract boundaries. This is a problem because a new, larger buffer width could easily eliminate the building area on one or more of the new lots and destroy the landowner's investment value. We recommend the City amend the vesting policy to clarify that future building permits in a subdivision or binding site plan are vested to the critical area provisions in effect at the time of application for the preliminary subdivision or preliminary binding site plan was made, and that vesting remains in effect for a period of five years following the recording of the final plat or final binding site plan. Suggested revisions to TMC 18.45.190.C are:

C. Vesting: Projects are vested to the critical area ordinance in effect at the time a complete building permit is submitted except for short plats, subdivisions, binding site plans, and shoreline permits. Short plats or subdivisions or binding site plans are vested to the critical area ordinance in effect at the time complete application is submitted for preliminary plats or for the binding site plan. The final plat, final site plan, and all future building permits on the lots remain vested to that same critical areas ordinance in effect for the preliminary plat or preliminary binding site plan application, so long as building permits are applied for within five years of the final plat or site plan approval. For short plats and subdivisions which received preliminary plat approval prior to the adoption of this ordinance, building permits on the lots shall be considered under the critical areas ordinance in effect on the date of the preliminary plat ~~approval~~ application provided complete building or construction permits are submitted within ~~one~~ five years of the final plat approval. Vesting provision for shoreline permits are provided in TMC 18.44.

Again, while this vesting regulation does not affect Segale's Tukwila South lands, we highly recommend these clarifying amendments to ensure protection of Tukwila landowners.

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We appreciate your attention to this matter and would be happy to answer any questions.

Very truly yours,



Nancy Bainbridge Rogers

NBR:jcs

cc: Ann Marie Soto  
Minnie Dhaliwhal  
Mark Segale  
Mike Pruett

**Wynetta Bivens**

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**To:** Minnie Dhaliwal  
**Subject:** RE: Tukwila's Critical Areas Code amendments, Chapter 18.45, Public Notice

**From:** Minnie Dhaliwal <Minnie.Dhaliwal@TukwilaWA.gov>  
**Sent:** Thursday, April 11, 2019 3:44 PM  
**To:** Wynetta Bivens <Wynetta.Bivens@TukwilaWA.gov>  
**Cc:** Jack Pace <Jack.Pace@TukwilaWA.gov>  
**Subject:** Fw: Tukwila's Critical Areas Code amendments, Chapter 18.45, Public Notice

**From:** Karen Walter <KWalter@muckleshoot.nsn.us>  
**Sent:** Wednesday, April 10, 2019 8:17 AM  
**To:** CriticalAreas  
**Subject:** FW: Tukwila's Critical Areas Code amendments, Chapter 18.45, Public Notice

Karen Walter  
Watersheds and Land Use Team Leader

*Muckleshoot Indian Tribe Fisheries Division  
Habitat Program  
39015-A 172<sup>nd</sup> Ave SE  
Auburn, WA 98092  
253-876-3116*

**From:** Karen Walter  
**Sent:** Tuesday, April 09, 2019 12:29 PM  
**To:** 'Criticalarea@TukwilaWA.gov'  
**Cc:** 'Minnie Dhaliwal'  
**Subject:** Tukwila's Critical Areas Code amendments, Chapter 18.45, Public Notice

To Tukwila staff,

We have reviewed the propose amendments to the City of Tukwila's Critical Areas Code and have questions/comments as noted:

1. Watercourse designation/classification

Currently, there is nothing in the City's code to require that watercourses be classified using current information and field data like there is for wetlands. The City should amend the code to require that all available information be used along with field data to verify watercourse classification. This is an important

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issue, particularly for streams that have artificial barriers on them as they will likely be considered non-fishbearing due to a lack of fish presence. Instead they should be evaluated for fish habitat potential using the WAC 222-16-031 (which is cited in the code already but not as an explicit method).

