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Donya Williamson

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## **URBANITES VERSUS RURAL RIGHTS: CONTEST OF LOCAL GOVERNMENT LAND-USE REGULATIONS UNDER WASHINGTON PREEMPTION STATUTE 82.02.020**

Donya Williamson

*Abstract:* In *Citizens' Alliance for Property Rights v. Sims*,<sup>1</sup> the Court of Appeals of Washington held that King County clearing and grading regulations—recently enacted pursuant to the Washington State Growth Management Act—constitute an unlawful “tax, fee, or charge” on the development of land, thereby violating a Washington excise tax preemption statute. The court ruled that the clearing limitations do not qualify under the statutory exception for mitigation of development impacts since they are not calculated on a site-by-site basis. This Note argues that the ruling greatly expands the scope of this statutory limitation on local land-use regulation, compromises Growth Management Act policies, and misconstrues prior case law. If upheld, the decision’s approach will significantly constrain municipal authority to protect environmental quality through land-use regulations.

### **INTRODUCTION**

Development restrictions implemented pursuant to the Washington State Growth Management Act (GMA) have caused tension between landowners, developers, and government<sup>2</sup> since the state legislature enacted the GMA in 1990.<sup>3</sup> In King County, Washington, the conflict

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1. 145 Wash. App. 649, 187 P.3d 786 (2008), *cert. denied*, 165 Wash. 2d 1030, 203 P.3d 378 (2009).

2. *See generally*, *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wash. 2d 224, 110 P.3d 1132 (2005) (citizens’ group contested county’s designation of GMA-mandated urban growth area); *Ass’n of Rural Residents v. Kitsap County*, 141 Wash. 2d 185, 4 P.3d 115 (2000) (citizens’ group contested county issuance of development permit for project outside of GMA-mandated urban growth area); *Snohomish County v. Anderson*, 124 Wash. 2d 834, 881 P.2d 240 (1994) (citizens’ group sought to subject county’s GMA-mandated planning policy to referendum); *Citizens’ Alliance*, 145 Wash. App. 649, 187 P.3d 786 (citizens’ group contested county’s critical areas ordinance, enacted pursuant to the GMA); *Honesty in Envtl. Analysis and Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App. 522, 979 P.2d 864 (1999) (interest group challenged city’s adoption of critical areas ordinance, enacted pursuant to the GMA).

3. Growth Management Act, ch. 17, 1990 Wash. Sess. Laws 1st Ex. Sess. 1972 (codified as amended at WASH. REV. CODE § 36.70A (2008)); Growth Management Act—Revised Provisions, ch. 32, 1991 Wash. Sess. Laws 1st Spec. Sess. 2903 (codified as amended at WASH. REV. CODE § 36.70A (2008)). The 1990 and 1991 legislatures enacted the GMA in two installments known as “GMA I” and “GMA II.” Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 871–72 (1993).

also divides urban and rural interests. Approximately 1.9 million people live in King County;<sup>4</sup> and while nearly one-third of that population lives in Seattle,<sup>5</sup> over 1500 of the county's 2000 square miles are zoned for rural, forest, and agricultural uses.<sup>6</sup> Nearly 150,000 people live in these unincorporated rural areas.<sup>7</sup>

In 2004, the King County Council considered a controversial clearing and grading ordinance that would prohibit rural landowners from clearing some types of vegetation—generally, trees and brush—from fifty or sixty-five percent of their land.<sup>8</sup>

Advocates argued that the limits were necessary to prevent further erosion and flooding, and to keep chemicals from running into rivers and streams.<sup>9</sup> Rural residents, who took the position that the proposed clearing and grading restrictions would unfairly limit what they could do with their land, fought the ordinance throughout the public-comment process,<sup>10</sup> including at the October 25, 2004 King County Council

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4. KING COUNTY OFFICE OF MGMT. AND BUDGET, 2008 ANNUAL GROWTH REPORT 55 (2008) [hereinafter ANNUAL GROWTH 2008], available at <http://www.metrokc.gov/budget/agr/agr08/#cities>. In ANNUAL GROWTH 2008, the county reports 1,884,200 people resided in King County. *Id.* In 2004, when the county enacted its clearing and grading ordinance, 1,788,300 people resided in King County. KING COUNTY OFFICE OF MGMT. AND BUDGET, 2004 ANNUAL GROWTH REPORT 55 (2004) [hereinafter ANNUAL GROWTH 2004], available at <http://www.metrokc.gov/budget/agr/agr04/#cities>.

5. ANNUAL GROWTH 2008, *supra* note 4, at 55. In ANNUAL GROWTH 2008, the county reports an estimated 592,800 people resided in the City of Seattle. *Id.* In 2004, an estimated 572,600 people resided in the City of Seattle. ANNUAL GROWTH 2004, *supra* note 4, at 55.

6. ANNUAL GROWTH 2008, *supra* note 4, inside front cover, 117 (noting rural unincorporated King County has a land area of 1676 square miles).

7. ANNUAL GROWTH 2008, *supra* note 4, at 117. Rural unincorporated King County has a population of about 144,000. *Id.* In 2004, rural unincorporated King County had a population of about 137,000. ANNUAL GROWTH 2004, *supra* note 4, at 117.

8. KING COUNTY, WASH., ORDINANCE 15053 § 14 (2004), available at [http://www.metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://www.metrokc.gov/mkcc/cao/clearing_grading_15053.pdf) (codified at KING COUNTY, WASH., CODE tit. 16.82.150, .152 (2008)), available at [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); Keith Ervin, *Court Says Rural-Land Restrictions Go Too Far*, SEATTLE TIMES, Jul. 8, 2008, at A1 [hereinafter Ervin, *Restrictions Go Too Far*]; see Keith Ervin, *Panel Approves Land-Use Package*, SEATTLE TIMES, Sept. 29, 2004, at B1 [hereinafter Ervin, *Panel Approves*].

9. Natalie Singer, *Suit Challenges Land-Use Rules*, SEATTLE TIMES, Mar. 4, 2005, at B5.

10. Keith Ervin, *County Approves Pair of Land-Use Regulations*, SEATTLE TIMES, Oct. 26, 2004, at B1 [hereinafter Ervin, *County Approves*]; Keith Ervin, *Foes Vow Court Fight Over Land-Use Rules*, SEATTLE TIMES, Aug. 2, 2004, at B1 [hereinafter Ervin, *Court Fight*]; Ervin, *Panel Approves*, *supra* note 8, at B1; Laura Onstot, *Can't Keep Them Down on the Farm*, SEATTLE WEEKLY, Sept. 3, 2008, at 16.

meeting at which the members cast their votes.<sup>11</sup> The ordinance passed by a 7–6 vote divided along partisan lines, with Democrats, who largely represented urban areas,<sup>12</sup> voting in favor of its enactment.<sup>13</sup>

Although the county had revised the ordinance based on public feedback, the ordinance as enacted was not a satisfactory compromise for the rural opposition. Citizens’ Alliance for Property Rights, a political action committee comprising property owners potentially impacted by the county’s proposed clearing and grading restrictions, sued King County. It argued that the ordinance ran afoul of the state constitution and amounted to a tax prohibited by state law.<sup>14</sup>

The Washington State Court of Appeals held that the clearing and grading ordinance was an unlawful “tax, fee, or charge” because it did not require individually determined clearing and grading restrictions based on site-specific evaluations of each plot of land.<sup>15</sup> The court did not reach the constitutional issues.<sup>16</sup> The decision could seriously undermine the ability of local governments to plan for responsible land use. If counties have to conduct site-specific evaluations, it will be more costly and time-consuming to create the comprehensive land-use plans the GMA requires.

This Note argues that the court of appeals erred in calling the land-use regulations an unlawful “tax, fee, or charge.” Part I gives an overview of the GMA. Part II introduces constitutional and statutory protections available to Washington landowners and developers, and Part III describes key cases interpreting some of these protections. Part IV introduces the King County ordinance, reviews the environmental concerns that spurred the ordinance, and discusses the rural response to the clearing restrictions. Part V describes *Citizens’ Alliance for Property Rights v. Sims*,<sup>17</sup> which Part VI argues was decided in error.

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11. Ervin, *County Approves*, *supra* note 10, at B1.

12. *Id.* at B7.

13. KING COUNTY, WASH., ORDINANCE 15053.

14. *Citizens’ Alliance for Prop. Rights v. Sims*, 145 Wash. App. 649, 654, 187 P.3d 786, 789 (2008); First Amended Complaint for Violation of RCW 82.02, Substantive Due Process (Wash. Const. art. I § 3), and Declaratory Relief at 5–7, *Citizens’ Alliance*, No. 04-2-13831-9 (Wash. Super. Ct. Snohomish County, filed Mar. 3, 2005); Onstot, *supra* note 10, at 18.

15. *Citizens’ Alliance*, 145 Wash. App. at 665, 187 P.3d at 794.

16. *Id.* at 653, 187 P.3d at 788.

17. 145 Wash. App. 649, 187 P.3d 786 (2008), *cert. denied*, 165 Wash. 2d 1030, 203 P.3d 378 (2009). Ronald Sims served as King County Executive from 1996 to 2009. Keith Ervin, *King County Exec Race Centers on Budget Skills*, SEATTLE TIMES, June 14, 2009, at B1.

