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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,

BRIEF OF RESPONDENT CITY OF OLYMPIA

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I. INTRODUCTION

Appellant Douglass Properties II, LLC (“Douglass”) appeals the traffic impact fee assessed pursuant to legislatively established schedules in OMC 15.16.040. Douglass failed to timely present an independent fee calculation justifying a deviation from the fees established by these schedules. Now, Douglass seeks to collaterally attack the fees by attacking the formula underlying the legislative adoption of the schedules by the City Council, essentially asking first the Hearing Examiner and now the Courts to re-write the City’s impact fee ordinances. Douglass’ demand is unsupported by the law, procedurally improper and is based on a fundamental misunderstanding of the nature of GMA impact fees. Douglass’ appeal should be rejected.

II. STATEMENT OF FACTS

On December 20, 2016 the Applicant/Appellant, Douglass Properties II, LLC ("Douglass") filed building permit applications with the City for a proposed self-storage mini warehouse facility known as Secure-It Storage off Cooper Point Road and Evergreen Park Drive in West Olympia. The facility was comprised of numerous self-storage buildings and an administrative building. Douglass submitted building applications for several buildings in December 2016. On February 22, 2017, Douglass submitted a permit application for the project's administrative office. AR 27. Then, on May 24, 2017, Douglass filed a building permit application for Building #2. *Id.*

Since the applicant's mini-warehouse self-storage proposal fit squarely within the mini warehouse category, the City did not elect to prepare an independent fee calculation but assessed the TIF based on the Council's Fee Schedule in OMC 15.16.040.¹ Transportation Impact Fees ("TIF") for Buildings 1 and 3-7 were calculated according to the 2016 impact fee rate of \$1.29 per square feet of gross floor area, as set forth in "Schedule D" adopted under Olympia Municipal Code (OMC) 15.16.040. These impact fees were paid by Douglass without protest. The TIF for the administrative building and Building 2 was calculated according to the slightly higher 2017 rate of \$1.33 per square feet, due to an annual amendment to the City's impact fee rates. AR 159. Building 2 contains 126,000 square feet, resulting in a TIF of \$167,580. AR 28, 70.

Since the City did not elect an independent fee calculation ("IFC"), the City's code provided the applicant with an option to prepare such a study if it believes that the Schedule D fee does not accurately describe or capture the impacts of a new development. OMC 15.04.050(C). Douglass did not submit an IFC as allowed by OMC 15.04.050. Instead, it paid the TIF calculated under Schedule D under protest and on February 5, 2018 filed a Request for Director's Review of the TIF for Building 2 without

¹ OMC 15.04.020(X) defines an "Independent Fee Calculation" to mean "the park impact calculation, the school impact calculation, the transportation calculation, and/or economic documentation prepared by a feepayer, to support the assessment of an impact fee other than by the use of Schedules A, C and D of Chapter 15.16, or the calculations prepared by the Director or District No. 111 where none of the fee categories or fee amounts in the schedules in Chapter 15.16 accurately describe or capture the impacts of the new development on public facilities."

submitting an IFC. AR 33. The Director confirmed the TIF was correctly calculated on March 2, 2018. AR 45. The City explained the methodology behind the City's rate schedule, which was analyzed in the 2016 Transportation Fee Update. AR 130. This study followed the methodology used in adopting TIFs in 1995 which had been expressly approved by the Washington Supreme Court in *City of Olympia v. Drebeck*, 156 Wn.2d 289, 126 P.3d 802 (2006).

The Appellant's description of the City's fee methodology is misleading. The fees are based on a legislatively adopted schedule, and aside from the IFC process, there is no discretion to vary the fee from that schedule. The schedule of fees identifies a type of development, a rate and for mini-warehouses determines the TIF by multiplying the square footage times the legislatively adopted rate. These rates are regularly revisited as the amount of revenue needed for anticipated future development changes. However, the Ordinance does not provide an individual calculation by identifying each project's new trips, the percentage of new trips, or adjusting for each project's trip length, as suggested by Douglass. Brief at 5. The formula in Schedule D for mini-warehouses in the 2017 City ordinance is simply calculated at \$1.33 per square foot of Gross Floor Area. AR 165.

If an applicant believes that the Schedule D fee is incorrect, the sole remedy in the code is to elect an independent fee calculation and submit documentation with the basis upon which the independent fee calculation was made to the Director prior to issuance of building permits.

The Director may consider the IFC analysis and impose an alternative fee on a case-by-case basis based on the independent fee calculation, the specific characteristics of the development, and/or principles of fairness. OMC 15.04.050(F). However, Douglass did not elect to submit an independent fee calculation, but instead obtained his permits and paid his fee under protest.

Douglass then appealed to the Hearing Examiner, arguing that the TIF for Building 2 was excessive and that the City should not have calculated the fees using the methodology adopted by the City's Ordinance. AR 49-50. Douglass objected to the use of Gross Floor Area in the calculations, claiming it was not supported by substantial evidence. AR 50. Douglass also asserted that the Trip Length Adjustment used by the City's studies was not rational and violated due process. AR 51- 52.

The Hearing Examiner held a hearing on August 21, 2018. The Examiner issued a decision on August 23, 2018 rejecting Douglass' appeal. AR 1. The Examiner rejected Douglass' challenges to individual components of the City's fees. AR 18-19. He also found that the applicant elected not to submit an IFC prior to filing its permit application and was therefore barred from seeking such a determination from the Hearing Examiner under OMC 15.04.050(C). AR 20-21.

Douglass filed a Land Use Petition in Thurston County Superior Court on September 12, 2018. After the record was produced and briefs were filed, a hearing was held on May 17, 2019 before the Honorable John

Skinder, who heard oral argument and issued an order affirming the Hearing Examiner's decision. Douglass now appeals.

III. STANDARD OF REVIEW

A. THE LAND USE PETITION ACT.

The Land Use Petition Act provides that on judicial review of land use decisions, the court should allow for "such deference as is due the construction of a law by a local jurisdiction with expertise."² In this case, the Examiner's decision was itself a review of agency action, in that the Examiner reviewed the amount of a transportation impact fee established by City ordinance, imposed by City staff and affirmed by the Director of the City's Community Planning and Development Department. This Court should give its deference to the City's ordinance as adopted by the City Council, the Staff's recommendation and the Director's decision.

LUPA authorizes the Court to "affirm or reverse the land use decision under review or remand it for modification or further proceedings."³ Because the Examiner's decision occurred in the context of a quasi-judicial proceeding where the parties had to make a factual record, this Court conducts its review on the administrative record.⁴

In a Land Use Petition Act appeal, appellate court stands in the shoes of the superior court and its review is limited to the record before

² RCW 36.70C.130(1)(b).

³ RCW 36.70C.140.

