Circuit Court for Prince George's County
Case No. CAL13-27595

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1507

September Term, 2015

FOUNTAIN CLUB, LLC, ET AL.

v.

CITY OF NEW CARROLLTON, MARYLAND

Woodward, C.J.,
Berger,
Shaw Geter,

JJ.

Opinion by Woodward, C.J.

Filed: July 10, 2018

"A special taxing district is an area designated by a municipality in which a special tax is levied, through a grant of authority from the General Assembly, in order to fund specific public works and construction projects." *Houghton v. Forrest*, 412 Md. 578, 591 (2010). In December 2006, the City of New Carrollton ("City"), appellee, created, by Ordinance No. 07-06, a special taxing district ("STD") that taxed all commercial and industrial properties within the City limits. The stated purpose of creating the STD was to raise funding for enhanced police services because of an increased "need for a greater police presence in the commercial areas[.]" The instant case arises out of the City's 2012 enactment of Ordinance No. 12-05, which expanded the STD to include the taxation of "all Multi-family rental properties[.]"

On September 19, 2013, Fountain Club, LLC and Fontainebleau, Inc. (collectively "Fountain Club"),[1] appellants and owners of multi-family rental properties, filed a complaint in the Circuit Court for Prince George's County against the City[2] challenging the City's authority to expand the STD to include multi-family rental properties and impose a special tax. Fountain Club requested, in relevant part, that the circuit court (1) enter a declaratory judgment finding that the City exceeded its statutory authority and imposed an unconstitutional tax, (2) issue an injunction on all future taxes, and (3) order a refund for the STD taxes Fountain Club paid for the 2013 fiscal year. After a hearing on the City's

[1] The record is unclear as to the relationship between Fountain Club, LLC and Fontainebleau, Inc. We will refer to the parties collectively because that is how they have represented themselves in the proceedings before the circuit court and before this Court.

[2] Fountain Club also filed suit against the City's mayor and several City council members, but these individuals were later dismissed from the suit.

motion for summary judgment, the court ruled that the City did not exceed its authority, ruled that the tax was constitutional, and then granted summary judgment in favor of the City.

Fountain Club filed this timely appeal and presents the following issues for our review:

> 1. Whether Ordinance Nos. 07-06 and/or 12-05, which single out properties based on use rather than a defined, set geographic area, fail to establish a special taxing district pursuant to Maryland Annotated Code, Article 23A, § 44[.]
>
> 2. Whether the special taxing district tax is an excise tax, and therefore, unlawful and *ultra vires*[.]
>
> 3. Whether Maryland Annotated Code, Article 23A, § 44 requires [the City] to demonstrate how the taxes generated from the special taxing district are expended by the City[.]
>
> 4. Whether [the City's] failure to expend the revenue generated by the special taxing district solely on *enhanced* police services that uniquely benefit the special taxing district above and beyond the benefit accrued to the general public violates [appellant's] constitutional rights, including the uniformity requirement of Article 15 of the Maryland Declaration of Rights[.]
>
> 5. Whether the [c]ircuit [c]ourt erred by relying on documents that were created by [the City] after the conclusion of the hearing on the motion for summary judgment and that were submitted as evidence months after the discovery deadline[.]

(Emphasis in original).

For the reasons set forth below, we need only address the second issue, because we hold that the City exceeded its authority to create a STD by imposing an excise tax on Fountain Club's multi-family rental properties. As explained, *infra*, we reverse in part and

vacate in part the judgment of the circuit court, and remand this case for further proceedings consistent with this opinion.

BACKGROUND

Maryland Code (1957, 2011 Repl. Vol), Article 23A, § 44(a),[3] authorizes municipalities to create a STD "for the purpose of financing the capital and operating costs to *enhance police*, fire protection, and rescue services[.]" (Emphasis added). Article 23A, § 44(a), also provides that within the STD, municipalities may

> **levy on all real and personal property located within these special taxing districts an ad valorem tax** at a rate sufficient to provide adequate annual revenues to pay the principal and interest on any bonds or other obligations of the municipality issued for these purposes as the principal and interest become due, and to pay the costs of operating and maintaining these facilities and activities. These taxes shall be levied in the same manner, upon the same assessments, for the same period or periods, and as of the same date or dates of finality as are now or may hereafter be prescribed.

