

HISTORY AND OVERVIEW OF IMPACT FEES

I. A Brief History:

A. Purpose of Impact Fees

Impact fees are assessed on new development in order to pay for a portion of the costs of the capital facilities needed to serve the new development. Throughout the United States, impact fees are imposed and used for capital projects such as:

- water and waste water treatment facilities
- roads
- parks
- libraries
- schools
- police and fire protection facilities.

Impact fees provide communities with an additional mechanism for financing the rising costs of capital facilities, without instituting new revenue enhancing measures or increasing existing taxes.

B. Impact Fees in Other States

A number of states, including Washington, have adopted impact fee statutes that expressly authorize and establish the requirements for the assessment of impact fees. These states include Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Maine, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Other states have not adopted statutory schemes that govern the collection of impact fees, but local jurisdictions rely on their land use authority to assess impact fees.

C. Impact Fees in Washington State

1. Authorization of GMA Impact Fees

Washington's statutory impact fee provisions were adopted by the State Legislature in 1990. The Growth Management Act ("GMA") provides for the collection of impact fees by counties, cities, and towns planning under the GMA. RCW 82.02.050(2) provides as follows:

Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on development activity as part of the financing for public facilities, provided that the financing for system improvements to serve new development must provide for a balance between

impact fees and other sources of public funds and cannot rely solely on impact fees.

RCW 82.02.090(7) provides that the following capital facilities may be funded with impact fees under the GMA:

- public streets and roads
- publicly-owned parks, open space, and recreation facilities
- school facilities
- fire protection facilities in jurisdictions that are not part of a fire district.

In contrast to the State Environmental Policy Act (“SEPA”) and other sources of statutory authority for requiring mitigation that are discussed below, the GMA authorizes the assessment of fees for impacts that are “reasonably related” to the new development. See RCW 82.02.050(3)(a). Similarly, impact fees may be used to finance “system improvements” that will “reasonably benefit” the new development. RCW 82.02.050(3)(c). The use of GMA impact fees, therefore, is not limited to on-site project-level improvements. These statutory provisions ensure that local jurisdictions can address cumulative impacts, and/or off-site system-wide impacts through the assessment of these fees.

2. Implementation of GMA Impact Fees

The GMA requires that local ordinances by which jurisdictions impose impact fees include certain provisions. Under RCW 82.02.060, an impact fee ordinance must include the following:

- a schedule of impact fees for each type of development activity that is subject to impact fees, which specifies the amount of the impact fee to be imposed for each type of system improvement and which is based on a formula or other method of calculating impact fees;
- a provision providing for credits for the value of any dedication of land from improvements to, or new construction of, any system improvements provided by the developer (so long as they are identified in the capital facilities plan);
- a provision allowing the jurisdiction to adjust the impact fee “to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;”
- a provision that permits the consideration of studies and data submitted by the developer to adjust the amount of the fees; and
- a provision establishing one or more reasonable service areas within which impact fees for various land use categories per unit of development shall be calculated.

The GMA forbids local jurisdictions from using impact fees to fund completely the system improvements needed to serve new development. In other words, public funds must be used to fund at least a portion of the system improvements needed to serve new development. The GMA provides guidance on how local jurisdictions are to determine the proportionate share of the costs of system improvements that may be covered by impact fees. RCW 82.02.060 provides that the determination of the proportionate share shall be made through the use of a formula or other method that incorporates the following:

- the cost of public facilities necessitated by new development;
- 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;
- the availability of other means of funding public facility improvements;
- the cost of existing public facilities improvements; and
- the methods by which public facilities improvements were financed.

These guidelines provide a means for local jurisdictions to use their past experiences and current data to determine the appropriate share of the cost of public facilities that should be covered by impact fees.

