THE SUPREME COURT OF WASHINGTON

DOUGLASS PROPERTIES II, LLC, Petitioner, v. CITY OF OLYMPIA, Respondent.	No. 99545-1 **ORDER** (Filed Jun. 30, 2021) Court of Appeals No. 53558-1-II

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its June 29, 2021, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied and the Respondent's request for attorney fees for filing an answer to the petition for review is granted. The Respondent is awarded reasonable attorney fees and expenses pursuant to RAP 18.1(j). The amount of the attorney fees and expenses will be determined by the Supreme Court Clerk pursuant to RAP 18.1. Pursuant to RAP 18.1(d), the Respondent should file an affidavit with the Clerk of the Washington State Supreme Court.

DATED at Olympia, Washington, this 30th day of June, 2021.

For the Court

/s/ González, C.J.
CHIEF JUSTICE

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION II

DOUGLASS PROPERTIES II, LLC, Appellant, v. CITY OF OLYMPIA, Respondent.	No. 53558-1-II PUBLISHED OPINION (Filed Feb. 2, 2021)

WORSWICK, J.—Douglass Properties II LLC (Douglass) appeals a superior court order affirming the Olympia Hearing Examiner's decision regarding transportation impact fees (traffic impact fees). That order upheld the imposition of $167,580 in traffic impact fees as a condition of the City of Olympia's issuance of a building permit to construct a storage facility. Douglass argues that the hearing examiner's decision was erroneous because it (1) made findings of fact and conclusions of law without placing the burden of proof on the City to establish that the traffic impact fees were roughly proportionate to the impacts of Douglass's project as required by *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (*Nollan/Dolan* test),[1] and (2) failed to conclude that the

[1] Together these cases require a nexus and rough proportionality between a government's demand and the effects of

City's traffic impact fees were excessive and not roughly proportionate. We affirm.

FACTS

I. BACKGROUND

A. *Permit Application*

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

---

development when the government demands that a landowner relinquish a portion of his property as a condition of a land use permit.

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

also declined to prepare its own independent fee calculation, as provided for under OMC 15.04.050(D). In 2018, Douglass paid all the impact fees. As to Building 2 only, Douglass paid these fees under protest and appealed the impact fee determination.

B. *City of Olympia Hearing Examiner*

In 2018, the City's hearing examiner held a hearing to consider Douglass's appeal. At the onset of the hearing, the hearing examiner stated that Douglass had the burden of proof to show that the City's traffic impact fee for Building 2 was "clearly erroneous." Clerk's Papers (CP) at 58. The parties then presented evidence in the form of exhibits and witness testimony.

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

Douglass challenged three of these variables: the number of trips per peak hour, the percentage of new trips, and the trip adjustment variable. Douglass argued the traffic impact fee should have been modified consistent with its own calculations, notwithstanding that Douglass neither requested an independent impact fee calculation from the City, nor submitted his own independent impact fee calculation for

consideration prior to issuance of the permit.[3] Douglass urged the hearing examiner to either find the City's impact fee to be clearly erroneous or, in the alternative, to undertake an independent fee calculation and determine a new fee that was consistent with Douglass's alternative calculation. Douglass contended that a failure to adjust the City's impact fee would be a violation of due process under *Nollan* and *Dolan*.[4]

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

---

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

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

calculating traffic impact fees. The transportation study formula for calculating such fees included the factors required by RCW 82.02.060, including:

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

CP at 293.

Following the hearing, the hearing examiner denied Douglass's appeal, deciding that the impact fee was correctly calculated in accordance with the ordinance. The hearing examiner concluded that it did not have the authority to overrule *City of Olympia v.*

Drebick,[5] which the hearing examiner concluded was the controlling authority. The hearing examiner reaffirmed that Douglass had the burden of proof at the hearing, and that the three challenged variables were not clearly erroneous. The hearing examiner further concluded that the City's actions were not clearly erroneous when the City did not extemporaneously conduct an independent fee assessment, and that a hearing examiner had no authority to conduct or consider an independent fee assessment for the first time on appeal.

C. *Judicial Review*

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

ANALYSIS

Douglass argues that the City's traffic impact fee is subject to Fifth Amendment scrutiny because it amounts to a regulatory taking of his property. Douglass argues that because the fee is a regulatory taking, the City had the burden to prove to the hearing examiner that the fees had a nexus and were roughly

---

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

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

I. Legal Principles and Standards of Review

A. *Standards of Review*

We review a LUPA action under chapter 36.70C RCW. *Ellensburg Cement Products, Inc. v. Kittitas County*, 179 Wn.2d 737, 742, 317 P.3d 1037 (2014). We stand in the same position as the superior court, and review the record that was before the hearing examiner. *Ellensburg Cement Products*, 179 Wn.2d at 742. The party seeking relief has the burden of establishing any of the following standards:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing

> for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

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

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

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

We adhere to "the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019).

B. *State Law*

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

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

RCW 82.02.050(4).

An "impact fee" is defined as

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

RCW 82.02.090(3).

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

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

> (a) The cost of public facilities necessitated by new development;

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

RCW 82.02.060(1).

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

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

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

> [T]his section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a *direct result* of the proposed development or plat to which the dedication of land or easement is to apply.
>
> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment *in lieu of* a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat.

RCW 82.02.020 (emphasis added).

C. *Local Ordinance*

The City enacted OMC 15.04.040 to collect transportation impact fees under RCW 82.02.050. Schedule D, in OMC 15.16.040 includes the transportation impact fees at issue here. The fees in Schedule D, are generated by the transportation study formula, and the fees are outlined in the "2009 Transportation Impact Fee Collection Rate Document." OMC 15.08.050(A).

Schedule D is reviewed annually to consider adjustments "to account for system improvement cost increases due to increased costs of labor, construction materials and real property." OMC 15.08.050(B).

