IN THE CIRCUIT COURT FOR THE
EIGHTEENTH JUDICIAL CIRCUIT, IN
AND FOR SEMINOLE COUNTY, FLORIDA

TIVOLI ORLANDO ASSOCIATES, LTD.,
a Florida Limited Partnership,
by THE TIVOLI 2900 CORP., a
Florida corporation, its General Partner,

Plaintiff,

Case No. 01-CA-1921-16-K

vs.

SEMINOLE COUNTY, a political
subdivision of the State of Florida,

Defendant.
_____/

FINAL JUDGMENT FOR DEFENDANT SEMINOLE COUNTY, FLORIDA

This matter came on for trial on June 5, 2007, with Plaintiff Tivoli Orlando Associates, Ltd., a Florida Limited Partnership, by The Tivoli 2900 Corp., a Florida Corporation and its General Partner (hereafter, "Tivoli"), seeking a declaratory judgment relating to the validity of certain water and wastewater connection charges (impact fees) and building permit fees imposed upon it by Defendant Seminole County, Florida (hereafter, the "County").

At the conclusion of the Plaintiff's case, upon motion by the Defendant, the Court granted the County a directed verdict with respect to Tivoli's challenge to the water and wastewater connection fees charged and to the validity of the ordinance by which those charges were imposed; and at the conclusion of the County's case, upon renewal of the motion, ruled in favor of the County on the remaining issue as to the validity of the building permit fees charged to Tivoli.

This Final Judgment memorializes the Court's rulings and provides the reasoning for

those rulings.

I. Background, Findings of Fact

Tivoli is the owner and developer of an apartment complex built in the County known as the Tivoli Apartments. The apartments were built in two phases from 1999 to 2001, with the first phase consisting of 14 buildings containing 168 one, two, three and four bedroom units, a clubhouse, a pool and other amenities in the common area. The second phase of the apartments, built on adjacent land acquired by Tivoli after development of the original property had begun, consists of an additional six buildings containing 72 three and four bedroom units.

During the course of its development of each phase of the apartments, Tivoli was required to pay to the County, among other regulatory fees and charges, water and wastewater connection charges, or impact fees, and building permit fees. When it did so, Tivoli indicated that "this payment is being made under protest and we reserve the right to reclaim a portion of these monies, if the claim is upheld by Seminole County officials and/or the judicial system." (Plaintiff Exhibits 8, 14) The Plaintiff was of the belief that the County arbitrarily and capriciously applied its governing ordinances and resolutions authorizing the levy of such charges and fees, thereby causing Tivoli to be overcharged for both, in each phase of its development.

The County's water and sewer impact fees were, at the time in question, established in Resolution 98-120. (Plaintiff Exhibit 3) A water and wastewater impact fee is a one time charge imposed on new development in order to capture the associated capital costs required to provide service to that development. Resolution 98-120 sets forth the formula for the calculation of the water and wastewater impact fee. The amount of the impact fee is determined by multiplying the cost per gallon for the treatment, transmission, plant capacity and associated

capital costs (the "Cost Component"), by the capacity factor for the type of development being constructed (the "Capacity Factor"). The Cost Component as established in Resolution 98-120 was $2.83 per gallon for water and $7.00 per gallon for wastewater. Tivoli made no challenge to this component. The Capacity Factor represents the anticipated consumption capacity, in gallons per day, that must be reserved to assure adequate water and wastewater supply to new residential or commercial development.

Resolution 98-120 sets forth a schedule of various uses and the Capacity Factor that is to be applied for each use. The Capacity Factors derived for the variety of uses are all premised upon the capacity requirements for an average single family home. This amount is established as 350 gallons per day ("GPD") for water and 300 GPD for wastewater not only in the Resolution but also within the Comprehensive Plan of Seminole County. The other land uses are variables of this amount determined by the extent of capacity needed when compared to that reserved for single family homes. Among the other usages established in Resolution 98-120 is the Capacity Factor for multi-family units. Under the Resolution, multi-family units are separated into two categories: 1) one and two bedroom units; and, 2) those with three or more bedrooms. The Capacity Factor for multi-family units with one or two bedrooms is established as 275 GPD for water and 250 GPD for wastewater. The Capacity Factor for multi-family units with three or more bedrooms is established as 335 GPD for water and 300 GPD for wastewater.

