HAVEN ROCK, LLC	*	IN THE
Petitioner,	*	
vs.	*	
		MARYLAND TAX COURT
DEPARTMENT OF FINANCE FOR BALTIMORE CITY	*	
	*	
Respondent		
	*	Case No. 21-MI-OO-0543

MEMORANDUM AND ORDER

Petitioner Haven Rock, LLC ("Petitioner," "Haven Rock," or "Haven") has appealed from a decision by Respondent Department of Finance for Baltimore City ("Respondent," "City," or "Baltimore") that denied an application for the City's High-Performance Market-Rate Rental Housing – Citywide Tax Credit provided in MD. CODE ANN., TAX-PROP. § 9-242 (2023) and Baltimore City Code Art. 28 § 10-18(c) ("the Credit"). In its appeal, Haven cites four independent issues:

1. The City's decision violated Article 28 § 10-18 of the Baltimore City Code.
2. The City's denial was arbitrary, capricious, or procedurally improper.
3. The City's decision violated the federal Fair Housing Act ("FHA").
4. The City's decision violated Petitioner's Equal Protection Rights ("EPR") under federal and state law.

By agreement of the Parties and the Court, this case has been bifurcated into two separate hearings on the above four issues. The first matter, having been heard and now being decided, consists of issues 1 and 2. The second matter, dealing with issues 3 and 4, has been stayed pending the outcome of the first matter and will proceed only if the first matter is decided in the Respondent's favor. For the reasons discussed below, on issue 1, the City's decision did not violate Article 28 § 10-18, and on issue 2, the City's denial was not arbitrary, capricious, or procedurally improper.

FACTUAL BACKGROUND

On January 9, 2019, Haven Rock acquired "in fee simple, the lot of ground lying and being in the Baltimore City, Maryland more particularly described as follows . . . 601-715 South Haven Street." Joint Stipulation of Exhibits No. 3 (Stip. Ex. 3). That lot and two other lots that Haven had acquired were the subject of a consolidation and subdivision request denied by the Permits & Code Enforcement division of the Baltimore City Board of Municipal & Zoning Appeals ("Board"). In its April 19, 2019, appeal request, Haven stated the issue to the Board as follows:

> Consolidate 3 lots: 601 S Haven St, Descriptive Lot (Block 6428 Lot 004A), and Block PSCO Lot 085, subdivide into 73 lots and construct 70 Single-Family Rowhouse Dwellings. Stip. Ex. 4.

On June 24, 2019, after a hearing, the Board granted the "request to consolidate the three lots, subdivide into seventy-three lots, and construct a Dwelling: Rowhouse(s) (seventy single-family rowhomes) . . . ." Stip. Ex. 5.

The project proceeded with the July 6, 2020, assignment of assessment addresses for Ward 26, Section 09, Block 6428-A and Lots 001-072. Stip. Ex. 11. According to Petitioner, its project at this stage "contemplated developing townhomes for sale to individual buyers, but after study of the market and review of financing options, Petitioner determined the prudent course was to develop a rental townhome project, in phases." Brief of Petitioner (Pet. Brief) at 6.

In accordance with that change of plans, on July 20, 2020, Haven Rock sent an email to the Respondent asking about the availability of the Credit for the project, noting that "the project would have approximately 70-units total on one parcel . . ." and referencing two similar projects that met the 20-unit requirement for the Credit in separate buildings. Stip. Ex. 12 at 4-5. The Respondent replied with a question that day,

"Can you please let me know if all the units would be on the same block and lot?" A reply came the next day when Haven Rock said,

> Yes, they would all be on the same block and lot. The argument in support of an interpretation that my client's proposed townhome/garden-style apartment project is eligible for [the Credit] is that the International Property Management Code, as recently amended by the City Council, defines a "multiple-family dwelling" as a "building or a group of buildings on the same lot . . . ." Stip. Ex. 12 at 2-3.

On July 31, 2020, the Respondent wrote back and said,

> After a thorough review of the City Legislation and the Rules and Regulations governing [the Credit], it has been determined that the townhomes project will not qualify for [the Credit]. The credit is limited to traditional apartment buildings that include multiple dwelling units within one building which also has common elements shared by the tenants. Stip. Ex. 12 at 1.

About four and a half months later, on December 15, 2020, Petitioner laid out its case for the Credit in a nine-page letter with exhibits. Stip. Ex. 13. The Respondent never replied to that letter.

Nonetheless, on January 25, 2021, Haven submitted its Final Development Plan to the City. In the "Site Information" section, Haven listed only Lot 001 of the 72 numbered lots and in the "Development Summary," Haven stated that the "Proposed Unit Count" was "70" and the "Unit Type" was "Single-Family." The City approved the development plan and assigned "the following New Lot Numbers and Tax Lot Addresses" for the 72 addresses. Stip. Ex. 17.

On May 4, 2021, Haven applied for the Credit. Stip. Ex. 22. The application itself only referenced Lot 001. *Id.* at 1. It also listed a construction start date of April 14, 2021. *Id.* at 2. An accompanying letter and exhibits from Haven again laid out the case for the Credit and made it clear that the application was for all 70 units, not just Lot 001. Stip. Ex. 25.

