

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6439**

**APPEAL OF PAUL N. CHOD**

OPINION OF THE BOARD

(Hearing held October 15, 2014)  
(Effective Date of Opinion: December 5, 2014)

Case No. A-6439 is an administrative appeal filed August 6, 2014, by Mr. Paul N. Chod (the "Appellant"), who heads the Minkoff Development Corporation ("Minkoff"). Mr. Chod charges error on the part of the County's Department of Environmental Protection ("DEP") in its partial denial, dated July 28, 2014, of the request for reconsideration of the Water Quality Protection Charge ("WQPC" or "Charge") assessed for the properties that comprise the Shady Grove Development Park. The properties that make up the Shady Grove Development Park (the "Properties") are owned by various subsidiaries of Minkoff. Mr. Chod is a general partner of and the general manager for each of these subsidiaries. Mr. Chod and his attorneys assert that Minkoff should have received a full credit (100 percent or the maximum allowable under the current regulations) for the Charge assessed for the Properties, instead of the 25 percent credit given Minkoff by DEP. The Properties are located at the following addresses, all of which are located in Gaithersburg, Maryland, 20877, in the I-1 Zone:

Parcel N377, Par Eye Washingtonian Ind Park Subdivision located at 9100-9172 Gaither Road

Parcel N300 and N291, Par Eye Washingtonian Ind Park Subdivision located at 9200 and 9230 Gaither Road

Parcel N512, Par Eye Washingtonian Ind Park Subdivision located at 15801-15813 Gaither Road

Parcel N291, Par Eye Washingtonian Ind Park Subdivision located at 9300-9304

Gaither Road

Parcel N291, Par Eye Washingtonian Ind Park Subdivision located at 15891 and 15895 Gaither Road

Parcel N300, Par Eye Washingtonian Ind Park Subdivision located at 9234 and 9298 Gaither Road

Parcel N300, Par Eye Washingtonian Ind Park Subdivision located at 15819 and 15875 Gaither Road

Parcel N180, Par Eye Washingtonian Ind Park Subdivision located at 9311-9319 Gaither Road

Parcel N182, Par Eye Washingtonian Ind Park Subdivision located at 9301 Gaither Road

Parcel N360, Par Eye Washingtonian Ind Park Subdivision located at 15878-15892 Gaither Road

Parcel N508, Par Eye Washingtonian Ind Park Subdivision located at 15800 and 15810 Gaither Road

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on October 15, 2014. The Appellant was represented by Diane E. Feuerherd, Esquire, and James L. Thompson, Esquire, of Miller, Miller & Canby. Associate County Attorney Walter Wilson represented Montgomery County.

Decision of the Board: Administrative appeal DENIED in part and GRANTED in part

**RECITATION OF FACTS**

**The Board finds, based on undisputed evidence in the record, that:**

1. The Properties are located in Gaithersburg, Maryland, in the I-1 Zone, and have the legal descriptions set forth above.
2. The Properties are owned by subsidiaries of Minkoff. See Exhibit 4.
3. On February 28, 2014, attorneys for the Appellant requested reconsideration of DEP's decision to deny Minkoff's application for a credit against full payment of the Water Quality Protection Charge for the Properties. See Exhibit 11, pages M79-M82.

4. The Director of DEP sent a letter, dated July 28, 2014, to the attorneys for the Appellant. The letter indicated that based on the engineering drawings submitted, the Properties would be granted a 25 percent reduction in the Water Quality Protection Charge. The letter went on to say that the drawings received with the application for the credit lacked engineering computations or reports demonstrating that water quality and quantity metrics applicable were met at the time of construction. The letter further states that “[a]ctual engineering computations are necessary to obtain a greater credit because, depending on the engineering approach that was permitted for the properties, these water quality and quantity metrics may or may not have been attained.” See Exhibit 3.

5. On August 6, 2014, Mr. Chod filed an appeal of DEP’s July 28, 2014, letter, asserting that DEP should have given full credit (100 percent or the maximum allowed under current regulations at the time) to each of the Properties against the Water Quality Protection Charge. See Exhibits 1(a) and 4.