## I. THE GMA EMPOWERS LOCAL GOVERNMENTS TO DEVELOP COMPREHENSIVE LAND-USE PLANS

The Washington landscape includes forestland, pastures, wetlands and deserts, and the state's people live in vast ranching areas and farm communities as well as densely populated cities and suburbs.<sup>18</sup> Washington's natural resources, from salmon to lumber to minerals, were the cornerstone of its economy throughout its early years.<sup>19</sup> During the 1970s and 1980s a massive influx of new residents<sup>20</sup> strained the state's environment and landscape.<sup>21</sup> By the late 1980s, it had become clear that Washington needed new approaches to manage population growth and development.<sup>22</sup>

In 1990, the Washington State Legislature passed the Growth Management Act,<sup>23</sup> which channels growth into urban centers and aims to reduce sprawl and preserve the character of rural areas.<sup>24</sup> The responsibility for implementing and enforcing the GMA's mandates falls chiefly to local governments,<sup>25</sup> allowing land-use planning under the GMA to account for local problems and needs. This can result in tension in counties with large urban populations and urban-centered local

18. Onstot, *supra* note 10, at 17.

19. *Id.*

20. WASHINGTON STATE OFFICE OF FINANCIAL MANAGEMENT, POPULATION CHANGE BY DECADE: EAST AND WEST (2001), <http://www.ofm.wa.gov/census2000/pl/charts/chart02.asp> [hereinafter POPULATION CHANGE]; see Settle & Gavigan, *supra* note 3, at 880–81; Ed Penhale, *Managing State Growth Looms as Hot Issue for '90 Legislature*, SEATTLE POST-INTELLIGENCER, Jan. 1, 1990, at A1.

21. Settle & Gavigan, *supra* note 3, at 880–81; Penhale, *supra* note 20, at A1; see also, POPULATION CHANGE, *supra* note 20.

22. Settle & Gavigan, *supra* note 3, at 880–81; Penhale, *supra* note 20, at A1; Joseph W. Tovar, *Needed: A Central Vision—A New Strategy for Growth*, SEATTLE TIMES, Dec. 3, 1989, at A20 (discussing a report of conclusions and recommendations by members of the Washington City Planning Directors Association and the Washington State Association of County Regional Planning Directors with respect to a new strategy for growth management in Washington).

23. Growth Management Act, ch. 17, 1990 Wash. Sess. Laws 1st Ex. Sess. 1972, (codified as amended at WASH. REV. CODE § 36.70A (2008)); see also Growth Management Act—Revised Provisions, ch. 32, 1991 Wash. Sess. Laws 1st Spec. Sess. 2903 (codified as amended at WASH. REV. CODE § 36.70A (2008)).

24. WASH. REV. CODE § 36.70A.020 (2008) (listing the Act's planning goals, including “[e]ncourag[ing] . . . development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner” and “[r]educ[ing] the inappropriate conversion of undeveloped land into sprawling, low-density development.”).

25. See WASH. REV. CODE § 36.70A.040(1) (2008). In this Note, “local government” refers to the governing bodies of towns, cities, or counties.

government because rural landowners sometimes feel their voices are overwhelmed by urbanites who do not understand rural lifestyles, underestimate ruralites' environmental awareness, and assign a disproportionate share of environmental protection costs to the rural minority.<sup>26</sup>

A. *Local Governments Must Enact Land-Use Regulations Consistent with the GMA's Goals and According to Defined Procedures*

By the late 1980s Washington's economy was booming, but the steadily increasing population and urban sprawl created traffic congestion,<sup>27</sup> reduced areas of open space,<sup>28</sup> and intensified instances of environmental degradation.<sup>29</sup> The state was in dire need of a comprehensive strategy to manage growth.<sup>30</sup> The land-use and development policies in effect were scattered throughout statutes enacted over the course of a century: a constitution written in the late 1880s,<sup>31</sup> planning laws adopted in the 1930s,<sup>32</sup> and environmental acts passed in the 1970s and 1980s.<sup>33</sup> State agencies were sending uncoordinated and conflicting messages to local governments, private developers, and the public,<sup>34</sup> and local governments were working under one of the weakest mandates for comprehensive planning in the United States.<sup>35</sup>

In 1990, the state legislature passed the GMA,<sup>36</sup> which empowers

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26. See Onstot, *supra* note 10, at 17.

27. Settle & Gavigan, *supra* note 3, at 880; Penhale, *supra* note 20, at A4.

28. Penhale, *supra* note 20, at A1; see Tovar, *supra* note 22, at A20.

29. Settle & Gavigan, *supra* note 3, at 880. The state population grew by about 734,000 people in the 1980s, with more than ninety percent of that growth concentrated in western Washington. POPULATION CHANGE, *supra* note 20; see Onstot, *supra* note 10, at 17; Penhale, *supra* note 20, at A1; Tovar, *supra* note 22, at A20.

30. See Settle & Gavigan, *supra* note 3, at 870–72, 880–81; Penhale, *supra* note 20, at A1, 4; Tovar, *supra* note 22, at A20.

31. Tovar, *supra* note 22, at A20.

32. *Id.*

33. *Id.* (“Prime examples [of conflicting planning strategies] are the Transportation 1990 Plan, the Environment 2010 Report and the Washington Works Worldwide economic development strategy. . . . Each effort proceeded with independent direction . . .”).

34. *Id.*; see Settle & Gavigan, *supra* note 3, at 875–80.

35. Tovar, *supra* note 22, at A20.

36. Growth Management Act, ch. 17, 1990 Wash. Sess. Laws 1st Ex. Sess. 1972, (codified as amended at WASH. REV. CODE § 36.70A (2008)); see also, Growth Management Act—Revised

local governments to create land-use plans, called “comprehensive plans,” consistent with economic development and environmental protection.<sup>37</sup> The GMA lists thirteen planning goals, including protecting the environment, focusing growth in high-density urban areas, protecting landowners from arbitrary and capricious regulations, and promoting development “within the capacities of the state’s natural resources.”<sup>38</sup> Local governments bear primary responsibility for implementing the GMA’s mandate,<sup>39</sup> but the GMA does not tell them how to balance what critics have described as contradictory goals.<sup>40</sup>

Under the GMA, all of the state’s local governments must designate “critical areas” and enact regulations to protect them.<sup>41</sup> Critical areas include wetlands, areas essential for potable water, and fish and wildlife conservation areas.<sup>42</sup> The GMA requires local governments to use the “best available science” to identify critical areas and to craft the restrictions that apply to them.<sup>43</sup> Scientific inquiry is particularly relevant to the designation and regulation of critical areas, although local governments may balance scientific findings against the GMA’s other goals.<sup>44</sup>

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Provisions, ch. 32, 1991 Wash. Laws 1st Spec. Sess. 2903 (codified as amended at WASH. REV. CODE § 36.70A (2008)).

37. WASH. REV. CODE §§ 36.70A.010, .020, .040 (2008); *see also* WASH. ADMIN. CODE § 365-195 (2009) (“Growth Management Act—Procedural Criteria for Adopting Comprehensive Plans and Development Regulations”).

38. WASH. REV. CODE § 36.70A.020(1)–(13).

39. *Id.* § 36.70A.040.

40. 24 TIM BUTLER & MATTHEW KING, WASHINGTON PRACTICE: ENVIRONMENTAL LAW AND PRACTICE § 18.2, at 231 (2d ed. 2008) (“[A] cursory review of these goals reveals they are vague and contradictory.” (citing Carol M. Ostrom, *Land-Use Planning—Or Just Land Grab? Chelan County Fight Could Affect Whole State*, SEATTLE TIMES, Feb. 8, 1996, at A1)).

41. WASH. REV. CODE §§ 36.70A.060(2)–(3), .170 (“Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170.”); *see also* WASH ADMIN. CODE §§ 365-190-040, -080 (2009).

42. WASH. REV. CODE § 36.70A.030(5).

43. *Id.* § 36.70A.172(1). This requirement was added to the GMA in 1995. Growth Management Act, ch. 347 § 105, 1995 Wash. Sess. Laws 1st Reg. Sess. 1556, 1560. The mandatory procedure for application of the best available science is set forth in the Washington Administrative Code. WASH. ADMIN. CODE §§ 365-195-900–920 (2009). *See generally* Alan D. Copsey, *Including Best Available Science in the Designation and Protection of Critical Areas Under the Growth Management Act*, 23 SEATTLE U. L. REV. 97 (1999).

44. *Honesty in Envtl. Analysis and Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App. 522, 531–32, 979 P.2d 864, 870 (1999).

Heavily populated counties or counties experiencing rapid growth<sup>45</sup> must do more than identify and protect critical areas: Their comprehensive land-use plans must include a map identifying urban-growth areas and areas where only rural land use will be allowed.<sup>46</sup> Plans must also identify the different regulations that will govern each type of land.<sup>47</sup> The GMA itself mandates that all urban development must occur within urban-growth areas, just as it requires local government to regulate rural lands in a way that preserves rural-based economies and traditional rural lifestyles.<sup>48</sup>

*B. GMA Regulations Cause Tension Between Government, Private Property Owners, and Developers*

The GMA has created tension between private landowners and local governments because it restricts certain uses of property in order to control the environmental impact of development<sup>49</sup> and flirts with the line between impermissible takings or due process violations, and permissible uses of government police power.<sup>50</sup> Critics have charged that the GMA's thirteen goals are contradictory and irreconcilable. For example, regulations to achieve one GMA planning goal—to protect the environment—are often a hindrance to another GMA planning goal—to encourage economic development.<sup>51</sup> Many landowners, especially rural landowners who make a living from their land, also feel that GMA

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45. Counties that must conform to the GMA include: (1) counties with populations of more than 50,000 that also experienced more than ten percent population growth between 1985 and 1995; (2) counties with populations of more than 50,000 that also experienced more than seventeen percent population growth within the past ten years; and (3) counties that, regardless of their populations, had population growth exceeding twenty percent in the past ten years. WASH. REV. CODE § 36.70A.040(1)–(2).

46. WASH. REV. CODE §§ 36.70A.030(15), .070; WASH. ADMIN. CODE § 365-195-300.

47. WASH. REV. CODE §§ 36.70A.060, .110; *see* WASH. ADMIN. CODE §§ 365-195-400–410.

48. WASH. REV. CODE §§ 36.70A.011, .020, .070(5)(b), .110; *see* WASH. ADMIN. CODE §§ 365-195-330–335.

49. WASHINGTON RESEARCH COUNCIL, *GMA: GOALS AND PROMISES REVIEWED 7, PROPERTY RIGHTS AND THE GROWTH MANAGEMENT ACT 1* (2002), *available at* [http://www.researchcouncil.org/publications\\_container/GMA7.pdf](http://www.researchcouncil.org/publications_container/GMA7.pdf) [hereinafter PROPERTY RIGHTS].

