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Division II
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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.

REPLY BRIEF OF APPELLANT DOUGLASS PROPERTIES II, LLC

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I. REPLY ARGUMENT

In *City of Olympia v. Drebeck*, 156 Wn.2d 289, 26 P.3d 802 (2006), the Washington Supreme Court stated that the Hearing Examiner’s function is to make findings of fact as to whether the City’s impact fee demand is proportionate and reasonably related to the impact created by the applicant’s new development:

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

Drebeck, 156 Wn.2d at 307. The same Court erroneously assumed—based on federal constitutional law in 2006—that such proportionality was required by the impact fee statute, RCW 82.02.050 *et seq.*, but *not* the *Nollan/Dolan*¹ doctrine. 156 Wn.2d at 302.

However, the *Drebeck* court’s assumption that *Nollan/Dolan* does not apply to monetary exactions (impact fees) was subsequently rejected in *Koontz v. Johns River Water Management District*, 570 U.S. 595, 606 (2013). In fact, the *Koontz* dissent specifically noted that Washington’s impact fee system was now subject to *Nollan/Dolan* doctrine. 570 U.S. at

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

627 (Kagen, J., dissenting). The City of Olympia relies on the portion of *Drebick* that is no longer good law while ignoring the portion that correctly states that the Hearing Examiner is required to make findings of fact on proportionality.

The City primarily argues that *Koontz* does not apply to *legislatively* prescribed impact fees. The City notes that the basic Olympia impact fee schedule was adopted legislatively, but the City overlooks the fact that the both the impact fee statutes and the Olympia Municipal Code (OMC) give the City substantial discretion in determining the actual amount of impact fees to be demanded from a particular applicant. That discretion makes such impact fees *adjudicative* fees subject to *Nollan/Dolan* under *Koontz*.

The law review article cited by the City agrees with Douglass that impact fees involving discretionary application, such as impact fees under RCW 82.02.050 et seq., should be considered *adjudicative* fees subject to *Nollan/Dolan*, even if the basic impact fee formula is established legislatively:

The *Nollan/Dolan* test should apply to exactions that are ad hoc adjudicatory monetary demands on land use permittees, **even if such demands are enacted by legislative bodies.** However, *Nollan/Dolan* should not govern exactions that (1) are generally applied, and (2) are based on a set legislative formula that is applied to specific development projects without any meaningful administrative discretion.

(Emphasis added).

Hansen, *Let's Be Reasonable: Why Neither Nollan/Dolan Nor Penn Central Should Govern Generally-Applied Legislative Exactions After Koontz*, 34 Pace Envtl. L. Rev. 237, 240 (2017).

Both the impact fee statutes, RCW 82.02.050 et seq., and *Nollan/Dolan* require the City's impact fee demand to be proportionate to the impact of the Douglass project. Because the undisputed facts establish that the City's impact fees are excessive the Hearing Examiner's decision must be reversed.

A. It is an undisputed fact that a proportionate impact fee for the Douglass project is no more than \$48,178.93.

As explained in Douglass' opening brief, Douglass proved, through evidence and expert testimony, that three of the variables used to calculate the impact fees were excessive. *App Br.* at 5-7, 28-41. The City made no attempt to prove otherwise, and the Hearing Examiner failed to make any findings of fact. *Id.* at 9, 22, 30-32.

In response, the City (i) explains how the City's impact fee schedules were originally enacted, and (ii) argues that the City's legislative actions were not "irrational or arbitrary and capricious." *Resp. Br.* at 27-31, 40-43. But the City makes no attempt to respond to Douglass' factual arguments about the impact fee calculations. *Id.* Consequently, it is *undisputed* that:

- a proportionate impact fee for the Douglass project is no more than \$48,178.93, and
- the City's impact fee of \$167,580.00 is **not** roughly proportionate to the actual impact.