6. Ms. Vicky Wan testified for the County. Ms. Wan stated that she is the Manager for the County’s Water Quality Protection Charge, and that she has been processing these Charges for nine years. She testified that she is responsible for the development and processing of, and the dissemination of, the Charge, including submission to the Department of Finance and in a tax bill. She testified that the Charge is the sole funding source for DEP to fund water quality improvement activities that benefit the entire County.

Ms. Wan testified that the Charge is assessed based on the impervious surface of each property. She noted that this is a standard method for calculating stormwater runoff from a property. She testified that the County has a hardship exemption and a credit program to reduce a property owner’s liability for payment of the Water Quality Protection Charge. She testified that the credit program is to incentivize with a lesser Charge those property owners who own and maintain a stormwater facility. She testified that the eligibility criteria for the credit include the submission of an application indicating an intent to apply for a credit, and the provision of supporting documents, including computations regarding the treatment provided by the stormwater facility.

Ms. Wan read the following portion of Bill 34-12, pertaining to the WQPC credit application criteria:

A property owner may apply for, and the Director of Environmental Protection must grant, a credit equal to a percentage, set by regulation, of the Charge if:

(A) the property contains a stormwater management system that is not maintained by the County;

(B) the owner participates in a County-approved water quality management practice or initiative;

(C) the property treats off-site drainage from other properties located within the same drainage area; or

(D) the property does not contain a stormwater management system, but is located in the same drainage area as another that contains a stormwater

management system and both properties have the same owner.

See Exhibit 9, page 21, lines 171-183. Ms. Wan testified that DEP's practice in evaluating a WQPC credit application is consistent with these criteria. She testified that once applications are received by DEP, they are sent to a contractor for evaluation. She testified that the contractors reviewing the credit applications are stormwater engineers.

Ms. Wan testified that Mr. Chod's credit application is in the record at Exhibit 9, page 56. She testified that the Shady Grove Development Park contains stormwater management systems in the form of two stormwater management ponds. She testified that these ponds are maintained by the County, and read from a Declaration of Covenants for Inspection, Maintenance of Stormwater Management Facility, executed between the County and Shady Grove Development Park IX Limited Partnership (Covenantor), that:

The County will provide maintenance for the Facility to keep it in proper working condition in accordance with approved design standards. The County will make structural repairs and/or have accumulated sediment removed at the County's discretion when necessary for the proper functioning of the Facility. Removal of sediment affecting the recreational or aesthetic qualities of the Facility shall be the Covenantor's sole responsibility.

See Exhibit 9, page 44, paragraph number 2. She testified that paragraph 2 of the Declaration of Covenants executed between the County and Shady Grove Development Park VIII is identical. See Exhibit 9, page 48, paragraph number 2. She testified that the County has not been able to determine how effective the stormwater management systems that are referenced in these Declarations of Covenants are because they do not have computations for these facilities. She testified that even assuming that DEP did have all the computations and data necessary to award the maximum credit, these Properties would only be eligible for a maximum 50 percent credit because they are not wholly treated by environmental site design.

In response to a Board question, Ms. Wan testified that environmental site design includes rain gardens, permeable pavement, rain barrel cisterns, micro bioretention, submerged gravel wetlands, landscape infiltration, micro-infiltration, swells, green roofs, reinforced turf, disconnection, sheet flow, and dry wells. She testified that the list of stormwater management systems from which she read this list of environmental site design systems is included as the last page of the credit application package. See Exhibit 9, page 43. She testified that this page is not included in the County's regulations (COMCOR).

Ms. Wan testified that the legal basis for extending a credit against the Water Quality Protection Charge to all of the Properties [with impervious surface] in the Shady Grove Development Park was Section 19-35(e)(1)(D), that "the property does not contain a stormwater management system, but is located in the same drainage area as another that contains a stormwater management system and both properties have the same owner." See Exhibit 9, page 21, lines 180-183. She testified that the fact that these stormwater

ponds were treating multiple parcels owned by the same owner was the reason that DEP granted the credit. She testified that the credit may also have been granted under Section 19-35(e)(1)(C) ("the property treats off-site drainage from other properties located within the same drainage area").

