Circuit Court for Montgomery County
Case No. 463417-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2107

September Term, 2019

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MONTGOMERY COUNTY

v.

CC HOMES ASSOCIATES, LLC

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Arthur,
Shaw Geter,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: July 13, 2021

In this appeal we are asked by Montgomery County, appellant, to determine whether the Maryland Tax Court properly interpreted the development impact tax exemption provisions of the Montgomery County Tax Code, Sec. 52-41(h) and Sec. 52-54(d), when it determined that a new development "replaced" existing facilities, thereby allowing an offset for the amount of impact taxes owed by the developer CC Homes Associates, LLC, appellee.

Montgomery County, appellant, presents two questions for our review:

1. Did the Maryland Tax Court err in ruling that a private developer's construction of Moderately Priced Dwelling Units (MPDUs) "replaced" existing affordable housing units when the developer had already agreed to relocate those units to another location?

2. Does the plain language in Sections 52-41(h) and 52-54(d) of the Montgomery County Code require the County to collect Impact Taxes on the difference between the tax due on the old and new dwelling units?

For the reasons discussed below, we shall affirm the judgment of the Circuit Court for Montgomery County affirming the Tax Court's grant of summary judgment.

## I. BACKGROUND

While this appeal concerns solely a dispute of the Tax Court's interpretation and application of the Montgomery County Tax Code's development impact tax exemption provisions on the new development, we provide a brief background of the relevant facts underlying the development project for context.

For the purposes of this litigation, the parties have stipulated to the facts concerning the underlying agreement between the Housing Opportunities Commission of Montgomery County (HOC), which operates as the agency for public housing within the county, and

EYA Development, LLC, an affiliate of CC Homes Associates, LLC[1] (CC Homes), for the redevelopment of four adjoining HOC-owned lots in the Chevy Chase Lake neighborhood of Montgomery County. Under that agreement, CC Homes would purchase three of the four lots from HOC, raze the four HOC-operated[2] low-income apartment buildings then on each of the lots, which consisted of a total of 68 garden apartments, and "lead the re-zoning, entitlement, and design of a townhome and multifamily project on the property…." The project called for (1) a new high-rise apartment building to contain 200 apartment units on the HOC-retained lot that would preserve the number of affordable housing units, (2) the construction of 62 townhomes, a minimum of 15% of which would be reserved for Moderately Priced Dwelling Units (MPDU's)[3], (3) the construction of a public park between the high-rise and townhome developments, and (4) the construction of a new private connector road for the development.

In order to sell and redevelop the property, HOC sought the requisite approval and authority from Montgomery County and a mandatory referral by the County Planning Board for the disposition of HOC-owned property. The County's approval was contingent on the execution of an Agreement Not to Convert among HOC, Chevy Chase Lake

[1] Throughout the record, references to appellee and its affiliates vary between "EYA", "EYA, LLC", "EYA Development, LLC", "EYA CC Investments, LLC", "CC Associates, LLC", and "CC Homes Associates, LLC". For clarity and consistency, we shall refer to all affiliates collectively as "CC Homes".

[2] HOC entered into a regulatory agreement with Chevy Chase Lake Development Corporation in 2005 to operate and maintain the Chevy Chase Lake Apartments as tax-exempt multifamily housing under the control of HOC.

[3] As created under Chapter 25A of the Montgomery County Code.

Development Corporation, and the County that was also consented to and executed by CC Homes. The Agreement required that the 68 apartment units from the four previous apartment buildings be relocated to the new high-rise apartment building on the HOC-retained lot, with at least 21 units to be reserved for low-income households and 35 units to be reserved for qualified workforce housing.[4]

CC Homes sought and received approval from the County Planning Board for the joint development plans of all four lots that included the proposed construction of the new multi-family high-rise apartment building on the HOC-retained lot, the re-subdivision of the remaining three lots into 62 individual lots, proposed construction of the 62 townhouses on the re-subdivided lots, a half-acre public park between the apartment building and the townhouses, and a new private local connector road. In its report approving the proposed development project, the Planning Board included its approval of HOC's mandatory referral request for disposition of three of its four lots.