⁴ RCW 36.70C.120(1).

the Hearing Examiner. *McMilian v. King County*, 161 Wn. App. 581, 255 P.3d 739 (2011). The review by the superior court under Land Use Petition Act (LUPA) constitutes appellate review on the administrative record before the local jurisdiction's body or officer with the highest level of authority to make the final determination. *DeTray v. City of Olympia* 121 Wn. App. 777, 90 P.3d 1116 (2004). The Court of Appeals reviews the Hearing Examiner's record to determine whether facts and law support the land use decision, applying the Land Use Petition Act's review standards in RCW 36.70C.110. *Id*; *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 961-2, 275 P.3d 367 (2012)

B. THE OLYMPIA MUNICIPAL CODE

The specific City Ordinance involved in this case gives further guidance on the standard of review, particularly as to the limits of the Examiner's scope of authority. An applicant may appeal the Director's decision regarding the applicability of the impact fees to a given development activity to the Hearing Examiner, subject to the procedures set forth in Chapter 18.75 OMC.⁵

In exercising his authority, the Examiner was bound to apply the procedural standards set forth in OMC 18.75.040(F). This Chapter incorporates standards of review on appeal borrowed from LUPA, RCW 36.70C.130 and required that the Examiner shall *only* grant the relief

⁵ OMC 15.04.090(D).

requested by the appellant upon a finding that the appellants have met their burden of proof⁶ to establish:

1. the staff engaged in unlawful procedures or failed to follow a prescribed procedure;
2. the staff's decision was an erroneous interpretation of the law;
3. the decision is not supported by substantial evidence within the context of the whole record;
4. the decision is a clearly erroneous application of the law to the facts;
5. the decision is outside the authority or jurisdiction of the decision-maker;
6. the decision violates the constitutional rights of the party seeking relief, or
7. the decision is clearly in conflict with the City's adopted plans, policies or ordinances.

The Court is therefore called upon to decide whether the Examiner correctly determined that Douglass failed to meet its burden to show that the City's decision to apply Schedule D impact fees was clearly erroneous, or other applicable standard of review under RCW 36.70C.130. The Examiner correctly upheld the City's staff decision and this court should likewise affirm the Examiner.

⁶ OMC 18.75.040(F). In the administrative process, the burden of proof lies with the appellant when challenging the validity of a particular enactment or a finding of fact or application of the law. *State v. Wittenbarger*, 124 Wn.2d 467, 485, 880 P.2d 517 (1994); *St. Francis Extended Health Care Service v. State of Washington*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990).

IV. ARGUMENT

A. RCW 82.02.050 AUTHORIZES CITIES TO ADOPT LEGISLATIVELY PRESCRIBED IMPACT FEES TO RAISE REVENUE FOR CAPITAL FACILITIES TO ENSURE THAT NEW GROWTH, IN PART, PAYS FOR ITSELF.

The City enacted the fees at issue in this case pursuant to RCW 82.02.050 - .090. This statute, established in 1990 as part of Washington’s “Growth Management Act or “GMA,” allows cities to “require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development ...” RCW 82.02.050(1)(b).

The Washington Supreme Court long ago determined that the imposition of generally applicable fees designed to raise revenue for needed capital improvements is a tax, requiring statutory authorization to be valid. *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 650 P.2d 193 (1982), *superseded by statute as stated in Ivy Club Investors, Ltd. Partnership v. City of Kennewick*, 40 Wn. App. 524, 699 P.2d 782 (1985). *Hillis Homes*, like GMA impact fees, was a legislatively prescribed, predetermined charge on residential land division and housing proposals in the county designed to raise revenue to pay for the increased demands on solid waste disposal facilities, parks, roads, and sheriff’s services, unless adequate capacity already existed. The Court held that because the purpose of such charges was to raise revenue to address general impacts of future development, it was a tax requiring specific legislative authority, which was absent at that time, but is now provided under the GMA.

Since the Supreme Court has long-held that municipalities must have authority, either constitutional or legislative, to levy such taxes, the Legislature has carefully distinguished between two fundamentally different categories of fees in adopting the GMA. The first category of fees is found in RCW 82.02.020 and concerns those designed to mitigate the *direct* impacts of a specific development.

[RCW 82.02.020] 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.

This section does not prohibit voluntary agreement 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.⁷

In other words, RCW 82.02.020 refers to fees that could be imposed by payments in lieu of mitigation for the direct impacts of a development under the State Environmental Policy Act, RCW Chapter 43.21C (“SEPA”) or the Local Transportation Act, RCW Chapter 39.92 (“LTA”). RCW 82.02.020 does not authorize the imposition of these fees; it simply recognizes that fees imposed pursuant to these statutes are not preempted by RCW 82.02.020. These so-called “direct impact” fees, however, are not the type of fees imposed on the Douglass development in this case.

⁷ RCW 82.02.020.

Unlike the fees imposed under SEPA or the Local Transportation Act, which are designed to mitigate *direct* impacts of specific development, the second category of fees, established by the 1990 GMA-related revisions to the excise tax statute are essentially excise taxes on new development generally and are designed to pay for capital facilities required to serve future growth generally over the next several years. RCW 82.02.050 - .090. These “GMA fees” include traffic impact fees which are at issue in this case. GMA impact fees are identical in character and purpose to the charges held to be taxes in *Hillis Homes*. As an exercise of taxing authority, GMA fees do not require site-specific analysis to be valid. Instead, impact fees imposed pursuant to GMA:

- (1) Shall only be imposed for system improvements that are reasonably related to the new development;
- (2) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
- (3) Shall be used for system improvements that will reasonably benefit the new development.⁸

In *New Castle Investments v. City of LaCenter*, 98 Wn. App., 224, 989 P.2d 569 (1999) a case in which this Court was called upon to determine whether the vested rights doctrine applies to GMA impact fees, the Court elaborated on the difference between direct regulatory fees imposed to mitigate impacts of specific development projects, such as the

⁸ RCW 82.02.050(3)(a-c).

SEPA or LTA fees referred to in RCW 82.02.020, and legislatively adopted GMA impact fees imposed under RCW 82.02.050 designed to raise revenue to pay for public facilities generally required due to new growth. The Court explained:

“Although impact fees imposed under RCW 82.02.050 must be ‘reasonably related’ to the impact of new development on the public infrastructure as a whole, they are not individually calculated for each new development, but rather are based on a *general calculation that applies to all new development*. RCW 82.02.090(3); RCW 82.02.050(3) and (4); RCW 82.02.060.”⁹

Because GMA impact fees are not regulatory, direct impact fees, their validity does not turn on whether specific fees imposed on *an individual development project* satisfies the reasonable relation, proportionality and benefit standards outlined in RCW 82.02.050(3). To carry out the standards outlined in RCW 82.02.050(3), the statute requires that impact fee ordinances adopted by local governments adhere to rigorous content standards designed to assure that they only raise the revenue needed to finance facilities necessary because of expected new growth as a whole. The local ordinance by which impact fees are imposed

⁹ *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 234, 989 P.2d 569 (1999) (emphasis added). The Court’s opinion recognized that GMA impact fees are not land use controls but bear the hallmarks of a tax on property because their purpose is to raise revenue for needed public improvements. *Id.* at 234. Such an assessment, following *Hillis Homes* and *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995), supports the determination that GMA impact fees are taxes. *Id.*, at 234-235.

must include a schedule of impact fees which are adopted for each type of development activity based on a formula, which incorporates (1) the cost of public facilities necessitated by new development; (2) 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 a particular system; (3) the availability of other means of funding; (4) the cost of existing public facilities improvements; and (5) methods by which the improvements were financed.¹⁰

B. DREBICK REJECTS APPELLANT’S CONTENTION THAT GMA IMPACT FEES ARE SUBJECT TO NOLLAN/DOLAN NEXUS AND PROPORTIONALITY TESTS.