II. LEGISLATIVELY IMPOSED GENERALLY APPLICABLE FEE

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

A. *Discussion*

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

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

In the cases of *Nollan* and *Dolan*, the Supreme Court relied on the Fifth Amendment to hold that the

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

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

U.S. at 628 (Kagan, J., dissenting). In applying the *Nollan/Dolan* test to this scheme, the court stressed that it was not expanding *Nollan* and *Dolan* much beyond its narrow confines, stating:

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

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

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

In *Drebick*, the hearing examiner ruled that a city's impact fee did not comply with RCW 82.02.050 because it failed to require an individualized assessment of a new development's direct impact on each improvement planned in a service area. 156 Wn.2d at 309. Our Supreme Court reversed. 156 Wn.2d at 309. The appellant in *Drebick* sought an independent fee calculation adjustment before it challenged whether

---

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

the City's ordinance complied with state law. 156 Wn.2d at 293. The Court explained that because GMA impact fees were legislatively prescribed development fees, *Nollan/Dolan* was not applicable, noting the distinctions from other jurisdictions where Fifth Amendment scrutiny did apply but only to fees that were direct mitigation and in lieu of possessory exactions. *Drebick*, 156 Wn.2d at 302.

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

Although the decision in *Drebick* was based on statutory construction, the distinction observed between "direct mitigation fees" and those "legislative prescribed development fees" from the GMA is instructive. 156 Wn.2d at 303. The same important factual distinction that our Supreme Court explained in *Drebick* exists here between the traffic impact fees in the instant case and those found in *Koontz*. The fees in *Koontz* were "not . . . generally applicable" to all permit applicants. 570 U.S. at 628 (Kagan, J., dissenting). Additionally, the fee imposed in *Koontz* was in lieu of a conveyance of a conservation easement. 570 U.S. at 617. Although *Koontz* expanded the scope of takings that require *Nollan/Dolan* scrutiny to include

---

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

"monetary exactions," it did not expand that scope to include legislatively prescribed development fees like those at issue here. Moreover, the language in *Koontz* clearly intended to limit its application, by explaining that the funds there were linked to a specific, identifiable property interest. We therefore conclude that *Koontz* does not invalidate *Drebick's* holding with respect to legislatively imposed generally applicable fees because these fees are outside the scope of *Koontz*.

Douglass also relies on *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board*, 96 Wash. App. 522, 533, 979 P.2d 864 (1999), a pre-*Koontz* case, to argue that *Nollan/Dolan* scrutiny applies to the City's traffic impact fees. In *HEAL*, Division One of this court explained that *Nollan/Dolan* scrutiny is required under the Growth Management Act, 36.70A RCW, for conditions other than an outright dedication of land, but that case did not specifically address impact fees. *HEAL*, 96 Wash. App. at 534. *HEAL* only concerned itself with the denial of a project based on less than "only the best available science [that] could provide its policy-makers with facts supporting those policies and regulations which, when applied to an application, will assure that the nexus and rough proportionality tests are met." 96 Wash. App. at 534. *HEAL*'s holding is immaterial to the instant case involving monetary exactions imposed based on a statutory formula.

We hold that *Drebick* is still good law, and that *Nollan/Dolan* scrutiny does not apply to the legislatively prescribed development traffic impact fees at

issue in this case subsequent to *Koontz*. Thus, the hearing examiner did not err by concluding that the *Nollan/Dolan* rule did not apply.

III. HEARING EXAMINER RULINGS

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

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

Douglass relies on *Isla Verde International Holdings v. City of Camas*, 146 Wn.2d at 763 n.16, to argue that the City bears the burden of proof to show adequate proportionality under RCW 82.02.050(4). But *Isla Verde International Holdings* was a case concerning RCW 82.02.020, not RCW 82.02.050. 146 Wn.2d at 753-54; *see Drebick*, 156 Wn.2d at 302 (distinguishing *direct* mitigation fees like those referred to in RCW 82.02.020 from legislatively prescribed development fees). The court in *Isla Verde International Holdings*

construed the burden of proof from the plain language of that wholly separate statute, which contains language that does not appear in the provision at issue here. 146 Wn.2d at 761.[8] Moreover, the development fees in *Isla Verde International Holdings* were not legislatively imposed generally applicable fees like those imposed here. The fees in *Isla Verde International Holdings* were statutory exceptions to the preclusive effect of RCW 82.02.020. 146 Wn.2d at 755. "[T]he burden of establishing a statutory exception is on the party claiming the exception." *Home Builders Ass'n of Kitsap Cnty. v. City of Bainbridge Island*, 137 Wn. App. 338, 347, 153 P.3d 231 (2007) (citing *Isla Verde*, 146 Wn.2d at 759).

As discussed above, *Nollan/Dolan* scrutiny does not apply to legislatively derived traffic impact fees such as the traffic impact fee in this case, so Douglass's

---

[8] RCW 82.02.020 provides:

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

(Emphasis added).

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

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

B. *Validity of Fee Not Clearly Erroneous*

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

Drebick. Br. of Resp't at 40. We hold that the hearing examiner's decision to uphold the fee calculation based on the requisite City ordinance was not clearly erroneous.

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

ATTORNEY FEES

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

In a LUPA appeal, the prevailing party on appeal is entitled to an award of its reasonable attorney fees and costs. RCW 4.84.370(1). Under the LUPA statute, the prevailing party is the party that prevailed or has substantially prevailed before the county, city, or town, and has prevailed or substantially prevailed before this court or the Supreme Court, and has prevailed or substantially prevailed in all subsequent judicial proceedings. RCW 4.84.370(1)(a), (b). The City prevailed before the hearing examiner, at the superior court, and on this appeal, and is thus entitled to an award of its attorney fees under RCW 4.84.370 and RAP 18.1

CONCLUSION

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

/s/ Worswick P.J.
Worswick, P.J.

We concur:

/s/ Glasgow, J.
Glasgow, J.

/s/ Cruser, J.
Cruser, J.

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

DOUGLASS PROPERTIES II, LLC, Petitioner, vs. CITY OF OLYMPIA, Respondent	No. 18-2-04520-34 **ORDER AFFIRMING LAND USE DECISION** (Filed May 17, 2019)

On May 17, 2019, this matter came on for hearing of the Land Use Petition of Douglass Properties II, LLC pursuant to the Land Use Petition Act, Ch. 36.70C RCW. The court heard oral argument of the parties through counsel for Petitioner, William J. Crittenden and Michael Murphy, and through counsel for Respondent City of Olympia, Jeffrey S. Myers. In consideration of the briefs submitted by the parties, and considering the arguments herein, the Court hereby ORDERS, DECREES AND ADJUDGES:

1. Petitioner's Land Use Petition is hereby DENIED.
2. The City of Olympia Hearing Examiner held a hearing on August 17, 2018 and did not engage in unlawful procedure or failed to follow a prescribed process.
3. The land use decision issued by the Hearing Examiner dated August 23, 2018 is not an erroneous interpretation of the law, after allowing for deference as is due the construction of a law by a local jurisdiction with expertise.