These undisputed facts significantly simplify this case, allowing the Court to focus on the legal issues under LUPA: if either (i) the impact fee statutes or (ii) federal constitutional law require the City's impact fees to be roughly proportional to the impact of the Douglass project then the Hearing Examiner's decision is erroneous as a matter of law and must be reversed.²

B. The City's excessive impact fees violate the impact fee statute as interpreted in *Drebick*.

Douglass has repeatedly pointed out that the impact fee statute (i) requires impact fees to be proportionate to the impact of the new development, and (ii) requires the City to provide an administrative hearing to challenge the proportionality of any required impact fee. RCW

² The City's failure to address the factual issues presented by Douglass makes it unnecessary to determine which party has the burden of proof. *See App. Br.* at 24-27. Nonetheless, the City's arguments on this issue are meritless. The City relies on its own appeal code to place the burden of proof on Douglass without explaining why the burden of proof for exactions would be different from the burden of proof on the proportionality of impact fees. *Resp. Br.* at 35-37. *Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 54 P.3d 213 (2004), cited by the City, does not address the burden of proof at all. The City continues to confuse the standards of review ***in court under LUPA*** with the factual burden of proof to be applied by a hearing examiner in an evidentiary hearing on impact fees. *Resp. Br.* at 37 (conflating the petitioner's burden under LUPA with the factual burden of proof). In this court, the Hearing Examiner's failure to properly apply the *Nollan/Dolan* standard is an error of law. *See* RCW 36.70C.130(1)(b).

82.02.050(4); -.070(5). The City ignores the statutory requirement of a hearing, citing RCW 82.02.070 only once, in an irrelevant discussion of the optional independent fee calculation near the end of its brief. *Resp. Br.* at 35; *see* section (F) below).

The City argues that the Hearing Examiner's role is limited to reviewing the director's decision on an independent fee calculation and/or whether City staff correctly applied the fee schedules. *Resp. Br.* at 33-34. The City provides no authority to support these arguments other than its own interpretation of its own codes.³ *Id.* But *City of Olympia v. Drebeck*, 156 Wn.2d 289, 126 P.3d 802 (2006), on which the City relies, directly contradicts the City's arguments. In *Drebeck* the applicant submitted an independent fee calculation, which the City's development director rejected in favor of the City's adopted fee schedule. 156 Wn.2d at 293. The Supreme Court's opinion in *Drebeck* mentions the independent fee calculation in passing, *id.* at 305, but does *not* address the independent fee calculation in its analysis of the legal issue presented.

On the contrary, *Drebeck* clearly states that the Hearing Examiner's function is to make findings of fact on whether the City's impact fee

³ The City also argues that the Court should defer to the City's local expertise under LUPA, RCW 36.70C.130(1)(b). *Resp. Br.* at 5 n.2. But the issues in this case are matters of state and federal law. There is no issue of interpreting local codes on which such deference would be due. *Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382 (2011) (no deference on issues of state law).

demand is proportionate as required by former RCW 82.02.050(3):

The hearing examiner's inquiry should have ended with his factual findings that "the Drebeck fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole*" and that "those improvements *considered as a whole* will benefit the Drebeck development." CP at 32 (emphasis added).

Drebeck, 156 Wn.2d at 307. The Supreme Court only faulted the hearing examiner for interpreting former RCW 82.02.050(3) to require the City "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 (emphasis added).

That legal issue is *not* presented in this case. Douglass has *not* challenged either the City's intended use of the impact fees or the nexus between the Douglass project and the particular offsite improvements that will be funded with those fees. Douglass challenges only the proportionality of the City's determination of the traffic impacts of mini storage warehouses. The City's assertion that Douglass is making the same argument as *Drebeck*, *Resp. Br.* at 13, is false.⁴

⁴ As explained in Douglass' opening brief at 12-13], *Drebeck's* only 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. Furthermore, *Drebeck* involved impact fees from an office building, not a mini storage warehouse. *Id.* The City's assertion that *Drebeck* "upheld" those aspects of the impact fee ordinance at issue in this case is simply false.

C. Under *Koontz*, impact fees authorized by RCW 82.02.050 are monetary exactions subject to the *Nollan/Dolan* doctrine.