To develop the base Capacity Factor for a single family unit, also known as an Equivalent Residential Connection ("ERC"), the County utilized standards common to the industry which recognize that the average daily use of water is 100 GPD per person and the average single

family unit houses 3.5 persons.[1] Thus, a single family unit would have a Capacity Factor or ERC of 350 GPD for water. The Capacity Factor for the two categories of apartments are calculated as a percentage of that used by single family units.

In determining the Capacity Factor for water, it is appropriate to consider that the extent of capacity that must be reserved for a newly developed unit is not just its average usage. Rather, the County is required to reserve for the maximum potential usage that the newly constructed residential unit might require. Apart from actual consumption, the Capacity Factor also requires the consideration of fire protection, public irrigation and line losses. The Florida Department of Environmental Protection ("FDEP") also sets standards for establishing capacity and requires that facilities be designed to serve peak hour demand to ensure that service is available during times of highest demand. Peak hour demand measures the hour of the year in which consumption is greatest. Therefore, average water consumption data such as that presented by Tivoli will grossly underestimate the extent of capacity that must by State regulation be set aside for that new development.

Similarly, in establishing the appropriate Capacity Factor for wastewater usage, industry standards are again used. Initially, wastewater Capacity Factors account for more than just daily use; they must also include infiltration and inflow, which fluctuates with weather and the age of the system. As residential wastewater use is not metered, it will always be less than the amount of water used. Therefore, the Capacity Factor for wastewater by various types of residential

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[1] Both the average water usage per person and the data on the average number of persons within a single family unit were standards established by the Florida Department of Health in regulating the size of septic tank systems for residential dwelling units. These standards are also used by the Florida Department of Environmental Protection with respect to its regulation and permitting of water distribution and wastewater treatment plants.

units is calculated as 85 to 90% of the Capacity Factor for that same unit's water Capacity Factor. This also is a well established industry standard in determining the appropriate Capacity Factor for wastewater purposes.

At trial, Tivoli presented its engineer of record on the apartment project, Rory Causseaux. Mr. Causseaux testified that, among the permits and approvals necessary in order to tie in with and have the apartments hooked up to the County's water and wastewater systems, were permits required to be approved by the FDEP. Separate permit applications were submitted for each phase of the project, and separate permits were submitted with respect to construction of extensions of both a water distribution system and a wastewater collection/transmission system. (Those permit applications are in evidence as Defendant Exhibits 16 and 17, for the water distribution system expansions in phases 1 and 2, respectively; and Defendant Exhibits 19 and 20, for the wastewater collection/transmission system construction in phases 1 and 2, respectively.)

Within the water distribution system permit applications, Mr. Causseaux, as the professional engineer in responsible charge of designing the project, was required to sign and certify a number of things, among which were to include a summary of design data for the project. With respect to the water distribution system design data, Mr. Causseaux was required to set forth projected annual average and maximum day water demands for the expanded facilities necessitated by the project. In doing so, Mr. Causseaux indicated that, in his professional judgment, the per capita average daily water demand would be 118 GPD (Defendant Exhibits 16 and 17, page 5, section VI(1)(E)). This figure is well above the standard of 100 GPD per person which the County has adopted.

Similarly, with respect to the wastewater collection/transmission system permit

applications, Mr. Causseaux testified that he also was required to sign and certify to a number of things, including the project details and a summation of the projected per capita flow. In this instance, Mr. Causseaux set forth as the average per capita flow a figure of 106.6 GPD for the phase 1 apartments and 94.74 GPD for phase 2 (Defendant Exhibits 19 and 20, page 2, Part II, subpart B(1)(b)). These figures, again, are above or extremely close to the 100 GPD per person standard adopted by the County.

