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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,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Douglass Properties II, LLC (“Douglass”) appeals from trial court’s LUPA¹ decision affirming the *Findings of Fact, Conclusions of Law, and Decision Denying Appeal* issued on August 23, 2018, by the Olympia Hearing Examiner (hereafter “*Decision*”). The Hearing Examiner’s *Decision* upheld a decision of the respondent City of Olympia to impose excessive traffic impact fees (roughly \$167,580) as a condition of the City’s issuance of a building permit for Douglass’ new mini storage warehouse in Olympia.

Both the impact fee statute, RCW 82.02.070, and federal constitutional law require the City’s impact fees to be roughly proportionate to the impact of the Douglass project. At the hearing before the Hearing Examiner the City had the burden to prove that the traffic impact fees that it demanded as a condition of Douglass’ permit were roughly proportionate to the impact of the Douglass project. The City failed to carry that burden. Even though the City had the burden of proof, Douglass incurred the expense of actually proving that the City’s impact fee methodology was flawed with respect to three of the factors used to

¹ Land Use Petition Act, Chap. 36.70C RCW (“LUPA”).

calculate the fee, and that a proportionate impact fee was no more than \$48,179.93. The City made no attempt to prove otherwise.

Instead, the City argued, and the Hearing Examiner erroneously agreed, that Douglass was required to prove that the City's legislative adoption of the traffic impact fee schedule was "clearly erroneous." This conclusion was based on an incorrect understanding of the constitutional limits on impact fees under the *Nollan/Dolan*² doctrine as well as the statutory requirements in Chapter 82.02 RCW.

In 2013, the United States Supreme Court clearly stated that impact fees must be roughly proportionate to the impact of a proposed development:

Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts...

Koontz v. Johns River Water Management District, 570 U.S. 595, 606 (2013). But the Hearing Examiner refused to follow *Koontz*, erroneously concluding that the Hearing Examiner had no authority to "overrule" an earlier decision of the Washington Supreme Court. CP 41. As a result the Hearing Examiner erroneously upheld the City's impact fees, and the City

² *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).

has violated Douglass' rights under the Fifth Amendment to the Constitution.

This Court should reject the hearing examiner's erroneous legal analysis, reverse the trial court's LUPA ruling, 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.

Pursuant to an *Order* entered on October 26, 2019, Douglass' claim for damages was stayed until the superior court ruled on the LUPA issues. CP 46. If this Court agrees with Douglass that the City's impact fees were excessive then the parties will need to address the damages claim on remand.

II. ASSIGNMENTS OF ERROR

Assignment of Error No 1: The trial court erred in entering the *Order Affirming Land Use Decision* (May 17, 2019). CP 316-318.

Issues Pertaining to Assignment of Error:

a. Whether the superior court erred as a matter of law by failing to hold that both RCW 82.02.050(4) and *Koontz v. St. Johns River Water Management Dist.*, 570 US 2586 (2013) require the City's impact fees to be roughly proportional to the impact of the Douglass project.

b. Whether the superior court erred as a matter of law in failing to hold that the City failed to carry its burden of proof that the City's impact fees were roughly proportionate to the impacts of the Douglass project.

c. Whether the superior court erred as a matter of fact and law in failing to find that the City's impact fees were excessive and not roughly proportionate.

d. Whether the superior court erred as a matter of fact and law in failing to hold that the optional independent impact fee calculation provided by OMC 15.04.050 is irrelevant.

III. STATEMENT OF THE CASE

RCW 82.02.050 *et seq.* authorizes cities to impose impact fees on development activity. The City of Olympia enacted such an ordinance in OMC 15.16.040. CP 23; CR 4.³

Douglass applied for a building permit for a mini storage warehouse facility in the City of Olympia. The City conditioned approval of the building permit on Douglass' payment of \$167,580 in traffic impact fees. CP 20-21; CR 1-2. There is no dispute as to whether Douglass is

³ In this brief "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. "CP" refers to the Clerk's Papers. "RP" refers to the hearing transcript filed by Douglass on or about December 7, 2018.

entitled to the building permit; only the traffic impact fees are at issue in this case.

A. The City’s Impact Fee Calculation

The City’s impact fees are a function of five factors: (i) the size of the project in 1000s of square feet, (ii) a trip generation variable based on the type the land use, (iii) the percentage of vehicle trips that are new trips (as opposed to pass-by trips), (iv) a trip length adjustment factor based on the type of land use, and (v) a determination that each new trip in Olympia creates \$2999 in traffic impacts. Based on these five variables the City and the Hearing Examiner employed the following calculation to determine the amount of the impact fee:

126	x	0.26	x	1.0	x	1.7	x	\$2999	=	\$167,580
Project		Peak PM		Assume		Trip Length		Per PM		Total
in 1000s		trips per		100 %		Adjustment		Peak		Impact
of s.f.		1000 s.f.		New Trips		Factor		Trip		Fee
		(disputed)		(disputed)		(disputed)				

CP 25-26; CR 6-7. Douglass does *not* dispute (i) the size of the Douglass project (126,000 s.f.), (ii) the City’s determination that each new City vehicle trip creates \$2999 in traffic impacts, or (iii) the City’s determination that the average City trip length is 3.0 miles. CP 28; CR 9.

B. Douglass’ Challenges to the Impact Fee Calculation

Douglass challenges three of variables used by the City to calculate the traffic impact fees for the Douglass project:

- Douglass asserts that the trip generation variable for mini warehouses, 0.26 trips per 1000 square feet, is excessive, and that a lower value of 0.17 trips per 1000 square feet. was actually proportionate;
- Douglass asserts that the City erroneously assumed that 100 % of the trips to the mini warehouse would be new trips, and that no more than 75% of trips generated by the project would be new trips for purposes of traffic impact fees;⁴ and
- Douglass asserts that the trip length adjustment factor of 1.7, which presumes an average trip length of 5.1 miles (3.0 x 1.7) for mini storage warehouses, is excessive and that no trip adjustment factor should be used.⁵

CP 35; CR 16. Based on these challenges to three variables used by the City Douglass argued that the maximum allowable impact fee was only \$48,178.93, less than a third of the impact fee demanded by the City and upheld by the Hearing Examiner:

⁴ The assumption of 100% are new trips means that the City assumes that every visit to the mini-warehouse is single purpose trip; that no one stops there on their way to or from work, or to or from another destination.