Following Planning Board approval, CC Homes sought building permits from the County's Department of Permitting Services (DPS) for 62 townhouses and requested a development impact tax credit for the 47 garden apartment units that were previously located on the three lots where the 62 townhouses were to be built. DPS denied the request for an impact tax credit, finding that the exemptions would not apply because the

[4] The County's workforce housing program was created under Chapter 25B of the Montgomery County Code to provide affordable housing opportunities through either rent limits or sale controls for public employees and other workers whose household incomes are at or below 120% of the area-wide median and cannot support the high cost of available housing. *See* Sec. 25B-23 through Sec. 25B-24.

townhouses were not replacement buildings. CC Homes appealed that ruling to the Maryland Tax Court.

**Review by the Tax Court**

Before the Tax Court, the parties filed a joint stipulation of the relevant facts, together with exhibits, and proceeded on counter motions for summary judgment. As the Tax Court effectively summarized, the County's position was that CC Homes is not entitled to an exemption from the impact tax, based on two main arguments: (1) "because it did not construct its townhouses on the same site or project as the previous buildings[;]"[5] and (2) "because all the previously owned apartments were exempt from the impact tax and thus the replacement building constructed cannot be exempt."

Following a hearing and supplemental briefing, the Tax Court issued a written memorandum and order denying the County's motion for summary judgment, and granting CC Homes' motion for summary judgment, thereby substantially reducing the impact tax assessment of the project against CC Homes.

[5] This "same site" argument was based on two sub-arguments, the first of which was the County's main argument asserted in its motion for summary judgment, that pursuant to its interpretation of this Court's unreported opinion in *Montgomery County v. Brault*, No. 195, Sept. Term, 2015 (filed Feb. 22, 2016), subdivision of a single lot into 62 lots no longer constitutes the "same site" as contemplated by the County's tax code. At oral argument, the County conceded that the townhouses are located on the same site or project and does not pursue the issue on appeal.

The County's second sub-argument, which will be addressed in greater detail below, was raised for the first time at the hearing before the Tax Court and asserts that there was an executed Agreement Not to Convert that required the relocation of the 68 garden apartment units from all four lots to the high-rise apartment building located on the HOC retained lot, thus, creating two separate projects.

The Tax Court explained:

> Here, the plain language of the impact tax law requires the County to reduce the impact tax assessment of Petitioner's new market rate townhouses by the assessment of the previously demolished apartments when taxed at the same time. Moreover, the exemption from tax actually results in a credit/offset against the tax.
>
> The 52 new [non-exempt] townhouses replaced the 47 garden apartments on the "same site" or in the same project as approved by the Planning Board and in accordance with the Preliminary Plan and Townhouse Site Plan….
>
> * * *
>
> The Impact Tax Law statutory framework and the legislative history supports an interpretation that Petitioner should only be responsible for paying its proportional impact on transportation and public-school facilities, namely, the net increase in dwelling units above the replaced development. The intent of the Impact Tax Law, which is best reflected by the plain language of the statute, is that the new development supports the need for transportation and school capacity above and beyond existing demand. The law requires new development to pay its pro rata share of the costs of impact transportation improvements and public-school improvements necessitated by that development. In fact, this is the stated purpose[] codified in the Impact Tax Law.[6]

The County sought judicial review in the Circuit Court for Montgomery County, which affirmed the decision of the Tax Court. This appeal followed.

[6] Relying on the per-unit rates and formula provided by CC Homes, the Tax Court computed the exemption to reduce the impact tax liability to $626,903. While we observe from the record that there appears to be a discrepancy in the appropriate rate that was applied to the 1-bedroom garden apartment units from the previous buildings, which appear to fall within the high-rise residential category rather than the standard garden apartment residential category as defined under Sec. 52-39 and Sec. 52-52, neither party has addressed the matter or briefed the subject. Moreover, we were advised at oral argument that the Tax Court's calculations are not in dispute.

Although CC Homes disputes the characterizations of the stipulated facts made by the County in its brief, the parties agree that the issue is a purely legal one concerning the interpretation of the County's impact tax exemption provisions.

