

KING COUNTY, WASHINGTON ORDINANCE 15053: IS “THE  
MOST RESTRICTIVE LAND-USE LAW IN THE NATION”  
CONSTITUTIONAL?

BY  
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*On October 26, 2004, the King County Council passed a land-use ordinance that prohibits the county’s rural landowners from clearing any more than fifty percent of their land. Some landowners must retain up to sixty-five percent of their land in its natural condition. Opponents argue that the regulation is the most restrictive land-use law in the nation. County landowners attack the regulation as an unconstitutional invasion of their private property rights. This Comment analyzes whether the regulation takes private property without just compensation in violation of the Fifth Amendment and whether the regulation violates landowners’ substantive due process rights protected by the Fourteenth Amendment. The author concludes that the regulation serves a substantial state interest in protecting water quality in rural areas, does not destroy fundamental aspects of property ownership, and will have an insufficient economic impact on individual landowners to amount to a regulatory taking. Likewise, landowners’ substantive due process challenges should fail because the ordinance does not unfairly force rural landowners to shoulder the burdens associated with water quality protection and does not “unduly oppress” the affected landowners.*

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## I. INTRODUCTION

Just after midnight on October 26, 2004, the King County<sup>1</sup> Council approved Ordinance 15053,<sup>2</sup> a controversial clearing and grading ordinance characterized by property rights advocates, and certain members of the council, as the "most restrictive land use law in the nation."<sup>3</sup> Passed by a vote of 7-6, the ordinance imposes stringent land clearing restrictions on

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<sup>1</sup> King County, with a population of 1,788,300, is the most populous county in Washington and the 13th most populous county in the United States. KING COUNTY, 2004 ANNUAL GROWTH REPORT – STATISTICAL PROFILE OF KING COUNTY 1 (2004), *available at* <http://www.metrokc.gov/budget/agr/agr04/PDFs/back-cvr04.pdf>. Despite containing densely populated urban areas such as the City of Seattle, 82% of King County's 2,130 square miles of land are located outside of cities and zoned for rural, forest, and agricultural uses. KING COUNTY, BEST AVAILABLE SCIENCE VOLUME 1: A REVIEW OF SCIENCE LITERATURE § 1.2, at 1-7 (2004), *available at* <http://www.metrokc.gov/ddes/cao/#best> [hereinafter BEST AVAILABLE SCIENCE VOLUME 1].

<sup>2</sup> King County, Wash., Ordinance 15053 (Oct. 26, 2004) (codified in scattered sections of KING COUNTY, WASH., CODE tit. 16 (2005)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>3</sup> See FoxNews.com, Private Property May Become Preserved, <http://www.foxnews.com/story/0,2933,124358,00.html> (last visited Jan. 22, 2006) (referring to the proposed ordinance as the most restrictive land-use regulation in the nation). Opposing King County Councilmember Rob McKenna called the ordinance "the most draconian land-use regulation[] in the state, if not the country." Keith Ervin, *In Effort to Preserve Land, King County, Wash., Limits Uses of Rural Property*, SEATTLE TIMES, Oct. 26, 2004, at B1, *available at* 2004 WLNR 14643898.

King County's rural landowners because a majority of the council concluded, on the basis of extensive scientific studies, that excessive clearing and loss of forest cover causes significant damage to wetlands, streams, and groundwater. Specifically, the studies showed that substantial impairment to water quality results when more than 35% of a watershed is cleared,<sup>4</sup> and that potentially irreversible loss of aquatic system function occurs where more than 10% is covered with an impervious surface.<sup>5</sup>

Ordinance 15053 prohibits most rural landowners in unincorporated King County from clearing more than 50% of their land.<sup>6</sup> Owners of large land parcels (parcels greater than five acres) are prohibited from clearing more than 35% of their land.<sup>7</sup> The remaining 65% of the land must remain unaltered in its natural forested or vegetative condition. These clearing restrictions became effective on January 1, 2005.

King County adopted the new clearing and grading ordinance in response to Washington's Growth Management Act (GMA),<sup>8</sup> which requires cities and counties to adopt and periodically update regulations that protect critical areas.<sup>9</sup> The GMA established a timetable for critical area regulation updates, requiring King County to review and revise its existing regulations by December 1, 2004.<sup>10</sup> By December 1, 2007, every other city and county in Washington must review and update their critical area regulations.<sup>11</sup>

In March 2005, Pierce County, which borders King County to the south, became the second county in Washington to prohibit rural residential landowners from clearing more than 35% of their land.<sup>12</sup> With thirty more counties required to update their critical area regulations by December 1, 2007, other counties may follow King County's lead and enact similarly restrictive clearing regulations. The success or failure of legal challenges to

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<sup>4</sup> BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, § 7.2.8, at 7-27 (citing D.B. BOOTH, FOREST COVER, IMPERVIOUS SURFACE AREA, AND THE MITIGATION OF URBANIZATION IMPACTS IN KING COUNTY, WASHINGTON (2000)).

<sup>5</sup> *Id.* § 7.2.5, at 7-14 (citing D.B. BOOTH & L.E. REINELT, CONSEQUENCES OF URBANIZATION ON AQUATIC SYSTEMS – MEASURED EFFECTS, DEGRADATION THRESHOLDS, AND CORRECTIVE STRATEGIES (1993)).

<sup>6</sup> King County, Wash., Ordinance 15053 § 14A (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.150A (2004)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> WASH. REV. CODE §§ 36.70A.010–36.70A.902 (2004).

<sup>9</sup> The GMA defines critical areas as (a) wetlands, (b) areas with a critical recharging effect on aquifers used for potable water, (c) fish and wildlife habitat conservation areas, (d) frequently flooded areas, and (e) geologically hazardous areas. *Id.* § 36.70A.030(5).

<sup>10</sup> *Id.* § 36.70A.130(4)(a).

<sup>11</sup> *Id.* § 36.70A.130(4)(a)–(d). The GMA's staggered deadlines for critical area updates required nine counties, including King and Pierce, to complete the updates of their critical area regulations by December 1, 2004. The other 30 counties in Washington have later deadlines, but all counties must complete their updates by December 1, 2007.

<sup>12</sup> Pierce County, Wash., Ordinance 2004-56s (Oct. 19, 2004). Pierce County enacted its critical areas package one week before King County passed its ordinance, but the Pierce County ordinance did not take effect until March 2005, two months after the King County ordinance took effect.

the King County ordinance will likely influence whether other counties adopt similar regulations.<sup>13</sup>

Affected rural landowners in King County claim that the land clearing restrictions are an unconstitutional intrusion on their private property rights.<sup>14</sup> There are two primary avenues to challenge the constitutionality of a land-use regulation in Washington.<sup>15</sup> The first is to allege that the regulation has “taken” the landowner’s property without payment of just compensation in violation of the Fifth Amendment of the U.S. Constitution.<sup>16</sup> The second is to argue that the regulation violates the landowner’s substantive due process rights under the Fourteenth Amendment<sup>17</sup> of the U.S. Constitution.<sup>18</sup> A landowner could also argue that the regulation takes property in violation of article I, section 16 of the Washington Constitution.<sup>19</sup> However, with only one exception, the Washington Supreme Court has not interpreted the takings clause in Washington’s Constitution to provide broader protection than the Fifth Amendment.<sup>20</sup>

It is unlikely that any landowner can successfully claim, either in a facial or as-applied challenge, under either the U.S. or Washington

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<sup>13</sup> On March 3, 2005, Pacific Legal Foundation filed suit on behalf of Citizens Alliance for Property Rights (CAPR) in Snohomish County, Washington Superior Court (Case No. 04-2-13831-9) to invalidate the ordinance. Natalie Singer, *Suit Challenges Land-Use Rules*, SEATTLE TIMES, March 4, 2005, at B5, *available at* 2005 WLNR 3323258. Prior to its lawsuit, CAPR also filed a referendum petition in an effort to subject the ordinance to a popular vote. King County and local environmental organizations filed a lawsuit to stop the referendum. In January 2005, King County Superior Court blocked the referendum, ruling that land-use regulations required under the GMA are “beyond the scope of the referendum power.” See Jim Downing, *Judge Rules Out Ballot Fight On Land-Use Rules*, SEATTLE TIMES, Jan. 12, 2005, at B1, *available at* 2005 WLNR 447287 (citing *City of Seattle v. Yes for Seattle*, 93 P.3d 176, 177 (Wash. Ct. App. 2004), *Whatcom County v. Brisbane*, 884 P.2d 1326, 1329 (Wash. 1994), and *Snohomish County v. Anderson*, 868 P.2d 116, 120 (Wash. 1994), cases where courts ruled against similar attempts to enact or invalidate land-use regulations through the initiative/referendum process). CAPR’s appeal of the King County Superior Court decision is currently pending before the Washington Supreme Court (Case No. 76581-2). See Dean Radford, *State’s High Court Hears Land Use Regulation Arguments*, KING COUNTY JOURNAL, Jan. 26, 2006, *available at* <http://www.kingcountyjournal.com/sited/story/html/228696>.

<sup>14</sup> Keith Ervin, *Foes Vow Court Fight Over Land-Use Rules*, SEATTLE TIMES, Aug. 2, 2004, at B1, *available at* 2004 WLNR 1789606; Singer, *supra* note 13, at B5.

<sup>15</sup> *Presbytery of Seattle v. King County*, 787 P.2d 907, 912 (Wash. 1990).

<sup>16</sup> U.S. CONST. amend. V (stating “nor shall private property be taken for public use, without just compensation”).

<sup>17</sup> U.S. CONST. amend. XIV, § 1 (prohibiting states from “depriv[ing] any person of life, liberty, or property, without due process of law”).

<sup>18</sup> *Guimont v. Clarke*, 854 P.2d 1, 5 (Wash. 1993).

<sup>19</sup> WASH. CONST. art. I, § 16 (stating “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made”).

<sup>20</sup> The one exception occurred in *Manufactured Housing Communities of Washington v. State*, where the Washington Supreme Court held that Washington’s Constitution forbids the taking of private property for *private* use, even in cases where the federal Fifth Amendment may permit such takings. 13 P.3d 183, 189–90 (Wash. 2000). The court also held that legislative abrogation of a landowner’s right to sell *facially* violates the takings clause of the Washington Constitution. *Id.* at 190. Compare *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *affirmed* 125 S.Ct. 2655 (2005) (holding that the condemnation and transfer of one person’s private property to another private party for economic development may be a public use under the Fifth Amendment).

Constitution, that Ordinance 15053 amounts to a regulatory taking because the ordinance substantially advances the county's interest in water quality protection, does not destroy fundamental attributes of property ownership, and will not have a sufficiently adverse economic effect on landowners to amount to an unlawful taking.<sup>21</sup> Landowners can still possess, convey, build on, and subdivide their land and thus retain a significant amount of economic value in their land.<sup>22</sup> The county's interest in protecting the quality of ground and surface water from the harm that results from loss of forest cover, as shown by the scientific studies that the county relied upon, is also significant.<sup>23</sup> Since Washington courts rarely conclude that land-use regulations take private property, the success of a takings claim seems especially unlikely.<sup>24</sup>

On the other hand, the Washington Supreme Court has exhibited a willingness to rule that restrictive land-use regulations violate a landowner's federal substantive due process rights.<sup>25</sup> The different remedies that the two claims offer explain this preference for due process versus takings analysis. A successful takings claim requires the local government to fully compensate the landowner, even for a temporary taking,<sup>26</sup> but a successful due process claim only results in invalidation of the ordinance.<sup>27</sup> The court expressly prefers the remedy of invalidation over an award of damages for burdensome land-use regulations, because the "specter of strict financial liability" in takings cases results in a "chilling effect" on land-use regulation, deterring legislative bodies from making difficult land-use regulatory decisions.<sup>28</sup>

The Washington Supreme Court's substantive due process analysis of land-use regulation poses a more significant and less predictable hurdle for the King County ordinance, primarily due to the large amount of discretion that the due process test vests in the court.<sup>29</sup> Washington's Supreme Court

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<sup>21</sup> See *infra* section III.B (analyzing whether King County Ordinance 15053 unconstitutionally takes private property in violation of the Fifth Amendment).

