IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PAUL N. CHOD	*	
	*	
Petitioner,	*	
	*	Civil Action No. 398704-V
v.	*	
	*	
BOARD OF APPEALS FOR MONTGOMERY COUNTY	*	
	*	
Respondent.	*	
	*	

OPINION AND ORDER

This matter is before the Court on a petition filed by Paul N. Chod ("Petitioner"), for judicial review of the decisions of the Board of Appeals for Montgomery County ("County") which concluded that the Water Quality Protection Charge as set forth in Section 19-35 of the Montgomery County Code is not inconsistent with Section 4-202.1 of the Environment Article of the Code of Maryland and to partially deny his appeal of the Water Quality Protection Charge, assessed pursuant to Section 19-35 of the Montgomery County Code and COMCOR Sections 19.35.01.01 *et seq*. Petitioner filed a Memorandum of Law on March 25, 2015. The County filed its Memorandum of Law on April 23, 2015. Petitioner filed a Reply Memorandum on May 11, 2015. Oral Arguments were heard on July 22, 2015. After consideration of the parties' memoranda and oral argument, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

This case concerns Shady Grove Development Park, a 34-acre commercial development that consists of eight related properties that abut I-270 in Gaithersburg.

Petitioner Paul N. Chod is the managing general partner of the owning entity, Minkoff Development Corporation. Over the past 40 years, Petitioner has built and maintained two stormwater retention ponds on Shady Grove Development Park. The ponds collect and treat all of the stormwater that drains from Shady Grove Development Park and surrounding private and public properties. In 1991, Petitioner entered into a Declaration of Stormwater Management Facility with Montgomery County. The 1991 Declaration obligated Petitioner to provide landscaping and trash removal maintenance and the County to provide structural maintenance of the ponds, at the County's discretion.

In 2013, the Department of Environmental Protection (DEP) assessed the Water Quality Protection Charge (WQPC) against the Petitioner. Established under Environment Article § 4-202.1 of the Maryland Code, the WQPC is a charge based on the share of stormwater management services provided by the county. DEP calculated the WQPC against Petitioner as $14,932.17 and Petitioner applied for a credit of the charge. DEP initially determined that Petitioner was not eligible for any credit because the County claimed to maintain the ponds based on the 1991 Declaration. Petitioner filed for reconsideration and DEP found that Petitioner was eligible for a 50% credit under COMCOR 19.35.01.05, but reduced it to 25% ($3,733.04) because Petitioner's credit application did not include engineering computations. The Charge after the credit was $11,199.13. Petitioner then appealed to the Board of Appeals, claiming that the WQPC is invalid for failing to adhere to § 4-202.1 of the Environment Article and that it was entitled to a full 100% credit.

Petitioner challenged the denial of a full credit on two theories:

(1) The WQPC was invalid for failing to adhere to § 4-202.1 of the Environment Article; and

(2) Petitioner's treatment of stormwater from a full drainage area three times the size of the park entitled it to a full credit under COMCOR 19.35.01.05.

DEP filed for summary disposition. DEP argued that the WQPC did not need to have any nexus to the county services provided to the charged property. The Board denied the motion in part, concluding that material facts were in dispute as to whether the DEP correctly calculated the credit under state and county laws. However, the Board said it would not consider the County's failure to meet the state mandates in § 4-202.1 as a basis for the appeal.

At the Board of Appeals hearing, the manager of the WQPC, Vicky Wan, testified that the Petitioner was eligible for a credit under § 19-35(e)(1) of the County Code and the credit was to be measured by COMCOR 19.35.01.05(A). Ms. Wan and Zachary Knight testified before the Board that the County uses the amount of impervious surface on a property to calculate the WQPC.

The Petitioner's stormwater management expert, Mr. Bossong, testified that the Petitioner's retention ponds control the quality and quantity of stormwater for the entire 150-acre drainage area. He also stated that the County's services to maintain the ponds is "essentially nonexistent" because the Petitioner took care of all the maintenance for the facilities. (Op. at 15).

After a hearing, the Board of Appeals ruled that the DEP had no authority to unilaterally implement a credit reduction from 50% to 25% by including it on its credit

application form. (Op. at 25-26). The Board further held that the WQPC under § 19-35 of the County Code generally comported with § 4-202.1 of the Environment Article because the Charge was based on a property's impervious area, which is permitted by 4-202.1(e)(3)(ii). (Op. at 24). The Board denied Petitioner's request for a full credit and concluded that the statutory and regulatory provisions provided for no more than a 50% credit. (Op. at 25).

Petitioner has appealed the decision of the Board of Appeals. Petitioner argues that the WQPC is per se invalid because the County is not required to reasonably relate the amount of the Charge to the stormwater management services that it provides. Petitioner also argues that the WQPC is invalid as applied because the Petitioner's maintenance of the ponds renders the County's stormwater management services to the property essentially nonexistent. Alternatively, Petitioner argues that even if the WQPC is not invalid, it is entitled to a full 100% credit under COMCOR § 19.35.01.05(A).

ANALYSIS

The Court's role in reviewing an administrative agency's adjudicatory decision is narrow; it is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and to determine if the administrative decision is premised upon erroneous conclusion of law. *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59 (1999). When reviewing the legal conclusions of the Board for error this Court may afford some deference to the agency's interpretations of the statutory provisions that it promulgated. However, no deference to the agency's statutory interpretation is appropriate where the record does not reveal a practice of

"consistent and long-standing construction given a statute by an agency charged with administering it." *Green v. Church of Jesus Christ of Latter-Day Saints*, 430 Md. 119, 133 (2013). In this case, § 4-202.1 of the Environment Article was enacted in 2012 and § 19-35 of the Montgomery County Code was amended in 2013 (along with the related COMCOR regulations). Therefore, there is no consistent and long standing construction for this Court to give deference to.