(Emphasis added).

Pursuant to this enabling statute, the City passed Ordinance No. 07-06 on December 20, 2006, which provides:

> AN ORDINANCE TO CREATE A SPECIAL PUBLIC SAFETY TAXING DISTRICT IN THE CITY OF NEW CARROLLTON, FOR THE PURPOSE OF FINANCING CAPITAL AND OPERATING COSTS TO ENHANCE POLICE, FIRE PROTECTION AND RESCUE SERVICES WITHIN THE SPECIAL TAXING DISTRICT.
>
> **WHEREAS,** the City Council of the City of New Carrollton, a body politic and corporate in the State of Maryland is authorized

[3] Maryland Code, Article 23A, § 44, repealed by Acts of 2013, ch. 119, § 1, is now codified in Maryland Code (2013, 2013 Repl. Vol.), §§ 21-401, *et seq.* of the Local Government Article.

under Maryland Annotated Code Article 23A, §44(a), to create a Special Public Safety Taxing District for the purpose of financing capital and operating costs to enhance police, fire protection and rescue services within the special taxing district; and

WHEREAS, the City of New Carrollton, Maryland finds itself coming under increasing pressure to address growing public safety concerns regarding calls for service especially in the commercial areas of the City; and

WHEREAS, the City's Police Force, due to limited budgetary revenue resources, is insufficient to meet the need for a greater police presence in the commercial areas; and

WHEREAS, the Mayor and Council desire to provide an increased police service presence to enhance the public safety in these areas.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of New Carrollton, Maryland, that:

1) the City hereby creates a Special Public Safety Taxing District for all properties *used for commercial and/or industrial purposes*, with the exception of home occupations, professional, and child care enterprises, located within the corporate limits of the City of New Carrollton pursuant to Maryland Code Annotated, Article 23A, §2 and §44.

2) the City hereby levies on all commercial properties as identified above located within the special taxing district ad valorem tax at a rate of $.15 per $100 assessed value of real property, to be billed annually beginning FY 2008 (July, 2007).

3) the City hereby levies on all commercial properties as identified above located within the special taxing district an ad valorem tax at a rate of $.15 per $100[] assessed value of personal property phased in over three (3) years, to be billed annually beginning FY 2008 (July, 2007).

(Bold in original) (italic emphasis added).

On September 5, 2012, the City expanded the STD created under Ordinance No. 07-

06, to include multi-family rental properties. This expansion of the STD occurred by the adoption of Ordinance No. 12-05, which provides:

> **AN ORDINANCE TO EXPAND THE SPECIAL PUBLIC SAFETY TAXING DISTRICT IN THE CITY OF NEW CARROLLTON, FOR THE PURPOSE OF INCLUDING THE CITY MULTI-FAMILY APARTMENT UNIT COMPLEXES WITHIN THE SPECIAL TAXING DISTRICT.**
>
> **WHEREAS,** the City Council of the City of New Carrollton, a body politic and corporate in the State of Maryland in accordance with the Maryland Annotated Code Article 23A, §44(a), in fiscal year 2007, created a Special Public Safety Taxing District for the purpose of financing and operating costs to enhance police, fire protection and rescue services within the special taxing district; and
>
> **WHEREAS,** the City of New Carrollton, Maryland finds itself coming under increasing pressure to address growing public safety concerns regarding calls for service in the apartment complexes within the City; and
>
> **WHEREAS,** the City's Police Force, due to limited budgetary revenue resources, is insufficient to meet the need for a greater police presence in the apartment areas; and
>
> **WHEREAS,** the Mayor and Council desire to provide an increased police service presence to enhance the public safety in these areas.
>
> **NOW, THEREFORE, BE IT ORDAINED** by the City Council of the City of New Carrollton, Maryland, that:
>
> 1) the City hereby expands the Special Public Safety Taxing District to include all *multi-family apartment complexes* located within the corporate limits of the City of New Carrollton pursuant to Maryland Code Annotated, Article 23A, §2 and §44.
>
> 2) the City hereby levies on *all Multi-family rental properties* as identified above located within the special taxing district an ad valorem tax at a rate of $.15 per $100 assessed value of real property and $.15 per $100[] assessed value of personal property, to be billed annually beginning FY 2013 (July, 2012).

