UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0195

September Term, 2015

MONTGOMERY COUNTY, MARYLAND

v.

THOMAS A. BRAULT

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.
Concurring Opinion by Nazarian, J.,
Joined by Berger, J.

Filed: April 1, 2016

In early 2009, Appellee/Cross-Appellant Thomas A. Brault purchased a 1.325 acre property on Meadow Lane in Chevy Chase, Maryland. After subdividing the property into two lots, on February 1, 2012, he obtained a building permit to build a house on one of the new lots at its new address: 7215 Ridgewood Terrace. Appellant/Cross-Appellee Montgomery County assessed a total impact tax of $58,700.00 on that new construction.

During construction Mr. Brault uncovered construction debris remaining under the ground cover from the previous demolition of a partially completed structure that straddled the two lots on the property. As a result, he incurred significant unexpected costs and requested an exemption from the County's impact taxes pursuant to provisions exempting construction that begins "within one year after demolition or destruction of the previous building was substantially completed . . . ." Montgomery County Code §§ 52-49(h)(3) (Development Tax for Transportation Impacts); 52-89(d)(3) (Development Impact Tax for Public School Impacts).[1]

On April 16, 2013, Montgomery County denied Mr. Brault's request. He sought review of that decision in the Maryland Tax Court. The Tax Court concluded that Mr. Brault "failed to establish that he is entitled to an exemption from the Montgomery County impact taxes." On Mr. Brault's petition for judicial review, the Tax Court ruling was

[1] The provisions, applicable at the time of Mr. Brault's 2012 permit application, were codified at Montgomery County Code, Chapter 52 Taxation, Title VII - Development Impact Tax for Transportation Improvements § 52-49 (2011) and Montgomery County Code, Chapter 52 Taxation, Title XII - Development Impact Tax for Public School Improvements § 52-89 (2007). The exemption provisions at issue in this case are identical in each statute. *See infra.* For consistency, we will adopt the approach of the parties and the Tax Court and refer to the provisions combined as "an exemption."

reversed by the Circuit Court for Montgomery County on March 12, 2015. Montgomery County presents the following question on appeal:

> Did the Tax Court rely on substantial evidence in the record and fundamental principles of statutory construction by ruling that the County did not err when it declined to refund the impact tax paid by Mr. Brault?

Mr. Brault filed a cross-appeal asserting that the circuit court erred in not awarding him fees and costs, and asks: "[h]aving prevailed on the appeal below, was the Cross-Appellant entitled to costs?"

Because the plain language of the relevant exemptions requires that the new "building [] replace[] an existing building on the same site," *see* Mont. Cnty. Code §§ 52-49(h)(3), 52-89(d)(3), the threshold question—before reaching an analysis of when and whether the demolition of the previous structure was substantially completed—is whether the new construction replaces an existing structure on the same site. We agree with the Tax Court's finding that "the new home erected [by Mr. Brault] does not constitute a reconstruction of the structure that was demolished at 7206 Meadow Lane." Therefore, we hold that the Tax Court did not err in determining, based on substantial evidence, that "[Mr. Brault] failed to establish that he is entitled to an exemption from the Montgomery County impact taxes." Additionally, on the facts before us, we cannot say that the circuit court abused its discretion by denying Mr. Brault's request for costs.

BACKGROUND

7206 Meadow Lane

In 2000, the owners of property located at 7206 Meadow Lane in Chevy Chase, Maryland (the "Meadow Lane Property") obtained building permits to construct a grand

residence—17,000 square foot in size—and accessory structures including a swimming pool. After several years, having built only parts of the residence, the owners abandoned the property and filed for bankruptcy. Montgomery County condemned the partially completed structure.

Through deed in lieu of foreclosure, Meadow Lane Partners, LLC ("Meadow Lane Partners") acquired the Meadow Lane Property in June 2005. Still, the property continued to lay stagnant until March 27, 2007, when Montgomery County obtained an order for abatement directing Meadow Lane Partners to repair or demolish the partially completed structure, to provide progress reports to the County, and to keep the property free of solid waste and secured from trespassers. Meadow Lane Partners obtained a demolition permit on May 7, 2007, and, thereafter, began demolition.

In October 2007, an inspector from the Montgomery County Department of Housing and Community Affairs ("DHCA") inspected the property and concluded, in an email to the County Attorney's Office dated October 3, 2007, that "the dwelling unit and structures have been completely demolished, the property cleaned, the land graded, seeded, and straw placed over the bare areas." Another inspector from Montgomery County Department of Permitting Services ("DPS") performed the final site inspection on or about January 18, 2008, and determined that the work under the demolition permit was completed. The record contains numerous photographs of the Meadow Lane Property taken between 2006 and 2010. A photograph taken on January 9, 2006, shows the partially completed structure still standing; however, an aerial photograph from March 15, 2008, shows a vacant lot.

In early 2009, Mr. Brault contracted to buy the Meadow Lane Property, contingent on subdivision, and applied to subdivide the property. During the subdivision process, Mr. Brault informed the Maryland-National Capital Park and Planning Commission ("M-NCPPC") that a partially completed structure that was demolished in 2008 had previously occupied Meadow Lane Property.

7215 Ridgewood Terrace

M-NCPPC approved the two-lot subdivision on February 2, 2012. The Meadow Lane Property was rezoned with entrances facing an alleyway to the west of the property. The alleyway was renamed "Ridgewood Terrace," and the newly created lots were addressed as 7215 and 7217 Ridgewood Terrace. Soon after completing the purchase of the properties on December 31, 2012, Mr. Brault obtained various permits from the Town of Chevy Chase and, on February 1, 2012, he obtained a building permit from Montgomery County to build a new house on 7215 Ridgewood Terrace. Montgomery County calculated the total impact tax for that construction on 7215 Ridgewood Ave to be $58,700.00.

Underground Construction Debris Exposed

At the July 16, 2014 hearing before the Tax Court, Mr. Brault testified that on the first day of construction and excavation, contractors discovered construction debris buried at the site and had to stop work. Photographs submitted during the hearing show rebar, ductwork, portions of the earlier foundation, and other unidentified debris.

Mr. Jeffrey McGregor, an engineer with ECS Mid-Atlantic, LLC (an independent expert originally engaged by Montgomery County), testified that he was contacted by Mr. Brault and, upon inspecting the debris at the construction site, concluded that "[t]he

materials that we found in the footings as excavated were not suitable for really any type of foundation construction over[, a]nd so they either ha[d] to be removed or remediated in some fashion." After all this debris was exposed, Montgomery County ordered that construction at the property cease, and further work was prohibited pending approval of a solution to stabilize the site.

