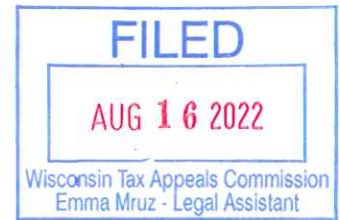


STATE OF WISCONSIN  
TAX APPEALS COMMISSION



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GREYWOLF PARTNERS, INC.,

DOCKET NO. 19-Y-204

Petitioner,

v.

VILLAGE OF WINDSOR,

Respondent.

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RULING AND ORDER

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JESSICA ROULETTE, COMMISSIONER:

This case comes before the Commission for decision following a trial held on May 4 and 5, 2022. The sole issue in this case is whether a water impact fee charged by the Village of Windsor bears a reasonable relationship to the service for which the fee was imposed. Wis. Stat. § 66.0628. The Petitioner, Greywolf Partners, Inc., appeared by Attorneys J. Wesley Webendorfer and Barret V. Van Sicklen of DeWitt, LLP. The Village of Windsor appeared by Attorneys Kyle Engelke and Pahoua Thao, Stafford Rosenbaum, LLP.<sup>1</sup>

At the hearing, the Commission received and entered into evidence Petitioner's Exhibits, B, C, J, and U, as well as Respondent's Exhibits 1-3, and 26-32. Petitioner

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<sup>1</sup> The Village was previously represented by Attorneys Ted Waskowski, Elizabeth Stephens, and Meg Vergeront, of the same firm.

introduced the sworn testimony of four witnesses, Paul Wagner, Julie Lonergan, Catherine Wunderlich, and Greg Gunderson. The Respondent presented sworn testimony from Gerald Groth and Tina Butteris.

The facts found at trial are listed below. Based upon the credible trial testimony and evidence in the record, the Commission finds the Village has met its burden of proof and demonstrated that the water impact fee imposed is reasonably related to the service provided.

## FINDINGS OF FACT

### *Material Facts*

1. The Petitioner, Greywolf Partners, Inc. ("Greywolf"), is a Wisconsin corporation with its principal place of business located at 115 S. 84<sup>th</sup> Street, Suite 275, Milwaukee, Wisconsin 53214.
2. The Respondent, Village of Windsor ("Village"), is a municipal entity duly organized under the laws of the State of Wisconsin and located in Dane County, Wisconsin.
3. The claims in this case relate to the water impact fee assessed for the development of an assisted living facility called the Legacy of DeForest ("the Legacy") located in the Village of DeForest, Wisconsin.
4. The Legacy obtains its water service from Windsor Water Utility, which is owned, managed and maintained by the Village.
5. Greywolf was the developer of the Legacy.

6. The Legacy is a health care facility providing personal and nursing services to individuals residing in 22 Community-Based Residential Facility (“CBRF”) units and 32 Residential Care Apartment Complex (“RCAC”) units.<sup>2</sup>

7. Each of the 22 CBRF units at the Legacy have a bathroom sink, toilet, and shower.

8. Each of the 32 RCAC units have a bathroom sink, toilet, and shower; 28 of the RCAC units have a dishwasher, while 4 of the RCAC units do not have a dishwasher.

9. The maximum total occupancy for residents of the Legacy is 82.

10. On September 8, 2016, the Village issued a Water Needs Assessment Study to establish water impact fees for a new storage tank and well facility.

11. On October 24, 2016, the Village issued an Addendum to Water Needs Assessment Study.

12. On August 16, 2018, the Village adopted a resolution titled Water Facilities Needs Assessment and Impact Fees (the “Policy”).

13. Under the Policy, the Equivalent Residential User (“ERU”) fee for a multi-family/senior family residence is \$3,000.00.

14. The water impact fee calculation for the Legacy is  $(2/3) \times (54 \text{ units}) \times (\$3,000.00) = \$108,000.00$ .

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<sup>2</sup> The parties stipulated the Legacy is licensed by the Wisconsin Department of Health Services.

15. On December 20, 2018, the Village imposed a \$108,000.00 water impact fee on Greywolf.

16. On December 31, 2018, Greywolf paid the water impact fee of \$108,000.00.

17. On January 18, 2019, Greywolf appealed the water impact fee to the Village Board.

18. On April 30, 2019, the Village Board held a hearing on Greywolf's appeal and sustained the \$108,000.00 water impact fee.