(Bold in original) (italic emphasis added).

Fountain Club owns and rents multi-family apartment units within the City limits. Consequently, on September 17, 2012, the City billed Fountain Club $38,244.20 in STD taxes for the 2013 fiscal year pursuant to Ordinance No. 12-05. On February 8, 2013, Fountain Club paid the 2013 STD taxes "under protest."

On September 4, 2013, the City billed Fountain Club $39,828.85 for STD taxes owed for the fiscal year of 2014. In response, Fountain Club sent a letter to the Office of Finance, Prince George's County and the City, "via Mr. Skaria Abraham, Finance Officer" requesting a refund of the STD taxes "for the tax year July 1, 2012[,] to June 30, 2013."

The next day, on September 19, 2013, Fountain Club filed a complaint[4] in the circuit court requesting, among other things, declaratory judgment, injunctive relief against the imposition of future STD taxes, and a refund of STD taxes paid by Fountain Club for the fiscal year of 2013. Fountain Club also filed on October 28, 2013, an appeal in the Tax Court requesting, among other things, a refund of the STD taxes paid for the fiscal year of 2013.

While litigation in both the circuit court and the Tax Court were pending,[5] the City

[4] We note that Fountain Club's initial filing was entitled, "Petition for Judicial Review; and, Complaint for Declaratory and Injunctive Relief, for Administrative Mandamus, Common Law Mandamus and Other Claims for Relief." As explained, *infra*, the circuit court considered this filing to be a complaint requesting declaratory and injunctive relief, and we shall do the same.

[5] Fountain Club has represented to this Court that the concurrent litigation "is currently pending, but stayed, in the Tax Court[.]"

enacted Ordinance No. 14-08, which was intended to retroactively amend Ordinances 07-06 and 12-05. Specifically, Ordinance No. 14-08 was enacted to correct what the City considered to be technical defects in the previous ordinances. Ordinance No. 14-08 amended Ordinances 07-06 and 12-05 by listing the addresses of the properties that were within the STD and attached a map of the STD. In addition, the ordinance required the City to adopt an annual budget for the STD specifically setting forth the costs of the enhanced police services, and stated that the taxes levied in the STD "shall be collected and enforced as other City taxes."

On December 19, 2014, the City filed a motion for summary judgment, and the circuit court held a hearing on the City's motion on January 8, 2015. At the conclusion of the hearing, the court took the matter under advisement, permitting both parties to submit supplemental briefing, if desired.

While the instant case was being held under advisement by the circuit court, the City passed Emergency Ordinance Nos. 15-09, 15-10, and 15-11 ("emergency ordinances"). These emergency ordinances contained budgets for the fiscal years of 2013, 2014, and 2015, which complied with Ordinance No. 14-08's retroactive requirement that the City's annual budget for the STD include the costs of the enhanced police services.

On June 19, 2015, the circuit court entered its opinion and order. As to whether the STD tax is an excise tax or a property tax, the court first determined that the opinion of the Court of Appeals in *Weaver v. Prince George's County*, 281 Md. 349, 356 (1977), established three factors that a court must consider: (1) the name of the tax, (2) the "actual operation and practical effect" of the tax, and (3) the method of imposing the tax. The

court then determined that the tax was an *ad valorem* property tax:

> The first and third factors weigh in favor of [the City's] argument that the special taxing district is a property tax as authorized by Md. Ann. Code Art. 23A §44. It is undisputed that the [City] has labeled the tax a property tax. It is also undisputed that the special taxing district tax is assessed based upon a valuation of the property, and failure to pay the tax results in a lien against the property.
>
> The second factor is more complicated, but the court concludes that the actual operation and practical effect of the special taxing district tax weighs in favor of designating it a property tax. A multifamily apartment complex is a specific *type* of property as much as it is a specific *use* of property. [The City] expanded the special taxing district to include "all multi-family apartment complexes" located within the City, not "all properties used as multi-family apartment complexes." [The City's] justification for expanding the special taxing district — "to meet the need for a greater police presence in the apartment areas" — is as applicable to a multi-family apartment complex being operated as such, as it is to a multi-family apartment complex that is empty of tenants but where criminal activity may still occur.

