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Court of Appeals No. 535581

99545-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOUGLASS PROPERTIES II, LLC.,

Appellant,

v.

CITY OF OLYMPIA,

Respondents.

APPELLANT DOUGLASS PROPERTIES II, LLC'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Douglass Properties II, LLC (Douglass) seeks review of the Court of Appeals decision designated in Part II.

II. COURT OF APPEALS DECISION

Douglass seeks review of the *Published Opinion* in *Douglass Properties II, LLC v. City of Olympia*, No. 53558-1-II, dated February 2, 2021 ("*Opinion*"). **Appendix A**.

III. ISSUES PRESENTED FOR REVIEW

A. Whether this Court's opinion in *City of Olympia v. Drebick*, 156 Wn.2d 289, 26 P.3d 802 (2006) required the Hearing Examiner to make findings of fact as to whether the impact fee was, in fact, roughly proportionate, ***not*** whether the fee schedules were "clearly erroneous."

B. Whether the *Opinion* erroneously concluded that impact fees authorized Chap. 82.02 RCW are "outside the scope" of *Koontz v. Johns River Water Management District*, 570 U.S. 595 (2013).

C. Whether the agency has the burden to prove the proportionality of its demand for impact fees where the burden of proof for similar Chap. 82.02 exactions is on the agency under *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

D. Whether the independent fee calculation authorized by RCW 82.02.060(5)(6) is optional, ***not*** a mandatory administrative remedy.

IV. STATEMENT OF THE CASE

Douglass Properties II, LLC ("Douglass") seeks review of the *Opinion* which affirmed the *Decision Denying Appeal* issued by the Olympia Hearing Examiner ("*Decision*"). The Hearing Examiner's *Decision* upheld the respondent City of Olympia's demand for roughly $167,580 in traffic impact fees of as a condition of the City's issuance of a building permit for Douglass' new mini storage warehouse in Olympia.

Douglass proved that a proportionate impact fee was no more than $48,179.93, and that the City's figure ($167,580) was based on erroneous assumptions and a lack of data about the impacts of mini-storage warehouses when the City's impact fee schedule was adopted. But the Hearing Examiner failed to make the findings of fact on proportionality as required by *City of Olympia v. Drebick*, 156 Wn.2d 289, 26 P.3d 802 (2006).

Instead, the Hearing Examiner applied the wrong standard of review and wrong burden of proof to the wrong question, upholding the excessive fee based on findings that the City's impact fee schedules were not "clearly erroneous" when they were adopted. CP 42.

A. The City's authority to impose any impact fees is a function of state statutes and federal constitutional law.

Prior to the 1990 amendments to RCW 82.02.020 *et seq.*, local governments had no authority under state law to impose impact fees as a

condition of development approval. *See Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 753 n.9, 49 P.3d 867 (2002); Laws of 1990, 1st Ex. Sess.. Ch. 17, § 42. The 1990 Growth Management Act (GMA) amended Chap. 82.02 RCW to allow counties and cities to impose traffic impact fees under certain conditions. RCW 82.02.020. Specifically, traffic impact fees:

> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; …

RCW 82.02.050(4).

These nexus and proportionality requirements are essentially the same as the constitutional *Nollan/Dolan*[1] standard for exactions analysis. For purposes of this case there is no significant difference between the statutory and constitutional standards: both require impact fees to be roughly proportionate to the impact of the development.

Whether or not the nexus and proportionality requirements in RCW 82.02.050(4) are also constitutionally-required by the *Nollan/Dolan* doctrine was debated by this Court in 2006 in *City of Olympia v. Drebick*. In that case a majority of this court noted that (in 2006) the United States Supreme Court had not yet extended the *Nollan/Dolan* doctrine to impact fees. 156 Wn.2d at 302. But in 2013, the United States Supreme Court

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[1] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

clearly stated that impact fees are subject to *Nollan/Dolan*, and must be roughly proportionate to the impact of a proposed development *Koontz v. Johns River Water Management Dist.*, 570 U.S. 595, 606 (2013). The *Koontz* dissent confirmed that *Nollan/Dolan* now applies to all sorts of exactions and permit conditions:

> By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery.

570 U.S. at 626 (Kagen, J., dissenting). The *Koontz* dissent specifically noted that **Washington's** impact fee system "now must meet *Nollan* and *Dolan's* nexus and proportionality tests." *Id.* at 626-27 (citing *Drebick*, 156 Wn.2d at 305). However, because RCW 82.02.050(4) already required both a nexus and proportionality, *Koontz* did ***not*** change Washington law.

RCW 82.02.070(5) requires local governments to provide an appeal for impact fees at which "the impact fee may be modified upon a determination that it is proper to do so based on principles of fairness."

RCW 82.02.060(5) and (6) require local governments to allow consideration of unusual circumstances as well as studies and data provided by the developer in determining the amount of fees. Nothing in Chap 82.02 RCW, however, suggests that RCW 82.02.060(6) creates a mandatory

administrative remedy or a precondition to appeal under RCW 82.02.070(5).

B. Douglass properly appealed the City's impact fee calculation to the Hearing Examiner.

In 2017 Douglass applied for a building permit for a mini storage warehouse facility in the City of Olympia. The City conditioned approval of the permit on Douglass' payment of $167,580 in traffic impact fees. CP 20-21; CR 1-2. This figure was based on erroneous assumptions, and grossly over-estimated the traffic impacts of mini-storage warehouses.[2]

As required by OMC 15.04.090(C), Douglass first requested review of the impact fee by the Director, who upheld the City's calculation, and directed Douglass to appeal to the Hearing Examiner. CR 33, 45.[3] Several months after Douglass' administrative appeal was filed, the City produced a staff report that argued, for the first time, that Douglass was required to submit an independent fee calculation, and that his failure to do so was an "election" to have the fee determined under the fee schedule. CR 27-32.

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[2] Douglass declined to request an independent fee calculation because he correctly deduced that the City would reject any such calculation. In its hearing brief the City indicated that it would not have accepted any independent fee calculation because there is "no dispute" that the project is "properly classified as a mini-warehouse" under the schedule. CR 258.