Though Tivoli has attempted to argue that Mr. Causseaux used these figures only because of concerns that the County would accept nothing less, Mr. Causseaux's cross examination testimony does not support that view. Mr. Causseaux clearly stated the figures he used were reasonable under the circumstances and were well within standards accepted throughout the industry. Moreover, he indicated that, as a professional engineer, he would not have signed and certified the applications had he believed otherwise. Finally, he acknowledged that, at the time these permit applications were submitted, he had not had conversations with anyone at the County who informed him that he must use any certain figures or design data and that neither he nor Tivoli's principal, Mr. Phil Emmer, had proposed to the County the use of any alternative consumption figures at this time.

Tivoli also produced, at trial, a summary chart showing its actual water and sewer consumption, from the time the apartments were completed and occupied through March 2007, based upon actual bills received from the County. (Plaintiff Exhibit 24(a)) Plaintiff attempted to show, through this exhibit, that its actual usage, averaged over time, was substantially less than calculations of anticipated consumption using both the County's standards taken from Resolution 98-120 and the alternative gallon per day per bedroom figure Tivoli had later proposed to the County when paying its impact fees. As shown by the County, however, there were a number of

months when Tivoli's actual usage exceeded the amounts anticipated under the County's standards, thus bolstering the County's stated justification for utilizing those standards - - to set aside capacity sufficient to capture usage at its peak, not simply its average.

The County's building permit fees in place at the relevant times were established in Resolution 97-R-245, adopted on November 25, 1997 (Plaintiff Exhibit 2), and implemented by the Seminole County Building Department. Under the provisions of Resolution 97-R-245, anyone undertaking construction of a new building or alteration of an existing building was required to obtain a building permit. The fees for such permits were also established, by reference, in the Resolution and, for multi-family residential developments such as Tivoli, required that the applicant pay $47 per square foot value of construction for "average" quality buildings and $60 per square foot value of construction for "good" quality buildings. The particular amounts established for the fees in Resolution 97-R-245 were not unique to the County, but rather, were established by reference to valuation data published by the Southern Building Code Congress International ("SBCCI"), a widely recognized and used source (Defendant Exhibit 13). The SBCCI based these values on construction undertaken in Alabama, and it therefore cautioned that a multiplier must be assigned for different geographic areas to allow the permit fees to be tailored to regional conditions. If the County had elected to apply the multiplier for the closest locale in Florida - - Orlando - - the cost per square foot would have been substantially higher (the Orlando multiplier was 1.11), but the County has chosen not to use the multiplier, thereby applying a more conservative approach.

During the construction of the multi-family units by Tivoli, the fee imposed was based upon the determination that they were construction of "good" quality buildings rather than "average" quality, thereby resulting in assessed permit fees at the higher rate. It was the

County's determination to assess at the higher rate for the permit fees which formed the basis for this portion of Tivoli's action. Tivoli presented data showing its actual building costs and argued that because such data reflected a construction cost of even less per square foot than the "average" figure, to assess it at the "good" level was both arbitrary and capricious.

Seminole County Building Official, Larry Goldman, testified, however, that it was not construction costs, but construction value, that the County's fees were based upon. This is borne out by the SBCCI Valuation Data chart (Defendant Exhibit 13), which states that its averages consist not only of typical construction cost items, but also include such things as architectural and design fees, site preparation, overhead and profit. Tivoli's project construction manager acknowledged that its building construction cost estimates did not include those types of items. Moreover, though it references "costs," the valuation data chart, in its overall description, indicates that its "good" and "average" categories are meant "to reflect the broad range of construction values." Clearly, the County's chosen method for calculating its building permit fees is one based upon the value of construction, not its cost.

Mr. Goldman further testified that the County's use of the "good" standard, rather than "average," for these apartments was based upon a number of the amenities each unit contained. Among those amenities that Mr. Goldman indicated were important in his determination were that each bedroom in all units has its own full bathroom; each bedroom has a walk-in-closet; the bathrooms have tubs and showers; the bedrooms have ceiling fans; the units are wired for cable and ethernet; the kitchens have dishwashers, garbage disposals and microwave ovens; there is a fire alarm system; the units have patios or porches; and the units have washers and dryers. Tivoli's own brochure describes them as "luxury apartments." (Defendant Exhibit 14) The Court concurs with Mr. Goldman's assessment that these apartments were, indeed, properly

designated in the "good" category for purposes of Tivoli's building permit fee calculations.[2]

II. Legal Requirements, Standards

The authority of local governments to impose impact fees works in conjunction with their power to regulate land use and their statutory responsibility to adopt and enforce a Comprehensive Plan. See Sections 163.3177, 163.3180 and 163.31801, Florida Statutes. Case law on impact fees establishes the legal requirements for the imposition of an impact fee by a local government, including those fees used to fund expansion of capacity for water and wastewater infrastructure.