(Emphasis in original). Ultimately, the court ruled that the City did not exceed its authority to create an STD or impose a special tax, and therefore, granted summary judgment in favor of the City.

Fountain Club then filed this timely appeal. Additional facts will be included as necessary for the resolution of this appeal.

STANDARD OF REVIEW

The Court of Appeals has stated:

> "[I]n reviewing a grant of summary judgment, [the appellate court] review[s] independently the record to determine whether the parties generated a [genuine] dispute of material fact[,] and, if not, whether the moving party was entitled to judgment as a matter of law. [The appellate court] review[s] the record in the light most favorable to the non-moving party[,] and construe[s] any reasonable inferences

> that may be drawn from the well-plead facts against the moving party."

Rowhouses, Inc. v. Smith, 446 Md. 611, 631 (2016) (alterations in original) (quoting *Hamilton v. Kirson*, 439 Md. 501, 522 (2014)). "When a circuit court's grant of summary judgment hinges on a question of law, not a dispute of fact, we review whether the circuit court was legally correct without according deference to that court's legal conclusions." *Peninsula Reg'l Med. Ctr. v. Akins*, 448 Md. 197, 208-09 (2016). All contentions in this appeal rely on the circuit court's legal analysis and do not challenge the circuit court's ruling that there was no genuine dispute of material fact. Thus we review the circuit court's grant of summary judgment *de novo*. *See id.*; *Anne Arundel Cty. v. Bell*, 442 Md. 539, 552 (2015).

DISCUSSION

I. Excise tax v. Property tax[6]

[6] Because the Court of Appeals has explained that a circuit court does not have jurisdiction to declare the rights of any party pertaining to *paid* taxes, we cannot address any claims concerning the 2013 STD refund. *Brutus 630, LLC v. Town of Bel Air*, 448 Md. 355, 361-62 (2016) (stating that no cause of action for paid taxes exist at common law except when created by the legislature or actions pertaining to "fraud, mistake of fact, or duress."); *Nordheimer v. Montgomery Cty.*, 307 Md. 85, 98, 101 (1986) (reiterating that no cause of action exists for paid taxes except for causes of action created by the legislature). Accordingly, we vacate the circuit court's grant of summary judgment as it pertains to the STD 2013 refund claims and instruct the circuit court on remand to dismiss those claims for lack of jurisdiction. *Nordheimer*, 307 Md. at 98, 101. We may, however, address the merits of Fountain Club's claims against the City for STD taxes assessed for the fiscal year 2014, because (1) those taxes were not paid, (2) there was no administrative remedy, or exclusive or primary statutory remedy set forth in the City's code or charter to challenge the levied STD taxes, and (3) Fountain Club's injunction claims were properly before the circuit court. *See id.* (addressing the merits of the appeal because the taxes were not paid and the appellant presented a valid claim for injunction).

Fountain Club contends that the tax imposed is an excise tax not authorized by Maryland Code, Article 23A, § 44(a), which only permits the imposition of an *ad valorem* property tax. Specifically, Fountain Club argues that the circuit court erred in holding the STD tax to be a property tax, because the tax is imposed on the use of the property, not simply the ownership of the property. According to Fountain Club, "[i]f a property owner tore down the apartment complex or converted it to another use, the property would no longer be included in the STD[,]" which demonstrates that the tax is not on the property's ownership but its use. In short, as we read Fountain Club's brief, Fountain Club's argument is that the second *Weaver* factor, the actual operation and effect of the tax, weighs so strongly in favor of the tax being an excise tax, that the circuit court erred in granting summary judgment in favor of the City.