## II. DISCUSSION

### Standard of Review – The Maryland Tax Court

Because "[t]he Maryland Tax Court is an administrative agency … it 'is subject to the same standards of judicial review as other administrative agencies.'" *Maryland Econ. Dev. Corp. v. Montgomery County*, 431 Md. 189, 198 (2013) (quoting *Frey v. Comptroller of the Treasury*, 422 Md. 111, 136 (2011)). The Court of Appeals has recently reaffirmed the appropriate standard of review for Maryland Tax Court decisions:

> "The Maryland Tax Court is an adjudicatory administrative agency" and, as we do when reviewing other administrative agencies, we "evaluate[ ] the decision of the agency[ ]" to determine whether, based on the "findings and reasons set forth by the Tax Court[,]" its determination can be upheld. *Gore Enter. Holdings, Inc. v. Comptroller of Treasury*, 437 Md. 492, 503–05 (2014) (quotation marks and citations omitted). …
>
> "When the Tax Court interprets Maryland [or county] tax law, we accord that agency a degree of deference as the agency that administers and interprets those statutes." *Maryland State Comptroller of Treasury v. Wynne*, 431 Md. 147, 160 (2013), *aff'd sub nom. Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015); *Gore Enter.*, 437 Md. at 505 ("The legal conclusions of an administrative agency that are premised upon an interpretation of the statutes that the agency administers are afforded great weight.") (quotation marks and citations omitted). That degree of deference, however, is not determinative; "a reviewing court is under no statutory constraints in reversing a Tax Court order which is premised solely upon an erroneous conclusion of law." *Ramsay, Scarlett & Co., Inc. v. Comptroller of Treasury*, 302 Md. 825, 834 (1985) (citations omitted); *Lane v. Supervisor of Assessments of Montgomery Cty.*, 447 Md. 454, 464 (2016) ("We affirm the decision of the Tax Court unless that decision is not supported by substantial evidence appearing in the record or is erroneous as a matter of law.") (quotation marks and citations omitted); *Comptroller of Treasury v.*

> *M. E. Rockhill, Inc.*, 205 Md. 226, 233 (1954) ("We have recognized that the interpretation placed by the State Comptroller upon the Retail Sales Tax Act is entitled to great weight as an administrative interpretation acquiesced in by the [General Assembly]. We must emphasize, however, that such an interpretation is not binding upon the courts."). In the case at bar, the determination by the Tax Court of whether [petitioner] was liable to pay the tax was premised on a conclusion of law. *See Kor-Ko Ltd. v. Maryland Dept. of the Environment*, 451 Md. 401, 412 (2017) ("An agency decision based on regulatory and statutory interpretation is a conclusion of law."). Accordingly, we will review the decision of the Tax Court *de novo*. *Donlon v. Montgomery Cty. Pub. Sch.*, 460 Md. 62, 74 (2018).

*Travelocity.com LP n/k/a TVL LP v. Comptroller of Maryland*, 473 Md. 319, 250 A.3d 175, 180–81 (2021).

**Preservation – The Agreement Not to Convert**

At the outset, we address CC Homes' preservation issue with respect to the County's arguments stemming from the Agreement Not to Convert. CC Homes contends that the issue is not preserved because "although the County raised the alleged preclusive effect of the Agreement Not to Convert on CC Homes' entitlement to a development impact tax offset/credit under the Impact Tax Law, the Tax Court did not expressly base its final decision on this issue." (Citing *Comptroller of Treasury v. Taylor*, 465 Md. 76, 98–99 (2019)). As addressed at length during oral argument before this Court, that argument holds merit if the County were trying to affirm the Tax Court's decision on a ground not previously raised before the Tax Court, or on a ground raised other than that on which the court had relied. Here, however, the County seeks reversal of the Tax Court's ruling on the basis of the alternative ground raised before the Tax Court, but not relied on in its ruling.

Nevertheless, we decline to review the substance of the Agreement Not to Convert and any preclusive effect it may have had. The County first raised the issue of the potential preclusive effect of the Agreement's provision requiring the relocation of the 68 garden apartment units to the high-rise building on Lot 1 at the hearing before the Tax Court. It was presented as a secondary argument for its claim that the new development was a separate project and not located on the same site as the previous apartment buildings. We glean from the record that, even though the County repeatedly asserted arguments concerning the transfer of units under the Agreement throughout the hearing and in its supplemental briefing, we find no mention or discussion of the Agreement in either the parties' joint stipulation of facts[7] or in the Tax Court's memorandum and order. However, the Tax Court's determination that the new townhouses replaced the 47 garden apartments previously located on the same site or project implicitly rejected the County's arguments concerning the transfer of those previous units to Lot 1 under the Agreement.

