UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2356

September Term, 2013

BRUTUS 630, LLC

v.

TOWN OF BEL AIR, MARYLAND

Nazarian,
Leahy,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 31, 2015

Brutus 630, LLC ("Brutus"), appellant and assignee of NVR Inc. d/b/a Ryan Homes ("NVR"), appeals an order from the Circuit Court for Harford County affirming the Tax Court's grant of the Town of Bel Air's ("the Town"), appellee, motion to dismiss. Brutus presents one question for our review: "Did the Circuit Court and the Tax Court err when they held that the Tax Court lacked jurisdiction to resolve the controversy over the systems connections charges?" For the reasons that follow, we shall affirm.

FACTS AND PROCEDURAL HISTORY

Prior to 1969, the Town operated its own sewerage system. In 1969, it contracted with Harford County ("the County") for the Town's sewage to flow through the Town's system into the County's treatment system. The fees for new and existing users covered capital costs and future capital upgrades to the Town's sewerage system and the projected cost of transport and treatment of sewage by the County. In 1977[1] and 1979,[2] the Town and County

[1]The agreement was revised in 1977 "for the purposes of settling legal claims and disputes regarding charges for sewer service between the Town and the County . . . and for the purpose of providing definitions and methods by which the costs of sewer service . . . can be determined and billed[.]" The Town and County disagreed on whether the County could change the rates unilaterally or the if the rates had to be changed by an agreement. The revised agreement provided the Town would review and comment on the County's rate making and charging procedures for sewage treatment, and the Town had the right to contest any rate change.

[2]The 1979 agreement superceded the 1977 agreement because the County was expanding one of its treatment plants with funding from the U.S. Environmental Protection Agency, and as a condition of the funding, the County and Town had to change the agreement to include specific sewage treatment provisions. Such changes included the County committing "a minimum of 1.30 MGD of its sewage treatment capacity for the treatment of sewage generated within the . . . Town[;]" that the sewage coming from the Town would be treated by the County "in a manner that [complies] with the N.P.D.E.S.

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revised the Sewer Service contract, and the Town agreed to pay $618,452.00 to the County amortized over 50 years to satisfy the Town's obligations "with regard to annual area connection charge equivalent payments, made to defray 'the cost of basic main facilities and other sewage treatment facilities' as they existed on May 29, 1979." There was a user charge of $.75/1,000 gallons of metered sewage to be paid from revenues collected by the Town from properties connected to the Town sewer system within its corporate limits. User charges for properties "receiving metered water from the Maryland Water Works Company,[3] and within [the Town's] corporate limits, whose sewage flow[ed] into the County sewerage system without passing through one (1) of the four (4) metered points joining the Town and County sewer systems" were "based on metered water readings at the treatment charge per one thousand (1,000) gallons of sewage paid by Town to County[.]" There was also a user charge for properties "located outside the corporate limits of the Town" that are connected

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Permit[;]" that the County shall monitor the "amount of flow and the quality of the flow matter" at certain stations; that the Town "adopt a sewer use ordinance and sewer use charge ordinance and an Industrial Cost Recovery System . . . in conformance with the requirements of the Environmental Protection Agency[;]" that the Town will "comply with the Environmental Protection Agency regulations[;]" and that the Town shall notify the County if it "propose[s] to service, by its sewer system, an industry which does or may potentially introduce toxic, incompatible or significant industrial wastes, as defined by the Environmental Protection Agency[.]"

[3]The current water company operating for the Town is Maryland American Water, a subsidiary of American Water, a publicly traded U.S. water and wastewater utility company. Maryland American Water, *Bel Air Water Supply Update: Spring 2015*, available at http://www.amwater.com/files/Bel%20Air%20Water%20Supply%2005-2015.pdf (last accessed July 24, 2015).

to the Town sewer system and pass through one of the metered points at a rate "based on metered water readings, equal the treatment charge paid by Town to County per one thousand (1,000) gallons of sewage[.]"

In 1988, the Town and County again revised the contract and since then have amended the contract multiple times to reflect changes in user charges. We shall refer generally to the 1988 agreement and the addenda as "the Agreement." In the Agreement, the Town agreed to pay $174,018.00 with six percent interest to the County over a period of 25 years in yearly payments of $13,612.87 for "additional basic main facilities and other sewage treatment facilities used to transmit and to treat swage generated within the corporate limits of the Town," as authorized by Maryland Code (1982, 2007 Repl. Vol.), §9-705 of the Environment Article ("Env.").[4] That Agreement also provides that the County and the Town "may authorize new sewer connections and hook up each such new sewer connection made after the date of this Agreement within the corporate limits of the Town . . . upon payment to the

[4]Env. §9-705:

> A municipal authority may:
> (1) Construct a system in a municipality;
> (2) Extend or alter an existing system;
> (3) Maintain and operate a system constructed, extended, altered, or acquired under this subtitle;
> (4) Make a contract or an agreement with another municipal authority, or with any sanitary commission, sanitary district, county, State, or federal authority about the construction, alteration, maintenance, or operation of a system;

county of appropriate sewer connection charges as required under this Agreement . . . ." In the Agreement, "sewer connection charge" is defined as

> a charge to be made for each new connection to the Town sewer system made after the date of this Agreement which shall be allocated by the County to defray the cost of future replacement and expansion of basic main and other sewage treatment facilities used to treat sewage generated within the corporate limits of the Town.