In *Koontz*, 570 U.S. 595 (2013), the United States Supreme Court held—contrary to the prognostications of many lower courts, including the Washington Supreme Court in *Drebick*, *supra*,—that the *Nollan/Dolan* proportionality requirement applies to impact fees. The City makes three attempts to distinguish *Koontz*:

- the City argues that *Koontz* merely extended *Nollan/Dolan* doctrine to fees in lieu of dedications of real property;
- the City argues that impact fees under RCW 82.02.050 are “taxes,” not impact fees, under *Koontz*; and
- the City argues that *Koontz* does not apply to “legislatively” adopted impact fees.

All of these arguments are erroneous as a matter of law.

1. *Koontz* is not limited to fees in lieu of dedication of real property.

Taking a passage from *Koontz* out of context, the City argues that *Koontz* merely extended *Nollan/Dolan* doctrine to fees in lieu of dedications of real property, not all impact fees. *Resp. Br.* at 15-17. Nothing in *Koontz* supports the City’s narrow interpretation. Indeed, the phrase “in lieu” appears only once in the entire *Koontz* opinion (including the dissent). 570 U.S. at 612. Contrary to the City’s arguments, *Koontz*

specifically notes that several states (including Illinois, Ohio, and Texas) had already applied the *Nollan/Dolan* doctrine to monetary exactions before the Supreme Court settled the issue in *Koontz*. 570 U.S. at 618. The *Koontz* dissent clearly rejects the City’s suggestion that the majority opinion is limited to fees in lieu of dedication:

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

570 U.S. at 626 (Kagen, J., dissenting).

The City devotes a substantial portion of its brief to an irrelevant discussion of *Drebick*, noting that *Drebick* distinguished between “in lieu” fees and impact fees, and that *Drebick* asserted (in dicta) that *Nollan/Dolan* did not apply to impact fees. *Resp. Br.* at 17-19. Unfortunately for the City, the alleged distinction identified by the Washington Supreme Court in 2006 did not survive the 2013 decision of the United States Supreme Court in *Koontz*. Nothing in *Koontz* supports the City’s argument that *Nollan/Dolan* only applies to “in lieu” fees. On the contrary, the *Koontz* dissent specifically cited *Drebick*, *supra*, as an example of a state impact fee system that “now must meet *Nollan* and *Dolan*’s nexus and proportionality tests.” *Id.* at 627. The dicta assumption

in *Drebick*, that *Nollan/Dolan* does not apply to impact fees, is simply bad law after *Koontz*.⁵

2. Impact fees authorized by RCW 82.02.050 are monetary exactions under *Koontz*, not taxes.

The City argues that impact fees under RCW 82.02.050 are “taxes,” not impact fees, under *Koontz*. *Resp. Br.* at 8-12. This argument fails for three reasons. First, *Dabbs v. Anne Arundel County*, 182 A.3d 798, 811 (Md. 2018), on which the City relies, clarifies that a payment that is necessary to obtain a permit and/or imposed on a particularized or discretionary basis is *not* a tax under *Koontz*.

Second, as explained in Douglass opening brief, the plain 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. *App. Br.* at 17. RCW 82.02.090(3) specifically defines “impact fee,” and RCW 82.02.060(1)(b) clearly distinguishes between “impact fees” and “taxes.” The City ignores the definition of “impact fee,” and paraphrases RCW 82.02.060(1)(b) to avoid using the word “tax.” *Resp. Br.* at 11, 28.

⁵ *Ehrlich v. City of Culver City*, 911 P.2d 429, 444, *cert. denied*, 519 U.S. 929 (1996), cited by the County, predates *Koontz* by almost two decades. *Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 54 P.3d 213 (2002), cited by the County, predates *Koontz*, *supra*, and does not address *Nollan/Dolan* at all.