On cross-examination, Ms. Wan agreed that Section 19-35(e)(1) details that the credit awarded is set by regulation. When asked why Minkoff's credit was reduced by half in light of the fact that that deduction was not included in the regulations, Ms. Wan testified that the 50 percent reduction was on the credit application form, which was invoked by Section 19-35(e)(2) ("[t]o receive the credit, the property owner must apply to the Director of Environmental Protection in a form prescribed by the Director...."). See Exhibit 9, page 21, lines 184-186.

When asked on cross-examination why Section 19-35(e)(1)(B), in which the owner participates in a County-approved water quality management practice, was not a reason to grant the Appellant a credit, Ms. Wan testified that the Shady Grove Development Park did not qualify for a credit under that Section because there has to be a County-approved water quality management practice or initiative, explaining that the intent of this Section was for County-developed stormwater treatment on County right of ways so that property owners that are unable to have stormwater treatment on their own properties could participate in a County-approved water quality practice or initiative.

On cross-examination, when asked about Section 19-35(e)(1)(A),<sup>1</sup> Ms. Wan confirmed that the Appellant's stormwater ponds were not due a credit under that Section because they were maintained by the County. When told that the Appellant had asked DEP to reconsider their credit denial on grounds that the stormwater ponds are not wholly maintained by the County, and asked if, by granting a 25 percent credit, DEP had reversed their determination regarding maintenance, Ms. Wan testified that DEP did not reverse its position, but rather that the credit was based on Section 19-35(e)(1)(C) or (D). She went on to explain that the intent of the law was that if the County maintains a facility, the property owner gets no credit. She testified that because of ambiguity in the statutory language, DEP later concluded that the credits could be given for any of the listed reasons (i.e. that County maintenance did not automatically preclude a property owner from being eligible for a credit), and that because of this reexamination, DEP concluded that Section 19-35(e)(1)(C) or (D) could apply. Ms. Wan testified that the money collected through the Water Quality Protection Charge ultimately funds the maintenance and inspection efforts of the stormwater facilities.

Ms. Wan agreed on cross-examination that the County's duty to maintain the Appellant's stormwater ponds was "at their discretion," reiterating that the Declaration of Covenants says that the County will provide maintenance for the facility to keep it in proper working condition in accordance with the approved design standards. When asked if DEP had considered the regional nature of these ponds, Ms. Wan deferred the

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<sup>1</sup> Section 19-35(e)(1)(A) says that "a property owner may apply for, and the Director of Environmental Protection must grant, a credit equal to a percentage, set by regulation, of the Charge if: (A) the property contains a stormwater management system that is not maintained by the County;".

question for the engineers.

On re-direct, Ms. Wan read the first sentence of COMCOR Section 19.35.01.05, implementing Section 19-35:

The Director must award a maximum credit of 50 percent, based on the volume of water treated by a combination of environmental site design and other stormwater management systems, or a maximum of 60 percent, based on the volume of water completely treated by environmental site design practices alone, as specified in the application provided to a nonresidential or multifamily residential property owner if the property contains a County approved stormwater management system and the system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection.

See Exhibit 9, page 30. She then testified that all of the criteria for determining the amount of credit to be awarded are specified on the application, including a provision for the 50 percent no calculations reduction, which she stated was included on Exhibit 9, page 63, and which reads "Applicants must provide supporting documentation as attachments, including engineering drawings, photographs, aerial images, computations of ESD control volumes (ESDv), etc. If ESDv computations are not provided for facilities, then a 50 percent reduction factor is applied to credit calculation." She testified that the Appellant had not provided any computations. When a Board member pointed out that these stormwater ponds were not ESD-controlled facilities, and asked where the language was which required computations for these non-ESD ponds, Ms. Wan testified that DEP relied on the "etc." in the above-quoted sentence on the application to extend the requirement for computations beyond ESD control volumes and to apply the 50 percent reduction in credit to non-ESD facilities. See Tr. page 49.