According to the Agreement, the sewer connection charge was based on the following:

> (d) Utilization of Scale. A specific sewer connection rate for each sewer connection shall be determined by establishing peak demand at the site in terms of fixture units and by comparing that number of fixture units to the base of thirty fixture units[5] . . .
>
> (ii) In the event the owner or future owner of property presently receiving sewer service within the Town replaces a building on such property, no additional sewer connection charge will be assessed unless the number of fixture units in the replacement building exceeds the number of fixture units in the original building, in which event such owner shall pay an additional sewer connection charge based on fixture unit count. . . . Such charge will be remitted to the County.

The user charge changed to $.73/1,000 gallons of metered sewage in the 1988 agreement, and in the last addendum in the record, the user charge was $2.42 per thousand gallons of sewage.

[5]The calculation of the charge based on number of fixtures was changed from a per dwelling charge.

At the time of Brutus' appeal to the Tax Court, the Town imposed sewer service charges under Town Code §397-18[6] and §397-19,[7] as authorized by Env. §9-723.[8] The

[6]At the time of the hearing, Town Code §397-18 stated:

> A. Except as provided in Subsection C of this section, the rate for sewer service for all properties connected to and discharging domestic sewage into the sanitary sewerage system of the Town of Bel Air and metered for water use shall be applied on each 1,000 gallons of water used or fraction thereof as measured by water meters either approved by the Director of Public Works of the Town or in use by the Maryland American Water Company, its successors and assigns.
>
> B. Except as provided in Subsection C of this section, the rate for sewer service for all properties connected to and discharging domestic sewage into the sanitary sewerage system of the Town of Bel Air for which the Director of Public Works has determined that no approved meter which measures water use accurately can be provided shall be a flat rate which shall be determined by the use to which the property is put, and such rate shall be directly related to the average water use of properties used for the same or similar uses which are metered, but in no case shall such charge be less than the minimum flat rate charges made by Harford County to its customers with the same or similar uses.
>
> C. The rate for sewer service for those properties connected to and discharging domestic sewage into the sanitary sewerage system of the Town of Bel Air which are served under a legally binding agreement with the Town shall be as set forth in the agreement so long as said agreement is in force. Upon the termination of such agreement, the rate then effective for users as set forth in Subsections A and B of this section shall immediately apply.

[7]Town Code §397-19 stated:

> Sewer Service Rate Determination
> The rates for sewer service shall be applied to each 1,000 gallons or fraction thereof of metered water used and shall be computed annually or more often if necessary to cover the projected cost of capitalization, transport, and

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Town imposes Sewer Connection Charges enacted by Town Code §397-13[9] and §397-14,[10]

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treatment of sewage by Harford County, its successors and assigns, plus the cost of administering, maintaining and operating the sanitary sewage system of the Town of Bel Air. The following charges/rates shall apply to all sewer customers in the Town of Bel Air unless otherwise specified:

[8]Env. §9-723 states:

(a) Subject to any charter provisions of a chartered county or municipal corporation, any political subdivision may establish reasonable rates for water service, and reasonable charges for sewer upkeep and sewer service to provide funds for:
(1) Maintenance, repair, and operation of any water or sewerage system; and
(2) Payment of all or part of the principal and interest on any indebtedness that is incurred to finance any water or sewerage system.
(b) The rates and charges are chargeable against all property that is connected to any water or sewer pipe that the political subdivision owns or supervises.
(c) Subject to any necessary modification and to the provisions of this section, the rates and charges shall be uniform throughout each water or sewerage district.

[9]Town Code §397-13 stated:

Sanitary sewer capital contribution charge.
A charge to be known as a "sanitary sewer capital contribution charge" shall be due from the owner of property within the Town making a new connection to the sanitary sewerage system of the Town or for a connection to the system requiring a larger-sized water meter, except in the case of existing single-family dwellings not connected to the sewerage system before February 25, 1963.

[10]At the time of the refund claim, Town Code §397-14 stated:

Schedule of charges.
Charges shall be due and owing at the time the connection is made to the sanitary sewerage system or at the time of issuance of a building permit, whichever first occurs, and shall be made upon the following basic

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as authorized by Env. §9-722.[11]

Between 2004 and 2011, NVR developed a number of properties in the Town and agreed to pay the Town a fee to connect 274 condominiums to the Town sewerage system. Those fees were, in turn, paid by the Town to the County to pay debt service on the County's sewerage system.

According to Brutus, and it does not appear from the record that the Town disagreed, the Town collected sewer connection charges pursuant to Town Code §397-17[12] from 2004

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schedule:
A. Single-family: $215.
B. Multifamily, per living unit: $160.
C. Other uses.

[11]Env. §9-722:

> (a) To provide funds for the payment of principal and interest on indebtedness that is incurred to finance any water or sewerage system, a political subdivision may:
> (1) Establish a reasonable charge that is not less than the actual cost, payable to the political subdivision, for connection with a water or sewerage system; and
> (2) Set an annual assessment, payable to the political subdivision, on all property, improved or unimproved, that abuts on any street, road, lane, alley, or right-of-way in which there is a water main or sewer.
> (b) Except for special provisions that apply only in certain political subdivisions, the provisions of §§ 9-655 through 9-658 of this title govern the imposition of assessments under this section.

