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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
(FROM THE COURT OF APPEALS STATE OF WA,
DIVISION II No. 535581-II)

DOUGLASS PROPERTIES II, LLC,

Appellant,

v.

CITY OF OLYMPIA,

Respondent,

RESPONDENT CITY OF OLYMPIA'S ANSWER TO PETITION FOR REVIEW

Jeffrey S. Myers
Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508
Phone: (360) 754-3480
E-mail: jmyers@lldkb.com

Attorney for Respondent City of Olympia

TABLE OF CONTENTS

I. INTRODUCTION……………..…………………..………..……..……..1

II. COUNTERSTATEMENT OF FACTS………..……….……..………..1

III. ARGUMENT ………………………..……………………..……..5

A. THIS COURT REJECTED APPELLANT'S ARGUMENT THAT GMA IMPACT FEES ARE SUBJECT TO *NOLLAN/DOLAN* ANALYSIS IN *DREBICK*. ..……..…...…5

B. THE COURT OF APPEALS OPINION DOES NOT CONFLICT WITH *KOONTZ V. v. JOHNS RIVER WATER MANAGEMENT DISTRICT*………..……….……7

1. GMA Impact Fees are legislatively prescribed charges designed to raise revenue for facilities needed to accommodate future growth…………7

2. *Koontz* is distinguishable on its facts. …………10

3. Courts have refused to apply *Nolan/Dolan* to legislatively prescribed impact fees, both before and after *Koontz*...……..……....................11

C. THE COURT OF APPEALS CORRECTLY REJECTED APPELLANT'S FACTUAL CONTENTIONS AND UPHELD THE HEARING EXAMINER RULING...……15

1. The Court Properly Found That The Appellant Bears The Burden Of Proof and does not conflict with *Isla Verde* ……..…………..................................16

2. Douglass' Failure To Perform An Independent Fee Calculartion Is Fatal To His Request To Reassess His Fees..………...………………….............17

3. The Court Of Appeals Correctly Rejected Douglass' Objections To The City Fee……..……………............19

D. THE CITY IS ENTITLED TO ITS REASONABLE ATTORNEYS' FEES IN OPPOSING THE PETITION FOR REVIEW UNDER RCW 4.84.370. ……………..……..20

IV. CONCLUSION ………………………..………….………..…...20

TABLE OF AUTHORITIES

Cases

American Furniture Warehouse Co. v. Town of Gilbert,
425 P.3d 1099 (2018) ….…………….…………………….…11, 14, 15

Better Hous. for Long Beach v. Newsom, 452 F. Supp. 3d 921 (C.D. Cal. 2020)
………………………….……………………………………11

Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915)………………………13

Building Industry Association—Bay Area v. City of Oakland,
289 F.Supp.3d 1056 (N.D. Cal. 2018) affirmed, 775 Fed. Appx. 348
(9th Cir. 2019)..…………..……………………………….…… 15, 16

City of Fed. Way v. Town & Country Real Estate, LLC,
161 Wn.App. 17, 252 P.3d 382 (2011) …..……..……………………13

City of Olympia v. Drebick, 156 Wn.2d 289,
126 P.3d 802 (2006) ……..…………….…………………………passim

Dabbs v. Anne Arundel County, 182 A.2d 798 (Md. 2018) …..…12, 14, 16

Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309,
128 L.Ed.2d 304 (1994) …...…………….………………………passim

Dorsten v. Port of Skagit County, 32 Wn.App. 785,
650 P.2d 220 (1982) ……..…………….……………………………8

Hillis Homes v. Snohomish County, 97 Wn.2d 804,
650 P.2d 193 (1982) …..………………..…………………………….9

Home Builders Ass'n of Central Arizona v. City of Scottsdale,
930 P.2d 993 (Az. 1997) ...……………….…………………………..13

Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park

and Recreation Dist., 62 P.3d 404 (Or. App. 2003) …………..………..…13

Isla Verde Int'l Holdings v. City of Camas,
146 Wn.2d 740, 49 P.3d 867 (2002) …………….………………………..16, 17

Koontz v. Johns River Water Management District, 570 U.S. 595,
133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) ..…………….……………………passim

Krupp v. Breckenridge Sanitation Dist.,
19 P.3d 687 (Colo. 2001) …….……………..……………….………...….13

Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 53 Cal. Rptr.2d
424 (1996) …….……………..……………….…………..….13

McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995) ……..………13

New Castle Investments v. City of LaCenter,
98 Wn.App. 224, 989 P.2d 569 (1999) …….……………………………..9

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) …………….passim

Rogers Machinery v. Washington County,
45 P.3d 966 (Or. App. 2002) …………………..……………………..13

San Remo Hotel, LP v. City and County of San Francisco,
41 P.3d 87 (Cal.4th 2002) …………..……………..……………………..13

Santa Monica Beach, Ltd. v. Superior Court,
968 P.2d 993 (Cal.4th 1999) ………..……………..……………………..13

Spokane County v. Eastern Washington Growth Management Hearings Bd.,
173 Wn.App. 310, 293 P.3d 1248 (2013) …………..………………9

Wellington River Hollow v. King County,
121 Wn.App. 224, 54 P.3d 213 (2002) …..……………………………..17

West Linn Corp. Park, L.L.C. v. City of West Linn,
240 P.3d 29 (Or. 2010) ……..………..…………..……………………...13

Statutes

RCW 4.84.370 …………..………..…………..………………………....20

RCW 82.02.020 ..…………..………………………………..…10, 12, 17, 18

RCW 82.02.050 ……….....………..…………..…………………………9

RCW 82.02.050-.090 …..……..…………..………..…………………1, 11

RCW 82.02.050(3)……………………………………………………..…4

RCW 82.02.050(4) …........………..…………..……………………….5, 6

RCW 82.02.060 …......………..…………..……………………………7, 8

Ordinances

OMC 15.04.050(C) ….......………..………………………..…………1, 3, 8, 16

OMC 15.16.040.......……..…..……………………..………………..1, 2

OMC 18.75.040 …......………..……..……..…………………...……...16

Other Authorities

RAP 10.3(a)(5). ….......……………………..…………..……….………..3

RAP 13.1(b)(1), (3), (4) .. ….......……………………..…………..………1

RAP 18.1 ….......……………………..…………..……….……………..20

I. INTRODUCTION

Appellant Douglass Properties II, LLC ("Douglass") seeks review of the Court of Appeals decision issued on February 2, 2021 under RAP 13.1(b)(1), (3) and (4). Because the opinion is consistent with both state and federal precedents, including *Koontz v. v. Johns River Water Management District*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013), and was correctly decided consistent with RCW 82.02.050 - .090, the court should deny the petition for review.

II. COUNTERSTATEMENT OF FACTS

A. FACTS

On December 20, 2016, Appellant Douglass Properties II, LLC ("Douglass") filed building permit applications with the City for a proposed self-storage mini warehouse facility in West Olympia. The facility was comprised of numerous self-storage buildings and an administrative building. Since the applicant's self-storage proposal fit squarely within the mini-warehouse category, the City did not prepare an independent fee calculation ("IFC") but assessed the Transportation Impact Fees ("TIF") based on the Council's Fee Schedule in Olympia Municipal Code (OMC) 15.16.040. When the City does not elect to prepare an IFC, the City's code provides 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. Absent an IFC, the City will impose Schedule D fees. OMC 15.04.050(C). The applicant must make this election prior to obtaining permits. *Id.*

Douglass did not submit an IFC as allowed by OMC 15.04.050. Instead, it obtained its permits, first for Buildings 1 and 3-7. The TIF for these buildings were calculated as set forth in "Schedule D" adopted under OMC 15.16.040 and were paid without protest. AR 27-28. Later, 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 29. Building 2 contains 126,000 square feet, resulting in a TIF of $167,580. AR 71. Douglass obtained his permits paid the TIF calculated under Schedule D under protest. It then filed a Request for Director's Review of the TIF for Building 2. AR 33. The Director confirmed the TIF was correctly calculated on March 2, 2018. AR 45.