⁵ A trip adjustment factor greater than 1.0 means that the City assumes that people travel more than the average City trip length (in this case almost twice as far) to go to a mini-warehouse.

$$126 \times 0.17 \times 0.75 \times 1.0 \times \$2999 = \$48,178.93$$

Project in 1000s of s.f.	Peak PM trips per 1000 s.f.	No More Than 75% New Trips	Trip Length Adjustment Factor	Per PM Peak Trip	Total Impact Fee
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CP 35; CR 16.

C. Procedural History

Douglass paid the demanded impact fee of \$167,580 under protest and then appealed the fee determination to the Hearing Examiner. CP 21; CR 2.

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. The City argued that Douglass had the burden to prove that the City’s adoption of the impact fee schedule was “arbitrary and capricious.” CR 254. The Hearing Examiner erroneously agreed that Douglass had the burden of proof, but held that Douglass had to prove that the City’s action was “clearly erroneous.” CP 36; CR 17.

Before the Hearing Examiner the City devoted considerable effort to blaming Douglass for failing to request an optional independent fee calculation under OMC 15.04.050. CR 27-31, 243, 253-54, 257-58. Douglass repeatedly explained that the independent fee calculation provided by OMC was *optional* (for both the City and the applicant), and

that the City had never argued that the independent fee calculation was an administrative remedy that Douglass was required to exhaust. CR 204-205, 377-78. The City's irrelevant arguments about the optional independent fee calculation confused the Hearing Examiner to the point of rejecting legal arguments that Douglass never actually made. *See* section IV(D).

The hearing on August 17, 2018 addressed three factual challenges to the City's impact fee calculation: (a) whether the City's trip generation variable was excessive, (b) whether the City erroneously assumed that 100% of vehicle trips generated by the Douglass project would be new trips, and (c) whether the City's trip adjustment factor was excessive. Douglass presented factual information and expert testimony establishing that:

- the City's trip adjustment variable of 0.26 trips per 1000 s.f. for mini storage warehouses was excessive, and that a lower value of 0.17 trips per 1000 s.f. was proportionate;
- that no more than 75% of trips generated by the mini storage warehouse would be new trips for purposes of impact fees; and
- the City's trip length adjustment factor of 1.7, which presumed an average trip length of 5.1 miles (3.0 x 1.7) for mini storage warehouses, was excessive and that no trip adjustment factor over

1.0 was supportable.

CP 35; CR 16. Each of these three factual issues is addressed in detail in section IV(C). At the hearing Douglass argued that a proportionate impact fee was no more than \$48,178.93. *Id.*

The Hearing Examiner disagreed with Douglass about the standard of review and burden of proof. CP 36; CR 17. The Hearing Examiner failed to make findings of fact on the issues raised by Douglass. Instead, the Hearing Examiner erroneously ruled that the City's impact fee schedule was not "clearly erroneous." CP 42; CR 23. This LUPA appeal followed.⁶

Douglass appealed the Hearing Examiner's *Decision* to the superior court under LUPA. CP 3-44. In the superior court, the City never argued that the optional independent fee calculation under OMC 15.04.050 was an administrative remedy that Douglass was required to exhaust. On the contrary, the City stipulated to a briefing schedule without first raising any exhaustion claims at a LUPA initial hearing as required by RCW 36.70C.080(3). CP 46. Consequently any arguments regarding standing or exhaustion have been waived under RCW

⁶ Douglass also argued, in the alternative, that the City's impact fees violated substantive due process. The hearing examiner rejected this argument which Douglass has elected *not* to pursue under LUPA or in this Court. CP 40-41; CR 21-22. Douglass' claim that the City's impact fee decision violates Douglass' rights under the Fifth Amendment to the Constitution was stayed pending resolution of the LUPA issues. CP 46.

36.70C.080(3), and the City's arguments about OMC 15.04.050 are irrelevant. *See* section IV(D).

The superior court affirmed the Hearing Examiner's *Decision* without explaining its reasoning or addressing any specific issues of fact or law. CP 316-318. This appeal followed.

IV. ARGUMENT

Under LUPA, this Court stands in the same position as the superior court, reviewing the record before the Hearing Examiner and applying the standards of review in RCW 36.70C.130(1). *Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

A. Both RCW 82.02.050(4) and *Koontz v. St. Johns River Water Management Dist.*, 570 US 2586 (2013) require the City's impact fees to be roughly proportional to the impact of the Douglass project.

In Washington local taxes are generally preempted by state law. *See generally*, RCW 82.02.020. 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 may

only be imposed for system improvements reasonably related to the new development, and 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 provisions require strict compliance. *Isla Verde*, 146 Wn.2d at 755. “A tax, fee, or charge, either direct or indirect, imposed on development is invalid unless it falls within one of the exceptions specified in [Chap. 82.02 RCW]. *Id.* (citing *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 247, 877 P.2d 176 (1994)).

Impact fees are also restricted by federal constitutional principles. *See Honesty in Environmental Analysis and Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999). Under the *Nollan/Dolan* decisions of the United States Supreme Court, conditions imposed by government on development (i) must establish a nexus between the impact of development and the exaction, mitigation or fee, and (ii) must be roughly proportional to the impacts that they are designed to mitigate. *See HEAL*, 96 Wn. App. at 533-534. As noted in *HEAL, id.*,⁷ both requirements have been incorporated into the impact fee statute:

(4) The impact fees:

(a) Shall only be imposed for system improvements that are reasonably related to the new development;

⁷ RCW 82.02.050 was amended after the *HEAL* decision, renumbering subsection (3) to subsection (4). Laws of 2015, ch. 241, § 1.

(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.

1. In *City of Olympia v. Drebeck*, 156 Wn.2d 289 (2006) the Washington Supreme Court erroneously assumed that the *Nollan/Dolan* doctrine would not apply to impact fees.

In *City of Olympia v. Drebeck*, 156 Wn.2d 289, 126 P.3d 802 (2006), the Hearing Examiner ruled that the City's impact fee for an office building did not comply with RCW 82.02.050(4) (former RCW 82.02.050(3)) because it did not require an individualized assessment of the development's impact on the planned traffic improvements. *Id.* at 293. The superior court reversed, and the applicant sought direct review in the Washington Supreme Court, which was denied. *Id.* at 294. The Court of Appeals reversed, holding that the *Nollan/Dolan* doctrine applied to impact fees, and that, to comply with *Nollan/Dolan* RCW 82.02.050(4) (former RCW 82.02.050(3)) must be construed "as requiring that impact fees be 'reasonably related to' the individualized impacts of the particular project." *City of Olympia v. Drebeck*, 119 Wn. App. 774, 790, 82 P.3d 443 (2004).