In a letter dated March 18, 2013, ECS outlined its observations and put forth a "Foundation Recommendations" plan for remediating the site. Mr. Brault testified that over the course of six weeks and at a cost of $40,000.00 to $50,000.00, he removed debris from the area of the former structure including: 20 sizable concrete pieces (3 to 4 feet), metal duct work, utility piping, steel pilings for an elevator, and other debris. On April 8, 2013, the site clean-up plan was certified complete, and Mr. Brault was finally allowed to pour footings for the new construction.

Tax Exemption Request

According to the records before the Tax Court, on April 16, 2013, Mr. Brault wrote to Ms. Gail Lucas, Manager of Permit Technicians at the Montgomery Department of Permitting Services to request an abatement from the impact taxes assessed for the two lots. He requested that the County collect just one set of impact taxes on lots 7215 and 7217 Ridgewood Terrace, and outlined several rationales for this request, including:

> The imposition of impact taxes on both new lots 37 [7215 Ridgewood Terrace] and 38 [7217 Ridgewood Terrace] creates the condition that the existing lot 36A [Meadow Lane Property] did not exist and did not pay taxes for well over 50 years. This is not correct as Montgomery County did in fact collect taxes on this lot and structure for that duration including in 2012 and it is unlawful and unconstitutional to create a condition that a tax paying lot and house did not exist by Executive or any other regulation.

On October 23, 2013, Mr. Brault sent a follow-up letter in which he focused on his contention that substantial completion of the original demolition on the Meadow Lane Property was not completed until April 8, 2013, and, therefore, pursuant to the tax exemption provisions contained in sections 52-49 and 52-89 of the Montgomery County Code, no impact taxes were due on the new construction begun within a year of the completion of demolition. In support of the exemption request, Mr. Brault also submitted a letter dated October 23, 2013, from ECS Mid-Atlantic, stating:

> Based on results from our field observations it was recommended in our "Foundation Recommendations" letter, dated March 18, 2013, that the existing fill and building materials be undercut and replaced prior to construction of new foundation elements. According to AIA documents, "Substantial Completion" refers to '*a stage of construction or building project or a designated portion of the project that is sufficiently complete, in accordance with the construction contract documents, so that the owner may use or occupy the building project or designated portion thereof for the intended purpose.*' Based on this definition and our own application of industry standards, it is ECS' opinion that demolition of the previous structure at the site was not "substantially complete" until after [Mr. Brault] had removed the existing debris, deleterious fill, and intact building elements remaining from the previous construction. . . . Thus, we believe that date of substantial completion of the structure's removal was obtained on our inspection certificate date, on or about April 8, 2013.

(Emphasis in original).

On December 18, 2013, Ms. Gail Lucas, writing for the Department of Permitting Services, denied Mr. Brault's request for a tax exemption. Regarding Mr. Brault's contention that the demolition was not substantially completed until April 8, 2013, she related that there was no definition of the phrase "substantially completed" in the County Code or the Code of Montgomery County Regulations ("COMCOR") with respect to

demolition or destruction of a building and that the AIA definition supplied by Mr. Brault was not as persuasive as a definition in the International Building Code. Ms. Lucas directed Mr. Brault, who at the time had not paid the outstanding impact taxes, that "the determination that you must pay the impact taxes assessed for your project is unchanged. You may appeal this decision through the Maryland Tax Court."

Proceeding in Tax Court

On January 15, 2014, Mr. Brault filed a petition of appeal with the Maryland Tax Court and then on January 23, 2014, Mr. Brault paid the $57,800.00 in impact taxes assessed for his new construction at 7215 Ridgewood. On or about January 28, 2014, construction of Mr. Brault's residence on the Meadow Lane Property was completed. On May 12, 2014, Mr. Brault filed a request in the Tax Court seeking a refund from the County in the amount of $58,700.00. Thereafter, the Tax Court received memoranda of law from both parties, and on July 16, 2014, a hearing was held on the matter.

At issue in the hearing was whether Mr. Brault's building permit for 7215 Ridgewood Ave was eligible for a tax exemption under sections 52-49(h)(3) and 52-89(d)(3) of the Montgomery County Code. Section 52-49 governing development impact taxes for transportation improvements, provides in relevant part:

> (a) A development impact tax must be imposed before a building permit is issued for development in the County.
> (b) An applicant for a building permit must pay a development impact tax in the amount and manner provided in this Article, unless a credit in the full amount of the applicable tax applies under Section 52-55 or an appeal bond is posted under Section 52-56.
> (c) The following impact tax districts are established:
>
> * * *

(d) Reserved.

(e) Development impact taxes collected from developments located in the cities of Gaithersburg and Rockville must be accounted for separately according to the municipality where the funds originated. . . .

* * *

(h) The development impact tax does not apply to:

(1) any reconstruction or alteration of an existing building or part of a building that does not increase the gross floor area of the building;

(2) any ancillary building in a residential development that:

(A) does not increase the number of dwelling units in that development; and

(B) is used only by residents of that development and their guests, and is not open to the public; and

(3) any building that replaces an existing building on the same site or in the same project (as approved by the Planning Board or the equivalent body in Rockville or Gaithersburg) to the extent of the gross floor area of the previous building, if:

(A) construction begins within one year after demolition or destruction of the previous building was substantially completed; or

(B) the previous building is demolished or destroyed, after the replacement building is built, by a date specified in a phasing plan approved by the Planning Board or equivalent body. However, if in either case the development impact tax that would be due on the new, reconstructed, or altered building is greater than the tax that would have been due on the previous building if it were taxed at the same time, the applicant must pay the difference between those amounts.

(Emphasis added). Section 52-89 provides in relevant part:

(a) An applicant for a building permit for a residential development must pay a development impact tax for public school improvements in the amount and manner provided in this Article before a building permit is issued for any residential development in the County unless:

(1) a credit for the entire tax owed is allowed under Section 52-93; or

(2) an appeal bond is posted under Section 52-56.

(b) Except as expressly provided in this Article, this tax must be levied, collected, and administered in the same way as the tax imposed under Article VII. All provisions of Article VII apply to this tax unless the application of that Article would be clearly inconsistent with any provision of this Article. This tax is in addition to the tax imposed under Article VII, and any

tax paid under this Article must not be credited against any tax due under Article VII.

* * *

(d) **The tax under this Article does not apply to:**

(1) any reconstruction or alteration of an existing building or part of a building that does not increase the number of dwelling units of the building;

(2) any ancillary building in a residential development that:

(A) does not increase the number of dwelling units in that development; and

(B) is used only by residents of that development and their guests, and is not open to the public; and

(3) any building that replaces an existing building on the same site or in the same project (as approved by the Planning Board or the equivalent body in Rockville or Gaithersburg) to the extent of the number of dwelling units of the previous building, if:

(A) construction begins within one year after demolition or destruction of the previous building was substantially completed; or

(B) the previous building is demolished or destroyed, after the replacement building is built, by a date specified in a phasing plan approved by the Planning Board or equivalent body. . . .