Douglass then appealed to the Hearing Examiner, arguing that the TIF was excessive and for the first time arguing that the City should not have calculated the fees using the methodology in 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 each of 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 appealed to Division Two which affirmed in an opinion issued on February 2, 2021.

B. APPELLANT'S MISLEADING AND ARGUMENTATIVE STATEMENT OF THE CASE.

Appellant asserts that he "proved" a lesser proportionate fee before the Examiner. Petition at 2. This is false. He did not prove any such thing because the Examiner rejected the underlying premises of his challenge to the City's Fee Schedule as "invalid", as well as holding that the demand to impose a fee proportionate to the individual impacts was contrary to *City of Olympia v. Drebick, 1*56 Wn.2d 289, 126 P.3d 802 (2006). AR at 18-19. Appellant failed to prove their case substantively, as the Examiner held and as the Opinion below found. Slip Opinion at 16.

Appellant's Statement of the Case further mis-states *Drebick* by erroneously contending that it required findings of fact on the claim of individual proportionality to the impacts of Douglass' specific project.[1] Appellant, Petition at 7, selectively quotes from *Drebick* to argue that it

[1] Appellant's Statement of the Case contains substantial amounts of argument in violation of RAP 10.3(a)(5).

requires the Hearing Examiner to make such findings. What this Court actually said was that the Examiner should not have made findings about individual project proportionality but should have stopped when he found the scheduled fees were proportionate to the demand for system improvements considered "as a whole". Appellant ignores the subsequent language which is contrary to his argument and states:

> However, the hearing examiner went on to hold that the City's calculations violated RCW 82.02.050(3) because Drebick's impact fee was not "reasonably related to the service demands or needs created by the Drebick proposal on *each* of the individual project groups on which the impact fees [were] based." CP at 22 (emphasis added); *see supra* note 6. But as discussed above, nothing in the plain language of the GMA impact fee statutes supports the hearing examiner's view that the City was required to calculate Drebick's impact fees by *individually* assessing his development's * *direct, specific* impact on *each* of the improvements listed in the City's capital facilities plan.

Drebick, 156 Wn.2d at 307-08.

In other words, the Hearing Examiner in *Drebick* was wrong to have engaged in the very analysis that Douglass now demands comparison of the impacts of the applicant's individual proposal and the GMA impact fee. Proportionality under GMA impact fees is determined between the GMA Impact Fees and the demand for new facilities created by new development "as a whole". *Drebick*, 156 Wn.2d at 307-308. Thus, the Supreme Court held:

> As the superior court correctly determined, the hearing examiner erred in concluding that the GMA impact fee

> statutes required the City to calculate Drebick's impact fee by making individualized assessments of the Drebick development's direct impact on each improvement planned in a service area. We hold that the City's method for calculating transportation impact fees complied with the plain language of the GMA impact fee statutes.

Drebick, 156 Wn.2d at 309.

III. ARGUMENT

A. THIS COURT REJECTED APPELLANT'S ARGUMENT THAT GMA IMPACT FEES ARE SUBJECT TO *NOLLAN/DOLAN* ANALYSIS IN *DREBICK*.

Appellant repeatedly misstates the holdings of *Drebick* and incorrectly posits that it held that the City is required to prove that GMA impact fees are proportionate to the impacts of an individual project. *Drebick* held the exact opposite. It held that the relevant comparison is between the legislatively adopted fees and new development "as a whole". *Drebick* thereby rejected the argument advanced by Appellant, that the fee must be proportionate to the impacts of their individual development.