Third, impact fees are not “taxes” under Washington case law. Whether a charge collected by the government is a tax or regulatory fee is determined from three factors: (1) whether the primary purpose is to regulate or raise money, (2) whether the money collected must be allocated to an authorized regulatory purpose, and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. In *Covell v. Seattle*, the Court held that a residential street charge was an unauthorized tax because the primary purpose was to raise money and there was no direct relationship between the charges and the benefits to and/or burden created by the payor. 127 Wn.2d 874, 905 P.2d 324 (1995). “Where the charge is related to a direct benefit or service, it is generally not considered a tax or assessment.” 127 Wn.2d at 884; see also *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 650 P.3d 193 (1982) (\$250 per lot fee on new development was a tax because its primary purpose was to raise money).

In contrast, impact fees under RCW 82.02.050 et seq. serve regulatory purposes, and are based on a direct relationship between the burden created by new development activity and the required impact fee. RCW 82.02.050(1), (4); .090(3). Such regulatory fees are not taxes. See *Hillis Homes v. Public Util. Dist. No. 1*, 105 Wn.2d 288, 714 P.2d 1163

(1986) (general facilities charge imposed on new water customers were regulatory fees not taxes).⁶

No case or other authority supports the City's assumption that impact fees under RCW 82.02.050 et seq. are taxes for purposes of *Koontz*.⁷ Because such impact fees are monetary exactions under *Koontz*, such fees are subject to the *Nollan/Dolan* doctrine.

3. Assuming, *arguendo*, that the distinction between legislative and adjudicative fees survives *Koontz*, the City's impact fees are adjudicative fees subject to the *Nollan/Dolan* doctrine.

Finally, the City argues that *Koontz* does not apply to “legislatively” adopted impact fees. *Resp. Br.* at 17-27. As a threshold matter, the City assumes that the proffered distinction between “legislative” and “adjudicative” fees survived *Koontz*. But the *Koontz* majority ignored the alleged distinction between “legislative” and

⁶ Furthermore, the Washington Constitution, article VII, § 1, requires uniform taxation of all real property. *City of Spokane v. Horton*, 189 Wn.2d 696, 406 P.3d 638 (2017) (local property tax exemption for senior citizens and veterans violated Washington constitutional requirement of uniform taxes on real property). Impact fees authorized by RCW 82.02.050 et seq. apply differently to different types of real property and allow discretionary application. Such impact fees are not valid property taxes under Washington law.

⁷ The cases cited by the City do *not* hold that impact fees are taxes for purposes of *Koontz*. *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 650 P.3d 193 (1982) predates the enactment of RCW 82.02.050 et. seq., and holds that, absent statutory authorization, locally imposed impact fees were an invalid tax. *New Castle Investments v. LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999) addressed whether impact fees authorized by 82.02.050 were taxes or land use controls subject to the Washington vested rights doctrine, not whether impact fees are taxes for purposes of *Koontz*. The *New Castle* court expressly declined to hold that impact fees were “taxes,” only that they were not “land use control ordinances” for purposes of vesting. 98 Wn. App. at 236.

“adjudicative” fees, recognizing only the distinction between impact fees (monetary exactions) and taxes (see above). 570 U.S. at 615. Indeed, only the *Koontz* dissent mentions a distinction between “legislative” and “adjudicative” fees, observing that “[m]aybe today’s majority accepts that distinction; or then again, maybe not.” 570 U.S. at 628 (Kagen, J., dissenting).

It is not necessary for this Court to decide whether the distinction between legislative and adjudicative fees survived *Koontz* because the City erroneously assumes that impact fees under RCW 82.02.050 et seq. are legislative rather than adjudicative. Most of the cases cited on pages 17-27 of the City’s brief are not relevant to that issue.⁸

The cases relied on by the City involved legislatively-imposed fees as opposed to adjudicative fees involving discretion. *Dabbs*, 182 A.3d at

⁸ Several cases predate *Koontz*, and, like *Drebick*, erroneously assume that *Nollan/Dolan* only applies to exactions of real property, not demands for money. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); *West Linn Corp. Park, L.L.C. v. City of West Linn*, 240 P.3d 29, 45 (Ks. 2010); *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 53 Cal.Rptr.2d 424, 434 (1996). Many of the cases cited by the City are also relied on by the *dissent* in *Koontz*. See *Lingle*, 544 U.S. 528; *City of Monterey*, 526 U.S. 687; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass’n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Az. 1997); *McCarthy v. City of Leawood*, 894 P.2d 836 (Kan. 1995). Other cases predate *Koontz* and have nothing to do with exactions or impact fees. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); *FCC v. Beach Communications*, 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); *San Remo Hotel, LP v. City and County of San Francisco*, 41 P.3d 87, 103 (Cal. 2002).