(Emphasis added).

Mr. Brault argued that the requirements of the County's 2007 condemnation and demolition orders for the previous structure were not met until Mr. Brault completed the demolition at the site in April 2013. Thus, he argued that the construction of the new residence, which also began in 2013, was commenced within one year after demolition or destruction of the previous building was substantially completed, and pursuant to subsection (3)(A), he was entitled to an exemption from impact taxes. Further, Mr. Brault argued that the impact tax provisions in the Montgomery County Code do not define the term "substantially completed" and the appropriate test to determine when the demolition was complete is not reliance on the finalization of the demolition permit.

Mr. Brault offered Mr. McGregor of ECS to testify in support of his contention that construction on the property had begun within one year after demolition was substantially complete. Mr. McGregor described a number of photographs submitted to the court depicting the debris found at the site and went through the original demolition status reports. He testified as to the original demolition:

> In my opinion, the demolition was not complete as evidence[d] by the remaining foundation elements. . . . [W]hen structures are demolished and removed there will certainly be remnants of debris, a shred here, a shred there, a small piece of steel, and old bucket, piece of concrete. If you have materials that are like we've seen here, formed footings, rebar, large chunks, in my opinion that's not the end of demolition.

Mr. McGregor stated, "in my professional opinion the foundations . . . may have been removed partially, but certainly not completely." During Mr. McGregor's testimony on cross-examination the court also received the October 23, 2013 ECS letter (reproduced in part above) indicating that ECS believed substantial completion of the demolition was not achieved until April 8, 2013.

Mr. Brault also testified to his observations at the site and the work undertaken to remedy to situation. During his testimony, Mr. Brault was shown aerial photographs provided by the Montgomery County Department of Technology Services – Geographic Information Systems Services depicting the Meadow Lane Property. He acknowledged that one picture showed the previous partial construction on the lot and a subsequent photograph showed that, in the areas visible in the photograph, the structure had been removed. Additionally, the photographs—taken over a period of years and overlaid with the property lines—revealed that the previous structure on the property straddled the new

subdividing line. Thus, the evidence before the Tax Court was clear that the previous structure occupied significant portions of both of the new buildable lots.

In response to the testimony presented regarding demolition at the site, Montgomery County offered Ms. Gail Lucas to testify about the demolition permit process. She explained:

> Once the building or the structure has been removed typically the customer or the applicant will call in and request that an inspector come out and review the property to make sure that there is no debris, that the grading has been restored to a satisfactory condition, and that's the inspection that happens and the permit is then final. The inspector will then pass a final inspection.

Ms. Lucas indicated that she had no part in the actual inspection of the property. However, she did acknowledge communicating with Mr. Brault about the relevant tax exemption and indicated that she is "usually the one that makes that determination[,]" whether the exemption from impact taxes applies.

Regarding the process for determining whether the exemption applied in the present case, Ms. Lucas testified:

> What I look [at] in determining the year is the final date of any demolition on a subject property. So if it's 89 Elmyra Street and there's a demolition permit on that property, when was that finaled? I use that date because it's a bright line date, it's a hard and fast date that I can hang my hat on. And then I look at when the applicant applies for the new home. . . .
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> * * *
>
> The last demolition on the property was completed, was finaled I should say, in 2008. Mr. Brault made application for a new home permit in 2012. There's four years there beyond the statutory one year time period. And so the determination I made was that he was not entitled to the exemption.

Residential inspections manager for Montgomery County, Steven Thomas, testified that, when inspecting the completion of a demolition permit, the County is primarily concerned with whether the building that was the subject of the demolition has been removed. He also testified that, after personally reviewing the site and the photographs depicting debris uncovered at the site, his position on the completion and finality of the 2008 demolition did not change.[2]

After a brief recess, the Tax Court issued its opinion on the record.[3] The court first reviewed the history and purpose of the tax exemption:

[2] The record in this case also reveals that the Montgomery Housing Code Enforcement inspector who inspected the Meadow Lane Property for the purposes of the demolition permit was unable to verify whether below-ground demolition was complete. He testified that, on October 2, 2007, he inspected and it was his opinion that the demolition had been completely finalized. However, he acknowledged that there was no visible way to check the status of the old foundations and, when examined regarding why his inspection memo contained no mention of the foundations, stated:

> Well that's probably the demolition work that I observed in removing when I came by and I saw them working on it.
>
> * * *
>
> . . . I didn't stay there to watch the whole total demolition of removing all the walls and everything else, I didn't do that. I had other work and assignments, so that did happen.

[3] Although the record reflects that to deny the requested exemption the County relied primarily on the rationale that demolition was substantially completed more than one year before the new construction, we note that pursuant to Maryland Code (1988, 2010 Repl. Vol), Tax – General Article ("TG"), § 13-523 an appeal before the Tax Court is heard *de novo*. Moreover, the Tax Court has "full power to hear, try, determine, or remand any matter before it," and "may reassess or reclassify, abate, modify, change or alter any valuation, assessment, classification, tax or final order appealed to the Tax Court." TG § 13-528(a). Thus, in its review of a statutory exemption, the Tax Court need not constrain itself to the narrow rationale put forth by the assessing agency.

> When the prior structure was removed and the property was stabilized the demolition was complete and the court order was complied with.
>
> I think you need to -- have some consideration of the Montgomery County Development Impact Tax, which was developed, the history of it which was developed as a fee in 1986. There of course have been a number of amendments to it for various reasons, and **the amendment that we're dealing with today . . . was actually an exemption [that] was added that states that the impact tax does not apply to a situation where a new building replaces a previous building** if construction begins within one year from -- when demolition of the existing structure was completed.

The court noted that five years had elapsed between the time the prior structure was removed and when Mr. Brault obtained his building permit:

> The Court finds that the facts in this case clearly establish that the construction of the new home by [Mr. Brault] began at the earliest on February 1 of 2013 when the first permit was issued to Mr. Brault and demolition of the existing structure was substantially completed at the latest of January 18, 20[0]8 when the County inspector completed his final inspection of the demolition permit.