Appellant contends that this court should review the Court of Appeals decision because it conflicts with *Drebick* and because GMA impact fees must comply with individual nexus and proportionality requirements set forth in *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Appellant contends that the "proportionate share" language of RCW 82.02.050(4) is the same as the

Nollan/Dolan standards. Petition at 3. Appellant then argues that the statute requires what *Nollan/Dolan* requires, stating that "both RCW 82.02.050(4) and *Nollan/Dolan* require impact fees to be roughly proportionate to the impact of the development." Petition at 12.

Drebick specifically considered and rejected these arguments. It reversed the Court of Appeals ruling that held GMA impact fees to the *Nollan/Dolan* standard. The Court held:

> First, to be clear, the Court of Appeals pointed to nothing in the legislative history that referred to the *Nollan* test, much less anything revealing that legislators had considered and deliberately applied language drawn from *Nollan*. Second, given that the legislature has used the phrase "reasonably related to" in literally dozens of statutes, its use of the phrase in the impact fee statutes could not be less remarkable; certainly, the presence of this commonplace standard does not, as the dissent claims, "conclusively demonstrate[ ]" the legislature's "deliberate use" of the *Nollan* standard.5 Finally, we find equally flawed the dissent's claim that "the definition of 'proportionate share' in RCW 82.02.090(5) supports the conclusion that the legislature intended the *Nollan* definition of 'reasonably related.' "

Drebick, 156 Wn.2d at 303.

Drebick does not require a hearing examiner to make findings comparing the fee imposed under the legislatively adopted fee schedule to the impacts of an individual proposal. As demonstrated above, it held the opposite and requires the fee schedule be evaluated in comparison to the impacts of planned new development "as a whole".

Drebick specifically approved of the City's Impact Fee Ordinance and its independent fee calculation requirements. The City's method for calculating TIFs was held to comply with the plain language of the GMA impact fee statutes. 156 Wn.2d at 309. The independent fee calculation, adopted pursuant to former RCW 82.02.060(4) and (5) is identical to the process now embodied by Olympia's ordinance.[2] The Supreme Court found no fault with Olympia's ordinance under the statute.

B. THE COURT OF APPEALS OPINION DOES NOT CONFLICT WITH *KOONTZ V. v. JOHNS RIVER WATER MANAGEMENT DISTRICT*

1. GMA Impact Fees are legislatively prescribed charges designed to raise revenue for facilities needed to accommodate future growth.

In an effort to avoid the myriad cases holding that *Koontz*, *Nollan* and *Dolan* do not apply to legislative enactments, Appellant makes a new argument –that impact fees are ***adjudicative*** fees, subject to *Nollan/Dolan* under *Koontz*, not "legislatively prescribed" uniform fees. Petition at 15. Appellant reverses course from his prior appellate briefs where appellant

[2] Nevertheless, Appellant argues that the Hearing Examiner must allow such a comparison even where the applicant has failed to take advantage of the opportunity to allow consideration of individual circumstances by submitting an IFC, based on the findings at issue in *Drebick*. Appellant fails to consider that 1) Drebick did submit an independent fee calculation, 156 Wn.2d at 293, and 2) there, the Hearing Examiner's requirement under *Nollan* and *Dolan* to compare the fee schedule to project specific impacts was held to be error. *Id.,* at 307-308.

conceded that the City's impact fee schedule was "legislatively" adopted no less than 5 times. Appellant's Opening Brief at 2, 22, 29 and 31. [3]

Appellant misrepresents the City's fees as adjudicative, when they are imposed pursuant to a legislatively adopted schedule. Petition at 14. He argues this because the statute requires a mechanism that Douglass admittedly did not use, an independent fee calculation process to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly. Since Douglass chose to have his fees calculated under the standard legislatively adopted schedule, he cannot complain that the City did not consider what Douglass failed to present under the ordinance authorized by RCW 82.02.060(5) and (6). [4]

Appellant cites no authority to support the belated contention that the ability to adjust fees to ensure fairness through an IFC renders them "adjudicative". Under Washington law, it is clear that GMA impact fees, unlike ad hoc fees in lieu of mitigation, are legislatively imposed. See *Dorsten v. Port of Skagit County,* 32 Wn.App. 785, 788, 650 P.2d 220 (1982) (factors to distinguish legislative and quasi-judicial actions).