50. *See* Jeffrey M. Eustis, *Between Scylla and Charybdis: Growth Management Act Implementation That Avoids Takings and Substantive Due Process Limitations*, 16 U. PUGET SOUND L. REV. 1181, 1181–85 (1993); John M. Groen & Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1300–01 (1993).

51. WASH. REV. CODE § 36.70A.020(5), (10); BUTLER & KING, *supra* note 40, § 18.2, at 231; PROPERTY RIGHTS, *supra* note 49, at 2.



regulations go too far.<sup>52</sup> When the Chelan County Commissioners were debating GMA regulations, long-time residents framed the issue as squarely involving their property rights: “We don’t need some governor telling us what to do with our land,” orchard owner Bob Peterson told a Seattle newspaper reporter.<sup>53</sup> “If you start passing legislation and laws that take away from the ability of a property owner to make his income or retirement off it, then you’ve gone beyond what’s right.”<sup>54</sup>

The GMA requires local governments to provide a public forum where these disputes can be aired before decision-makers.<sup>55</sup> Requirements for comprehensive plans include public notice, public review and comment,<sup>56</sup> and consideration of public feedback.<sup>57</sup> But after that process, the decision lies in the hands of elected officials, who do not have to adopt the policies favored by the majority of those who participated in the process.<sup>58</sup>

The administrative courts that review GMA-related decisions, Growth Management Hearings Boards (GMHBs), give deference to elected officials with respect to their decisions about GMA regulations.<sup>59</sup> A GMHB can set aside a local government plan only if it “*is clearly erroneous* in view of the entire record before the Board and in light of the public participation requirements of [the GMA].”<sup>60</sup> Parties may also agree to waive review before a GMHB and take their dispute directly to a county superior court, where the same standard of review—deference to elected officials—applies.<sup>61</sup>

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52. BUTLER & KING, *supra* note 40, § 18.2, at 231.

53. *Id.*

54. *Id.*

55. WASH. REV. CODE §§ 36.70A.035(2), .140.

56. *Id.* § 36.70A.035.

57. *Id.* § 36.70A.140.

58. *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wash. App. 375, 388, 53 P.3d 1028, 1035 (2002) (holding that the GMA requires public participation in the development and amendment of comprehensive land-use plans and regulations, but does not require that local government act upon the desires expressed by the public).

59. STATE OF WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, PRACTICING BEFORE THE GROWTH MANAGEMENT HEARINGS BOARDS FOR WASHINGTON STATE 6 (2008) [hereinafter HEARINGS BOARD], <http://www.gmhb.wa.gov/images/pdf/PracticeHandbookAug2008.pdf>. There are three GMHBs: the Eastern Board, the Central Puget Sound Board, and the Western Board. *Id.* at 4.

60. *City of Burien*, 113 Wash. App. at 383, 53 P.3d at 1032 (quoting WASH. REV. CODE § 36.70A.320(3) (2002) (emphasis added)); *see* HEARINGS BOARD, *supra* note 59, at 6.

61. WASH. REV. CODE § 36.70A.295; *see* WASH. ADMIN. CODE §§ 242-02-290–295 (2009).

While the public has the opportunity to shape comprehensive plans through public participation processes, and there are a number of forums in which to be heard, rural property owners often perceive this process as futile: A conflict between city politicians who cannot identify with the perspectives of rural property owners and the rural property owners who believe they bear a drastic and disproportionate share of the cost of environmental protection.<sup>62</sup>

## II. WASHINGTON LAW PROVIDES CONSTITUTIONAL AND STATUTORY PROTECTIONS FOR PROPERTY OWNERS

Property owners with grievances about overreaching government land-use decisions have several state law protections. The Washington State Constitution provides takings<sup>63</sup> and substantive due process protections,<sup>64</sup> and Washington statutes prevent local governments from using their authority to withhold development permits to extract revenue-generating concessions.<sup>65</sup>

### A. *Washington Landowners Enjoy Strong Constitutional Protections from Overreaching Government Land-Use Regulations*

Washington has a long history of vesting broad police powers in local governments,<sup>66</sup> and the state constitution provides that “[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”<sup>67</sup> Local governments may create any local regulation so long as it is consistent with state law, is aimed at a legitimate government purpose, and is reasonably calculated to achieve that

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62. See e.g., Ervin, *County Approves*, *supra* note 10, at B7; Ervin, *Court Fight*, *supra* note 10, at B4; Onstot, *supra* note 10, at 18; BUTLER & KING, *supra* note 40, § 18.2, at 231.

63. WASH. CONST. art I, § 16.

64. *Id.* § 3.

65. WASH. REV. CODE §§ 82.02.020–.090. Washington residents with land disputes also have a number of forums in which to be heard, including courts and quasi-judicial and administrative forums such as Growth Management Hearings Boards. See *supra* Part I.B.

66. See Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 494, 497–506 (2000).

67. WASH. CONST. art. IX, § 11.

purpose.<sup>68</sup>

However, Washington's constitution provides protections against overreaching local land-use regulations for landowners, who can bring both takings and substantive due process claims.<sup>69</sup> Washington courts analyze the takings claim first,<sup>70</sup> and start with the "threshold inquiry" of whether the regulation amounts to a "physical invasion" or "total taking" as well as whether it "destroys or derogates any fundamental attribute of property ownership: including the right to possess; to exclude others; or to dispose of property."<sup>71</sup> If it is either a physical invasion or total taking, the regulation amounts to a taking, and the government must compensate the landowner.<sup>72</sup>

If the land-use regulation at issue does not involve a physical invasion or total taking, courts next ask "whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area."<sup>73</sup> This type of legitimate regulation, the Washington State Supreme Court has said, stands in contrast to one that "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit."<sup>74</sup> If a court finds that the regulation promotes a legitimate purpose and does not destroy a fundamental attribute of ownership, the analysis ends: No taking has

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68. Spitzer, *supra* note 66, at 507–09 (citing *Petsel, Inc. v. King County*, 77 Wash. 2d 144, 154–55, 459 P.2d 937, 942–43 (1969)); see *County of Spokane v. Valu-Mart, Inc.*, 69 Wash. 2d 712, 719, 419 P.2d 993, 998 (1966); see also *In re 14255 53rd Ave. S.*, 120 Wash. App. 737, 749, 86 P.3d 222, 227 (2004) (holding no compensation was required where the Washington Department of Agriculture undertook to destroy all trees that might be host to the citrus longhorned beetle to prevent a widespread infestation because it was a justifiable action to avert public calamity).

69. WASH. CONST. art. I, §§ 3, 16. The Washington judiciary uses the *Orion-Presbytery* test to determine whether a takings or substantive due process analysis is appropriate. Spitzer, *supra* note 66, at 514–16; ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION, A REFERENCE GUIDE* 31 (G. Alan Tarr ed., Greenwood Press 2002) (relying on *Presbytery of Seattle v. King County*, 114 Wash. 2d 320, 787 P.2d 907 (1990)); see *Guimont v. Clarke*, 121 Wash. 2d 586, 616–17, 854 P.2d 1, 18 (1993) (Utter, J., concurring) (citing *Presbytery*, 114 Wash. 2d at 329–30, 787 P.2d at 912–13; *Orion Corp. v. State*, 109 Wash. 2d 621, 651, 747 P.2d 1062, 1078 (1987)); *Orion*, 109 Wash. 2d 621, 747 P.2d 1062 (1987).

70. *Guimont*, 121 Wash. 2d at 594–95, 853 P.2d at 5 (citing *Presbytery*, 114 Wash. 2d at 329, 787 P.2d at 912).

71. *Id.* at 602, 853 P.2d at 10 (citations omitted).

72. *Id.* at 602–03, 853 P.2d at 10 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–18 (1992)).

73. *Id.* at 603, 853 P.2d at 10 (relying on *Robinson v. Seattle*, 119 Wash. 2d 34, 49, 830 P.2d 318, 327–28 (1992)).

74. *Id.* (citing *Robinson*, 119 Wash. 2d at 49, 830 P.2d at 328).

occurred. However, if a court finds a regulation fails this analysis, it next considers “whether [it] *substantially* advances a legitimate state interest. If it does not, the regulation is a taking.”<sup>75</sup> If the regulation substantially advances a legitimate state purpose, courts balance the state interest in the regulation against the economic impact on the landowner, considering “(1) the regulation’s economic impact on the property; (2) the extent of [its] interference with investment-backed expectations; and (3) the character of the government action.”<sup>76</sup> If a court finds a taking has occurred, “just compensation is mandated.”<sup>77</sup>

The Washington State Supreme Court has declared that “[e]ven if a regulation is not susceptible to a takings challenge,” courts must still “subject [it] to substantive due process scrutiny for reasonableness.”<sup>78</sup> Courts determine “(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner.”<sup>79</sup> A court invalidates property regulations that fail this substantive due process test.<sup>80</sup>

#### B. *Washington Law Limits Counties’ Authority to Tax Development*

Washington law limits the power of local governments to extract taxes and fees from developers. Section 82.02.020 of the Revised Code of Washington (RCW) (the “state preemption statute”) preempts certain taxes, fees, and charges relating to development.<sup>81</sup> It reads, in relevant part:

Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no [local government] shall impose any tax, fee, or charge, either direct or indirect, on the . . . development . . . of land. However, this section does not preclude dedications of

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75. *Id.* at 604, 853 P.2d at 11 (citing *Presbytery*, 114 Wash. 2d at 333, 787 P.2d at 914; *Robinson*, 119 Wash. 2d at 50, 830 P.2d at 328) (emphasis added).

76. *Id.* (citing *Presbytery*, 114 Wash. 2d at 335–36, 787 P.2d at 915; *Robinson*, 119 Wash. 2d at 51, 830 P.2d at 328).

77. *Id.*

78. *Id.* at 608, 853 P.2d at 13–14 (citing *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 912–13).