Notwithstanding the implicit rejection of the County's arguments, absent any stipulation of fact or factual finding by the Tax Court as to the Agreement and its effect, we will not engage in our own fact-finding excursion. *See Gore Enter.*, 437 Md. at 504 (explaining that "[i]t is not our place to 'make an independent original estimate of or decision on the evidence…. [or determine for ourselves], as a matter of first instance, the

[7] A copy of the executed Agreement Not to Convert was included as one of 30 joint exhibits appended to the joint stipulation of facts but is not referred to or acknowledged within the stipulated facts.

weight to be accorded to the evidence before the agency.'" (*quoting Ramsay,* 302 Md. at 838)).

**The Development Impact Tax Exemptions**

The County's first issue is that the "Tax Court incorrectly held that 47 of CC Homes' 52 new luxury townhouses replaced 47 existing apartments on the same lots because those townhouses had already been dedicated to another lot in the same project." For support, it contends that "[b]y signing the Agreement Not to Convert CC Homes, through its related business entity, agreed to be bound by the terms of that agreement." The County further argues that "CC Homes cannot now claim exemptions from development impact tax on a *post hoc* theory that their new luxury townhouses replace existing buildings when they already agreed that every existing apartment unit from all four lots would be transferred to HOC's new multifamily housing building[.] …"

Because we find that the record is silent as to any factual stipulations or determinations with respect to the Agreement Not to Convert, we decline to address the merits of the County's arguments that rely on the asserted preclusive effect of the Agreement. *See Mayor & City Council of Baltimore v. ProVen Mgmt., Inc.*, 472 Md. 642, 667 (2021) (Review of the agency's decision is limited to whether "it is sustainable on the agency's findings and for the reasons stated by the agency." (internal quotations and citation omitted)).

Next, we consider the Tax Court's interpretation and application of the development impact tax exemption provisions of the Montgomery County Tax Code Sec. 52-41(h) and Sec. 52-54(d), for transportation and public school improvements, respectively.

The relevant portions of Sec. 52-41(h), governing the imposition and applicability of development impact taxes for transportation improvements, provide that:

> (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.

Similarly, the nearly identical exemption provisions of Sec. 52-54(d) for the development impact taxes assessed for public school improvements, provide:

> (d) 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 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.
>
> However, if in either case the 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.

In its memorandum and order, the Tax Court implicitly determined that the language of the impact tax exemptions was unambiguous, finding that: "Here, the *plain language of the impact tax law* requires the County to reduce the impact tax assessment of Petitioner's new market rate townhouses by the assessment of the previously demolished apartments when taxed at the same time." (Emphasis added). The Tax Court continued: "The 52 new townhouses replaced the 47 garden apartments on the 'same site' or in the same project as approved by the Planning Board and in accordance with the Preliminary Plan and Townhouse Site Plan." In support of its interpretation, the Tax Court proffered, "[t]he intent of the Impact Tax Law, which is *best reflected by the plain language of the statute*, is that the new development supports the need for transportation and school capacity above and beyond existing demand[,] … [and] requires new development to pay its pro rata share of the costs …." (Emphasis added).

However, as the Court of Appeals recognized in *Travelocity.com LP*:

> "With regard to determining whether a statute is ambiguous, we have been clear; an ambiguity may still exist even when the words of the statute are themselves 'crystal clear.' That occurs when its application in a given situation is not clear. This is consistent with this Court's recognition that a term which is unambiguous in one context may be ambiguous in another. We have also acknowledged that language can be regarded as ambiguous in two different respects: 1) it may be intrinsically unclear; or 2) its intrinsic meaning may be fairly clear, but its application to a particular object or circumstance may be uncertain."

*Travelocity.com LP*, 473 Md. 319, 250 A.3d at 181–82 (quoting *Blind Indus. and Services of Maryland v. Maryland Dept. of Gen. Servs.*, 371 Md. 221, 231–32 (2002)). In the particular circumstances of this appeal, we find the latter category of latent ambiguity is apparent when applying the exemptions to the joint development plan of the parties.

At first glance, both of the impact tax provisions provide three clear instances when they do not apply or where development would be exempt — reconstruction or alteration of a building, an ancillary building in a residential development, and any building that is approved by the Planning Board to replace an existing building. *See* Sec. 52-41(h); Sec. 52-54(d). Then, in apparent contradiction to the impact tax exemptions, the provisions also provide an exception to the limitations of their applicability, in what the County characterizes as a "catch-all"[8] provision.