<sup>22</sup> King County, Wash., Ordinance 15053 § 15E (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.152 (2005)), available at [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf). Compare *Lucas v. South Carolina Coastal Council*, where the South Carolina Beachfront Management Act prohibited construction of any improvements on the land at issue, denying the landowner of all economic value of his land, and resulting in a taking. 505 U.S. 1003 (1992).

<sup>23</sup> BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, § 7.2.8, at 7-27 (citing BOOTH, *supra* note 4) and § 7.2.5, at 7-14 (citing BOOTH & REINELT, *supra* note 5).

<sup>24</sup> See *Orion Corp. v. State*, 747 P.2d 1062, 1077 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1987) (noting that in the past 20 years, the Washington Supreme Court has found a taking on only two occasions, and in those cases the court implicitly employed a due process analysis and remedy, rather than a takings analysis).

<sup>25</sup> *Presbytery of Seattle v. King County*, 787 P.2d 907, 914 (Wash. 1990); *Orion*, 747 P.2d at 1077.

<sup>26</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987).

<sup>27</sup> *Presbytery*, 782 P.2d at 913.

<sup>28</sup> *Id.* at 913-914; *Orion*, 747 P.2d at 1077.

<sup>29</sup> See Susan Boyd, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of Lawton v. Steele in the Supreme Court of Washington*, 74 WASH. L. REV. 69, 79, 94 (1999) (arguing that the Washington Supreme Court has improperly used the wide amount of discretion allowed in its substantive due process analysis to "invade the social policymaking

determines whether an ordinance violates federal due process rights by balancing numerous factors that weigh in favor and against the public and private interests involved.<sup>30</sup> The key inquiry in the context of the clearing and grading ordinance is whether the 35 and/or 50% clearing limits are “unduly oppressive” to individual landowners in rural King County.<sup>31</sup>

This Comment analyzes the constitutionality of the clearing and grading restrictions adopted by King County in Ordinance 15053. Part II scrutinizes the key provisions of Ordinance 15053 and the justifications for their adoption. Part III explains why landowners will likely fail on their claims that the ordinance works a regulatory taking of their land. Part IV examines the Washington Supreme Court’s application of substantive due process and argues that Ordinance 15053 does not violate the substantive due process rights of King County’s rural landowners. The Comment concludes that Washington courts will likely hold that Ordinance 15053 neither unconstitutionally takes private property, nor violates landowners’ substantive due process rights because of the county’s substantial interest in protecting water quality, and because the economic impact on affected landowners is insufficient to result in a taking or a due process violation.

## II. KING COUNTY ORDINANCE 15053: RESTRICTIONS ON CLEARING TO PREVENT HARM TO WATER QUALITY AND SPECIES

The GMA requires every city and county in Washington to designate critical areas within their jurisdiction and to protect those areas through the adoption of development regulations.<sup>32</sup> Critical area regulations serve a dual purpose of protecting both public health and safety and environmentally sensitive areas. Critical area regulations comply with the GMA only if they include the best available scientific information and protect all “functions and values” of the critical areas designated by the local government.<sup>33</sup> In developing critical area regulations, local governments must give special consideration to the conservation and protection of anadromous fisheries within the government’s jurisdiction.<sup>34</sup>

In late 2002, King County began to review the existing science on critical area protection in preparation for its required critical area regulation updates. In February 2004, the county published a two-volume report that summarized the best available scientific information and assessed the new critical area protections that King County proposed.<sup>35</sup> In October 2004, after two full years of scientific review, twenty-one public meetings, and sixteen

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role of the legislature”).

<sup>30</sup> *Presbytery*, 787 P.2d at 913.

<sup>31</sup> *Robinson v. City of Seattle*, 830 P.2d 318, 330 (Wash. 1992) (stating that the inquiry into whether a land-use regulation is unduly oppressive is the “difficult and determinative” inquiry in a substantive due process claim).

<sup>32</sup> WASH. REV. CODE §§ 36.70A.170, 36.70A.060(2) (2004).

<sup>33</sup> *Id.* § 36.70A.172(1).

<sup>34</sup> *Id.*

<sup>35</sup> BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1; KING COUNTY, BEST AVAILABLE SCIENCE VOLUME 2: ASSESSMENT OF PROPOSED ORDINANCES (2004), *available at* <http://www.metrokc.gov/ddes/cao/#best>.

opportunities for public comment, the King County Council narrowly approved a “critical areas package” that included a stormwater ordinance, a critical areas ordinance, and, most controversially, Ordinance 15053, the clearing and grading ordinance.<sup>36</sup>

The purpose of the new clearing limits is to preserve the quality of streams and groundwater and protect anadromous fish habitat through retention of adequate forest cover.<sup>37</sup> King County relied on scientific studies that showed that retention of forest cover is essential for protection of stream quality and fish habitat.<sup>38</sup> One study concluded that when a watershed reaches approximately 10% effective impervious area, “demonstrable, and probably irreversible, loss of aquatic system function occurs in western Washington streams.”<sup>39</sup> Another study indicated that retention of a minimum of 65% of natural land cover in a basin is necessary to prevent such damage.<sup>40</sup>

Loss of forest cover and its negative effects on water quality is especially problematic in King County, which contains both a large and expanding population and numerous streams containing imperiled salmon runs. From 1972 to 1996, King County lost more than one third of its forest cover, including 27,000 acres of forest cover from 1994–1996 alone.<sup>41</sup> With King County’s population expected to grow by 250,000 people over the next twenty years, this pattern of forest cover removal for residential development is certain to continue. In adopting the clearing restrictions in Ordinance 15053, King County attempted to balance preservation of its

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<sup>36</sup> Ervin, *supra* note 3, at B1.

<sup>37</sup> In the words of the King County Council:

the clearing and grading ordinance . . . applies seasonal clearing limits . . . to help prevent sedimentation of streams and other critical areas. . . . Retention of forest cover augments the protection provided by buffers for wetlands, aquatic areas, and fish and wildlife conservation areas. The clearing limits are structured in a way that encourages forest cover to be retained in the vicinity of other critical areas, and to lay out subdivisions in a manner that minimizes fragmentation of wildlife habitat.

King County, Wash., Ordinance 15051 § 3(f) (Oct. 25, 2004), *available at* [http://www.metrokc.gov/council/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/council/cao/critical_areas_15051.pdf). See generally KING COUNTY, CRITICAL AREA ORDINANCE USER’S MANUAL (2004), *available at* <http://www.metrokc.gov/ddes/cao/Manual/Intro.pdf> (explaining the purposes and effects of the clearing and grading ordinance); KING COUNTY, CLEARING AND GRADING ORDINANCE FACT SHEET (2004), *available at* [www.metrokc.gov/ddes/cao/PDFs/factClearingGrading.pdf](http://www.metrokc.gov/ddes/cao/PDFs/factClearingGrading.pdf) (providing an overview of the clearing and grading ordinance).

<sup>38</sup> See BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, § 7.2.5, at 7-13–7-14 (2004) (discussing the effects of development on aquatic habitat).

<sup>39</sup> *Id.* § 7.2.5, at 7-14 (citing BOOTH & REINELT, *supra* note 5).

<sup>40</sup> *Id.* § 7.2.8, at 7-27 (citing BOOTH, *supra* note 4) (finding that 35% loss of vegetative cover and 10% effective impervious surface is the point where downstream aquatic channels start to become “seriously degraded”).

<sup>41</sup> See King County, *Accountability, Efficiency and Ease of Use Added to Critical Areas Package* (Oct. 25, 2004), [http://www.metrokc.gov/council/news/2004/1004/DC\\_LP\\_DP\\_CAO.htm](http://www.metrokc.gov/council/news/2004/1004/DC_LP_DP_CAO.htm) (last visited Jan. 22, 2006) (discussing the adoption of new legislation in King County to protect critical areas, steep slopes, and wetlands from the impacts of new development).

streams and fisheries, as required by the GMA,<sup>42</sup> with this projected increase in population and development.

The clearing limits in Ordinance 15053 apply only to properties located in the “rural area” zone,<sup>43</sup> presumably because other than the forest production lands in eastern King County (which are largely publicly owned), the rural area is the only part of the county that retains a substantial amount of forest cover. The ordinance prohibits landowners within the rural area from clearing any more than 50% of their land.<sup>44</sup> For lots greater than five acres, the clearing limit is the greater of 2.5 acres or 35%.<sup>45</sup> For lots under 1.25 acres, the clearing limit is 50%, but clearing necessary for utilities, septic, and access does not count towards the clearing limit.<sup>46</sup> The ordinance applies prospectively; therefore, lots cleared prior to adoption of the ordinance are unaffected.<sup>47</sup>

A landowner subdividing her property may clear up to 50% of the proposed subdivision, so long as she places the uncleared area in a separate tract that either minimizes fragmentation of wildlife habitat or maximizes protection of critical areas and prevention of flooding, erosion, and

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<sup>42</sup> The GMA requires counties to protect the environment including water quality and the availability of water. WASH. REV. CODE § 36.70A.020(10) (2004). The GMA specifically requires protection of all the “functions and values” of critical areas and requires counties to give “special consideration” to anadromous fisheries in its jurisdiction. *Id.* § 36.70A.172.

<sup>43</sup> King County, Wash., Ordinance 15053 § 14A (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.150A (2005)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf). Approximately 13% of land in King County is zoned “rural area” (RA). Eighteen percent of King County is zoned for cities/urban growth; the remaining 69% consists of agricultural, mining, and forest resource lands. The purpose of the RA zone is to provide for an area-wide long-term rural character and to minimize land-use conflicts with nearby agricultural or forest production districts or mineral extraction sites. *See* KING COUNTY, WASH., CODE § 21A.04.060A (2005). Low density residential is the primary land-use in the rural area zone, comprising 85% of the land area within the RA zone. BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, § 1.2 at 1-8.

<sup>44</sup> King County, Wash., Ordinance 15053 § 14A (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.150A (2005)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>45</sup> *Id.* § 14A(3) (codified at KING COUNTY, WASH., CODE § 16.82.150A(3) (2005)).

<sup>46</sup> *Id.* § 14A(1) (codified at KING COUNTY, WASH., CODE § 16.82.150A(1) (2005)).