Ms. Wan then testified that there is an explanation of the credit calculation in the record at Exhibit 9, pages 41-42. She read the penultimate sentence at the bottom of page 41: "If supporting computations demonstrate that both WQv [water quality volume] and CPv [channel protection volume] were provided to treat the entire impervious area, the maximum credit percentage is 50 percent." She also read the last sentence on page 42: "But since detailed computations were not provided, the WQPC is reduced by 50 percent." She testified that the latter sentence was from an example in which the property owner provides documentation on type, year of installation and impervious area treated for more than one storm water management system. She stated that the Appellant had provided type but had not provided year or impervious area treated. In response to Board questions, Ms. Wan explained that water quality volume means how much sediment the facility is holding or controlling on site before it is released into a nearby stream or storm drain. She testified that channel protection volume looks at the volume of water contained on site before it runs off to a local stream or storm drain. In response to a Board question asking where these metrics are referenced in the regulations, Ms. Wan began to read the first sentence in COMCOR Section 19.35.01.05(A), which states that "[t]he Director must award a maximum credit of 50 percent, based on the volume of water treated by a combination of environmental site design and other stormwater

management systems, or a maximum of 60 percent, based on the volume of water completely treated by environmental site design practices alone, as specified in the application provided to a nonresidential or multifamily residential property owner if the property contains a County approved stormwater management system and that system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection.” She agreed with a Board member that stormwater on these Properties was not treated by environmental site design, and so that portion of the sentence was irrelevant, and that in this case, the focus was on water treated by other stormwater management systems. When asked if the phrase “as specified in the application” modifies “[t]he Director must award” or “based on the volume of water treated by other stormwater management systems,” Ms. Wan testified that she believed it modified “must award.”

When asked about the calculation of the credit set forth on page 40 of Exhibit 9, which seems to be based solely on the amount of impervious area treated as a percentage of the total impervious area, Ms. Wan testified that DEP did not know the impervious area treated because the Appellant did not provide computations.

7. Mr. Zachary Knight testified for the County. Mr. Knight is a civil engineer with CH2MHill, an engineering consulting firm. He testified that he is a water resource engineer, specializing in all aspects of stormwater planning, design and construction. Mr. Knight testified that he has both a bachelor’s degree and a master’s degree in engineering, that he has his LEED-accredited professional certification, and that he has been in his current position for 7 years.

Mr. Knight testified that CH2MHill assists Montgomery County with their Water Quality Protection Charge, including helping them to process credit applications. He testified that the WQPC is linked to impervious area because impervious area is the standard for measuring stormwater contaminants. He stated that impervious area does not directly measure the volume of water coming off and thus is a “surrogate,” but that through calculations based on impervious surface, a person can figure out the volume and discharge amount coming off a property. He noted that impervious surfaces, because of their nature, cause contaminants to become suspended and dissolved in stormwater. He testified that impervious area is therefore an efficient and standard way of measuring the pollutants coming from people’s properties.

In reviewing the credit application, Mr. Knight testified that there are essentially two ways that a property owner can get a credit against their Water Quality Protection Charge: they can provide engineering documentation indicating that they are providing a certain level of treatment on their property, or they can provide certain basic information including the type of stormwater facility on their property and the year it was installed, and possibly the amount of impervious surface or hardscape on their properties. See Exhibit 9, page 39. He testified that the Appellant did provide the type of facility, but did not provide the square footage or footprint of the impervious area being treated. He testified that part of his job is to determine how much impervious area is being treated by the Appellant’s stormwater facilities.