Finally, the court gave its ruling:

> So the Court finds that the demolition of the existing structure was substantially completed on January 18th, 2008. Secondly, the Court finds that Mr. Brault failed to begin construction of his new home within one year of the date that the demolition of the previous existing structure was substantially completed.
>
> **It should also be pointed out that, and I think this is an important fact, that the property was subdivided into two lots and that the new home erected at 7215 Ridgewood Terrace does not constitute a reconstruction of the structure that was demolished at 7206 Meadow Lane. And the Court seriously doubts that Montgomery County ever envisioned that an exemption should be granted under the facts of this case.**
>
> **So accordingly, based on the language in the Montgomery County code and the application of the evidence to the code, the Court finds that the petitioner has failed to establish that he is entitled to an exemption from the Montgomery County impact taxes**.

(Emphasis added). On August 18, 2014, the Tax Court entered an order dismissing Mr. Brault's petition of appeal and entered judgment in favor of the County.

On August 5, 2014, Mr. Brault filed a petition for judicial review in the Circuit Court for Montgomery County. In a memorandum and order entered March 12, 2015, the circuit court reversed the order of the Tax Court. The circuit court stated:

> Careful review of the Record requires that the Tax Court be reversed. No reasoning mind could find that demolition was substantially completed in 2007-08 under the facts presented.
>
> * * *
>
> By its own stop order action the County belies any rational finding that demolition was substantially complete since the ground and its contents post-demolition would not allow new construction for which building permits had previously been granted by both Chevy Chase and Montgomery County.
>
> The Court finds that a substantially completed demolition would, at a minimum, allow a purchaser with a proper permit to build and construct. Otherwise the impact tax exemption's purpose would be totally frustrated. The County's work stoppage evidences such purpose. Brault's Forty Thousand dollar ($40,000) expenditure over six (6) weeks to remedy subterranean conditions, to any reasonable mind, cannot equate to removal of routine construction debris. No reasoning mind could find that the demolition was substantially complete before Brault's excavation and construction efforts. Brault is entitled to the exemption is Section 52-49(h) of the Montgomery County Code and refund of the paid impact tax.

Thereafter, the County filed a notice of appeal to this Court on April 8, 2015.

On April 10, 2015, Mr. Brault filed a motion for an entry of a money judgment and costs, requesting a money judgment in the amount of the tax refund plus prejudgment interest, costs, and attorneys' fees, for a total of $84,049.12. In opposition, the County argued that a stay was appropriate because the case was being appealed to this Court, that judicial review does not contemplate the entry of money judgments, and that no statute

provides that right to receive attorneys' fees in this case. On April 30, 2015, the circuit court denied Mr. Brault's motion and entered the stay requested by Montgomery County. Mr. Brault filed a notice of appeal from that order on May 19, 2015.

Additional facts will be introduced as the discussion requires.

DISCUSSION

On appeal, we review a decision of the Maryland Tax Court as an adjudicatory administrative agency and bypass the decision of the circuit court. *Frey v. Comptroller of the Treasury*, 422 Md. 111, 136 (2011) (citation omitted). "We undertake a 'severely limited' review of Tax Court decisions." *Zorzit v. Comptroller*, 225 Md. App. 158, 168-69 (2015) (quoting *Comptroller of the Treasury, Income Tax Div. v. Diebold, Inc.,* 279 Md. 401, 407 (1977)). "We give great deference to the Tax Court's fact-finding, and 'great weight to the Tax Court's interpretation of the tax laws, but review[] its application of the case law without special deference.'" *Id.* at 169 (quoting *State Dep't of Ass't & Taxation v. Andrecs,* 444 Md. 585, 604 (2015)).

Montgomery County contends that the Tax Court properly adhered to statutory interpretation principles when it strictly construed the impact tax exemptions and resolved doubt in favor of the taxing authority. The County maintains that substantial evidence in the record supported the Tax Court's determinations that Mr. Brault's new construction on the Meadow Lane Property was not begun within one year of the substantial completion of the demolition of the previous structure and was ineligible for the impact tax exemptions. Thus, the County argues that the circuit court erred in not according the appropriate deference to the factual findings of the Tax Court and its interpretation of the tax laws.

Mr. Brault contends that, according to industry standards, the demolition of the previous structure on the Meadow Lane Property was not complete at the time DPS inspectors certified it complete under the permit. Mr. Brault maintains that the overwhelming weight of the evidence suggests that demolition sufficient to make the property safe for the construction of a replacement structure was not complete until April 8, 2013, and the new construction was, therefore, begun within the one-year time frame required to qualify for exemption from impact taxes. Mr. Brault argues that the Tax Court clearly erred in finding that the demolition in this case was substantially complete at the time of the final DPS inspection in January 2008.

We conclude that both parties overlook the threshold jurisdictional issue in this case.

A. Impact Taxes in Montgomery County

In the 1980s, as unrestrained residential growth placed heavier demands on Maryland counties and municipalities, local officials were forced to seek new revenue sources to pay for the necessary infrastructure. Paul A. Tiburzi, *Impact Fees in Maryland*, 17 U. Balt. L. Rev. 502, 502 (1988). Some counties and municipal corporations enacted impact fees (later known as impact taxes) to generate the revenue required to support continued growth. *Id.* "Impact fees have two essential features: (1) they shift the cost of capital improvements from all users or taxpayers in the jurisdiction to the new residents who create the need for them, and (2) they are collected before the improvements are constructed rather than after they are in service." *Id.* at 502-03. In theory, an impact fee for an individual dwelling "represents the proportionate share of the capital cost of providing [] municipal service[s]" to that residence. *Id.* at 503.

In *Waters Landing Ltd. Partnership v. Montgomery County*, the Court of Appeals addressed the inception of the impact tax in Montgomery County. The court stated:

> On April 22, 1986, the Montgomery County Council enacted bill 17-86, codified as Montgomery County Code, chapter 49A, §§ 49A-1 through 49A-14; it imposed a development impact fee on construction in two areas within the County (Germantown and Eastern Montgomery County). These two areas were designated because the development within them had reached or exceeded a threshold set by the County. The amount of the fee was based on the type of unit (residential or non-residential) and either the number of dwelling units (if residential) or the gross floor area (if non-residential) in the proposed development. The ordinance required the County to impose the fee before issuing a building permit. Fees collected from a fee area were to be segregated and "restricted in their use to funding improvements listed in the Impact Fee Area Transportation Program for such area." Montgomery County Code, Ch. 49A, § 49A–4(e). The County Council stated that, in imposing the impact fees, it was "exercising its home rule powers, including its *police power* to ensure and coordinate the provision of adequate transportation facilities with new development so that the public health, safety, and welfare are enhanced, traffic congestion is lessened, accessibility is improved, and economic development is promoted." *Id.* § 49A–3(b) (emphasis added).