809 (impact fee ordinance afforded no discretion in imposition or calculation of fees); *Homebuilders Ass’n of Metro Portland v. Tualatin*, 62 P.3d 404, 409 (Or. 2003) (parks and recreation fee left no meaningful discretion in imposition or calculation of fee); *Rogers Machinery v. Washington County*, 45 P.3d 966, 981 (Or. App. 2002) (impact fee ordinance involved no significant discretion in imposition or calculation); *see also, Bldg. Indus. Ass’n v. City of Oakland*, 289 F.Supp.3d 1056, 1059 (N.D. Cal. 2018), affirmed, 775 Fed. Appx. 348 (9th Cir. 2019) (refusing to consider *facial* challenge to ordinance requiring developers to spend 0.5% of building costs on art).⁹ The City erroneously assumes that the impact fees authorized by Chap. 82.02 are likewise devoid of significant discretion and therefore “legislative” as opposed to “adjudicative.” *App. Br.* at 26-27.

In arguing that impact fees under Chap. 82.02 are “legislative” fees the City ignores the substantial discretion granted to local officials in establishing the amount of such fees, which makes such fees “adjudicative” (or ad hoc) fees. Although the Olympia city council “legislatively” adopted the City’s impact fee schedules, the actual impact

⁹ *See also, Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1105 (Az. 2018) (traffic signal fee was legislative act); *Ballinger v. City of Oakland*, 18-CV-07186-HSG, 2019 WL 3533069 (N.D. Cal. Aug. 2, 2019) (tenant relocation fee was a legislative act).

fees imposed by the City's development director are adjudicative fees, subject to *Nollan/Dolan* because of the significant discretion granted to the City by RCW 82.02.050 et seq. The statute *requires* local governments to consider unique circumstances in calculating impact fees. Local impact fee ordinances

(5) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;

(6) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee;

RCW 82.02.060. And the statute requires local governments to provide a hearing process in which impact fees may be modified "based on principles of fairness." RCW 82.02.070(5). As the City notes, the Olympia impact fee codes include these required discretionary and adjudicative features. The discretion afforded by these provisions demonstrates that impact fees are adjudicative fees, subject to *Nollan/Dolan*.

The law review article cited by the City confirms that the City's position is erroneous. *See Resp. Br.* at 22 n. 15. That article correctly notes that *Koontz* did not address the question of whether *Nollan/Dolan* also applies to legislatively imposed monetary exactions. *Hansen, supra*,

at 240. However, after reviewing the rationales underlying the distinction between legislative and adjudicatory exactions, the article concludes that after *Koontz* the *Nollan/Dolan* doctrine **should apply** to adjudicative fees, such as impact fees under Chap. 82.02 RCW, because of the discretion afforded to the local officials in the implementation of such fees:

The *Nollan/Dolan* test should apply to exactions that are ad hoc adjudicatory monetary demands on land use permittees, **even if such demands are enacted by legislative bodies.** However, *Nollan/Dolan* should not govern exactions that (1) are generally applied, and (2) are based on a set legislative formula that is applied to specific development projects without any meaningful administrative discretion. (Emphasis added).

Hansen, supra, at 275. Because of the significant discretion granted to both City officials and the hearing examiner, under both the Olympia code and RCW 82.02.050 et seq., the City's impact fees are not "legislative" fees even if the distinction between legislative and adjudicative fees is still valid after *Koontz*.