19. On July 25, 2019, Greywolf filed its Petition for Review with the Commission.

20. On August 26, 2019, the Village filed its Answer and a Motion to Dismiss.

21. The Legacy was completed and opened in November 2019.

22. On December 1, 2020, after briefing by the parties, the Commission issued a written order denying the Village's Motion to Dismiss, and that order's findings and conclusions of law are incorporated into this opinion.

23. The Commission held a trial in this matter on May 4 and 5, 2022, which was duly recorded.

24. The Village engaged in a comprehensive process to develop the water impact fee framework. The Village decided to create a scheme with 4 classifications of development as follows: a fee of \$3,000 per lot with a single-family residence applies to new construction, a fee of \$6,000 per building applies to development of 2-family residences, a

fee of \$2,000 per unit applies to development of multiple family and senior family residences, and a fee of \$9,000 per acre applies to non-residential construction.

25. The Village assessed and collected the water impact fee at issue before Greywolf could obtain a building permit from the Village of DeForest to allow construction of the Legacy.

26. Due to the timing of the planning and licensing processes, the Village determined the correct water impact fee classification for the Legacy, which was at that time described as a senior living facility, prior to Greywolf being issued a building permit for the Legacy.

27. At the time the water impact fee was imposed and collected by the Village, Greywolf had neither built the Legacy, nor had it obtained licensure as a healthcare facility.

28. The estimated costs to build a new well and well house, and a new storage tank totaled \$2,835,000. At the time of the hearing in this matter, the actual costs to complete the portion of work on the well that had already taken place were much greater than the initial estimates.

29. Pursuant to the Village water impact fee schema, only new connections to the water system are charged a water impact fee.

30. The Village estimated 1,463 new connections could be reasonably expected to be added to the water system.

31. The Village applies payment of water impact fees to defray the costs of a number of prior water system projects. The projects to which Greywolf's \$108,000 fee was

applied include: 1) a \$2,000,000 reservoir, 2) a \$2,000,000 well (well #3), and 3) a \$2,000,000 water tower.

### APPLICABLE LAW

#### **66.0628 Fees imposed by a political subdivision.**

(4)(a) Any person aggrieved by a fee imposed by a political subdivision because the person does not believe that the fee bears a reasonable relationship to the service for which the fee is imposed may appeal the reasonableness of the fee to the tax appeals commission by filing a petition with the commission within 90 days after the fee is due and payable. The commission's decision may be reviewed under s. 73.015. For appeals brought under this subsection, the filing fee required under s. 73.01 (5)(a) does not apply.

(b) With regard to an appeal filed with the tax appeals commission under par. (a), the political subdivision shall bear the burden of proof to establish that a reasonable relationship exists between the fee imposed and the services for which the fee is imposed.

### ANALYSIS

This case involves \$108,000 in water impact fees charged to the Petitioner for the connection of the Legacy to the Village's water infrastructure. Petitioner objected to the fees. Petitioner was represented by Attorney Webendorfer before the Village Board, which oversees the imposition of water impact fees in the Village of Windsor. The Village Board voted to uphold the fees. The Petitioner then appealed to the Wisconsin Tax Appeals Commission.

Although completely unrelated to the usual subject matter generally addressed by the Tax Appeals Commission, the legislature has granted the Commission jurisdiction over municipal fees. The Commission's review in municipal fee cases is limited

to a determination of whether such fees bear a reasonable relationship to the service for which the fee was imposed. Wis. Stat. § 66.0628.

Unlike any other issues within the jurisdiction of the Commission, in municipal fee cases, Petitioners do not bear the burden of proof. The procedures outlined in Wis. Stat. § 66.0628 provide that the burden in municipal fees cases rests with the municipality. The Village bears the burden of proof “to establish that a reasonable relationship exists between the fee imposed and the services for which the fee is imposed.”

Greywolf’s appeal may only address the reasonableness of the fee assessed. The parties do not agree on how to measure the reasonableness of the fees. Greywolf takes the position that the Legacy’s subsequent licensure as a healthcare facility and subsequent actual water use prove that the Village imposed the wrong water impact fee classification. The Village takes the position that the reasonableness should be measured by the Village’s reasonable development of a four-category classification schema, and the Village’s subsequent best efforts to place Greywolf into one of the four categories of user.

The Village provided evidence that the water impact fee paid by Greywolf was used to defray the cost of three different water system projects, two of which predated the building of the Legacy, and a third which was in progress at the same time as the Legacy was being built. The known costs of the three projects combined were approximately \$6,000,000 as of the date of trial. The Commission cannot find that a fee of \$108,000 is unreasonable in relation to costs of \$6,000,000.