[12]At the time of the appeal to the Tax Court, Town Code §397-17 stated:

> Whereas a review of sanitary sewer capital improvement charges has been

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through 2011 rather than §397-13 and 14. On February 12, 2012, Brutus, as assignee for NVR filed a Claim for Refund for certain sewer connection charges pursuant to Maryland Code, Article 24, §9-710.[13] A public hearing was held on April 18, 2012, at which Brutus contended that charges in the "Town/County Sewer Service Agreement" have been miscalculated in the Town Code and Harford County Code, and that "the Town uses the sewer connection charges for operational, not capital costs[.]" Brutus further argued that "[i]f the Town subcontracts its sewage disposal[,] then the Town should be responsible for all the expense associated with that sewage disposal contract."

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> made in recognition that the potential undeveloped sewer service areas of the Town have changed and the requirements for additional basic main facilities have changed, under an agreement with Harford County the Town has agreed to collect for each new sewer connection or increase in sewage demand within its corporate limits an amount equal to the charge the County would make for like connections and increases as determined by the County rate schedules enacted and in force at such time and to rebate to the county the balance of said amount after deducting the Town's sanitary sewer capital improvement charge.

[13]Article 24, §9-710:

> A claim for a refund may be filed with the tax collector who collects the tax, fee, charge, interest, or penalty by a claimant who:
> (1) Erroneously pays to a county or municipal corporation a greater amount of tax, fee, charge, interest, or penalty than is properly and legally payable; or
> (2) Pays to a county or municipal corporation a tax, fee, charge, interest, or penalty that is erroneously, illegally, or wrongfully assessed or collected in any manner.

Article 24, §9-710 was repealed by Acts 2013, c.119, §1, and was replaced by the Maryland Code, (2013) §20-113 Local Government Article ("LG"), without substantive change.

The hearing officer denied the claim, in a written decision, explaining that:

> Under its agreements with the County, . . . the Town has secured unlimited use of the county sewage system for its property owners. In return, as stated in 397-17 of the Code of the Town of Bel Air, "the Town has agreed to collect for each new sewer connection . . . within its corporate limits an amount equal to the charge the County would make for like connections and increases as determined by County rate schedules enacted and in force at such time and to rebate to the County the balance of said amount, after deducting the Town's sanitary sewer capital improvement charge." During the period from 2004 through 2011, the Town did not impose its own sanitary sewer capital improvement charge.

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The financial structure necessary for the construction of a public sewer system usually includes sewer connection charges as a basic component. Such a structure based on connection charges, undergirds the Harford County – Town of Bel Air Agreement dated June 20, 1988 ("the 1988 Agreement") and all the addendums to the 1988 Agreement . . . . Any government constructing a sewer system must borrow construction funds usually by selling bonds. In the case of Harford County's system, those bonds are paid from funds generated in part by sewer connection charges collected from builders of new commercial or residential units being connected to the sewer system and depositing new daily sewage flows into the system; hence sewer connection charges are routinely made for each new unit hookup.

As required by the 1988 Agreement, by making its last payment in May, 2004, the Town has fully paid all "annual area charge connection equivalent payments" constituting principal totaling $792,470.00 along with 6% interest on the unpaid balance, on behalf of all its property owners with properties that contribute sewage to the County system as the share of all Town users of the total capital costs of the County sewage system incurred prior to June 20, 1988.

In addition, the 1988 Agreement provides for sewer connection charges to pay future capital costs incurred after June 20, 1988. Paragraph 1(b) of the 1988 Agreement defines a sewer connection charge to mean "a charge to be made for each new connection to the Town sewer system made after the date of this agreement (June 20, 1988) which shall be allocated by the County to defray the cost of future replacement and expansion of basic main and other

> sewage treatment facilities used to treat sewage generated within the corporate limits of the Town." The Town has reviewed all payments it has collected from NVR, Inc. and paid over to the County . . . and received assurances from the County that the money collected from these charges is used to pay the debt incurred for the replacement and expansion of basic main and other sewage treatments facilities used to treat sewage generated within the Town limits. Although [Brutus] has asserted that funds paid by NVR, Inc. have been allocated by the County to pay current operating expenses of the Harford County Sewage System, [Brutus] has not provided any factual evidence to substantiate its assertion.

The hearing officer concluded that Env. §9-222 authorized the Town to impose sewer connection charges on NVR in order to hook up its condominium units to the Town and County systems, and that Env. §9-723 does not require that "the sewerage system being maintained be located within boundaries of the political subdivision levying the charges." The hearing officer found that "the Town is obligated under the 1988 Agreement and the addend[a] . . . to levy and collect the sewer connection charges" that were collected from NVR and paid to the County. Because those charges were calculated correctly, the claim for refund was denied.

Brutus appealed the hearing officer's decision to the Tax Court and filed a motion for summary judgment and a series of memoranda, in which it asserted the following arguments. Because the Town's and County's sewerage systems were "distinctly separate," and a charge permitted by Env. §9-722 "is limited to a single system[,]" any funds "collected must be used for the capital costs of the Town sewer system." In other words, the Town cannot "collect Sewer Connection Charges for the benefit of or on behalf of Harford County." According to

Brutus, "the Town has no control over how the funds are used" and "funds . . . should be dedicated to specific uses within the corporate boundaries of the Town" and not for the "benefit [of] the general public."

Brutus also argued that the Town cannot "prove there is reasonable allocation of costs between new and existing Town or County sewer customers" especially "for the 'replacement and expansion' of the Town system much less the County system," and that the Town "must equally burden all the service recipients, present and future, in proportion to the benefit received." According to Brutus, "the Town can not provide any calculated basis for the sewer connection charges." In its view, the 1988 Agreement "significantly changed the Sewer Connection Charge calculation methodology from per dwelling unit to per fixture unit, and "[t]he Town Hearing Officer failed to perform any investigation to verify or disprove this calculation methodology change."

