

# MEMO



Date: January 8, 2024  
To: Mayor Sullivan  
Tumwater City Council Members  
Tumwater Planning Commission Members  
From: Karen Kirkpatrick, City Attorney  
CC: Mike Matlock, Community Development Director  
Brad Medrud, Planning Manager  
Subject: Attorney General's Advisory Memorandum and Recommended Process for  
Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional  
Takings of Private Property

The Attorney General is directed under RCW 36.70A.370 to advise state agencies and local governments on an orderly, consistent process that better enables the government to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property or raise substantive due process concerns. This process must be used by local governments that plan under the Growth Management Act (GMA). As a result of this direction, the *Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property* (Advisory Memorandum) was prepared. The Attorney General's Office reviews the Advisory Memorandum annually and updates it as necessary.

The current version was issued September 2018 and is available at this link:

<http://www.atg.wa.gov/avoiding-unconstitutional-takings-private-property>.

Please review the Attorney General's Advisory Memorandum and use it when considering amendments to the Comprehensive Plan and associated rezones and any other land use actions that come before you.

The recommended process outlined in Part 1 of the four-part Advisory Memorandum includes the following:

1. Review and Distribute. In addition to review by the City Attorney, it is recommended that the Advisory Memorandum be distributed to all of the City's decision makers and key staff.
2. Use Warning Signals. The Advisory Memorandum states that local governments should use the "Warning Signals" to evaluate proposed regulatory actions. Examples are listed in Part Three starting on Pg. 14.

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3. Develop an Internal Process. Staff and legal counsel have developed an internal process for assessing constitutional issues. This process occurs through adoption of development regulations, land use designations, and confidential attorney-client communications and legal memoranda.
  4. Incorporate Constitutional Assessments into the Agency Review Process. The nature and extent of the assessment will depend on the type of regulatory action and the specific impacts on private property. The City assesses constitutional issues through the City Attorney's office. This information is communicated to staff and decision makers via confidential attorney-client communications including confidential attorney-client memoranda and executive sessions.
  5. Develop an Internal Process to Respond to Identified Constitutional Issues. The City Attorney prepares an analysis of potential constitutional issues and options based on the Advisory Memorandum, independent analysis, and advice of outside counsel. That analysis is then communicated to staff and decision makers through verbal communication, confidential attorney-client communications and legal memoranda, and executive sessions.

If you have a problem with the above link to the Advisory Memorandum, prefer a printed copy, or have any questions, please contact my assistant, Sharleen Johansen, by phone at 360-701-3748 or email [sjohansen@ci.tumwater.wa.us](mailto:sjohansen@ci.tumwater.wa.us).