[3] "CR" refers to the Certified Record filed by the City on or about December 17, 2018, which was transmitted to this Court as an exhibit. *See* CP 247-249.

C. Douglass proved that a proportionate impact fee was no more than $48,179.93.

Even though the City had the burden of proof as a matter of state law, Douglass incurred the expense of proving that the City's impact fee methodology was flawed with respect to three of the factors used to calculate the fee, and that a proportionate impact fee was no more than $48,179.93. CP 22. The City focused its evidence on how and why the City developed and adopted its standard impact fee schedules. CP 29-24. Based on several errors of law the Hearing Examiner failed to make any findings of fact as to whether the City's impact fee of $167,580 was ***in fact*** roughly proportionate to the impact of the Douglass project.

The City has never attempted to challenge Douglass' evidence that a proportionate impact fee is no more than $48,179.93. *See Reply Br.* at 3-4. This Court can assume, *arguendo*, that a proportionate impact fee for the Douglass project would be no more than $48,179.93. Such a fee is clearly not "proportionate" to the fee of $167,580 demanded by the City.

D. The Hearing Examiner failed to make findings of fact, applied the wrong standard of review to the wrong question, and erroneously shifted the burden of proof to Douglass.

Both RCW 82.02.070 and federal constitutional law required the City to prove that the impact fees demanded by the City were roughly proportionate to the actual impacts of the Douglass project. Furthermore, this Court's decision in *City of Olympia v. Drebick* clearly states that that

the Hearing Examiner's function is to make findings of fact as to whether the City's impact fee is proportionate to the impact of the development:

> The hearing examiner's inquiry should have ended with his factual findings that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements considered as a whole" and that "those improvements considered as a whole will benefit the Drebick development."

Drebick, 156 Wn.2d at 307.

But the Hearing Examiner held that Douglass had to prove that the City's adoption of the impact fee schedule was "clearly erroneous," and upheld the City's erroneous assumptions under the "clearly erroneous" standard. CP 36-38. For example, the City assumed that the average vehicle trip to a mini-storage warehouse in Olympia would be 5.1 miles, an absurd assumption given the size of the City and the existence of five (5) other mini-storage warehouses within three (3) miles of the Douglass project. CR 344; RP 110. The City's own expert admitted that there was **no data** on length for mini warehouses, and that City simply assumed that mini-storage warehouses have the same impacts as commercial warehouses:

> Q. [I]t is correct that for lack of data, you simply took the 5.1 miles from the warehouse classification and slapped it on mini warehouse. Is that what the evidence shows?
>
> A. That was our assumption.

RP 166. Faced with uncontroverted evidence that the City's trip length assumption was excessive, the Hearing Examiner upheld the City's

assumption based on the total lack of data when the impact fee schedule was adopted. CP 38. The hearing examiner rejected Douglass' other two challenges to the impact fee for the same erroneous reasons. CP 37-38.

The City blamed Douglass for not requesting an optional independent fee calculation under OMC 15.04.050. CR 27-31, 243, 253-54, 257-58. Douglass explained that the independent fee calculation was ***optional*** (for both the City and applicant), and that the City had never argued that the independent fee calculation was an administrative remedy. CR 204-205, 377-78. Nonetheless, the Hearing Examiner erroneously ruled that the lack of an independent fee calculation from Douglass prevented the Hearing Examiner from performing its function under *Drebick*: to make findings on proportionality as required by RCW 82.02.050(4). CP 39-40.

E. Procedural History.

The superior court affirmed without explaining its reasoning. CP 316-318. Douglass then appealed to Division II of the Court of Appeals, which issued the *Opinion* affirming.

V. ARGUMENT

Under RCW 82.02.070(5) and *Drebick*, *supra*, Douglass was entitled to a hearing at which the City was required to prove that the impact fee was roughly proportionate to the impact of the project. After *Koontz*, *supra*, Douglass was entitled to the same determination of proportionality

under the *Nollan/Dolan* doctrine.

But the Hearing Examiner failed to provide that hearing, and the City was never required to carry its burden of proof. The Court of Appeals *Opinion* holds, contrary to *Drebick* and the statutes, that Douglass was only permitted to challenge the legislative adoption of the impact fee schedule under the "clearly erroneous" standard. *Opinion* at 15-16. The Court of Appeals purported to follow *Drebick* in making this determination despite the fact that the phrase "clearly erroneous" never appears in *Drebick* even once, in either the majority or dissent.

This Court should grant review under RAP 13.4(b)(1) and (3) because the *Opinion* is contrary to both *Drebick* and *Koontz*. The Court should also grant review under RAP 13.4(b)(4) because the Court of Appeals' interpretation of Chap 82.02 RCW, including its analysis of the burden of proof and the independent fee calculation are of substantial importance to local jurisdictions and developers throughout the state.

A. The *Opinion* is directly contrary to this Court's opinion in *City of Olympia v. Drebick* (2006), which required the Hearing Examiner to make findings of fact as to whether the impact fee was roughly proportionate.

The impact fee statute (i) requires impact fees to be proportionate to the impact of the new development, and (ii) requires the City to provide an hearing to challenge the proportionality of any fee. RCW 82.02.050(4); -

.070(5). Where a permit applicant demands a hearing on the proportionality of an impact fee the hearing examiner's job is to make findings of fact as to whether the impact fee is proportionate as required by RCW 82.02.050. That is clearly shown by this Court's decision in *Drebick*, *supra*.

In *Drebick*, the developer of an office building appealed the City of Olympia's impact fee demand to the City's hearing examiner. 156 Wn.2d at 293. The hearing examiner made dozens of findings of fact about the whether the City's impact fee was proportionate as required by RCW 82.02.050, including a specific finding that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements considered as a whole." *Id*. at 305. As this Court noted, these findings established that the fee complied with the statute. *Id.* at 306.