Any question as to the difference between direct mitigation measures under RCW 82.02.020 and GMA Impact Fees under RCW 82.02.050 - .090 was laid to rest by the Supreme Court decision in *City of Olympia v. Drebeck*, 156 Wn.2d 289, 126 P.3d 802 (2006) (“*Drebeck*”). In *Drebeck*, the court rejected the contention that such fees must be imposed for direct impacts and be proportional to the impacts of a specific development, as RCW 82.02.020 and the *Nollan/Dolan* test for development exactions would require.¹¹ *Drebeck*, 156 Wn.2d at 300. In reversing the Court of Appeal opinion subjecting GMA impact fees to these requirements, the Supreme Court emphatically rejected the legal

¹⁰ RCW 82.02.060(1)(a-e).

¹¹ *Nollan v. California Coastal Commission*, 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, 128 L.Ed.2d 304 (1994).

basis underlying Douglass' brief. All of the impact fee cases relied upon by Douglass are specific development exactions subject to RCW 82.02.020. Douglass cites RCW 82.02.020 myriad times even though it expressly excludes GMA fees from its requirements.

Douglass mistakenly argues that the holding of *Drebick* was limited to a determination that local governments need not calculate impact fees by making individualized assessments of developments direct impact on each improvement planned in a service area under RCW 82.02.050(3). Brief at 18-19. In contrast to the Petitioner's arguments, the Supreme Court opinion in *Drebick* reversed the Court of Appeals holding which subjected traffic impact fees to the requirements of *Nollan* and *Dolan* nexus and proportionality tests. Additionally, they fail to acknowledge that the Supreme Court upheld the City's ordinance and methodology for determining impact fees, stating:

“We hold that the City's method for calculating transportation impact fees complied with the plain language of the GMA impact fee statutes.”

Drebick, 156 Wn.2d at 238.

Drebick unmistakably rejects the premises of the argument advanced by Douglass in this case. *Drebick* held that impact fees under RCW 82.02.050-.090 need not determine nexus and proportionality between a specific project and the assessment of GMA impact fees. Yet that is exactly what Douglass demanded that the Hearing Examiner require

and what he now demands the Court to impose upon the City. No such requirement is present in our Constitution, in the GMA impact fee statute or in the City ordinance adopting these legislatively prescribed charges in order to pay for future City infrastructure.

C. THE RATIONAL NEXIS/ROUGH PROPORTIONALITY TEST SET FORTH IN *NOLLAN/DOLAN* AND *KOONTZ* IS INAPPLICABLE TO LEGISLATIVELY PRESCRIBED IMPACT FEES.

Appellant's argument is premised on the faulty assumption that Federal tests for ad hoc development exactions set forth in *Nollan and Dolan* apply to legislatively adopted, generally applicable impact fees under the Growth Management Act. Douglass relies upon dicta in *Honesty and Environmental Analysis in Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) to argue that the federal *Nollan/Dolan* test applies to GMA impact fees. Brief at 11. The suggestion that such GMA impact fees are subject to the *Nollan/Dolan* test was expressly rejected in *Drebick*, where the same argument was advanced. *HEAL* did not concern impact fees under RCW 82.02.050 – .090 but was an analysis of authority to adopt a critical area ordinance under the best available science.

Division One of the Court of Appeals retreated from the *HEAL* dicta in its opinion in *Wellington River Hollow v. King County*, 121 Wn.

App. 224, 54 P.3d 213 (2002). In an opinion by Judge Applewick, who also authored the *HEAL* dicta, that case ruled that GMA impact fees under RCW 82.02.050 - .090 “need not benefit a particular development, but only need provide a general benefit to the entire district.” 121 Wn. App. at 238. As such, *HEAL*’s discussion of *Nollan/Dolan* being applicable to impact fees is not good law and does not survive either *Wellington River Hollow* or the Supreme Court decision in *Drebick*.

1. Koontz is distinguishable on its facts.

Likewise, the appellant’s reliance on *Koontz v. Johns River Water Management District*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) is misplaced, as the nexus/proportionality test set forth in that case is inapplicable to these types of fees. Appellant contends that the fees at issue here are the same type of fees addressed in *Koontz*. This is incorrect.

Koontz involved an ad hoc condition imposed to demand performance of off-site mitigation to enhance approximately 50 acres of District-owned wetlands not associated with the permit application. *Koontz*, 570 U.S. at 602, 133 S.Ct. at 2593. *Koontz* extended the *Nollan Dolan* nexus/proportionality tests applicable to adjudicative requirements exacting a dedication of property to mitigate project specific impacts to monetary exactions imposed to pay for off-site mitigation in lieu of dedication of on-site property to mitigate impacts. *Id.*, 570 U.S. at 602,

133 S.Ct. at 2593. The Court was concerned that a municipality could evade *Nollan* and *Dolan* scrutiny by demanding money, as the Court explained in holding:

We note as an initial matter that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L.Rev. 177, 202–203 (2006), and they are functionally equivalent to other types of land use exactions. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

Koontz, 570 U.S. at 612, 133 S.Ct. at 2599.

Koontz therefore only dealt with monetary exactions "in lieu of" a dedication or onsite measures to mitigate impacts of a development. It did not deal with taxes or impact fees imposed pursuant to a generally applicable, legislatively adopted formula, such as those as set forth in RCW 82.02.050 – .090. The fees "in lieu of" mitigation imposed on a specific development project to mitigate project specific impacts, which were involved in *Koontz*, are not the same type of condition as the legislatively prescribed impact fees imposed by GMA and the City's

ordinance here. Likewise, *Koontz* itself recognizes that it does not apply to legislatively adopted measures to raise revenue, such as taxes or legislatively prescribed impact fees. The Court stated:

This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.

Koontz, 570 U.S. at 615, 133 S.Ct. at 2601.