4. The land use decision issued by the Hearing Examiner dated August 23, 2018 is supported by evidence that is substantial when viewed in light of the whole record before the court.

5. The land use decision issued by the Hearing Examiner dated August 23, 2018 is not a clearly erroneous application of the law to the facts.

6. The land use decision issued by the Hearing Examiner dated August 23, 2018 was within the authority or jurisdiction of the City of Olympia Hearing Examiner under its code, OMC 15.04.090(d).

7. The land use decision does not violate the constitutional rights of Petitioner Douglass Properties II, LLC.

8. The decision of the Hearing Examiner is AFFIRMED.

DONE IN OPEN COURT this 17th day of May, ~~2018~~ [2019 s/JCS].

/s/ John Skinder
Hon. John Skinder

Presented by:

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

/s/ Jeffrey S. Myers
Jeffrey S. Myers, WSBA No. 16390
Attorney for Respondent
City of Olympia

[Approved as to form /s/ WJ Crittenden]

Approved as to form:

GROFF MURPHY, PLLC

/s/ _____

Michael J. Murphy, WSBA #11132
William John Crittenden, WSBA #22033
Attorneys for Petitioner Douglass Properties

BEFORE THE CITY OF OLYMPIA
HEARINGS EXAMINER

IN RE:	)	HEARING NO. 17-2150
DOUGLASS PROPERTIES II, LLC, Appellant.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION DENYING APPEAL
	)	(Filed Aug. 23, 2018)

APPLICANT/APPELLANT:

Douglass Properties II, LLC
1402 E. Magnesium Road
Spokane, Washington 99217

REPRESENTATIVES:

William John Crittenden
Groff, Murphy, PLLC
300 E. Pine
Seattle, Washington 98122

Jeffrey Myers, Special Counsel for City of Olympia
P.O. Box 11880
Olympia, Washington 98508

PROJECT LOCATION:

2225 Cooper Point Road S.W. #2 Building

SUMMARY OF REQUEST:

Applicant/Appellant has appealed the Transportation Impact Fee imposed on Building #2 of a seven-building mini warehouse facility at 2225 Cooper Point Road S.W. and Auto Mall Drive S.W.

SUMMARY OF DECISION:

The Transportation Impact Fee was correctly calculated in accordance with the Transportation Impact Fee Ordinance. The appeal is therefore denied.

BACKGROUND

On December 20, 2016, the Applicant/Appellant, Douglass Properties II, LLC ("Douglass") filed building permit applications with the City for Building #1 and Buildings #3 through #7 of a proposed mini warehouse (self storage) facility in West Olympia. On February 22, 2017, Douglass submitted a permit application for the project's administrative office. Then, on May 24, 2017, Douglass filed a building permit application for Building #2. Building #2 is by far the largest of the seven storage structures comprising this mini warehouse facility.

Transportation Impact Fees for Buildings #1 and #3 through #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. Traffic impact fees for Building #2 were calculated according to the slightly higher 2017 rate of $1.33 per square feet. As Building #2 contains 126,000 square feet, this resulted in a Transportation Impact Fee of $167,580 for Building #2.

Consistent with RCW 82.02.060(4), the City allows applicants the opportunity to submit an independent

fee analysis to provide evidence that the impact fee established by Schedule D is excessive under the specific circumstances of the project. OMC 15.04.050. Douglass chose not to submit an independent fee analysis. Instead, on February 5, 2018, Douglass paid the

Transportation Impact Fee for Building #2 under protest and then timely appealed the fee.

On appeal Douglass argues that:

1. Despite Douglass not having asked the City to undertake an independent fee analysis, the City's Director should have, on his own initiative, undertaken an independent fee calculation.

2. Several variables contained in Schedule D are calculated in error:

a. The selection of Gross Floor Area (GFA) as the unit of measure is in error, and the proper unit of measure is the number of storage units;

b. The reliance on .26 PM trips per unit of measure is in error and should be reduced to .17;

c. The determination that all trips to the facility are "new trips" is in error and should be reduced;

d. The length of the trip adjustment factor is not well supported and should be eliminated; and

e. Overall, the Transportation Impact Fee is excessive and violates substantive due process rights.

3. On appeal the Hearing Examiner has independent authority to determine an appropriate Transportation Impact Fee even though the Applicant did not present an independent fee analysis to the City during building permit review.

At the conclusion of the hearing Douglass argued that the Transportation Impact Fee should be reduced to $48,179.93.

HEARING

The hearing on Douglass's appeal was held on August 17, 2018, in the City Council Chambers in City Hall. The Applicant appeared through its owner, Lancze Douglass, and was represented by William Crittenden. The City appeared through Tim Smith, Principal Planner, and was represented by Jeffrey Myers, Special Counsel.

Pursuant to an earlier Pre-Hearing Order both parties submitted briefing, witness lists and intended exhibits prior to the hearing. The City submitted its Staff Report with eleven attachments (Exhibit 1). Douglass submitted 24 exhibits, admitted as Exhibits A-1 through A-24. The only other exhibit submitted during the hearing was a copy of the 2001 Thurston County Superior Court Decision in *Olympia v. Drebick*, Case No. 00-2-021522-3, including the trial judge's accompanying letter. These additional documents are collectively admitted as Exhibit 2.

The City presented the testimony of Tim Smith, its Principal Planner and author of the Staff Report, and Don Samdahl, a consulting Transportation Engineer involved with the City's Transportation Impact Fee since its inception in 1995. Douglass presented the testimony of its owner, Mr. Lancze Douglass, and Todd Whipple, consulting Traffic Engineer. All testimony was taken under oath.

FINDINGS OF FACT

Any Findings of Fact contained in the foregoing Background and Hearing sections are incorporated herein by reference and adopted by the Hearing Examiner as his own Findings of Fact.

A. Findings Relating to the City's Enactment of the Transportation Impact Fee.

1. The Growth Management Act (GMA), Chapter 36.70A, empowers Olympia and other local governments to enact Transportation Impact Fees. The requirements for establishing the impact fee are set forth in RCW 82.02.060.