Mr. Knight testified that pages 76-87 of Exhibit 9 contain an aerial photograph of the Shady Grove Development Park and construction documents related to its development. He testified that pages 77-79 are site plans for the stormwater management facilities. The remaining documents are site development plans showing buildings and various infrastructure that was to be installed as part of developing these properties. He testified that the site plans contain stand-alone instructions and plans for one building, and that he had to coordinate the various site plans with the stormwater ponds. He testified that through these site plans, he had determined by looking at the contours and drainage infrastructure that all of the Properties for which the Appellant is seeking a credit drain into the on-site stormwater management facilities, some directly and some via drainage infrastructure. In response to a Board question, he confirmed that all of the impervious area of these Properties drains into one or more of the stormwater management facilities on the Appellant's property.

Mr. Knight testified that he had computed the impervious area on the eight Properties for which the Appellant is seeking a credit as 1,219,237 square feet. See Exhibit 9, page 36. He later testified when asked if he had made this computation based on the site plans submitted that he had not, because that would have involved a lengthy drainage area analysis, and it was not his job to do such an analysis. He explained that when engineering calculations indicating how much impervious area a property contains are not provided, he computes impervious area from DEP's Water Quality Protection Charge Assessment website, which has the square footage of impervious surface for which a property is assessed. Mr. Knight testified that his firm uses the Facility Credit Percentages set forth in the chart on page 43 of Exhibit 9 to calculate the credit for a given property if an applicant does not provide engineering calculations. See Exhibit 9, page 43. Mr. Knight then testified that it was his interpretation, based on the site plans and all of the information that he had, that all of the Appellant's impervious area was treated, and that they should be given full impervious area credit.

Mr. Knight testified by way of context that the County is being regulated based on impervious surface and pollutants. He testified that even if all of an impervious area from these Properties is being discharged into their stormwater ponds, the County still needs to know what level of treatment is being provided. He testified that when these ponds were constructed, the standard was basically to control water so as not to flood neighboring properties. He testified that there was very minimal water quality management being provided. He stated that without substantiation of the type of treatment being provided, the County has no basis for taking credit for treatment with the State and the Environmental Protection Agency.

Mr. Knight testified that the two stormwater ponds are not considered environmental site design, and that in light of this, the maximum credit available to the Appellant is 50 percent. He testified that the COMCOR regulations direct applicants to the credit application, which he reiterated gives an applicant two basic options: either provide engineering documents to substantiate a level of treatment, or provide basic, rudimentary information, in which case the potential credit will be reduced by 50 percent.



He testified with respect to the Appellant's Properties that page 36 of Exhibit 9 contains his recommendation regarding the credit, namely that the 1,219,237 square feet of impervious surface is entitled to a 50 percent credit, which is then reduced by 50 percent because of the lack of engineering computations, resulting in one-quarter of the 1,219,237 square feet (304,809 square feet) of impervious area being eligible. See Exhibit 9, page 36. He testified that he had access to, or the Appellant provided, the information necessary to proceed with the credit calculation under Option 3. See Exhibit 9, page 42. When asked by a Board member where in that sample calculation, which the Board member described as multiplying the runoff captured over the total runoff by the 50 percent credit, there was any consideration of the *quality* of treatment that was taking place in the stormwater facility (which the Board member stated was presumably what the computations were needed for), Mr. Knight pointed to the sentence below that example which states that since detailed computations were not provided, the credit is reduced by half.

In response to a Board question asking Mr. Knight what type of information he was seeking to make these "computations," Mr. Knight testified that that depends on when the stormwater facility was built, explaining that in 2000, the State published the Maryland Stormwater Manual, which contained basic metrics and ways to compute the level of treatment being provided. He testified that he needs to know the volume of water, and whether the stormwater facilities are treating that volume for quality and quantity purposes. He testified that engineering calculations are needed for this, and that it is not his job to figure that out. He testified that the Appellant could have provided calculations showing that his Properties are not flooding their neighbors (water quantity), but that to demonstrate water quality, the Appellant would have had to hire an engineer or find the original calculations.

Mr. Knight testified that he had met with the Appellant and Ms. Wan a year ago, at which time the Appellant gave him his application materials, including a CD containing all of the site plans provided. He testified that while processing the Appellant's credit application, he noticed that the plans submitted did not contain calculations substantiating the water quantity or quality treatment. He stated that he sent an email to the Appellant informing him of this, and stating that the credit would be reduced by half if the calculations were not received. He testified that he received no response to that email. See Exhibit 12.