The Supreme Court granted review and reversed, holding that "the GMA impact fee statutes [RCW 82.02.050 et seq.] do not require local

governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area.” 156 Wn.2d at 293. This holding was based on the Court's statutory interpretation of former RCW 82.02.050(3), and *not* on constitutional grounds. 156 Wn.2d at 294 n.1.

However, in response to the decision of the Court of Appeals and the arguments in the dissent by Justice Sanders, the *Drebick* court noted that *Nollan* and *Dolan* involved exactions of land, not money, and that the United States Supreme Court had not extended the *Nollan-Dolan* analysis to monetary exactions such as traffic impact fees. 156 Wn.2d at 302. That statement in *Drebick* was true when it was made in 2006. But it was no longer correct in 2016 when the City demanded excessive traffic impact fees from Douglass in this case.

2. The Hearing Examiner refused to apply *Koontz v. St. Johns River Water Management Dist.*, 570 US 2586 (2013), which held that *Nollan/Dolan* applies to monetary exactions such as impact fees.

Seven years after *Olympia v. Drebick*, the dissent and the Court of Appeals in *Drebick* were vindicated by the United States Supreme Court's decision in *Koontz v. St. Johns River Water Management Dist.*, 570 US 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013). In *Koontz*, the Supreme Court clarified that the *Nollan-Dolan* analysis also applies where a

government demands money, such as the traffic impact fees at issue in this case.

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.

570 U.S. at 619. The Court rejected the argument that the Takings Clause of the Fifth Amendment did not apply when no property had been taken.

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

570 U.S. at 607.⁸ After *Koontz* the law is clear; the nexus and rough proportionality requirements of *Nollan/Dolan* apply to monetary exactions such as impact fees. The contrary assumption by the *Drebick* majority in 2006 is now simply wrong.

However, the Hearing Examiner refused to follow *Koontz*, erroneously asserting that "it is not the Hearing Examiner's role to overrule the State Supreme Court." The Hearing Examiner cited no

⁸ The issue before this Court is whether the City's impact fees are valid or must be reversed. Douglass' claim for damages for constitutional violations has been reserved. CP 46.

authority to support its inexplicable refusal to follow a decision of the United States Supreme Court on a question of federal law. It is well-settled that Washington courts must follow decisions of the United States Supreme Court. *State v. Laviollette*, 118 Wn.2d 670, 673-74, 826 P.2d 684 (1992). The Hearing Examiner's decision to ignore *Koontz* was erroneous as a matter of law.

3. The impact fees imposed by the City are monetary exactions under *Koontz*, not taxes.

The dissent in *Koontz* argued that the application of *Nollan-Dolan* to monetary exactions would be problematic because the distinction between taxes and monetary exactions would be difficult to apply. *Id.* at 627 (Kagan, J., dissenting). The *Koontz* majority disagreed, and clarified that courts must distinguish between taxes and monetary exactions such as impact fees:

We think [the dissenting justices] exaggerate both the extent to which that problem is unique to the land-use permitting context and the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.

570 U.S. at 615. Having refused to follow *Koontz* the Hearing Examiner also failed to address whether the impact fees authorized by RCW 82.02.050 were monetary exactions or taxes under *Koontz*.

Before the Hearing Examiner the City asserted—without any analysis or authority—that the impact fees authorized by RCW 82.02.050

et seq. are “taxes” for purposes of *Koontz*. CR 244. The City cited a Maryland case, *Dabbs v. Anne Arundel County*, 182 A.3d 798, 809 (Md. 2018), which held that the fees at issue in that case were taxes and not monetary exactions, and therefore *Koontz* did not apply. But *Dabbs* is easily distinguishable from *Koontz* and the present case:

Unlike *Koontz*, the Ordinance here does not direct a property owner to make a conditional monetary payment to obtain approval of an application for a permit of any particular kind, nor does it impose the condition on a particularized or discretionary basis.

182 A.3d 811. In contrast, (i) the fees imposed by the City in this case were necessary to obtain a building permit, and (ii) the both the statute and the City’s code allows the impact fee to be determined on a particularized basis. *See* RCW 82.02.070; OMC 15.04.050. Under *Koontz* and *Dabbs*, the City’s impact fees are not taxes but monetary exactions subject to *Nollan-Dolan*.

Before the Hearing Examiner the City’s argument that impact fees under RCW 82.02.050 are “taxes” was based on nothing more than a footnote citation to “RCW 82.02.050-.090.” CR 244. The City never explained what part of these statutes establishes that the impact fees permitted by RCW 82.02.050 *et seq.* are “taxes.” The City appears to rely on nothing more than the fact that the 1990 GMA impact fee statutes, RCW 82.02.050 *et seq.*, are codified in Chapter 82.02 which deals with

taxes. CR 244. But the dedication exactions allowed by RCW 82.02.020 are also codified in Chapter 82.02 RCW, and those exactions of land are *not* taxes.⁹

The language of Chap. 82.02 RCW confirms that the impact fees permitted by RCW 82.02.050 *et seq.* are monetary exactions for purposes of *Koontz*, *not* taxes:

(3) “Impact fee” means 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). The word “tax” appears only once in RCW 82.02.050, in an irrelevant reference to “tax account number.” The only other reference to “tax” in “RCW 82.02.050-.090 is in RCW 82.02.060(1)(b), which requires a local agency to consider other revenue sources, including “taxes,” in determining the amount of impact fees to be imposed:

⁹ Having no authority to support its assertion that impact fees under RCW 82.02.050 are “taxes,” the City falsely accused Douglass of relying on RCW 82.02.020, which deals with exactions of land that are necessary as a result of a proposed development, and then leapt to the unsupported conclusion that impact fees under RCW 82.02.050 *et seq.* are taxes for purposes of *Koontz*. CR 244, 247, 256. The exactions of land permitted by RCW 82.02.020 are not at issue in this case, and Douglass has never argued otherwise. The Hearing Examiner correctly ignored this part of the City’s argument.

The local ordinance by which **impact fees** are imposed:

(1) Shall include a schedule of **impact fees** which shall be adopted for each type of development activity that is subject to impact fees, specifying the amount of the impact fee to be imposed for each type of system improvement. The schedule shall be based upon a formula or other method of calculating such **impact fees**. In determining proportionate share, the formula or other method of calculating **impact fees** shall incorporate, among other things, the following:...

(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 prorable to the particular system improvement;.. (Emphasis added).

RCW 82.02.060(1)(b). In other words, the fees permitted by RCW 82.02.050 are impact fees, not taxes, for purposes of *Koontz*.