The City responds that the circuit court correctly determined that the STD tax is a property tax. In applying the three-part test of *Weaver* to determine whether a tax is an excise tax or a property tax, the City asserts that the court properly concluded that under the first factor, the tax was labeled by the ordinance as an *ad valorem* property tax. As to the second factor, "the actual operation and practical effect" of the tax, the City contends that the court properly determined that the City was imposing a tax on the type of property, not the use of the property. According to the City, "the imposition of the tax was not affected by the use of the multifamily apartment complexes, as it would be the same if they were used for that purpose or if they were vacant." The City further contends that the circuit court correctly ruled that the tax was a property tax under the third factor, because the method for calculating the tax is the *ad valorem* method.

As we probe into the sparse case law addressing the difference between an excise tax and a property tax, the observation of the Court of Appeals over forty years ago still holds true: "The line that separates an excise tax from a property tax is a difficult one to draw, and courts have not fully succeeded in developing a truly useful definition of either concept." *Weaver*, 281 Md. at 356. Hence, we think it expedient to begin with *Weaver*, the case where the three-factor test finds its origin.

In *Weaver*, Prince George's County enacted an ordinance imposing a "4% tax on monthly rents charged for the use and occupancy of rental multifamily residential units." *Id.* at 353. The petitioners argued that the tax was an unconstitutional property tax, because it was imposed on the "tenant's leasehold estate, which [was] not based on the actual worth of the possessory interest in the hands of the tenant." *Id.* at 353-54. Accordingly, the Court of Appeals was tasked with determining whether Prince George's County's "Occupancy Tax" was an unconstitutional property tax or a constitutional excise tax. *Id.* at 355.

In order to ascertain the nature of the tax, the Court stated that it would consider "[1.] the designation placed upon the tax by the Legislature, [2.] the subject matter of the tax, and [3.] the incidents of the tax, i.e., the manner in which it is assessed and the measure of the tax." *Id.* at 356. The Court recognized the principle first expounded in *Educational Films Corp. v. Ward*, 282 U.S. 379, 387 (1931), and then adopted in *Herman v. Mayor and City Council of Baltimore*, 189 Md. 191, 198 (1947): "[*T*]*he nature of any tax should be determined by reference to its actual operation and practical effect, rather than by any particular descriptive language which may have been employed by the legislative body*" but added that "we are nevertheless cognizant of the rule that the declaration of the

Legislature as to the character of a levy is entitled considerable weight in [the Court's] own independent determination." *Id.* (emphasis added).

In examining the designation given by the General Assembly and Prince George's County, the Court held that the tax was on the rent charged for the use of the property, not the value of the tenant's possessory estate, indicating that the tax was an excise tax. *Id.* at 356-57. The Court then determined that the tax's operation was that of an excise tax, because it was a tax "on the privilege of occupying a residential rental dwelling unit[.]" *Id.* at 359. Finally, the tax was a flat four percent rate on the rent, not the value of the leasehold estate, which supported the conclusion that the tax was an excise tax. *Id.* at 358.

In sum, the Court stated:

> [T]he Occupancy Tax exhibits few if any of the attributes traditionally associated with a conventional property tax. First, the tax was imposed directly by the Legislature and the governing body of Prince George's County, neither of which made any provision for the assessment of the individual units as is commonly the case with a true property tax. Secondly, neither statute saddles the property directly with a lien in the event the tenant fails to remit the tax, although a lien might arise indirectly as a result of a landlord's suit for distress for nonpayment of rent, which, under the statute, includes the tax for enforcement purposes. Thirdly, the measure of the tax does not seem to be based on the value of the leasehold itself, but tends to reflect the extent to which the tenant has enjoyed and exercised his privilege to occupy the rental unit. Fourthly, unlike a property tax, the Occupancy Tax is not payable at a specified date, but is due as each rental payment is made much in the same way a retail sales tax is collected.

Id. at 364 (citations omitted). Accordingly, the Court held that the tax was a constitutional excise tax. *Id.* at 365.

The next in-depth consideration by the Court of Appeals of whether a tax was an excise tax or a property tax occurred in *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15 (1994).[7] In *Waters Landing*, Montgomery County "imposed a development impact [tax] on construction" in "Germantown and Eastern Montgomery County[.]" *Id.* at 20. "The amount of the [tax] 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." *Id.* The tax was assessed before the county issued a building permit, which would allow construction to commence. *Id.* On appeal, the petitioners argued that the tax was an unauthorized property tax. *Id.* at 25.