79. *Id.* at 609, 853 P.2d at 14 (quoting *Presbytery*, 114 Wash. 2d at 330, 787 P.2d at 913).

80. *Id.* at 616, 853 P.2d at 18 (Utter, J., concurring) (citing *Orion Corp. v. State*, 109 Wash. 2d 621, 657, 747 P.2d 1062, 1081 (1987)).

81. RCW 58.17 also addresses state power to regulate plats, subdivisions, and dedications. WASH. REV. CODE §§ 58.17.010–.210 (2008).

land or easements . . . which the [local government] can demonstrate are reasonably necessary as a direct result of the proposed development . . . .

This section does not prohibit voluntary agreements with [local governments] that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development . . . .<sup>82</sup>

The statute protects developers from having to pay taxes, fees, or charges as a condition of development, unless those payments directly relate to the impacts of their specific developments. The exceptions in RCW 82.02.050 through 82.02.090 allow local governments to impose mitigation measures to offset the costs new development will create.<sup>83</sup>

Since 1982, RCW 82.02.020 has undergone two substantial revisions.<sup>84</sup> The first change addressed an issue then before the Washington State Supreme Court: whether local governments could use their power to approve development applications as a revenue-raising device by conditioning approval on payment of fees.<sup>85</sup> The legislature allowed them to charge only those fees “reasonably necessary as a direct result of the proposed development,” and forbade fees that “exceed the proportionate share of [the proposed development’s] costs.”<sup>86</sup> Put simply, the legislature allowed local governments to recoup costs they would incur because of a development, but forbade them from inflating their balance sheets by using their authority to approve developments to

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82. WASH. REV. CODE § 82.02.020.

83. WASH. REV. CODE § 82.02.050–.090. The legislature added sections 82.02.050 and 82.02.090 as part of the Growth Management Act. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 753 n.9, 49 P.3d 867, 875 n.9 (2002) (citing Growth Management Act, ch. 17, §§ 42–44, 46–48, 1990 Wash. Sess. Laws 1st Ex. Sess. 1972, 1994–98, 1999–2001).

84. Prior to 1982, RCW 82.02.020 addressed state preemption regarding the imposition of taxes on retail sales, and use of personal property, pari-mutuel wagering, conveyances, and cigarettes; it did not concern development exactions for permitting. Act of May 24, 1979, ch. 196, § 3, 1979 Wash. Sess. Laws 1st Ex. Sess. 1755, 1758 (amended 1982); Martha S. Lester, *Subdivision Exactions in Washington: The Controversy Over Imposing Fees On Developers*, 59 WASH. L. REV. 289, 294 n.40 (1984).

85. *Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 810, 650 P.2d 193, 195–96 (1982) (holding that where local governments exact fees in order to raise revenue, rather than to forward a regulatory purpose, those fees constitute an unlawful tax under the Washington State Constitution). RCW 82.02.020, as amended in 1982, diminished the significance of the *Hillis* decision because it statutorily limits the ability of municipalities to put conditions on plat approval for the development of land. Lester, *supra* note 84, at 289–90; *see* *Ivy Club Investors Ltd. P’ship v. City of Kennewick*, 40 Wash. App. 524, 529, 699 P.2d 782, 785 (1985).

86. WASH. REV. CODE § 82.02.020.

extort money from developers.

Similar concerns drove the 1990 amendment to RCW 82.02.020, enacted in response to the GMA.<sup>87</sup> The 1990 amendment authorized local governments to recoup certain costs incurred from improving public facilities under the GMA,<sup>88</sup> but the legislature clearly wanted to limit local authorities to only assessing fees for system improvements reasonably and proportionately related to that new development.<sup>89</sup> For example, the statute requires that local governments immediately deposit the funds received into an earmarked account, and spend the money on the identified purpose within five years.<sup>90</sup> If the funds are not spent within five years, the developer gets a refund.<sup>91</sup>

### III. THE SUPREME COURT OF WASHINGTON HAS INTERPRETED RCW 82.02.020 TO FORBID TAXES, FEES, OR CHARGES UNRELATED TO A DEVELOPMENT'S IMPACT

RCW 82.02.020 has generated lawsuits against local governments by developers and landowners who claim that land set-aside requirements are an impermissible “tax, fee, or charge.”<sup>92</sup> The Washington State Supreme Court has agreed that local governments impose a tax by requiring land set-asides, but have allowed local governments to do just that if the requirements are reasonably related to the direct impact of a development.<sup>93</sup>

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87. Growth Management Act, ch. 17, §§ 42–44, 46–48, 1990 Wash. Sess. Laws 1st Ex. Sess. 1972, 1994–98, 1999–2001 (codified at WASH. REV. CODE § 82.02.050–.090 (2008)); *Isla Verde*, 146 Wash. 2d at 753 n.9, 49 P.3d at 875 n.9.

88. WASH. REV. CODE §§ 82.02.050–.090; *Isla Verde*, 146 Wash. 2d at 753 n.9, 49 P.3d at 875 n.9 (citing WASH. REV. CODE § 82.02.050(2) (2002)).

89. *Isla Verde*, 146 Wash. 2d at 753 n.9, 49 P.3d at 875 n.9 (citing WASH. REV. CODE § 82.02.050(2) (2002)).

90. WASH. REV. CODE § 82.02.080 (2008).

91. *Id.*

92. *Citizens' Alliance for Prop. Rights v. Sims*, 145 Wash. App. 649, 653–54, 187 P.3d 786, 788 (2008), *cert. denied*, 165 Wash. 2d 1030, 203 P.3d 378 (2009); *Isla Verde*, 146 Wash. 2d at 753–58, 49 P.3d at 874–78; *Vintage Constr. Co. v. City of Bothell*, 83 Wash. App. 605, 607–08, 922 P.2d 828, 829 (1996); *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 264, 877 P.2d 187, 188–89 (1994). *See generally* Lester, *supra* note 84.

93. *E.g.*, *Isla Verde*, 146 Wash. 2d at 759–61, 49 P.3d at 878–79; *Trimen*, 124 Wash. 2d at 274–75, 877 P.2d at 194–95.

A. *In Trimen, the Court Upheld a County's Open Space Ordinance Because It Was Reasonably Calculated to Remedy an Underlying Need*

In *Trimen Development Company v. King County*,<sup>94</sup> the Supreme Court of Washington upheld a King County open-space ordinance requiring that subdivision developers reserve or dedicate open space for the recreational needs of new residents who would live in the subdivision.<sup>95</sup> Developers also had the option of paying a fee in lieu, equivalent in value to the land they would have had to set aside, that the county could use only “for the acquisition and development of open space, park sites, and recreational facilities . . . where the proposed subdivision is located.”<sup>96</sup> *Trimen Development Company* (*Trimen*) objected to the fee in lieu, arguing that it constituted an “unauthorized tax.”<sup>97</sup>

King County had identified the need for open space in 1981 when the county council found a “general and increasing need for parks, open spaces and recreational facilities to serve the expanding population of the County.”<sup>98</sup> The council found that the problem was especially “acute at the neighborhood level” because of new subdivisions.<sup>99</sup> The county commissioned a study in 1985 that found a deficit of more than one hundred acres of parks and open space in the Northshore community, where *Trimen* proposed to develop.<sup>100</sup> *Trimen* submitted two Northshore plans, one for twenty-one acres divided into seventy-seven lots, and the other for twenty-two acres divided into forty-one lots.<sup>101</sup> Instead of reserving or dedicating a little more than one acre per development as open space, *Trimen* opted to pay fees in lieu.<sup>102</sup>

A few months after receiving final approval on both plats, *Trimen* sued, alleging that the county's fee in lieu was an unlawful “tax, fee, or

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94. 124 Wash. 2d 261, 877 P.2d 187 (1994).

95. *Id.* at 274, 877 P.2d at 194 (referring to KING COUNTY, WASH., CODE § 19.38 (1981)).

96. *Id.* at 265, 877 P.2d at 189.

97. *Id.* at 268–69, 877 P.2d at 191.

98. *Id.* at 264, 877 P.2d at 189.

99. *Id.*

100. *Id.* at 274, 877 P.2d at 194.

101. *Id.* at 266, 877 P.2d at 190.

102. *Id.* at 267, 877 P.2d at 190.

charge” under RCW 82.02.020.<sup>103</sup> The state supreme court rejected that argument: “We have previously stated that ‘if the primary purpose of the legislation is regulation rather than raising revenue, the legislation cannot be classified as a tax even if a burden or charge is imposed.’”<sup>104</sup> Trimen also argued that the ordinance conflicted with RCW 82.02.020 because the county had failed to establish that the land reservations and dedications or associated fees were “reasonably necessary as a direct result of the proposed development or plat.”<sup>105</sup> Trimen argued that the county had arrived at its conclusion by applying a mechanical formula: “Under King County’s fee exaction methodology, a publicly accessible swimming pool, tennis court, golf course, soccer field, and baseball diamond could all be across the street from [the proposed subdivisions], and the exact same park fee would be assessed . . . .”<sup>106</sup> According to Trimen, state law gave it the right to a site-specific evaluation.

The Court disagreed. King County based its formula on information contained in the 1985 comprehensive report, which had identified a significant lack of parks and open space in the very area where Trimen was hoping to build 112 homes with an average of three occupants each.<sup>107</sup> For the Court, that was enough: “King County correctly assessed the direct impact of Trimen’s developments on the demand for neighborhood parks and imposed a fee reasonably necessary to mitigate these impacts.”<sup>108</sup>

*B. In Isla Verde, the Court Invalidated a City’s Open Space Set-Aside Requirement Because the City Did Not Show a Reasonably Calculated Relationship Between the Regulation and the Proposed Development*

*In Isla Verde International Holdings, Inc. v. City of Camas,*<sup>109</sup> the

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103. *Id.* at 268–69, 877 P.2d at 191.

104. *Id.* at 270, 877 P.2d at 192 (quoting *Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 809, 650 P.2d 193, 195 (1982)) (internal citation omitted).