Impact fees provide the infrastructure to allow development to proceed under the requirements of growth management and concurrency. See Section 163.31801(2). In Section 163.3177(10)(h), Florida Statutes, the Legislature has stated its intent that public facilities needed to support development be available concurrently with the development. Section 163.3180(2)(a), Florida Statutes, requires specifically that water and wastewater treatment facilities needed to serve new development must be in place by the time the County is ready to issue a certificate of occupancy and that before issuing a building permit a local government must get assurance from the water supplier that an adequate supply of water will be available to serve the new development by the expected issuance date of the certificate of occupancy.

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[2] Plaintiff elicited testimony from Mr. Goldman that the County has, only once, to his knowledge, ever based the building permit fees on an "average" designation for construction value. While this might lend itself to Tivoli's argument that such is evidence of arbitrary and capricious behavior under different circumstances, Plaintiff's is a challenge to the way the County applied the Resolution to the Tivoli Apartments, alone. Based upon the Court's finding that Tivoli's construction value was properly designated "good" under the evidence produced at trial, Plaintiff's argument in this regard must fail.

Impact fees are charges imposed against new development to provide for the cost of capital facilities made necessary by population growth. The purpose of the charge is to impose upon newcomers, rather than the general public, the cost of new facilities necessitated by newcomers. See City of Dunedin v. Contractors & Builders Ass'n of Pinellas County, 312 So. 2d 763, 766 (Fla. 2d DCA 1975) ("Where a city's water and sewer facilities would be adequate to serve its present inhabitants were it not for drastic growth, it seems unfair to make the existing inhabitants pay for new systems when they have already been paying for the old ones."); see also Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983). The use of impact fees "has become an accepted method of paying for public improvements that must be constructed to serve new growth." St. Johns County v. N. E. Fla. Builders Ass'n, 583 So. 2d 635, 638 (Fla. 1991).

For an impact fee to be valid in the State of Florida, it must meet the "dual rational nexus" test. First, there must be a reasonable connection or nexus between the anticipated need for the additional capital facilities and the new development. Second, there must be a reasonable connection or nexus between the expenditure of the impact fee proceeds and the benefits accruing to the development that paid those proceeds. See, e.g., Hollywood, Inc., 431 So. 2d at 611-12; N.E. Fla. Builders Ass'n, 583 So. 2d at 637.

The argument that not all new development will use a public facility to the same degree, and should therefore pay a lower fee or no fee, does not work to reduce the fees of those who use the facilities less. In N.E. Fla. Builders Ass'n, for example, developers contended that they should not have to pay impact fees for new schools because many of the residences they built would not place demands on the public schools. The Court rejected this argument as too simplistic. "During the useful life of the new dwelling units, school-age children will come and

go. It may be that some of the units will never house children. However, the county has determined that for every 100 units that are built, 44 new students will require an education at a public school. The St. Johns County impact fee is designed to provide the capacity to serve the educational needs of all 100 dwelling units." Id., 583 So. 2d at 638-639.

Under the second prong of the dual rational nexus test, an impact fee must exhibit a reasonable connection or rational nexus between the expenditure of the fees collected and the benefits accruing to the new development. See Hollywood, Inc., 431 So. 2d. at 611. This is normally satisfied when the impact fees are used to provide capital expansion of the same facilities which are utilized by the new development or are otherwise restricted for that purpose. See id.

