

**King County, Washington
Policies and Practice for the Use of Eminent Domain
For Flood Risk Reduction**

Introduction

Eminent domain refers to the power possessed by the state over all property within the state, specifically its power to appropriate property for a public use. In some cases, the state may delegate eminent domain power to certain public agencies or special purpose districts. This paper summarizes eminent domain policies used by King County to acquire property for flood risk reduction projects over the past 17 years. The King County Flood Control Zone District is guided by the policies in the 2006 King County Flood Hazard Management Plan, which are reflective of the current and past policies and practices used by King County.

Authority

Counties within Washington State are granted the authority to condemn property through the use of eminent domain for flood risk reduction purposes under RCW 86.12.030. Washington State also grants authority to flood control zone districts in RCW 86.15.080 to use condemnation to acquire necessary property, property rights, facilities, and equipment necessary to the purposes of the zone.

Limitations on Condemnation Under Federal Funding

Most jurisdictions, including King County, rely heavily on federal mitigation grant programs established through the Robert T. Stafford Disaster Relief and Emergency Assistance Act to acquire property for flood risk reduction purposes. Under the Code of Federal Regulations, 44 CFR 80.11, “eligible acquisition projects are those where the property owner participates voluntarily, and the grantee/subgrantee will not use its eminent domain authority to acquire property for open space purposes should negotiations fail.” Thus, funding under the federal Pre-Disaster Mitigation Grant Program, the Flood Mitigation Assistance Grant Program and the Hazard Mitigation Grant Program cannot be used for the purpose of property acquisitions through the means of condemnation. Since this is a significant source of funding for property acquisition, the federal prohibition on the use of grant money has served as a natural limit on the ability for King County, and many other jurisdictions, to use condemnation.

1993 King County Flood Hazard Reduction Plan

King County uses a number of factors when considering acquisition as a flood risk reduction strategy, but the primary factor is the depth and velocity of flood waters on properties. The 1993 Flood Hazard Reduction Plan identified a number of areas of high risk where the best solution for reducing or eliminating the risk would be to purchase and remove the structures, restore the site to natural conditions and restrict any future development on the site. In implementing the recommendations in the 1993 Plan, there was always more interested property owners willing to voluntarily sell their property to King County than there was available funding, so there was no need to use the power of eminent domain for property acquisition. Never-the-less, King County recognized the need to have clear policy direction when developing the 1993 King County Flood Hazard

Reduction Plan. Policy FHR-5 established four circumstances under which King County would consider using the power of eminent domain.

Policy FHR-5:

Except under very limited circumstances, county acquisition of threatened buildings should be voluntary on the part of the property owner. Condemnation should be considered only under the following circumstances: 1) federal, state and/or local regulations prohibit reconstruction of the building; 2) the property in question is causing significant flood damage to other properties; 3) a property owner refuses to sell a portion of an area in which the majority or property owners have agreed to sell to the county, or 4) a property owner refuses to sell and area needed to complete an approved capital improvement project.

Using the guidance under Policy FHR-5, King County acquired ninety properties at a total purchase price of \$10,489,754¹ between 1991 and 2005. All of these acquisitions were voluntary on the part of the property owners and were acquired at fair market value. Eminent domain was not used for any of these acquisitions. Two of the properties were donated to King County.

Green River Flood Control Zone District

The Green River Flood Control Zone District was originally established with concurrence of the affected Lower Green River valley cities of Tukwila, Renton, Kent and Auburn in 1960. The District established a policies and procedures document for property acquisition of real property or acquisition of property rights, which is included as attachment 1 to this paper. One of the key components of the Green River Flood Control Zone District policy on acquisition was to coordinate acquisition proposals through the District's Technical Committee, but in all cases the District's Board of Supervisors had the final authority to approve or reject any real property or property rights acquisition proposal. Thus any decision to condemn property needed concurrence with all four cities and King County. The Green River Flood Control Zone District recognized that condemnation would only be used under very rare circumstances and must benefit the interests of the underlying community:

Acquisition by Condemnation. When a mutually satisfactory negotiated settlement cannot be reached, real property may be acquired through the use of eminent domain authorities (condemnation). Exercising condemnation rights would occur under rare circumstances and must benefit the interests of the underlying community and be in direct connection with a planned flood hazard reduction project.