The Hearing Examiner erred in failing to conclude that the impact fees imposed by the City were monetary exactions under *Koontz* and not “taxes.” Under *Koontz*, the nexus and rough proportionality requirements of *Nollan/Dolan* apply to such fees. The Hearing Examiner erred in concluding otherwise.

4. *Olympia v. Drebeck* is not relevant to any issue in this case.

In addition to ignoring *Koontz*, the Hearing Examiner made other erroneous rulings based on *Drebeck*. Although the *Drebeck* majority disagreed with the Court of Appeals and dissent, both of which were based

on *Nollan/Dolan*, the *Drebick* majority clearly stated that it was only interpreting former RCW 82.02.050(3). “Our task is to interpret the relational standard prescribed in [former] RCW 82.02.050(3) and to determine whether the City complied with that standard.” 156 Wn.2d at 294 n.1. *Drebick’s* only actual holding was that the impact fee statutes, RCW 82.02.050 *et seq.*, “do not require local governments to calculate an impact fee by making individualized assessments of the new development’s direct impact on each improvement planned in a service area.” 156 Wn.2d at 293. The *Drebick* court’s interpretation of former RCW 82.02.050(3) is not an issue in this case. And the *Drebick* court’s dicta assumption that *Nollan/Dolan* did not apply to impact fees is not good law after *Koontz*.

Nonetheless, noting that the City’s impact fee ordinance is largely the same as the one at issue in *Drebick*, CR 8, the Hearing Examiner erroneously interpreted *Drebick* as disposing of any possible challenge to the City’s impact fee ordinance:

e. The Effect of *Drebick*. **It must also be remembered that all of the methodology discussed above was examined and approved in the Supreme Court’s decision in *Drebick*.** The Court concluded that the then Hearing Examiner had considered each element of the Transportation Impact Fee and found it to be correctly established... (Emphasis added).

CR 19. An appellate case is not controlling authority on an issue the appellate court did not actually consider, even if the literal words of the opinion appear to be controlling. *In re Burton*, 80 Wn. App. at 573, 582, 910 P.3d 1295 (1996). The Hearing Examiner erred in citing *Drebick* on issues that the Supreme Court did not actually address. Furthermore, the highlighted portion of the Hearing Examiner’s statement (above) is patently erroneous. *Drebick* involved a completely different land use: a four-story office building. 156 Wn.2d at 293. None of Douglass’ three specific challenges to the City’s impact fee calculations for mini storage warehouses were at issue in *Drebick*, either before the Hearing Examiner or in the reviewing courts.¹⁰

The *Drebick* court noted that the Hearing Examiner had summarized the City’s impact fee methodology, and that the Hearing Examiner made various findings and conclusions. 156 Wn.2d at 303-307. But the Supreme Court never “examined” or “approved” any of those rulings in its opinion. The *Drebick* opinion clearly states that the only task before the Court was “to interpret the relational standard prescribed in

¹⁰ The Hearing Examiner admitted as an exhibit the Thurston County Superior Court’s 2001 decision in *Drebick*. CR 3, 191-202. Neither the City nor the Hearing Examiner has made any attempt to explain why a trial court ruling in a case to which Douglass was not a party would be applicable to this case.

[former] RCW 82.02.050(3).” 156 Wn.2d at 294 n.1. And on that one issue the Court disagreed with the Hearing Examiner:

[T]he hearing examiner erred in concluding that the GMA impact fee statutes required the City to calculate Drebeck’s impact fee by making individualized assessments of the Drebeck development’s direct impact on each improvement planned in a service area. We hold that the City’s method for calculating transportation impact fees complied with the plain language of the GMA impact fee statutes.

156 Wn.2d at 309.¹¹

That one legal issue is not presented in this case. No other part of *Drebeck*—including Drebeck’s erroneous assumption that *Nollan/Dolan* does not apply to impact fees—is relevant to this case.

In sum, the Hearing Examiner erred in failing to rule that the impact fees authorized by RCW 82.02.050(4) are subject to the requirements of *Nollan/Dolan*.

B. The City failed to carry its burden to prove that the City’s impact fees were roughly proportionate to the impacts of the Douglass project.

Both RCW 82.02.070(5) and OMC 15.04.090 required the City to provide an administrative appeal to challenge the City’s impact fees. And

¹¹ The first sentence in the quote from *Drebeck*’s concluding paragraph provides the context for the second sentence, indicating that the *Drebeck* court upheld the City’s impact fee methodology against the one legal challenge presented: whether former RCW 82.02.050(3) required individualized assessments of a project’s impact. But before the Hearing Examiner, the City ripped the last sentence of the majority opinion out of context to make the absurd argument that the *Drebeck* court had already “upheld the City’s ordinance and methodology for determining impact fees.” CR 248.

a hearing was provided, insofar as Douglass was permitted to introduce evidence and argument that the City's impact fees were excessive. CR 3.

The Hearing Examiner correctly rejected, *sub silentio*, the City's argument that Douglass was required to challenge the impact fee ordinance under the "arbitrary and capricious" standard.¹² However, relying solely on the City's appeal code, the Hearing Examiner held that Douglass had the burden to prove that the City's impact fee schedule was "clearly erroneous" when it was legislatively established. CP 42; CR 23. As a result, the Hearing Examiner rejected all of Douglass' specific factual challenges to the impact fees under the "clearly erroneous" standard. CP 37-38; CR 18-19.

The Hearing Examiner failed to make findings of fact required by the statute: whether the City's impact fees exceeded the "proportionate share of the costs of system improvements that are reasonably related to" the Douglass project. RCW 82.02.050(4). The Hearing Examiner also failed to make findings of fact required by *Nollan/Dolan*: whether the traffic impact fees demanded by the City were roughly proportionate to the impact of the Douglass project.

¹² The City erroneously argued that Douglass was required to challenge the City's legislative adoption of the impact fee schedule under the "arbitrary and capricious" standard. CR 254-55. Douglass explained that the cases cited by the City did not involve administrative hearings on impact fees. CR 211. The Hearing Examiner ignored the City's erroneous argument regarding the "arbitrary and capricious" standard.

The “clearly erroneous” standard chosen by the Hearing Examiner was just one of seven standards of review set forth in the City’s appeal code. OMC 18.75.050(F). The Hearing Examiner provided no legal authority to support its determination that the “clearly erroneous” standard was applicable to impact fee appeals. CR 23. The Hearing Examiner never explained why neither the error of law or substantial evidence standards, also set forth in OMC 18.75.050(F) would not apply.