337 Md. 15, 20-21 (1994) (footnote omitted). In *Eastern Diversified Properties, Inc. v. Montgomery County*, the Court of Appeals held that the impact "fee" enacted as Montgomery County Code 49A was "a tax which Montgomery County [wa]s without authority to enact, and the development impact fee is therefore invalid." 319 Md. 45, 55 (1990) (footnote omitted). As a result of that decision, "on April 27, 1990, the Montgomery County Council, by emergency bill 33-90 (codified as Montgomery County Code, Ch. 52, §§ 52-47 through 52-59), reenacted the development impact fee as a development impact tax, changing the word 'fee' to 'tax' wherever it appeared." *Waters Landing*, 337 Md. at 21. The Court of Appeals subsequently upheld that enactment as a valid exercise of the

County's taxing power (as distinct from a "revenue measure . . . disguise[d] [] as a regulatory fee"). *Id.* at 24-25.

Since that time, the Montgomery County Council has amended the impact tax provisions numerous times to incorporate additional development areas within the County. *See, e.g.*, 2001 Laws of Montgomery County ("L.M.C.") ch. 10 (Bill No. 4-01) (adding the Clarksburg impact tax district); 2003 L.M.C. ch. 27 (Bill No. 31-03) (adding the Metro Station, Red Line, and Suburban impact tax districts).

In 2002, the County Council added exemptions to the "Impact tax for Major Highways" in section 52-49(h) for the "reconstruction or alteration of an existing building . . . that does not increase the gross floor area," and "any building that replaces an existing building on the same site to the extent of the gross floor area of the previous building, if construction begins within one year after demolition or destruction of the previous building was substantially completed." 2002 L.M.C. ch. 4 (Bill No. 47-01). In 2003, that exemption was amended to clarify that the transportation impact tax does not apply to "any building that replaces an existing building on the same site or in the same project (as approved by the Planning Board or the equivalent body in Rockville or Gaithersburg) . . . if construction begins within one year after demolition . . . or [if] the previous building is demolished or destroyed after the replacement building is built." 2003 L.M.C. ch. 27 (Bill No. 31-03). Notably, the requirement that the builder pay any taxes assessed based on the extent that the replacement structure exceeds the square footage of the previous structure or where the amount of taxes that would be due is greater than that which would have been due on the previous structure remained. 2003 L.M.C. ch. 27 (Bill No. 31-03). During the same

session, the "Development Impact Tax for Public School Improvements," codified as section 52-89, was also amended to add an identical exemption. 2003 L.M.C. ch. 26 (Bill No. 9-03).

Once again, the current exemptions codified in Montgomery County Code §§ 52-49 and 52-89 read as follows:

> The development impact tax does not apply to:
>
> (1) any reconstruction or alteration of an existing building or part of a building that does not increase the gross floor area of the building;
>
> (2) any ancillary building in a residential development that:
>
> (A) does not increase the number of dwelling units in that development; and
>
> (B) is used only by residents of that development and their guests, and is not open to the public; and
>
> (3) any building that replaces an existing building on the same site or in the same project (as approved by the Planning Board or the equivalent body in Rockville or Gaithersburg) to the extent of the gross floor area of the previous building, if:
>
> (A) construction begins within one year after demolition or destruction of the previous building was substantially completed; or
>
> (B) the previous building is demolished or destroyed, after the replacement building is built, by a date specified in a phasing plan approved by the Planning Board or equivalent body.
>
> However, if in either case the development impact tax that would be due on the new, reconstructed, or altered building is greater than the tax that would have been due on the previous building if it were taxed at the same time, the applicant must pay the difference between those amounts.

It is clear that these impact tax exemptions have always been tied to the replacement or reconstruction of an existing structure "on the same site or in the same project." Mont. Cnty. Code §§ 52-49(h), 52-89(d). Even then the exemptions are conditioned upon the new structure not increasing the number of dwelling units, not being open to the public, and not exceeding the square footage of the previous structure. *Id.* This is reflective of the purpose articulated by the County Council of "[i]mposing a development impact tax that requires new development to pay its pro rata share of the costs of impact transportation improvements necessitated by that development[,]"and "to further the public purpose of ensuring that an adequate transportation system is available in support of new development." Mont. Cnty. Code § 52-48(d), (h); *see also* Mont. Cnty. Code § 52-88 (articulating the purpose and intent for the Development Impact Tax for Public School Improvements).

B. The Plain Language of the Impact Tax Exemptions

To ascertain legislative intent, "'we look first to the language of the statute, giving it its natural and ordinary meaning.'" *Montgomery Cnty. v. Phillips*, 445 Md. 55, 62 (2015) (quoting *Stoddard v. State,* 395 Md. 653, 661 (2006)). "If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Id.* at 62 (quoting *Stoddard*, 395 Md. at 661). In addition, in construing tax statutes, the established rule is "'not to extend the tax statute's provisions by implication, beyond the clear import of the language used, to cases not plainly within the statute's language, and not to enlarge the statute's operation so as to embrace matters not specifically pointed out.'" *Comptroller*

of Treasury v. Martin G. Imbach, Inc., 101 Md. App. 138, 144 (1994) (quoting *Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527, 539 (1979)). Thus, "'[i]t is fundamental that statutory tax exemptions are strictly construed in favor of the taxing authority and if any real doubt exists as to the propriety of an exemption that doubt *must* be resolved in favor of the State.'" *Id.* at 145 (1994) (emphasis in original) (quoting *C & P Tel. v. Comptroller,* 317 Md. 3, 11 (1989)).

Here, the plain language of the relevant exemptions requires that the new "building [] replace[] an existing building on the same site." *See* Mont. Cnty. Code §§ 52-49(h)(3), 52-89(d)(3). Where the construction at issue constitutes "new development," the exemption does not apply, and the impact tax should be assessed. *See* Mont. Cnty. Code §§ 52-48(d), 52-88(d). Therefore, the threshold question in applying the impact tax exemptions in Montgomery County Code §§ 52-49(h)(3) and 52-89(d)(3)—before reaching any analysis of when and whether the demolition of the previous structure was substantially completed—is whether the new construction replaces an existing structure on the same site.