Notwithstanding our finding of ambiguity in application of the impact tax exemption provisions, as we will explain more fully below, we conclude, giving deference

[8] For clarity and convenience, we adopt the County's use of the term "catch-all" when referring to the additional, unnumbered exception to the exemption provisions in both Sec. 52-41(h) and Sec. 52-54(d). However, we do so without attaching the County's characterization or interpretation of the term.

to the expertise of the agency, that the Tax Court was correct in its interpretation and application of the exemption provisions.

**Statutory Interpretation**

We have recently considered the appropriate methods to employ when construing or confirming the meaning of a statute or county law in this state:

> All "[l]egislation is created with a particular objective or purpose." *Bowers v. State*, 227 Md. App. 310, 322 (2016) (citation omitted). As such, "[t]he cardinal rule of statutory construction is to effectuate and carry out legislative intent." *Duffy v. CBS Corp.*, 232 Md. App. 602, 612 (2017) (quoting *Rose v. Fox Pool Corp.*, 335 Md. 351, 358 (1994)), *cert. granted*, 456 Md. 53 (2017).
>
> When this Court is "called upon to construe a particular statute, we begin our analysis with the statutory language itself since the words of the statute, construed according to their ordinary and natural import, are the primary source and most persuasive evidence of legislative intent." *Duffy*, 232 Md. App. at 613 (quoting *Rose*, 335 Md. at 359). However, "[w]here the statute's language is ambiguous or not clearly consistent with the statute's apparent purpose, the court 'search[es] for [the legislative] intent in other indicia, including the history of the [statute] or other relevant sources intrinsic and extrinsic to the legislative process[,]' in light of: (1) 'the structure of the statute'; (2) 'how [the statute] relates to other laws'; (3) the statute's 'general purpose'; and (4) '[the] relative rationality and legal effect of various competing constructions.'" *Hailes v. State*, 442 Md. 488, 495-96 (2015) (quoting *Gardner v. State*, 420 Md. 1, 9 (2011)). *See also Patton v. Wells Fargo Fin. Maryland, Inc.*, 437 Md. 83, 97 (2014) ("Where, as here, there appears to be ambiguity or uncertain meaning in a statute, the Court 'may and often must consider other external manifestations or persuasive evidence, including a bill's title and function paragraphs, … its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal[.]'" (quoting *Kaczorowski v. Mayor of Baltimore*, 309 Md. 505, 515 (1987))).

*Mihailovich v. Dep't of Health & Mental Hygiene*, 234 Md. App. 217, 224–25 (2017).

We begin our analysis, unlike the Tax Court,[9] with the plain language of the two nearly identical impact tax exemption provisions as applied to the particular circumstances at hand.

Because the potential for ambiguity lies in the application of the two exemptions to the joint development project, we look to any definitions provided by the Montgomery County Tax Code for clarification. While neither of the relevant articles of the Tax Code provide definitions for the terms "building," "replace," or "dwelling unit," Sec. 52-39 of the transportation impact tax article does define "development" as meaning, "the carrying out of any building activity or the making of any material change in the use of any structure or land which requires issuance of a building permit and: (1) Increases the number of dwelling units; or (2) Increases the gross floor area of nonresidential development." Sec. 52-39. For the definition a "dwelling unit," Sec. 52-39 directs us to Chapter 59 for the Montgomery County Zoning Ordinance, which defines a "dwelling unit" as "[a] building or portion of a building providing complete living facilities for not more than one household, including, at a minimum, facilities for cooking, sanitation, and sleeping." Sec. 59-1.4.2. However, neither of those definitions are helpful in resolving potential ambiguity.

[9] The Tax Court began its discussion with a brief overview of the legislative history of the two development impact taxes, noting their progression from the initial enactment of the impact tax for transportation improvements, with the early legal challenges to its validity that it ultimately overcame, to the enactment of the additional impact tax for public school improvements.

The parties proffer differing interpretations of the concepts of a building that "replaces" another on the "same site or in the same project." Sec. 52-41(h)(3); Sec. 52-54(d)(3). Both concepts are resolved by the qualifying, parenthetical language that directly follows the "same site or in the same project" phrase in both exemption provisions: "*as approved by the Planning Board* …." Sec. 52-41(h)(3) (emphasis added). *See also* Sec. 52-54(d)(3). The exemption provisions expressly provide, the determination of whether a proposed building(s) is "replac[ing]" another on the "same site or in the same project" is to be made by the County Planning Board.