Nor did the Hearing Examiner explain why Douglass would bear the burden of proof. It is undisputed that Douglass was entitled to the building permit. The only issue before the Hearing Examiner was whether the City was entitled to condition the issuance of the building permit on Douglass’ payment of roughly \$167,580 in impact fees. On that issue the City should have borne the burden of proof.

The Hearing Examiner cited only OMC 18.75.040(F), which does not actually address the burden of proof. CR 17. That section merely states, similar to LUPA, that that appellant has the burden to establish that they are entitled to relief under one of seven standards. Under Washington case law the burden of proof is on the agency demanding an exaction from the applicant for a permit. *Isla Verde Int’l Holdings v. City of Camas*, 146 Wn.2d 740, 763 n.16, 49 P.3d 867 (2002).

The hearing required by statute should have addressed the factual question of whether the City's impact fees were proportionate to the impact of the project. RCW 82.02.050(4), -070(5). Even *Drebick*, upon which the City and the Hearing Examiner erroneously rely, notes that the Hearing Examiner was supposed to make factual findings as to whether the impact fees were proportionate. *Drebick*, 156 Wn.2d at 307. Nothing in *Drebick* supports the Hearing Examiner's determination that Douglass was required to challenge the adoption of the impact fee schedule under the "clearly erroneous" standard.

Applying the correct standard of review and burden of proof to the record requires reversing the Hearing Examiner's decision.

1. The City had the burden to prove that its impact fees were roughly proportionate.

In *Isla Verde* the applicant challenged a City of Camas ordinance that required all new subdivisions to retain 30 percent of their area as open space. The Supreme Court noted that although the LUPA appellant (applicant) had the burden of persuasion under RCW 36.70C.130(1), the agency still has the burden to prove the validity of any exaction of land under RCW 82.02.020:

[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.

156 Wn.2d at 755-56. Applying this burden of proof the Court held that the City had failed to support its determination that a 30 percent open space requirement was needed:

Aside from the ordinance requiring a flat 30 percent set aside for every proposed subdivision, there is nothing in the record explaining why 30 percent was chosen as the amount of open space needed in this case.

Isla Verde, 146 Wn.2d at 763. Concurring in *Isla Verde*, one justice asserted that the record was insufficient to determine whether the city had violated RCW 82.02.020 in that case. 146 Wn.2d at 772 (J. Johnson, concurring). In response, the *Isla Verde* majority clarified that the agency has the burden to create a factual record that justifies the exaction the city seeks to impose:

The problem to which the criticism is more appropriately addressed is the City's failure to establish a record that justifies its imposition of the set aside condition on *Isla Verde*. **That is a matter of the City failing to meet its burden of proof**, not a matter of an inadequate record on which to make a decision under RCW 82.02.020. (Emphasis added).

Isla Verde, 146 Wn.2d at 763 n.16; *see also Vintage Construction Co., Inc. v. City of Bothell*, 83 Wn. App. 605, 611, 922 P.2d 828 (1996), *affirmed*, 135 Wn.2d 833 (1998) (RCW 82.02.020 "places the burden on the municipality, not the developer, to show that the fee is reasonably necessary as a direct result of the development.") The Hearing Examiner erroneously ignored these authorities.

When Douglass cited *Isla Verde* and *Vintage Construction* for the burden of proof, the City noted that these cases involved fees in lieu of dedication under RCW 82.02.020, and argued that the burden of proof for impact fees under RCW 82.02.050 was reversed (placed on the applicant) for some unexplained reason. CR 256. In support of its argument the City cited *Drebick, supra*, which does not address the burden of proof at all. *Id.* The City also cited the portion of *Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 238, 54 P.3d 213, *as amended on denial of reconsideration* (2004), which holds that a party seeking review in superior court under LUPA has the burden to establish a violation of constitutional rights. Like *Drebick*, *Wellington* does not address the burden of proof at all.

The City's attempt to reverse the burden of proof for impact fees (as opposed to dedications) is not consistent with the City's other arguments or its own appeal code. OMC 18.75.040(F) does not distinguish between demands for dedication of property under RCW 82.02.020 and impact fees under RCW 82.02.050. Therefore, because the City concedes that it has the burden of proof on dedications under RCW 82.02.020, the City's interpretation of OMC 18.75.040(F) is necessarily incorrect, at least in the context of dedications. Nor have the City or the Hearing Examiner even attempted to explain how the City of Olympia

could have the legal power to re-allocate the burden of proof on matters of state and federal law. (It doesn't).

Nor has the City explained why the burden of proof on two different types of land use exactions, both of which are subject to *Nollan-Dolan* scrutiny, would be different. Whatever distinction the City thinks it has identified is lost on the United States Supreme Court:

Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts... 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.

Both the City and the Hearing Examiner are wrong. The City has the burden to prove that its demand for money from Douglass complies with both RCW 82.02.050(4) and *Nollan/Dolan*. For purposes of this case there is no important difference between those standards; both require the City to prove that the impact fees are proportionate to the impacts of the Douglass project.¹³ As explained in the next subsection the City failed to carry its burden of proof.

¹³ It is unclear whether the legislature intended the standards in RCW 82.02.050(4) to be identical to the *Nollan/Dolan* standards for land use exactions. The dissent (and Court of

2. The City failed to carry its burden of proof on proportionality.

At the hearing Douglass made three specific factual challenges to the City's impact fee calculations, each supported by evidence including expert testimony:

- Douglass presented evidence and expert testimony that the City's trip adjustment variable of 0.26 trips per 1000 square feet for mini storage warehouses was excessive, and that a lower value of 0.17 trips per 1000 square feet was proportionate. CP 28-29, 31-32, 37-38; CR 9-10, 12-13, 18-19, 263-279, 288-296, 298-342, 365-373; RP 87-94.
- Douglass presented evidence and expert testimony that that no more than 75% of trips generated by the mini storage warehouse would be new trips for purposes of impact fees. CP 28-29, 32-33, 38; CR 9-10, 13-14, 19, 263-279, 287, 363; RP 97-105.
- Douglass presented evidence and expert testimony that the City's trip length adjustment factor of 1.7, which presumed an average trip length of 5.1 miles (3.0 x 1.7) for mini storage warehouses,

Appeals) in *Drebick* asserted that the 1990 legislature was aware of *Nollan* when it adopted the GMA impact fee statutes. 156 Wn.2d at 320 (Sanders, J., dissenting). The *Drebick* majority dismissed this legislative history as "inapposite." 156 Wn.2d at 302. But the *Drebick* majority incorrectly assumed that *Nollan/Dolan* would not be applied to impact fees. *Id.* In light of *Koontz*, the *Drebick* dissent would seem to have the better argument.

was excessive and that no trip adjustment factor should be used.