In the present matter, both parties acknowledge that the Meadow Lane Property was subdivided by Mr. Brault prior to beginning construction of his new home on the site. Aerial photographs overlaid with County property lines were presented in the Tax Court. Those photographs reveal that the original dwelling (at 7206 Meadow Lane) was in the center of the parcel and substantial portions of that structure were located on both of the buildable lots that resulted from the subdivision. As a result of the December 2012 subdivision, the alley accessing the lots was renamed "Ridgewood Terrace" and access

points were created for the two lots. Indeed, Mr. Brault testified before the Tax Court that, from the beginning of his involvement with the Meadow Lane Property, his preference was to subdivide the lot so that more than one structure could be developed. The subdivision process also required a new forest conservation plan and variance request approved by the Maryland-National Capital Park and Planning Commission and approval of the building permits required approximately 35 variances from the Town of Chevy Chase. The new dwelling constructed by Mr. Brault is on the new lots at the address 7215 Ridgewood Terrace.[4] A separate dwelling was constructed on the other lot, 7217 Ridgewood Terrace.[5]

There was substantial evidence in the record before the Tax Court to support its finding that the new construction—on a newly subdivided lot approximately *five years* after the original structure that stood partially on the same land was razed—was not a replacement as contemplated in the Montgomery County Code impact tax provisions. Looking to the plain language of Montgomery County Code §§ 52-49(h)(3) and 52-89(d)(3), we agree with the Tax Court's determination that

> the property was subdivided into two lots and [] the new home erected at 7215 Ridgewood Terrace does not constitute a reconstruction of the structure that was demolished at 7206 Meadow Lane. And the Court seriously doubts that Montgomery County ever envisioned that an exemption should be granted under the facts of this case.

[4] This address was later changed to 7221 Ridgewood Terrace.

[5] We acknowledge that the record reflects that Mr. Brault paid impact taxes for the new construction on the lot at 7217 Ridgewood Terrace under permit #594567; however, that does not, in itself, render the construction on the lot at 7215 Ridgewood Terrace a replacement of the previous structure that occupied both lots.

The new construction was not a "building that replace[d] an existing building on the same site" as required by the plain language of the exemptions. *See* Mont. Cnty. Code §§ 52-49(h), 52-89(d). Rather, this was a new development on a newly subdivided lot and, consistent with the purpose articulated in the Montgomery County impact tax provisions, impact taxes were properly assessed "to pay [the] pro rata share of the costs of . . . improvements necessitated by that development." *See* Mont. Cnty. Code §§ 52-48(d), 52-88(d).

The parties' arguments focusing on the fine points of a substantially completed demolition are misplaced. Montgomery County's impact taxes are intended to address the prospective impact of new development on the surrounding community. *See* Mont. Cnty. Code § 52-48(d), (h); Mont. Cnty. Code § 52-88; *cf. Waters Landing*, 337 Md. at 26 ("[T]he development impact tax operates as an excise tax rather than as a property tax. It is not imposed simply because the taxpayer owns the land; rather it is imposed only when the owner of land makes a particular use of the land, i.e., develops it."). There can be no doubt under the facts of this case that Mr. Brault's newly constructed residence represented a new use of the land and new impact on the local transportation and education infrastructures that was not present during the previous 10 years during which no one resided on the property.

Mr. Brault's frustration in this matter is understandable. He purchased the property and planned its development with the reasonable assumption that demolition on the property was complete. Instead, Mr. Brault ended up bearing the burden and substantial cost of correcting a bad situation he had no reason to anticipate and had no part in creating.

However, the tax exemption was not intended to serve as a remedial provision pursuant to which Mr. Brault can recoup his loss. Accordingly, we hold that the Tax Court did not err in determining that, "based on the language in the Montgomery County [C]ode and the application of the evidence to the code . . . [Mr. Brault] failed to establish that he is entitled to an exemption from the Montgomery County impact taxes."

Having determined that the Tax Court's factual findings were supported by substantial evidence and that the Tax Court was correct in determining that Mr. Brault's new construction failed to meet that threshold requirement, we need not reach the issue of when and whether the demolition of the previous structure was substantially completed. Nevertheless, we note (without deciding) that legitimate concerns arise where the standard for demolition in one context and for one purpose is relied upon for a separate and unrelated purpose. Here, the initial purpose for the condemnation order and demolition, consistent with Chapter 8 of the Montgomery County Code, was to remove the hazardous structure;[6] however, the mere removal of the above-ground structure proved insufficient to produce a

[6] The County has authority to condemn any building or structure that has "become unsafe, unsanitary or deficient in adequate exitway facilities or which constitute[s] a fire hazard or [is] otherwise dangerous to human life or the public welfare . . . ." Mont. Cnty. Code § 8-10(a). Such an unsafe building "shall be taken down and removed or made safe and secure, as the director may deem necessary." *Id.* To that end, the Director of the Department of Permitting Services may issue a permit for the removal or demolition of the unsafe structure pursuant to section 8-27, titled Demolition or Removal of Buildings. Section 8-27(g)(2) provides that "demolish means to tear down or destroy an entire building or structure, or all of a building or structure except a single wall or facade." Notably, a demolition permit must also require that the applicant clear all construction and demolition debris after demolition, and at all times keep the site free from any unsafe condition. Mont. Cnty. Code § 8-27(e)(2) & (4).

safe, stable site appropriate for construction under a newly issued building permit. Within the context of this case, the Tax Court rightly construed the exemption narrowly. *See Martin G. Imbach, Inc.*, 101 Md. App. at 144-45. Any attempt by the Tax Court to define when demolition is "substantially completed" under the strict interpretation required in construing a tax exemption statute, however, should not be relied upon in contexts outside of tax litigation. Another reason why we decline to address the issue and, instead, affirm the Tax Court based on its alternate holding as explained above.

C. Cross-appeal

Mr. Brault conceded that an award of attorneys' fees is beyond the jurisdiction of the circuit court in an administrative appeal. Further, Mr. Brault makes no argument on appeal (and, therefore, cites to no authority to support the contention) that the circuit court erred by not entering a money judgment in this case. Because there has been no money judgment or other order for the payment of money, prejudgment interest is not at issue.

Mr. Brault's sole contention before this Court on cross-appeal is that, pursuant to Maryland Rule 2-603, he is entitled to "costs" in the form of the "expense of transcription" because he prevailed in the circuit court. Md. Rule 2-603(a) provides:

> **Allowance and Allocation.** Unless otherwise provided by rule, law, or order of court, the prevailing party is entitled to costs. The court, by order, may allocate costs among the parties.

Maryland courts have long recognized that the allocation of costs under Rule 2-603 is discretionary. *See Tabler v. Medical Mut. Liability Ins. Soc. of Maryland*, 301 Md. 189, 201 (1984) ("The discretionary awarding of costs is not a novel principle."). On the facts before us, we cannot say that the circuit court abused its discretion by denying Mr. Brault's

motion for the costs of transcribing the Tax Court hearing for use in the circuit court proceedings.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY ENTERED MARCH 12, 2015, REVERSING THE DECISION OF THE MARYLAND TAX COURT REVERSED.

JUDGMENT OF THE CIRCUIT COURT ENTERED APRIL 30, 2015, DENYING APPELLEE/ CROSS-APPELLANTS MOTION FOR ENTRY OF MONEY JUDGMENT AND COSTS AFFIRMED.

