

CABIN BRANCH MANAGEMENT, LLC,

Petitioner

v.

MONTGOMERY COUNTY
DEPARTMENT OF TRANSPORTATION,

Respondent

* IN THE
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* MARYLAND TAX COURT
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* Case No. 18-IP-OO-0878
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MEMORANDUM AND ORDER

In the present case, the Petitioner, Cabin Branch Management, LLC (“Cabin Branch” or “Petitioner”), has appealed the decision of the Respondent, Montgomery Department of Transportation (the “County” or “Montgomery County” or “Respondent”) in denying a Montgomery County Impact Tax Credit on the entire development project which the Petitioner is developing in the Clarksburg area of Montgomery County (the “Project”). Both parties have filed cross-motions for summary judgment and have stipulated to the material facts.

Montgomery County has an Adequate Public Facilities Ordinance (“APFO”) which required the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission (the “Planning Board”) to find that public roads and transportation facilities will be adequate to support and serve a proposed subdivision before approving a preliminary plan for a new development project. Montgomery County also had an Annual Growth Policy (“AGP”) that evaluated development capacity staging ceilings planning areas including the Clarksburg Planning Area in which the Cabin Branch project was proposed.

Under the AGP in effect at the time of the Cabin Branch approval, Montgomery County employed a Policy Area Transportation Review analysis of the development capacity. The computer-based analysis of the transportation system for the planning area calculated whether the combination of existing and programmed roads and transportation facilities would support additional development. If the roads and transportation facilities would support more development, the AGP provided an adequate staging ceiling. If, on the other hand, the roads and transportation facilities were insufficient to support additional development, the AGP established an inadequate staging ceiling, meaning new development could not be approved unless the development project constructed new transportation infrastructure to support the new development.

At the time of the Preliminary Plan approval, West Old Baltimore Road was a narrow, two-lane rural road with trees and brush directly adjacent to the road. The Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") informed Cabin Branch that for the new project to proceed, it was requiring road improvements to provide transportation staging ceiling capacity under the Policy Area Review test of the AGP and the APFO. Those improvements included upgrading of West Old Baltimore Road to two-lane arterial roadway standards between Newcut Road and Clarksburg Road. The Development Review Group, Traffic Engineering and Operations Section of the MC-CPW&T (now MC-DOT) also recommended Cabin Branch be required to make the following improvements to West Old Baltimore Road:

- 11' wide travel lanes;
- 10' wide shoulders (first 4' paved full depth asphalt for bike compatibility);
- Side ditches, randomly spaced trees, streetlights, and traffic signal conduit;

- Grass shelf on the north side of the right-of-way with 8' wide paved shared-use path (path will not be provided in the section between Broadway and Kittiwake Avenues -- it will be located along Broadway Avenue, Little Seneca Parkway, and Kittiwake Avenue within the development);
- 5' wide sidewalk on the south side of the right-of-way; and
- Relocation of existing affected utilities.

On June 22, 2004, the Planning Board approved the Cabin Branch project with the prescribed roadway improvements, including the upgrade of West Old Baltimore Road.

In 2008, the Planning Board adopted a resolution allowing Cabin Branch to increase the size of the development from 1,600 to 1,886 dwelling units and 2.4 million square feet of commercial space, conditioned on Cabin Branch reconstructing West Old Baltimore Road and making improvements to comply with Montgomery County APFO regulations. The improvement plans provided by Cabin Branch reflected a complete expansion and reconstruction of the road by more than doubling the width of the pavement. The plans for the new road specify that it will be 38 feet to 41 feet wide with paved shoulders, as well as adjoining grass shoulders, and it will be reconstructed with a flatter and straighter profile.

In 2018, Cabin Branch applied for a transportation impact tax credit for the required West Old Baltimore Road improvements. The County granted part of Cabin Branch's requests for an impact tax credit but determined certain portions of the Project were not eligible:

- Upgrading West Old Baltimore Road to a two-lane arterial roadway standard between Broadway Avenue and Clarksburg Road (MD121) with 11-foot wide travel lanes -- one travel lane in each direction;

- Adding 10-foot wide shoulders with the first four feet paved with full-depth asphalt for bike compatibility;
- Adding side ditches, streetlights and traffic signal conduits; and
- Installing a grass shelf on the north side of the right-of-way with an 8-foot wide paved shared-use path.

Those improvements were not eligible for the tax credit because Cabin Branch was reconstructing an existing road but not adding lanes and therefore not adding traffic capacity. Cabin Branch disputed the County's analysis and provided a traffic engineer's report setting forth the additional traffic capacity being added by the improvements. After further review by the County, it agreed that Cabin Branch was eligible for credits for costs incurred relating to the installation of a turn lane and the hiker-biker path, but further asserted that the remaining credits requested were not eligible for tax credits because it did not add additional lanes and therefore does not increase traffic capacity.