While the Green River Flood Control Zone District had the authority under state law to used condemnation, they never used that authority in their 47-year history. The Green River Flood Control Zone District was abolished in 2007.

2006 King County Flood Hazard Management Plan

¹ This number reflects the actual purchase price at the time of the sale and has not been adjusted to 2008 dollars.

The 2006 King County Flood Hazard Management Plan recognizes the authority authorized under RCW 86.12.030 to condemn property for flood risk reduction purposes. When King County purchases land from willing sellers, the property owner is given fair market value based on an independent private-sector appraisal. King County has never exercised the authority under RCW 86.12.030 to condemn property for a flood risk reduction project. The following policy in the 2006 Flood Hazard Management Plan provides property direction for property acquisition:

Policy PROJ-2: Property Acquisition

Property acquisition for flood risk reduction projects should be voluntary on the part of the property owner, except under very limited circumstances.

The 2006 Flood Hazard Management Plan has identified a number of areas of high flood risk where property acquisition is the recommended strategy. Policy PROJ-2 will guide King County's property acquisition.

King County Flood Control Zone District

The King County Flood Control Zone District was established on April 16, 2007 under King County Ordinance 15728. Section 4 of that ordinance adopts the 2006 King County Flood Hazard Management Plan as the initial comprehensive plan for the King County Flood Control Zone District. As such, Policy PROJ-2: Property Acquisition included above in this paper serves as the guiding policy for the District as it relates to property acquisition.

Conclusion

King County has acquired ninety properties at a cost of approximately \$10.5 million since 1991. In all cases, these acquisitions have been voluntary on the part of property owners, who were compensated at fair market value. The King County Flood Control Zone District uses policy guidance in the 2006 King County Flood Hazard Management Plan, which calls for voluntary acquisition of property, but maintains the right to use the powers of eminent domain under limited circumstances.

Attachment 1.

PROPERTY ACQUISITION POLICIES AND GUIDELINES

GREEN RIVER FLOOD CONTROL ZONE DISTRICT

I. POLICY ABSTRACT

The following policy sets forth the guidelines for when and how Green River Flood Control Zone District resources are used to acquire real property or property rights.

King County's comprehensive Flood Hazard Reduction Plan (1993) provides the policy framework to guide countywide flood hazard reduction programs and projects, which includes objectives to reduce flood impacts through the acquisition of developed and undeveloped land.

To ensure that real property or property rights acquisitions are consistent with goals and objectives of the *Interlocal Agreement for the Administration of the Green River Flood Control Zone District*, more specific policies and guidelines are necessary.

These principles and guidelines provide additional policy guidance regarding real property and property rights acquisitions by the District including procedures for coordinating acquisition proposals and process through the District's Technical Committee². The underlying intent of these principles and guidelines are to ensure greater involvement, understanding and cooperation of real property or property rights acquisitions for flood hazard reduction projects and programs among the cooperating jurisdictions within the District, which are the Cities of Auburn, Kent, Renton and Tukwila, and King County.

II. LAND ACQUISITION AUTHORITY

The authority of the Green River Flood Control Zone District to acquire real property is broadly established in Chapter 86.15.080 of the Revised Code of Washington (RCW), which grants the District to "exercise all the powers vested in a county for flood water or storm water control purposes under the provisions of chapters 86.12, 86.13, 36.89 and 36.94."

This includes the authority "to construct, operate, and maintain dams and impounding basins and dikes, levees, revetments, bulkheads, rip-rap or other protection" and "to acquire any real or personal property or rights and interest therein for the prosecution of such works or to preserve any floodplain or regular or intermittent stream channels from any interference to the free or natural flow of flood or storm water."

² The **Technical Committee** is the cooperative body composed of the public works or department directors and/or their designated representatives of each of the ILA's parties in addressing the cooperative administration of the District. The Technical Committee is also responsible for recommending actions to the Executive Committee related to flood hazard reduction planning, project implementation, and other District-related activities.

RCW 86.12.020 further authorizes counties, and therefore the Green River Flood Control Zone District, “to construct, operate, and maintain any and all other works, structures, and improvements necessary” for the purpose of “the control of waters subject to flood conditions from streams, tidal, or other bodies of water.” The authority in RCW 86.12.020 further establishes that counties “may purchase or otherwise acquire land, property, or rights, including beds of non-navigable waters and state, county and school lands and property and may damage any land or other property for any such purpose, and may condemn land and other property and rights and interests therein and damage the same for any other public use after just compensation having been first made or paid into court for the owner.”