But the Hearing Examiner went further, concluding that local governments were required to make "individualized assessments of the new development's direct impact on each improvement planned in a service area." *Id*. at 293. The superior court reversed the hearing examiner, and then the Court of Appeals reversed the superior court, agreeing with the hearing examiner and relying, in part, on the *Nollan/Dolan* doctrine to deduce the intent of the 1990 legislature. *City of Olympia v. Drebick*, 119 Wn. App. 774, 785, 83 P.3d 443 (2004). This Court reversed, primarily on grounds of statutory interpretation. 156 Wn.2d at 293. This Court upheld

the City's fee calculations, noting that the hearing examiner's findings established that the impact fee was proportionate:

> The hearing examiner's inquiry should have ended with his factual findings that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements considered as a whole" and that "those improvements considered as a whole will benefit the Drebick development."

156 Wn.2d at 307. In sum, this Court has clearly stated that the hearing examiner's function in an impact fee appeal is to make findings of fact as to whether the fee at issue is, in fact, proportionate to the impact. The Hearing Examiner failed to make the findings of fact required by the statute, and the Court of Appeals affirmed that failure to follow *Drebick*.

Apart from noting that *Drebick* incorrectly predicted that the outcome of *Koontz*, *supra*, (erroneously assuming that *Nollan/Dolan* would not extend to impact fees), *see* section (B), Douglass does ***not*** challenge *Drebick* at all. On the contrary, Douglass seeks review in this Court under RAP 13.4(b)(1) precisely because the Court of Appeals failed to follow *Drebick* on the issue of whether the hearing examiner was supposed to make findings of fact on proportionality.

The *Opinion* ignores the only part of *Drebick* that really matters in this case: the part that says the hearing examiner is supposed to make findings of fact. That is undoubtedly because the City not only ignored that

part of *Drebick* in its briefing, but also stuffed its brief with misleading, erroneous arguments about *Drebick*.

Contrary to the City's obfuscation, Douglass is ***not*** making the same legal argument as the developer in *Drebick*:

- Douglass has ***not*** argued that an individualized assessment of the impact on planned improvements is required by either RCW 82.02.050 or *Nollan/Dolan*;
- Douglass is ***not*** challenging the City's decision to designate the entire City as a single service area under RCW 82.02.060(7); and
- Douglass does ***not*** care what particular traffic improvements his impact fee will be spent on.

Furthermore, Douglass has explained that, *for purposes of this case*, there is no significant difference between the statutory and constitutional standards: both RCW 82.02.050(4) and *Nollan/Dolan* require impact fees to be roughly proportionate to the impact of the development.

Douglass argues that an impact fee that , is three and a half times larger than the actual impact of his project due to flawed methodology is ***not*** proportionate under ***either*** the statute ***or*** *Nollan/Dolan*. The City has never even argued otherwise.

This Court should grant review under RAP 13.4(b)(1) because the *Opinion* conflicts directly with *Drebick*, *supra*, by failing to require the Hearing Examiner to make findings of fact on proportionality.

B. The *Opinion* conflicts with the United States Supreme Court's opinion in *Koontz v. Johns River Water Management District* (2013) by erroneously holding that impact fees under RCW 82.02.050 *et seq*. are "legislatively prescribed" fees and therefore "outside the scope" of *Koontz*.

The Court of Appeals agreed with the City that impact fees under RCW 82.02.050 et seq. are "legislatively prescribed" fees "outside the scope" of *Koontz*. *Opinion* at 12. *Drebick* (2006) notes a distinction between fees in lieu of possessory exactions, such as RCW 82.02.020, and "legislatively prescribed" fees. 156 Wn.2d at 302. But it is unclear whether that distinction still exists after *Koontz* (2013). The *Koontz* majority ignored the alleged distinction between "legislative" and "adjudicative" fees, recognizing only the distinction between impact fees (monetary exactions) and taxes. 570 U.S. at 615. Only the Koontz *dissent* mentions a distinction between "legislative" and "adjudicative" fees, observing that "[m]aybe today's majority accepts that distinction; or then again, maybe not." 570 U.S. at 628 (Kagen, J., dissenting).

After determining that the distinction still exists after *Koontz*, the Court of Appeals assumed, without any analysis, that impact fees under RCW 82.02.050 *et seq* are "legislatively prescribed" fees not subject to

Nollan/Dolan. *Opinion* at 13. Even if "legislatively prescribed" fees remain outside the scope of *Nollan/Dolan* after *Koontz*, the Court of Appeals' assumption that impact fees under RCW 82.02.050 et seq. are "legislatively prescribed" fees is erroneous.

The Court of Appeals ignored the substantial discretion granted by to local officials in determining the amount of fees actually imposed on a particular project. That discretion makes such fees "adjudicative" (or ad hoc) fees. Although the Olympia city council "legislatively" adopted the City's impact fee schedules, the actual impact fees imposed by the City's development director are adjudicative fees, subject to *Nollan/Dolan*, because of the significant discretion granted to the City by RCW 82.02.050 *et seq*. The statute does ***not*** require, or even allow, the City to rely on the presumed validity its legislatively adopted schedules. Local governments are required to consider unique circumstances in calculating the impact fees on particular projects ***when those fees are imposed on a particular project***:

> Local impact fee ordinances…
>
> (5) Shall allow the county, city, or town imposing the impact fees to **adjust the standard impact fee at the time the fee is imposed** to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;
>
> (6) Shall include a provision for **calculating the amount of the fee to be imposed on a particular development** that permits consideration of studies and data submitted by the developer to adjust the amount of the fee;

RCW 82.02.060. The statute also requires local governments to provide a hearing process in which impact fees may be modified "based on principles of fairness." RCW 82.02.070(5). The discretion afforded by these provisions demonstrates that impact fees are ***adjudicative*** fees, subject to *Nollan/Dolan* under *Koontz*, not "legislatively prescribed" uniform fees.

Under RCW 82.02.060**(5)** the City had the discretion to reduce the impact fees without even asking Douglass to provide data or calculations under RCW 82.02.060**(6)**. The Court of Appeals mischaracterized the consideration of unusual circumstances under RCW 82.02.060**(5)** as part of the City's initial adoption of the impact fees formula. *Opinion* at 4. But RCW 82.02.060**(5)** clearly states that the City may "adjust the standard fee at the time the fee is imposed."