105. *Id.* at 273–74, 877 P.2d at 193–94 (quoting WASH. REV. CODE § 82.02.020 (1982)).

106. Brief of Appellant at 25–26, *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994) (No. 57881-8).

107. *Trimen*, 124 Wash. 2d at 274, 877 P.2d at 194.

108. *Id.* at 275, 877 P.2d at 194 (“King County’s fee in lieu of dedication is calculated based on zoning, projected population, and the assessed value of the land that would have been dedicated or reserved. King County’s assessment of fees in lieu of dedication are specific to the site . . .”).

109. 146 Wash. 2d 740, 49 P.3d 867 (2002).



Supreme Court of Washington invalidated a Camas Municipal Code provision that applied an open space set-aside of thirty percent to every proposed subdivision.<sup>110</sup> The city council had great discretion, and could waive the requirement in favor of a fee in lieu upon two findings: (1) that the set-aside “would not fulfill the intent or purpose of useful common open space,” and (2) “that a payment of an equivalent fee in lieu . . . is appropriate.”<sup>111</sup> Isla Verde International Holdings, Inc. (Isla Verde) objected to the regulation, and the Washington State Supreme Court struck it down because it did not bear the requisite relationship to the proposed development under RCW 82.02.020.<sup>112</sup>

In 1995, Isla Verde had submitted a proposed 13.4-acre development that included fifty-one homes.<sup>113</sup> Many Camas residents spoke out against the proposal, in part because the property had steep slopes of forest containing wildlife, including two species being monitored by the Fish and Wildlife Service: the pileated woodpecker and ringneck snake.<sup>114</sup> The fire marshal also expressed concern about the fact that only one road provided access to the development, making emergency response service difficult during wildfires.<sup>115</sup> The city council approved Isla Verde’s development proposal notwithstanding those concerns, but required Isla Verde to set aside the full thirty percent of the land, refusing to accept a fee in lieu.<sup>116</sup>

Isla Verde sought review of the city’s decision, alleging that the City of Camas had violated its constitutional property rights and that the set-aside requirement was an unlawful tax.<sup>117</sup> The trial court and court of appeals agreed, both finding that the regulation amounted to an unconstitutional taking.<sup>118</sup> The city petitioned the Washington State

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110. *Id.* at 765, 49 P.3d at 881 (regarding CAMAS, WASH., MUN. CODE § 18.62.020(A) (1991), *invalidated by Isla Verde*, 146 Wash. 2d 740, 49 P.3d 867 (2002)).

111. *Id.* at 747 n.3, 49 P.3d at 871 n.3 (quoting CAMAS, WASH., MUN. CODE §17.12.090(E) (1991)).

112. *Id.* at 763–64, 49 P.3d at 880.

113. *Id.* at 745–46, 49 P.3d at 871.

114. *Id.* at 748–49, 49 P.3d at 872.

115. *Id.* at 746, 767, 49 P.3d at 871, 882. There were two issues in this case: (1) whether the City of Camas’s open-space ordinance was proper; and (2) whether the City of Camas could require Isla Verde to construct a secondary limited access road on the development for emergency vehicles. *Id.* at 745, 49 P.3d at 867. This Note focuses on the former issue.

116. *Id.* at 749–50, 49 P.3d at 873.

117. *Id.* at 750, 49 P.3d at 873.

118. *Id.*

Supreme Court for review.<sup>119</sup> The Court declined to reach the constitutional issue, deciding instead that the set-aside regulation was an unlawful “tax, fee, or charge” under RCW 82.02.020.<sup>120</sup>

The Court concluded that a land dedication qualifies as a tax.<sup>121</sup> The issue then became whether the thirty percent set-aside required of *Isla Verde* was “reasonably necessary as a direct result of the proposed development.”<sup>122</sup> The city argued that the case was like *Trimen*, in that the city preferred to keep a certain percentage of land as open space and required developers to set aside that percentage.<sup>123</sup> The Court was not persuaded: In *Trimen*, King County based its findings on a comprehensive study,<sup>124</sup> whereas the record in *Isla Verde* indicated that the City of Camas was relying on a bare legislative determination of the need for open space.<sup>125</sup> Furthermore, King County had studied the particular community and its needs for parks,<sup>126</sup> whereas the City of Camas applied its thirty percent open-space requirement to any proposed subdivision in Camas.<sup>127</sup> King County could directly trace the need for open space to the 112 homes *Trimen* hoped to build.<sup>128</sup> The City of Camas could make no such showing with respect to *Isla Verde*.<sup>129</sup> The

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119. *Id.* at 751, 49 P.3d at 873.

120. *Id.* at 752, 49 P.3d at 874 (“We adhere to the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues.”).

121. *Id.* at 757–58, 49 P.3d at 877 (“The exclusionary language of the statute demonstrates that the prohibited charges are not limited to monetary charges. . . . [A] required dedication of land or easement is a tax, fee or charge.” (citing *San Telmo Assocs. v. City of Seattle*, 108 Wash. 2d 20, 24, 735 P.2d 673, 674–75 (1987))).

122. *Id.* at 759, 49 P.3d at 878.

123. *Id.* at 760, 49 P.3d at 878.

124. *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 274, 877 P.2d 187, 194 (1994).

125. *Isla Verde*, 146 Wash. 2d at 761, 49 P.3d at 879 (“We reject the City’s argument that it satisfies its burden under RCW 82.02.020 merely through a legislative determination . . .”). In his concurrence, Justice Johnson stated, “[t]he record before us regarding the contested open space condition is simply insufficient to determine its appropriateness under RCW 82.02.020.” *Id.* at 772, 49 P.3d at 884 (Johnson, J., concurring). He further opined that the Court should have remanded the case for further development of the record with respect to evidence showing the relationship between the open space condition and the development. *Id.* at 773, 49 P.3d at 885 (Johnson, J., concurring).

126. *Trimen*, 124 Wash. 2d at 274, 877 P.2d at 194.

127. *Isla Verde*, 146 Wash. 2d at 764–65, 49 P.3d at 881 (regarding CAMAS, WASH., MUN. CODE § 18.62.020(A) (1991), *invalidated by Isla Verde*, 146 Wash. 2d 740, 49 P.3d 867).

128. *Trimen*, 124 Wash. 2d at 274, 877 P.2d at 194.

129. *Isla Verde*, 146 Wash. 2d at 762–63, 49 P.3d at 879–80.

differences were significant:

We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community. RCW 82.020.020 does not permit conditions that satisfy a “reasonably necessary” standard for *all* new development collectively; it specifically requires that a condition be “reasonably necessary as a direct result of *the* proposed development or plat.”<sup>130</sup>

#### IV. KING COUNTY IMPLEMENTED STRINGENT CLEARING LIMITATIONS ON RURAL LAND OVER RURAL LANDOWNERS’ OBJECTIONS

King County is home to about 1.9 million people; nearly one third of them are urbanites of Seattle.<sup>131</sup> But nearly twenty percent of the county’s population lives on large tracts of unincorporated land,<sup>132</sup> predominantly zoned for rural, forest, and agricultural uses.<sup>133</sup> The county’s urban center creates environmental problems, especially stormwater runoff that carries chemicals into rivers and streams.<sup>134</sup> One way to alleviate the problem of chemical runoff is to keep rural land in its natural condition because natural soil and root systems absorb pollutants before they reach waterways; concrete and asphalt do not.<sup>135</sup>

In 2004, to protect local rivers from pollution and to prevent increased flooding, the King County Council’s growth management committee proposed an ordinance that prohibited rural landowners from clearing

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130. *Id.* at 761, 49 P.3d at 879 (internal citations omitted). The court upheld that condition, noting that it was a constitutional exercise of police power. *Id.* at 763–74, 49 P.3d at 880. For further discussion about judicial interpretation of police power as applied to land-use issues in Washington, see Spitzer, *supra* note 66, at 511.

131. ANNUAL GROWTH 2008, *supra* note 4, § III, at 26; *see* ANNUAL GROWTH 2004, *supra* note 4.

132. ANNUAL GROWTH 2008, *supra* note 4, § VII, at 116. The estimated 2008 population for unincorporated King County is 341,150. *Id.*

133. KING COUNTY, BEST AVAILABLE SCIENCE, VOLUME I: A REVIEW OF SCIENCE LITERATURE § 1.2, at 1-7 (2004) [hereinafter BAS I]. About eighty-two percent of the county’s 2130 square miles of land are part of unincorporated King County. *Id.* Employment in agriculture, fishing, forestry, and hunting accounted for an estimated 2651 jobs in 2006 in King County at large. ANNUAL GROWTH 2008, *supra* note 4, § II, at 15.

134. BAS I, *supra* note 133, § 6.2.3, at 6-17; *see id.* § 7.2.5, at 7-14–15.

135. *Id.* § 7.2.5, at 7-14–19.

many of the trees and other vegetation on their land.<sup>136</sup> Rural landowners objected throughout a contentious two-year public comment period,<sup>137</sup> arguing that the ordinance unfairly allocated the burden to prevent environmental harm on the county's rural community<sup>138</sup> and that it threatened traditional rural activities like horse grazing.<sup>139</sup> The full county council, split along party lines,<sup>140</sup> narrowly passed the ordinance in October 2004.<sup>141</sup>

A. *King County Proposed Revisions to Its Clearing and Grading Regulations to Protect King County's River Systems, Which Are Threatened by Urban Stormwater Runoff*

King County's six major river systems are fed by mountain rain and snowmelt.<sup>142</sup> However, the numerous streams of the county are infiltrated by stormwater runoff from developed areas.<sup>143</sup> Because developed areas are generally covered by impervious surfaces, that runoff carries with it sediment and chemicals that would otherwise be absorbed and filtered by the terrain in its natural, undeveloped state.<sup>144</sup> This runoff causes alterations in natural habitat structures and changes to water chemistry that impact aquatic species, causing lower reproductive

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136. KING COUNTY, WASH., ORDINANCE 15053 § 14 (2004), available at [http://www.metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://www.metrokc.gov/mkcc/cao/clearing_grading_15053.pdf) (codified at KING COUNTY, WASH., CODE tit. 16.82.150,152 (2008)), available at [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx).