2. Courts have refused to apply *Nolan/Dolan* to legislatively prescribed impact fees, both before and after *Koontz*.

In the six years following the Supreme Court decision in *Koontz*, no courts have accepted the petitioner's invitation to apply its holding to legislatively adopted, generally applicable impact fees such as those prescribed in the GMA and Olympia's ordinance. Indeed, every appellate court considering such a case has rejected the application of case specific nexus and proportionality analysis under *Nollan/Dolan/Koontz* to such impact fees.

Prior to *Koontz*, numerous courts held that the site specific nexus/proportionality applied only in the context of ad hoc adjudicative exactions imposed on a project specific basis to mitigate project specific impacts. *Drebick* falls into this category, but Douglass contends that it is no longer good law. Brief at 13. Douglass acknowledges, as it must, that *Drebick* did not extend *Nollan-Dolan* analysis to traffic impact fees. Brief

at 13, citing *Drebick* at 302. Yet Douglass attempts to shrug off *Drebick*'s analysis and misreads its application to various classes of cases, reading that it is an either/or decision as to whether *Nollan* and *Dolan* apply to dedications or monetary exactions. This misreads *Drebick* which identified a more nuanced analysis. First, in addressing the dissent, the majority in *Drebick* acknowledged the application of *Nollan* and *Dolan* to a site specific condition of development approval requiring a property owner's dedication of a portion of land for public use. The Court then distinguished between monetary exactions "in lieu" of mitigation or dedication from GMA impact fees, stating:

The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approval on a property owner's dedication of a portion of land for public use; nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) (noting that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use"). For the proposition that the *Nollan–Dolan* standard should apply to GMA impact fees, the dissent inaptly cites decisions from other jurisdictions applying that standard to

direct mitigation fees of the type referred to in RCW 82.02.020 (that is, to fees in lieu of possessory exactions), not to the legislatively prescribed development fees at issue here.

Thus, although *Koontz* applies *Nollan/Dolan* to ad hoc monetary exactions imposed “in lieu” of mitigation or dedication, Appellants fail to recognize that GMA fees fall in a third class – generally applicable, legislatively prescribed charges adopted to raise revenue to address global impacts of anticipated development as a whole. Consistent with the reasoning in *Drebick*, neither *Koontz*, *Nollan* nor *Dolan* applies to this latter category.¹²

Courts widely rejected the application of *Nollan* and *Dolan* to legislatively prescribed fees designed to raise revenue for city-wide projects designed to accommodate growth generally, such as the system improvements funded by GMA impact fees. Washington courts have followed *Drebick*'s distinction between legislatively authorized GMA impact fees, which are not subject to *Nollan/Dolan* analysis, and fees in

¹² *Drebick* also cited to *Ehrlich v. City of Culver City*, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929, 117 S.Ct. 299, 136 L.Ed.2d 218 (1996), where the California Supreme Court recognized this same distinction, stating “it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment—cases in which the courts have deferred to legislative and political processes to formulate ‘public program[s] adjusting the benefits and burdens of economic life to promote the common good.’ ” *Id.*, 911 P.2d at 447. (quoting, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)).

lieu of possessory exactions, which are. *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 44–45, 252 P.3d 382 (2011).

The Supreme Court’s quartet of regulatory takings decisions, beginning with *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) left no doubt that *Nollan* and *Dolan*’s heightened standards apply only to (1) ad hoc, adjudicative land use decisions (2) conditioning development approval on the dedication of real property. Indeed, the Supreme Court’s ruling in *Lingle* affirmed its prior decisions to that effect:

Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions -- specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.

The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be “rough[ly] proportiona[l]” ... both in nature and extent to the impact of the proposed development.

... *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings.

Lingle, 544 U.S. at 546-47 (emphasis added). The U.S. Supreme Court’s decisions decisively conclude that *Nollan* and *Dolan* do not apply where legislatively-imposed fees that are not the functional analog of real

property dedications, such as fees imposed “in lieu” of mitigation or dedication.¹³ *Koontz* merely extended the application of *Nollan* and *Dolan* to fees “in lieu” of direct dedications, and did not extend it to generally applicable, legislatively adopted fees.

No lower federal or state court has ever applied *Nollan* and *Dolan*’s individualized, heightened scrutiny to legislatively adopted impact fees, which are traditionally afforded greater deference. “It has long been axiomatic that legislative and quasi-legislative enactments enjoy a significantly higher degree of judicial deference than individualized adjudications.” *Homebuilders Ass’n of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist.*, 62 P.3d 404, 410 (Or. App. 2003) (citing *Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)).¹⁴

¹³ See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). See also *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

¹⁴ Besides *Drebeck*, which has already been discussed, numerous other courts have refused to apply *Nollan/Dolan* to legislatively adopted fees. See also *San Remo Hotel, LP v. City and County of San Francisco*, 41 P.3d 87, 103 (Cal.4th 2002) (citing *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 966 (Cal.4th 1999) (quoting *Dolan*, 512 U.S. at 385) (... The most deferential review of land use decisions appears to be for those that pertain to ‘essentially legislative determinations’ that do not require any physical conveyance of property’’)); *Rogers Machinery v. Washington County*, 45 P.3d 966, 973 (Or. App. 2002) (“[W]hen the government regulates property without physically occupying it, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.”); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass’n of*

One of the reasons why this distinction has been followed by our sister courts is that adjudicative fees have been criticized for allowing abuse by forcing developers with a pending project to meet ad hoc demands not embodied by city codes.¹⁵ This was explained by the Colorado Supreme Court in *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001), stating:

One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development.

Likewise, the Arizona Supreme Court observed that “the *Dolan* analysis applied to cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land,” but the risk of that sort of leveraging “does not exist when the exaction is embodied in a generally applicable legislative

Central Arizona v. City of Scottsdale, 930 P.2d 993, 1000 (Az. 1997); *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995); *West Linn Corp. Park, L.L.C. v. City of West Linn*, 240 P.3d 29, 45 (2010); and *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 53 Cal. Rptr.2d 424, 434 (1996)).

¹⁵ See generally, Hansen, *Let's Be Reasonable: Why Neither Nollan/Dolan Nor Penn Central Should Govern Generally-Applied Legislative Exactions After Koontz*, 34 Pace Env'tl. L. Rev. 237, 292 (2017).

decision.” *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d at 1000. Here, there is no risk of such “leveraging” because the TIF was determined by Olympia’s legislatively adopted fee schedule, not an ad hoc adjudicative process.

3. Cases after *Koontz* also reject application to legislatively prescribed fees.

Appellants fail to cite a single case applying nexus/proportionality analysis to legislatively adopted fees under *Nollan/Dolan/Koontz*. No such case has done so even in light of *Koontz*’ holding in 2013 that it applies to monetary exactions. This is so because it is limited to exactions where the underlying adjudicative condition would be unconstitutional under such an analysis. This holding does not apply to legislatively adopted fees, such as the TIFs imposed here.