The Court of Appeals erroneously cited the ***dissent*** in *Koontz* for the proposition that Washington's impact fee statutes are unaffected by *Koontz*. *Opinion* at 11-12. But the *Koontz* dissent specifically noted that Washington's impact fee system was now subject to *Nollan/Dolan* doctrine:

> Cities and towns across the nation impose many kinds of permitting fees every day. **Some enable a government to mitigate a new development's impact on the community, like increased traffic or pollution—or destruction of wetlands. *See, e.g., Olympia v. Drebick*, 156 Wash.2d 289, 305, 126 P.3d 802, 809 (2006).** … **All now must meet *Nollan* and *Dolan's* nexus and proportionality tests.**

570 U.S. 626-27 (Kagen, J., dissenting) (emphasis added). The *Koontz* dissent does ***not*** support the *Opinion*; it confirms that it is wrong.

Under *Koontz*, impact fees under are adjudicative monetary exactions subject to the *Nollan/Dolan* doctrine. Because the City's impact fees are not roughly proportionate to the impacts of the project, the Hearing Examiner's decision must be reversed. This Court should grant review under RAP 13.4(b)(3) because the *Opinion* raises a significant question of federal constitutional law.

C. The *Opinion* conflicts with this Court's decision in *Isla Verde Int'l Holdings v. City of Camas* (2002), which places the burden of proof on the agency demanding the exaction, not the permit applicant.

If the City had demanded an exaction (dedication) of a tiny strip of real property worth only a few hundred dollars for road improvements, pursuant to RCW 82.02.**020**, the City would have the burden of proof as a matter of state law:

> [U]nder RCW 82.02.020 the burden of establishing that a condition is reasonably necessary as a direct result of the proposed development is on the City.

Isla Verde Int'l v. City of Camas, 146 Wn.2d 740, 763 n.16, 49 P.3d 867 (2002). But according to the *Opinion*, if the City wants $167,580 in cash under RCW 82.02.**050** for "traffic impacts", the burden of proof shifts to the developer.

The Court of Appeals provided no authority or rationale to support its conclusion that the permit applicant has the burden of proof in the impact fee hearing required by RCW 82.02.070(5). The court simply leaped from a determination that *Isla Verde* does not apply to RCW 82.02.050 to a conclusion that the burden of proof for impact fees under RCW 82.02.050 is reversed from the burden under RCW 82.02.020. *Opinion* at 13-14. But there is no reason why the burden of proof on different types of land use exactions would be different where the United States Supreme Court treats them exactly the same:

> We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of Nollan and Dolan even when the government denies the permit **and even when its demand is for money**.

Koontz, 570 U.S. at 606, 619 (emphasis added).

Compounding its error, the Court of Appeals relied on the City's code, OMC18.75.040(F), to place the burden of proof to Douglass without explaining how the City could possibly have the legal authority to re-allocate the burden of proof under a state statute. *Opinion* at 15. Furthermore, OMC 18.75.040(F), cited by the Court of Appeals, does ***not*** distinguish between dedication of property under RCW 82.02.020 and impact fees under RCW 82.02.050. Consequently, to the extent OMC

18.75.040(F) purports to place the burden of proof on the developer under RCW 82.02.020, that provision is simply invalid under state law.

There is no authority for placing the burden of proof on the permit applicant, and no authority to allow a local jurisdiction to allocate the burden of proof to the applicant by ordinance. This Court should grant review under RAP 13.4(b)(1),(3) and (4) to clarify that where an agency demands any exaction under Chap. 82.02 RCW, whether physical or monetary, the agency has the burden to prove that the exaction complies with *Nollan/Dolan*.

D. The independent fee calculation authorized by RCW 82.02.060(5)(6) is optional, not a mandatory administrative remedy.

State law requires the City to provide ***both*** (i) an optional independent fee calculation, ***and*** (ii) an administrative appeal to challenge the amount of impact fees. RCW 82.02.060(5),(6), -070(5). Nothing in those statutes suggests that the independent fee calculation under RCW 82.02.060 is a precondition to the mandatory administrative appeal under RCW 82.02.070(5). Nothing in those statutes gives the City the authority to require a permit applicant to make an "election" between an independent fee calculation and the City's standard impact fee schedule. *Resp. Br.* at 4. Nothing in *Drebick*, *supra*, suggests that the independent fee calculation is a mandatory administrative remedy. On the contrary, *Drebick* noted, in

passing, that an independent fee calculation was denied, but then focused exclusively on the hearing examiner's findings regarding the City's regular fee schedule. 156 Wn.2d at 293, 305.

Nonetheless, after Douglass had already appealed to the Hearing Examiner as instructed by the Director, the City argued for the first time in its staff report that Douglass could not challenge the impact fee because he did not request an independent fee calculation. CR 27-32. Relying on its own codes, the City simply ignored the fact that RCW 82.02.070(5) required the City to provide a hearing on the "fairness" of the City's impact fee. The Hearing Examiner erroneously agreed with the City, and mischaracterized Douglass' appeal as an impermissible request to have the Hearing Examiner conduct an independent fee calculation. CP 39.

Even if the independent fee calculation in RCW 82.02.060 were a mandatory administrative remedy, that issue should have died in the superior court. The City never argued that the independent fee calculation was a mandatory administrative remedy, and the City proceeded to brief the merits without first raising the threshold exhaustion issue as required by RCW 36.70C.080(3). CP 46. But the *Opinion* at 16 still blamed Douglass for not seeking an independent fee calculation, relying exclusively on the City's own codes while ignoring both the statute and the City's failure to properly and timely raise its exhaustion argument. The Court of Appeals

also ignored the undisputed fact that any request for an independent fee calculation was futile. CR 258.