Some of the approved permits for construction were submitted with the Credit application (Stip. Ex. 30) and some dated after the application was submitted to the Court (Stip. Ex. 31-34). Only those approved after the Credit application contain the permit applications and each permit application is dated March 31, 2021, with the following language therein: "Permit Description Submitted: Residential townhouse new build (not multifamily)."

On September 9, 2021, the City denied the Credit application stating, "[The Credit] is limited to traditional multifamily buildings that include several dwelling units within one building situated on the same lot." Stip. Ex. 35 & 36.

APPLICABLE LAW

MD. CODE ANN., TAX-PROP. § 6-202 (2023) states:

> The Mayor and City Council of Baltimore City or the governing body of a county may impose property tax on the assessment of property that is subject to that county's property tax.

MD. CODE ANN., TAX-PROP. § 9-242 (2023) states as follows:

> (a) (1) Subject to paragraph (2) of this subsection, in this section, "high performance building" means a building that:
>
> (i) achieves at least a silver rating according to the U.S. Green Building Council's LEED (Leadership in Energy and Environmental Design) green building rating system as adopted by the Maryland Green Building Council;
>
> (ii) is a residential building that achieves at least a silver rating according to the International Code Council's 700 National Green Building Standards;
>
> (iii) achieves at least a comparable rating according to any other appropriate rating system; or
>
> (iv) meets comparable green building guidelines or standards approved by the State.
>
> (2) For purposes of paragraph (1) of this subsection, under LEED Credit MR7 or a similar criterion in a comparable rating system, credit may be awarded for the use of wood–based materials derived from all credible sources, including the Sustainable Forestry Initiative Program, the Canadian Standards Association,

the American Tree Farm System, and other credible certified sources programs.

(b) The Mayor and City Council of Baltimore City or the governing body of a county or of a municipal corporation may grant, by law, a tax credit against the county or municipal corporation property tax imposed on a high performance building.

(c) A county or municipal corporation may provide, by law, for:
(1) the amount of a property tax credit under this section;
(2) the duration of a property tax credit under this section;
(3) the criteria and qualifications necessary to receive the credit; and
(4) any other provision necessary to carry out this section.

Baltimore City Code Art. 28 § 10-8(f-1)(2)(ii)(B) states:

(2) For a project subject to this subsection to be eligible for any tax credit under this section:
...

(B) the project is a high-performance market-rate rental housing project, as these terms are defined in § 10-18(a)(2) {"Definitions: High-performance"} and (a)(3) {"Definitions: Market-rate rental housing project"} of this subtitle; or ...

Baltimore City Code Art. 28 §10-18(a)(2) and (3) states:

(2) High-performance.
"High-performance" means a high performance building as defined in State Tax-Property Article §9-242.

(3) Market-rate rental housing project.
"Market-rate rental housing project" means a multi-family dwelling:
(i) that contains 10 or more rental units; and
(ii) in which dwelling, except to the extent specifically required by City Code Article 13, Subtitle 2B {"Inclusionary Housing Requirements"}, none of the rental units are subject to governmental restrictions on the amount of rent charged or on the tenant's income level.

Baltimore City Code Art. 28, §10-18(c) states:

In accordance with State Tax-Property Article § 9-242, a High-Performance Market-Rate Rental Housing Tax Credit is granted against the City property tax

imposed on eligible newly constructed or converted high-performance market-rate rental housing projects.

Baltimore City Code Art. 32 §1-305(r) defines "Dwelling: rowhouse" as follows:

> "Dwelling: Rowhouse" means 1 of 3 or more buildings, each of which contains a single dwelling unit used for residential occupancy, with each building having its own private entrance and being joined to the others by a party or shared wall.

ARGUMENT

Petitioner makes the following arguments:

1. Respondent violated fundamental principles of statutory construction in interpreting the laws applicable to the Project.
2. The denial of the credit is arbitrary and capricious because the word "traditional" in the decision is a non-statutory term.
3. The City's current basis for the denial of the Credit is different than the original basis and therefore the City's interpretation of the applicable law is not entitled to deference.
4. Similarly situated Credit applicants have been granted the Credit.
5. The purpose of the Credit is to expand the availability of multi-bedroom space with a piece of land in the City and this Project meets that goal.
6. The City's own guidance for applicants of the Credit were followed to the letter and the Credit should therefore be allowed.
7. The City's reliance on the "one lot" requirement is a reliance on lines on a paper, not a meaningful rule.
8. The City did not communicate with the Petitioner in a timely manner.

Each of these arguments will be addressed in turn.

1. Statutory Construction

The terms of the statutes in this case are relatively straightforward. In MD. CODE ANN., TAX-PROP. § 9-242(b) (2023), the State legislature grants the City the authority to grant the Credit "against the county or municipal corporation property tax imposed on a high performance building." In TAX-PROP. § 6-202 (2023), the State allows the City to

"impose property tax on the *assessment* of property. . . ." (emphasis added). With these statutes, the State tied the tax and any property credits to the assessment and taxing process–imposed on each assessed property or numbered lot. The flaw in the Petitioner's argument is that Haven Rock would like the State and City to impose property tax and any credits on "Projects." That is not how properties are taxed in Maryland. Each property of a numbered lot is assessed and taxed accordingly.

