

MARYLAND TAX COURT

BURTONSVILLE LAND LLP

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Petitioner

*

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v.

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Case No. 15-IP-OO-0250

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MONTGOMERY COUNTY

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DEPARTMENT OF PERMITTING

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SERVICES

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Respondent

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MEMORANDUM AND OPINION

In the present case, Burtonsville Land, LLLP (“Petitioner”) is contesting Montgomery County’s (“Respondent”) imposition of its Development Impact Tax for Transportation Improvements (“Impact Tax”) on Petitioner’s development of a self-storage facility in Burtonsville, Montgomery County, Maryland. The Impact Tax is an excise tax imposed on any development within Montgomery County (the “County” or the “Respondent”).

The facts are not in dispute as set forth in the Joint Stipulation of Facts and Exhibits (the “Joint Stipulation”) submitted by the parties. For purposes of this decision, the conditions, facts and exhibits set forth in the Joint Stipulation are accepted into evidence.

A consideration of the facts requires the Tax Court to construe and interpret the County's Development Impact Tax in Sections 52-47 through 59 of the Montgomery County Code, which Sections authorize the County to impose the tax. Petitioner contends that the February 3, 2015 assessment of a Development Impact Tax for Transportation in the amount of \$785,988.45 on Petitioner's construction of the self-storage facility in Burtonsville, Maryland ("Burtonsville EZ-Storage") is so grossly disconnected to the express intent and purpose established by the statute for this tax, that it is completely arbitrary, capricious, erroneous and unlawful as applied.

Prior to the County's assessment of the Impact Tax, the Montgomery County Department of Transportation and the Maryland-National Capital Park and Planning Commission determined through the entitlement processes for the proposed self-storage use that Burtonsville EZ-Storage generated *di minimis* traffic impact. The Petitioner, in advance of the County's imposition of the Impact Tax, submitted a written request to the County seeking a determination that the Impact Tax rate applied to Burtonsville EZ-Storage should be either \$0 or considerably lower than the rate applied to Industrial or Other Non-Residential Uses so as to more accurately establish an Impact Tax rate in an amount that had at least some minimal nexus to the impact that the self-storage use would have on the transportation network. The County denied Petitioner's request for assessment of any lesser Impact Tax rate commensurate with the *de minimis* traffic impact created by Burtonsville EZ-Storage. The County determined that the project was appropriately classified as warehouse which is expressly included as an industrial use under the non-residential use in Section 52-47 of the Montgomery County Code. The Petitioner argues that the County's assessment of an Impact Tax in the amount of \$785,988.45 to a project that generates *de minimis*

traffic impact is excessive and unlawful in that it does not reflect the pro rata share of the costs of impact transportation improvements necessitated by Burtonsville EZ-Storage.

The Court's review and interpretation of the County's Development Impact Tax law in the context of the facts of this case requires the Court to consider whether the law must be interpreted, applied and enforced as a tax. Petitioner's arguments are only appropriate if the County law was a regulatory fee or benefit assessment. Petitioner refers to an Adequate Public Facilities Ordinance review and to a traffic study, both of which discuss the alleged actual traffic impact of Petitioner's development on the public roads. Petitioner argues that application of a rate that reflects the actual traffic impact should be used, arguing that in light of the actual traffic impact related to Petitioner's development, the use of any other rate is arbitrary, capricious and excessive.

The Court finds that the County's Development Impact Tax is a tax, and therefore a revenue raising measure with its sole purpose of raising funds for the construction of public roads in the County. The legislative history of the County's Development Impact Tax law supports the County's position. In 1986, the Montgomery County Council adopted Bill 17-86 which, in its original form, imposed an impact fee on development within the County to finance road construction within certain areas of the County. However, the legislation was challenged and, in *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 570 A.2d 850 (1990), the Maryland Court of Appeals held that the impact fee actually was a tax, not a regulatory fee. The Court concluded that the County law "impose[d] a tax which Montgomery County is without authority to enact, and the development impact fee is therefore invalid." In response to the *Eastern Diversified* ruling, the County enacted Bill 33-90 in 1990, reenacting the

development impact fee as a tax. The County's authority to enact a development impact tax was also challenged and, in *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15, 19, 650 A.2d 712 (1990), the Court of Appeals held that Montgomery County had the authority to adopt a development impact tax under its general taxing authority found at §52-17 of the Montgomery County Code.

The County's Development Impact Tax law creates an excise tax on the privilege of development of land in Montgomery County and is not a regulatory measure. The law imposes the tax on each applicant for a building permit and provides that the Department of Permitting Services is required to determine the amount of the tax based on the types of structure and proposed use, calculating the amount of the tax after verifying the applicable tax rate and multiplying the applicable tax rate by the number of dwelling units or gross floor area or a combination of both.

While a regulatory fee must be reasonable and must be related to the service provided and shall not exceed the cost of providing the services, a tax is a revenue raising measure imposed on the performance of an act or enjoyment of a privilege. There is no reasonableness requirement, and the amount of the tax is not subject to judicial scrutiny. The County has determined that the tax associated with land development in Montgomery County is based on the category of development, residential or nonresidential, and the number of dwelling units or the amount of gross floor area of development or a combination of both. The tax rates applicable to the various use categories were established through an appropriate public legislative process and are not subject to judicial review or scrutiny based on fairness, reasonableness, or the traffic impact placed on County roads by Petitioner's development.

In order to calculate the amount of the Development Impact Tax, Petitioner further contends that the County is required to assign an Impact Tax rate to Burtonsville EZ-Storage that was commensurate with the traffic impact generated by this project. The Impact Tax Law provides that if the type of proposed development cannot be categorized under the definitions of nonresidential and residential in Section 52-47, the Department of Permitting Services must use the rate assigned to the type of development which generates the most similar traffic impact characteristics. The County's Development Impact Tax law defines a nonresidential development in the negative, i.e., "the use of a building that is not a residential use...." The definition, however, continues, giving examples of the types of uses that the code considers as nonresidential including:

(1) offices, including general, medical, office parks, research parks, townhouse office buildings, government offices and other similar uses;

(2) industrial uses, including truck terminals, warehouses, light or heavy industrial and manufacturing, industrial parks and other similar uses;

(3) retail uses, including stores or shopping centers engaging in the sale of goods, restaurants, vehicles sales or service, banks or savings and loan institutions, theaters, post offices and other similar uses;

(4) places of worship;

(5) private elementary, secondary or post-secondary schools; and

(6) other nonresidential uses, including hotels, motels, day care centers, nursing homes, recreational facilities and other public facilities and similar uses.

Petitioner's development, a 127,803 square foot self-storage facility, does not meet the code's definition of residential. It does not contain any dwelling units, and it is not residential in character. Therefore, since Petitioner's proposed development is not residential, it meets the definition of nonresidential under §52-47 and naturally fits in the warehouse classification within the industrial category.

Accordingly, it is this 2nd day of June, 2016, by the Maryland Tax Court, ORDERED that the Development Impact Tax imposed by Montgomery County be and the same is hereby **AFFIRMED**.

CC: Robert C. Park, Jr, Esq.
Scott R. Foncannon, Esq.

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

NOTICE: You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.