According to Brutus, "[n]othing in Town Code §397-17 suggests that sewer connection charges are charged solely on the basis of the 1988 Sewer Service Agreement or service provided to the property owner, or to defray expenses of the development regulatory process[.]" Therefore, the Town "illegally raise[d] the revenue it needs to partially satisfy the terms of its contract with Harford County through the collection of Sewer Connection Charges assessed under Town Code §397-17" and "illegally legislated its contractual obligations for purposes clearly outside the limits of the statutory authority granted by the state" in Env. §9-722 and §9-723.

Brutus cites *Eastern Diversified v. Montgomery County*, 319 Md. 45 (1990)[14] to support its argument that the connection charge is a tax because "the sole condition required by the Town to obtain a building permit is the payment of the Sewer Connection Charge." Brutus argued that the connection charges could not "be considered a regulatory fee [because] [t]here were no sewer[age] systems improvements attributable to the NVR . . . connections, there was no benefit to NVR, much less a special benefit, from the payment of Sewer Connection Charge, there were no new facilities required as a result of the new NVR connections and most importantly there is no methodology to support and to validate the Sewer Connection Charge." In its view, "[t]he Town simply has not performed the necessary calculations to ensure that the Sewer Connection Charges are reasonable and proportional." Rather, the "predominant purpose" of the charge was "to raise revenue" as demonstrated by the amount owed, and that "to qualify for a building permit" the developer only had to pay the sewer connection charges. The purpose of §397-17 "is not the regulation of development"

[14]In *Eastern Diversified*, the Court of Appeals decided "whether a 'development impact fee' imposed by [the Montgomery County Code] for road construction, [was] a valid regulatory fee under the County's home rule power or a tax which the County [was] without authority to impose." 319 Md. at 46. The impact fees were collected from building permit applicants before the issuance of a building permit. The fees were calculated based on the structure being built. The Court held that the fee was a tax, not a regulatory fee, because its "primary and predominant" purpose was to raise revenue, and that nothing in the language of the code suggested that the "impact fees [were] charged solely on the basis of service provided to the property owner, or to defray expenses of the regulatory process." *Id.* at 54-55. Additionally, the revenue was "used to finance road construction which benefit[ted] the general public." *Id.* at 55. The Court pointed out that there were no other conditions that a developer had to meet to qualify for the permit besides paying the fee.

but "to generate revenue to pay contractual obligations incurred on behalf of the general public." Therefore, §397-17 imposes "an excise tax–a tax imposed on a transaction or as a condition to the exercise of a privilege."

The Town moved to dismiss the appeal to the Tax Court arguing that "[t]he Sewer Connection Charges required of NVR, Inc., Brutus 630, LLC's Assignor, in order to connect each of its condominium units to the Town sewer system were made to comply with the Agreement and the Town Code." Env. §9-705(4) "authorizes a municipality to 'make a contract or agreement with any . . . county, state, or federal authority about the construction, alteration, maintenance, or operation of a (sewerage) system[.]'" According to the Town, the language of Env. §9-722 and §9-723 clearly authorizes "regulatory charges, not taxes[,]" and "the Town . . . may require sewer connections charges so that new users hooking up within the Town will pay a fair share of the capital costs of the County sewerage system." The Town also argued that

> The §9-722 and §9-723 connection charges meet the test for regulatory charges first set forth by the Maryland Court of Appeals in *Theatrical Corporation v. Brennan*, 180 Md. 377, 380-82 (1942) and recently recognized in *[Eastern Diversified*, 319 Md. at 54-55] that "a regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act."

(Parallel citations omitted). In support of its argument, the Town cited McQuillin Municipal Corporations, §31:32 that states "'sewer charges are not taxes or special assessments . . [.] but are in the nature of tolls or rents for services furnished or available[,]'" and the decision

in *Homeowner's Loan Corporation v. Baltimore*, 175 Md. 677, 681 (1939) that "'the rates for the service sometimes referred to as taxes, are literally service charges. They are not taxes in the ordinary sense of the word . . . but are commonly referred to as rates or rents.'" The Town also quoted *West Capital v. City of Annapolis*, 110 Md. App. 443, 450 (1996) for the proposition that "'water and sewer charges imposed by municipalities are generally not regarded as taxes or fees in the nature of taxes, but rather as charges for the sale of service or commodity.'"

The Town filed a motion for summary judgment, and, in that motion and in other memoranda responding to Brutus' filings, made the following arguments: "[T]he Town of Bel Air may require sewer connections charges so that new users hooking up within the Town will pay a fair share of the capital costs of the County sewerage system." In addition, the sewer connection charges were calculated correctly and "whether using methods employed by the Town or by Harford County[,]" the sewer connections charges are equivalent to those "which Harford County would impose if the properties" were connected to its system in Harford County. The sewer connection charges are used to fund the costs of the Town's transmission system and the County's treatment facilities for accepting the increased sewer flows generated by the new NVR units, and the charges "are applied solely to the cost of facilities serving the real property units connected to the system."

Moreover, "each property is charged a unique fee for the sewer capacity made available to it. The sewer connection charge is not a uniform charge levied on members of

the public generally to raise revenue. The charge is a necessary part of the regulatory scheme to provide public utility service to specific properties" and "bears a definite relationship to the purpose of the act imposing them." An affidavit from the CPA for the County, submitted with its motion for summary judgment, explained that the Town collected the checks from NVR "and paid them to Harford County as sewer connection charges, System Development Fees and Plumtree Run Pumping Station surcharges," and that "[t]he money collected from these charges is used to pay the debt incurred for the replacement and expansion of basic main and other sewerage treatment facilities used to treat sewerage generated within the Town limits" and does not pay "for operation and maintenance costs."