Tivoli claims that Resolution 98-120 is arbitrary and capricious as applied to its apartment complex. The County's adoption of its water and wastewater impact fees through the Resolution is a quasi-legislative action. See City of Cape Canaveral v. Rich, 562 So. 2d 445 (Fla. 5th DCA) (finding that adoption of a sewage impact fee was a quasi-legislative function). The standard of review to be used by a trial court in an "as applied" challenge to a quasi-legislative action is articulated in Workman Enterprises, Inc. v. Hernando County, 790 So. 2d 598 (Fla. 5th DCA), where, in a challenge to the application of a special assessment to an owner's property, the Court regarded such application as legislative action and stated that it should be upheld unless found to be arbitrary. Id. at 600.

When there is conflicting evidence regarding the basis of a local government's legislative action, as there usually will be, predicated on the judgment of expert witnesses, the court will not disturb the government's action. See id. The burden is on the property owner to rebut the presumption of correctness that follows a legislative action, and that "presumption can be

overcome only by strong, direct, clear and positive proof" with "the evidence presented at trial . . . viewed in the light most favorable to the County." Id. (citation omitted) (internal quotation marks omitted).

With respect to evaluating a local government's methodology for establishing an impact fee, cases addressing the validity of methodologies used to calculate a special assessment are of assistance in that the same legislative presumptions apply in that context. In analyzing the validity of a special assessment, Florida courts have developed certain broad guidelines in determining whether an assessment is reasonable. The principle that legislative bodies have wide discretion in creating a methodology for the apportionment of costs among the properties underlies those guidelines. See Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995). Such rule of judicial restraint is grounded in the separation of powers concept mandated by Section 3, Article III of the Florida Constitution.

Accordingly, an apportionment methodology need not be perfect; it simply must avoid being clearly arbitrary. See Meyer v. City of Oakland Park, 219 So. 2d 417 (Fla. 1969) ("No system of . . . assessing costs has yet been devised that is not open to some criticism. . . ."); Haire v. Florida Dep't of Agric. & Consumer Svcs., 870 So. 2d 774, 786 (Fla. 2004) (discussing, in the context of the appropriate scientific methodology, that the court ought not substitute its judgment for that of the legislature in determining whether a legislative determination is reasonable or rational). As a wide variety of methodologies and approaches may be used to apportion assessments, Florida courts have determined that the final decision should be that of the legislative body because it is best able to consider all of the pertinent factors. Such an approach is equally applicable in reviewing the validity of an impact fee.

Just as the particular methodology that can be used to calculate a special assessment may vary, an impact fee could be calculated, for a particular jurisdiction, using a variety of approaches and each could arrive at different approximations as to the amount of the impact fee. Further, each of these different approaches could be deemed reasonable and, therefore, valid. That is why the ultimate determination as to the methodology selected among these various approaches is best made by the legislative body.

The County's fee for building permits is a user fee, which is a fee based on the proprietary right of a governing body that permits the use of its facilities or services. City of Gainesville v. State of Florida, 863 So. 2d 138, 144 (Fla. 2003); State of Florida v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994). As with impact fees, the adoption of user fees is a legislative action. City of New Smyrna Beach v. Board of Trustees of the Internal Improvement Trust Fund, 543 So. 2d 824, 830 (Fla. 5th DCA 1989). User fees are paid by choice, in that, an individual has the option of not utilizing the governmental service and thereby avoiding the fee. Port Orange, 650 So. 2d at 7.

Under Florida law, local governments may require the payment of a user fee to cover the cost of their regulation, provided the amount of the fee is reasonable and the revenue is expended for the purposes for which it was collected or for closely allied purposes. In addition, Section 125.56(2), Florida Statutes, allows counties to adopt "reasonable inspection fees in order to defer the costs of inspections and enforcement" incurred in ensuring that buildings meet state and county standards.

III. Application of the Law

In the present case, the issue as to the validity of the water and wastewater impact fee turned on a single issue - - that is, whether the Capacity Factor established by Seminole County

and utilized in Resolution 98-120 is arbitrary. The essence of Tivoli's Amended Complaint is that the Capacity Factors are arbitrary and capricious as applied to its apartment development because they overestimate the quantity of water and wastewater service that the apartment complex actually uses.[3]

Contrary to the position of Tivoli, the Capacity Factors used by the County in determining the amount of the water and wastewater impact fees imposed on Tivoli are reasonable and supported by general industry practice and standards. Tivoli's own engineer of record admitted as much. Further, as shown by Tivoli's actual usage charts, its monthly consumption exceeded even the amounts for which capacity was set aside under the County's standards. Together, these facts demonstrate that the calculation and imposition of the water and sewer connection fees upon Tivoli by the County were neither arbitrary nor capricious, but were reasonable in all respects.