2. Olympia initially implemented a Transportation Impact Fee program in 1995. It was updated in 1998, 2002, 2006, and 2009. (Staff Report)

3. Pursuant to RCW 82.02.060 Olympia enacted Chapters 15.04, 15.08 and 15.16 to the City's Municipal Code. Among other things, these code chapters provide the following:

a. OMC 15.04.040 establishes Transportation Impact Fees to be calculated in accordance with either the schedule found in OMC Chapter 15.16 (Schedule D) or through an independent fee calculation as provided for in OMC 15.04.050.

b. OMC 15.04.040(d) requires that Transportation Impact Fees be assessed at the time the complete building permit application is submitted for each unit, using either the Schedule D then in effect or an independent fee calculation, at the election of the applicant.

c. OMC 15.04.050(a) allows the director to prepare an independent fee calculation if the director in his/her judgment, finds that none of the fee categories or fee amounts found in Chapter 15.16 accurately describe or capture the impacts of the proposed development.

d. OMC 15.04.050(c) allows the applicant the choice of either having impacts fees determined according to the schedule found in Chapter 15.16 (Schedule D) or elect an independent fee calculation. If the applicant elects an independent fee calculation, the applicant may prepare and submit his/her own independent fee calculation, or may request the City prepare an independent fee calculation. The applicant must make the election between fees calculated under the schedules or an independent fee calculation prior to issuance of the building permit for the development. If the applicant elects to prepare its own independent fee calculation, the applicant must submit documentation

showing the basis upon which the independent fee calculation was made.

e. OMC 15.04.050(e) requires that any applicant providing its own independent fee calculation shall pay the City a fee of $500 plus the City's actual costs incurred in reviewing the application.

f. OMC 15.04.050(f) recognizes that while the calculations relied upon by the City in its schedules are presumed valid, the director is to exercise good faith in reviewing any information provided by the applicant challenging the accuracy of the calculations and, if warranted, 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."

g. OMC 15.08.050 acknowledges that the Transportation Impact Fees in Schedule D (OMC 15.16.040), are generated from the formula for calculating impacts fees set forth in the Transportation Study. These fees are to be reviewed annually to consider adjustments to account for system improvement cost increases.

h. OMC 15.16.040, more commonly referred to as "Schedule D", sets forth the Transportation Impact Fee Rate Schedule for each land use. Schedule D also identifies the unit of measure and rate for each land use. For example, the unit of measure for mini warehouses is square feet of Gross Floor Area and the rate is $1.33 per square foot (including a .02 administrative fee). This means that a mini warehouse project having its Transportation Impact Fee calculated under

Schedule D will be imposed a Transportation Impact Fee of $1.33 per square foot of Gross Floor Area (in 2016 the fee was $1.29 per square foot).

4. The Transportation Impact Fee of $1.33 for mini warehouses is based upon a formula explained more fully in the Transportation Impact Fee Update dated November 2016 (Attachment 11 to the City Staff Report). This fee begins with the calculation that the cost to the City of projected transportation improvements resulting solely from new traffic trips is $18,590,836. The study anticipates 6,241 new PM Peak Hour trips from new development, resulting in a cost to the City of $2,979 per each new PM Peak Hour trip. The City also imposes an administrative fee of $20 per new trip, resulting in a total cost per new trip of $2,999.

5. Based upon this calculated cost of $2,999 per new PM Peak trip, the specific impact fee for each land use is then calculated based upon several variables found in Table 3 of the Transportation Impact Fee Update. These variables include:

a. An adjustment for the number of PM Peak trips per unit of measure;

b. The number of trips that are "new trips"; and

c. An adjustment for the anticipated length of each trip, with 3.0 miles being the standard trip length.

6. Olympia calculates that for every 1,000 square feet of new mini warehouse .26 of a PM Peak

trip will be generated. This number is derived from the ITE Trip Generation Manual, 9th Edition.

7. Olympia calculates that each trip to a mini warehouse during the PM Peak Hour will be a "new trip", that is, a trip specifically related to the mini warehouse and not a "pass by" trip where the traveler merely stops in at the facility while traveling along the road to somewhere else. This is again based upon the ITE Trip Generation Manual.

8. Olympia calculates that on average each new PM Peak trip to a mini warehouse will be 5.1 miles in length, or 1.7 times the standard trip length of 3.0 miles. This trip adjustment calculation was originally established by the City in 1995. This calculation was based upon then available studies for warehouses in general as there were no separate studies for mini warehouses. The trip adjustment variable has remained unchanged since 1995.

9. The current Transportation Impact Fee of $1.33 is therefore based upon the following calculations: The number of thousands of square feet (126) times PM Peak trips per thousand square feet (.26) times number of trips that are new trips (100%) times standard length of trip compared to average trip length of 3.0 miles (1.7) times cost of each new trip ($2,999). Stated numerically for Douglass's Building #2, this translates to 126 x .26 x 1.00 x 1.7 x $2,999 = $167,020.

10. All of these variables are then converted to a simple fee per square foot, resulting in a slightly

different, final impact fee amount. For mini warehouses the Transportation Impact Fee per square foot is $1.33. The calculation for this fee is $2,999 ÷ 1,000 x .26 x 1.7 = $1.33. Applied to Building #2, this fee produces a final Transportation Impact Fee of $126,000 x $1.33 = $167,580. This is the Transportation Impact Fee imposed by the City on Douglass's Building #2.

11. Olympia's Transportation Impact Fee methodology was analyzed by our State Supreme Court in *City of Olympia v. Drebick*, 136 Wn.2d 289, 126 P.3rd 802 (2006). In *Drebick* the Court noted that the City's then Hearing Examiner had examined each of the components of the Transportation Impact Fee and found them to be correctly calculated, and that the fee is proportionate to and reasonably related to the demand for new capacity improvements considered as a whole, and that those improvements considered as a whole will benefit the Drebick development. "The Hearing Examiner thus found that the City's method for calculating Transportation Impact Fees met the statutory requirement that 'system improvements' be 'reasonably related to' and 'reasonably benefit' the specific development. RCW 82.02.050(3(a)-(c), .090(9)." *Drebick*, Supra at 306.

12. Except for minor adjustments and updates Olympia's Impact Fee Ordinance is the same as the one examined in the *Drebick* decision.

B. **Findings Relating to an Independent Fee Analysis.**

1. As noted earlier, a project's Transportation Impact Fee is established either by Schedule D or by an independent fee analysis.