<sup>47</sup> *Id.* § 14A (codified at KING COUNTY, WASH., CODE § 16.82.150A (2005)). Ordinance 15053 allows landowners some flexibility to increase the clearing limits on their property under certain circumstances. To increase the clearing limit, the landowner may prepare either a rural stewardship plan or farm management plan. *Id.* § 16 (codified at KING COUNTY, WASH., CODE § 16.82.154 (2005)). Upon county approval of such a plan, the clearing limit provided for in the approved plan supersedes the clearing limits in the ordinance. *Id.* § 14C(1) (codified at KING COUNTY, WASH., CODE § 16.82.150C(1) (2005)). In a rural stewardship or farm management plan, a property owner agrees to restore, maintain, and monitor critical areas, buffers, and/or native vegetation in exchange for an increase in clearing limits on the property, or a lessening of other environmental restrictions. King County, Wash., Ordinance 15051 §§ 138–139 (Oct. 25, 2004) (codified at KING COUNTY, WASH., CODE §§ 21A.24.051, 21A.24.055 (2005)), *available at* [http://www.metrokc.gov/council/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/council/cao/critical_areas_15051.pdf). The landowner may also be eligible for property tax reductions upon approval of the rural stewardship plan. KING COUNTY, WASH., CODE § 21A.24.055H (2005). King County also allows a reasonable use exception in the event that critical area regulations deny a landowner all reasonable use of her land. *See* KING COUNTY, WASH., CODE §§ 21A.06.950, 21A.24.070B (2005).



groundwater impacts.<sup>48</sup> The ordinance does not require the landowner to dedicate the separate tract to the public.<sup>49</sup> If the landowner does not place the uncleared portion of the subdivision in a separate tract, the clearing limit remains at 35%, and the owner can distribute the required 65% vegetative cover throughout the plat however she wants.<sup>50</sup>

Within the uncleared area, the ordinance permits 1) logging that complies with a county-approved forest management plan, 2) recreational uses like hiking and biking trails, nature viewing areas, and fishing and camping areas, and 3) other uses that do not require permanent structures.<sup>51</sup> Other permissible uses include pruning or removal of hazard trees, removal of downed trees, actions taken to reduce danger from wildfire if done in accordance with the King County fire marshal's best management practices, and the removal of noxious vegetation.<sup>52</sup>

### III. THE CONSTITUTIONALITY OF THE CLEARING AND GRADING ORDINANCE UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

King County's rural landowners argue that the clearing and grading regulations unconstitutionally take their private property rights. This section describes the Washington Supreme Court's framework for analyzing regulatory takings claims<sup>53</sup> and explains that the landowners' takings claims will likely fail because: 1) the King County Ordinance serves a substantial state interest, 2) does not destroy fundamental attributes of property ownership, and 3) will have an insufficient economic impact on individual landowners to amount to a regulatory taking.

#### *A. The Washington Supreme Court's Takings Framework*

Landowners in Washington may challenge land-use regulations as either an unconstitutional taking or as a violation of their substantive due process rights.<sup>54</sup> If the landowner challenges the regulation on both grounds, Washington courts will analyze the takings claim first.<sup>55</sup> If the court does not find a taking, the court will proceed to consider whether the regulation violates the landowner's substantive due process rights.<sup>56</sup>

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<sup>48</sup> King County, Wash., Ordinance 15053 § 15E (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.152E (2005)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>49</sup> *Id.* § 15E(1) (codified at KING COUNTY, WASH., CODE § 16.82.152E(1) (2005)).

<sup>50</sup> *Id.* § 15A(1) (codified at KING COUNTY, WASH., CODE § 16.82.152A(1) (2005)). The county can require additional open space if a specific development has a direct adverse effect on critical areas that requires additional mitigation. *Id.* § 7 (codified at KING COUNTY, WASH., CODE § 16.82.075 (2005)).

<sup>51</sup> *Id.* § 14F (codified at KING COUNTY, WASH., CODE § 16.82.150F (2005)).

<sup>52</sup> *Id.*

<sup>53</sup> The Washington Supreme Court's framework for analyzing a takings claim is set forth in *Guimont v. Clarke*, 854 P.2d 1, 8–11 (Wash. 1993).

<sup>54</sup> *Guimont*, 854 P.2d at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* A landowner may choose to proceed on one or both of the two independent theories.

When reviewing a takings claim, the Washington Supreme Court first considers whether the regulation, on its face, is a per se taking.<sup>57</sup> The Washington Supreme Court considers four types of regulations to be subject to a facial challenge as per se categorical takings.<sup>58</sup> Those four types of government action are those that: 1) effect a total taking of all economically viable uses of an individual's property,<sup>59</sup> 2) result in an actual physical invasion of property,<sup>60</sup> 3) destroy one or more fundamental attributes of property ownership,<sup>61</sup> or 4) are aimed at enhancing the value of publicly owned property.<sup>62</sup> If a property owner successfully proves that the mere enactment of the regulation accomplishes one or more of those four results, the court will require payment of just compensation without any further inquiry into the purpose or effect of the regulation.<sup>63</sup> The landowner's burden is high in such a facial challenge, since she must show that mere enactment of the regulation causes one of the four categorical takings to occur.<sup>64</sup>

If a landowner fails to establish a categorical taking under this first threshold inquiry, the court will analyze whether the regulation prevents a public harm or provides an affirmative public benefit.<sup>65</sup> Despite the U.S. Supreme Court's explicit criticism of such harm/benefit analysis,<sup>66</sup> the Washington Supreme Court has declined to remove that analysis from its takings framework.<sup>67</sup> If the court deems the regulation harm-preventing, the regulation may be insulated from a takings challenge.<sup>68</sup> If the court does not

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<sup>57</sup> *Id.* at 9; *Guimont v. City of Seattle (Guimont II)*, 896 P.2d 70, 76 (Wash. Ct. App. 1995).

<sup>58</sup> *Manufactured Hous. Cmty. of Wash. v. State (Manufactured Hous.)*, 13 P.3d 183, 187 (Wash. 2000).

<sup>59</sup> *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

<sup>60</sup> *Manufactured Hous.*, 13 P.3d at 187 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

<sup>61</sup> Fundamental attributes of property ownership include the right to possess, the right to exclude, and the right to dispose of property. *Manufactured Hous.*, 13 P.3d at 187 (citing *Presbtery v. City of Seattle*, 787 P.2d 907, 912–913 (Wash. 1990)). In *Manufactured Housing*, the court held that deprivation of the property owner's right to sell was a facially unconstitutional taking. However, the court analyzed and ruled on the issues in *Manufactured Housing* under the Washington Constitution, not the federal Fifth Amendment. *See supra* note 20.

<sup>62</sup> *Manufactured Hous.*, 13 P.3d at 187 (citing *Orion Corp. v. State*, 747 P.2d 1062, 1078 (Wash. 1987)).

<sup>63</sup> *Guimont v. Clarke*, 854 P.2d 1, 12 (Wash. 1993). Plaintiffs will presumably bring facial challenges to the third and fourth type of regulations identified by the Washington Supreme Court as categorical takings in *Manufactured Housing* under the Washington Constitution, as opposed to the Fifth Amendment because the U.S. Supreme Court has recognized only two types of regulations to be "per se" Fifth Amendment takings. *See Lucas*, 505 U.S. at 1015 (recognizing per se takings when regulations result in physical invasions of property or deny all economically beneficial use of land).

<sup>64</sup> *Guimont*, 854 P.2d at 12.

<sup>65</sup> *Id.* at 10.

<sup>66</sup> *Lucas*, 505 U.S. at 1024–25.

<sup>67</sup> *See Guimont*, 854 P.2d at 10–11 n. 5 (acknowledging the United States Supreme Court's "questioning" of the harm/benefit analysis in *Lucas*, but refusing to modify the court's takings framework).

<sup>68</sup> *Id.* at 11.

characterize the regulation as harm-preventing, the regulation is not insulated and the court proceeds with a fact-specific takings analysis.<sup>69</sup>

In the fact-specific takings analysis, the Washington Supreme Court first examines whether the regulation substantially advances a legitimate state interest.<sup>70</sup> If the regulation does not substantially advance a legitimate state interest, it is a taking, and the court's inquiry ends.<sup>71</sup> If the regulation does substantially advance a legitimate state interest, the court will continue its taking analysis with a balancing test, evaluating 1) the regulation's economic impact on the specific property at issue, 2) the extent of the regulation's interference with investment-backed expectations, and 3) the character of the government action.<sup>72</sup> If the adverse economic effect on the landowner outweighs the state's interest in the regulation, a taking exists, and the local government must pay the landowner just compensation.<sup>73</sup>

*B. Analyzing Whether King County Ordinance 15053 Unconstitutionally Takes Private Property in Violation of the Fifth Amendment*

It is unlikely that landowners can prevail on a claim that King County Ordinance 15053 unconstitutionally takes private property without compensation because the clearing and grading regulations substantially advance the legitimate state interest of water quality protection, are strongly supported by scientific studies that document the harm that King County is attempting to prevent, do not destroy fundamental attributes of property ownership, and will not have a sufficiently adverse economic impact on landowners to amount to an unlawful taking. Although the Ordinance restricts certain uses and activities on private land, both the U.S. and Washington Supreme Courts have upheld regulations with substantially greater economic effects than the clearing and grading restrictions in Ordinance 15053.<sup>74</sup> It is unlikely that any landowner, even in an as-applied challenge, could allege a sufficient economic impact to warrant compensation.

*1. Facial Challenges to the King County Clearing and Grading Ordinance*

To prevail in a facial challenge of Ordinance 15053, a landowner will have to prove that the mere enactment of the regulation results in one of the

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 397 (1926) (holding that 75% diminution in value is not a takings); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 414 (1915) (affirming state court decision that diminution in value from \$800,000 to \$60,000 did not result in a taking); *Orion Corp. v. State*, 747 P.2d 1062, 1065–66, 1082 (Wash. 1987) (reduction of property value from \$600 an acre to approximately \$100 per acre not sufficient, standing alone, for a taking); *Jones v. King County*, 874 P.2d 853, 855, 859 (Wash. Ct. App. 1994) (downzoning that reduced size of potential subdivision from about 160 lots to approximately 25 not a taking).

four categorical takings recognized by the Washington Supreme Court.<sup>75</sup> First, the ordinance does not deprive the landowner of all economically viable use of his land because the landowner can still build one or more residences and can still subdivide the property into multiple lots.<sup>76</sup> The regulation bears no resemblance to the beachfront management regulation at issue in *Lucas v. South Carolina Coastal Council*<sup>77</sup> that prohibited construction of any structure on the land and thus deprived the landowner of all economically beneficial use of his land.<sup>78</sup> Even if Ordinance 15053 does lower the value of land (a debatable proposition), it does not deprive the owner of all economically viable uses.<sup>79</sup>

Second, Ordinance 15053 does not result in a physical invasion of land. The clearing and grading regulations do not require a landowner to submit to occupation of any portion of his land by the government or the public.<sup>80</sup> Nor do the regulations 1) require a landowner to open up his land for public use,<sup>81</sup> 2) require any dedication of land, or 3) impose any restrictions or covenants on the title to the land.<sup>82</sup> The regulations restrict the amount of permissible clearing, but this is not an affirmative government invasion of land.<sup>83</sup> The clearing limitations are a restriction on use, similar to setback requirements, lot coverage restrictions, building height restrictions, and wetland buffers that do not implicate the physical invasion categorical taking.<sup>84</sup>

The Washington Supreme Court recognizes a third type of categorical taking: a regulation that destroys one or more fundamental attributes of

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<sup>75</sup> *Manufactured Hous.*, 13 P.3d 183, 187 (Wash. 2000).

<sup>76</sup> King County, Wash., Ordinance 15053 § 15E (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.152E (2005)), available at [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>77</sup> 505 U.S. 1003 (1992).

<sup>78</sup> *Id.* at 1007 (stating that the South Carolina Beachfront Management Act had direct effect of barring landowner from erecting any permanent habitable structures on his two parcels).

<sup>79</sup> *Lucas* held that where a regulation renders a parcel of property completely valueless, there is a per se taking without any need for inquiry into the government interests behind the regulation. *Id.* at 1014–19.

<sup>80</sup> *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (finding physical taking where law required property owners to allow cable television companies to attach cable boxes to buildings).

<sup>81</sup> *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (finding a taking where government attempted to force owners of private marina to open up for general public use); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987) (conditioning building permit on grant of public easement over beachfront).

<sup>82</sup> *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (conditioning permit on dedication of land for protection of floodplain).

<sup>83</sup> Taking by physical invasion occurs when “government causes its agents or the public to regularly use or permanently occupy property known to be in private ownership.” *Orion*, 747 P.2d at 1088 (citing *Loretto*, 458 U.S. at 427 n. 5 (1982)).