The GMA also provides some flexibility in the process of developing impact fees. RCW 82.02.060(2) permits an impact fee ordinance adopted by a local jurisdiction to include exemptions for low-income housing and other development activities with broad public purposes. For example, shelters for temporary placement, relocation facilities, and transitional housing facilities may be exempt from the payment of school impact fees. Likewise, accessory dwelling units, which typically serve low-income residents, may be exempt from the payment of school impact fees. In addition, RCW 82.02.060(7) permits an impact fee ordinance to require the payment of impact fees for previously incurred system improvement costs, so long as new growth and development will be served thereby.

Although the above requirements and guidelines assist jurisdictions in determining the public and private shares of the costs of new facilities, specific determinations are left to the local jurisdictions. This is consistent with the GMA's emphasis on local responsibility and control over the growth process.

3. Appropriate Uses of GMA Impact Fees

The GMA's impact fee provisions contain a number of limitations on the imposition and use of impact fees. These include the following:

- GMA impact fees can only be imposed for system improvements that are “reasonably related to the new development” and that will “reasonably benefit” the new development, RCW 82.02.090(9);
- impact fees can be used only for public facilities that are addressed in a capital facilities plan element of a comprehensive land use plan adopted under the GMA, RCW 82.02.070(2);
- impact fees must be spent or encumbered within six years of receipt, unless there exists an extraordinary and compelling reason to hold them longer, RCW 82.02.070(3); and
- impact fees can be used only to fund public facilities that are designed to provide service to service areas within the community at large, not for a particular development project. As discussed above, only the following types of facilities may be funded with GMA impact fees: (a) public street and roads; (b) publicly owned parks, open space, and recreation facilities; (c) school facilities; and, (d) fire protection facilities in jurisdictions that are not part of a fire district, RCW 82.02.090(7) and (9).

In general, impact fees can be spent on capital projects if a nexus of benefit exists between the expenditure and new development. Nexus in the context of GMA impact fees means that the improvements made must “reasonably benefit” the new development. For example, construction of new facilities, or the addition of capacity to existing facilities, may be financed with impact fees. Impact fees may be used for traditional “bricks and mortar” expenditures, land acquisition, and “soft” costs for design, engineering, and permitting. In addition, impact fees may be spent on renovation projects that increase the capacity of existing facilities to serve new development, as long as the renovation may be capitalized. Finally, impact fees may be used to buy some equipment and supplies necessary for new or expanded facilities. Disposable items should not be purchased with impact fees.

II. Taxes, Not Regulations:

GMA impact fees are taxes, not a form of land use regulation. The characterization of GMA impact fees as taxes is important because taxes are not subject to vesting rules or the statutory limitations applicable to land use regulations. Impact fees are still subject to the statutory limitations imposed on excise taxes, as well as the limitations found in the GMA itself.

Under Washington law, GMA impact fees are properly characterized as a tax rather than as a land use regulation. The primary purpose of GMA impact fees is to raise revenue, not to dictate land use. See Hillis Homes v. Snohomish County, 97 Wn.2d 804 (1982). This

characteristic of impact fees is clearly stated in the definition of “impact fees” set forth in RCW 82.02.090:

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.

RCW 82.02.090(3) (emphasis added). A 1999 Court of Appeals decision followed the Hillis Homes analysis to hold that GMA impact fees “augment” tax dollars and are not intended to regulate development in the manner of a land use control ordinance. New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 231 (1999 Div. II), rev. denied, 140 Wn.2d 1019 (2000).

GMA’s impact fee provisions are codified in the excise tax section of the Revised Code of Washington, an additional indication that they are properly classified as taxes. The Thurston County Superior Court, in the first impact fee case litigated in Washington State, agreed that impact fees are taxes. See Olympia Master Builders v. City of Olympia and the Olympia School District, No. 92-2-02215-7, Thurston County Superior Court, Report of Proceedings (April 28, 1993), at 4 and 8. See also New Castle, 98 Wn. App. at 235-36.

The Washington Supreme Court has not directly addressed the legal classification of GMA impact fees. Indeed, in City of Olympia v. Drebeck, involving whether the calculation of impact fees may be based on area-wide infrastructure improvements rather than on the direct, specific impact of a particular development, the Court determined it did not need to determine whether impact fees are taxes or regulatory fees for the purpose of its decision. 156 Wn.2d 289, 295, fn.1 (2006).