2. As also noted earlier, the Director, in his/her judgment, can undertake an independent fee analysis without request by the applicant if the Director concludes that none of the fee categories or fee amounts found in Schedule D accurately describe or capture the impacts of the new development. OMC 15.04.050(a).

3. The Director, Mr. Smith, did not undertake an independent fee analysis pursuant to 15.04.050(a) for the reason that Mr. Smith did not see any reason to deviate from Schedule D. His decision was based upon the fact that mini warehouses are expressly provided for in the fee schedule and, further, that the Applicant had already submitted six other building applications for the project's other mini warehouse buildings, and had not objected to the use of Schedule D for the other six buildings.

4. As noted earlier, the applicant may request that the City undertake an independent fee analysis subject to payment of a $500 application fee. OMC 15.04.050(c) and (e).

5. Douglass did not ask the City to prepare an independent fee analysis, nor did Douglass pay the $500 fee to have the City undertake an independent fee analysis.

6. As noted earlier, the applicant may prepare its own independent fee analysis. OMC 15.04.050(d). If the applicant elects to undertake its own independent fee analysis it must pay an application fee of $500 together with a down payment of $500 for the City's cost in reviewing the independent fee calculation. OMC 15.04.050(e).

7. Douglass did not undertake an independent fee analysis nor did it pay the required fees associated with an independent fee analysis.

8. The building application for Building 2 was submitted on May 24, 2017. The building permit was issued January 31, 2018, approximately eight months later.

9. Despite having eight months between submission of the building permit application and its approval, Douglass elected not use this available time to undertake its own independent impact fee analysis. Mr. Douglass testified that he chose not to do so as he believed that the City would be unwilling to consider his information and adjust the impact fee accordingly.

10. Although Douglass did not submit an independent fee analysis, or ask the City to undertake an independent fee analysis, Douglass argues that the City Director erred by not preparing an independent fee calculation pursuant to OMC 15.04.050(a). In the alternative, Douglass argues that, on appeal, the Hearing Examiner has the authority to make an independent fee calculation.

C. **Findings Relating to Douglass's Challenges to the Various Components of the Transportation Impact Fee.**

1. Douglass does not challenge the City's conclusion that each new PM Peak trip has a cost of $2,999 in necessary transportation improvements.

2. Douglass does not dispute that it is reasonable to assume a standard trip length of 3.0 miles in Olympia when calculating Transportation Impact Fees.

3. Douglass does dispute the following matters relating to Schedule D and the calculations for determining the project-specific impact fee:

a. The use of square footage/Gross Floor Area as the unit of measure for mini warehouses instead of the number of rental units;

b. The reliance on .26 PM Peak trips per thousand square feet for mini warehouses;

c. The assumption that 100% of PM Peak trips to a mini warehouse will be "new trips" and not "pass by" trips; and

d. Use of an average trip length of 5.1 miles instead of the standard 3.0 miles, resulting in a trip adjustment factor of 1.70.

4. In support of its position Douglass presented the testimony of its expert, Todd Whipple, of Whipple Consulting Engineers ("Mr. Whipple"). Mr. Whipple is a licensed Civil Engineer and Traffic Engineer with thirty years of professional experience and licensing in

eight states. Mr. Whipple has testified as an expert witness in various states and types of hearings and has contributed to the ITE Manual. Mr. Whipple admits, however, that he has never served as a consultant to any local government on the issue of Transportation Impact Fees and has not participated in the establishment of impact fees by any municipality.

5. The City responds to Douglass' arguments, and the testimony of Mr. Whipple through the expert testimony of Don Samdahl ("Mr. Samdahl"). Mr. Samdahl is a principal with Fehr Peers and is a Transportation Engineer and Planner specializing in impact fee studies. Mr. Samdahl was responsible for Olympia's original 1995 Transportation Study and has continued to advise Olympia on its Transportation Impact Fees ever since, including the November 2016 Transportation Impact Fee Update referred to earlier. Among other things, Mr. Samdahl assisted the City of Bellevue in establishing the first Transportation Impact Fee in the State. He has subsequently assisted with establishing Transportation Impact Fees in thirty counties and cities in Washington. For most of these jurisdictions, including Olympia, he has served as project manager and analyst and has been responsible for the studies supporting the Transportation Impact Fees. He has also testified as an expert witness in our courts on the methodology used in establishing Transportation Impact Fees, and served as Olympia's expert witness in the *Drebick* lawsuit. In addition, Mr. Samdahl has previously served as President of the Washington

Section of ITE, and was asked by ITE to review the 10th Edition of the ITE Transportation Manual.

D. **Findings Relating to Use of Square Footage/Gross Floor Area as the Unit of Measure.**

1. When calculating Transportation Impact Fees for mini warehouses, Olympia relies upon the project's square footage as the unit of measure, resulting in a standard Transportation Impact Fee of $1.33 per square foot of Gross Floor Area.

2. Olympia's reliance upon square footage as the unit of measure is derived from the ITE Transportation Manual. The ITE Transportation Manual is widely relied upon for transportation-related calculations.

3. The ITE Manual offers two options for the unit of measure when calculating Transportation Impact Fees for mini warehouses: (a) square footage (relied upon by Olympia) or (b) the number of storage units.

4. Douglass's expert, Mr. Whipple, testified that it was "ludicrous" for Olympia to rely upon the square footage unit of measure for mini warehouses. Mr. Whipple argues that the square footage unit of measure fails to recognize the individual size of storage units and, unless the entire storage facility is unusually large, or each individual storage unit is unusually small, the square footage unit of measure will result in unrealistically high traffic trip calculations. As an example, a mini warehouse designed solely to store

RV's may have the same square footage as one designed for small individual storage spaces and yet the square footage unit of measure would impose the same Transportation Impact Fee on each, even though the two facilities would generate a significantly different number of trips. Mr. Whipple therefore concludes that the only reasonable unit of measure for mini warehouses is the number of storage units.

5. Mr. Samdahl responds to Mr. Whipple's testimony by noting that the data gathered for the ITE Manual reveals that far more jurisdictions rely on the square footage unit of measurement for mini warehouses than on the number of storage units. Indeed, Mr. Samdahl has personal knowledge that at least fifteen jurisdictions in Western Washington rely on the square footage unit of measure for mini warehouses and, conversely, he is not aware of any jurisdictions relying on the number of storage units. Mr. Samdahl explained that it is standard practice to rely on the square footage unit of measure for commercial projects, while relying on the number of units measure for residential projects. Mr. Samdahl also noted that Olympia has relied on the square footage unit of measure since it first established its Transportation Impact Fee in 1995, and that use of this unit of measure was approved in the *Drebick* decision.