The Court reiterated the three-factor *Weaver* test as follows: (1) "consider the label given [to] the tax by the legislative body[,]" (2) "evaluate the actual operation and practical effect of the tax[,]" and (3) "consider the methods used to impose the taxes to fix their amount." *Id.* at 25-26 (internal quotation marks, citation, and alterations omitted). As to the first factor, the Court determined that Montgomery County explicitly and implicitly intended the tax to be an excise tax, because (1) the county explicitly called the tax an excise tax, and (2) the General Assembly's enabling statute only allowed Montgomery County to levy an excise tax. *Id.* at 25. As to the second factor, actual operation and

[7] To be sure, the Court of Appeals considered in *Ogrinz v. James* whether a one-time tax on attorneys admitted to the bar was a property tax or an excise tax. 309 Md. 381, 389, 397 (1987). The Court did not conduct an in-depth analysis in applying the three-factor test that would aid in our discussion here. *Id.* at 398. Instead, the Court simply determined that the tax was an excise tax on the privilege to practice law in Maryland. *Id.*

practical effect of the tax, the Court stated that "the development impact tax operate[d] as an excise tax . . . [because] it [was] imposed only when the owner of land [made] a particular use of the land, i.e., develop[ed] it." *Id.* at 26.

The Court then considered the third factor—"the methods used to impose [the taxes] to fix their amount." *Id.* (alteration in original) (internal quotation marks and citation omitted). The Court held that this factor weighed in favor of the tax being an excise tax, because it was imposed without an assessment of the value of the land. *Id.* at 27. The Court explained that the

> indirect connection between the value of the development and the type and size [of the development] is entirely too speculative to support a holding that the impact tax is a property tax. Furthermore, the petitioner[']s theory does not account for the fact that development rights are not taxes at all, no matter what their value, if the rights are not exercised.

Id.

In addition, the Court determined that the tax was more like an excise tax, because if the tax was not paid, a lien would be imposed "on *all property*, real or personal, and all rights to the property that belongs to the taxpayer." *Id.* (emphasis in original) (internal quotation marks and citation omitted). The Court expounded:

> Unlike a property tax, which ordinarily results in a lien on only the property taxed, this lien is imposed on all the taxpayer's property. It is, therefore, similar to that imposed for failure to pay income, sales, and use taxes, which we have consistently held are not property taxes.

Id. Accordingly, the Court held that the tax was a valid excise tax. *Id.*

Recently in *Shaarei Tfiloh Congregation v. Mayor and City Council of Baltimore*, ___ Md. App. ___, ___, No. 2645, Sept. Term 2015, No. 2572, Sept. Term 2016 (filed April 27, 2018) slip op. at 37, this Court held that Baltimore City's ("Baltimore") stormwater remediation fee, also known as the "Rain Tax," was indeed a tax, and then addressed, *inter alia*, whether the Rain Tax was an excise tax or a property tax. By ordinance and later codified in its Code, Baltimore imposed a Rain Tax in an effort to raise funds for stormwater management services and to comply with state and federal law. *Id.* at 6-8. The Rain Tax was calculated based on the amount of impervious surface on a property, and a bill evidencing the tax was provided by Baltimore. *Id.* at 11. The Shaarei Tfiloh Congregation ("Congregation") was subject to the Rain Tax, because it owned three properties within Baltimore. *See id.* at 10-11.

On appeal, the Congregation argued, *inter alia*, that they were exempt from the fee, because the tax was a property tax and the Congregation is religiously exempt from property tax under Maryland law. *Id.* at 30. Turning to the first factor in determining whether the Rain Tax was an excise tax or a property tax, this Court determined that the name given by the General Assembly and Baltimore did not aid the analysis, because the name given was "fee." *Id.* at 40. Next, we explored the operation and effect of the Rain Tax. *Id.* We determined that the tax was imposed "based on an aspect of the use of the property—the amount of impervious surface[,] [and] [i]t [wa]s not based on the value of the property or ownership of the property." *Id.* In other words, the Congregation's ability to increase, decrease, or maintain the amount of impervious surface on its property was a condition precedent to the imposition of the amount of tax levied against the Congregation.