The Washington Supreme Court has also analyzed mitigation payments collected pursuant to voluntary agreements in two cases. See Henderson Homes v. City of Bothell, 124 Wn.2d 240 (1994) and Trimen Development v. King County, 124 Wn.2d 261 (1994). In Henderson Homes, the Court held that suits based on the collection of such payments are subject to the three-year statute of limitations applicable to the recovery of unlawful taxes. Although the Court’s decision is not clear on this point, the opinion implies that such fees may be considered taxes rather than a land use regulation. In Trimen Development, however, the Court took pains to state that the application of the three-year statute of limitations to suits for the recovery of mitigation payments did not imply that such fees are taxes.

III. Cases on GMA Impact Fees:

Washington courts have analyzed GMA impact fees in several key cases and have established a number of important principles.

A. Olympia Master Builders v. City of Olympia and the Olympia School District, No. 92-2-02215-7, Thurston County Superior Court (1993).

In the first case litigated in Washington State on GMA impact fees, the Olympia Master Builders (“OMB”) filed an action against the City of Olympia (“City”) and the Olympia School District (“District”) in Thurston County Superior Court. OMB sought to have the City’s parks, fire, and school impact fee ordinance declared invalid. None of OMB’s procedural or constitutional challenges were successful.

With respect to OMB’s procedural challenges, the Court found that OMB lacked standing to bring a SEPA challenge because it failed to produce evidence demonstrating a likelihood of adverse environmental impacts resulting from the collection of impact fees. In the alternative, the Court found that the City’s determination of nonsignificance was not clearly erroneous. Furthermore, the Court made it clear that a city, town, or county can base a school impact fee ordinance on rate studies submitted by a school district without violating prohibitions against unlawful delegation, and that a city, town, or county can enter into an interlocal agreement with a district to ensure the proper application and expenditure of the impact fees collected. Finally, the Court rejected the challenges to the City’s park capital facilities plan and concluded that provisions in the ordinance to address past taxes did not violate the GMA.

OMB also challenged the school impact fee ordinance based on several constitutional claims. OMB argued that the ordinance violated due process and equal protection because school impact fees are based on the type, rather than the size, of the dwelling units. OMB asserted that impact fees based on square footage or the number of bedrooms would be reasonable, but impact fees imposed uniformly on single family or multi-family residences were not. OMB also argued that the ordinance violated equal protection, because school impact fees are collected only from the developments within both the City and District; developments outside the City, or inside the City but outside the District, do not pay school impact fees.

OMB’s equal protection argument, had it been successful, could have created new challenges for assessing school impact fees in districts located in more than one jurisdiction. In most cases, the boundaries of school districts do not coincide with city or county boundaries. OMB argued, in effect, that school impact fees cannot be collected until every city, town, and county within the school district enacts a school impact fee ordinance. The Court rejected this argument, finding that equal protection guarantees apply within jurisdictions. As long as the City of Olympia treats its own residents equally, it is not a matter of constitutional concern that City residents may be taxed more heavily for schools than non-City residents.

B. Nolte v. City of Olympia, 96 Wn. App. 944 (1999 Div. II).

The Division II Court of Appeals found that a governmental entity may only impose impact fees on projects within the entity’s boundaries. In Nolte, a developer sought plat approval for a development located in unincorporated Thurston County (“County”), but within the City of Olympia’s (“City”) urban growth area (“UGA”). The City and the County had previously agreed that they would plan jointly for the UGA, with the City’s utilities serving the UGA and the City’s development standards applying in the UGA. 96 Wn. App. 944, 946.

Pursuant to this Agreement, the County Hearing Examiner, in approving the proposed plat, required the developer to enter into a utility extension agreement with the City in order to receive city utilities. The City's standard utility extension agreement provided that the City would furnish sewer and water, but only if the developer paid impact fees consistent with the City's Code. 96 Wn. App. at 949.