This Court should grant review under RAP 13.4(b)(4) to clarify that permit applicants are entitled to a hearing under RCW 82.02.070(5), that the independent fee calculation authorized by RCW 82.02.060(5)(6) is optional, not a mandatory administrative remedy, and that the City had no authority under state law to require Douglass to "elect" between an independent fee calculation, which would have been denied anyway, and the City's baseless, excessive impact fee schedule.

VI. CONCLUSION

This Court should grant review under RAP 13.4(b)(1), (3) and (4) to review and reject the Court of Appeals' erroneous analysis of impact fees in Washington. The Court should reverse the Hearing Examiner's *Decision*, and hold that the City failed to prove that it was entitled to any more than $48,179.93 in traffic impact fees. This matter should be remanded to the trial court for further proceedings.

VII. APPENDICES

Appendix A *Published Opinion*

DATED this 3rd day of March, 2021.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DOUGLASS PROPERTIES II, LLC, Appellant, v. CITY OF OLYMPIA, Respondent.	No. 53558-1-II PUBLISHED OPINION

WORSWICK, J. — Douglass Properties II LLC (Douglass) appeals a superior court order affirming the Olympia Hearing Examiner's decision regarding transportation impact fees (traffic impact fees). That order upheld the imposition of $167,580 in traffic impact fees as a condition of the City of Olympia's issuance of a building permit to construct a storage facility. Douglass argues that the hearing examiner's decision was erroneous because it (1) made findings of fact and conclusions of law without placing the burden of proof on the City to establish that the traffic impact fees were roughly proportionate to the impacts of Douglass's project as required by *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed .2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (*Nollan/Dolan* test),[1] and (2) failed to conclude that the City's traffic impact fees were excessive and not roughly proportionate. We affirm.

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[1] Together these cases require a nexus and rough proportionality between a government's demand and the effects of development when the government demands that a landowner relinquish a portion of his property as a condition of a land use permit.

FACTS

I. Background

A. *Permit Application*

In 2016 and 2017, Douglass applied for building permits for a mini storage warehouse facility in Olympia. In accordance with the Transportation Impact Fee Rate Schedule in Olympia Municipal Code (OMC) 15.16.040, the City calculated the traffic impact fees and conditioned Douglass's permits based on those calculated fees. Douglass's proposal included 7 buildings. Building 1 and Buildings 3 through 7 were calculated at a rate of $1.29 per square foot of gross floor area according to the 2016 OMC, but Building 2 was calculated at $1.33 per square foot of gross floor area according to the 2017 OMC.[2] Although OMC 15.04.050(C) and (E) contained provisions to allow Douglass to request an independent fee analysis, Douglass declined to request an analysis. Douglass also declined to prepare its own independent fee calculation, as provided for under OMC 15.04.050(D). In 2018, Douglass paid all the impact fees. As to Building 2 only, Douglass paid these fees under protest and appealed the impact fee determination.

B. *City of Olympia Hearing Examiner*

In 2018, the City's hearing examiner held a hearing to consider Douglass's appeal. At the onset of the hearing, the hearing examiner stated that Douglass had the burden of proof to

[2] Building 2 contained 126,000 square feet, which resulted in a traffic impact fee of $167,580 when multiplying 126,000 times $1.33. The $1.33 per square foot multiplier is based on the following calculation: peak trips per thousand square feet (.26) times number of trips that are new trips (1), times standard length compared to average trip length of 3.0 miles ("trip adjustment variable") (1.7), times cost of each new trip ($2,999).

show that the City's traffic impact fee for Building 2 was "clearly erroneous." Clerk's Papers (CP) at 58. The parties then presented evidence in the form of exhibits and witness testimony.

The OMC contains a formula to calculate a traffic impact fee, which the City employed to calculate the impact fees here. OMC 15.16.040 Schedule D, "Transportation Impact Fees." This formula includes a number of variables.

Douglass challenged three of these variables: the number of trips per peak hour, the percentage of new trips, and the trip adjustment variable. Douglass argued the traffic impact fee should have been modified consistent with its own calculations, notwithstanding that Douglass neither requested an independent impact fee calculation from the City, nor submitted his own independent impact fee calculation for consideration prior to issuance of the permit.[3] Douglass urged the hearing examiner to either find the City's impact fee to be clearly erroneous or, in the alternative, to undertake an independent fee calculation and determine a new fee that was consistent with Douglass's alternative calculation. Douglass contended that a failure to adjust the City's impact fee would be a violation of due process under *Nollan* and *Dolan*.[4]

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[3] Douglass argued that peak trips per thousand square feet should be .17, number of trips that are new trips should be .75, and the standard length compared to average trip length (trip adjustment variable) should be 1, resulting in an impact fee of $48,178.93. Although the City's ordinances presume that its own impact fee schedule calculations are valid under OMC 15.04.050(F), under OMC 15.04.050(C) a permit applicant can submit his own independent fee calculation *prior to* issuance of any building permit and the City may consider such independent fee calculation.

[4] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The *Nollan* and *Dolan* cases are landmark Fifth Amendment takings cases. "[*Nollan* and *Dolan*] held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

The City presented evidence from its own expert, Don Samdahl, regarding the methodology used by the City to calculate traffic impact fees. The City also showed that it formally adopted a transportation study prepared for the city, which included the formula for calculating traffic impact fees. The transportation study formula for calculating such fees included the factors required by RCW 82.02.060, including:

- The cost of public facilities necessitated by new development;
- Adjustments to the cost for past or future payments by developers (including user fees, debt service payments, taxes or other fees);
- The availability of other funding sources;
- The costs of existing facilities improvements;
- The methods by which existing facilities were financed;
- Credit for the value of any dedication of land to facilities identified in the capital facilities plan and required as a condition of approval;
- Adjustments for unusual circumstances; and
- Consideration of studies submitted by the developer.

CP at 293.