On cross-examination, Mr. Knight testified that while tax bills are part of the credit application package, they are not a part of the package that he uses. He testified that he has access to the County's geographic information system (GIS) data, which includes aerial photography, property parcel data, and the locations and types of stormwater management facilities in the County. From this data, he testified that he determined that the County maintained the Appellant's stormwater ponds, explaining that the County's stormwater management facility GIS data has an attribute that says whether the facility is maintained by DEP or not. He testified that he informs DEP if the facility is maintained by them.

Still on cross-examination, when asked if, in calculating the credit, he had the opportunity to include the amount of runoff captured from off-site properties, Mr. Knight testified that only off-site properties with the same ownership could be taken into account. When pressed as to where the Code or regulations specify that the properties have to be under the same ownership, Mr. Knight cited the last sentence of COMCOR Section 19.35.01.05(A), which states that "a property owner must not receive a credit based on a calculation that exceeds the total impervious area on the property for which the credit is issued." See Exhibit 9, pages 30-31. He then explained the calculations on his credit worksheet. See Exhibit 9, page 36; Tr. pages 91-94.

8. Mr. Paul Chod, the Appellant, testified that he has been employed by the Minkoff Development Company since 1978, and that he is currently its President and owner. He explained that Minkoff itself does not own any real property, but rather serves as the agent, general contractor, leasing agent, and property manager for all of the real estate entities which own the various Properties comprising the SGDP, none of which have any employees. Mr. Chod testified that all but one these real estate entities are all LLPs; the other is an LLC. He testified that he is the general partner and managing member of each of the entities. He testified Minkoff takes care of these properties for their owners, and that Minkoff was responsible for all of the building construction, all of the site development, and all of the tenant improvements since development.

Mr. Chod testified that Minkoff was started by his father-in-law, who purchased property containing the first building of the Shady Grove Development Park in 1972, along with an option to purchase 40 additional acres. He testified that the County required construction of the existing stormwater ponds prior to the erection of the second and third SGDP buildings. See Exhibit 11, page M142. He testified that the topography is such that all of the ground slopes toward the highway (I-270), and that initially, water had been collected in an underground storage facility and pumped under the highway to a series of ponds that served the Washingtonian Golf Course, which was formerly located across I-270 from the Properties. He testified that the ponds were constructed in 1975.

Mr. Chod recounted the development of the various properties comprising the Shady Grove Development Park, portions of which are in the City of Gaithersburg. He testified that Shady Grove Development Park LLP, Shady Grove Development Park IX, and Shady Grove Development Park VIII own the real estate on which the stormwater ponds are located. He testified that all of the Shady Grove Development Park Properties drain into those ponds, and that since 1978 (when he joined Minkoff), he has never seen the ponds flood. He testified that the ponds were renovated when I-270 was widened, with various iterations of drawings submitted to the County and the State between 1985 and 1988. He testified that the 1988 drawings were submitted to and approved by the County and the State. He testified that the drawings show that there is work being done by the State or to be done by the County, and work to be done by Minkoff. He testified that Minkoff paid their engineers (from two successive engineering firms) to prepare all of the modifications to the ponds, and to submit them to the County and the State. When asked if the engineers had provided computations with their requests for approval, Mr. Chod testified that the engineers may have submitted computations, but stated that all he

ever received from them were the drawings.

Mr. Chod testified that Minkoff has not been cited for any violations of the County's stormwater management requirements. He testified that Minkoff does the grass cutting, landscape maintenance, and trash removal for the stormwater ponds. He testified that to date this year, Minkoff has spent about \$3,200 maintaining the ponds. Mr. Chod testified that the County did the first structural maintenance that he can recall about two years ago, replacing a drainage pipe that comes into the pond. He testified that they also did something in 2009 that he was not aware of.