See id. Lastly, we reviewed the method used to calculate the tax. *Id.* We noted that the tax was calculated based on the amount of impervious surface on the property, not on the value of the property itself. *Id.* "[W]e observe[d] that although [Baltimore] may use property tax records to measure the amount of impervious surface and failure to pay results in a personal lien on the property, these features alone [did] not alter the [Rain Tax's] intrinsic operative characteristics as an excise tax." *Id.* at 41. Taking the three *Weaver* factors together, this Court concluded that the Rain Tax was an excise tax. *Id.* at 40.

With the above legal framework in mind, we turn to the case *sub judice* and begin with the first *Weaver* factor—the name of the STD tax. The City's Ordinance No. 12-05 describes the tax as "an ad valorem tax at a rate of $.15 per $100 assessed value of real property and $.15 per $100[] assessed value of personal property . . . ." In addition, Ordinance No. 12-05's enabling statute is Maryland Code, Article 23A, § 44(a), which states in relevant part:

> **[T]he General Assembly hereby expressly authorizes all municipal corporations in this State . . . for the purpose of financing the capital and operating costs to enhance police, fire protection, and rescue services . . . to create within their corporate limits special taxing districts for these purposes and to levy on all real and personal property located within these special taxing districts an ad valorem tax** at a rate sufficient to provide adequate annual revenues to pay the principal and interest on any bonds or other obligations of the municipality issued for these purposes as the principal and interest become due, and to pay the costs of operating and maintaining these facilities and activities. These taxes shall be levied in the same manner, upon the same assessments, for the same period or periods, and as of the same date or dates of finality as are now or may hereafter be prescribed.

(Emphasis added). In considering the text of Ordinance No. 12-05 and the text of the enabling statute, which only authorizes a municipality to impose an *ad valorem* property tax, we conclude that the City intended the STD tax to be a property tax, and therefore, this factor weighs in favor of the STD tax being a property tax. *See Waters Landing*, 337 Md. at 25.

In considering the second *Weaver* factor, "actual operation and practical effect" of the tax, the Court of Appeals stated in *Waters Landing* that

> [a] property tax is a charge on the owner of property by reason of his ownership alone **without regard to any use that might be made of it**. . . . In contrast an excise tax is a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.

Id. at 25-26 (emphasis added) (citations and internal quotations omitted). Furthermore, "a tax imposed upon a particular use of property or the exercise of a single power incident to ownership, is an excise tax." *Weaver*, 281 Md. at 359. In other words, unlike a property tax, "the payment of the excise tax is made a condition precedent to the act, event, or occurrence on which the tax is based." 16 McQuillin Mun. Corp. § 44:242 (3d ed. 2016).

Here, Ordinance No. 12-05 expanded the STD to include "all multi-family apartment complexes located within the corporate limits of the City of New Carrollton" and permitted the City to levy taxes on "all Multi-family *rental* properties[.]" (Emphasis added). But for Fountain Club's properties already being used as a multi-family rental property or multi-family apartment complexes, Fountain Club would not be subject to the STD tax. In other words, the City taxed and continues to tax Fountain Club for the privilege of using their property as multi-family rental properties, engaging in the occupation of

being a landlord providing multi-family rental apartments, or simply having apartment complexes on their property. Thus Fountain Club's use of their property is a condition precedent to the imposition of the tax and more akin to an excise tax. *See* 16 McQuillin Mun. Corp. § 44:242.

We note that the City even conceded during oral argument before this Court, seemingly in contravention to its brief, that if Fountain Club converted its apartments to condominiums, Fountain Club would not be subject to the STD tax. Similarly, it follows that, if Fountain Club no longer rented its multi-family apartment units, the City, by its own ordinances, could not levy the STD tax against Fountain Club, because the properties could not be considered "Multi-family *rental* properties[.]" (Emphasis added).