The Town also argued that NVR "voluntarily requested the sewer connections and sewer service, so that even if the charges weren't permitted by Env. §7-905 and §7-922, Brutus is barred from obtaining a refund." Quoting *Washington Suburban Sanitary Commission v. C.I. Mitchell*, 303 Md. 544, 572 (1985), the Town contends that the voluntary payment doctrine "establishes that one who 'voluntarily pays a . . . governmental charge, under a mistake of law or under what he regards as an illegal imposition, no common law action lies for recovery . . . absent a special statutory provision sanctioning a refund.'" Here, NVR "voluntarily paid sewer connection fees from February, 2004 through November, 2010 in order to obtain sewer connections to sell its residential condominium units. In reliance on NVR, Inc.'s voluntary payment of sewer connection charges, the Town granted sewer connections . . . and has transferred all sums to Harford County[.]" According to the Town,

Brutus "is without either a common law remedy or a special statutory provision sanctioning a refund."

On September 26, 2012, the Tax Court heard arguments on Brutus' motion for summary judgment and the Town's motion to dismiss but reserved its ruling because there was no "factual record," and it wanted the parties to stipulate the facts. At the second hearing held on May 29, 2013, when the parties could not agree on the facts, the Tax Court decided only the Town's motion to dismiss. In a ruling from the bench, it found that *West Capital* was controlling and that "water and sewer charges imposed by the municipalities are generally not regarded as taxes or fees in the nature of taxes but rather as charges for the sale, the service, or a commodity." *West Capital*, 110 Md. App. at 450. Therefore, the Tax Court did not have jurisdiction over the case. But, even if the charges were taxes, Brutus could not file a claim for refund under Article 24[15] §9-710 and §9-712.[16] And, moreover, even if it had jurisdiction, Brutus would be "barred from seeking a refund by the voluntary payment doctrine" because, as set forth in *Washington Suburban*, "[t]here is no such special statutory provision which permits a refund" and "no statutory refund mechanism available for the refund of water and sewer connection charges where the charges are voluntary."

[15]The Tax Court ruled according to Article 24 because the Local Government article did not take effect until October 1, 2013.

[16]Article 24, §9-712 provided that a tax collector "investigate each claim for refund" and "[c]onduct a hearing at the request of the claimant prior to a final determination on the claim." It was recodified, without substantive change, as LG §20-116.

Brutus sought judicial review in the Circuit Court for Harford County on July 9, 2013. In response, the Town filed a preliminary motion to dismiss on July 31, 2013 asserting essentially the same arguments it made before the Tax Court. Brutus filed an answer to the motion to dismiss on October 15, 2013, arguing that the Town's reliance on *West Capital* and *Washington Suburban* was misplaced because those rulings do not "fall within the factual parameters of this matter" and are therefore inapplicable. *West Capital* dealt with "water and sewer service charges," and, in *Washington Suburban*, the developer paid a one time, up front charge for new water and sewer service directly to Washington Suburban Sanitary Commission.

In a written opinion, filed December 12, 2013, the circuit court upheld the decision of the Tax Court that the fees were not taxes and, therefore, the Tax Court did not have jurisdiction. In the circuit court's view, Brutus' "attempt[] to distinguish the *West Capital* case based on the fact that it dealt with charges for water and sewer and not for initial hook-up charges . . . [was] a distinction without a difference." (Italics added). It continued:

> [b]oth the hook-up and user charges are part of an overall scheme that, if operated correctly, is designed to pay the cost attributed to the construction and operation of the sewer systems so that expense rests on the users and not on tax payers who do not have access to the system. To the extent that the hook-up fees go to all or a part of th[ese] costs, they are legally indistinguishable from user fees.

Brutus filed a timely appeal to this court.

DISCUSSION

On appeal, Brutus argues that the Tax Court "failed to apply the plain meaning of the statute, Article 24, Section 9-710 and the Circuit Court misconstrued the terms of the same statute." In its view, an

> informed reading of the text would lead one to conclude that the express terms of Section 9-710 permit the claimant to submit a refund for exactions made by the local government upon its citizens generally, pursuant to the taxing power, to support the government (i.e., a 'tax') *as well as monies* demanded by the local government from certain groups, pursuant to the police power, to pay for the cost of the service provided or to defray the costs of the regulatory program used or supplied to those groups (i.e., a 'fee' or a 'charge').

(Emphasis added). And, because those terms permit it "to apply to the local government for a refund of systems connection charges . . . [it] may appeal to the Tax Court an adverse decision on its refund claim" under §9-712.[17]

Brutus points out that because the dictionary defines a "charge" as a "'debt; an entry of money or the price of goods, on the debit side of an account . . . cost, price, expense . . . ,'" it follows that had the General Assembly "intended to restrict the 'refund remedy' . . . to controversies involving only 'taxes' then it would have omitted the terms 'charge' and 'fee' in Section 9-710." According to Brutus,

> It is crystal clear from the legislative history that the General Assembly was aware that "taxes" included only money paid compulsorily for the maintenance

[17]Article 24, §9-712(d): "[W]ithin 30 days after the date on which a notice is mailed, a person who is aggrieved by the action in the notice may appeal to the Maryland Tax Court in the manner allowed in Title 13, Subtitle 5, Parts IV and V of the Tax - General Article." It was recodified, without substantive change, as LG §20-117

> of the government generally and that "charges" and "fees" encompassed money paid to the government either for services or things other than taxes. The basis for this conclusion is the fact that the General Assembly invariably distinguished between "taxes" on the one hand and "fees" and "charges" on the other.