Therefore, the District may acquire real property or property rights for the following public purposes:

- To construct, operate, and maintain flood protection facilities such as levees and revetments;
- To preserve floodplains for the free and natural flow of flood waters; and
- For any other public use, which would presumably include public access and/or the preservation or restoration of aquatic, and riparian and floodplain habitat areas, particularly when used as mitigation for similar habitats otherwise affected by the Green River Flood Control Zone District’s flood protection goals and objectives.

III. LAND ACQUISITION AND PROTECTION METHODS

These statutory authorities set forth in Chapter 86.15–Flood Control Zone Districts of the RCW allows the District to acquire real property or property rights through the following methods:

1. Acquisition by Purchase. Fee simple land purchase involves a voluntary and mutually satisfactory negotiated settlement by the property owner and the District. Direct purchase of real property is carried out consistent with all state and federal laws, and is based on appraised fair market value. Acquisitions are also available through the sale of tax title by King County in which properties become available for purchase when property taxes are delinquent for a period of greater than two years.
2. Acquisition by Condemnation. When a mutually satisfactory negotiated settlement cannot be reached, real property may be acquired through the use of eminent domain authorities (condemnation). Exercising condemnation rights would occur under rare circumstances and must benefit the interests of the underlying community and be in direct connection with a planned flood hazard reduction project.
3. Acquisition by Donation. Real property can be acquired by donation, however, donations cannot or should not always be accepted. Undesirable liabilities associated with real property ownership could include cost-prohibitive maintenance and management responsibility, contamination cleanup costs, or potentially other short- and long-term liabilities.
4. Acquisition by Exchange. An exchange action transfers the title of a District owned parcel for one or more privately owned properties of equal value. This type of transaction can be viewed as a combination acquisition and disposal action; disposal

of property by the District is also permissible under Chapter RCW 86.15. All exchange actions follow fee simple land acquisition procedures, such as conducting environmental site surveys.

5. Property Rights. Acquisition of property rights, such as easements and water rights, are also available to the District in lieu of fee simple land purchase. Such property rights acquisitions may be the preferred alternative if acquiring the easement is satisfactory to meet the District's needs for a specific purpose, or if acquiring the entire parcel is not financially in the best interest of the District and/or the land does not provide substantial value to flood hazard reduction or protection, or fish and wildlife resources. Conservation easements can, for example, restrict land-use impacts on private land by prohibiting development and therefore protect floodplain and ecological attributes.

IV. ACQUISITION PRINCIPLES

The primary purpose of any real property or property rights acquisition shall solely be for flood hazard reduction and mitigation purposes consistent with the District's goals and objectives and the District's authorities set forth in Chapter 86.15 RCW, and as referenced in Chapter 86.12 RCW.

Properties proposed for acquisition shall be lands that are located in the District's boundary and within the 100-year floodplain as delineated on the Federal Emergency Management Agency's Flood Insurance Rate Map and/or mapped channel migration hazard zones (CMZ)³. However, due to out-dated floodplain maps along the lower Green River, these maps may not fully represent today's 100-year floodplain and therefore a certain degree of professional judgment shall be used when evaluating the acquisition of land.

Those properties which lie outside the boundary of the mapped 100-year floodplain, but which may be integral to the implementation of an existing or planned flood hazard reduction project, may be acquired. This shall include real property and property rights that are necessary for mitigation, restoration and access purposes associated with an existing or planned flood hazard reduction project.

Acquisition of land for its habitat value or potential future enhancement must be considered so that, during the planning and subsequent construction of new projects or major modifications to existing projects in which impacts to fish and wildlife resources may require mitigation, the acquired land may provide necessary mitigation. These lands may also be available to the individual city with jurisdiction underlying the District's acquisition for purposes of a city-sponsored project consistent with any deed restrictions and the District's overall management goals (i.e., floodplain rehabilitation and/or other site restoration actions) for the property and subject to the approval of the District's Board of Supervisors⁴. Precedence shall be given to the acquisition of properties which

³ **Channel migration hazard zones** are those areas subject to risk due to stream bank destabilization, rapid stream incision, stream bank erosion and shifts in locations of stream channels. Currently, the only mapped CMZs for the Green River exist between river miles 25.0 and 45.0, with river mile 36.8 the upstream limit of the District's boundary.