The parties have called our attention to legislative history of the existing exemption provisions by providing us with portions of the bill file relating to Bill 31-03, which was considered by the Montgomery County Council in 2003. As recognized by the Tax Court in its memorandum and order, that legislation provided support for amendment of the then applicable impact tax laws by including language that expanded the "same site" requirement to include "or in the same project" and a modification to the timing of the demolition of an existing building intending to be replaced.

At that time, the exemption provision for the replacement building exemption provided that the impact tax did not apply to "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." Sec. 52-49 (h)(2) (2002).

The rationale for the change was that, at that time, an approved large-scale development project for the Friendship Heights area included a plan to build a new

department store to replace an existing department store, but the original building would not be removed until after completion of the new building. Under the version of the impact tax statute in effect at that time, because the new building was to be built before removal of the existing building it was to replace, the new building would not have been entitled to the impact tax exemption.

In correspondence to the County Council from an attorney for the developer of the Friendship Heights project, clarifying language was requested in order to include that phased building replacement within the scope of the impact tax exemption. The County Council's Management and Fiscal Policy Committee agreed and recommended approval of such an amendment. In a work session memorandum relating to Bill 31-03, submitted to the County Council by the Deputy Council Staff Director and the Senior Legislative Attorney, the request to clarify was reiterated with the need to include situations where, "if the replacement building is part of a single project it can be built *before* the original building is demolished[,]" and explained that "[t]he Committee agreed that this clarification is within the intent of that provision, and staff will circulate language to accomplish it."

As the Tax Court concluded in the instant case: "The 52 new townhouses replaced the 47 garden apartments on the 'same site' or in the same project *as approved by the Planning Board and in accordance with the Preliminary Plan and Townhouse Site Plan*." (Emphasis added). This is consistent with the Planning Board's report approving the concurrently submitted site plans for the whole development project. The report characterized the proposed development project as:

> The public-private partnership between EYA and HOC will *transform* an existing garden apartment *community* into a development of 62 townhouses and a 200 unit multi-family residential building with workforce housing units and moderately priced dwelling units, public open space, structured parking, vegetated roof, the construction of a new road, Private Street "A", and a ½ [sic] public park.

(Emphasis added).

The Planning Board approved the joint development project as one that would "transform an existing garden apartment community into a development of 62 townhouses ***and*** a 200 unit multi-family residential building …." (Emphasis added). Further, the report states: "There are currently 68 rental garden apartments owned by HOC on the Property, which *are proposed to be replaced with one (1) multi-family building* ***and*** *62 townhouses*." (Emphasis added). In its discussion of the proposed sketch plan of the project, with respect to the County's Sector Plan, the Planning Board stated that "the Project proposes the redevelopment of the Property in a single sketch plan and includes all required public benefits for incentive density to be included in the Sector Plan's first phase of development …."

As to the issue of a building that "replaces" another, the County argues that "even if [the replacement building] criteria are met, the new construction cannot be counted towards the replacement of existing units more than once as CC Homes' [sic] would have this Court do." While the County concedes that "[t]he parties agree that Section 52-41(g)(1) provides an exemption for the construction of 10 of CC Homes' 62 townhouses as MPDU dwelling units [sic][,]" it "disagree[s] about whether the remaining 52 luxury townhouses constitute replacement buildings under Sections 52-41(h)(3) and 52-54(d)(3)."

In response, CC Homes contends that the Tax Court correctly found that the townhouses replaced the previous apartments, explaining that its "application of the stipulated facts to the plain terms of the Impact Tax Law concluding CC Homes' townhouses replaced previous garden apartments 'on the same site or in the same project' is supported by referenced substantial evidence and consistent with the plain statutory language."

The County's arguments contradict the Planning Board's report approving the development project as a whole, stating that the existing garden apartments "are proposed to be replaced with one (1) multi-family building and 62 townhouses." While the Planning Board's report does not outline in detail which proposed buildings replace which of the garden apartment buildings, it is reasonable to interpret the report as meaning the two separate site plans for the multi-family high-rise on the HOC retained lot replaces the building that was previously located there, and the site plan for the 62 townhouses on the three CC Homes-owned lots would replace the three buildings that previously existed there.