Tracing the legislative history, beginning with Acts 1929 ch. 226 section 153, Brutus argues that there is a difference between charges and taxes. This difference continued with Laws 1941 ch. 701 (codified in Maryland Code, Article 81, sections 161, 162, and 162(A) (1947)), providing for a refund for "ordinary taxes" and "other fees or charges." Subsequent recodifications have retained the distinction. The recodification Acts 1971, ch. 644 section 215 included a refund for "charges" paid to "county or municipal agencies" to seek a refund from the local government to appeal to the Tax Court. In the Acts of 1988, ch. 2 section 4, section 215 of Article 81 was recodified as Article 24, sections 9-710 and 9-712, and as of 2013 recodified as LG, §20-113 and §20-117. According to Brutus, "[a]ll of this indicates a legislative intent to expand the kinds of payments for which a citizen can seek a refund rather than restrict the class of payments for which a refund remedy exists."

Brutus cites *Vytar Associates v. City of Annapolis*, 301 Md. 558, 568 (1984), in which the Court of Appeals concluded that license fees imposed by the City of Annapolis for operators of certain rental dwellings, "'literally f[e]ll' into the category of 'other fees or charges' . . . and 'were entitled to file claims for refund of the license fees they had paid[.]'" Brutus argues that "[a] 'license fee' certainly doesn't resemble a 'tax' and if a claimant can

recover a refund under the statute for a license fee then [it] should be able to recover its hook up charges."

Brutus also cites *Bowman v. Goad*, 348 Md. 199 (1997). In that case, Bowman filed suit for a refund of service of process fees paid to a sheriff that he argued the sheriff was not entitled to collect. According to Brutus, "[t]he Court of Appeals held that Bowman failed to state a cause of action but also specifically pointed to Bowman's administrative remedy" at either Maryland Code, (1988) §13-901 of the Tax-General Article ("T.G.") or Article 24, §9-710, and that for "unlawfully collected fees from the plaintiff Bowman and the other members of the putative class, each one had an administrative remedy." In other words, Brutus contends "there now exists a *comprehensive* refund remedy that applies to nearly every kind of payment made to a State or local government authority, at least when the government acts in its governmental capacity." (Italics in original).

Before exploring the particular arguments of the parties in regard to *West Capital*, it is helpful to review our decision in that case. A small part of the property owned by West Capital was located within the City of Annapolis with the rest located outside the city. The Annapolis Code authorized the City to provide water and sewer services outside the city and set forth the charges for those services. The rate was twice the rate for city resident users, but the Code also allowed the City to charge the rate paid by city resident users if the outside user agreed "to make annual payments to the City in amounts equivalent to city real property taxes

which would be imposed if the property were in the city." *West Capital*, 110 Md. App. at 447.

West Capital and the City agreed that the City would provide water and sewer to the entire property with West Capital paying connection charges, capital facility charges, user rates equivalent to city resident users, and an annual fee equivalent to a real estate tax. After paying the fees for six years, West Capital refused to pay the fee equivalent to a real estate tax and demanded a refund for all such fees previously paid arguing that there was no reasonable relationship between the charge imposed and the cost of service. The City rejected the claim and West Capital filed an appeal to the Tax Court. Meanwhile, the City filed a breach of contract action in the circuit court. West Capital filed a motion to dismiss the circuit court action, arguing that the Tax Court had primary jurisdiction. The circuit court in denying the motion to dismiss concluded that, "although the Tax Court might have concurrent jurisdiction, the [circuit] court was the appropriate forum to decide the contractual . . . issues[.]" *Id*. at 448. The circuit court found in favor of the City finding that it had no legal obligation to provide services to non-city residents and was acting, instead, in its proprietary capacity.

On appeal to this Court, we affirmed the decision of the circuit court. Addressing the issue of the Tax Court's jurisdiction, we stated:

> We are not concerned here with front-foot assessments, but only with charges for the water and sewer service provided to appellant. Water and sewer charges imposed by municipalities are generally not regarded as taxes or fees

> in the nature of taxes but rather as charges for the sale of a service or commodity. The Court of Appeals so held in *Loan Corporation v. Baltimore*, 175 Md. 676 (1939). At 681, the Court, speaking of water service, observed:
>
> > "The rates for the service, sometimes referred to as taxes, are literally service charges. They are not taxes, in the ordinary sense of that word ... but are commonly referred to as rates or rents, although the charge is for a commodity actually consumed. . . ."
>
> ***
>
> This is especially true when, as here, (1) the rates, though higher than those charged to City residents, were based either on consumption (of the water) or provision of the service (water and sewer) and did not represent a general exaction applicable to people who did not use the product or service, and (2) the rates were fixed by contract, the ordinance merely ratifying the contract.
>
> Because these charges were not taxes, or even in the nature of taxes, but instead constituted fees charged by the City in its proprietary capacity for the provision of a particular service or commodity, they did not fall within the ambit of art. 24, § 7-912(d) or of Tax-General art., § 3-102. Accordingly, the Tax Court had no jurisdiction to resolve the dispute, much less any primary jurisdiction. The circuit court did not err in exercising its jurisdiction over the City's breach of contract action.