137. Onstot, *supra* note 10, at 17; see also Ervin, *Panel Approves*, *supra* note 8, at B1.

138. Ervin, *County Approves*, *supra* note 10, at B7. “[R]ural landowners mounted months of protests and blasted [the ordinance] as ‘a massive land grab’ that violates their property rights. . . . Members of the Republican minority on the County Council blasted the package as unfairly putting the burden of environmental protection on rural residents, while city dwellers and suburbanites shoulder little of the burden.” *Id.* at B1, B7.

139. *Summary of Changes to Executive Proposal in Proposed Substitute Ordinance 2004-0124, Clearing and Grading Ordinance* at 3, Ex. 22, Consolidated Index, *Citizens’ Alliance v. Sims*, No. 04-2-13831-9 (Wash. Super. Ct. Snohomish County, filed Oct. 13, 2006) [hereinafter *Changes to Executive Proposal*]; *Constantine Proposes More Flexibility for Regulations Protecting Critical Areas in King County* (Sept. 16, 2004), [http://www.metrokc.gov/mkcc/News/2004/0904/DC\\_CAO\\_Striker.htm](http://www.metrokc.gov/mkcc/News/2004/0904/DC_CAO_Striker.htm) [hereinafter *More Flexibility*].

140. Ervin, *Restrictions Go Too Far*, *supra* note 8, at A1.

141. KING COUNTY, WASH., ORDINANCE 15053 §§ 14–15.

142. BAS I, *supra* note 133, § 3.2.1, at 3-1. The White River is the only glacial system in King County. *Id.*

143. *Id.* § 3.2.3, at 3-2.

144. *Id.* § 7.2.5, at 7-14–7-15; *id.* § 6.2.3, at 6-17.

rates, vulnerabilities to predators, and modified migration patterns.<sup>145</sup> Impervious surfaces also increase the potential for flooding. Public agencies have built levees and dug channels to direct and store stormwater, but these solutions have created problems of their own, including increased water velocity and stream bank erosion,<sup>146</sup> and an actual reduction in overall floodwater storage capacity.<sup>147</sup> These impacts of development on rivers and streams often deprive fish and wildlife of passable corridors and bring them into contact with harmful chemical runoff.<sup>148</sup>

King County commissioned a comprehensive scientific study in 2002, published in 2004, that proposed a more natural solution: leave rural land in its natural state so it can absorb stormwater runoff before it reaches rivers and streams.<sup>149</sup> The study, which relied on the contributions from more than twenty reputable scientists,<sup>150</sup> concluded that the best way to prevent chemical runoff and maintain “physical, biological and chemical connectivity” between rivers and the surrounding land was to leave forestland in its natural state.<sup>151</sup> Specifically, the study concluded that King County should limit impervious surfaces to ten percent of rural land and retain sixty-five percent of the natural forest cover and vegetation in rural areas.<sup>152</sup>

King County revised its proposed clearing and grading ordinance in response to public comments,<sup>153</sup> but the ordinance substantially

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145. *Id.* § 7.2.5, at 7-14–7-15; *id.* § 2.2, at 2-4.

146. *Id.* § 3.2.3, at 3-4. Increased water velocity can cause “channel scour.” *Id.* This means erosion of stream banks (usually along their outside curves) and streambeds. Lake Whatcom Management Program Glossary of Terms, <http://lakewhatcom.wsu.edu/display.asp?ID=67> (last visited Jun. 22, 2009).

147. BAS I, *supra* note 133, § 3.2.3, at 3-4. A reduction in floodwater storage is problematic because it can cause increased flooding and prevents water from traveling in its natural patterns among wetlands. *Id.*

148. *Id.* § 3.2.3, at 3-3–4; *id.* § 3.3, at 3-10.

149. *Id.* § 3.2.3, at 3-3; KING COUNTY, BEST AVAILABLE SCIENCE, VOL. II: ASSESSMENT OF PROPOSED ORDINANCES § 4.2, at 4-5 (2004), available at <http://www.kingcounty.gov/property/permits/codes/CAO.aspx#best> [hereinafter BAS II].

150. BAS I, *supra* note 133, App. C: Science Experts, at C-1–33; see Ervin, *County Approves*, *supra* note 10, at B7 (reporting King County Executive Ron Sims’s rebuttal of accusations that the Best Available Science report was not good science).

151. BAS I, *supra* note 133, § 3.2.3, at 3-4.

152. *Id.* § 7.2.8, at 7-30 (suggesting ten percent limitation on impervious surfaces and a thirty-five percent clearing limitation).

153. *Changes to Executive Proposal*, *supra* note 139, at 3; see *More Flexibility*, *supra* note 139,

conformed to the study findings<sup>154</sup> requiring landowners in rural areas to maintain sixty-five percent of their land in its natural state.<sup>155</sup> The proposed revisions were included as part of King County’s critical areas ordinance update.<sup>156</sup>

*B. Rural Residents Opposed King County’s Revised Clearing and Grading Regulations*

Members of the rural community responded to the proposed clearing and grading ordinance revisions with outrage, arguing vociferously against the proposal during at least fifteen public meetings.<sup>157</sup> Such stringent clearing limitations, they said, would make their traditional rural lifestyle impossible, since keeping horses, farming, and home-building all require landowners to clear vegetation and trees.<sup>158</sup>

County leaders amended the proposal to respond to a few of those concerns, including adding a grandfather provision for lots already cleared, and allowing owners of lots smaller than five acres to clear fifty percent of their land.<sup>159</sup> They also inserted a “Rural Stewardship Plan” and “Farm Management Plan,” which allow landowners to petition for permission to clear larger areas in a way consistent with the county’s

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at 1–4.

154. BAS II, *supra* note 149, § 6.2, at 6-2.

155. KING COUNTY, WASH., ORDINANCE 15053 § 14 (2004), *available at* [http://www.metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://www.metrokc.gov/mkcc/cao/clearing_grading_15053.pdf) (codified at KING COUNTY, WASH., CODE §§ 16.82.150, .152 (2008)), *available at* [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx).

156. The King County Code requires updates of its comprehensive plan, including critical areas ordinances, every five years. KING COUNTY, WASH., CODE § 20.12.010(A) (2008); *see also* WASH. REV. CODE § 36.70A.130(4)(a) (2008) (requiring updates of county comprehensive plans every seven years); WASH. ADMIN. CODE § 365-195-900 (2009) (requiring updates of county comprehensive plans every five years, if needed for compliance with the GMA). Clearing and grading ordinance 15053 accompanied King County Ordinances 15051 and 15052, which amended the critical areas and stormwater ordinances, respectively. KING COUNTY, WASH., ORDINANCE 15051 (2004), *available at* [http://www.metrokc.gov/mkcc/cao/critical\\_areas\\_15051.pdf](http://www.metrokc.gov/mkcc/cao/critical_areas_15051.pdf) (codified at KING COUNTY, WASH., CODE § 21A.24 (2008)), *available at* [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx); KING COUNTY, WASH., ORDINANCE 15052 (2004), *available at* [http://www.metrokc.gov/mkcc/cao/stormwater\\_15052.pdf](http://www.metrokc.gov/mkcc/cao/stormwater_15052.pdf), (codified at KING COUNTY, WASH., CODE §§ 9.04, 9.12 (2008)), *available at* [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx).

157. Ervin, *County Approves*, *supra* note 10, at B1; Ervin, *Court Fight*, *supra* note 10, at B1; Ervin, *Panel Approves*, *supra* note 8, at B1, B4; Onstot, *supra* note 10, at 17.

158. *See Changes to Executive Proposal*, *supra* note 139, at 3; *More Flexibility*, *supra* note 139, at 1.

159. KING COUNTY, WASH., ORDINANCE 15053 § 14.

underlying goals of protecting rivers and native fish species.<sup>160</sup> As passed, the ordinance limits clearing and the building of permanent structures, but allows landowners to use their property for certain logging and recreational activities.<sup>161</sup>

The changes did little to ameliorate the opposition of rural landowners: “My take is it’s stealing—out and out stealing,” said resident Marshall Brenden. “They’re taking 65 percent of your land that you fought years to pay for, paid mortgages on, and now you can’t use it.”<sup>162</sup> Opponents of the ordinance continued their protest through the October 2004 county council meeting where the ultimate decision was made.<sup>163</sup> The meeting lasted until late at night.<sup>164</sup> In the end, King County Ordinance 15053 passed 7–6, divided along party lines, with Democrats voting in favor.<sup>165</sup> Republican council members, who largely represented rural areas of King County, did not hide their anger. Some argued that the best available science showed no need for such strict regulations.<sup>166</sup> Republican Rob McKenna described the ordinance as one of “the most draconian land-use regulations in the state, if not the country.”<sup>167</sup>

#### V. THE WASHINGTON COURT OF APPEALS HELD THAT THE KING COUNTY ORDINANCE WAS AN UNLAWFUL TAX

For rural landowners opposed to the new ordinance the fight was not over. Citizens’ Alliance for Property Rights (Citizens’ Alliance), a political action committee that had formed in 2003 during the public hearings process,<sup>168</sup> filed a lawsuit against King County in March of

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160. *Id.*

161. *Id.*

162. *Private Property May Become Preserved*, FOXNEWS, Jul. 10, 2004, [http://foxnews.com/printer\\_friendly\\_story/0,3566,124358,00.html](http://foxnews.com/printer_friendly_story/0,3566,124358,00.html).

163. Ervin, *County Approves*, *supra* note 10, at B7; Onstot, *supra* note 10, at 18.

164. Ervin, *County Approves*, *supra* note 10, at B1.

165. Onstot, *supra* note 10, at 17.

166. Ervin, *County Approves*, *supra* note 10, at B7 (“Republicans also argued that the county’s analysis of ‘the best available science’ didn’t show the need for stricter regulation.”).