I. The Water Quality Protection Charge is Per Se Invalid.

Petitioner contends that Montgomery County's Water Quality Protection Charge is per se invalid because it fails to adhere to the requirements set forth in the enabling statute, § 4-202.1 of the Environment Article. For the following reasons, this Court agrees.

The focus of this case is Section 4-202.1 of the Environment Article. It provides:

> (e)(3)(i) If a county or municipality establishes a stormwater remediation fee under this section, a county or municipality shall set a stormwater remediation fee for property in an amount that is based on the share of stormwater management services related to the property and provided by the county or municipality.
> (ii) A county or municipality may set a stormwater remediation fee under this paragraph based on:
> 1. A flat rate;
> 2. An amount that is graduated, based on the amount of impervious surface on each property; or
> 3. Another method of calculation selected by the county or municipality.

The County has taken the position that § 4-202.1(e)(3)(i) need not be the basis for the Charge. Instead, the County contends that in imposing the Charge, subsection (e)(3)(i) should be read as requiring the County to "adopt a stormwater remediation charge that, at a bare minimum, allows [the County] to recover the cost of providing services to individual property owners by collecting a regulatory fee-for-service." (County Mem., at 10). From the County's perspective, the broad flexibility of the statute

allows for the Charge to be imposed as a tax unrelated to the services provided. The County argues that because the Charge was assessed based on the imperviousness of the property that it complies with the statute because that is a permissible method under subsection (e)(3)(ii). In that respect, the County's interpretation of the enabling legislation is incorrect because it ignores the express language of § 4-202.1.

Subsection (e)(3)(i) clearly states that the fee *must* be "based on the share of stormwater management services related to the property." Furthermore, subsection 4-202.1(f) provides that the credit reduction should in part "account for the costs of, and the level of treatment provided by, stormwater management facilities that are funded and maintained by a property owner." The WQPC is not valid simply because it uses one of the methodologies permitted in subsection (e)(3)(ii), which in this case was the amount of impervious surface on the property. The statute still requires that the WQPC be based on the County's stormwater management services that are related to the property. The statute clearly requires the imposition of a fee that is reasonably connected to the County's stormwater management of the property.

This Court finds that the WQPC is invalid per se because this Charge need not reasonably relate to the stormwater management services provided by the County. This defies the plain and mandatory language of the statute which states that the Charge "shall" be an "amount that is based on the share of stormwater management services related to the property and provided by the county or municipality." Md. Code Ann., Envir. § 4-202.1(e)(3)(i). A county may not impose any type of charge without the authority to do so from the General Assembly. A local law that fails to adhere to the directives of the state enabling legislation, like the WQPC, is unauthorized and invalid.

II. The Water Quality Protection Charge is Invalid as Applied.

Petitioner also contends that the Charge imposed against it is invalid as applied because the County's stormwater management services to the property were essentially nonexistent. For the following reasons, this Court agrees.

Shady Grove Development Park's two retention ponds collect and treat all the stormwater from a drainage area that is three times the size of the park. As a result, the County's stormwater management services to the property are "essentially nonexistent." (Pet Mem., at 9). Petitioner contends that the WQPC is invalid as applied because there are several other commercial properties within Petitioner's drainage area that do not fund their own private stormwater management and rely on Petitioner's ponds and the County to address stormwater runoff. Nevertheless, these other properties are assessed the same WQPC as Petitioner. Petitioner's stormwater management expert, Mr. Bossong, testified at the Board of Appeals hearing that comparable properties with no stormwater management facilities, such as Hillandale and Glenmont shopping centers, were charged at the same rate as Shady Grove Development Park. (Op. at 14). Despite differing shares of county stormwater management services, these properties are being assessed the same charge.

Therefore, this Court finds that the WQPC is invalid as applied because it is being imposed on the Petitioner without consideration for the services provided by the County, as expressly required by § 4-202.1 of the Environment Article. Petitioner's stormwater retention ponds service an area three times the size of the Shady Grove Development Park and receive essentially no services from the County in return. Therefore, as applied, the Charge does not take into account the services provided by the property owner

compared with the services provided by the County. Property owners like the Petitioner are thus being burdened with the same charge as other property owners despite bearing the cost of managing the property themselves. Such an application of the statute clearly violates the intentions behind the law, thus creating an arbitrary and onerous burden on the Petitioner. Accordingly, the Board of Appeals erred in finding that this application of the WQPC was consistent with § 4-202.1 of the Environment Article of the Code of Maryland.

Nelson W. Rupp, Jr., Judge

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PAUL N. CHOD	*	
	*	
Petitioner,	*	
	*	Civil Action No. 398704-V
v.	*	
	*	
BOARD OF APPEALS FOR MONTGOMERY COUNTY	*	
	*	
	*	
Respondent.	*	
	*	

ORDER

Upon consideration of the Petitioner Paul N. Chod's Memorandum of Law (DE #10), Respondent's Opposition thereto (DE #11), Petitioner's Reply Memorandum (DE #12), and the arguments of counsel in open court, it is this 22 day of July, 2015, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that the Board of Appeals' ruling that the Water Quality Protection Charge as set forth in Section 19-35 of the Montgomery County Code is not inconsistent with Section 4-202.1 of the Environment Article of the Maryland Code is **REVERSED**; and it is further

ORDERED, that the Water Quality Protection Charge as applied to Petitioner Paul N. Chod is invalid for failing to adhere to the requirements of Section 4-202.1 of the Environment Article of the Maryland Code.

Nelson W. Rupp, Jr., Judge