110 Md. App. at 450-51 (parallel citations omitted). With respect to the merits, the Court held that West Capital offered no evidence that the rates were unreasonable or discriminatory.

Brutus contends that the Tax Court and circuit court in this case incorrectly relied on *West Capital.* First, it argues that the Tax Court only considered whether the connection charge was a "tax" rather than a "fee" or "other charge" and because it failed to consider this issue, "[t]he decision must therefore be reversed." Moreover, the "language relied upon by

the Tax Court [in *West Capital*] is dicta and superfluous to the actual holding . . . and should not have [been] applied . . . to decide the case." According to Brutus, the Tax Court in *West Capital* didn't have jurisdiction because

> when a municipal corporation supplies utility services to customers beyond its boundaries it acts in a proprietary rather than a governmental capacity. When the municipality acts in its proprietary capacity it is at liberty to contract with its users at the rate it pleases and can charge the customers beyond the city limits whatever it wants for the service, including a profit. . . .
>
> In the case of *West Capital*, the reason why the Tax Court did not have jurisdiction is because the real estate tax equivalent was a fee *agreed upon* in a contract between the non-resident user/developer and the City of Annapolis where the City acted in a proprietary, rather than a governmental capacity, when it supplied the utility services to a property outside of the city limits. . . .
>
> To further explain, the real estate tax equivalent fee was not imposed by the City pursuant to a government program or a regulatory program. The City and West Capital evidently negotiated this term and the City blessed the deal. The deal, however, between West Capital and Annapolis was strictly a private affair. More to the point, the reason why the dispute . . . could not fit within Section 9-710 or Section 9-712 is that there was no "final" administrative act from which West Capital could appeal. The agreed upon charge that was the subject of West Capital's "appeal" was exactly that: an agreed upon charge.

In the context of this case, we understand Brutus' argument to be that the Town is not acting in a proprietary capacity, but rather a governmental capacity, because the homes NVR built were within the Town and there was no contract between NVR and the Town.

The Town responds that "[t]he sewer connection charges collected from NVR were required by Sewer Service Agreements between Harford County and the Town and were authorized by [Env.] §9-705[.]" According to the Town, "Maryland law makes plain that the sewer connection charges authorized by §9-722(a), and collected by the Town and paid to

Harford County for debt service, are fees for service and are neither taxes nor fees or charges in the nature of taxes that could be challenged under Article 24, §§9-710 and 9-712."

Quoting *West Capital*, the Town asserts that the "Court did not differentiate among user charges, service charges or connection charges when it stated that 'the rates, though higher than those charged to City residents, were based either on consumption (of the water) or provision of the service (water and sewer) and did not represent an exaction applicable to people who did not use the product or service.'" 110 Md. App. at 451. According to the Town, "it was not apparent how the real estate tax equivalent payments were to be applied, whether to operational costs or to debt services[.]" The *West Capital* Court "did not differentiate between the real estate tax equivalent payments which West Capital contested and the other charges contained in West Capital's contract with the city, including rates for water and sewer service, connection charges and capital facilities charges when reaching its holding denying jurisdiction in the Maryland Tax Court."

The Town points out that Judge Wilner, writing for the Court in *West Capital* and citing T.G. §3-103, explained that jurisdiction of the Tax Court is limited "to appeals from a final decision, final determination, or final order 'about any tax issue.'" 110 Md. App. at 449. In other words, the Tax Court cannot "hear appeals from denials of refunds of fees, charges, interest or penalty interest which are not taxes or in the nature of taxes." The Town argues that the connection charges are not taxes because "NVR voluntarily undertook its development project within the Town and paid sewer connection charges in order to obtain

connections for its units. . . . [T]he sewer connection charges it paid do not constitute a general exaction applicable to people who do not use the Town and the County sewer systems."

The Town argues that Brutus' reliance on *Vytar* is misplaced because T.G. §3-103 "was enacted four years after the *Vytar* decision." Moreover, the licensing fee in *Vytar* was "'in the nature of a tax,' because its purpose is to raise the revenue necessary for the government to operate." Here, however, the charge was "[a] sewer connection charge . . . paid by a private landowner in consideration of the government's providing a utility service to that landowner."

The Town also contends that Brutus' reliance on *Bowman* is misplaced because "[t]he 'service' in *Bowman* was 'services rendered in connection with a prosecution under the vehicle laws of this state,' as described at the time in [Maryland Code (1977, 1992 Repl. Vol.) §26-410 of the Transportation Article ("Tr.")]." 348 Md. at 200. Because the statute denied a sheriff a fee for service of process, "the sheriff was not entitled to any additional fee for executing the duties he or she was already sworn to execute, such as assisting with the prosecution of a traffic violation." Moreover, "[t]he chief holding of *Bowman* was that the plaintiffs were barred by the voluntary payment doctrine from recovering, in a common law action, the fees they paid to the sheriffs." While "the Court of Appeals noted the truism that the plaintiffs generally have an administrative remedy to recover taxes or fees wrongfully collected by the sheriffs . . . . the [C]ourt did so without specifically addressing the nature of

the fee sought to be refunded" and "[did] not explore the distinction between what is and what is not a tax or tax equivalent[.]"

In addition, it is the Town's position that even if the sewer connection charges were not reasonable and authorized by Env. §9-705 and §9-722, Brutus "is barred from obtaining any refund" under the voluntary payment doctrine as explained in *Washington Suburban*.