The County argues that additional highway capacity is defined in the County Code, as well as the Code of Montgomery County Regulations. Both definitions specifically require an improvement to increase the maximum theoretical volume of traffic that a highway can handle in order to accommodate the new developments being built by the property owners. The County has interpreted these laws to require construction of additional lanes in order to increase the maximum theoretical volume of traffic that a highway can accommodate. Moreover, the County argues that credits, like exemptions, from taxation should be rigidly construed and established beyond a reasonable doubt, and it is only where a deliberate purpose of the legislature to grant an exemption is expressed in clear terms that a claim thereto can be maintained, *Comptroller v. Imbach*, 101 Md.

App. 138, 144, 643 A.2d 513, 516 (1994); *SDAT v. Belcher*, 315 Md. 111, 118-119, 553 A.2d 691 (1989).

The Montgomery County Code Section 52-47 governs Impact Tax Credits and requires the County to provide Impact Tax Credits for certain types of road improvements: “a property owner must receive a credit for constructing or contributing to an improvement of the type listed in Section 52-50.” Mont. Co. Code § 52-47(b). Petitioner claims that the list of improvements that are eligible for Impact Tax Credits under Section 52-50 are projects that involve the “widening of an existing road, *or* total reconstruction of all or part of an existing road required as part of widening of an existing road, that adds highway or intersection capacity.” Mont. Co. Code Section 52-50(a). The evidence is clear that Cabin Branch is widening the road and completely reconstructing West Old Baltimore Road as part of its Project to widen the road. The central question before the Court is whether such improvements add highway or intersection capacity without adding an additional lane of traffic.

The County’s authority to impose a Development Impact Tax was upheld as a valid excise tax under its general taxing authority. *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994). The Development Impact Tax provides credits against the tax based on a property owner’s cost of improvements which increase transportation capacity. The law is codified in Sections 52-39 through 52-51 of the Montgomery County Code and the related County Regulations codified under Article VII of the Montgomery County Regulations. The language for additional highway capacity, which became effective in 2004, provided that impact tax funds may be used for “...any new road or widening of an existing road that adds

highway or intersection capacity or improves transit service or bicycle commuting, such as bus lanes or bike lanes.”

Later the law was slightly amended to also allow a property owner to receive a credit for widening or reconstructing a road to the extent that it adds highway capacity. Impact tax funds may be used for any “,,new road, or widening of an existing road, or total reconstruction of all or part of an existing road required as part of widening of an existing road that adds highway or intersection capacity or improves transit service or bicycle commuting, such as bus lanes or bike lanes.” Montgomery County contends that since highway capacity is a fixed volume based on the number of lanes on any given roadway, the law still requires a property owner to create additional lanes in order to receive Development Impact Tax credits.

Montgomery County required Petitioner to totally reconstruct and widen West Old Baltimore Road because the then-existing road lacked the capacity to accommodate the increased traffic that would be generated by the Project. The Project approval was contingent on Petitioner improving West Old Baltimore Road so that it would have additional transportation capacity. It is undisputed that the Project in general provides additional transportation capacity. The Project adds a turn lane to the existing road and provides other features that create additional transportation capacity. In addition, the road-widening portion of the Project also provides additional transportation capacity by improving road performance and adding capacity to the road.

The County argues that widening a road without adding lanes cannot provide additional transportation capacity because capacity is a fixed value based on the number of lanes under theoretical base conditions. For purposes of determining the maximum theoretical volume of traffic that a road can handle, the County contends that all two-lane roads have the same theoretical

capacity. Such an abstract application of the Code is inconsistent with and undermines the legislative intent of incentivizing property owners to improve roadways.

The Court finds that the County's theoretical analysis is flawed when applied to the facts of this particular project and not supported in the Code. Capacity is not a fixed number; it depends on a myriad of circumstances and factors such as lane width, topography, and visibility. The County requests that the Court should ignore the Code's plain and unambiguous language that a party can add capacity by "widening an existing road." Such a restrictive and strained analysis would render the language of the Code as meaningless and nugatory.

Accordingly, it is this 8th day of APRIL, 2020, ORDERED, by the Maryland Tax Court, that Petitioner is entitled to an Impact Tax Credit for costs incurred related to widening West Old Baltimore Road and shall determine the specific amount of those costs at a separate hearing in the future.

CERTIFIED TRUE COPY
TEST: John T. Hearn, Clerk

cc: Michael J. Goecke, Esq.
Taggart Hutchinson, Esq.