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[3] Plaintiff did not raise the contention that the City's impact fees required by the City's ordinance are "adjudicative" until his reply brief below. Reply at 2.

[4] Appellant wants to have it both ways, the fees he argues are not legislative because the ordinances adopting them allow consideration of unique circumstances, but he need not follow the process established by that ordinance to submit such information. By failing to submit an IFC as required by the City's ordinance, Douglass elected the very fee that he now contests. See, OMC 15.04.050 (C).

Applying these factors, the City's impact fee ordinance was adopted by ordinance as required by RCW 82.02.050. The fees are generally applicable to all new development that requires building permits. OMC 15.04.040. The fees are based on a legislatively approved schedule after consideration of a formula and are designed to raise revenue to pay for system improvements necessitated by new development. As such, these are in the nature of taxes, not mitigation charges. *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 650 P.2d 193 (1982); *New Castle Investments v. City of LaCenter*, 98 Wn.App. 224, 989 P.2d 569 (1999). By enacting the GMA impact fee statute, the legislature intended to enable cities to plan for new growth and to recoup from developers a predictable share of the infrastructure costs attributable to the planned growth, with the qualification that the local government is to protect specific developments from impact fees that were arbitrary or that duplicated the amount paid for the same impact. *Spokane County v. Eastern Washington Growth Management Hearings Bd.,* 173 Wn.App. 310, 293 P.3d 1248 (2013). As such, the Court of Appeals correctly ruled that GMA impact fees are not the type of exactions governed by *Koontz, Nollan or Dolan.*

2. *Koontz* is distinguishable on its facts.

Likewise, the Court of Appeals correctly ruled that *Koontz* 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 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* tests applicable to adjudicative exactions of property to mitigate project specific impacts to monetary exactions imposed for the same type of mitigation. *Id.,* 570 U.S. at 602, 133 S.Ct. at 2593. *Koontz* concerned "in lieu" fees similar to those allowed by RCW 82.02.020, stating:

> 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 "so-called" monetary exactions "in lieu of" a dedication or onsite mitigation measures. It did not deal with fees

imposed pursuant to a generally applicable, legislatively adopted formula, such as those in RCW 82.02.050 – .090. *Koontz* recognized that it does not apply to legislatively adopted fees, stating:

> 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.

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

The Court of Appeals below correctly distinguished the Supreme Court decision in *Koontz*, and correctly observed that 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. See, Opinion at 11-12. 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. Opinion at 12, n.7, citing *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 163, 425 P.3d 1099 (Ariz. Ct. App. 2018); *Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 932 (C.D. Cal. 2020); *Dabbs v. Anne Arundel Cnty.*, 458 Md. 331, 357, 182 A.3d 798 (2018)

Prior to *Koontz*, numerous courts held that the site specific nexus/proportionality applied only to adjudicative exactions imposed on a

project basis to mitigate project specific impacts. *Drebick* falls into this category. Douglass attempts to apply *Nollan-Dolan* analysis to demand proportionality between legislatively prescribed GMA impact fees and individual projects, a proposition *Drebick* rejected. *Drebick* distinguished between monetary exactions "in lieu" of mitigation or dedication, which were at issue in *Koontz,* from GMA impact fees at issue here, stating:

> 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.

Drebick, 156 Wn.2d at 302.

The Court of Appeals Opinion below joined numerous other courts rejecting the application of *Nollan* and *Dolan* to legislatively prescribed fees. Washington courts followed *Drebick's* distinction between legislatively authorized GMA impact fees, which are not subject to *Nollan/Dolan* analysis, and fees "in 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).