<sup>84</sup> See *Gorieb v. Fox*, 274 U.S. 603, 606 (1927) (setback ordinance not an unconstitutional taking); *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (restrictions on building in superadjacent air space not an unconstitutional taking); *Presbytery of Seattle v. King County*, 787 P.2d 907, 911 (Wash. 1990) (wetland regulations that prohibited building on one portion of property do not necessarily constitute a taking); *Robinson v. City of Seattle*, 830 P.2d 318, 331 (Wash. 1992) (stating “[m]ere regulation on the use of land has never constituted a ‘taking’ . . . under federal or state law” (quoting *Presbytery*, 787 P.2d at 911)).

property ownership. The U.S. Supreme Court has not recognized a regulation that destroys a fundamental attribute of property ownership as a categorical taking, and therefore a landowner presumably would assert this claim under the Washington Constitution.<sup>85</sup> Fundamental attributes of property ownership include the rights to possess, exclude others, and dispose of property.<sup>86</sup> A challenge to Ordinance 15053 should fail on this ground as well, because the landowner's right to possess is not destroyed, and because the ordinance has no effect on the right to exclude others or dispose of property.<sup>87</sup>

A landowner may argue that Ordinance 15053 destroys his right to possess the uncleared portion of her land (up to 65%). However, this argument will fail because takings analysis requires the land to be viewed in its entirety,<sup>88</sup> and because, even within the uncleared area, the landowner retains her full possessory interest. The Ordinance merely restricts how land is used or developed, and does not destroy a landowner's right to possess, even in the uncleared area.

The Washington Supreme Court has not clearly defined when a regulation aimed at enhancing the value of publicly owned property will amount to a taking. The court asserted in *Manufactured Housing* that a regulation that was "employed to enhance the value of a right in publicly held property" was "subject to a categorical 'facial' taking challenge."<sup>89</sup> This proposition is not applicable to the King County ordinance because the ordinance is not intended to, nor does it have the effect of, enhancing the value of publicly owned property.<sup>90</sup>

## 2. "Harm Preventing" vs. "Benefit Conferring"

Since none of the categorical takings categories apply, the court will proceed to determine whether the regulation is "harm preventing" or

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<sup>85</sup> *Manufactured Housing* is the only Washington case to find that the destruction of a fundamental attribute of property ownership is a taking of private property, but the court analyzed that case under article I, section 16 of the Washington Constitution, not the Fifth Amendment of the U.S. Constitution. 13 P.3d 183, 190 (Wash. 2000).

<sup>86</sup> *Id.* at 187.

<sup>87</sup> See *Andrus v. Allard*, 444 U.S. 51, 65–67 (1979) (ruling a complete prohibition on sale of property not a taking where property owner still allowed to possess the property and was not otherwise restricted in using the property). Unlike the regulation found objectionable in *Manufactured Housing*, King County Ordinance 15053 does not take away the ability of the landowner to sell his property. Cf. *Manufactured Hous.*, 13 P.3d at 190 (holding that the regulation constituted a taking under the Washington Constitution because it took from the park owner "the right to freely dispose of his or her property").

<sup>88</sup> *Presbytery*, 787 P.2d at 915; *Penn Cent.*, 438 U.S. at 130–31 ("taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

<sup>89</sup> *Manufactured Hous.*, 13 P.3d at 187.

<sup>90</sup> In *Manufactured Housing*, the Washington Supreme Court cited *Orion* for the proposition that such a regulation was a per se taking. 13 P.3d at 187. However, in *Orion*, the court merely stated that no taking could be found unless a regulation went beyond "preventing harm" to "actually enhanc[ing] a publicly owned right in land." *Orion Corp. v. State*, 747 P.2d 1062, 1078 (Wash. 1987). Nothing in *Orion* suggested that the mere enactment of a "benefit conferring" regulation categorically would work a taking on all affected properties.

“benefit conferring.” The U.S. Supreme Court has recognized the futility of analyzing a regulation in these terms because whether regulations “prevent harm” or “confer benefits” is “in the eye of the beholder.”<sup>91</sup> However, even after the U.S. Supreme Court’s decision in *Lucas* that strongly criticized insulating “harm preventing” regulations from takings analysis, the Washington Supreme Court will still insulate a regulation from a takings claim (including claims brought under the federal constitution), so long as the regulation is designed to prevent “real harm” to public health, safety, or the environment that “directly results from the prohibited use of the property.”<sup>92</sup>

Prior to the U.S. Supreme Court’s opinion in *Lucas*, the Washington Supreme Court held that general environmental protection regulations could be insulated from takings claims.<sup>93</sup> In *Orion*, (a pre-*Lucas* case) the Washington Supreme Court upheld the Shoreline Management Act (SMA), a statute that regulates development and use of privately and publicly owned lands adjacent to navigable waterbodies in Washington, against a takings challenge, since the statute was a “harm preventing” regulation.<sup>94</sup> The purpose of the SMA is 1) to safeguard the environment, 2) to protect against adverse effects to public health, safety, and welfare, and 3) to ensure that development along state shorelines and waters does not adversely affect the general public trust rights in navigable waters.<sup>95</sup> However, the court did not similarly hold that the protected Estuarine Sanctuary status of the property at issue in *Orion* was immune from a takings claim. The court stated that the sanctuary designation was not “harm preventing” because the purpose of the sanctuary was to *preserve* the pre-existing uses in the bay. Thus, the court held that the sanctuary designation, in contrast to the SMA, was not insulated from a takings claim.<sup>96</sup>

Under *Orion*, environmental *protection* regulations may be insulated from takings challenges, while environmental *preservation* regulations are not. This protection/preservation distinction is no more helpful than the general harm prevention versus benefit conferring analysis that the U.S. Supreme Court criticized in *Lucas*. King County Ordinance 15053 has characteristics of both a harm prevention and a preservation regulation. It requires preservation of forested and vegetated areas and precludes a number of activities, most significantly clearing and development, in order to preserve the pre-existing uses in the area. On the other hand, the county states that the express purpose of the ordinance is to protect King County’s streams from the damaging effects of land clearing, primarily erosion and

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<sup>91</sup> *Lucas*, 505 U.S. 1003, 1024–26 (1992).

<sup>92</sup> *Orion*, 747 P.2d at 1079–80; *Guimont*, 854 P.2d 1, 10–11 (Wash. 1993) (stating that insulated “harm preventing” regulations are those that prevent “real harm” that directly results from the prohibited use of the property).

<sup>93</sup> *Orion*, 747 P.2d at 1080 (stating that “exercises of the police power cannot be characterized as a compensable taking whenever the state imposes land use restrictions in order to safeguard the ‘public interest in health, the environment, and the fiscal integrity of the area’”).

<sup>94</sup> *Id.* at 1083.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1084.

the transfer of silt-laden runoff into waters.<sup>97</sup> The county also maintains that the ordinance is designed to protect the quality of groundwater, much of which is used for drinking water by rural King County residents.<sup>98</sup> By preventing harm to water quality and protecting forest cover, the regulation also prevents harm to aquatic life in the streams, especially imperiled salmonid species that live, migrate, and spawn in King County's waters.

Since *Lucas*, the Washington Supreme Court continues to analyze whether harm preventing regulations should be insulated from takings claims, but the court has limited the types of regulations that qualify as "harm preventing."<sup>99</sup> In *Guimont v. Clarke* (the first post-*Lucas* case to reach the Washington Supreme Court), the court expressly refused to abandon its practice of insulating harm preventing regulations from takings analysis, even for takings claims brought under the federal constitution.<sup>100</sup> However, the court stated that it would consider a regulation harm preventing and thus insulated from a takings claim only if it prevents "real harm" to the public which is "directly caused by the prohibited use of the property."<sup>101</sup>

Despite the Washington Supreme Court's refusal to abandon its harm/benefit analysis of challenged land-use regulations, the court's narrowing of what fits within the harm-preventing category, combined with the U.S. Supreme Court's express criticism of such insulation, may make Washington courts reluctant to insulate a regulation from a takings claim unless the regulation clearly fits the harm preventing characterization. Although the King County ordinance has characteristics of a harm preventing regulation, it also has characteristics of a preservation regulation, and thus it seems unlikely that courts will end the takings inquiry at this stage.<sup>102</sup>

### 3. *The Fact-Specific Balancing Test: Weighing the Adverse Effect on Private Landowners Against the County's Interest in Protecting Water Quality*

King County Ordinance 15053 satisfies the first step of the fact specific inquiry, as there clearly is a legitimate public purpose for the Ordinance.<sup>103</sup>

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<sup>97</sup> Dow Constantine, Chair of King County's Growth Management and Unincorporated Areas Committee stated: "For generations to come, this legislation will help prevent flooding and erosion and protect our drinking water, streams and wetlands from being degraded by new development." King County, Accountability, Efficiency and Ease of Use Added to Critical Areas Package (Oct. 25, 2005), [http://www.metrokc.gov/council/news/2004/1004/DC\\_LP\\_DP\\_CAO.htm](http://www.metrokc.gov/council/news/2004/1004/DC_LP_DP_CAO.htm) (last visited Jan. 22, 2006); see also King County, Wash., Ordinance 15051 § 3(f) (Oct. 25, 2004) (discussing the need for forest retention to preserve aquatic areas).

<sup>98</sup> See KING COUNTY, CRITICAL AREAS PACKAGE NEWSLETTER (2004), available at <http://dnr.metrokc.gov/dnrp/cao> (stating that one justification for critical areas package is that forests help return water to aquifers and thus to the wells that 30% of King County residents rely on for drinking water).

<sup>99</sup> *Guimont v. Clarke*, 854 P.2d 1, 10–11 (Wash. 1993).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) ("States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the

The county has a significant interest in protecting the quality of surface and ground water and in protecting aquatic life that includes threatened salmon species.<sup>104</sup> The science supporting the regulation shows that loss of forest cover has damaged, and continues to damage, ground and surface water quality in King County, a serious concern given the number of rural landowners who rely on groundwater as their primary drinking water supply and the number of imperiled salmon runs that migrate through county waters. A legitimate government interest would likely exist even if the sole purpose of the regulation was to preserve the aesthetic quality of King County through the preservation of trees and vegetation, rather than to protect water quality.<sup>105</sup>

If a landowner challenges a regulation as applied to his land, the court must balance the county's interest against the economic impact on the landowner.<sup>106</sup> It is unlikely that any landowner, in an as-applied challenge, could prove a sufficient enough economic injury to result in an unconstitutional takings because the clearing restrictions in Ordinance 15053 allow a substantial amount of economic development, such as construction of a home and even subdivision of land into multiple lots.<sup>107</sup> Neither the U.S. Supreme Court nor the Washington Supreme Court has established a threshold level of economic injury (other than a total economic deprivation) that will result in a taking. However, reductions in property value of up to 75% and even 87.5% have been insufficient standing alone to warrant a takings.<sup>108</sup> In *Penn Central*, the U.S. Supreme Court ruled that a regulation depriving the landowner of contract rights in excess of \$3 million per year was insufficient standing alone to establish a taking.<sup>109</sup> In *Orion*, the Washington Supreme Court concluded that a drop in value of a 5,600-acre parcel from \$600 per acre to \$100 per acre was insufficient, standing alone, to establish a taking.<sup>110</sup>

A landowner's argument that the King County ordinance has a negative economic impact on land values may not even be factually accurate. In one

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character and desirable aesthetic features of a city.").

<sup>104</sup> Compare the purposes of the Shoreline Management Act found insulated from takings analysis in *Orion*, 1) to safeguard the environment, 2) to protect against adverse effects to public health, safety, and welfare, and 3) to ensure development does not negatively affect public trust interests. *Orion Corp. v. State*, 747 P.2d 1062, 1083 (Wash. 1987).

<sup>105</sup> *Penn Cent.*, 438 U.S. at 129–30 (upholding historic preservation legislation enacted as part of comprehensive plan to preserve structures of historic or aesthetic interest against a takings challenge).

<sup>106</sup> *Guimont*, 854 P.2d at 11.

<sup>107</sup> *Cf. Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (holding that there was no taking when property value dropped from \$800,000 to \$60,000).

<sup>108</sup> *Id.*; see also *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (holding that a 75% diminution in value did not take private property).