We saw this incorrect classification for the various tributaries to Gilliam Creek that drain through the south side of SR 518 and Klickitat Drive back in 2007 when we did the correct assessment and showed that most of the streams in the project area met the physical criteria from WAC 222-16-031 for Type F waters but were blocked in part by barriers culverts on SR 518. We provide this information to the City of Tukwila in the course of that project. If another copy is needed, please let me know.

The City also needs to have regular updates to its critical areas maps for watercourses to include more recent field data and after barrier culverts are removed, like those on SR 518 and I-405 should be per the Federal Court injunction requirements under U.S. v Washington.

The City should be aware that WDFW is updating the State barrier data frequently and their map should be consulted as part of critical areas reports as WDFW will have already assessed upstream areas on particular streams to determine if physical criteria under WAC 222-16-031 for presumed fish habitat is met. The interactive map can be found at <https://geodataservices.wdfw.wa.gov/hp/fishpassage/index.html>

## ArcGIS Web Application - [geodataservices.wdfw.wa.gov](https://geodataservices.wdfw.wa.gov)

[geodataservices.wdfw.wa.gov](https://geodataservices.wdfw.wa.gov)

WDFW maintains a centralized database of fish passage, diversion screening, fish use, and habitat information from inventory efforts conducted throughout Washington State. WDFW's Fish Passage and Diversion Screening Inventory (FPDSI) database is a main data source for planning fish passage projects.

Please note that some of the data on this map is not shown on the PHS or Salmonscape maps so it is another tool that should be consulted regarding barriers, stream hydrography, and potential fish habitat.

### 2. Buffer considerations

The need to increase buffers on watercourses should include those necessary to improve water temperatures as described under any state/federal water quality improvement plans such as Total Maximum Daily Load (TMDL) plans.

### 3. In-Lieu mitigation considerations

The City should allow in limited cases the opportunity for applicants to pay into an In Lieu fund to ensure that projects are fully mitigated for additional piping or culvert work and for those instances when an applicant is daylighting stream sections but cannot provide fully regulatory compliant stream buffers. An option to pay into an In Lieu should help ensure that there is no net loss of important stream functions such as shading and future wood recruitment that might otherwise be lost if no mitigation is required.

We appreciate the opportunity to review these code amendments. If you have any questions, please let me know.

Thank you!  
Karen Walter  
Watersheds and Land Use Team Leader

*Muckleshoot Indian Tribe Fisheries Division  
Habitat Program  
39015-A 172<sup>nd</sup> Ave SE  
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APR 11 2019

CITY OF TUKWILA  
CITY CLERK

**Comments to City of Tukwila Critical Area code update**

**Submitted at Public Meeting on April 11, 2019, City of Tukwila**

**by Ion Manea, owner of 13407 48<sup>th</sup> Av S, Tukwila, WA., 98168 property**

**Re: Critical Areas**

The proposed TMC 18.45.100 E replace "sensitive area" with "critical area".  
However there is no definition of "critical area" in the TMC.

**Please update definition accordingly.**

**Re: Critical Area Map TMC 18.45.30 G. 1.**

The current TMC 18.45.30 G. 4 states:

*"Regardless of whether a sensitive area is shown on the sensitive areas map, the actual presence or absence of the features defined in the code as sensitive areas shall govern. The Director may require the applicant to submit technical information to indicate whether sensitive areas actually exist on or adjacent to the applicant's site, based on the definitions of sensitive areas in this code."*

The proposed code change eliminates TMC 18.45. G. 1. provision and the following is inserted in TMC 18.45.30. G 1:

*"Not all critical area are shown on the map, it is the applicant responsibility to verify actual presence or absence of critical area or critical area buffer based on the definition of this code."*

There is no mechanism to require correct errors or make updates if circumstances change.

**Please include a provision that if the actual presence or absence of critical area is verified, that finding shall govern and shall be incorporated in all revisions, updates and reprinting of sensitive areas maps, inventories, ratings and buffers.**

**Re: Watercourse buffers TMC 18.45.100 E**

Pursuant to RCW 36.70A.172 in designating and protecting critical areas counties and cities shall include the best available science (BAS) in developing policies and development regulations to protect the functions and values of critical areas.