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)).[5]

Appellants failed to cite a single case applying nexus and proportionality analysis to legislatively adopted fees under *Nollan, Dolan*[6] or *Koontz*, even in light of *Koontz'* holding in 2013 that it applies to "monetary" exactions. This is so because it is limited to ad hoc exactions where an adjudicative condition would be unconstitutional. This holding does not apply to legislatively adopted fees, such as the TIFs here.

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[5] Besides *Drebick,* 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 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)).

[6] *Dolan* itself distinguishes between constitutionally valid legislative determinations and ad hoc "adjudicative determinations" to impose individual conditions on a permit. *Dolan v. City of Tigard*, 512 U.S. at 385, 114 S. Ct. at, 2316.

The first case to consider such a claim after *Koontz* was *Dabbs v. Anne Arundel County*, 182 A.2d 798 (Md. April 10, 2018) where Maryland's highest court held that area wide impact fees similar to those assessed under the GMA are not subject to *Nollan/Dolan* takings analysis. *Dabbs* rejected 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. The Court there held:

> 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. (Emphasis added).

Arizona also rejects applying individual nexus/proportionality to generally applicable, legislatively adopted impact fees in light of *Koontz*. 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. *Am. Furniture Warehouse* held that *Koontz* did not change the result:

> *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 … *Koontz* did not abrogate the legislative/adjudicative dichotomy as AFW suggests.

Am. Furniture Warehouse Co., 425 P.3d at 1106.[7]

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.

C. THE COURT OF APPEALS CORRECTLY REJECTED APPELLANT'S FACTUAL CONTENTIONS AND UPHELD THE HEARING EXAMINER RULING.

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 correctly applied the standard of review mandated by City Ordinance, OMC 18.75.040. Further, his ruling expressly disagreed with Appellant's factual contentions.[8]

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[7] 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), affirmed, 775 Fed.Appx. 348 (9th Cir. 2019) (takings claim based on *Koontz* was precluded against a legislative act, rather than an adjudicative land-use determination).

[8] Douglass contends that the City has not argued a failure to exhaust administrative remedies. Petition at 19. This is not correct. The City repeatedly has

1. The Court Properly Found That The Appellant Bears The Burden Of Proof and does not conflict with *Isla Verde*.

Douglass makes the astonishing and legally incorrect assertion that the City had the burden of proof in considering the applicant's appeal. The Court of Appeals correctly distinguished *Isla Verde Int'l Holdings v. City of Camas,* 146 Wn.2d 740, 49 P.3d 867 (2002) because it 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 legislatively imposed GMA impact fees. Opinion at 13-14.

The Opinion noted that Appellant's argument rested on the faulty premise that GMA impact fees were subject to *Nollan-Dolan* scrutiny, which was in conflict with *Drebick*. Cases under RCW 82.02.020, including *Isla Verde,* do not apply to GMA impact fees. Opinion at 14. Appellant refuses to recognize the distinction between fees "in lieu" of mitigation or dedication and legislatively imposed GMA impact fees. This misunderstanding of the law pervades Appellant's position.

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argued that the failure to submit an IFC prior to obtaining a building permit forecloses the ability to create an IFC during an appeal. The City made this argument consistently to the Examiner, AR 243, 257-58, as well as before the Superior Court. CP 29-301. 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).

Secondly, Washington cases involving challenges to GMA impact fees places the burden of proof on appellants, not upon the City, consistent with the deference due and presumption of validity for adopted ordinances. Appellant again ignores adverse cases. 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, holding the opposite:

> 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).

Finally, as cited by the Court of Appeals, the Hearing Examiner correctly followed the City's ordinance explicitly placing the burden of proof on the appellant. Opinion at 14. Appellant simply disregards law that is inconvenient to their position, instead relying on inapposite case law applying dedications under RCW 82.02.020. The Court of Appeals opinion correctly recognized the authority of the City under RCW 82.02.070 to adopt ordinances governing its administrative appeal process.