The developer challenged this provision, and argued that the City did not have the legal authority to impose impact fees outside of its boundaries. The City countered with the argument that the County, through its development approval process, was the actual entity imposing the fees based upon the Hearing Examiner's requirement that the developer enter into the utility extension agreement as a condition of development. 96 Wn. App. at 951. The Court held in favor of the developer, finding that regardless of any joint planning efforts between the City and the County, the fees were purely City fees because they were imposed pursuant to the City's ordinance and collected by the City. 96 Wn. App. at 951-52. The Court further held that the provisions of RCW 82.02.050-.090 do not authorize the City to impose impact fees on developments outside of the City's boundaries. The Court reasoned that because RCW 82.02.090 specifically defines "impact fee" as "a payment of money imposed upon development as a condition of development approval," an impact fee can only be imposed by an entity with development approval authority over a particular development. In Nolte, this would have been the County. 96 Wn. App. at 953-54.

- C. New Castle Investments v. City of LaCenter, 98 Wn. App. 224 (1999 Div. II), rev. denied, 140 Wn.2d 1019 (2000).

In New Castle, the Division II Court of Appeals examined the issue of whether GMA impact fees are subject to vesting requirements. A developer argued that the City of LaCenter's transportation impact fees should not apply to a plat because the impact fee ordinance was not enacted until after the preliminary plat application was perfected. Essentially, the developer argued that the fees are a land use control ordinance and that the vesting statute in RCW 58.17.033 rendered the fees inapplicable since the application was completed prior to the enactment of the fees. RCW 58.17.033 provides that a proposed division of land shall be considered under the ordinances, zoning "or other land use control ordinances in effect on the land at the time a fully completed application for preliminary plat approval has been submitted." The developer argued that the transportation impact fee ordinance was one such "land use control ordinance."

The Court of Appeals rejected the developer's arguments and held that impact fees are not subject to the vesting principles. The Court first determined that a GMA impact fee ordinance is not a "land use control ordinance" within the meaning of RCW 58.17.033 since the imposition of an impact fee does not "control" development in the sense of limiting or changing the development in any way; rather, the ordinance only increases the cost of development. 98 Wn. App. at 229. Following this, the Court noted that the original version of the GMA impact fee legislation included a provision stating that impact fees should vest upon the issuance of a building permit (rather than on the filing of a complete application, which would have been consistent with the vesting statute). 98 Wn. App. at 230 (citing Laws of 1990, 1st Ex. Sess., ch. 17, § 45 (CP 128)). While this section was eventually vetoed by the Governor for other

reasons, the Court reasoned that the provision reflected the legislative intent that impact fees not be subject to traditional vesting requirements. Id.

The Court also held that because an impact fee does not limit the use of land or otherwise resemble a zoning law, it is not the type of right that vests under the vested rights doctrine. Id. The Court then examined whether the fee should be considered a “regulatory fee” subject to vesting and concluded that: “By their nature, [impact fees] augment tax dollars; they are another source of revenue for improvements that benefit the public in general, and they are not intended to regulate the particular development.” 98 Wn. App. at 236. This case now stands for the principle that the vesting doctrine does not apply to impact fees.

D. Wellington River Hollow LLC v. King County and Northshore Sch. Dist. No. 417, 121 Wn. App. 224, 54 P.3d 213 (2002), rev. denied, 149 Wn.2d 1014, 70 P.3d 965 (2003).

In December 1997, Wellington River Hollow, LLC (“Wellington”) applied to King County to construct a 144-unit apartment complex in the part of the County served by the Northshore School District (“District”). (The District is located partially in unincorporated King County and partially in unincorporated Snohomish County, and partially in cities.)

Based on the District’s 1997 school impact fee schedule, which was in effect when Wellington applied to develop the property and per the provisions of the County code, Wellington’s school impact fees were assessed at \$1,398 per unit.