- CP 28-29, 33-34, 38; CR 9-10, 14-15, 19, 263-279, 343-362; RP 105-115.

It is undisputed that, if accepted, these three challenges to the proportionality of the City's impact fee calculations would reduce the total impact fee from \$167,580 to a maximum of \$48,178.93. CP 35; CR 16.

Based on its erroneous argument that Douglass was required to challenge the City's legislative action under the "arbitrary and capricious standard," CR 254-55, the City made no attempt to respond to Douglass' factual arguments or to prove that the City's impact fees were actually proportionate. For example, Douglass demonstrated that a newer edition of the ITE¹⁴ Transportation Manual had reduced the trip generation rate for mini warehouses from 0.26 trips per 1000 s.f. to 0.17 trips per 1000s s.f., a reduction of more than a third. CP 31; CR 12, 290, 370. In response, the City made no attempt to defend the proportionality of the higher trip generation rate used by the City or to explain why the more recent ITE manual reduced that rate by almost a third. Instead, the City argued that such evidence was irrelevant to the question of whether the City's legislative adoption of the fee schedule was "irrational." RP 189.

¹⁴ "ITE" means the Institute of Transportation Engineers, which collects and publishes data on traffic impacts.

Based on its erroneous determination that Douglass was required to challenge the City's impact fees under the "clearly erroneous" standard, the Hearing Examiner failed to make findings of fact on any of these issues. Nor did the Hearing Examiner make a finding that the City's impact fees were roughly proportionate to the impact of the Douglass project. Indeed, the word "proportionate" appears only twice in the Hearing Examiner's decision.¹⁵

The Hearing Examiner's refusal to make findings of fact on any of these issues amounts to negative findings—findings against the City—on each of the factual issues of proportionality. *Douglass NW v. Bill O'Brien & Sons Constr.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992) (unless the absence of a specific finding is unintentional a missing finding of fact is a negative finding on the issue); *Smith v. King*, 106 Wn.2d 443, 451, 772 P.2d 796 (1986) (absence of finding of fact demonstrates a party's failure to carry its burden of proof). Specifically, the City failed to prove, and the Hearing Examiner failed to find:

- that the City's trip adjustment variable of 0.26 trips per 1000

¹⁵ The Hearing Examiner noted that the hearing examiner in *Drebick* had found that the impact fee imposed in that case was "proportionate" to the development. CP 26; CR 7. As explained in section IV(A), *Drebick* is not relevant to the issues in this case. The Hearing Examiner also erroneously held that, by not seeking an independent fee calculation under OMC 15.04.050, Douglass "chose to forego" the opportunity to show that the impact fees were "disproportionate." CP 41; CR 22. As explained in section IV(D), the optional independent fee calculation was not an administrative remedy that Douglass was required to exhaust.

square feet for mini storage warehouses was accurate or proportionate;

- that the City's assumption of 100% new trips was accurate or proportionate;
- that the City's trip length adjustment factor of 1.7 was accurate or proportionate; and/or
- that the total impact fee of \$167,580 was roughly proportionate to the impact of the Douglass project.

The City's failure to carry its burden of proof establishes that the City's impact fees were *not* roughly proportionate for purposes of either RCW 82.02.050(4) or *Nollan/Dolan*. The Hearing Examiner's decision should be reversed, and the City's impact fee should be reduced to \$48,178.93.

C. Assuming, *arguendo*, that Douglass had the burden of proof, Douglass proved that the City's impact fees were excessive and not roughly proportionate.

Based on its erroneous argument that Douglass was required to challenge the City's legislative action under the "arbitrary and capricious standard," CR 254-55, the City made no attempt to address to Douglass' factual challenges to the City's impact fee calculations. In contrast, Douglass produced substantial evidence that each of the three challenged factors in the City's impact fee calculations was excessive.

Based on its erroneous ruling that Douglass was required to challenge the impact fees under the “clearly erroneous” standard, the Hearing Examiner failed to make findings of fact on these issues. *See* CP 20-44. Assuming, *arguendo*, that Douglass had the burden of proof, the uncontroverted evidence establishes that a proportionate impact fee is no more than \$48,178.93.

1. The City’s trip generation variable of 0.26 trips per 1000 s.f. was excessive. A proportionate impact fee required using a lower value of 0.17 trips per 1000 s.f.

The City used a trip generation variable of 0.26 trips per 1000 square feet for mini warehouses. CP 25; CR 6. At the hearing Douglass argued that a lower figure of 0.17 trips per 1000 square feet was actually proportionate. CR 370; RP 178.¹⁶

The City used the trip generation rate of 0.26 trips per 1000 square feet from the 9th Edition of the Institute of Transportation Engineers (ITE)

¹⁶ Before the Hearing Examiner, Douglass also challenged the City’s decision to use square feet (in 1000s) instead of the actual number of storage units to determine the trip generation variable for mini storage warehouses. Douglass’ expert testified that, unless the storage units were unusually small, the use of square footage as opposed to number of units produced excessive traffic trip calculations. CP 30; CR 11, RP 79-82. The Institute of Transportation Engineers (ITE) Trip Generation Manual (9th Ed.) relied on by the City requires an analysis to determine which trip generation variable should be used. CR 295-96. Douglass’ expert testified that he had not seen any evidence to suggest that the City ever performed such an analysis before choosing to use square feet (in 1000s) instead of the number of storage units. RP 70. The City’s expert countered that the use of square footage was common practice in Western Washington, but did not actually respond to Douglass’ expert’s analysis of the effect of using square feet instead of number of units. CP 30; CR 11. That issue—whether the City should have used square feet or number of units—is no longer relevant to this case. Before the end of the hearing, Douglass argued that a lower trip generation variable of 0.17 trips per 1000 square feet was proportionate. CR 370; RP 178.

Trip Generation Manual.¹⁷ CP 25; CR 6. Douglass' expert testified that he performed his own traffic study for mini warehouses, and that this study resulted in a trip generation rate that was about half what the 9th Edition *ITE Manual* suggested. CR 303-313, 365-66; RP 87-89. The City's expert did not testify otherwise.