2. Douglass' Failure To Perform An Independent Fee Calculation Is Fatal To His Request To Reassess His Fees.

Appellant completely misinterprets the City's impact fee ordinance and its requirements to either elect 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.

For the first time, the Petition now offers an explanation why no IFC was submitted, by falsely claiming that the City would not have accepted any IFC from the applicant because there was "no dispute" that the project is "properly classified as a mini-warehouse" under the schedule. Petition at 5, n.2 (citing CR 258). This misrepresents the City's statements below. The City argued below that the City's choice of whether to rely on its schedule or prepare its own IFC turns on whether the proposal falls within the categories in the schedule. CR 258. Since the storage proposal is indisputably a "mini-warehouse", the City did not prepare an IFC, but its choice did not foreclose Douglass submitting its own IFC. At no time did the City state that they would not accept an IFC or tell Douglass that he could do so for the first time on appeal to the Examiner. The City's expert testified that Douglass could have included its analysis in an IFC and it would have been considered. ROP 159. The petition misrepresents the

record and falsely states otherwise. Petition at 19. In the absence of an IFC, the City was required to impose the impact fee set forth in Schedule D. OMC 15.04.040(A).

3. The Court Of Appeals Correctly Rejected Douglass' Objections To The City Fee.

The Court of Appeals Opinion correctly upheld the Examiner's rejection of Appellant's substantive arguments. Opinion at 15-16. The City proved the validity of its fees via expert testimony by Don Samdahl, its staff report and studies supporting the adoption of its fee schedule that the TIF ordinance as rationally based, following the same methodology previously upheld in *Drebick*. ROP 149-160; AR 30, 118-120, 148-49.

The Examiner correctly rejected Appellant's factual arguments holding that 1) use of floor area was rationally based on the ITE manual; 2) the City did not err by failing to use a version of the ITE manual that did not exist when the Council adopted their impact fee schedule; 3) the applicant's anecdotal data on the number of new trips did not overcome the City's reliance on the ITE manual; and 4) that the trip length adjustments was based on valid available information and was not overcome by Appellant's intuitive and anecdotal evidence. AR 18-19.

D. THE CITY IS ENTITLED TO ITS REASONABLE ATTORNEYS FEES IN OPPOSING THE PETITION FOR REVIEW UNDER RCW 4.84.370.

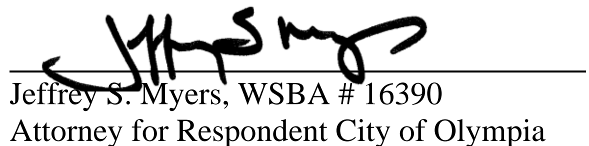
Under RCW 4.84.370, a party who prevails before the City, in all subsequent judicial proceedings and on appeal is entitled to an award of its reasonable attorney's fees and costs.. The City of Olympia was awarded its fees under RCW 4.84.370 as the prevailing party before the Court of Appeals. The Court should deny the Petition for Review and award attorney's fees incurred in opposition under RCW 4.84.370 and RAP 18.1.

IV. CONCLUSION

The Court should deny the Petition for Review because the Court of Appeal decision is consistent with applicable case law and does not result in violation of Appellant's rights. It does not meet the criteria for granting review under RAP 13.4. Finally, the Court should award the City its attorney's fees incurred in opposing the Petition under RCW 4.84.370.

DATED this 12th day of April, 2021.

LAW, LYMAN, DANIEL, KAMERRER &
BOGDANOVICH, P.S.



Jeffrey S. Myers, WSBA # 16390
Attorney for Respondent City of Olympia

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I served the foregoing with the Clerk of the Court for the Court of Appeals of the State of Washington, Division II using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 12th day of April, 2021.

/s/ *Lisa Gates*
Lisa Gates, Assistant to Jeffrey S. Myers

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

April 12, 2021 - 4:20 PM

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