CASE REMANDED WITH INSTRUCTIONS FOR THE CIRCUIT COURT FOR MONTGOMERY COUNTY TO AFFIRM THE JUDGMENT OF THE MARYLAND TAX COURT.

COSTS TO BE PAID BY APPELLEE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0195

September Term, 2015

MONTGOMERY COUNTY, MARYLAND

v.

THOMAS A. BRAULT

Berger,
Nazarian,
Leahy,

JJ.

Concurring Opinion by Nazarian, J.,
Joined by Berger, J.

Filed: April 1, 2016

I was, and remain, fully on board with the outcome and analysis contained in Judge Leahy's opinion in this case. But Mr. Brault has filed a Motion for Reconsideration (the "Motion"), in which he contends that we "substituted an issue not raised below at any time in any hearing without notice and an opportunity for [him] to object, present argument or evidence, and be heard." As a result, he claims, he "has been denied his Constitutional right to due process of law." The Motion will be denied, unanimously, by separate order, but I write separately to make two points, and Judge Berger has authorized me to say that he joins me in them.

I.

First, the underlying premise of the Motion—that we (over)reached and decided the case on a question not presented—is wrong. Of course it's true that an "appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a); *see also Prince George's Cnty. Health Dep't v. Briscoe*, 79 Md. App. 325, 341 (1989), *aff'd in part, rev'd in part*, 323 Md. 439 (1991) ("We recently reaffirmed the requirement that only issues which have been raised and decided at the administrative level may be heard on appeal in *Maryland State Retirement and Pension Systems v. Martin,* 75 Md. App. 240, 248, 540 A.2d 1188 (1988)"); *Chertkof v. Dep't of Nat. Res., Water Res. Admin.*, 43 Md. App. 10, 16 (1979) ("We have said innumerable times that except under unusual circumstances, we will abide by Maryland Rule 1085 which says, 'This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court.'"). But the inverse is true as well: we can, and do, consider issues that "plainly

appea[r] by the record to have been . . . decided by the [Tax C]ourt." Md. Rule 8-131(a). And in this case, we resolved the question Mr. Brault sought to frame by noting and relying on the Tax Court's finding that the statutory condition precedent had not been met.

The issue before the Tax Court was whether Mr. Brault was entitled to an exemption, under §§ 52-49 and 52-89 of the Montgomery County Code, from the impact tax normally due on the large house he planned to build. In these cases, the tax has been assessed and paid, and as the petitioner, Mr. Brault bore the burden of proving that he was entitled to a refund. *Supervisor of Assessments of Baltimore City v. Keeler*, 362 Md. 198, 228 (2001) ("The burden is on the applicant for an exemption to prove his right to it . . . ."). In its *de novo* review of the County's initial decision to deny the exemption, the Tax Court was charged with interpreting and applying Maryland tax law, and reviewing courts accord appropriate deference to its decisions. *See Comptroller of Treasury v. Johns Hopkins Univ.*, 186 Md. App. 169, 188-89 (2009); *Zorzit v. Comptroller*, 225 Md. App. 158, 169 (2015) ("We give great deference to the Tax Court's fact-finding, and great weight to the Tax Court's interpretation of the tax laws, but review its application of the case law without special deference." (citation and internal quotation marks omitted)). The Tax Court had "full power to hear, try, determine, or remand any matter before it," and "may reassess or reclassify, abate, modify, change or alter any valuation, assessment, classification, tax or final order appealed to the Tax Court." TG § 13-528(a).

After he lost in the Tax Court, Mr. Brault had the right to appeal to the circuit court, and he succeeded there. But he misapprehends the posture of the County's appeal to this court when he argues in his motion (without authority) that "[t]his Court is not supposed

to ignore the Circuit Court proceeding literally as if it did not occur." In fact, and as the majority explained correctly, our job is to look through the circuit court decision as if it wasn't there. *See Frey v. Comptroller of the Treasury*, 422 Md. 111, 136 (2011) (citation omitted). Neither we nor the law mean any disrespect to the circuit court—for what it's worth, the Court of Appeals will look through our opinion the same way if it decides to review the case. But this matters because it is the Tax Court proceeding that frames the issues, not his appeal of the Tax Court's decision to the circuit court.

All else being equal, the impact tax was due on Mr. Brault's new construction unless an exemption applied to, well, exempt it. The main battle in the Tax Court, the circuit court, and here, revolved around how much time had elapsed between the removal of the prior structure and Mr. Brault's contention that he began his new construction within a year of the time demolition of the prior structure had been substantially completed. The core disagreement was a quintessentially factual one: the County argued, based on another County agency's site inspection from 2008, that the old building was demolished long ago, and Mr. Brault countered with evidence about how much of the prior structure remained when he took it over. The Tax Court found as a matter of fact that the destruction of the earlier structure had been substantially completed, as that term is used in the County's tax code, more than a year beforehand. And as I detail in Section II below, I would have deferred to that finding of fact, reversed the circuit court's decision to the contrary, and reinstated the Tax Court's decision for that reason.

But I joined the majority decision in the first place because it is correct as well. Both § 52-49 and § 52-89 condition their respective exemptions from the impact tax on the

project replacing an existing building on the same site or in the same project—and Mr. Brault couldn't even reach the "substantial completion" issue without first proving that his project met this condition:

§ 52-49. Imposition and applicability of development impact taxes.	**§ 52-89. Imposition and applicability of tax.**
(a) A development impact tax must be imposed before a building permit is issued for development in the County. (b) An applicant for a building permit must pay a development impact tax in the amount and manner provided in this Article, unless a credit in the full amount of the applicable tax applies under Section 52-55 or an appeal bond is posted under Section 52-56. (b) The following impact tax districts are established: * * * (d) Reserved. (e) Development impact taxes collected from developments located in the cities of Gaithersburg and Rockville must be accounted for separately according to the municipality where the funds originated. . . . * * * **(h) The development impact tax does not apply to:** (1) any reconstruction or alteration of an existing building or part of a building that does not increase the	(a) An applicant for a building permit for a residential development must pay a development impact tax for public school improvements in the amount and manner provided in this Article before a building permit is issued for any residential development in the County unless: (1) a credit for the entire tax owed is allowed under Section 52-93; or (2) an appeal bond is posted under Section 52-56. (b) Except as expressly provided in this Article, this tax must be levied, collected, and administered in the same way as the tax imposed under Article VII. All provisions of Article VII apply to this tax unless the application of that Article would be clearly inconsistent with any provision of this Article. This tax is in addition to the tax imposed under Article VII, and any tax paid under this Article must not be credited against any tax due under Article VII. * * * **(d) The tax under this Article does not apply to:** (1) any reconstruction or alteration of an existing