<sup>109</sup> *Penn Cent.*, 438 U.S. at 116. *Penn Central Transportation Company* entered into a 50-year lease agreement with UGP Properties, in which UGP agreed to construct a multi-story office building on top of Grand Central Terminal in New York City and also promised to pay Penn Central \$1 million annually during construction of the office building and \$3 million annually thereafter. *Id.* The loss of this value was not sufficient, standing alone, to establish a taking. *Id.* at 138.

<sup>110</sup> *Orion Corp. v. State*, 747 P.2d 1062, 1085–86 (Wash. 1987).



King County watershed where similar clearing restrictions have been in place for almost ten years, land values have not noticeably changed, perhaps suggesting that people are willing to pay more to live in an area that will retain forested characteristics and other environmental qualities, as opposed to living in a treeless, densely populated, traffic-filled subdivision.<sup>111</sup> It may be that people will actually pay a premium to live in an area where landowners are required to protect the land's natural characteristics and that has little to no risk of becoming the latest victim of urban sprawl.<sup>112</sup>

The most likely challenger to the ordinance is an owner of a relatively large parcel of land that wants to subdivide, because the ordinance potentially has the most effect on such an owner. It is possible that the fifty percent clearing limitation will reduce the number of lots that can be created in the rural zone. However, creative plat layouts may allow for substantially the same number of lots as under existing rural zoning.<sup>113</sup> Even if the ordinance does limit, to some extent, the number of lots that can be carved out of a tract of land, it is nearly impossible to imagine a circumstance under which the clearing restrictions would lower the value of property significantly enough to result in an unconstitutional taking.<sup>114</sup> A claim that the regulation merely has some negative economic effect on property will not be sufficient to trigger a compensation requirement.<sup>115</sup> Courts will likely reject a claim that the restriction takes all economic value from the *uncleared portion*, since Washington courts refuse to divide a parcel into discrete segments for the purpose of takings analysis, and instead evaluate the parcel as a whole.<sup>116</sup>

The Washington Supreme Court will also evaluate the extent to which the ordinance adversely effects the landowner's investment-backed expectations. Investment-backed expectations are relevant to the takings analysis only to the extent that they are "distinct" and "reasonable."<sup>117</sup> The

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<sup>111</sup> King County adopted a mandatory 35% clearing limit for the Issaquah and Bear Creek Basins, in the mid-1990s. See BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, §7.2.8, at 7-26–7-27 (2004). Property values in the Bear Creek Basin, which have been under the 35% clearing restrictions since the mid-1990s, have kept pace or exceeded those in other areas of King County. King County, *Critical Areas Package FAQ*, <http://www.metrokc.gov/mkcc/cao/faqs.htm> (last visited Jan. 22, 2006).

<sup>112</sup> See also *Penn Cent.*, 438 U.S. at 139–140 (Rehnquist, J., dissenting) (Justice Rehnquist explained that land-use restrictions often work an "average reciprocity of advantage." "[That is], any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties.").

<sup>113</sup> Under existing zoning regulations, the rural area zoning generally allows no more than one lot per five acres. KING COUNTY, WASH., CODE §§ 21A.04.010, 21A.04.060, 21A.12.030 (2005).

<sup>114</sup> Cf. *Jones v. King County*, 874 P.2d 853, 861 (Wash. Ct. App. 1994) (downzoning that reduced number of possible lots from about 160 to approximately 25 not an unconstitutional taking).

<sup>115</sup> *Orion*, 747 P.2d at 1078 (stating that "[a] significant enough economic impact has never, in and of itself, been sufficient to establish a regulatory taking under Washington law").

<sup>116</sup> *Presbytery of Seattle v. King County*, 787 P.2d 907, 915 (Wash. 1990) (stating that "a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety").

<sup>117</sup> *Penn Cent.*, 438 U.S. at 124 (noting that an expectation must be "distinct"); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (holding that an expectation must be "reasonable").

expectation must have some concrete manifestation in the form of development plans, contract rights, or something more than a general desire.<sup>118</sup> The expectation must also be reasonable.<sup>119</sup>

A landowner that purchased land years ago with the general intent to hold it and subdivide it for a large profit at some time in the future does not have the distinct and reasonable investment-backed expectations necessary to support a takings claim.<sup>120</sup> Landowners were put on notice of King County's proposal a minimum of nine months before it took effect; thus, a landowner with existing plans to develop land could have taken the opportunity to file permit applications.<sup>121</sup> The restrictions do not apply to plans approved prior to the effective date of the regulation.<sup>122</sup> Therefore, most people who did have legally sufficient, distinct, specific, and reasonable investment-backed expectations are unaffected by this regulation. In addition, the effect of this regulation will only modify, not totally prohibit development plans, further weighing against the finding of a taking.<sup>123</sup>

The third balancing factor, the character of the government action, adds nothing more than a reconsideration of the legitimacy of the public purpose, the level of infringement of the private right, and the reasonableness of the measure to effectuate the purported public purposes.<sup>124</sup> As stated above,<sup>125</sup> the county clearly has legitimate authority to enact a regulation for the purpose of protecting water quality, protecting aquatic life, and preserving other benefits that come from a vegetated/forested ecosystem. Also, the ordinance is narrowly drawn to avoid infringing on private rights, except as necessary to effectuate the public purpose. The scientific studies relied upon by King County suggest that the clearing of any more than 35% of a

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<sup>118</sup> See *Presbytery*, 787 P.2d at 907 n.29 (citing Daniel R. Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 14 (1987)) (observing the implication that investment-backed expectations must have some concrete manifestation).

<sup>119</sup> *Penn Cent.*, 438 U.S. at 135–36 (concluding that investment-backed expectations were not substantially interfered with because the property owner would be left with reasonable return on investment where the regulation allowed continuation of use that had existed on property for past 65 years).

<sup>120</sup> Such general intent would not be a sufficiently “concrete manifestation” to provide sufficient investment-backed expectations. See *Mandelker*, *supra* note 118, at 15 (discussing takings of divisible property interests).

<sup>121</sup> King County formally announced its proposed clearing limits in March 2004, nine months prior to enactment. KING COUNTY, CRITICAL AREAS, CLEARING & GRADING, AND STORMWATER ORDINANCES, available at <http://www.metrokc.gov/council/cao/summary.htm>.

<sup>122</sup> King County, Wash., Ordinance 15053 § 14A (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.150A (2005)), available at [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>123</sup> *Penn Cent.*, 438 U.S. at 136 (finding it significant that appellants were not necessarily denied of all use of airspace above Grand Central Station, since appellants refused to apply for approval of a smaller structure).

<sup>124</sup> In *Presbytery of Seattle v. King County*, the court noted only that “[i]n considering the character of the government action, we note that permanent physical invasions . . . have routinely been held to be takings.” 787 P.2d 907, 915 n.30 (Wash. 1990). The Washington Supreme Court has given no further substantive analysis to this third prong.

<sup>125</sup> See *supra* notes 103–105 and accompanying text.

watershed has negative effects on water quality.<sup>126</sup> In balancing the public need with private rights, King County relaxed the clearing restriction to 50% in many cases, in an effort to limit adverse effects on development rights.<sup>127</sup> In addition, while early drafts of the Ordinance limited impervious surfaces to a maximum of 10% of the land, the County deleted these restrictions from the ordinance due to their perceived harshness on landowners.<sup>128</sup>

Landowners in Washington very rarely prevail on claims that regulations unconstitutionally take private property.<sup>129</sup> King County's clearing restrictions also do not rise to the level of an unconstitutional taking because the county's interest in protecting water quality through the clearing restrictions outweighs the adverse economic impact suffered by individual landowners. Even in an as-applied challenge, it is unlikely that a landowner can show significant enough economic loss or infringement of property rights to establish a taking.

#### IV. THE CONSTITUTIONALITY OF KING COUNTY ORDINANCE 15053 UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The most significant threat to the King County clearing and grading ordinance arises from the Washington Supreme Court's earnest application of a 110-year-old U.S. Supreme Court case, *Lawton v. Steele*.<sup>130</sup> In *Lawton*, while upholding the constitutionality of a regulation that permitted summary seizure and destruction of equipment used to illegally catch or take fish, the Court stated that police power regulations that are "unduly oppressive" on individual property owners may violate "substantive" due process.<sup>131</sup> The Washington Supreme Court has employed this test to invalidate land-use regulations, including a notable series of cases in which the court struck down local and state regulations designed to limit the loss of low-income housing.<sup>132</sup>

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<sup>126</sup> BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, § 7.2.8, at 7-27 (citing BOOTH, *supra* note 4).

<sup>127</sup> King County, Wash., Ordinance 15053 § 14A (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE § 16.82.150A (2005)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf); *see also* Keith Ervin, *Proposal for Rural Land Use Softens Sims Plan*, SEATTLE TIMES, Sept. 17, 2004, at B1, *available at* <http://archives.seattletimes.nwsource.com> (discussing amendments that allowed majority of landowners to clear 50% rather than 35% of their land).

<sup>128</sup> *See* RUSS BROOKS & WILLIAM R. MAURER, KING COUNTY'S CRITICAL AREAS PACKAGE: A HEAVY-HANDED APPROACH TO GROWTH MANAGEMENT (Apr. 16, 2004), <http://www.washingtonpolicy.org/Environment/PNKingCountyCriticalAreasPackage04-16.html> (last visited Jan. 22, 2006) (describing original proposal to limit effective impervious surface area to 10%); Ervin, *supra* note 127.

<sup>129</sup> *See* Orion Corp. v. State, 747 P.2d 1062, 1077 (Wash. 1987) (noting that in the past twenty years, the Washington Supreme Court has found a taking on only two occasions, and in those cases the court implicitly employed a due process analysis and remedy, rather than a takings analysis).

<sup>130</sup> 152 U.S. 133 (1894).

<sup>131</sup> *Lawton*, 152 U.S. at 136-37.

<sup>132</sup> *See* Robinson v. City of Seattle, 830 P.2d 318, 331 (Wash. 1992) (striking down tenant relocation fees in HPO as violation of substantive due process); Sintra v. City of Seattle, 829 P.2d 765, 778 (Wash. 1992) (holding that HPO provisions violate substantive due process and potentially violate § 1983 of the Civil Rights Act); Guimont v. Clarke, 854 P.2d 1, 5 (Wash. 1993)

*A. The Lawton Substantive Due Process Test: Is The Regulation "Unduly Oppressive"?*

In *Lawton*, the Court analyzed the proper limits of the police power—the state's legislative power to enforce laws protecting public health, safety, and welfare.<sup>133</sup> The Court in *Lawton* (and more explicitly in *Lochner v. New York*<sup>134</sup> eleven years later) reasoned that the due process clause of the Fourteenth Amendment limited the bounds of the police power.<sup>135</sup> This doctrine of "substantive" due process restrains the legislature from using its police power in an arbitrary or unreasonable manner.<sup>136</sup>

The *Lawton* Court developed a three-part test for courts to use to determine when legislative activities violate an individual's "substantive" due process rights, and it is this three-part test that the Washington Supreme Court employs when analyzing the constitutionality of land-use regulations.<sup>137</sup> Using the *Lawton* test, the court evaluates whether the challenged land-use regulation 1) is required by the public interest, 2) uses means reasonably necessary for accomplishing the purpose, and 3) is not unduly oppressive upon individual property owners.<sup>138</sup> Only the third element takes on any significance in the Washington Supreme Court's application of the test, with the court routinely finding for the government on the first two elements, but then concluding that the ordinance is "unduly oppressive" and thus unconstitutional.<sup>139</sup>

To determine whether a regulation is "unduly oppressive," the court evaluates "the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner."<sup>140</sup> Application of the *Lawton* balancing test has the potential to result in undue judicial intervention into the social

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(holding state law requiring mobile home developments to pay relocation costs of tenants to be violation of substantive due process).