Following the hearing, the hearing examiner denied Douglass's appeal, deciding that the impact fee was correctly calculated in accordance with the ordinance. The hearing examiner concluded that it did not have the authority to overrule *City of Olympia v. Drebick*,[5] which the hearing examiner concluded was the controlling authority. The hearing examiner reaffirmed that Douglass had the burden of proof at the hearing, and that the three challenged variables were not clearly erroneous. The hearing examiner further concluded that the City's actions were not clearly erroneous when the City did not extemporaneously conduct an independent fee

[5] 156 Wn.2d 289, 293, 126 P.3d 802 (2006). Our Supreme Court in *Drebick* held that impact fees under RCW 82.02 do not require an individualized assessment of a development's direct impact.

assessment, and that a hearing examiner had no authority to conduct or consider an independent fee assessment for the first time on appeal.

C. *Judicial Review*

Douglass filed an appeal to the superior court for judicial review under the Land Use Petition Act, RCW 36.70C (LUPA). The superior court affirmed the decision of the hearing examiner. Douglass now appeals to this court.

ANALYSIS

Douglass argues that the City's traffic impact fee is subject to Fifth Amendment scrutiny because it amounts to a regulatory taking of his property. Douglass argues that because the fee is a regulatory taking, the City had the burden to prove to the hearing examiner that the fees had a nexus and were roughly proportional, as required by *Nollan* and *Dolan*. We hold that the *Nollan/Dolan* test does not apply to the traffic impact fees, because such fees are legislatively prescribed generally applicable fees outside the scope of *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013), and that *Drebick* still controls. Thus, we hold that the hearing examiner did not err when it ruled that Douglass had the burden of proof at the hearing and that Douglass failed to meet that burden. We further hold that the hearing examiner's conclusions were not erroneous.

I. Legal Principles and Standards of Review

A. *Standards of Review*

We review a LUPA action under chapter 36.70C RCW. *Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 742, 317 P.3d 1037 (2014). We stand in the same position as the superior court, and review the record that was before the hearing examiner.

Ellensburg Cement Products, 179 Wn.2d at 742. The party seeking relief has the burden of establishing any of the following standards:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

Standards (a), (b), (c), (d), and (f) are at issue in this case. Standards (a), (b), (e), and (f) contain questions of law that we review de novo. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 828-829, 256 P.3d 1150 (2011).

For standard (c), we review all facts and inferences in a light most favorable to the party that prevailed in the highest fact-finding forum to decide challenges to the sufficiency of the evidence, and then determine whether sufficient evidence exists in the record to persuade a reasonable person of the truth asserted by the alleged facts. *Phoenix*, 171 Wn.2d at 828-829.

For standard (d), only when we are left with "the definite and firm conviction that a mistake has been committed," do we decide an application of law to the facts is clearly erroneous. *Phoenix*, 171 Wn.2d at 828-829.

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."

Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752, 49 P.3d 867 (2002), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

B. *State Law*

RCW 82.02.050 authorizes the imposition of impact fees. The statute limits how municipalities can implement impact fees, stating that such fees

> (a) Shall only be imposed for system improvements that are reasonably related to the new development;
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
> (c) Shall be used for system improvements that will reasonably benefit the new development.

RCW 82.02.050(4).

An "impact fee" is defined as

> a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. "Impact fee" does not include a reasonable permit or application fee.

RCW 82.02.090(3).

"'Proportionate share' means that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development." RCW 82.02.090(6).

Local ordinances imposing impact fees under RCW 82.02.050 must include a schedule of impact fees for each type of development activity subject to the fees. RCW 82.02.060(1). The schedule must specify "the amount of the impact fee to be imposed for each type of system improvement" and must be "based upon a formula or other method of calculating such impact

fees." RCW 82.02.060(1). The formula or method of determining "proportionate share" in a schedule of impact fees must, at a minimum, include:

> (a) The cost of public facilities necessitated by new development;
> (b) An adjustment to the cost of the public facilities for past or future payments made or reasonably anticipated to be made by new development to pay for particular system improvements in the form of user fees, debt service payments, taxes, or other payments earmarked for or proratable to the particular system improvement;
> (c) The availability of other means of funding public facility improvements;
> (d) The cost of existing public facilities improvements; and
> (e) The methods by which public facilities improvements were financed.

RCW 82.02.060(1).

In addition to an impact fee schedule, the local ordinance must "include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee." RCW 82.02.060(6).

Local governments are required to provide an administrative appeals process, which may follow either the underlying development approval process or a process separately established by the local government. RCW 82.02.070(5). Impact fees in the administrative appeal process can be modified under "principles of fairness." RCW 82.02.070(5).

Title 82 RCW contemplates other types of impact fees that may be authorized under alternative statutes which are necessary as a direct result of the proposed development (in contrast to the traffic impact fees in the instant case) and carves out an exception to the preemption section under RCW 82.02.020:

> [T]his section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a *direct result* of the

> proposed development or plat to which the dedication of land or easement is to apply.
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations 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, subdivision, or plat.

RCW 82.02.020 (emphasis added).

C. *Local Ordinance*

The City enacted OMC 15.04.040 to collect transportation impact fees under RCW 82.02.050. Schedule D, in OMC 15.16.040 includes the transportation impact fees at issue here. The fees in Schedule D, are generated by the transportation study formula, and the fees are outlined in the "2009 Transportation Impact Fee Collection Rate Document." OMC 15.08.050(A). Schedule D is reviewed annually to consider adjustments "to account for system improvement cost increases due to increased costs of labor, construction materials and real property." OMC 15.08.050(B).

II. Legislatively Imposed Generally Applicable Fee

Douglass argues that the City's fee scheme is unlawful because it fails to comply with the proportionality requirements under state and federal law, specifically RCW 82.02.050(4) and *Nollan/Dolan* scrutiny by extension from *Koontz v. St. Johns River Water Management District*, 570 U.S. 595. Douglass also argues that *Drebick* is no longer controlling law. We disagree.

A. *Discussion*

Douglass makes several arguments based on an underlying premise that the *Nollan/Dolan* test applies to the traffic impact fees assessed here. Specifically, Douglass argues that after *Koontz*, *Drebick* no longer controls. We disagree.

The takings clause of the Fifth Amendment provides, "[N]or shall private property be taken for public use, without just compensation." Similarly, article I, section 16 provides, "No private property shall be taken or damaged for public or private use without just compensation having been first made." WASH. CONST. art. I, § 16.