gross floor area of the building; (2) any ancillary building in a residential development that: (A) does not increase the number of dwelling units in that development; and (B) is used only by residents of that development and their guests, and is not open to the public; and **(3) any building that replaces an existing building on the same site or in the same project (as approved by the Planning Board or the equivalent body in Rockville or Gaithersburg) to the extent of the gross floor area of the previous building, if:** **(A) construction begins within one year after demolition or destruction of the previous building was substantially completed; or** (B) the previous building is demolished or destroyed, after the replacement building is built, by a date specified in a phasing plan approved by the Planning Board or equivalent body. However, if in either case the development impact tax that would be due on the new, reconstructed, or altered building is greater than the tax that would have been due on the previous building if it	building or part of a building that does not increase the number of dwelling units of the building; (2) any ancillary building in a residential development that: (A) does not increase the number of dwelling units in that development; and (B) is used only by residents of that development and their guests, and is not open to the public; and **(3) any building that replaces an existing building on the same site or in the same project (as approved by the Planning Board or the equivalent body in Rockville or Gaithersburg) to the extent of the number of dwelling units of the previous building, if:** **(A) construction begins within one year after demolition or destruction of the previous building was substantially completed; or** (B) the previous building is demolished or destroyed, after the replacement building is built, by a date specified in a phasing plan approved by the Planning Board or equivalent body. (Emphasis added.)

were taxed at the same time, the applicant must pay the difference between those amounts. (Emphasis added.)	

Mr. Brault's request for this contingent tax exemption necessarily raised the statutory threshold question. And this was not some subtle interpolation on our part—the Tax Court found, in so many words if perhaps in reverse order, that the new home was not a reconstruction of the previously demolished structure:

> So the Court finds that the demolition of the existing structure was substantially completed on January 18th, 2008. Secondly, the Court finds that Mr. Brault failed to begin construction of his new home within one year of the date that the demolition of the previous existing structure was substantially completed.
>
> **It should also be pointed out that, and I think this is an important fact, that the property was subdivided into two lots and that the new home erected at 7215 Ridgewood Terrace does not constitute a reconstruction of the structure that was demolished at 7206 Meadow Lane. And the Court seriously doubts that Montgomery County ever envisioned that an exemption should be granted under the facts of this case.**
>
> So accordingly, based on the language in the Montgomery County code and the application of the evidence to the code, the Court finds that the petitioner has failed to establish that he is entitled to an exemption from the Montgomery County impact taxes.

(Emphasis added.) For that reason, Mr. Brault was not deprived of any "opportunity to submit evidence and argument to the Tax Court" or otherwise "blindsided." As the Tax

Court saw it, he made his case as to whether the new project qualified as a reconstruction, and his case fell short.[7]

It does appear that, in the circuit court phase of the case, everyone hopped over the "reconstruction" threshold to get to the "substantial completion" question. But that doesn't make the issue disappear. And it was not incumbent on the County to raise every argument against the application of the exemption. *See Keeler*, 362 Md. at 228 ("The burden is on the applicant for an exemption to prove his right to it."). The fact that he persuaded the circuit court to start farther down the analytical path doesn't preclude us from walking it all the way through, and I stand by my decision to join the majority opinion.

II.

Second, and all of that said, I (and Judge Berger) would reverse the judgment of the circuit court on the "substantial completion" issue because, in my view, the court erred in holding that "[n]o reasoning mind could find that demolition was substantially completed in 2007-08 under the facts presented." Assuming, without deciding, that the project somehow qualified as a "reconstruction," the question boils down to a judgment about the meaning of the word "substantial" as that term is used in these tax statutes. The

[7] Mr. Brault also describes (without citation) a "long-standing practice of allowing an exemption for one of the lots under these circumstances." The record reveals the opposite: Mr. Brault made such an assertion in an email to an employee of the Department of Permitting Services ("DPS"), and attached that email to a letter he sent to DPS dated April 16, 2013. DPS acknowledged the request, but denied it. In his Motion, he attempts to bolster this argument by attaching an email exchange with the County that *post-dates this Court's original opinion*, but we decline the invitation to consider factual material from outside the administrative record.

circuit court correctly labeled the issue as a mixed question of fact and law, and the Tax Court's resolution was entitled to greater deference than the circuit court accorded it.

It's true that the relevant provisions of the Montgomery County Code do not define independently when demolition of a prior structure has been "substantially completed." So, understandably, both sides pointed to different sources of potential measurement. The County relied on history: after a prior owner failed to complete construction on a house, the County sought and obtained an Order for Abatement ("Abatement Order") that required the owner to "complete the demolition process to completion [sic] no later than September 1, 2007." DPS issued a demolition permit, monitored compliance with the Abatement Order, certified to the District Court that demolition was complete, and persuaded the court to dismiss the action in January 2008. At that point, the County argued (and the Tax Court agreed) that the ordered demolition of the prior structure had been substantially completed.

Mr. Brault made more of a practical argument. After settling on the site on December 31, 2012 and commencing construction a few months later, he found elevator pilings, ductwork, conduits, and sections of concrete that, collectively, he characterized as "enormous things." As such, and notwithstanding the prior administrative process, he argued that the demolition wasn't substantially completed until he completed it, an effort that took more than six weeks and cost between $40,000 and $50,000.

Both approaches are eminently plausible and consistent both with the law and common sense. It was not at all unreasonable for the County to define "substantial compliance" with reference to the property-specific, court-ordered demolition process and the certification by its own staff that that process had been completed, and a "reasoning

mind" could readily have found the County's definition superior to Mr. Brault's. Mr. Brault's approach could have worked too—nobody seems to dispute the extent of his surprise upon finding the subterranean leavings of his predecessors-in-interest, and I would have felt equally compelled to credit a Tax Court finding that the amount of remaining demolition rendered the prior efforts insubstantial. Even so, there is a structural analytical advantage to the County's approach. "Substantial"-ness (substantiality?) is a highly fact-bound concept, and rather than leaving it to a case-by-case assessment—$40,000 to $50,000 in unanticipated demolition expense might be insubstantial in the context of an eight-figure project like the original plan here, but not in the context of a more normal-sized house—the Tax Court could rationally have decided to rely instead on the fact that the County and the District Court had analyzed and decided this question with regard to this same property. There was, therefore, substantial evidence to support the Tax Court's decision, *see, e.g.*, *Johns Hopkins Univ.*, 186 Md. App. at 181 (holding that reversal of Tax Court is not required if the record discloses substantial evidence supporting its decision), and I would have held that the circuit court erred for that reason in reversing it, independently of the reasons explained in the majority opinion.