<sup>133</sup> *Lawton*, 152 U.S. at 136.

<sup>134</sup> 198 U.S. 45 (1905) (striking down maximum working hour legislation as a violation of substantive due process).

<sup>135</sup> In *Lawton*, the Court discussed the limits of the police power without expressly stating the Fourteenth Amendment was the constitutional authority for such limits. In *Lochner*, the Court explicitly stated that if the police power of a state had no limits, "the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power." *Lochner*, 198 U.S. at 56.

<sup>136</sup> See *Lawton*, 152 U.S. at 136–37 (noting state exercise of police power is subject to judicial review); *Lochner*, 198 U.S. at 56 (explaining limits of the police power of the states).

<sup>137</sup> *Presbytery of Seattle v. King County*, 787 P.2d 907, 913 (Wash. 1990).

<sup>138</sup> *Robinson v. City of Seattle*, 830 P.2d 318, 329 (Wash. 1992).

<sup>139</sup> *Id.* (noting that "the first and second part of this test are often easily met by challenged government action" and that "the third part is a more difficult determination").

<sup>140</sup> *Presbytery*, 787 P.2d at 913. The court is also guided by other "non-exclusive factors" including the seriousness of the public problem; the extent to which the proposed regulation solves the problem; the feasibility of less oppressive solutions; the amount and percentage of value loss; the extent of remaining uses, past, present and future uses; temporary or permanent nature of the regulation; the extent to which the owner should have anticipated such regulation; and how feasible it is for the owner to alter present or currently planned uses. *Id.* (citing William H. Stoebe, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3, 33 (1983)).

policymaking role of the legislature, because the court, in applying the test, exercises the traditionally legislative role of balancing the public's interest in the regulation against the economic impact on the individual landowner.<sup>141</sup> One commentator has argued that, in applying the *Lawton* multi-factor balancing test, the Washington Supreme Court emphasizes those factors that support its own view of the appropriate social policy, while arbitrarily ignoring those factors that do not.<sup>142</sup> The same commentator argues that the court's application of *Lawton* and "substantive" due process is inconsistent with federal law, and grounded neither in the U.S. nor Washington Constitutions.<sup>143</sup>

Federal courts used the *Lawton* substantive due process analysis to strike down numerous legislative acts during the *Lochner* era,<sup>144</sup> but have virtually ignored *Lawton* since the 1930's, properly deferring to rational legislative determinations of social policy.<sup>145</sup> Similarly, the Washington Supreme Court declared as late as 1974 that:

the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . For protection against abuses by legislatures the people must resort to the polls, not to the courts.<sup>146</sup>

However, just a dozen years later, in 1986, the Washington Supreme Court reintroduced *Lawton* into its land-use jurisprudence in *West Main Associates v. City of Bellevue*.<sup>147</sup> In *West Main*, the court struck down an ordinance that prevented landowners from filing a building permit application until the landowner completed a series of burdensome tasks such as site plan approval, design review approval, conditional use approvals, and so forth.<sup>148</sup> In Washington, landowners obtain constitutionally protected "vested rights" upon the *filing* of a building permit application.<sup>149</sup> Citing *Lawton*, the court held that it was "unduly oppressive" on individual

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<sup>141</sup> See Boyd, *supra* note 29, at 79, 94 (arguing that the Washington Supreme Court has improperly used the wide amount of discretion allowed in its substantive due process analysis to "invade the social policymaking role of the legislature").

<sup>142</sup> *Id.* at 91 (stating that the court's application of the unduly oppressive balancing test "emphasizes factors that weigh in favor of the landowner (against regulation) and almost ignores those that weigh in favor of the government (in favor of regulation)").

<sup>143</sup> *Id.* at 83 (stating that "[b]ecause the *Lawton* test has disappeared from federal law and the [Washington] supreme court has not integrated the *Lawton* test into the state constitution, the state's doctrine appears to be adrift, unanchored in either [the federal or state constitution]").

<sup>144</sup> From 1905–1934, the U.S. Supreme Court struck down over 200 economic regulations, usually on grounds that the regulations violated "substantive" due process under the Fourteenth Amendment. GEOFFREY R. STONE, CONSTITUTIONAL LAW 829 (3d ed. 1996).

<sup>145</sup> See Boyd, *supra* note 29 at 72–78 (discussing the *Lawton* analysis and the subsequent treatment of *Lawton* within other cases).

<sup>146</sup> *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n*, 520 P.2d 162, 169 (Wash. 1974) (quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) and *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

<sup>147</sup> *West Main Ass'n v. City of Bellevue*, 720 P.2d 782, 786 (Wash. 1986).

<sup>148</sup> *Id.* at 784.

<sup>149</sup> *Id.* at 785.

landowners for the city to require completion of the various required tasks (which would have cost the landowner in *West Main* \$500,000 to complete) before allowing the landowner to file its building permit application and obtain vested rights.<sup>150</sup>

Since 1990, the Washington Supreme Court has applied *Lawton*, and used the wide discretion that it vests in the court, to invalidate a number of land-use regulations, including three cases in which the court struck down legislative attempts to limit the loss of low-income housing.<sup>151</sup> In these cases, discussed in more detail below, the court ultimately determined that the challenged regulations were “unduly oppressive” on individual landowners primarily because, in the court’s view, the regulations forced a discrete group of landowners (owners of low-income housing) to shoulder burdens more appropriately borne by the public as a whole.<sup>152</sup>

### *B. Invalidating Legislative Attempts to Protect Low-Income Housing*

A substantial portion of the Washington Supreme Court’s substantive due process jurisprudence concerns legislative efforts to preserve and protect low-income housing.<sup>153</sup> In a series of three cases, the court considered and struck down Housing Preservation Ordinances (HPOs) enacted by the City of Seattle. The HPOs required owners of housing who intended to demolish or convert their buildings to pay a per-unit licensing fee that would be placed in a housing replacement fund, and also pay \$1,000 in relocation fees to tenants displaced by the demolition.<sup>154</sup>

The court ruled that the HPOs were unduly oppressive on owners of low-income housing buildings because the social problem of homelessness resulted not from the specific property owner’s demolition of low-income housing, but from complex social and economic conditions, and as a

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<sup>150</sup> *Id.* at 786.

<sup>151</sup> *Robinson v. City of Seattle*, 830 P.2d 318 (Wash. 1992); *Sintra v. City of Seattle*, 829 P.2d 765 (Wash. 1992); *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993).

<sup>152</sup> *Robinson*, 830 P.2d at 331; *Guimont*, 854 P.2d at 15.

<sup>153</sup> In addition to the low-income housing cases, the Washington Supreme Court has decided two other challenges to land-use regulations on due process grounds. In *Christianson v. Snohomish Health District*, the court held that a health district’s refusal to issue a construction clearance permit for an addition to a lakeside cabin on the grounds that the cabin’s septic system was substandard did not violate substantive due process. 946 P.2d 768, 777 (Wash. 1997). According to the court, the regulation did not force the landowner to “shoulder” a burden of society,” as the regulation was focused on preventing harm that directly resulted from the landowner’s substandard system. *Id.* In *Rivett v. City of Tacoma*, the supreme court held that a city ordinance that purported to impose liability upon abutting landowners for the condition of defective public sidewalks and purported to indemnify city for any judgments arising out of the negligent maintenance of public sidewalks violated substantive due process. 870 P.2d 299, 303–04 (Wash. 1994). The court deemed it unreasonable for a city to require an abutting private landowner to indemnify a city without limitation for any sum paid to a person injured on a public sidewalk. *Id.*

<sup>154</sup> See *Robinson*, 830 P.2d 318, 324 (Wash. 1992) (invalidating HPO on substantive due process grounds); *Sintra*, 829 P.2d 765, 773 (Wash. 1992) (invalidating HPO on substantive due process grounds); *R/L Assocs. v. City of Seattle*, 780 P.2d 838, 842 (Wash. 1989) (invalidating HPO as violation of state statutory law).

function of how all the city's landowners used their property.<sup>155</sup> According to the court, every landowner in Seattle was partially to blame for the lack of low-income housing, because all of those landowners chose to use their land for something *other than* low-income housing.<sup>156</sup> Since the owners of office buildings, market rate rental housing, and warehouses also chose not to use their land for affordable housing, homelessness and the lack of affordable housing was a problem caused by all of the city's landowners. Because the housing shortage was a problem caused by all, the court deemed it a burden that should be shouldered by all, not just by the small number of individuals that owned low-income housing buildings in the city. By shifting the costs of relocating tenants to these few individual property owners, the HPOs were "unduly burdensome" and a violation of the landowners' right to substantive due process.<sup>157</sup>

A similar case concerned legislative attempts to protect residents of mobile home parks by requiring owners of the underlying land to pay relocation fees to the lessees if owners redeveloped the land to another use.<sup>158</sup> As with Seattle's HPOs, the court held that the state's mobile home tenant relocation fee law violated the mobile home park owners' substantive due process rights.<sup>159</sup> Because the lack of low-income housing was a common problem to be shouldered by all, it was unfair to single out the few owners of these mobile home parks by making them pay substantial fees when they wanted to exit the mobile home park business.<sup>160</sup>

*C. Distinguishing the King County Clearing and Grading Ordinance from the Unconstitutional Housing Preservation Ordinances (HPOs)*

King County Ordinance 15053 should survive a due process challenge because it is significantly distinguishable from the unconstitutional housing preservation ordinances and is not "unduly oppressive" under the factors that the court applies in its substantive due process analysis. First, unlike the HPOs, Ordinance 15053 does not shift the costs of a public problem solely to a discrete group of landowners, because the burdens associated with protecting the environment, and specifically water quality, are spread broadly among all of King County's landowners. Second, given the significant development restrictions that already exist in King County's rural area zone, Ordinance 15053 should have only a nominal adverse effect on the ability of landowners to derive economic benefit from their land. Ordinance 15053 is also distinguishable from the HPOs because it places no affirmative obligations or liabilities on landowners. Finally, King County determined through study and public hearings that *more* restrictive measures were

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<sup>155</sup> *Sintra*, 829 P.2d at 777; *Robinson*, 830 P.2d at 331.

<sup>156</sup> *Robinson*, 830 P.2d at 331.

<sup>157</sup> *Id.*

<sup>158</sup> *Guimont v. Clarke*, 854 P.2d 1, 4 (Wash. 1993).

<sup>159</sup> *Id.* at 14–17. The law challenged in *Guimont* required mobile home park owners to pay relocation assistance of \$4,500 to \$7,500 per tenant to the park's tenants if the owner wanted to close the park or convert it to another use.

<sup>160</sup> *Id.* at 14–16.

necessary to accomplish the purposes of the regulation, but chose *less* restrictive measures in order to balance the regulation's goals with the rights of landowners.

*1. The Shared Burdens of Environmental Protection in King County*

Unlike the HPOs, Ordinance 15053 does not force King County's rural landowners to single-handedly shoulder the burdens associated with protecting water quality. In the HPO cases, the court focused on the fact that the HPOs affected only an extremely small and discrete group of landowners, even though all of the city's landowners contributed to the problem.<sup>161</sup> The HPOs imposed relocation fees only on landowners that 1) owned land consisting in part of low-income housing, and 2) wanted to change the current land use of the property, eliminating low-income housing in the process.<sup>162</sup> The vast majority of the city's landowners, who also chose not to use their land for low-income housing, and instead developed industrial facilities, office buildings, market rate housing, or commercial/retail facilities did not have to pay any money to facilitate low-income housing, even though those landowners' land-use choices also directly contributed to the lack of low-income housing within the city.<sup>163</sup> In other words, every landowner in Seattle that did not dedicate a portion of its land to low-income housing contributed to the lack of low-income housing, but the HPOs burdened only those few landowners who actually owned (and wanted to leave the business of) low-income housing.<sup>164</sup>

In contrast, the King County clearing and grading ordinance is a generally applicable land-use regulation that applies to *every* landowner within the rural area zone, no matter what the past, present, or intended future use of the property is.<sup>165</sup> The rural area zone consists of approximately 13% of the land (almost 200,000 acres) in unincorporated King County, and thus the ordinance affects thousands of individual landowners, as opposed to a discrete few (like in the HPO situation). In addition, the restrictions are not limited only to those rural landowners who want to develop their property (like the HPOs were),<sup>166</sup> but apply to all property owners regardless of the reason that they want to clear their land. The ordinance affects rural area landowners who want to clear their land to increase the amount of light that reaches their house, to carve out off-road vehicle trails, or to create pasture land for sheep or cows just as equally as it

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<sup>161</sup> *Sintra v. Seattle*, 829 P.2d 765, 777 (Wash. 1992); *Robinson*, 830 P.2d at 331; *Guimont*, 854 P.2d at 15.