Because each site plan overlapped and were interconnected, approval was possible only as a joint project with many of the Planning Board's conditions for approval — open space area and local connector road — located on the site for the HOC high-rise multi-family building. Indeed, in the report's discussion of the traffic study for the preliminary plan of the whole project, the traffic generated by the 68 garden apartments was credited against the combined amount of traffic to be generated by both the townhouses and the high-rise apartments.

Consistent with the Tax Court's conclusion and the clear parenthetical language in the development impact tax exemption provisions, the Planning Board approved "any building that replaces an existing building on the same site or in the same project[,]" which is what occurred in the instant appeal.

**Calculating Impact Taxes for Replacement Buildings**

Lastly, the County contends that

> even if [this] Court finds that the new market-rate townhouses qualify as replacement buildings, transportation and school impact tax would still be due on the remaining 52 townhouses because the law anticipates situations where impact tax may not have been collected previously, and includes a "catch-all" provision to ensure the collection of impact tax on the difference between the tax due on the new dwelling units and the tax due that would have been due on the existing units if they were taxed when the developer applies for the new building permits.

Further, it asserts that "[t]his catch-all provision prevents new construction from getting the benefit of a replacement building exemption when, as in this case, the original building units that they purport to replace never paid impact tax in the first place."

As the Tax Court correctly points out, that argument "disregards the plain language of the Impact Tax law …." The operative language that it claims the County disregards is, "if it were taxed at the same time." We agree.

The tax exemptions refer to the number and type of dwelling units as quantifiers to determine the amount of impact taxes due on residential development, not in determining whether one building replaces another. To be sure, the replacement building exemption is limited "to the extent of" either "the gross floor area" or "the number of dwelling units" of the previous building, thereby reinforcing that the impact tax is due only on the impact of

the new development in excess of the previous building(s) being replaced. Sec. 52-41(h)(3); Sec. 52-54(d)(3). The language of the tax exemptions address replacing a building as a whole, regardless of whether it is residential, commercial, or otherwise. The impact tax due on a replacement building is calculated based on whether it is residential, non-residential, or a mixture of both. *See* Sec. 52-43(a) through (c). The building to be replaced is assessed a development impact tax as if it were a new development in accordance with the current tax rates for the type of building it is. *See* Sec. 52-41(h); Sec. 52-54(d). If it is residential, the applicable rate is assessed on the number and kind of dwelling units the building contains; if non-residential, the rate is assessed on the type and size of the non-residential building; and if the new structure is a mixture of both, the rate is assessed on both the number and kind of units the building contains as well as the size and type of the portion of the building that is non-residential. *See* Sec. 52-43(a) through (c).

Furthermore, the "catch-all" provision essentially provides that, notwithstanding the applicability of the exemptions, an impact tax assessment is to be calculated on both the existing building and the proposed development under the current impact tax rates, leaving the applicant to pay the difference between the taxes that would be due on the existing building and the new, altered, or reconstructed building. *See* Sec. 52-41(h); Sec. 52-54(d). Under the "catch-all" provision, the question then becomes, what is the appropriate quantifier for determining the amount of impact taxes assessed — the number and type(s) of dwelling unit(s) for residential development or the size and type(s) of building(s) for non-residential development. *See* Sec. 52-41(h); Sec. 52-54(d). *See also* Sec. 52-43(a)

through (c). The two development impact taxes are assessed on either per square footage of gross floor area or per unit of the development. *See* Sec. 52-43(a) through (b).

There is nothing in the language of the two impact tax provisions to suggest that taxable status of the dwelling units in an existing building is to be considered when assessing the impact taxes resulting from the replacement building. Accordingly, as the Tax Court concluded, CC Homes "should only be responsible for paying its proportional impact on transportation and public-school facilities, namely, the net increase in dwelling units above the replaced development."

Consistent with the Tax Court's conclusion, to which we give deference, and the clear parenthetical language in the development impact tax exemption provisions, the Planning Board approved the joint development project as collectively replacing the previous four garden apartment buildings, leaving CC Homes to be responsible for only its proportional share of the impact, *i.e.* the increase in dwelling units from its replacement of the three buildings previously located on its three lots.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO MONTGOMERY COUNTY.**