The first case to consider such a claim was Maryland’s highest court in *Dabbs v. Anne Arundel County*, 182 A.2d 798 (Md. April 10, 2018) which held that area wide impact fees similar to those assessed under the GMA are not subject to *Nollan/Dolan* takings analysis. The plaintiffs in *Dabbs* made precisely the argument advanced by Douglass – that *Nollan* and *Dolan* analysis applies to the County’s impact fee ordinance because of *Koontz*. *Dabbs*, 182 A.2d at 807-08. After a thorough analysis of *Koontz* and numerous other cases, the Maryland court

followed its earlier precedent and rejected application of nexus and proportionality tests to legislatively adopted impact fees, holding:

We re-affirm our holding in *Waters Landing [Ltd. Ptnrsp. v. Montgomery County]*, 650 A.2d 712 (1994)], and, thus, conclude that *Koontz* is inapplicable to the Impact Fee Ordinance in this case. Impact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny.

Dabbs, 182 A.2d at 812-13.

Maryland's rejection of this argument has been the result in other post-*Koontz* courts which consider whether *Nollan/Dolan* applies to legislatively adopted impact fees. Arizona also rejects this argument. In *American Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099 (2018), the Arizona Court of Appeals held *Nollan/Dolan* inapplicable to generally applicable, legislatively imposed traffic signal System Development Fees. Following *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, which held *Dolan* did not apply to generally applicable legislative decisions, *Am. Furniture Warehouse* held that *Koontz* did not change the result for such fees:

Koontz held that, when applicable, *Nollan/Dolan* provides the proper analysis when the government conditions issuance of a permit either upon the payment of a fee or upon the transfer of property. *Id.* at 619, 133 S.Ct. 2586. What *Koontz* did not do was replace, negate or (given the facts) even address *Dolan*'s legislative/adjudicative dichotomy discussed in *City of Scottsdale*. As a result, *Koontz* did not hold that *Dolan* applied to generally

applicable legislative development fees like those imposed in the traffic signal SDF. *Id.* at 614 n.2, 617, 133 S.Ct. 2586 (“because the proposed offsite mitigation obligation in this case was tied to a particular parcel of land, this case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking;” “[t]his case does not require us to say more”); *see also id.* at 628, 133 S.Ct. 2586 (Kagan, J., dissenting) (“Maybe today’s majority accepts [the legislative versus adjudicative] distinction; or then again, maybe not.”). *Koontz* did not abrogate the legislative/adjudicative dichotomy as AFW suggests.

Am. Furniture Warehouse Co., 425 P.3d at 1106.

This same result was reached within the Ninth Circuit by *Building Industry Association—Bay Area v. City of Oakland*, 289 F.Supp.3d 1056 (N.D. Cal. 2018).¹⁶ This case involved a challenge to the requirement that development either include or pay a fee for art to be included as part of their projects. The plaintiff contended that the art requirement was a violation of the exactions doctrine set forth in *Nollan*, *Dolan* and *Koontz*. 289 F.3d at 1057. The court rejected the contention that *Koontz* made the *Nollan/Dolan* analysis applicable to generally applicable, legislatively adopted development requirements. The U.S. District Court ruled:

But that’s not what happened in *Koontz*. The Court did not hold in *Koontz* that generally applicable land-use regulations are subject to facial challenge under the

¹⁶ The Ninth Circuit recently affirmed the District Court’s dismissal. *Bldg. Indus. Ass’n - Bay Area v. City of Oakland*, 775 Fed. Appx. 348, 349–50 (9th Cir. 2019) (BIA was precluded from bringing its takings claim based on *Koontz* because it challenged a legislative act, rather than an adjudicative land-use determination.)

exactions doctrine; it held only that the exactions doctrine applies to demands for money (not merely demands for encroachments on property). In reaching this holding, the Court went out of its way to make clear that it was not expanding the doctrine beyond that. *See* 133 S.Ct. at 2602 (“This case does not require us to say more.”); *id.* at 2600 n. 2 (“[T]his case does not implicate the question whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking.”). *Koontz* involved an adjudication by local land-use officials regarding an individual piece of property, and throughout its decision the Court spoke of the exactions doctrine in those terms.

Id., 289 F.3d at 1058. The court therefore distinguished *Koontz* and refused to extend the nexus and proportionality analysis to the art fee imposed by the City ordinance. *Id.*, 289 F.3d at 1059.

The most recent interpretations of *Koontz* also reject its application to legislative enactments. A federal district court in California recently held:

Koontz held only that monetary exactions in the permitting process were subject to *Nollan/Dolan* scrutiny because they burdened the ownership of an identifiable parcel of land. *See* 570 U.S. at 613–14. But it did not bring all general legislation requiring the transfer of money within the realm of the Takings Clause.

Ballinger v. City of Oakland, 18-CV-07186-HSG, 2019 WL 3533069, at *9 (N.D. Cal. Aug. 2, 2019)

In contrast to these cases, Douglass cites no cases that have applied *Nollan/Dolan* to generally applicable, legislatively adopted impact fees

following the *Koontz* decision. This court should follow *Dabbs, American Furniture Warehouse* and *BIA—Bay Area* in rejecting this argument.

D. THE CITY OF OLYMPIA’S TRANSPORTATION IMPACT FEE ORDINANCE.

The City of Olympia has implemented GMA transportation impact fees through its transportation impact fee ordinance in Chapter 15 of the Olympia Municipal Code. The City’s expert, Don Samdahl, the leading authority on how to calculate GMA impact fees, explained the methodology used by the City since the inception of its TIF program. Transcript 144-160.¹⁷

Olympia has used the same methodology for its impact fees since the initial adoption in 1995. See AR 94. In enacting the impact fee ordinance, the City Council formally adopted a Transportation Impact Fee Rate Study (Transportation Study”) prepared for the City by JHK Associates.¹⁸ Although the methodology is unchanged, the rates were updated in 1998, 2002, 2006, and 2009.¹⁹ The Examiner correctly notes that this is essentially the same approach upheld by the Supreme Court in *Drebick*. AR 19. The formula for calculating transportation impact fees contained in the Transportation Study includes the factors required by RCW 82.02.060, including but not limited to:

¹⁷ By contrast, Douglass’ expert had no experience with legislatively adopted impact fees under GMA and was limited in his experience to identifying project specific traffic impacts and direct mitigation. Transcript 120:25-121:4.

¹⁸ AR 94, Staff Report Attachment 10.

¹⁹ AR 133, Staff Report Attachment 11.

- 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.²⁰

The product of the formula represents the “unfunded” need, or the figure that would fairly be charged to new development using the factors required to be considered under RCW 82.02.060. To arrive at the specific impact fee amounts that would ultimately be charged to a particular development, the Olympia City Council adopted an impact fee schedule which provides impact fee rates for different categories of land use. The fee structure uses a traffic forecasting model to allocate future trips to the improvement projects and to determine each impact fee zone’s share of the cost of the improvements.²¹

²⁰ See also, RCW 82.02.060.