Petitioner argues that the schema developed by the Village to assess water impact fees improperly relied upon a Department of Natural Resources (DNR) code

provision (Admin. Code NR 811.29) intended to address pumping capacity requirements. The Village engineer credibly testified that the Village wanted to develop a schema that would be easy to administer, and which would cover “99% of what was being built in Windsor,” which gave credit for multi-family buildings, and which had a separate category for non-residential development. The Village engineer further credibly testified that he wanted to use an objective measure of the appropriate relation of water capacity needed for single family homes versus multi-family dwellings that “someone has already codified.” First, the Village looked at how many developable plots of land in both the Village of DeForest and the Village of Windsor would be likely to tap into the Village’s water infrastructure. The Village then undertook a study of how much to increase the capacity of its water delivery system, and where best to situate a well, well house and elevated tank, given the existing two other wells and storage tank for the municipal system. That study resulted in a recommendation that the third well be sited either at Cradle Hill Park or at Tower Park, with a 400,000 gallon elevated water storage tank, to avoid adverse effects on the existing wells, pumping system, and local aquifer. The estimated cost of the new well and well house was anticipated to be \$1,285,000. The estimated cost of the new elevated water tank was anticipated to be \$1,550,000. These estimates were made in 2016, well before the advent of COVID-19 and supply chain issues, which have increased the actual costs considerably.

Petitioner’s expert witness, Cathy Wunderlich, testified that the Village’s reliance on Admin. Code NR 811.29 was completely inappropriate, because that administrative code provision does not relate to health care facilities. However, at the time



the Village was assessing the water impact fee, the Village had not been informed that the Legacy would be operating as a healthcare facility. The Village assessed the water impact fee based on the information that it had, which was simply that the Legacy was to be senior housing. The testimony of Ms. Wunderlich was not helpful in determining whether the fee applied to the Legacy was reasonable or not.

Petitioner argued that the Village improperly applied its schema to the Legacy, and that the Legacy should be considered a commercial property. The water impact fee classification scheme developed by the Village had four categories, none of which were specifically "commercial." Presuming that Petitioner intended to argue that the Legacy could not reasonably be considered a residential property and so must be considered a non-residential property, the Commission holds that it is not unreasonable to classify the Legacy as a residential property, given that the Legacy contains 32 apartment type units where seniors can reside, along with 22 units where seniors with additional care needs can reside.

Petitioner also offered a series of arguments which are not relevant to the reasonableness of the water impact fee at the time it was imposed. Petitioner offered testimony relating to the Legacy's actual water usage during its first year of operation and minimal water use habits of the elderly. The testimony described the actual water use of a facility operating at partial capacity for its first year of operation. This testimony does not inform our analysis of whether the water impact fee was reasonable at the time it was imposed. None of the evidence regarding the actual water usage of the Legacy, measured after it opened for residents, was useful to the Commission in determining whether the

water impact fee was reasonable at the time it was imposed, before ground was broken for the building.

The Commission must look at the information the Village had at the time it imposed the fee. The Commission can also look at whether the water impact fee classifications as developed by Village are reasonable. There is no requirement in Wisconsin law that every new development pay a fee that relates to the water it will actually use. Additionally, there was no evidence introduced that the schema was developed or used by the Village to unfairly target any particular type of development. A relatable illustration of how the water impact fee is unrelated to actual water use across all categories is this: the schema treats a 5,000 square foot house with an in-ground swimming pool and manicured lawn the same as a 1,200 square foot house with a xeriscaped yard, so long as both houses are single-family homes. Another relatable example of how actual water use is unrelated to the water impact fee is this: the water impact fee charged to a car wash would be the same as the water impact fee charged to a yarn store, where both businesses were located on the same size parcel.

A municipality is free to construct a water impact fee classification system with as many classes as it desires. Petitioner submitted an example of a water impact fee from a different municipality with 15 classifications. There is no requirement in Wisconsin law that a municipality have a particular number of classifications in its water impact fee schedule. The only "brake" on a municipality's development of a classification system in Wisconsin law is that the classifications must result in fees that are reasonably related to the

service provided. A \$108,000 fee, in relation to \$6,000,000 of improvements, is not unreasonable.