As the City's expert noted, the trip generation rates in the *ITE Manual* are revised from time to time, as additional data becomes available. By the time of the hearing, the *ITE* had published its 10th edition of the *ITE Manual*. RP 151-52. Douglass showed that the 10th Edition of the *ITE Manual* significantly lowered the trip generation rate for mini warehouses from 0.26 trips per 1000 square feet to only 0.17 trips per 1000 square feet. CR 370. Douglass argued that the lower rate in the 10th edition *ITE Manual* was more accurate and that the lower rate of 0.17 trips per 1000 square feet was proportionate. The City's expert never testified otherwise, and the City never argued otherwise.

The Hearing Examiner did *not* make findings of finding of fact as to whether the 9th edition *ITE Manual* rate of 0.26 was excessive or whether the lower 10th edition *ITE Manual* rate of 0.17 was proportionate.

¹⁷ The *ITE Trip Generation Manual* provides different trip generation rates for different times of day. CR 288-293, 367-373. It is undisputed that the City's traffic impact fees are based on projected PM Peak Hour trips. CP 25; CR 6. Both the 0.26 rate used by the City and the lower rate of 0.17 argued by Douglass are based on PM Peak Hour trips. CR 290, 370.

Nor did the Hearing Examiner disagree with the testimony of Douglass' expert that the 9th edition rate of 0.26 was too high. Instead, applying the wrong standard of review, the Hearing Examiner held that the City's use of the 9th edition ITE Manual was not "clearly erroneous":

b. Number of PM Peak Trips. Douglass correctly points out that the newest edition of the ITE Trip Generation Manual, issued late 2017, adjusts the number of PM Peak trips for mini warehouses from .26 trips to .17 trips. But, while true, this has no bearing on the outcome. The 10th Edition of the Manual did not yet exist when Douglass submitted its building permit application for Building #2. Schedule D then in effect was based upon the 9th Edition of the Trip Generation Manual, being the most current version of the Manual then in effect. The City's reliance on the then existing Trip Manual was not clearly erroneous.

CP 37-38; CR 18-19. This ruling was erroneous as a matter of law. As explained in sections (A) and (B) (above), impact fees must be roughly proportionate to the actual impact of a project, and it is the agency's burden to prove such proportionality. The City made no attempt to prove proportionality, and the undisputed evidence establishes that the 9th edition ITE trip generation rate of 0.26 trips per 1000 square feet is excessive.

The Hearing Examiner erred in failing to find that the City's determination that mini storage warehouses generate 0.26 PM Peak trips per 1000 square feet resulted in excessive impact fees that violate RCW 82.02.050(4) and *Nollan/Dolan*.

2. The City's assumption of 100% new trips is not supported by any evidence; no more than 75% of the trips generated by a mini warehouse would be new trips.

Douglass' mini storage warehouse is located in the Western half of the City of Olympia, on Cooper Point Road near the intersection with Highway 101. CP 20; CR 1, 281. Douglass selected the Cooper Point location because it is on a major road with lots of residential areas around it. RP 42. Common sense dictates that at least some portion of the vehicle trips generated by the mini warehouse will be either "pass-by trips" (trips where the driver enters and exits the warehouse while driving along the street to another destination) or "diverted trips" (where the driver diverts to the warehouse from a trip to or from another destination such as work).

But the City's impact fee calculation assumed that every trip to a mini warehouse would be a new trip for purposes of impact fees. CP 25; CR 6, 287. The City's expert admitted that the City's dubious assumption of 100% new trips was based on the lack of any data. RP 164.

Both parties' experts testified that the assumption of 100% new trips was incorrect. Douglass' expert explained that the City had assumed

that every trip to the mini warehouse would be the only reason the driver left their house, and that no one would stop by the mini warehouse on their way to or from another destination, such as work. RP 98. Douglass' expert described this assumption as "phenomenal." Douglass' expert also testified that Douglass performed a survey of customers at another mini warehouse to determine whether customers were on their way home from work or going back to where they came from. CR 363; RP 101-102. Based on this brief survey, Douglass' expert testified that up to 75% of the trips to the mini warehouse would be pass-by or diverted trips, not new trips. RP 102-105.

The City's expert admitted that there was no data to support the assumption of 100% new trips, and that the expert "had no idea" how many trips would actually be pass-by trips:

Q. Now, is it -- is it reasonable to assume that 100 percent of the trips going to -- to the Cooper Point facility will be new trips?

A. I don't know. I've never seen any data.

Q. Knowing what you know about mini storage warehouses, do you think it's reasonable to assume that a hundred percent of trips to mini storage warehouses are new trips?

A. I think it's reasonable there probably are some pass-by trips.

Q Some? 10 percent, 20 percent?

A. I have no idea.

RP 164. The City's expert testified that pass-by trips do not create traffic impacts, but diverted trips still have some traffic impacts. RP 157. The expert further testified that, because of the lack of data on pass-by trips and/or the length of diverted trips, the City simply assumed 100% new trips. *Id.* But the expert conceded that the ITE Manual did not support assuming 100% new trips under those circumstances. RP 168. The expert also conceded that the City's assumption of 100% new trips produced the largest impact fee amount. RP 164.

The Hearing Examiner dismissed Douglass' survey as "anecdotal" and faulted Douglass' expert for not clearly distinguishing between diverted and pass-by trips. CP 30; CR 19. But the Hearing Examiner did *not* make findings of finding of fact as to whether the assumption of 100% new trips was accurate, what portion of trips would be pass-by trips without any impact, or what portion of trips would be diverted trips or what the relative impact of such trips might be.

Instead, applying the wrong standard of review, the Hearing Examiner blamed Douglass for the lack of adequate data, and held that the City's assumption of 100% new trips was not "clearly erroneous."

c. Number of New Trips. ... Douglass failed to present any well founded data that the City's reliance on the Manual is in error. The City's assumption that all trips

are new trips is not clearly erroneous.

CP 30; CR 19. This ruling was erroneous as a matter of law. As explained in sections (A) and (B) (above), impact fees must be roughly proportionate to the actual impact of a project, and it is the agency's burden to prove such proportionality. The City made no attempt to prove that its assumption of 100% new trips was accurate or proportional, and the undisputed evidence establishes that City's assumption is excessive.

The Hearing Examiner erred in failing to find that the City's assumption of 100% new trips resulted in excessive impact fees that violate RCW 82.02.050(4) and *Nollan/Dolan*.

3. The City's trip adjustment factor of 1.7 was excessive; no trip adjustment factor should have been used for mini warehouses.