⁴ Pursuant to Chapter 86.15.050 RCW, the King County Council members are the **Board of Supervisors** of the Green River Flood Control Zone District.

have the clear potential to contribute beneficially to flood hazard reduction and/or properties for which there is a high likelihood of conversion from its undeveloped condition to a developed condition.

To the extent that it is feasible, lands that are acquired should achieve multiple benefits in addition to flood hazard reduction by providing appropriate levels of public access and recreational opportunities; promoting fish and wildlife habitats; and/or facilitating and encouraging optimum use and utilization of adjacent public lands that serve the same or like purposes.

Land acquisitions in unincorporated King County shall be consistent with the policy directives adopted in the Rural Legacy, Environment, and Parks, Open Space & Cultural Resources chapters of the King County Comprehensive Plan (2000). Additionally, land acquisitions in unincorporated King County shall be evaluated with King County sensitive area designations and King County's Shoreline Management Master Program.

V. IMPLEMENTATION OF A PROPOSED PROPERTY ACQUISITION

The evaluation approach for determining and implementing the acquisition of real property or property rights shall be carried out as follows:

1. **Define Purpose.** Evaluate and identify the need for acquiring the land/interests (e.g., fee simple purchase, flood protection easement, conservation easement).
2. **Identify Parcel.** Identify the parcels, the authority to acquire rights and any restrictions on the District's authority to acquire rights, and a preliminary cost for acquisition. If practical, determine property owner's willingness to sell.
3. **Ascertain Potential Liabilities.** Establish the nature and extent of any potential liability resulting from hazardous substances or other environmental problems associated with such property.
4. **Prioritize Acquisition.** Identify the general order of acquisition priority, if more than one property is targeted for acquisition.
5. **Determine Funding.** Identify funding sources to acquire the interests in the property.
6. **Develop Schedule.** Develop a schedule for the commencement and completion of appraisals and negotiations and other key steps in the acquisition process, including a multi-year schedule if necessary.
7. **Implement Acquisition.** Carryout procedures consistent with the schedule and any other requirements necessary to complete the acquisition. This will include specific tasks such as an environmental site survey, title and appraisal reports, and real estate negotiation. Other tasks may include public meetings and grant acquisitions.

Throughout the implementation of the acquisition process, the District's Technical Committee shall be fully appraised and consulted with on each proposed acquisition to ensure acquisitions are consistent with this policy. The Technical Committee staff shall have the opportunity to comment on any proposed acquisition and appeal any decision

to the District's Executive Committee⁵ for further consideration in support of or rejection of the proposed acquisition. If unresolved, the Executive Committee shall defer its decision to the District's Board of Supervisors for approval or rejection. Under all circumstances, however, the District's Board of Supervisors will have the final authority to approve or reject any real property or property rights acquisition proposal.

All new proposed real property or property rights acquisitions shall be identified and approved through the adoption of the District's annual work program and budget consistent with the *Interlocal Agreement for the Administration of the Green River Flood Control Zone District*. The acquisition of all real property or property rights which have not been identified in the District's annual work program and budget will be forwarded to and coordinated through the District's Technical Committee. However, if an opportunity exists for the District to purchase real property or property rights and sufficient time is not available to fully consult with the Technical Committee, the District's Administrators⁶ shall follow these principles and guidelines to the fullest extent possible. The Technical Committee shall be kept apprised of all activities and decisions.

These guidelines and policies do not abrogate authorities in any adopted code and shall remain effective for the duration of the ten-year term of the *Interlocal Agreement for the Administration of the Green River Flood Control Zone District (2002)* or unless superceded by amended property acquisition policies and guidelines.

⁵ The **Executive Committee** is the governing body responsible for providing advisory policy guidance and recommendations under the terms of District's ILA and is responsible for reviewing and providing recommendations on the District's annual budget and work program, and for providing recommendations, as appropriate, to the District's Board of Supervisors.

⁶ **Administrators** means the employees, specialists, technicians, fiscal agents and other personnel supplied by King County for the administration of the District.