When a landowner gains access to a municipal water system, the landowner gains access to the water capacity of that system. The capacity of the municipal water system is the service to which the impact fee relates. The monthly or quarterly bill is what the landowner pays for actual usage. The evidence provided by the taxpayer as to the Legacy's actual water use after it opened is not relevant to the reasonableness of the water impact fee under Wis. Stat. § 66.0628.

The water impact fee allows a landowner to have access to a municipal water system not only for the owner's regular, recurring water usage, but also for use in the event of a fire. When a municipality builds or expands a municipal water system, the municipality has to build its water system to account for the maximum water use day: a day where there has been no rain for 2 weeks, folks are sprinkling their lawns, and a fire needs to be quelled with water from the water supply. An appropriately built municipal water system has excess capacity on every day except the maximum use day. Municipalities could ill afford to create, maintain, and expand municipal water systems if they were prohibited from charging a fee which acknowledges the impact of development on the necessary capacity of the water system. Such demand includes the need for water for sprinkler systems and Fire Department use in the event of a fire at the development. The Petitioner's arguments that the Legacy's actual water use is somehow proof that the water impact fee charged by the Village is unreasonable fails.

## CONCLUSIONS OF LAW

1. The Village bears the burden to prove “that a reasonable relationship exists between the fee imposed and the services for which the fee is imposed.” Wis. Stat. § 66.0628.

2. In this matter, evidence of total costs was available, and evidence of total potential revenues related to the pool of potential water impact fee payers was not specifically enumerated. The fee of \$108,000 charged to Greywolf must have its reasonableness measured in relation to total system improvement costs totaling \$6,000,000.

3. The Village presented sufficient evidence from which to conclude that its water impact fees are reasonably related to the services for which they are charged. The Village also presented sufficient evidence from which to conclude that the costs to expand the municipal water system equal or exceed the revenues generated.

4. Because the Village has met its burden of proof, the fees assessed to Petitioner, which are the subject of this appeal, are affirmed.

## ORDER

Based on the foregoing, it is the order of the Commission that the Petitioner’s Petition for Review is denied, and its fees are adjudged properly assessed and paid.

Dated in Madison, Wisconsin, this 16<sup>th</sup> day of August, 2022.

WISCONSIN TAX APPEALS COMMISSION

  
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Jessica Roulette, Commissioner

  
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Elizabeth Kessler, Chair

  
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Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

WISCONSIN TAX APPEALS COMMISSION  
101 E Wilson St, 5<sup>th</sup> Floor  
Madison, Wisconsin 53703

**NOTICE OF APPEAL INFORMATION**

NOTICE OF RIGHTS FOR REHEARING, OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

A taxpayer has two options after receiving a Commission final decision:

***Option 1: PETITION FOR REHEARING BEFORE THE COMMISSION***

The taxpayer has a right to petition for a rehearing of a final decision within 20 days of the service of this decision, as provided in Wis. Stat. § 227.49. The 20-day period commences the day after personal service on the taxpayer or on the date the Commission issued its original decision to the taxpayer. The petition for rehearing should be filed with the Tax Appeals Commission and served upon the other party (which usually is the Department of Revenue). The Petition for Rehearing can be served either in-person, by USPS, or by courier; however, the filing must arrive at the Commission within the 20-day timeframe of the order to be accepted. Alternately, the taxpayer can appeal this decision directly to circuit court through the filing of a petition for judicial review. It is not necessary to petition for a rehearing first.

**AND/OR**

***Option 2: PETITION FOR JUDICIAL REVIEW***

Wis. Stat. § 227.53 provides for judicial review of a final decision. Several points about starting a case:

1. **The petition must be filed in the appropriate county circuit court and served upon the Tax Appeal Commission and the other party (which usually is the Department of Revenue) either in-person, by certified mail, or by courier, within 30 days of this decision if there has been no petition for rehearing or, within 30 days of service of the order that decides a timely petition for rehearing.**
2. **If a party files a late petition for rehearing, the 30-day period for judicial review starts on the date the Commission issued its original decision to the taxpayer.**
3. **The 30-day period starts the day after personal service, or the day we mail the decision.**
4. **The petition for judicial review should name the other party (which is usually the Department of Revenue) as the Respondent, but not the Commission, which is not a party.**

For more information about the other requirements for commencing an appeal to the circuit court, you may wish to contact the clerk of the appropriate circuit court or, the Wisconsin Statutes. The website for the courts is <https://wicourts.gov>.

This notice is part of the decision and incorporated therein.