²¹ AR 94, Staff Report Attachment 10.

1. The Rate Study Adopts a Formula to Determine Olympia’s GMA Transportation Impact Fees Needed to Pay for Future System Improvements on a Programmatic Basis.

Before adopting its impact fee rate schedule, the City undertook a detailed process to determine the amount of the impact fees that would be imposed on new development. First, it identified on a programmatic basis transportation improvement projects in its Capital Facilities Plan (CFP) which are needed to meet adopted level of service (LOS) standards which are “capacity improvements”. The City identifies capacity improvement project groups for which revenue will be needed.²² The City then estimates the total cost of the future capacity improvements, eliminating projects needed to remedy existing deficiencies in the City’s transportation system. The resulting list, therefore, included only improvements providing capacity needed to meet the demands of *new growth*.

Next, the City’s methodology subtracts the amount of funding projected to be available from various grants and other City funds for the capacity improvement funded by the City’s impact fee program. The City formula further reduces the resulting figures by calculating the expected amount of “pass through” traffic. Pass through traffic are those vehicles whose point of origin and destination is outside of the Olympia Urban Growth Area.²³

²² AR 110-111, Staff Report Attachment 10.

²³ Because these trips do not significantly impact the surrounding street system, they are subtracted out prior to calculating the impact fee. AR 119, Staff Report Attachment 10.

The City's next task was to determine how those anticipated costs would be allocated among new development projects forecast to occur within the City. To do this, the City developed a computer model that predicts future traffic volumes and patterns. This model identified for the City the total number of new, afternoon peak-hour trips projected during the upcoming six-year period. By dividing the total revenue needed by the number of new, afternoon peak-hour trips generated, the City calculates an average cost-per-trip.²⁴ In 2016, the City determined that the cost per new trip was \$2,999,²⁵ which Appellants conceded is valid.

2. The Ordinance develops a predetermined schedule of fees for different categories of development based on trip generation statistics.

To calculate the impact fees that would be charged to each development type, the City multiplies the resulting trip rates for the various land uses, adjusted for trip length and "pass-by" traffic, by the average cost of a new, afternoon peak-hour trip, which is identified by using data from the ITE Manual, a universally recognized source for traffic information. Appellant's expert This results in the total cost of the transportation improvement projects to provide capacity for new growth over the applicable six-year period attributable to each land use type.

The transportation impact fee for mini-warehouses is calculated based on increments of 1,000 square feet of gross floor area. This basis is

²⁴ AR 116, Staff Report Attachment 10, Figure 6.

²⁵ AR 139, Staff Report Attachment 11, Figure 2.

used for numerous land use types in the City’s impact fee schedule. It is a widely accepted basis derived from the ITE manual, a universally recognized source of data for traffic trip generation. Accordingly, the 2017 TIF rate for mini-warehouses was established by Schedule D in OMC 15.16.040 as \$1.33 per square foot. AR 166.

3. Independent Fee Calculations.

Consistent with RCW 82.02.060(4), the City of Olympia adopted a provision in its impact fee ordinance at OMC 15.04.050 that would authorize the Director to “adjust the standard fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that the fees are imposed fairly.”²⁶ Specifically, that provision states:

While there is a presumption that the calculations set forth in the Transportation Study are valid, the Director shall consider the documentation submitted by the fee payer, but is not required to accept such documentation or analysis which the Director reasonably deems to be inaccurate or not reliable, and may, in the alternative, require the fee payer to submit additional or different documentation for consideration. The Director is authorized to adjust the impact fees on a case-by-case basis based on the independent fee calculation, the specific characteristics of the development, and/or principles of fairness...²⁷

In order to qualify for an alternative impact fee, a project proponent must submit an IFC that demonstrates that its proposed

²⁶ RCW 82.02.060(4).

²⁷ OMC 15.04.050(F).

development bears some unique characteristic that is not consistent with its land use classification and the level of impact fees assigned to that classification. Alternatively, a project proponent might also demonstrate that its proposed development will not generate the average number of afternoon, peak-hour trips assumed by the City's impact fee rate study.

Olympia's Ordinance presumes that the calculations set forth in the impact fee schedule are valid and allows the director to modify or deny requests for adjustment based upon an IFC. OMC 15.04.050 (F). The applicant must choose between the scheduled fees or submitting documentation supporting its IFC prior to issuance of any building permit. OMC 15.04.050(C).

What the Ordinance does not allow is what Douglass attempted to do here. Douglass sought to secure its building permits without conducting an IFC, then pay its impact fees, and finally file an after-the-fact appeal arguing that the formula upon which the legislative body adopted its schedule of fees in the City's Ordinance is unfair to it. The City's IFC ordinance requires that Douglass submit the IFC prior to receiving its building permits. Having failed to timely submit an IFC, the only issues that could be appealed are whether the City correctly applied the impact fee schedule. It was simply too late to demand an IFC after the fact.

E. THE HEARING EXAMINER’S PROPER ROLE IN REVIEWING IMPACT FEE APPEALS.

This appeal questions whether the Hearing Examiner correctly rejected Douglass’ appeal because Douglass failed to perform an independent fee calculation and the City correctly applied the schedule of fees applicable to mini-warehouse storage facilities.

Douglass claims that it “proved” that a fee of no more than \$48,198.73 is warranted based on site specific evidence and its own disagreement with the formula used by the Council to legislatively determine the City’s fee schedule. Brief at 19. The Examiner did not make any such finding and found that Douglass knowingly elected to forgo its opportunity to present such information by failing to provide an IFC as provided by OMC 15.04.050(C). AR 21. In essence, Douglass asked the Examiner, and now asks this Court, to rewrite the City’s ordinance without complying with the procedural requirements that allow consideration of alternative fee calculations. The Examiner correctly interpreted his own authority as being limited in cases where the applicant fails to timely submit an IFC as allowed by the Ordinance.

The Hearing Examiner’s role under the City’s ordinances was to review whether the staff properly applied the traffic impact fee ordinance adopted by the City Council, not to rewrite the ordinance. The transportation impact fee schedule that yielded the Douglass fee was legislatively enacted by the Olympia City Council. The Examiner’s review is therefore limited to determining whether the Director’s review found circumstances unique to Douglass’s mini-storage building as

demonstrated in an IFC which would make it unfair to apply the standard fee to it, or, whether the fee amount was otherwise flawed by mathematical errors in the calculations.²⁸ Indeed, because Douglass did not present information on the unique characteristics of this project in an IFC, staff correctly concluded that nothing about the Douglass mini-storage was so unique as to justify any adjustment. Staff correctly applied the fee established for mini warehouses under Schedule D in OMC 15.16.040. The Examiner correctly upheld this determination.