An update to TMC 18.45 is proposed based on planning department work augmented by public inputs.

Substantial assistance was provided by BAS review and gap analysis report (Report) prepared by The Water Shed Company (Consultant).

Although the BAS presented in the report or its references are not specific on watercourse buffer reductions, the Consultant is recommending:

*...reductions of up to 25 percent with enhancement are likely to provide adequate protection for most small stream channels...*

*and*

*, for consistency with the wetland regulations, the City may consider utilizing buffer averaging only*

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Current TMC 18.45.100.E currently allows buffer reduction by up to 50% with buffer enhancement .

The proposed TMC 18.45 buffer reduction requires narrowest buffer width no less than 75% of standard buffer, same total area as required buffer and additional regulatory and financial burdens (reports, sequencing, vegetation management, financial guarantees).

The proposed TMC 18.45 update introduce an "interrupted buffer waiver" that allows existing nonconforming structures to be remodeled, reconstructed or replaced with buffer enhancement, by limited expansion vertically or laterally or by enclosing existing footprint providing that it is outside of the 75% of the existing buffer.

The current TMC 18.45 will allow a property owner to apply for a buffer reduction permit to develop 50% of the existing buffer without financial burden unnecessary additional regulatory compliance and financial hardship and no size limitations.

The Ecology regulatory watercourse buffer framework has been developed to for large acreage on forested and non urban areas where a 100ft buffer has no practical impact for the use of the property.

By the contrary, in a highly urbanized area like Tukwila, the parcels are of small size, and some buffers extend over the whole property. Under the current code, watercourse buffer reduction permit and setback variants and waivers may allow use of 50% of the property with and requires enhancement of wildlife habitat. Under the proposed 75% width and total area conditions the development is impossible and for all practical purposes that will be a property confiscation without compensation and no further enhancement for wildlife of human habitat.

**This will be contrary to the purpose of TMC 18.45 including balance of the rights of individual property owners with the preservation of the environmentally critical areas.**

**The proposed reduction watercourse buffers of up to 25% and preservation of the total buffer area without including best available science and just for consistency with wetland regulations could be construed as in non compliance with TMC 18.45.10, TMC 18.45.20 and RCW 36.70A.172 and could be the subject of a petition with under RCW 36.70A.290.**

**It will be more fair and constructive and in concordance with the purpose of the TMC 18.45 to maintain the 50% reduction rule as is now and no further requirements on minimum widths or total buffer area.**

#### **Re: TMC 18.45.110 B 2. Alterations**

"Any watercourse alteration shall not cause adverse impact to fish, confine the channel or flood plain, or adversely affect riparian habitat (including downstream habitat)

However, allowed alterations like crossing and culverts will confine the channel or flood plain.

**It will be more appropriate to remove "confine the channel or flood plain" text.**

#### **Re: TMC 18.45.110. C d**

" Stream channel bed and biofiltration system equivalent to (in the case of public drainage maintenance projects) and better than (in case of other kinds of projects) in the original stream" It implies a double standard for public drainage vs. other kinds of projects.

**It will be more appropriate to replace "... system equivalent to ... and better than.." with "... system equivalent to the original stream"**

**Re: TMC 18.45.180 4. f**

**There is a new requirement stating that:**

“All unavoidable impacts are fully mitigated”

The statement is confusing. The whole purpose of reasonable use exception is to address expressly the exceptional situation in which mitigation alternatives have been exhausted. Requiring full mitigation of impacts will practically exclude the use of reasonable use exception permitting alternative.

**It will be more appropriate to exclude this provision.**

**Re: TMC 18.45.195 D 4.**

There is no justification of establishing a minimum penalty of \$ 1,000 per tree regardless of the tree size and marketable value of each tree.

**It will be more appropriate that penalty to be “up to the marketable value of the tree” established by a certified professional.**

Ion Manea

Date: 04.11.2019

Property owner, 13407 4<sup>th</sup> Av S, Tukwila, WA., 98168