"The Maryland Tax Court is an administrative agency and its decisions are subject to the same standards of judicial review that are reserved for any appellate tribunals." *Bert v. Comptroller of the Treasury*, 215 Md. App. 244, 262 (2013). "Determining whether an agency's 'conclusions of law' are correct is always, on judicial review, the court's prerogative, although we ordinarily respect the agency's expertise and give weight to its interpretation of a statute that it administers." *Comptroller of Treasury v. Gore Enter. Holdings, Inc.*, 209 Md. App. 524, 535 (2013). We, however, review the agency's "application of case law without special deference." *NIHC, Inc. v. Comptroller of Treasury*, 439 Md. 668, 682 (2014) (citing *Gore Enter. v. Comptroller*, 437 Md. 492, 503 (2014). "A reviewing court may uphold a Tax Court decision only on the findings and reasons given by the Tax Court." *Id.* at 683 (citing *Gore Enter.*, 437 Md. at 503.)

The jurisdiction of the Tax Court is stated in T.G. §3-103(1988, 2010 Repl. Vol.):

> (a) In general.—The Tax Court has jurisdiction to hear appeals from the final decision, final determination, or final order of a property tax assessment appeal board or any other unit of the State government or of a political subdivision of the State that is authorized to make the final decision or determination or issue the final order about any tax issue, including:

(1) the valuation, assessment, or classification of property;
(2) the imposition of a tax;
(3) the determination of a claim for refund;
(4) the application for an abatement, reduction, or revision of any assessment or tax; or
(5) the application for an exemption from any assessment or tax.

Focusing on the word "charge" in §9-710, Brutus contends that an appeal of the connection charge falls within the Tax Court's jurisdiction. We are not persuaded. As we noted in *West Capital*, a commonly used term can have more than one meaning. *See* 110 Md. App. at 450 (quoting *Loan Corp. v. Baltimore*, 175 Md. at 681 ("The rates for the service, sometimes referred to as taxes, are literally service charges. They are not taxes, in the ordinary sense of that word.")) Although a charge can involve a tax issue, it does not necessarily mean that all charges are in the nature of a tax and thus present tax issues.

We agree with Brutus that the discussion of the Tax Court's jurisdiction in *West Capital* is dicta, but the Court's reasoning in that regard is persuasive. As we said in *West Capital*, "[w]ater and sewer charges imposed by municipalities are generally not regarded as taxes or fees in the nature of taxes but rather as charges for the sale of a service or commodity." 110 Md. App. at 450. And, "[t]his is especially true when . . . rates . . . [are] based either on consumption (of the water) or provision of the service (water and sewer) and did not represent a general exaction applicable to people who did not use the product or service, and . . . the rates were fixed by contract, the ordinance merely ratifying the contract." *Id.* at 451.

Here, as detailed in the 1988 Agreement and the subsequent addenda, the connection charge is a fixed rate for the purpose of "defray[ing] the cost of future replacement and expansion of basic main and other sewage treatment facilities." The charges are not used for operation and maintenance costs and do not generate general purpose revenue. Furthermore, the charges are not an exaction from all Town taxpayers, but only to those who connect with the system.

NVR was not required to connect to the system and agreed to pay the connection charge as provided in the agreement between the Town and the County. We agree with the circuit court that the fact that NVR's property was *within* the Town rather than *outside* the Town does not distinguish *West Capital* in any meaningful way nor turn the operation of a sewerage system into a governmental function as Brutus suggests. *See Snyder v. State Dept. of Health & Human Servs.*, 40 Md. App. 364, 369 (1978) (when engaged in the construction and maintenance of a sewerage system, "the municipality is performing a proprietary function"); *Lewis v. Mayor & City Council of Cumberland*, 189 Md. 58, 66 (1947) (when "the service or utility is supplied by a municipality, . . . the municipality acts in its business or proprietary rather than governmental character.") To the extent that the connection charge supported the cost of sewage treatment by the County, NVR effectively stood in the shoes of West Capital in that it benefitted from the services provided under the Agreement between the Town and the County.

Other states have taken a similar approach in regard to water and sewer charges. *See Opinion of Justices*, 93 N.H. 478, 481 (1944) (quoting Page & Jones, Taxation by Assessment, § 6, "'a charge which is in substance a contract is to be found where a municipality, under authority conferred by statute, imposes a charge upon property owners who connect their land with a sewer system constructed by the city, the owner being free to avoid liability by refraining from making such connection. Such charge may be a fixed sum for the privilege of making the connection, or it may be a charge based upon the amount of sewage discharged from the premises into the sewer. Such a charge is not ordinarily regarded as a local assessment.'"); *Western Heights Land Corp. v. City of Fort Collins*, 146 Colo. 464, 468-89 (1961) ("Municipalities are authorized by statute to construct, operate and maintain a sewerage system; the city may prescribe reasonable rates for connections to and the use of the facility. . . . The rates adopted by the city with reference to the facilities involved here cannot be considered as taxes even though imposed and collected by the city. The ordinances involved are not revenue measures."); *Contractors & Builders Ass'n of Pinellas County v. City of Dunedin*, 329 So.2d 314, 318 (1976) ("we join many other courts in rejecting the contention that [water and sewer] connection fees are taxes"); *Hartman v. Aurora Sanitary Dist.* 23 Ill.2d 109, 116 (1961) (charges for new sewer connections which are reasonable "have been uniformly sustained as a service charge rather than a tax").

In sum, the connection charges do not constitute a tax or a charge in the nature of a tax and, therefore, the Tax Court was without jurisdiction to hear Brutus' appeal. In light of our decision, we need not address the voluntary payment argument.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.