In Washington, local governments' legislative acts are presumed valid and are subject to judicial review only under the highly deferential "arbitrary and capricious" standard of review.²⁹ Washington courts have identified four factors to distinguish legislative from quasi-judicial action: (1) whether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.³⁰ Applying these factors, the City's TIF ordinance is a legislative act.

²⁸ OMC 15.04.090(D). Of course, because no IFC was presented to the Director, the Examiner could not make any determination concerning whether the Director erred in reviewing such an IFC.

²⁹ *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985).

³⁰ *Dorsten v. Port of Skagit County*, 32 Wn. App. 785, 788, 650 P.2d 220 (1982).

Douglass contends that the City has not argued a failure to exhaust administrative remedies. Brief at 42. After obtaining its building permit Douglass asked for director review of the fee imposed and timely filed an appeal of the assessment of impact fees to the Hearing Examiner, as contemplated by RCW 82.02.070(5). At each step, the City took the position that Douglass' failure to submit an IFC, as required by OMC 15.04.050, was fatal. AR 243, 257-58. The Examiner agreed and denied the appeal. AR 24. The Superior Court affirmed. CP 316. Olympia's Ordinance does not permit a permittee to construct an *ad hoc* IFC for the first time in an appeal to the Hearing Examiner. OMC 15.04.050(C). The failure to submit the IFC is a failure to exhaust available remedies, which would justify dismissal of the LUPA petition entirely. See *Estate of Friedman v. Pierce Cty.*, 112 Wn.2d 68, 80, 768 P.2d 462 (1989); *Ward v. Bd. of Skagit County Comm'rs*, 86 Wn. App. 266, 936 P.2d 42 (1997), *Durland v. San Juan Cty.*, 175 Wn. App. 316, 322, 305 P.3d 246, 249 (2013), *aff'd*, 182 Wn.2d 55, 340 P.3d 191 (2014).

F. THE APPELLANT BEARS THE BURDEN OF PROOF.

Douglass makes the astonishing and legally incorrect assertion that the City has the burden of proof in this case. Brief at 24-27, cites two cases arising from case specific exactions imposed as part of the development process which were challenged to RCW 82.02.020, not GMA impact fees which are at issue here. *Vintage Construction Company*

v. City of Bothell, 83 Wn. App. 605, 922 P.2d 828 (1996) was a challenge under RCW 82.02.020 to a fee “in lieu” of a dedication, not a case involving GMA impact fees. In order to exact a dedication, or a fee “in lieu” of dedication, RCW 82.02.020 requires a city to justify the fee as reasonably necessary as a direct result of a specific development.

Likewise, *Isla Verde Int’l Holdings v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) concerned whether an open space dedication within a plat met the requirements of RCW 82.02.020 and *Nollan/Dolan* on an individual project basis. It did not concern GMA impact fees. Cases under RCW 82.02.020 do not apply to GMA impact fees, because RCW 82.02.020 expressly excludes application to impact fees adopted under RCW 82.02.050 – .090. Appellant fails to distinguish cases arising under “in lieu” fees imposed to mitigate direct impacts of a specific proposal pursuant to RCW 82.02.020 from legislatively imposed GMA impact fees adopted under RCW 82.02.050 –.090. This fundamental misunderstanding of the law pervades Appellant’s position.

In making this assertion, and relying on inapposite case law, Appellant ignores established law which places the burden of proof on the appellant to demonstrate entitlement to relief from the legislatively imposed fee. First, the City’s appeal ordinance, OMC 18.75.040 (F), places the burden upon the appellant. The ordinance provides “the

examiner shall only grant the relief requested by an appellant upon finding that the appellant has established that: ...” Thus, the City’s ordinance clearly places the burden of proof to show that the City’s decision should be reversed on Douglass.³¹

Secondly, case law interpreting challenges to GMA impact fees has placed the burden of proof on appellants, not upon the City, consistent with the deference due and presumption of validity for adopted ordinances. In *Wellington River Hollow LLC v. King County*, 121 Wn. App. 224, 54 P.3d 213 (2002), the Court of Appeals held that the Appellant had the burden of proof to prove that the impact fee violated their rights. Appellants claim that *Wellington River Hollow* does not address the burden of proof. Brief at 26. However, it states:

Wellington contends that the \$1,398 per unit school impact fee assessment violates its constitutional rights. RCW 36.70C.130(1)(f). It has the burden of showing such a violation. RCW 36.70C.130(1)(f); *Ramm v. City of Seattle*, 66 Wn. App. 15, 19, 830 P.2d 395 (1992).

Wellington River Hollow, 121 Wn. App. at 238. (Emphasis added).

³¹ Appellant contends that there is no difference in the burden of proof between legislatively prescribed GMA fees and ad hoc, adjudicative exactions (whether monetary or property based). Appellant demands that in both, the city must prove the impact fees are proportionate to the impacts of the specific Douglass project. In doing so, he assumes his own preferred conclusion. This is precisely what *Drebick* rejected in holding the GMA impact fees are not subject to project specific scrutiny. To hold that a legislative enactment prescribing a schedule for GMA impact fees must address their proportionality to specific impacts of project not yet proposed when the ordinance is being considered proposes the impossible.

G. DOUGLASS' FAILURE TO PERFORM AN INDEPENDENT FEE CALCULATION IS NOT IRRELEVANT BUT IS FATAL TO HIS REQUEST TO REASSESS HIS FEES.

Appellant completely misinterpreted the City's impact fee ordinance and its requirements to impose either the fee adopted by the City Council's Impact Fee Ordinance in Schedule D or to impose an alternative fee calculated through an IFC. Douglass is incorrect in asserting that the election not to use the IFC mechanism is irrelevant. In essence, he was asking the Examiner to disregard City ordinances regarding when and how an applicant must use IFCs under the ordinance and consider an untimely site specific fee calculation presented for the first time during the appeal to the Hearing Examiner. This demand is barred by the City's ordinances.

First, GMA based traffic impact fees are assessed based on one of two methods: the schedules adopted in OMC 15.16 or by an IFC. OMC 15.04.040(A) states:

A. The City shall collect impact fees, based on the schedules in Chapter 15.16, or an independent fee calculation as provided for in Chapter 15.04.050, from any applicant seeking development approval from the City for any development activity within the City, where such development activity requires the issuance of a building or occupancy permit.

The City may elect an independent fee calculation where the Director determines that a proposal does not fit within one of the

categories set forth in Schedule D. OMC 15.04.050(A). Here there is no dispute that Douglass' mini-storage facility is properly classified as a mini-warehouse under Schedule D. Thus, the City correctly did not elect an IFC under OMC 15.04.050(A).