Initially, a Hearing Examiner reduced Wellington’s school impact fee assessment to \$668 per unit. Both the District and Wellington appealed the Hearing Examiner’s decision to King County Superior Court. The Court reinstated the \$1,398 per unit fee.

Wellington appealed to the Division I Court of Appeals, arguing that its fees were incorrectly calculated and that its fees were unjust based on its allegation that the District had initially quoted a different fee to Wellington.

In a published opinion, the Division I Court of Appeals held that the County complied with the terms of the County code in assessing Wellington’s school impact fee payments. Second, Wellington had argued that the District had incorrectly calculated the student factor, which is the number “derived by a school district to describe how many students of each grade span are expected to be generated by a dwelling unit.” The District’s consultant had concluded that there was insufficient data to calculate the District’s actual student generation rates. Instead, he used a composite of actual student generation rates for new developments built in the four school districts within the County for which actual data had been collected. The Court of Appeals concluded that the school impact fee program complied with the legal requirements.

In addition, by relying on the plain meaning of K.C.C. 21A.43.050(D), which states that school impact fees be imposed based on “the impact fee schedules in effect at the time of permit application,” the Court of Appeals held that school impact fees should be calculated based on the fee schedules in effect at the time of the building permit application.

Furthermore, the Court of Appeals rejected Wellington's argument that its assessed fees are unjust because they are not reasonably related to its development and because the fees will fund system improvements that will not directly benefit its development. Finally, Wellington asserted a number of constitutional arguments, including that the County violated its constitutional rights by imposing school impact fees that are not identical to school impact fees imposed by other jurisdictions within the District. The Court of Appeals held that, because impact fees are not property taxes, the constitutional requirement of uniformity does not apply to impact fees.

In May 2003, Wellington's Petition for Review was denied by the Washington Supreme Court. The Supreme Court then affirmed the award of attorneys' fees to the District.

E. Pavlina v. City of Vancouver, 122 Wn. App. 520, 94 P.3d 366 (2004).

In Pavlina, a developer had received preliminary and final short plat approval from Clark County. The project was then annexed into the City of Vancouver. The City adopted an impact fee ordinance, and several years later, Pavlina sought and received final site plan approval and a building permit. Under the City's ordinance, Pavlina was required to pay \$111,112 in impact fees as a condition of final site plan approval. Pavlina paid the impact fees under protest, and appealed to the Hearings Examiner. The Examiner affirmed the imposition of the fees, and the decision was upheld by the Clark County Superior Court.

Pavlina challenged the impact fees on a number of different grounds, all of which were rejected by the Division II Court of Appeals. First, the Court of Appeals held that Clark County's preliminary approval of Pavlina's development did not constitute "new growth and development" under RCW 82.02.050-.090. Accordingly, the City properly collected impact fees at the time of building permit application.

Second, contrary to Pavlina's contention, the Court concluded that transportation impact fees are not "additional conditions" of development approval. Citing New Castle v. City of LaCenter, the Court held that because impact fees do not affect physical aspects of development and are not "land use control ordinances," they are not additional conditions of approval and can be imposed at the time of a building permit application, even if the fees were not an original condition of preliminary or final plat approval.

Third, the Court determined that Pavlina had no vested rights in its preliminary plat approval. As the Court noted in the New Castle v. City of LaCenter, an impact fee is not a land use ordinance that vests with a development application. Accordingly, the City was authorized to impose impact fees at the time Pavlina applied for the building permit.

Fourth, the definition of "new development" under RCW 82.02.050 is not ambiguous. Although Pavlina argued that its development was not "new," the City adopted its impact fee ordinance in 1995, and Pavlina's development did not receive final plat approval and building permits until after that date. Accordingly, the City's impact fee ordinance was properly applied to Pavlina's development.

Fifth, Pavlina argued that the City's ordinance required that impact fees could be imposed only for development not necessitating or not having been previously granted preliminary approval. The Court rejected Pavlina's interpretation on the grounds that contradicted the clear legislative intent of state law and the local ordinance and would create an unintended loophole in the language of the City's impact fee statute.