<sup>162</sup> *Sintra*, 829 P.2d at 777; *Robinson*, 830 P.2d at 331; *Guimont*, 854 P.2d at 15.

<sup>163</sup> *Robinson*, 830 P.2d at 331.

<sup>164</sup> *Guimont*, 854 P.2d at 15.

<sup>165</sup> *Cf. Robinson*, 830 P.2d at 331 (reemphasizing that "[m]ere regulation on the use of land has never constituted a 'taking' or a violation of due process under federal or state law." (quoting *Presbytery of Seattle v. King County*, 787 P.2d 907, 911 (Wash. 1990))).

<sup>166</sup> *Cf. Sintra*, 829 P.2d at 777 (noting "the entire burden of the regulation falls on landowners who wish to develop their property"); *Robinson*, 830 P.2d at 331 (involving regulation of those desiring to develop property from low-income housing), *Guimont*, 854 P.2d at 15 (involving regulation of those desiring to develop property used as a mobile home park).



applies to those who want to clear the land to build a housing development. The generally applicable nature of the King County ordinance distinguishes it from the HPOs that targeted a discrete few landowners.

More importantly, the ordinance does not force King County's rural landowners to single-handedly shoulder the burdens of environmental protection in King County. The county enacted the clearing and grading ordinance as just one component of an unusually comprehensive critical areas package (consisting of a 261-page critical areas ordinance, a stormwater ordinance, and the clearing/grading ordinance) that imposes significant development restrictions on urban properties as well as rural properties in King County.<sup>167</sup> For example, all properties in unincorporated King County, both rural and urban, are subject to aquatic area buffers that prevent development within 115 to 165 feet of areas such as shorelines or tidelands.<sup>168</sup> Also, both rural and urban properties are subject to development regulations in "hazard areas" such as landslide prone areas, erosion zones, coal-mine hazard areas, and seismically active areas.<sup>169</sup> Urban developments must also be designed to protect breeding sites of certain protected species,<sup>170</sup> and are subject to comprehensive stormwater restrictions whenever 2,000 square feet or more of new impervious surface is developed.<sup>171</sup>

In some circumstances, the critical areas package subjects urban landowners to stricter regulations than their rural neighbors. For example, the critical areas package requires development buffers near sensitive (Class I) wetlands on urban properties that range from a minimum of 125 feet up to 225 feet.<sup>172</sup> In contrast, the minimum Class I wetland buffer on a property in the rural area zone can be set as low as 50 feet, depending on the specific characteristics of the property.<sup>173</sup> Also, urban landowners are subject to stormwater fees of up to \$1,598 per acre, per year where the land is covered with extensive impervious surface,<sup>174</sup> while owners of rural land that retains

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<sup>167</sup> King County, Wash., Ordinances 15051, 15052, 15053 (Oct. 25–26, 2004), *available at* <http://www.metrokc.gov/council/cao/>.

<sup>168</sup> King County, Wash., Ordinance 15051 § 193 (Oct. 25, 2004) (codified at KING COUNTY, WASH., CODE § 21A.24.358 (2005)), *available at* [http://www.metrokc.gov/council/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/council/cao/critical_areas_15051.pdf).

<sup>169</sup> See KING COUNTY, WASH., CODE §§ 21A.24.210 (coal mine hazard areas), 21A.24.220 (erosion hazard areas), 21A.24.280 (landslide hazard areas), 21A.24.290 (seismic hazard areas) (2005).

<sup>170</sup> King County, Wash., Ordinance 15051 § 198 (Oct. 25, 2004) (codified at KING COUNTY, WASH., CODE §§ 21A.24.382–21A.24.388 (2005)), *available at* [http://www.metrokc.gov/council/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/council/cao/critical_areas_15051.pdf).

<sup>171</sup> King County, Wash., Ordinance 15052 § 2 (Oct. 25, 2004) (codified at KING COUNTY, WASH., CODE § 9.04.030 (2005)), *available at* [http://www.metrokc.gov/council/cao/stormwater\\_15052.pdf](http://www.metrokc.gov/council/cao/stormwater_15052.pdf).

<sup>172</sup> King County, Wash., Ordinance 15051 § 185A (Oct. 25, 2004) (codified at KING COUNTY, WASH., CODE § 21A.24.325A (2005)), *available at* [http://www.metrokc.gov/council/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/council/cao/critical_areas_15051.pdf).

<sup>173</sup> King County, Wash., Ordinance 15051 § 185B (Oct. 25, 2004) (codified at KING COUNTY, WASH., CODE § 21A.24.325B (2005)).

<sup>174</sup> KING COUNTY, WASH., CODE § 9.08.070C (2005).

65% vegetative cover pay as little as \$102 per year, or in some cases are entirely exempt from the fees.<sup>175</sup>

The clearing and grading restrictions are just one part of the county's comprehensive critical area protection package that applies to all landowners in unincorporated King County. To prevail on a claim that the clearing and grading restrictions are unduly oppressive and a violation of the U.S. Constitution, rural landowners must persuade a court that they are being singled out or being forced to bear burdens more properly borne by landowners at large.<sup>176</sup> The comprehensive nature of the critical areas package ensures that no property owner in King County is spared from the burdens associated with water quality protection, and thus the claim that rural landowners are "unduly oppressed" by the clearing restrictions should fail.

An additional difference between the HPOs and the clearing and grading ordinance is that all of King County's landowners, even before passage of the critical areas package, were subject to extensive environmental and land-use regulations that limited land development and commercial activities on land. Unlike the HPOs, which imposed a new, unusual, and presumably unexpected liability on just a few property owners in order to solve a long-term, society-wide problem, King County's landowners (regardless of whether their property is zoned rural, urban, agricultural, or forest production) are already subject to comprehensive local, state, and federal regulations designed to protect water quality.<sup>177</sup> The new land clearing restrictions are just one small piece of the matrix of local, state, and federal land-use and environmental restrictions imposed on all

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<sup>175</sup> *Id.* § 9.08.080B.

<sup>176</sup> *Robinson v. City of Seattle*, 830 P.2d 318, 331 (Wash. 1992).

<sup>177</sup> For example, state laws and regulations burden landowners in King County's vast resource area zones. Logging in these areas, which consist primarily of federal and state owned forest lands, must comply with Washington's Forest Practices Act and Washington State Department of Natural Resource regulations that restrict logging in riparian corridors and provide for erosion control measures that may limit timber production or add to the cost of operations. *See* WASH. REV. CODE §§ 76.09.010–79.09.935 (2004) (regulating forest management practices); *see also* WASH. ADMIN. CODE §§ 222–30 (regulating logging and erosion control for protection in riparian areas). Landowners in King County are also subject to the State Environmental Policy Act (SEPA), WASH. REV. CODE §§ 43.21C.010–43.21C.914 (2004), which mitigates environmental damage caused by development and vests power in local governments to deny project proposals that cause significant environmental harm. *See Polygon Corp. v. City of Seattle*, 578 P.2d 1309, 1312 (Wash. 1978) (holding that SEPA vests local government with authority to deny building permit on basis of adverse environmental impact). Urban owners of commercial and industrial properties in King County are also subject to numerous environmental regulations designed to protect water quality that impose significant costs on operation of their business. The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (2000), requires industrial facilities to install costly technology to limit water pollution, and both the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–9675 (2000), and the state counterpart, Model Toxics Control Act of 1971 (MTCA), WASH. REV. CODE §§ 70.105D.010–90.58.920 (2004), require owners of property contaminated with hazardous substances to invest substantial amounts of money to ensure contamination does not reach local groundwater supplies. These examples are a mere sample of the environmental regulations that limit and regulate land-use to protect water quality.

landowners. As a result of this comprehensive local, state, and federal regulation, the “burden” of environmental protection is one that is spread broadly among all of King County’s landowners and not borne solely by rural landowners.

Courts should not view the King County ordinance in a vacuum, as if it were the only or first land-use or environmental regulation ever enacted. Every property owner in King County shares the burden of protecting the quality of King County’s waters, through the application of environmental and land-use regulations imposed by King County, as well as by state, federal, and other local jurisdictions.<sup>178</sup> The burdens imposed by the clearing and grading ordinance may differ from those imposed on other landowners in the county, but that fact alone does not make the ordinance unconstitutional.<sup>179</sup> In contrast to the HPOs which completely and uniquely placed the costs of a social problem caused by all onto the backs of a discrete few landowners, no King County landowner escapes the burden of land-use restrictions designed to protect water quality.

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<sup>178</sup> Landowners in incorporated King County are subject to regulations imposed by the various municipalities. For example, landowners in the City of Seattle, part of King County, are subject to steep slope ordinances, lot coverage and impervious surface restrictions, and wetland buffers that significantly restrict the amount of land that can be built on. *Girton v. City of Seattle*, 983 P.2d 1135, 1137, 1140 (Wash. Ct. App. 1999) (holding that there was no violation of substantive due process when the City of Seattle’s steep slope ordinance, which allowed no more than 30% disturbance of steep slope area, prohibited landowner from building his proposed home, where landowner could still build a home in a different location on the property with the same square footage, but with a diminished view, and because the landowner had failed to demonstrate any economic loss resulting from application of the steep slope ordinance).

<sup>179</sup> *See In re Binding Declaratory Ruling of Dept. of Motor Vehicles*, 555 P.2d 1361, 1367 (Wash. 1976) (noting that it is a “well established rule ‘that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others’” (quoting *McGowan v. Maryland* 366 U.S. 420, 425 (1961))); *see also* *Just v. Marinette County*, 201 N.W.2d 761, 769 (Wis. 1972) (noting that lands adjacent to navigable waters of state exist in special relationship to state and may be subject to special restrictive zoning ordinances not otherwise applicable to properties at large). Many environmental regulations are crafted to apply to only certain kinds of property, depending on their characteristics. For example, Washington’s Shoreline Management Act (SMA), WASH. REV. CODE §§ 90.58.010–90.58.920 (2004), burdens landowners whose land abuts “shorelines of statewide significance.” *See Orion Corp. v. State*, 747 P.2d 1062, 1065–67 (Wash. 1987) (enactment of SMA and designation of Padilla Bay as a shoreline of statewide significance prohibited development of Venetian style development, with canals and all, on 5,600 acres of tidelands, reducing land value from \$600 per acre to \$100 per acre). Likewise, owners of wetlands have burdens and restrictions not generally applicable to the public at large. *See Presbytery of Seattle v. King County*, 787 P.2d 907, 910 (Wash. 1990) (challenging King County’s Sensitive Area Ordinance, which prohibited construction on wetlands and established wetland buffers). Also, owners of land that contain habitat for endangered species may be significantly more limited in the use of their land by the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000) than owners of lands lacking such habitat. Landowners adjacent to waters designated as “water quality limited” under § 303(d) of the Clean Water Act may be subject to significant land-use restrictions under a state approved total maximum daily load (TMDL) program. *See Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1340, 1356 (N.D. Cal. 2000), *aff’d sub nom. Pronsolino v. Natri*, 291 F.3d 1123 (9th Cir. 2002) (upholding TMDL despite landowners’ argument that compliance with land-use restrictions resulting from state TMDL program would cost \$10,602,000).