The applicant may elect to have impact fees determined by either Schedule D or, in the alternative, by electing an IFC. OMC 15.04.050 (C).³² The applicant must make this election and prepare the IFC prior to issuance of the building permit. OMC 15.04.050(C). As part of the IFC, the applicant is required to submit documentation showing the basis upon which the IFC is made, which would demonstrate why unique circumstances or data justify a variance in the amount of the regular impact fee. This allows the Director to evaluate and consider whether the applicant has demonstrated that an alternate fee is warranted. OMC 15.04.050(D). Having failed to elect the IFC and to submit documentation

³² C. An applicant may elect to have impact fees determined according to Schedule A, B, or D (Sections 15.16.010 and .040, respectively). If the applicant does so, s/he shall execute an agreement in a form satisfactory to the City Attorney waiving the applicant's right to an independent fee calculation provided for in this Section. In the alternative, if an applicant opts not to have the impact fees determined according to Schedule A or D (Sections 15.16.010 or 15.16.040), the applicant may elect an independent fee calculation for the development activity for which a building permit is sought. In that event, the applicant may prepare and submit his/her own independent fee calculation or may request that the City prepare an independent fee calculation. The applicant must make the election between fees calculated under Schedules A or D and an independent fee calculation prior to issuance of the building permit for the development. If the applicant elects to prepare his/her own independent fee calculation, the applicant must submit documentation showing the basis upon which the independent fee calculation was made. (Emphasis added).

showing the basis upon which the IFC is to be made, the City had no choice but to impose the impact fee set forth in Schedule D, as required by ordinance. OMC 15.04.040(A). The Examiner correctly rejected Appellant's demand to consider an IFC submitted for the first time on appeal to the Examiner.

H. THE EXAMINER CORRECTLY REJECTED DOUGLASS' OBJECTIONS TO THE CITY FEE.

Even though Douglass has missed his opportunity to provide an IFC, his challenges to the Council's basis for adoption of GMA fees are misplaced.³³ The City's fees are presumptively valid enactments of the City's legislative body, which the Examiner could not invalidate. The City demonstrated through the testimony of its expert, Don Samdahl, that the TIF ordinance is rationally based, following the same methodology previously upheld in *Drebick*. The Examiner so held and pointed out that Douglass failed to exercise an opportunity to demonstrate that the City's assessed fee was disproportionate when he failed to conduct the IFC. AR 22. The Court should follow this decision as the Examiner's findings are based on substantial evidence.

³³ Douglass has abandoned any due process challenge to the City's ordinance. Opening Brief at 5, n.4.

1. Use of Gross Floor Area to Determine Trips is Rationally Based.

The Appellant in this case contended that there is no basis to project trips based on gross floor area. However, the selection of gross floor area as the basis to project trips generated by mini-warehouses is supported by the ITE Manual. The ITE Manual provides two alternatives and the City is free to select either as a rational basis for projecting trips. The City decided to use square footage because that is a more reliable indicator of the size of a development and it is something which is readily identified in building permit applications. Samdahl Testimony, Transcript at 153:6–154:1.

Before the Hearing Examiner, the applicant here did not challenge either the validity of the City's ordinance or argue that an individualized assessment of impacts was required. AR 380. Douglass now switches course, arguing that *Koontz* compels such a result. Douglass must accept the legislative determination as adopted in Schedule D and OMC 15.16.030 as a presumptively valid, rationally based impact fee based on the square footage of building.

The use of square footage as a basis to project trips is something which permeates the entire ITE Manual. The square footage is a basis for numerous categories. AR 157. If the applicant believed that the number

of units is a more accurate indicator of trips, as Douglass argued to the Examiner, Douglass should have sought to persuade the City Council when it adopted the impact fee ordinance. However, the City Council's choice of a valid alternative presented in the ITE Manual to determine trips is rational and nearly universally relied upon by traffic engineering professionals.

2. Douglass failed to show that the trip length factor used by the City is invalid.

Appellant also contends that the trip length adjustment factor used by the City is unsupported. This reverses the burden of proof. As discussed above, it is up to the Appellant to show that this is irrational or arbitrary and capricious. Appellant has not done so. Instead, Douglass suggests that the City has the burden to measure trips from individual projects. Brief at 8. This burden is not the City's but is the burden of the applicant to demonstrate why the standardized method set forth in the impact fee study and resulting schedule is unfair given specific factual information. However, Douglass did not do so by presenting alternative factual information as part of an IFC, which the ordinance would have allowed Douglass to do.

Douglass sought to provide information impeaching the legislative basis for the adopted fees in the context of an appeal to the Hearing

Examiner. Douglass' contentions were misdirected and should be directed to the Council if the Ordinance needs to be amended. If Douglass had information concerning differences in the impacts arising from its mini-storage proposed in Olympia, Douglass could have submitted an IFC, which would have given the City a basis to adjust Douglass' fees. Douglass did not do so. Instead, Douglass elected to pay its Schedule D fees without submitting supporting documentation to the City in an IFC as required by OMC 15.04.050. Douglass cannot now collaterally attack the legitimate, legislatively adopted basis of those fees.

I. THE CITY IS ENTITLED TO ITS REASONABLE ATTORNEYS FEES UNDER RCW 4.84.370.

Under the Land Use Petition Act, a party who prevailed before the City, who has prevailed in all subsequent judicial proceedings and prevails or substantially prevails on appeal is entitled to an award of its reasonable attorney's fees and costs. RCW 4.84.370. The City of Olympia initially prevailed before the City Hearing Examiner when he rendered his decision on August 23, 2018. The City again prevailed in Superior Court when Judge Skinder issued his order affirming the Hearing Examiner on May 17, 2019. As such, the City has prevailed on all prior proceedings on the merits of the claim, both at the administrative and judicial stages. If the

City prevails here, it is entitled to an award of its attorney's fees on appeal under RCW 4.84.370 and RAP 18.1.

V. CONCLUSION

Douglass' appeal was correctly rejected by both the Hearing Examiner and Superior Court as procedurally improper and lacking merit. The City's fees are valid, soundly based and should be upheld. Douglass failed to timely seek an independent fee calculation and must therefore accept the scheduled fee. Douglass is barred by OMC 15.04.050 from seeking an independent fee calculation for the first time in an appeal to the Hearing Examiner.

The City Hearing Examiner and Thurston County Superior Court both correctly rejected Douglass' appeal, which sought to rewrite the schedule of legislatively adopted TIFs in the context of an administrative appeal. Nothing in our Constitution or *Koontz* compels reversal of the Examiner's decision. Petitioners' arguments conflict with the Washington Supreme Court ruling in *Drebick* and have been rejected by every court asked to consider applying *Koontz* to legislatively adopted generally applicable development charges.

Like the Hearing Examiner and Judge Skinder, this court should affirm the decision to apply the legislatively adopted impact fees for mini-warehouses as set forth in Schedule D of OMC 15.16.040. Finally, the

Court should award the City its reasonable attorney's fees under RCW
4.84.370.

DATED this 30th day of September, 2019.

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