Finally, although there was a handwritten notation on a SEPA checklist regarding the a number of additional daily trips that would be generated by Pavlina's development, there was nothing in the record to suggest that a County employee made this note or that the SEPA checklist actually considered these trips to be the number of new trips resulting from Pavlina's proposed development. Based on the actual record evidence regarding the number of additional daily trips to be generated by Pavlina's development, the Court held that Pavlina's development would create 817 previously non-existent trips served by the transportation facilities the impact fees funded and that Pavlina must pay his proportionate share for the use of those facilities.

Most notably, the Court ruled that municipalities need not spend impact fees collected under RCW 82.02.050 on infrastructure that specifically benefits a particular development. Instead, citing Wellington River Hollow, LLC v. King County, 113 Wn. App. 574, 587, 54 P.3d 231 (2002), review denied, 149 Wn.2d 1014 (2003), the Court ruled that impact fees need only provide a general benefit to the entire area.

F. James T. James, et. al. v. County of Kitsap, et. al., 154 Wn.2d 574 (2005).

A group of developers initiated this action against, among others, Kitsap County ("County") and three School Districts in Kitsap County, alleging that the County improperly collected and imposed impact fees without a valid Comprehensive Plan as required by the GMA.

In December 1994, Kitsap County adopted its Comprehensive Plan. In October 1995, the Central Puget Sound Growth Management Hearings Board ("GMHB") determined that the County's Comprehensive Plan, and specifically the Capital Facilities Element, was invalid. As a result of the GMHB's decision, the County stopped collecting GMA impact fees. Instead, the County adopted a "promise to pay" system whereby developers obtaining a building permit would sign a document acknowledging that they were obligated to pay impact fees and would pay those fees if and when the County's Comprehensive Plan was determined to be valid. The developers then recorded these agreements, and they became a lien against the property.

While some permit applicants elected to pay the impact fees rather than have a lien recorded against their property, most applicants signed these lien documents. Many of the liens were paid off in subsequent transactions when titles to the properties were transferred.

In September 1999, the plaintiffs filed a lawsuit against Kitsap County. The Pierce County Superior Court granted the plaintiffs' motion for summary judgment, denied the County's motion,¹ and confirmed the class.

¹ The three School Districts entered a settlement agreement with the plaintiffs. Per the terms of the agreement, the School Districts refunded to class members a portion of the school impact fees that they received fees during the relevant period. Some of the class members chose to allow the Districts to retain the fees received.

Kitsap County filed for Discretionary Review by the Washington State Supreme Court of the James v. Kitsap County judgment. The State Supreme Court accepted review, and the parties argued the case before the Court in January of 2004. The Supreme Court issued its ruling on July 7, 2005.

In a 5-4 decision that went much further than any impact fee case in the past, the Supreme Court held that “the imposition of impact fees as a condition of the issuance of a building permit is a ‘land use decision’ subject to the time requirements” of LUPA. In other words, the imposition of impact fees is not reviewable unless a party timely challenges that decision within 21 days of its issuance and complies with the other procedural requirements of the LUPA statute.

The Supreme Court went further to state that if the challenge to imposition of impact fee is not brought within 21 days, the issue of whether the County improperly imposed impact fees is no longer reviewable. Thus, the Court will not review a decision imposing an impact fee even if the Kitsap County Comprehensive Plan was not in compliance with the GMA.

Finally, the Court held that the developers in Kitsap County had the option of paying under protest (as provided in the impact fee statute) or challenging the imposition of the impact fees under LUPA. Because the developers did neither, they were barred under LUPA from challenging the legality of the fees imposed. In closing, the Court made a strong public policy statement, as follows: “Reviewing challenges to the imposition of impact fees as land use decisions furthers the legislative objectives of the GMA and LUPA.”

G. Sundquist Homes, Inc. v. Snohomish County, et. al., 276 F.Supp.2d 1123 (W.D. Wash. 2003), affirmed by, 166 Fed. Appx. 903 (9th Cir. 2006).