In the cases of *Nollan* and *Dolan*, the Supreme Court relied on the Fifth Amendment to hold that the government cannot condition approval of a land use permit on the conveyance of real property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386. The case of *Koontz v. St. Johns River Water Management District.*, extended the *Nollan/Dolan* requirement to certain "monetary exactions." 570 U.S. at 612. The nexus test requires conditions of development to be necessary to mitigate a specific adverse impact of a proposal. *Nollan*, 483 U.S. at 837. The rough proportionality test limits the extent of required mitigation measures to those that are roughly proportional to the impact they are designed to mitigate. *Dolan*, 512 U.S. at 391. *Olympic Stewardship Found. v. State Env't & Land Use Hearings Off. through W. Wash. Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 747, 399 P.3d 562 (2017). Taxes and user fees are not "takings" subject to Fifth Amendment scrutiny. *Koontz*, 570 U.S. at 615 (quoting *Brown v. Legal Found. of Washington*, 538 U.S. 216, 243, n. 2, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003)) (Scalia, J., dissenting).

As stated above, *Koontz* extended the *Nollan/Dolan* rule to certain "monetary exactions." In *Koontz*, the government refused to issue water permits to a land owner unless the landowner either deeded to the government an easement over land not being developed, or paid for improvements to noncontiguous government owned land. *Koontz*, 570 U.S. at 601-602. This fee

scheme was "imposed ad hoc," and was "not . . . generally applicable" to permit applicants. *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting). In applying the *Nollan/Dolan* test to this scheme, the court stressed that it was not expanding *Nollan* and *Dolan* much beyond its narrow confines, stating:

> [Koontz's] claim rests on the . . . *limited proposition* that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "per se [takings] approach" is the proper mode of analysis under the Court's precedent.

Koontz, 570 U.S. at 614 (emphasis added) (quoting *Brown*, 538 U.S. at 235).

Prior to *Koontz*, courts across the country generally held that the *Nollan/Dolan* test was limited to adjudicative and ad hoc exactions, and did not apply to more broadly applicable legislative exactions.[6] Washington weighed in on this issue in the case of *City of Olympia v. Drebick*, 156 Wn.2d 289.

In *Drebick*, the hearing examiner ruled that a city's impact fee did not comply with RCW 82.02.050 because it failed to require an individualized assessment of a new development's direct impact on each improvement planned in a service area. 156 Wn.2d at 309. Our Supreme Court reversed. 156 Wn.2d at 309. The appellant in *Drebick* sought an independent fee calculation adjustment before it challenged whether the City's ordinance complied with state law. 156 Wn.2d at 293. The Court explained that because GMA impact fees were legislatively prescribed development fees, *Nollan/Dolan* was not applicable, noting the distinctions from

[6] Michael Castle Miller, *The New Per Se Takings Rule: Koontz's Implicit Revolution of the Regulatory State*, 63 AM. U.L. REV. 919, 947 (2014).

other jurisdictions where Fifth Amendment scrutiny did apply but only to fees that were direct mitigation and in lieu of possessory exactions. *Drebick*, 156 Wn.2d. at 302.

Subsequent to *Koontz*, a number of courts have considered the issue and continue to hold that the *Nollan/Dolan* test does not apply to generally applicable legislative decisions.[7]

Although the decision in *Drebick* was based on statutory construction, the distinction observed between "direct mitigation fees" and those "legislative prescribed development fees" from the GMA is instructive. 156 Wn.2d at 303. The same important factual distinction that our Supreme Court explained in *Drebick* exists here between the traffic impact fees in the instant case and those found in *Koontz*. The fees in *Koontz* were "not . . . generally applicable" to all permit applicants. 570 U.S. at 628 (Kagan, J., dissenting). Additionally, the fee imposed in *Koontz* was in lieu of a conveyance of a conservation easement. 570 U.S. at 617. Although *Koontz* expanded the scope of takings that require *Nollan/Dolan* scrutiny to include "monetary exactions," it did not expand that scope to include legislatively prescribed development fees like those at issue here. Moreover, the language in *Koontz* clearly intended to limit its application, by explaining that the funds there were linked to a specific, identifiable property interest. We therefore conclude that *Koontz* does not invalidate *Drebick's* holding with respect to legislatively imposed generally applicable fees because these fees are outside the scope of *Koontz*.

Douglass also relies on *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 533, 979, P.2d

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[7] *See, e.g.*, *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 163, 425 P.3d 1099 (Ariz. Ct. App. 2018); *Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 932 (C.D. Cal. 2020); *Dabbs v. Anne Arundel Cnty.*, 458 Md. 331, 357, 182 A.3d 798 (2018).

864 (1999), a pre-*Koontz* case, to argue that *Nollan/Dolan* scrutiny applies to the City's traffic impact fees. In *HEAL*, Division One of this court explained that *Nollan*/*Dolan* scrutiny is required under the Growth Management Act, 36.70A RCW, for conditions other than an outright dedication of land, but that case did not specifically address impact fees. *HEAL*, 96 Wn. App. at 534. *HEAL* only concerned itself with the denial of a project based on less than "only the best available science [that] could provide its policy-makers with facts supporting those policies and regulations which, when applied to an application, will assure that the nexus and rough proportionality tests are met." 96 Wn. App. at 534. *HEAL*'s holding is immaterial to the instant case involving monetary exactions imposed based on a statutory formula.

We hold that *Drebick* is still good law, and that *Nollan/Dolan* scrutiny does not apply to the legislatively prescribed development traffic impact fees at issue in this case subsequent to *Koontz*. Thus, the hearing examiner did not err by concluding that the *Nollan/Dolan* rule did not apply.