E. **Findings of Fact Relating to the Number of PM Peak Trips Per Unit of Measure.**

1. Olympia's Transportation Impact Fee analysis assumes that every thousand square feet of mini

warehouse facility generates .26 trips during the PM Peak travel period. Based upon this assumption Douglass's Building #2, having 126,000 square feet, would generate approximately 33 travel trips during the PM Peak period.

2. Olympia's reliance on .26 travel trips per thousand square feet of mini warehouse is taken directly from the 9th Edition of the ITE Transportation Manual.

3. Mr. Whipple argues that reliance on .26 trips per thousand square feet is unwarranted, leading to inflated impact fees. Mr. Whipple points to the most recent (10th) Edition of the ITE Transportation Manual, released in late 2017, which reduces the PM Peak trips per thousand square feet of mini warehouse from .26 to .17. In other words, under the most recently released Traffic Manual the number of PM Peak trips generated by Douglass' Building #2 would be reduced from 33 to 21 trips, or a reduction of approximately one-third the number of trips.

4. On cross examination Mr. Whipple admitted that the 10th Edition of the ITE Traffic Manual did not exist at the time Douglass applied for the building permit for Building #2, as the building application occurred in May 2017 and the 10th Edition of the ITE Manual was not released until late in the year.

5. In further response to Mr. Whipple's testimony, Mr. Samdahl and the City's Director, Mr. Smith, explained that the City's fee schedule relies on the then current edition of the ITE Manual at the time the schedules are established. The recent release of the

10th Edition of the Manual does not affect any Transportation Impact Fee schedules currently in existence, but it may cause an adjustment when the schedules are next reviewed.

F. **Findings Relating to the Number of "New Trips".**

1. Olympia's Transportation Impact Fee is premised on the concept that only new traffic trips generated by the project should result in impact fees, and that the project should not pay impact fees for traffic that is otherwise occurring. New development is therefore imposed Transportation Impact Fees only for "new trips" and not for other traffic trips already occurring.

2. Olympia's Transportation Impact Fee is based upon the premise that 100% of the PM Peak period trips to a mini warehouse will be new trips that would not have otherwise occurred.

3. Olympia's reliance upon 100% of the PM Peak trips being "new trips" is again taken directly from the ITE Transportation Manual.

4. Mr. Whipple strongly disagrees with the assumption that 100% of PM Peak trips will be new trips, and describes this conclusion as "phenomenal". Mr. Whipple believes that a significant number of trips to Douglass' facility would be "pass by" trips, that is, trips where the traveler is heading from one destination to another and only stopping at the warehouse as he/she passes by. "Pass by" trips are not "new trips" and Mr. Whipple contends that the assumption that 100% of all

trips being new trips is unrealistic. Mr. Whipple undertook a brief questioning of Douglass' storage customers in other cities (Exhibit A-20) which suggested that perhaps fifty percent or more stopped at the storage facility as they passed by and not as a new trip.

5. Mr. Samdahl's responds to Mr. Whipple's testimony by explaining that there is no published data evidencing his claim that a percentage of trips to the facility will be pass by trips. Mr. Samdahl adds that most of what Mr. Whipple claims to be "pass by trips" are, in fact, "diverted trips". "Diverted trips" involve traveling along one street and then diverting off that street to gain access to the project before proceeding to another destination, while "pass by trips" are limited to only those where the project is located directly on the traveler's intended route and do not require diverting to another street. The Manual recognizes that a diverted trip has the same impact on transportation needs as a new trip and is therefore included within the definition of new trips. For all of these reasons Mr. Samdahl believes that the City is justified in considering all PM Peak trips to the warehouse to be new trips.

G. **Findings Relating to the Trip Adjustment Variable.**

1. The Transportation Impact Fee is premised on the average length of a new trip being 3.0 miles.

2. For each type of land use the average trip length is adjusted by a trip adjustment factor based

upon that land use's average trip length as compared to the City's standard trip length of 3.0 miles.

3. Schedule D assumes that for mini warehouses the standard trip length will be 5.1 miles. This results in a trip adjustment factor of 1.7 (5.1 ± 3.0 = 1.7).

4. Mr. Whipple contends that the City's trip adjustment factor of 1.7 for mini warehouses has no basis in reality, either in general or with respect to Douglass' project.

5. Mr. Whipple supports his position by several maps (Exhibit A-16 and A-17) showing a 5 mile radius from the project site. Map A-16 demonstrates that this radius extends well beyond the City limits of Olympia. Map A-17 demonstrates that there are 5 other existing, competing mini warehouses within the 5 mile radius. Mr. Whipple argues that it is unrealistic to expect customers to travel from other cities to use the Douglass storage facility. It is also unrealistic to expect customers to select the Douglass storage facility over several other closer facilities. Mr. Whipple therefore concludes that the 1.7 trip adjustment factor is wholly inappropriate for the Douglass facility.

6. On a more general basis, Mr. Whipple argues that the 1.7 trip adjustment factor is not based upon any good source of data. Mr. Whipple is aware that this trip adjustment variable was set in 1995 when the Transportation Impact Fee was first established, and that the variable was derived from data for warehouses in general. But Mr. Whipple argues that mini warehouses have little relation to other types of warehouses, and their trip adjustment variable should not

be based upon data for general warehouses. Stated slightly differently, Mr. Whipple argues that the travel habits of mini warehouse customers are far different than those for conventional warehouses and that the average trip length for a mini warehouse customer is far shorter than for a general warehouse customer.

7. Mr. Whipple concludes that there is no good basis to impose a trip adjustment factor on mini warehouses and that Transportation Impact Fees for such uses should assume the City's standard trip length of 3.0 miles.

8. Mr. Samdahl responds to Mr. Whipple's arguments by confirming that the trip adjustment variable for mini warehouses was established in 1995 when the Impact Fee Ordinance was first established, and that at that time there was no separate category for mini warehouses. Instead, there was only one general category for all types of warehouses, including mini warehouses. Data collected for all types of warehouses produced a trip adjustment variable of 1.7 – the variable Olympia has used since then for both warehouses and mini warehouses.