In June 2002, a group of developers filed an action in King County Superior Court against 28 separate defendants, including Snohomish County (“County”), ten School Districts in Snohomish County, and the City of Mill Creek.

The developers challenged the County’s collection of impact fees under the GMA, alleging that the County lacked the authority to collect traffic, park, and school impact fees because the County’s Comprehensive Plan was not fully in compliance with the GMA. The developers further claimed that the Districts were not authorized to receive the school impact fees.

In June 2003, U.S. District Court Judge Lasnik granted defendants’ motion for summary judgment and denied the plaintiffs’ motion for class certification. The chief basis for the Court’s decision was that the plaintiffs had failed to preserve their claims. Plaintiffs paid the impact fees prior to the time of building permit issuance and did not pay the fees under written protest. The Court held that a developer who makes payment without lodging a protest is precluded from seeking a refund under RCW 84.68.020. The Court also concluded that the impact fees at issue were properly characterized as taxes for the purposes of RCW 84.68.020’s requirements. Finally, citing West Coast, Inc. v. Snohomish County, 104 Wn. App. 735, 742 (2000), the Court

found that the plaintiffs had failed to comply substantially with LUPA's administrative exhaustion requirement before challenging the legality of the impact fee program. Therefore, since the plaintiffs had failed to exhaust administrative remedies, the Court found that it lacked jurisdiction over the matter.

The plaintiffs filed an appeal with the U.S. Ninth Circuit Court of Appeals, and the Ninth Circuit heard oral arguments on this case on November 3, 2004. The Ninth Circuit stayed its decision pending the outcome of James v. County of Kitsap, discussed above. Following the Washington State Supreme Court's decision in James, the Ninth Circuit found that Judge Lasnik's decision was consistent with James, and it issued an opinion affirming the District Court in January 2006. The plaintiffs did not file for review by the United States Supreme Court.

H. City of Olympia v. Drebeck, 119 Wn. App. 774, 83 P.3d 443 (2004), 156 Wn.2d 289 (2006); cert. denied 127 S.Ct. 436, 166 L.Ed.2d 330 (2006).

Drebeck challenged the imposition of transportation impact fees by the City of Olympia ("City"). The developer alleged that his commercial office building would not benefit specifically from the improvements identified in the City's six-year plan. The Hearing Examiner held on behalf of the developer in part, and remanded the case to the City for additional analysis. Pursuant to the Land Use Petition Act ("LUPA"), the City appealed the Hearing Examiner's decision to Thurston County Superior Court, and the developer cross-appealed.

The Superior Court ruled that it was permissible for the City to assess GMA transportation impact fees on a citywide basis. The City did not need to show that a particular development was specifically benefited by, or imposed a burden on, the projects identified in the transportation plan. It was sufficient that the commercial office building burdened the City's transportation system.

Drebeck then filed an appeal to the Court of Appeals, which reversed the decision of the Superior Court and remanded the matter to the City for a recalculation of the impact fee. 119 Wn. App. 774 (2004).

The City then appealed to the Washington State Supreme Court. The Supreme Court reversed the Court of Appeals, essentially affirming the Superior's Court's ruling that the impact fee statute permits local governments to base impact fees on area-wide infrastructure improvements that are reasonably related and beneficial to the particular development being assessed the fee.

The Supreme Court rejected the developers' argument that the City's ordinance was unconstitutional because it did not meet the "nexus" and "rough proportionality" tests of 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):

The dissent does not explain that neither Nollan nor Dolan concerned the imposition of impact fees but addressed instead the authority of a local

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

156 Wn.2d at 302. Furthermore, the Supreme Court concluded that the use of the term “reasonably related to” by the Legislature in the impact fee statute does not require “local governments to calculate GMA impact fees by making individualized assessments of each proposed development’s direct impact on each improvement planned in a service area.” Id. at 304.

While plaintiffs filed a petition for certification to the United States Supreme Court, the Supreme Court declined to review this decision in October 2006.

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