167. *Id.* at B7. Rob McKenna is currently Washington’s attorney general. Washington State Office of the Attorney General—About the Office—About Rob McKenna, <http://www.atg.wa.gov/AboutTheOffice/default.aspx> (last visited August 20, 2009).

168. Citizens’ Alliance for Prop. Rights v. Sims, 145 Wash. App. 649, 654, 187 P.3d 786, 789

2005.<sup>169</sup> Citizens' Alliance argued that the clearing and grading regulations ran afoul of RCW 82.02.020 as an unlawful tax, fee, or charge,<sup>170</sup> just like the thirty percent land set-aside in *Isla Verde*.<sup>171</sup> King County disagreed with the comparison of facts to *Isla Verde*. The county argued that because the clearing limitations had been passed pursuant to the Growth Management Act, RCW 82.02.020 did not apply.<sup>172</sup> Further, the county asserted that the controlling case was *Trimen*, and the clearing limits were like the *Trimen* open-space requirements—necessary to accomplish a legitimate public goal and based on the best available science.<sup>173</sup> The trial court agreed with the county and granted its motion for summary judgment.<sup>174</sup> Citizens' Alliance appealed.<sup>175</sup>

The court of appeals heard oral arguments on January 23, 2008,<sup>176</sup> and considered the issue of whether the King County clearing and grading ordinance violated RCW 82.02.020.<sup>177</sup> It issued its decision in favor of

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(2008), *cert. denied*, 165 Wash. 2d 1030, 203 P.3d 378 (2009); Onstot, *supra* note 10, at 18.

169. *Citizens' Alliance*, 145 Wash. App. at 654, 187 P.3d at 789. The Snohomish County Superior Court was a proper venue for the action under RCW 36.01.050, which states that actions against any county may be commenced in the superior court of such county or the superior court of either of the two nearest judicial districts. WASH. REV. CODE § 36.01.050 (2008).

170. *Citizens' Alliance*, 145 Wash. App. at 654, 187 P.3d at 789. Citizens' Alliance also alleged constitutional violations of substantive due process. *Id.*; *First Amended Complaint*, *supra* note 14, at 6–7. See *supra* Part II.A for discussion of substantive due process as it pertains to the Washington State Judiciary's evaluation of land-use issues.

171. Plaintiff's Motion and Memorandum in Support of Motion for Summary Judgment at 7, *Citizens' Alliance*, No. 04-2-13831-9 (Wash. Super. Ct. Snohomish County, filed Aug. 30, 2006). Both the constitutional and statutory claims came as a facial challenge; there was no proposed development available for an as-applied challenge to the ordinance. See *First Amended Complaint*, *supra* note 14, *passim*.

172. Defendant King County's Response to Plaintiffs' Motion for Summary Judgment on RCW 82.02.020 Claim at 40–43, *Citizens' Alliance*, No. 04-2-13831-9 (Wash. Super. Ct. Snohomish County, filed Sep. 27, 2006).

173. *Id.* at 48–55.

174. *Citizens' Alliance*, 145 Wash. App. at 655, 187 P.3d at 789; Order Granting King County's Motion for Partial Summary Judgment on RCW 82.02.020 Claim and Entry of Final Judgment in Favor of King County at 3, *Citizens' Alliance*, No. 04-2-13831-9 (Wash. Super. Ct. Snohomish County Dec. 22, 2006).

175. *Citizens' Alliance*, 145 Wash. 2d at 655, 187 P.3d at 789. Notice of Appeal, *Citizens' Alliance*, No. 04-2-13831-9 (Superior Court for the State of Washington, Snohomish County, filed Jan. 12, 2007).

176. Court of Appeals Division I, *Oral Argument Calendar for Wednesday, January 23, 2008*.

177. *Citizens' Alliance*, 145 Wash. 2d at 653, 187 P.3d at 788. The court of appeals determined that its discussion and holding pertaining to the statutory violation resolved the issue, and did not analyze the substantive due process claim. *Id.* at 671, 187 P.3d at 797.



Citizens' Alliance on July 7, 2008,<sup>178</sup> reversing the trial court's ruling.

The "threshold questions" were whether the clearing limitations imposed a "tax, fee, or charge," and if so, whether they fell within one of the exceptions in RCW 82.02.020.<sup>179</sup> The court held that the ordinance was subject to the statute, that it qualified as an "in kind indirect 'tax, fee, or charge'" under RCW 82.02.020,<sup>180</sup> and that it did not fall within the statutory exceptions.<sup>181</sup> In making its finding, the court relied almost entirely on *Isla Verde*.<sup>182</sup> In fact, the court described the City of Camas set-aside at issue in *Isla Verde* as "not materially distinguishable" from King County's clearing limitations.<sup>183</sup>

The court rejected King County's argument that because the clearing limitation's purpose was land-use regulation, and not the raising of revenue, *Trimen* was controlling precedent, meaning the ordinance "[did] not constitute a 'tax, fee, or charge.'"<sup>184</sup> However, the court did not expressly find that the main purpose of the ordinance was to raise revenue. Instead, it relied on the conclusion that "[t]he plain words of the statute indicate that its application is not limited to 'taxes,'"<sup>185</sup> and characterized Washington case law as "clear that RCW 82.02.020 applies to ordinances that may require developers to set aside land as a condition of development."<sup>186</sup> The court also rejected King County's argument that the clearing ordinance could not possibly violate the state preemption statute because it had been passed pursuant to mandatory GMA requirements imposed by the state legislature.<sup>187</sup> The GMA did

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178. *Id.* at 649, 187 P.3d at 786. On the panel for the Washington State Court of Appeals, Division I: Judge Cox (writing), Judge Agid, Judge Ellington. *Id.* at 652, 672, 187 P.3d at 788, 798.

179. *Id.* at 657, 187 P.3d at 790.

180. *Id.* at 653, 187 P.3d at 788.

181. *Id.*

182. *Id.* at 660–61, 665–66, 187 P.3d at 791–92, 794–95.

183. *Id.* at 661, 187 P.3d at 792. For the court, the only distinguishing fact was that King County had not offered a "payment of a fee in lieu" exception, whereas the City of Camas provided for this alternative. *Id.*

184. *Id.* at 662, 187 P.3d at 792; see Defendant King County's Response to Plaintiffs' Motion for Summary Judgment on RCW 82.02.020 Claim, *supra* note 172, at 44–48; see also *Hillis Homes, Inc. v. Snohomish County*, 97 Wash. 2d 804, 810, 650 P.2d 193, 195–96 (1982) (holding that where local governments exact fees in order to raise revenue, rather than to forward a regulatory purpose, those fees constitute an unlawful tax under the Washington State Constitution).

185. *Citizens' Alliance*, 145 Wash. App. at 662, 187 P.3d at 793.

186. *Id.* at 663, 187 P.3d at 793 (citing *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 758, 49 P.3d 867, 877 (2002)).

187. *Id.*

not require the particular clearing limitations the county had approved, said the court, and “no Washington law supports the County’s argument that [the ordinance] is exempt from the requirements of RCW 82.02.020 because it was adopted in response to the State’s GMA requirements.”<sup>188</sup>

Having determined that the clearing and grading ordinance was an in-kind indirect tax, fee, or charge under RCW 82.02.020,<sup>189</sup> the court turned to the next threshold question: Did it fall within one of the state-preemption statute’s listed exceptions? Specifically, was it “reasonably necessary as a direct result of the proposed development”?<sup>190</sup> The court stated that this second question was more difficult to answer.<sup>191</sup> To prevail, King County would have to bear the burden of showing that there was a “nexus” and “rough proportionality” between the clearing limitations and the proposed development.<sup>192</sup> These were two separate requirements, said the court, and the trial court had erred by addressing only the “nexus” requirement.<sup>193</sup> While King County had met its burden of showing a nexus by submitting “a wealth of unchallenged evidence,”<sup>194</sup> it had failed to show rough proportionality.<sup>195</sup> It could not meet that burden, said the court, because it had not conducted a site-specific evaluation of the proposed development.<sup>196</sup> The county’s attempt to rely on *Trimen*, in which there was no site-specific evaluation, again failed. The court characterized *Trimen* as “mak[ing] clear that the reason the ordinance at issue there satisfied the statute was because its requirement was reasonably necessary as a direct result of Trimén’s development.”<sup>197</sup> Because King County failed to meet its burden, the court held that the ordinance was an illegal “in kind indirect ‘tax, fee, or charge’” on new development, and remanded the matter to the trial

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188. *Id.*

189. *Id.* at 661–62, 187 P.3d at 792.

190. *Id.* at 665, 187 P.3d at 794 (emphasis omitted).

191. *Id.*

192. *Id.* The court’s “nexus” and “rough proportionality” language came from federal takings law under the Fifth Amendment. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987) (requiring a “nexus” between permit condition and purpose of permit condition); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1986) (requiring “rough proportionality” between land use regulation and proposed development).

193. *Citizens’ Alliance*, 145 Wash. App. at 665, 187 P.3d at 794.

194. *Id.* at 669–70, 187 P.3d at 796.

195. *Id.* at 670, 180 P.3d at 796.

196. *Id.* at 668–69, 187 P.3d at 796.

197. *Id.* at 667, 668–69, 187 P.3d at 795, 796.

court, directing it to enter an order for summary judgment in favor of Citizens' Alliance.<sup>198</sup>

The Washington State Supreme Court denied King County's petition for review on March 3, 2009.<sup>199</sup>

VI. THE COURT ERRED IN DECIDING *CITIZENS' ALLIANCE V. SIMS*, A DECISION THAT UNDERMINES THE GMA AND COMPREHENSIVE LAND-USE PLANNING

The Washington State Court of Appeals was wrong to conclude that King County's clearing ordinance was not a direct result of the proposed development for one simple reason: *There was no proposed development in the case*. The court's mistake was in analyzing the issue under the wrong body of law: Citizens' Alliance had brought a facial challenge,<sup>200</sup> which meant there was no specific proposed development for the county to evaluate, and the court's application of RCW 82.02.020 was erroneous. Alternatively, the court should have evaluated the restrictions in question as a possible regulatory taking or a violation of substantive due process.<sup>201</sup>

The court's ruling rejects the public policy choices inherent in the GMA, and it represents judicial intrusion into legislative decision-making. This could have starkly negative consequences for Washington land-use planning. The legislature passed RCW 82.02.020 to prevent local governments from exacting fees from landowners and developers as a condition for approval of a specific development. It did not intend for the law to preclude all comprehensive local land-use planning, yet this is exactly the implicit effect of the court's ruling.