9. Mr. Samdahl adds that since 1995 there have been no known studies for trip adjustment variable specific to mini warehouses. The data gathered for warehouses in general therefore remains the only reliable data. Mr. Samdahl concludes that in the absence of any data specific to mini warehouses it remains entirely appropriate to rely on data associated with warehouses in general.

H. **Findings Relating to Douglass' Requested Relief.**

1. At the conclusion of the hearing Douglass argued that Schedule D should be modified for mini warehouses in the following respects:

a. The trips per peak hour should be reduced from .26 to .17 in accordance with the changes reflected in the 10th Edition of the ITE Trip Generation Manual.

b. The percentage of new trips should be reduced from 100% to 75% to recognize that at least 25% of trips to the mini warehouse are pass by trips.

c. The trip length adjustment variable should be eliminated.

2. With these three adjustments the Transportation Impact Fee would be calculated as follows: 126 (thousand square feet) x .17 (number of trips) x .75 (new trips) x 1.0 (trip adjustment variable) x $2,999 = $48,178.93.

3. In the alternative, Douglass asks that if the Hearing Examiner does not find Schedule D to be in error, that nonetheless the Transportation Impact Fee be reduced to this amount based upon the Hearing Examiner's authority, on appeal, to undertake his own independent fee calculation.

4. Douglass further contends that, not withstanding the Supreme Court's decision in *Drebick*, a refusal to adjust Douglass's Transportation Impact Fee

as suggested is violative of his substantive due process rights per the *Nollan/Dollan* cases[1] and their progeny.

ANALYSIS

1. **Burden of Proof and Standard of Review on Appeal.**

The authority of the Hearing Examiner, including the burden of proof and the standard on review, is established by the City Council in its enabling ordinances unless these ordinances are silent on such matters. The Olympia City Council, pursuant to OMC 18.75.050(f), has established that the burden of proof on appeal is with the appellant: "The Examiner shall only grant the relief requested by an appellant *upon finding that the appellant has established that*. . . ."

OMC 18.75.050(f) also establishes the standard of review on appeal to the Hearing Examiner. Seven standards of review are set forth depending upon the type of issue involved[2] with the one most applicable to

---

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

[2] (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;

this matter being Subsection 4: "The decision is a clearly erroneous application of the law to the facts".

To summarize, it is Douglass' burden on appeal to prove that the City's Transportation Impact Fee was clearly erroneous.

2. **Douglass's Argument that the City Director Should Have Undertaken an Independent Fee Analysis on his own Initiative.**

Douglass' first argument on appeal is that the City's Director, Mr. Smith, should have undertaken an independent fee analysis for Building #2 on his own initiative pursuant to OMC 15.04.050(a). Douglass's argument is not well supported. Mini warehouses are expressly provided for in Schedule D, leaving no reason for Mr. Smith to have to turn to an independent fee analysis to establish a basic impact fee. Further, Douglass had earlier presented six other building applications for the project's other mini warehouse buildings and on each occasion had accepted the City's reliance on Schedule D for the correct Transportation Impact Fee. In short, there was nothing clearly erroneous about the Director's decision to not undertake an independent fee analysis on his own initiative.

---

(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.

3. **Douglass's Arguments that the Various Components of Schedule D are Invalid.**

Douglass argues that reliance on: square footage as the unit of measure; on .26 trips per PM Peak period; on 100% of trips being new trips; and the use of a 1.7 trip adjustment variable are all invalid. I respectfully disagree with each of these arguments. More specifically:

a. The Unit of Measure. Olympia's reliance upon square footage as the unit of measure when calculating Transportation Impact Fees for mini warehouses is taken directly from the ITE Trip Generation Manual. The fact that the Manual also offers the option of using the number of storage units as the unit of measure is of little importance. When the ITE Trip Generation Manual – the source widely relied upon for such matters – offers two reasonable options, the choice of option is a legislative one for the City Council. The Council's selection of the square footage unit of measure is not clearly erroneous. Indeed, no evidence has been presented that any other municipality in Western Washington relies on the number of storage units as the unit of measure.

b. Number of PM Peak Trips. Douglass correctly points out that the newest edition of the ITE Trip Generation Manual, issued late 2017, adjusts the number of PM Peak trips for mini warehouses from .26 trips to .17 trips. But, while true, this has no bearing on the outcome. The 10th Edition of the Manual did not yet exist when Douglass submitted its building permit

application for Building #2. Schedule D then in effect was based upon the 9th Edition of the Trip Generation Manual, being the most current version of the Manual then in effect. The City's reliance on the then existing Trip Manual was not clearly erroneous.

c. Number of New Trips. Douglass argues that surely some percentage of PM Peak trips to a mini warehouse must be "pass by" trips and not "new trips". But Douglass's anecdotal data of its Tacoma customers' travel habits is no basis to challenge the City's reliance on the Trip Generation Manual, especially when Douglass incorrectly considers diverted trips as the same as pass by trips. Douglass failed to present any well founded data that the City's reliance on the Manual is in error. The City's assumption that all trips are new trips is not clearly erroneous.

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

e. The Effect of *Drebick*. It must also be remembered that all of the methodology discussed above was examined and approved in the Supreme Court's

decision in *Drebick*. The Court concluded that the then Hearing Examiner had considered each element of the Transportation Impact Fee and found it to be correctly established. The Court added that, once the Hearing Examiner reached this conclusion, he should have ended his analysis and approved the City's Transportation Impact Fee. The City's current Transportation Impact Fee methodology is virtually unchanged from what was examined in *Drebick*. There is no reason to conclude that the Supreme Court's decision has lost any of its validity.

4. **Douglass's Argument that the Hearing Examiner has Authority on Appeal to Undertake an Independent Fee Calculation.**

Douglass separately argues that, even if the variables relied upon in the Schedule D calculations are valid, the Hearing Examiner still has authority on appeal to undertake his own independent fee calculation based upon the information presented during the hearing. In other words, even if Schedule D is valid, Douglass argues that its information relating to PM Peak trips, the number of new trips, and the appropriate trip variable, should all be considered by the Hearing Examiner and the impact fee revised accordingly. I respectfully disagree.