In sum, impact fees under RCW 82.02.050 et seq. are neither "taxes" nor legislatively imposed fees. Under *Koontz*, impact fees are monetary exactions subject to the *Nollan/Dolan* doctrine. Because it is undisputed that the City's impact fees are not roughly proportionate to the impacts of the project, see section (A) (above), the Hearing Examiner's decision must be reversed.

D. In the alternative, the City’s impact fees are “arbitrary and capricious.”

The City repeats its erroneous argument that the City’s actions are reviewed under the “arbitrary and capricious” standard. *App. Br.* at 33-34; CR 254-255. The cases cited by the City have nothing to do with administrative hearings on impact fees, and the City’s argument conflicts the City’s own codes, which do *not* mention the “arbitrary and capricious” standard at all. *See Resp. Br.* at 7 (citing OMC18.75.040(F)). The Hearing Examiner correctly rejected the City’s argument *sub silentio*. See CR 17.

As explained in section (B), the Hearing Examiner’s function is to make findings of fact on whether impact fees are proportionate. Assuming, *arguendo*, that the arbitrary and capricious standard applied, the City’s actions were arbitrary and capricious. The City devotes a substantial portion of its brief to a discussion of how the City originally promulgated its impact fee schedules. *Resp. Br.* at 27-31. But the City provides no meaningful response to any of Douglass’ three specific objections.

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.

With respect to the trip generation variable the City addresses the *wrong issue*. *See Resp. Br.* at 41-42. As previously explained the issue of whether the City should have used square feet or number of units was not

before the Hearing Examiner and is not before this Court. *App. Br.* at 32 n. 16. The more recent (and more accurate) trip generation rate from the 10th Edition ITE manual (0.17 per 1000 s.f.) was presented to the Hearing Examiner at the hearing, and its failure to consider the lower rate was arbitrary and capricious.

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

As explained in *App. Br.* at 35-36, both parties' experts testified that the assumption of 100% new trips was incorrect, and that there was no data to support that assumption. The City has not addressed this issue at all, effectively conceding that the City's action was arbitrary and capricious. *See Resp. Br.* at 41-42.

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

The City's own expert admitted that the City's decision to use the 1.7 trip length multiplier for ordinary warehouses was based on nothing more than the total lack of data on mini warehouses, even though those land uses are very different. RP 166. Apart from erroneously arguing that Douglass was required to submit an independent fee calculation (*see* section E), the City completely fails to address this issue, effectively conceding that the City's action was arbitrary and capricious. *See Resp.*

Br. at 42-43.

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

The City argues that Douglass' refusal to submit an optional independent fee calculation was a failure to exhaust administrative remedies. *Resp.* at 35. As explained in Douglass' brief, *App. Br.* at 43, the City waived any such arguments by failing to raise that issue by motion at a LUPA initial hearing. RCW 36.70C.080(3).

Relying entirely on its own ordinances the City argues that the Hearing Examiner's role is limited to hearing appeals from the director's decision on an independent fee calculation. *Resp. Br.* at 31-32, 38-40. The City ignores the fact that state law requires the City to provide a hearing. RCW 82.02.070(5). *Drebick* confirms that the Hearing Examiner's function is to make findings of fact on whether the City's impact fee demand is proportionate as required by RCW 82.02.050(4) (former RCW 82.02.050(3)). *Drebick*, 156 Wn.2d at 307. The fact that neither the City nor Douglass elected to perform an independent fee calculation is not relevant to any issue in this case.

F. The City is entitled to an award of fees on appeal only if the City is the prevailing party.

Douglass acknowledges that the City is entitled to an award of reasonable attorneys fees under RCW 4.84.370 if the City is the prevailing

party in this appeal. Douglass reserves the right to challenge the amount of any fee award pursuant to RAP 18.1(e).

II. 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.

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DATED this 30th day of October, 2019.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DOUGLASS PROPERTIES II, LLC.,

Appellant

v.

CITY OF OLYMPIA,

Respondents.

CERTIFICATE OF SERVICE

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GROFF MURPHY PLLC

October 30, 2019 - 11:01 AM

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Appellate Court Case Title: Douglass Properties II, LLC, Appellant v. City of Olympia, Respondent
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