When the City's impact fee ordinance was established in 1995 there was only one general category for "warehouses," including mini warehouses. The trip adjustment factor of 1.7, used by the City, was based on data collected for all types of warehouses. CP 34-35; CR 15-16. Based on the average Olympia trip length of 3.0 miles, the City's use of the 1.7 trip adjustment factor for warehouses assumes that the average trip length to a mini warehouse in Olympia would be 5.1 miles. CP 25; CR 6.

The City's expert admitted that there was no data on the average trip length for mini warehouses, and that the City's decision to use the 1.7

factor for warehouses was based on nothing more than the total lack of data on mini 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.

Douglass's expert demonstrated that there were five (5) other storage facilities less than three (3) miles from the Douglass location, and that it was *not* reasonable to assume that customers in Olympia would drive 5.1 miles to a mini warehouse when much closer facilities are available. CR 344; RP 110. The expert further testified that warehouses and mini warehouses were "totally different uses," and that there was no engineering judgment to support the City's assumption that the average trip lengths for warehouses and mini warehouses were the same. RP 108, 115. Douglass also demonstrated that, even in a much larger city like Tacoma, most mini warehouse customers live within 3 miles of the mini warehouse. CR 344; RP 50-51.

Although the Hearing Examiner acknowledged that Douglass' argument about the trip adjustment factor was "compelling" and had an "intuitive quality," the Hearing Examiner did not make any finding of fact as to whether the City's use of the 1.7 trip adjustment factor for

warehouses was actually proportionate for mini warehouses. Instead, applying the wrong standard of review, the Hearing Examiner held that, in the absence of any data on mini warehouses, that the City's use of the 1.7 trip adjustment factor was not "clearly erroneous."

d. Trip Adjustment Variable. Douglass's most compelling argument is with respect to the trip adjustment variable of 1.7, resulting in an average trip to mini warehouses of 5.1 miles. Douglass's arguments have an intuitive quality, especially with additional anecdotal evidence as to the current location of competing facilities and the likely travel patterns of self storage customers. But the City's decision to rely on the best available data is not clearly erroneous, especially when no data has been gathered specifically for mini warehouse facilities.

CP 38; CR 19. This ruling was erroneous as a matter of law. As explained in sections (A) and (B) (above), impact fees must be roughly proportionate to the actual impact of a project, and it is the agency's burden to prove such proportionality. The City made no attempt to prove that its use of the 1.7 trip adjustment factor for warehouses was accurate or proportional. The undisputed evidence establishes that City's assumption is erroneous and that no trip adjustment factor should be used.

The uncontroverted evidence establishes that (a) the trip adjustment factor should be reduced to 0.17 trips per 1000 square fee, (b) that no more than 75% of trips would be new trips, and (c) that no trip adjustment factor should be used. A proportionate impact fee for the

Douglass project is no more than \$48,178.93. The cumulative effect of the three errors in the City's impact fee calculations was an impact fee nearly three and a half times larger (\$167,580).

This Court should reduce the impact fee to a maximum of \$48,178.93.

D. The optional independent impact fee calculation provided by OMC 15.04.050 is irrelevant.

The City's impact fee ordinance provides for an optional independent impact fee calculation. The City may prepare an independent fee calculation and impose alternative impact fees based on those calculations. OMC 15.04.050(A). An applicant may also submit an independent fee calculation, with supporting documentation, to the City. OMC 15.04.050(C). In addition to the cost of preparing an independent impact fee calculation, the applicant must pay the City's actual costs in reviewing the independent impact fee calculation. OMC 15.04.050(E). The City has no obligation to accept the applicant's calculation. OMC 15.04.050(F).

It is undisputed that neither the City nor Douglass offered an independent fee calculation. CR 2. Douglass elected to challenge the City's impact fees at the evidentiary hearing as required by RCW 82.02.070(5).

The City issued a staff report that erroneously suggested that Douglass could not challenge the City's impact fee calculations because Douglass had not requested an independent fee calculation. CR 29, 31. Douglass' opening brief explained that the independent fee calculation was optional and irrelevant to the hearing. CR 377-378. Ignoring the fact that state law, RCW 82.02.070(5), requires the City to provide a hearing, the City continued to argue that Douglass was not permitted to challenge the City's impact fee calculations. CR 253-54. But the City never argued that the independent fee calculation was an **administrative remedy** that Douglass was required to exhaust. CR 243-262.

At the hearing the City repeatedly asked irrelevant questions about the optional independent fee calculation, and Douglass repeatedly objected. RP 19-23, 126, 147, 159. Douglass explained, both in its written materials and closing argument, that RCW 82.02.070(5), required a hearing to allow Douglass to challenge the proportionality of the City's impact fees. CR 205; RP 181. But the City's irrelevant arguments confused the Hearing Examiner to the point of rejecting several arguments that Douglass never actually made.¹⁸

¹⁸ Douglass never argued that the City's director should have undertaken an independent fee calculation. See CP 21, 30, 36-37; CR 2, 10, 17-18. Douglass merely explained that the City had the option but chose not to consider it. RP 36. Douglass never argued that the Hearing Examiner should conduct an "independent fee calculation." See CP 28, 35-37, 39-40; CR 9, 16-18, 20-21. Douglass argued that state and federal law required the

Before the Hearing Examiner the City never argued that the optional independent fee calculation was an administrative remedy that Douglass was required to exhaust. CR 204. The Hearing Examiner never ruled otherwise.

Nor did the City argue, in the superior court under LUPA, that Douglass was required to exhaust that optional process. On the contrary, the City waived any argument regarding exhaustion of administrative remedies by failing to raise such issues at the LUPA initial hearing. CP 46; *see* RCW 36.70C.060, -.080.

The optional independent impact fee calculation provided by OMC 15.04.050 is irrelevant to the issues before this Court.

V. CONCLUSION

For all these reasons the Court should reject the hearing examiner's erroneous legal analysis, reverse the trial court's LUPA ruling, and hold that the City failed to prove that it was entitled to any more than \$48,179.93 in traffic impact fees. The Court should remand this matter to the trial court for further proceedings.

City to provide a hearing on the proportionality of the City's impact fees. CR 205. Rejecting arguments Douglass never actually made, the Hearing Examiner made the numerous irrelevant and/or erroneous findings and conclusions: "Background" nos. 1, 3; A(3)(b); A(3)(d); A(3)(e); B(1) through B(10); H(1) to H(3); "Analysis" (conclusions of law) nos. 2, 4; "Conclusions" no. 7, 9. *See* CP 21-42; CR 2-23.

DATED this 19th day of August, 2019.

Respectfully submitted,

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