III. Hearing Examiner Rulings

A. *Imposing Burden of Proof on Appellant Not Clearly Erroneous*

Douglass argues that the hearing examiner's ruling was clearly erroneous when it ruled that Douglass had the burden of proof under the OMC. Douglass contends that the City, as the governmental agency attempting to impose a fee, had a burden to show that the traffic impact fees met the *Nollan/Dolan* test. The City argues that Douglass had the burden of proof as prescribed by the City ordinance which is based on LUPA. Because the *Nollan/Dolan* test does not apply to legislatively prescribed impact fees, and because this is a LUPA appeal where the

City's ordinance was explicit in giving the challenger the burden of proof, we agree with the City.

Douglass relies on *Isla Verde International Holdings v. City of Camas*, 146 Wn.2d at 763 n.16, to argue that the City bears the burden of proof to show adequate proportionality under RCW 82.02.050(4). But *Isla Verde International Holdings* was a case concerning RCW 82.02.020, not RCW 82.02.050. 146 Wn.2d at 753-54; *see Drebick*, 156 Wn.2d at 302 (distinguishing *direct* mitigation fees like those referred to in RCW 82.02.020 from legislatively prescribed development fees). The court in *Isla Verde International Holdings* construed the burden of proof from the plain language of that wholly separate statute, which contains language that does not appear in the provision at issue here. 146 Wn.2d at 761.[8] Moreover, the development fees in *Isla Verde International Holdings* were not legislatively imposed generally applicable fees like those imposed here. The fees in *Isla Verde International Holdings* were statutory exceptions to the preclusive effect of RCW 82.02.020. 46 Wn.2d at 755. "[T]he burden of establishing a statutory exception is on the party claiming the exception." *Home*

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[8] RCW 82.02.020 provides:

> However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation *can demonstrate* are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.
>
> . . . .
>
> (3) . . . .
>
> No county, city, town, or other municipal corporation shall require any payment as part of such a voluntary agreement which the county, city, town, or other municipal corporation *cannot establish* is reasonably necessary as a direct result of the proposed development or plat.

(Emphasis added).

Builders Ass'n of Kitsap Cnty. v. City of Bainbridge Island, 137 Wn. App. 338, 347, 153 P.3d 231 (2007) (citing *Isla Verde*, 146 Wn.2d at 759).

As discussed above, *Nollan/Dolan* scrutiny does not apply to legislatively derived traffic impact fees such as the traffic impact fee in this case, so Douglass's argument fails. Because the fees at issue here are not subject to the *Nollan/Dolan* test, the City did not have a burden to show a nexus or proportionality. Instead, the hearing examiner correctly observed the OMC which states, "The examiner shall only grant relief requested by an appellant upon finding that the appellant has established that . . . ," and then goes on to describe the means in which an appellant can prevail. OMC 18.75.040(F). The language clearly requires the appellant has to "establish" the factual basis for the findings of fact and conclusions of law, thus bearing the burden of proof. OMC 18.75.040(F).

We hold that the hearing examiner's ruling that Douglass had the burden of proof under the OMC was not clearly erroneous.

B. *Validity of Fee Not Clearly Erroneous*

Douglass argues that the hearing examiner's ruling regarding the traffic impact fee was clearly erroneous because the fees were excessive and not roughly proportionate. Specifically, Douglass argues that three of the variables the City used in its calculation caused the fees to be excessive and not proportional. The City contends that Douglass is attempting to "rewrite the City's ordinance without complying with the procedural requirements that allow consideration of alternative fee calculations." Br. of Resp't at 33. The City argues that its fees are "presumptively valid enactments of the City's legislative body," and that they are rationally based on the same methodology upheld in *Drebick*. Br. of Resp't at 40. We hold that the

hearing examiner's decision to uphold the fee calculation based on the requisite City ordinance was not clearly erroneous.

The hearing examiner rejected all of Douglass's challenges to the City's fee calculation that were based on its own independent information unique to its own project. The hearing examiner found that each of the three challenged variables was supported by the widely accepted trip generation manual, which was the same manual from *Drebick*, according to Samdahl's testimony at the hearing. The hearing examiner reasoned that each of the City's decisions to adhere to Schedule D calculations was not a clearly erroneous application of the law to the facts. This is the standard of review under OMC 18.75.040(F)(4). OMC 15.04.050 required Douglass to submit its independent fee calculation before obtaining its permit, but it failed to do so. If an independent fee calculation under OMC 15.04.050 is not submitted timely to the City, the City is allowed to collect impact fees based on the schedules in Chapter 15.16 OMC. We hold that the hearing examiner's decision to uphold the City's fee calculation based on the requisite City ordinance was not clearly erroneous.

ATTORNEY FEES

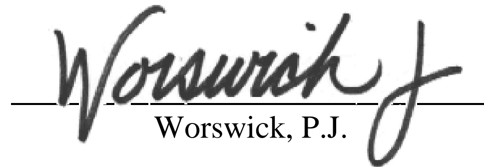
The City argues that it is entitled to an award of reasonable attorney fees and costs. Because the City is the prevailing party, we agree.

In a LUPA appeal, the prevailing party on appeal is entitled to an award of its reasonable attorney fees and costs. RCW 4.84.370(1). Under the LUPA statute, the prevailing party is the party that prevailed or has substantially prevailed before the county, city, or town, and has prevailed or substantially prevailed before this court or the Supreme Court, and has prevailed or substantially prevailed in all subsequent judicial proceedings. RCW 4.84.370(1)(a), (b). The

City prevailed before the hearing examiner, at the superior court, and on this appeal, and is thus entitled to an award of its attorney fees under RCW 4.84.370 and RAP 18.1

CONCLUSION

In conclusion, we hold that the *Nollan*/*Dolan* test does not apply to the traffic impact fees in this case, because such fees are legislatively prescribed generally applicable fees outside the scope of *Koontz*, and that *Drebick* still controls. Thus, we hold that the hearing examiner did not err when it ruled that Douglass had the burden of proof at the hearing and that Douglass failed to meet that burden. We further hold that the hearing examiner's conclusions were not erroneous. Finally, we hold that the City is entitled to its reasonable attorney fees. We affirm.



Worswick, P.J.

We concur:

Glasgow, J.

Cruser, J.

WILLIAM JOHN CRITTENDEN

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Transmittal Information

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