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198. *Id.* at 672, 187 P.3d at 797-98.

199. Citizens' Alliance for Property Rights v. Sims, 165 Wash. 2d 1030, 203 P.3d 378 (2009). The King County clearing and grading ordinance is still technically in effect, but the county will not enforce it. Questions and Answers Regarding Court Rulings on King County's Clearing Limits in the Critical Areas Ordinance, <http://www.kingcounty.gov/property/permits/codes/CAO/CourtRulingsQA.aspx> (last visited July 15, 2009).

200. The handling of "facial challenges" versus "as-applied" challenges by Washington courts is an extensive topic that is not addressed in detail in this Note.

201. See *supra* Part II for explanation of regulatory taking and substantive due process challenges.

A. *The Court Erred When It Applied RCW 82.02.020 Because There Was No “Proposed Development”*

The Washington State Legislature adopted RCW 82.02.020 to prevent local governments from leveraging their power to approve development plats by exacting revenue from developers. The statute is designed to ensure that developers carry only their fair share of the cost of community infrastructure or environmental protection. The statute clearly targets parties that have proposed developments, as it allows dedications, easements, or fees in lieu that are “reasonably necessary as a direct result of *the proposed development*.”<sup>202</sup>

The court was mistaken in relying on *Trimen* and *Isla Verde*, because neither case is on point. In both cases, the Supreme Court of Washington was able to consider the reasonableness of local government regulations and fees as applied to proposed development because actual proposals for development were at issue: In *Trimen*, a developer had proposed two plats, encompassing forty-three acres and 118 homes;<sup>203</sup> in *Isla Verde*, the developer had proposed a thirteen-acre development with fifty-one homes.<sup>204</sup> In *Citizens’ Alliance v. King County*, no development had been proposed.

*Trimen* and *Isla Verde* do not mandate the outcome in *Citizens’ Alliance*. Instead, they recognize King County’s authority to pass an ordinance like the clearing and grading limitations at issue in *Citizens’ Alliance*. In *Trimen*, the court recognized that RCW 82.02.020 does not affect a local government’s power to pass reasonably calculated comprehensive land-use regulations,<sup>205</sup> and it refused to characterize the open-space set-aside as an unlawful tax under the state preemption statute.<sup>206</sup> Further, the court ruled that the fee charged the developer was “reasonably necessary as a direct result of the proposed development” based on data from an area study commissioned by the county

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202. WASH. REV. CODE § 82.02.020 (2008) (emphasis added).

203. *See Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 266, 877 P.2d 187, 190 (1994) (noting that *Trimen* proposed 2 developments with 77 and 41 lots for detached family homes, respectively, for a total of 118 lots).

204. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 746, 49 P.3d 867, 871 (2002).

205. *Trimen*, 124 Wash. 2d at 275, 877 P.2d at 194; *see id.* at 270, 877 P.2d at 192.

206. *Id.* at 270, 877 P.2d at 192.

government.<sup>207</sup> The King County clearing and grading ordinance at issue in *Citizens' Alliance* is indistinguishable from the *Trimen* open-space set-aside: After a long and detailed area study, King County concluded that clearing and grading limitations were required to preserve water quality and prevent increased flooding.<sup>208</sup> If a landowner were to propose a specific development, the county would be able to rely on its study findings in considering other site-specific limitations that might be necessary to further the county's underlying goals. It bears repeating that consideration of RCW 82.02.020 is unnecessary in this case because no one proposed to develop a specific site.

Dictum in *Isla Verde* also suggests that King County has authority to impose its clearing and grading ordinance. The *Isla Verde* court acknowledged a local government's inherent police power authority to regulate land use by passing zoning ordinances,<sup>209</sup> but found that the City of Camas land set-aside requirement could not be defended as a zoning ordinance because it applied to all proposed developments, "regardless of zoning."<sup>210</sup> Presumably, if the City of Camas set-aside requirement had tracked a reasonably calculated zoning classification, its regulation would have been permissible. The *Isla Verde* court also distinguished *Trimen*, noting that the comprehensive area study supporting the need for open space in *Trimen* fulfilled the "reasonably necessary" component of the state preemption statute, whereas the mere legislative determination of that need in *Isla* was insufficient.<sup>211</sup> The King County clearing limitation was based on a comprehensive area study and was applied only to land zoned rural residential.<sup>212</sup>

While RCW 82.02.020 does not apply in this case, it does not follow that King County is unlimited in the land-use restrictions it may impose. The county is subject to important state constitutional limitations, including substantive due process requirements and the prohibition on

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207. *Id.*

208. KING COUNTY, WASH., ORDINANCE 15053 § 14A (2004), available at [http://www.metrokc.gov/mkcc/cao/clearing\\_grading\\_15053.pdf](http://www.metrokc.gov/mkcc/cao/clearing_grading_15053.pdf) (codified at KING COUNTY, WASH., CODE § 16.82.150A (2005), available at [http://www.kingcounty.gov/council/legislation/kc\\_code.aspx](http://www.kingcounty.gov/council/legislation/kc_code.aspx)).

209. See *Isla Verde*, 146 Wash. 2d at 763–65, 49 P.3d at 880–81.

210. *Id.* at 764–65, 49 P.3d at 880–81.

211. *Id.* at 760–61, 49 P.3d at 878–79.

212. KING COUNTY, WASH., ORDINANCE 15053 § 14A; BAS II, *supra* note 149, § 6, at 6-1–14; see *Citizens' Alliance for Prop. Rights v. Sims*, 145 Wash. App. 649, 653, 669–70, 187 P.3d 786, 788, 796 (2008), *cert. denied*, 165 Wash. 2d 1030, 203 P.3d 378 (2009).

takings. The court of appeals should have analyzed King County's regulation under those protections and precedents.

It is critically important that courts use the correct body of law to evaluate land-use regulations. If they require local governments to evaluate a possible regulation's potential impact on every affected parcel of land, regardless of whether a development has been proposed there, attempts at comprehensive land-use planning will fail.

*B. Citizens' Alliance v. Sims Undermines the Objectives of the GMA and Has Dire Implications for the Future of Land-Use Planning in Washington*

The Washington State Legislature passed the GMA to promote comprehensive land-use planning in a climate of rapid population growth and urban sprawl.<sup>213</sup> Comprehensive land-use planning requires consideration of locales in their entirety. In the case of environmental planning, planners must evaluate entire ecosystems, ignoring artificial property lines. Stormwater runs faster over impervious surfaces regardless of who owns the land, and stormwater runoff carries sediment and toxins into Washington's river systems. In addition to deciding upon a statewide course that includes comprehensive land-use planning, the GMA also represents a legislative determination that local government is in the best position to create those plans.<sup>214</sup> The GMA includes several different environmental and economic goals—some of which occasionally conflict—and the legislature vested the task of balancing those goals in the local governments, which represent the communities the regulations will affect.<sup>215</sup>

In *Citizens' Alliance*, the Washington Court of Appeals undermined those legislative priorities. If local governments have to evaluate each potentially affected parcel of land as part of their comprehensive land-use planning, those plans will fail simply because *comprehensive* planning requires laws of *general application*. Such a result is directly at odds with the GMA. Moreover, it runs counter to the very foundation of local police powers, which exist to benefit the health, safety, and welfare *of the community overall*.

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213. See Settle & Gavigan, *supra* note 3, at 880–81.

214. See *supra* Part I.

215. See WASH. REV. CODE §§ 36.70A.040, .120 (2008); Settle & Gavigan, *supra* note 3, at 896–98.

The decision in *Citizens' Alliance* also undermines the goals of the GMA by making comprehensive planning prohibitively expensive and inefficient, without a corresponding benefit. In fact, it *undermines* property development by forcing local governments to commission environmental evaluations of each parcel of property in order to reach a conclusion based on the best available science, even if an analysis of the general area would achieve the same results. Because of limited public funds, the cost of individualized studies would likely be imposed on property owners and developers. Such an intrusion onto local property would also be an unwanted invasion from the private property owner's perspective. It is difficult to identify any benefit from such a mandate other than satisfying the court's new legal requirement. Furthermore, the newly required evaluations would cause long delays while potential regulations are considered with respect to every specific site to which they could be applied. The result of implementing most police powers in this site-specific manner would be impractical and cost-prohibitive. In this case, such an implementation is an ineffective means of protecting community interests through comprehensive land-use planning.

#### CONCLUSION

The *Citizens' Alliance* holding undermines the comprehensive nature of the GMA and a well established approach to land-use planning. The opinion contemplates imposing clearing and grading limit regulations based on site-specific evaluations, requiring the county to expend already tight resources and to implement an inefficient method for protecting community interests in environmental protection and preservation. Landowners in Washington State have access to numerous protections against overreaching government regulations that impede private property rights to an unreasonable degree: Constitutional, statutory, and administrative remedies exist for abuses of police powers. However, Washington's preemption statute, RCW 82.02.020, is an inappropriate framework for analyzing a facial challenge of King County's clearing and grading regulations, and the court of appeals erred when it held otherwise. Despite the court's decision, GMA objectives and requirements remain. Municipalities are still obligated to have regulations based on the best available science that protect the functions and values of critical areas. The actual impact of *Citizens' Alliance* remains to be seen, but absent a judicial correction or legislative clarification, treating comprehensive land-use regulations as a "tax, fee,

or charge” subject to the state preemption statute, without application to a proposed development, threatens to render comprehensive land-use planning nearly impossible to achieve.