Similarly, with respect to the County's building permit fee, the issue before the Court was whether the County's application of Resolution 97-R-245 to assess Tivoli was subjective, arbitrary and capricious because it "fails to consider the actual, historical estimated costs of construction by square foot" (Amended Complaint, ¶25), and because the County designated the construction as of "good" quality rather than "average."

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[3] Tivoli also attempted, at trial, to challenge the validity of the County's Resolution by arguing that there was no provision in the Resolution which specifically required that the impact fees collected be segregated and earmarked for only water and wastewater facility building and expansion. As correctly pointed out by the County, this was not a claim raised in Tivoli's Amended Complaint. Regardless, the testimony of Environmental Services Financial Manager, Robert Briggs, established that the underlying ordinance which authorizes the imposition of the impact fees calls for such funds to be set aside in a separate Enterprise Fund, to be expended only for water and wastewater capital improvements and expansions. Further the actual practice of the County is to separately account for these funds. This clearly satisfies the requirements set out in case law on the subject. See City of Dunedin, 312 So. 2d at 766-67.

The County's building permit fees are reasonable. They are related to the value of the building inspected and the quality of the materials used in construction, and their amount is closely tied to the cost of the services provided. The valuation comes from a commonly used industry reference source, the SBCCI. At the time in question, the SBCCI established that multi-family residential buildings of average quality should be valued at $47 per square foot and buildings of good quality should be valued at $60 per square foot. In implementing these standards, the County recognized industry guidelines for differentiating between average quality and good quality in residential structures. As noted by the SBCCI, most developed properties will have both good and average features, but the existence of certain average features should not act to defeat an overall determination that the quality of construction is good. Based upon the list of amenities noted above and the testimony of the County's Building Official, the County's determination in this regard was neither arbitrary nor capricious, but was, in fact, quite reasonable.

IV. Conclusion

Resolution 98-120 and its underlying methodology are based on commonly accepted industry standards for water and wastewater capacity and usage and for apartment occupancy, and they are therefore reasonable. The County's methodology is, after all, entitled to a presumption of correctness that can only be overcome by clear evidence that the County is wrong. Under the facts and circumstances of this case, that showing was not made; indeed, the evidence presented by the Plaintiff failed to establish a prima facie case to support Tivoli's challenge to the validity of the water and wastewater connection fees. On the contrary, the evidence presented conclusively established that the fees were based upon reasonable

assumptions and conclusions. Therefore, directed verdict for the County on this claim was appropriate.

Likewise, Resolution 97-R-245 is based on standard industry guidelines for construction. That Tivoli's buildings are of good quality is the relevant factor under the ordinance. Whether Tivoli built them for less than the valuation placed upon them is irrelevant because building permit fees need not be based on the actual cost to build a particular building. There is nothing arbitrary about relying on the SBCCI standards, and the County's permit fees, using those standards, are closely aligned with the cost of providing its building inspection services. Further, the evidence established that the appropriate standard was applied to Tivoli based upon the amenities provided. The Resolution and the use of the County's chosen methodology in assessing Tivoli's building permit fees are therefore reasonable and are upheld in all respects.

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that:

1. Final Judgment is entered on behalf of Seminole County, Florida, and against Tivoli Orlando Associates, Ltd., by The Tivoli 2900 Corp., on each and every claim asserted. Defendant Seminole County shall go hence without day.

2. The Court reserves jurisdiction to tax costs and for such further relief as may be requested.

F.J.
Case #01-CA-1421

DONE AND ORDERED in Chambers in Sanford, Seminole County, Florida, this 23 day of July, 2007.

/s/ DEBRA S. NELSON

DEBRA S. NELSON
Circuit Judge

Copies furnished to:
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