Our assessment finds further support when viewed in light of the stated purpose of Ordinance No. 12-05:

> **WHEREAS,** the City of New Carrollton, Maryland finds itself coming under increasing pressure to address growing public safety concerns regarding calls for service in the apartment complexes within the City; and
>
> **WHEREAS,** the City's Police Force, due to limited budgetary revenue resources, is insufficient to meet the *need for a greater police presence in the apartment areas*; and
>
> **WHEREAS,** the Mayor and Council desire to provide an *increased police service presence to enhance the public safety in these areas*.

(Bold emphasis in original) (italic emphasis added). In our view, the City's rationale for enacting Ordinance No. 12-05 was that the increased demand for police services was the result of multi-family apartment complexes housing more individuals that required police

services, and therefore, the City imposed a special tax on Fountain Club whose *use* of its property contributed to an increased demand for police services throughout the City. Stated differently, the purpose behind Ordinance No. 12-05 was to tax Fountain Club for using its property in a particular manner, which is indicative of an excise tax. Hence, the above observations on the second factor strongly support the conclusion that the tax imposed by the City operates as an excise tax.[8]

As to the last *Weaver* factor, the method used to levy the tax, the Court of Appeals has stated:

> "[W]here a tax is levied directly by the Legislature without assessment and is measured by the extent to which a privilege is exercised by a taxpayer without regard to the nature or value of his assets, it is an excise. Where, however, the tax is computed upon a valuation of the property and is assessed by assessors, and where the failure to pay the tax results in a lien against the property, it is a property tax, even though a privilege might be included in the valuation."

Waters Landing, 337 Md. at 26 (quoting *Weaver*, 281 Md. at 358). Here, the tax imposed is computed by an assessment of the value of real and personal property, and it appears to be payable at the same time every year. This indicates that the STD tax is a property tax.

On the other hand, like the ordinance at issue in *Weaver*, Ordinance No. 12-05 does not state the consequences for failure to pay the tax. 281 Md. at 364. The failure to provide for a lien on the taxed property for failure to pay the tax indicates the STD tax is an excise

[8] It is not lost on this Court that the taxation of *all* properties within the STD appears to be based on the use of the property. The first ordinance, Ordinance No. 07-06, is explicit in levying the STD tax on "all properties *used for commercial and/or industrial purposes*" within the City limits. (Emphasis added).

tax. *See id*. (indicating that a lien not imposed on the property taxed is more like an excise tax). The City counters by arguing that pursuant to Ordinance No. 14-08, a lien would be imposed under the City Charter § C-12, which states: "All taxes levied under this section shall be a lien on *any and all property* of the person, partnership, firm or corporation against whom said taxes are levied." (Emphasis added). This language, however, is very similar to the ordinance in *Waters Landing*, which stated that a "lien would be created 'on *all property*, real or personal, and all rights to the property that belongs to the taxpayer.'" 337 Md. at 27 (emphasis in original). The Court of Appeals held that such language indicated that the tax was *not* a property tax, because property taxes usually impose a lien only on the property taxed. *Id.* Here too, if we were to accept the City's contention that § C-12 applies, the lien imposed would be more analogous to a lien imposed for "failure to pay income, sales, and use taxes" instead of a property tax, because the lien in this case would be imposed on Fountain Club's property beyond the property taxed by the STD. *See id.* Because the method of levying the STD tax has characteristics of both an excise tax and a property tax, we conclude that the third *Weaver* factor is neutral.

In considering all three *Weaver* factors, this Court confronts a classic legal dilemma of whether form—the name given to the tax, trumps substance—the actual operation and effect of the tax. We recognize that the name given by the legislative body is given considerable weight, but it is not determinative. *Waters Landing*, 337 Md. at 25. The case *sub judice* is one where we cannot overlook the strong evidence that the STD tax operates as an excise tax, because the STD tax would not apply to Fountain Club but for Fountain Club using its properties as multi-family rental apartments. We, therefore, conclude that

the City's STD tax is an excise tax, and thus the City exceeded its authority pursuant to Maryland Code, Article 23A, § 44(a). Accordingly, we reverse the circuit court's granting of summary judgment as to the unpaid STD taxes imposed on Fountain Club.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED AS TO THE UNPAID STD TAXES AND VACATED AS TO THE REFUND CLAIM FOR 2013 STD TAXES. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.