Additionally, the State grants the City the authority to impose additional conditions on obtaining the Credit, such as the "Market-rate rental housing project" requirement in Baltimore City Code Art. 28 § 10-18(a)(3). While this statute does list "project," it also defines the term to include the word "dwelling," which is another singular term, like lot.

Thus, the statutory construction process, as applied to a single assessed property or lot fails to meet the statutory language in at least two respects: a) no single lot contains one multi-family dwelling and b) no single lot contains one building with at least 10 rental units.

2. Arbitrary and Capricious

There can be no doubt that the word "traditional" is not in the statute. As one can read above, the word "traditional" is not pertinent to the proper statutory interpretation in this case. Had the City needed the word "traditional" to reach its conclusion on the application that would tend to make the decision arbitrary, but this Court, having the benefit of a *de novo* review of the evidence and applying that evidence to the statutory scheme finds no need to rely on the word "traditional" in reaching the conclusion that the statutory terms of the Credit were not met.

3. Change in Rationale

The Petitioner's argument that the City may not change its argument at the hearing and must defend its use of the word "traditional" in its decision throughout the process of this case again ignores the fact that the Tax Court hears matters *de novo*. Not only is the Court not bound by any evidentiary or legal findings made procedurally below, but also the Parties are similarly not bound by the arguments they made below. As long as both sides are given adequate time to respond to new arguments, it is perfectly fine to make new arguments that are based on the same facts and law that were available to both Parties. If there was new evidence to consider along with a new argument, a remand might be advisable, but in this case, only new arguments are being made.

4. Similarly Situated Applicants

The Petitioner believes that at least four other applicants have received the Credit in similar situations. While it is true that some of the other applicants mentioned did have more than one building on an assessed lot, none of the other applicants asked for the Credit on more than one assessed lot. That characteristic is a statutory one and distinguishes the Petitioner from the others. There are no similarly situated applicants that failed to meet that term of the statute and received the Credit.

5. Purpose of the Credit

The purpose of the Credit, according to the Petitioner, is to "stimulate growth of Baltimore's City's residential population in an environmentally sensitive manner." Pet. Brief at 3. The Petitioner also argued at the hearing that one of the purposes of the statute was to fill a real and growing need for families to live in a multi-bedroom space with an accompanying piece of land. Those are laudable goals, but unfortunately meeting a goal

is not the same as meeting the terms of a statute. The Court is powerless to grant any equitable relief for projects or a building based on a "goals met" criteria. It must apply the law as written. Should there be ambiguity in the law, the legislative history and goals may become important, but there is no ambiguity here.

6. The City's Guide for Applicants

At the hearing, the Petitioner stated that the City's regulations encouraged subdivision of parcels into lots prior to submitting an application for the Credit, and that is exactly what Petitioner did. Thus, the argument goes, the Petitioner should not be penalized by a denial of the credit on the single assessed lot basis. Code of Balt. Regs. Ann., 05.01.04, however, encourages prospective applicants to perform any subdivisions or consolidations before submitting the application, because any such changes after the submission of the application could void the Credit. The regulation reads:

> Prior to the submission of any application, applicants should complete any property modifications involving subdivision of one lot into multiple lots or the consolidation of multiple lots into one lot. Any lot changes made during the application process will render any previously submitted application null and void. Any lot changes made during the term of the credit will result in the immediate revocation of the credit.

Thus, the Petitioner's argument lacks merit. The Petitioners voluntarily subdivided the land to sell to homeowners in fee simple transactions, then after the subdivision, changed to a single owner with multiple tenants. That was Haven Rock's choice and consequences. Indeed, all the permits were couched in single family terms and no document submitted by Haven ever used the term "multi-family," which is a necessary indicium for the Credit.

7. Reliance on One Assessment, One Lot Rule is Not Meaningful

The Petitioner argued that the City's reliance on a one assessment, one lot rule is effectively elevating form over substance because subdivisions are just lines on a piece of paper. To the contrary, properties in Maryland are assessed by lot, taxed by lot, and sold by lot. If those lines were not drawn, the system of taxation and property transfer would fail. The Petitioner's argument is without merit.

8. Timely Communication

The Petitioner argued that the delay between the application and the decision, a period of four months, somehow disadvantaged it with respect to the Credit. Haven knew as early as July 2020, however, that the City was more than likely going to deny the credit on the same grounds as it finally did. The Court finds no untoward delay in the City's decision-making.

CONCLUSION

For the above reasons, it is this 2ND day of MAY, 2024 that the Petitioner's relief on issues 1 and 2 are DENIED. The Court will lift the stay as necessary on issues 3 and 4.

Cc: Harris Eisenstein, Esq.

Steven Potter, Esq.

CERTIFIED TRUE COPY
TEST: Andrew Berg, Clerk

Chief Judge