The City's Principal Planner, Mr. Smith, concludes that Chapter 15.04 OMC does not give the Hearing Examiner authority to undertake an Independent Fee Calculation when the applicant failed to have an independent fee analysis undertaken during the building

permit review process. OMC 18.75.040(f) declares that "with regard to decisions of City Staff, the Examiner shall accord due deference to the expertise and experience of the staff rendering such decision." Thus, while Mr. Smith's conclusion is not binding on the Hearing Examiner it must be accorded due deference. But even if Mr. Smith had not come to this conclusion the Hearing Examiner would reach the same conclusion on his own.

OMC 15.04.040(d) requires that "impact fee shall be assessed at the time the complete building permit application is submitted for each unit in the development., using either the impact fee schedules then in effect or an independent fee calculation, at the election of the applicant . . . " OMC 15.04.050(c) requires that:

> "If an applicant opts not to have the impact fees determined according to Schedule D, 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 Schedule D and an independent fee calculation prior to issuance of the building permit for the development**."

The City Council's directive in these two provisions is clear and unequivocal. The opportunity to present an independent fee analysis is only allowed prior to issuance of the building permit. There is no

provision allowing for any independent fee analysis to be raised for the first time on appeal. Indeed, such an argument is wholly in conflict with the provisions of Chapter 15.04 OMC.

Furthermore, OMC 15.04.090(d), regulating appeals of impact fee determinations, only allows the Hearing Examiner to review the determination of the Director. It does not allow the Hearing Examiner to undertake an independent fee calculation.

It is certainly possible, and perhaps probable, that Douglass would have had its Transportation Impact Fee reduced from the amount calculated under Schedule D if it had simply undertaken an independent fee analysis and provided the Director with the same information it presented on appeal. It is unfortunate that the Applicant knowingly elected to forego this opportunity. But having made this choice the Appellant is without authority to present an independent fee analysis for the first time on appeal, and the Hearing Examiner is without authority to consider it.

5. **Douglass's Constitutional Arguments.**

Douglass's final argument is that the City's Transportation Impact Fee is in violation of Douglass's substantive due process rights.

Consideration of this argument by the Hearing Examiner is a challenging one. OMC 18.75.040(f)(6) authorizes the Hearing Examiner to consider whether the City's decision "violates the constitutional rights of

the party seeking relief." It is believed that Olympia is the only municipality giving its Hearing Examiner the authority to consider constitutional issues. The granting of this authority is questionable as our Superior Courts are generally regarded as having original jurisdiction over constitutional issues. Nonetheless, for the Hearing Examiner to declare this provision to be unconstitutional would, arguably, be improper as well. Therefore, until direction is provided by our courts the Hearing Examiner will assume this provision to be valid, and will review this matter in a constitutional context.

But this constitutional review is a simple one. In *Drebick* our State Supreme Court declared Olympia's Transportation Impact Fee Ordinance to be constitutionally valid.

Nonetheless, Douglass argues that the U.S. Supreme Court's decision in *Koontz v. John's River Water Management District*[3] effectively overrules *Drebick*. This is an arguable assertion but, even if correct, it is not the Hearing Examiner's role to overrule the State Supreme Court. Again, *Drebick* remains authority for the position that Olympia's Transportation Impact Fee Ordinance is constitutionally valid.

It should be added that the City's Transportation Impact Fee Ordinance achieves its validity by the very provisions that Douglass chose to forego, that is, by giving every applicant the opportunity to show why the

---

[3] 570 U.S. 595, 133 S.Ct. 2586, 196 L.Ed. 2nd 697 (2013)

fee established by Schedule D is disproportionate or inequitable. Having knowingly disregarded this opportunity, Douglass is precluded from claiming a violation of his substantive due process rights.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the parties and the subject matter.

2. Any Conclusions of Law contained in the foregoing Background, Hearing, Findings or Analysis sections are incorporated herein by reference and adopted by the Hearing Examiner.

3. The Hearing Examiner must accord due deference to the expertise and experience of the City Staff rendering the decision. OMC 18.75.040(f).

4. Pursuant to OMC 18.75.040(f) the Hearing Examiner shall only grant the relief requested by an appellant upon finding that the appellants has established that:

a. The staff engaged in unlawful procedures or failed to follow a prescribed procedure;

b. The staff's decision was an erroneous interpretation of the law;

c. The decision is not supported by substantial evidence within the context of the whole record;

d. The decision is a clearly erroneous application of the law to the facts;

e. The decision is outside the authority or jurisdiction of the decision-maker;

f. The decision violates the constitutional rights of the party seeking relief; or

g. The decision is clearly in conflict with the City's adopted plans, policies or ordinances.

5. The Appellant's Transportation Impact Fee was correctly calculated in accordance with Schedule D. OMC 15.16.040.

6. When establishing Schedule D and the specific provision for mini warehouse facilities, the City's reliance on: (a) square footage as the unit of measure; (b) .26 PM Peak Hour trips per thousand square feet; (c) 100% of trips being new trips; and (d) a trip adjustment variable of 1.7 were not clearly erroneous.

7. The City Director's decision to not undertake an independent fee analysis on his own initiative as allowed by OMC 15.040.050(a) was not clearly erroneous.

8. The Appellant's Transportation Impact Fee was correctly calculated in accordance with Chapter 15.04 OMC.

9. The Hearing Examiner is without authority to undertake an independent fee calculation for the first time on appeal.

10. The calculation of the Appellant's Transportation Impact Fee in accordance with Chapter 15.04 OMC is not a violation of the Appellant's substantive due process rights.

11. Pursuant to OMC 18.75.040(f):

(a) The staff has not engaged in unlawful procedures or failed to follow the prescribed procedure;

(b) The staff's decision is not an erroneous interpretation of the law;

(c) The decision is supported by substantial evidence within the context of the whole record;

(d) The decision is not a clearly erroneous application of law to the facts;

(e) The decision is not outside the authority or jurisdiction of the decision-maker;

(f) The decision does not violate the constitutional rights of the party seeking relief; and

(g) The decision is not clearly in conflict with the City's adopted plans, policies or ordinances.

12. The Appellant's appeal of the Transportation Impact Fee imposed on Building #2 should be denied.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

DECISION

The appeal of Douglass's Transportation Impact Fee of $167,580 for Building #2 is denied.

DATED this 23 day of August, 2018.

/s/ Mark C. Scheibmeir
Mark C. Scheibmeir
City of Olympia Hearing Examiner