## 2. *The Nominal Impact on Landowners' Ability to Develop Their Property*

The court will also analyze the economic effect on specific landowners in a due process challenge.<sup>180</sup> The landowners will argue that the clearing restrictions negatively affect land values, especially for those landowners who planned to subdivide their land. However, this adverse economic effect is likely overstated. Again, courts should not view the clearing ordinance in a vacuum. Existing zoning regulations already significantly restrict the level of density in King County's rural area zone. Even without the clearing and grading restrictions, the King County zoning code restricts density for much of the rural area zone to one dwelling unit per five acres of land.<sup>181</sup> Therefore, even before enactment of the clearing and grading ordinance, a landowner subdividing a 100-acre parcel could, in general, build no more than twenty houses in the subdivision (absent special approval from the county), and perhaps less if existing environmental conditions or constraints further reduced the number of possible lots.<sup>182</sup>

The King County ordinance does not prohibit the subdivision of land. A landowner still may subdivide, so long as 50% to 65% of the property remains uncleared.<sup>183</sup> The landowner may be able to develop substantially the same number of lots on a property by placing all the uncleared area in one tract, and spreading that area throughout the new lots. Even if fewer lots are required, the resale value of those lots may actually increase, since no further development can occur next to those properties.<sup>184</sup> Land values in areas of King County that have experimented with such clearing restrictions have not depreciated. For example, land values in the Bear Creek Basin, which have been under 35% clearing restrictions since the mid-1990s, have kept pace or exceeded land values in other areas of King County.<sup>185</sup>

The case of *Jones v. King County*<sup>186</sup> shows how a court would likely view a landowner's "loss of economic value" argument. In *Jones*, King County downzoned the Jones' 129-acre parcel from suburban (which allowed 1-acre minimum lot size) to a rural designation (which allowed a 5-

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<sup>180</sup> *Guimont v. Clarke*, 854 P.2d 1, 3, 15 (1993) (observing that under Washington's Mobile Home Relocation Assistance Act, an owner closing a mobile home park with 100 pads could be responsible for paying \$750,000).

<sup>181</sup> KING COUNTY, WASH., CODE §§ 21A.04.010, 21A.04.060, 21A.12.030 (2005).

<sup>182</sup> Local governments have authority to limit the density of subdivisions, or impose other mitigation measures, based on specific environmental conditions that exist on a given piece of property pursuant to Washington's State Environmental Policy Act. WASH. REV. CODE §§ 43.21C.010–43.21C.914 (2004).

<sup>183</sup> King County, Wash., Ordinance 15053 § 15E (Oct. 26, 2004) (codified at KING COUNTY, WASH., CODE §16.82.152E (2005)), *available at* [http://metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://metrokc.gov/mkcc/cao/clearing_grading_15053.pdf).

<sup>184</sup> *See Jones v. King County*, 874 P.2d 853, 856, 861 (Wash. Ct. App. 1994) (acknowledging that downzone from one-acre zoning to five-acre zoning would reduce land value, but noting record "is devoid of information concerning relative prices these homes could be sold for or how many homes could be built under either zoning classification").

<sup>185</sup> *See* King County, *Critical Areas Package FAQ*, <http://www.metrokc.gov/mkcc/cao/faqs.htm> (last visited Jan. 22, 2006) (noting that property owners in the Bear Creek Basin have no observed adverse market effects from implementation of the critical area ordinance).

<sup>186</sup> 874 P.2d 853 (Wash. Ct. App. 1994).

acre minimum lot size). As a result, the Jones' property could be divided into only 25 lots, instead of approximately 130. Without evidence of comparative values of the homes under the respective zoning designations, and without specific evidence of how many homes could have been actually built under each zoning designation, the Washington Court of Appeals concluded that the mere fact that significantly fewer homes could be built on the Jones' parcel did not warrant invalidation of the downzoning on substantive due process grounds.<sup>187</sup>

The King County ordinance is much less oppressive than the downzoning at issue in *Jones* because the King County ordinance does not necessarily have *any* effect on the number of lots that a parcel can be subdivided. It merely restricts the amount of clearing that can take place on those lots. Whether a 100-acre property is divided into five lots or twenty, that 100 acres can have no more than 50% to 65% cleared. Creative planners and landowners may be able to design subdivisions that comply with the clearing limits and result in valuable subdivisions.

3. *The "Indentured Servitude" Aspect of the HPOs, and the Similarity of the King County Clearing and Grading Ordinance to a Traditional Restriction on Use*

The King County ordinance is also distinguishable from the "unduly oppressive" HPOs because it does not force onerous affirmative obligations on property owners, but instead consists of a negative use restriction similar to a traditional land-use regulation. For example, in *Sintra v. City of Seattle*,<sup>188</sup> the court noted that the HPO forced the landowner to pay a tenant relocation fee of \$218,000 to develop a property worth \$670,000, single-handedly making the redevelopment economically unfeasible.<sup>189</sup> Similarly, in *Guimont*, the HPO was unduly oppressive because the state could have charged landowners a relocation fee of up to \$750,000 merely because the property owner wanted to leave his business.<sup>190</sup> This "indentured servitude" aspect of the HPOs is not present in King County Ordinance 15053.<sup>191</sup>

The clearing and grading restrictions in Ordinance 15053 are much more analogous to traditional land-use regulations that receive significant deference in the courts than to the HPOs. In striking down the HPO in *Robinson*, the supreme court noted that there was no Washington case determining mere land-use regulations, such as "building height, setbacks from the street, requirements for streets and access, dedication of easements for the public use, and creation of parks or green space in residential developments, and many environmental regulations," to be per se

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<sup>187</sup> *Id.* at 861.

<sup>188</sup> 829 P.2d 765 (Wash. 1992).

<sup>189</sup> *Id.* at 776–77 (Wash. 1992) (noting the "economic impact on Sintra is enormous").

<sup>190</sup> *Guimont v. Clarke*, 854 P.2d 1, 15–16 (Wash. 1993) (stating that "park owners were given no opportunity to alter their present or planned uses without subjecting themselves to the [HPO's] onerous obligations").

<sup>191</sup> *Id.* at 16 (deeming "it important that the increased costs imposed by the [HPO] attach to the activity of leaving a business").

violative of substantive due process.<sup>192</sup> The HPOs, which imposed significant monetary liability on a few property owners, can hardly be characterized as traditional zoning/land-use regulations.

Ordinance 15053 requires no affirmative obligations and does not prohibit a landowner from building on or subdividing his land. The ordinance does not prevent an owner of a 100-acre parcel from dividing it into 5-acre lots, consistent with the rural area zoning, and selling those lots for substantial profit.<sup>193</sup> The ordinance requires no affirmative payment of money, imposes no liability on a property owner, and changes no existing use. Even if landowners subjectively consider the restrictions on the use of their property “oppressive,” the restrictions do not rise to the level of “undue” oppression required for a violation of substantive due process, especially in light of the substantial interest the county has in preventing water quality degradation; the lack of infringement on landowner’s rights to sell, possess, build on, and subdivide their land; and the economic value that landowners will retain in their land.

#### 4. *King County Determined That No Less Restrictive Alternatives Would Accomplish the Goals of the Regulation*

A Washington court will also consider whether any less restrictive alternatives are available to accomplish the purposes of the regulation. In the case of Ordinance 15053, there are no such available alternatives. In fact, *stricter* regulations are necessary to achieve the minimum goals of the ordinance, but, in a compromise, the Council enacted less restrictive regulations.<sup>194</sup>

Studies relied upon by King County in passing the ordinance show that significant impairment to water quality results when any more than 35% of a watershed is cleared and where any more than 10% is covered with an impervious surface.<sup>195</sup> As a result, initial drafts of Ordinance 15053 required a mandatory 65% clearing restriction on all properties in the rural zone, and allowed no more than 10% of the land to be covered with an effective impervious surface.<sup>196</sup> As a result of public comment, however, King County ultimately eased many of the restrictions that were considered the minimum necessary to achieve the goals of the ordinance.<sup>197</sup> For example, the Council

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<sup>192</sup> Robinson v. City of Seattle, 830 P.2d 318, 331–32 (Wash. 1992).

<sup>193</sup> Jones v. King County, 874 P.2d 853, 860–61 (Wash. Ct. App. 1994) (noting that the downzoning did not make unfeasible the current use of property, nor eliminate all future development capability).

<sup>194</sup> See *id.* (recognizing that given the goal of the downzoning, any less restrictive regulation would fail to achieve the purpose of the regulation).

<sup>195</sup> BEST AVAILABLE SCIENCE VOLUME 1, *supra* note 1, § 7.2.8, at 7-26 to 7-27 (citing BOOTH, *supra* note 4).

<sup>196</sup> See BROOKS & MAURER, *supra* note 128 (describing original proposal to limit effective impervious surface area to 10%); see Ervin, *supra* note 127, at D1 (reporting on proposed modifications to the Ordinance that reduce the burden of certain land-use restrictions).

<sup>197</sup> See Guimont v. City of Seattle (*Guimont II*), 896 P.2d 70, 74–76 (Wash. 1995) (finding it significant, in the context of a substantive due process challenge, that the legislature ultimately adopted much less restrictive regulations than it initially considered in early drafts of the bill).

removed the 10% impervious surface restriction in favor of variable clearing limits that depend on the size of the parcel.<sup>198</sup>

#### V. CONCLUSION

Despite its label as the “most restrictive land use regulation in the nation,” the King County clearing and grading ordinance, Ordinance 15053, should withstand challenges to its constitutionality on both takings and due process grounds. King County has a significant interest in limiting damage to groundwater and surface water quality that results from loss of forest cover. The GMA requires counties to protect wetlands, groundwater, and wildlife habitat, and the scientific studies relied on by King County show that retention of forest cover is essential to protect those natural features.

The actual economic impact on most landowners is likely to be small, and any economic impact that landowners do suffer will not be significant enough to amount to a taking or a violation of due process. The regulation does not infringe upon any of the fundamental attributes of property ownership. The landowner’s rights to possess, exclude, and convey are unaffected by the regulation. The ordinance does not prohibit the landowner from continuing its present use of the land, building a residence on the land, or subdividing the parcel into multiple lots for resale. The ordinance is nothing more than a regulation of use, similar to setback requirements, height restrictions, and the myriad other land-use regulations consistently upheld by Washington courts.

The ordinance is also distinguishable in significant ways from the HPO ordinances held unconstitutional by the Washington Supreme Court. The ordinance does not force King County’s rural landowners to single-handedly shoulder the burden of environmental protection—a burden that is shared broadly by all of King County’s landowners. Even if landowners subjectively consider the ordinance oppressive, the legal test is whether the law is “unduly” oppressive. Given the county’s substantial interest in protecting water quality, and the lack of economic impact that property owners will suffer, the ordinance will likely survive a challenge on due process grounds.

Although the reaction to the ordinance by King County’s rural landowners is understandably negative, the landowners’ recourse will have to lie in the chambers of the county council or at the polls, not with the courts. The government interest in the regulation is too strong, and the actual effect on landowners too small or speculative to overturn the regulations on either takings or due process grounds.

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<sup>198</sup> See King County, Wash., Ordinance 15051 § 5(j) (Oct. 25, 2004), *available at* [http://www.metrokc.gov/council/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/council/cao/critical_areas_15051.pdf) (noting that relaxing the clearing limit to 50% rather than 35% of a property increases risk to aquatic system functions and values, but finding that the relaxed clearing limits will be “adequate when carried in conjunction with continued protection of the forest production district, acquisition of forested lands, tax incentive programs to encourage protection and restoration of forest cover, transfer of development rights programs and forestry stewardship programs”).