Mr. Chod testified that the ponds currently occupy approximately two (2) acres of land, their size having been reduced when I-270 was widened. Based on the assessment for the Shady Grove Development Park set forth on the 2014-2015 SDAT tax bills, he testified that the land is assessed at \$453,000 an acre, and so he estimated that the land that is occupied by the ponds is worth about \$950,000. He testified that with the Shady Grove Development Park currently occupies about 37 acres of land, the rest having been given up when I-270 was widened. Mr. Chod testified that the area which drains into these ponds extends beyond the borders of the Shady Grove Development Park and even includes a portion of I-270. See Exhibit 11, page M142 (blue line demarcating drainage area). He testified that he does not receive any other contribution—financial or in kind—from any other property owner, from the County,<sup>2</sup> or from the State to help with the maintenance of the stormwater ponds.

Mr. Chod testified that the original plans for the stormwater ponds were submitted to and approved by the County's Department of Environmental Protection. He testified that he believes that DEP has computations pertaining to these ponds because in 2013, he was contacted by someone from DEP who wanted to come on site and look at the ponds to see if they could upgrade them. See Exhibit 13. Mr. Chod said that DEP ultimately concluded that they could not upgrade these ponds because of the volume that is in them. He testified that DEP concluded that because the water now goes from the SGDP stormwater ponds into the large pond at the Rio Center, there was no reason to do anything. He testified that DEP sent him an email, dated October 11, 2013, which said that they had computations, presumably indicating why DEP was not going to modify the ponds, and which asked Mr. Chod if he wanted a set of those computations. He testified that he did not ask for them.

Mr. Chod testified that he is challenging the Water Quality Protection Charge assessed for the Shady Grove Development Park Properties because through 2012, he was not assessed a Charge since they were treating their own water and the State and County did not require non-residential property owners to pay this Charge. He testified that he has dedicated a million dollars' worth of land to treat the stormwater from an area that is three times as large as the SGDP Properties that he manages. He testified that they built these stormwater ponds in 1975 because the County required their construction, and that they have done those portions of the pond maintenance with which they were tasked since that time. He testified that Minkoff pays for all of that maintenance, and questioned

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<sup>2</sup> The County does provide structural maintenance, as indicated in the preceding paragraph.

why a property owner who does no on-site stormwater management would have to pay only slightly more than he is charged.

On cross-examination, Mr. Chod acknowledged that each of the properties comprising the Shady Grove Development Park is owned by a different entity, but testified that it is all family business. He testified that the County does provide structural maintenance for the stormwater ponds. He testified that when he received Mr. Knight's email asking for calculations in connection with his WQPC credit application, he referred the matter to his attorneys, and did not respond because he had told Ms. Wan that he did not have any calculations, and because he had submitted everything he had to the County and Mr. Knight. Finally, he testified that in 1988, these ponds were converted from dry grass ponds to wet ponds, with marsh grass around them to filter the water. He stated that they are not environmental site design because they were built so long ago.

On redirect, Mr. Chod testified that when he submitted his credit application, he met with Mr. Knight and Ms. Wan, and gave them everything he had that pertained to the stormwater facilities. He testified that whatever was required for these ponds when they were constructed was submitted to DEP for approval. He testified that the cost to obtain the computations now sought by DEP would exceed the credit available to him.

9. Mr. Frank Bossong, who works for Rodgers Consulting, testified for the Appellant. He has previously been accepted by the Board as an expert in civil engineering, and has been working on stormwater management, which is his current area of expertise, since 1979. He testified that including environmental site design, he has designed over 1,000 stormwater facilities in the Washington metropolitan area. Mr. Bossong was accepted as an expert in stormwater management. His qualifications are in the record at Exhibit 11, page M193.

Mr. Bossong testified that the dashed blue line on Exhibit 11, page M142, shows the area that drains into the Shady Grove Development Park stormwater ponds, which in turn discharge to the Washingtonian Lake and ultimately to Muddy Branch. He testified that this area extends south of Shady Grove Road and north of Gaither Road, and includes part of I-270. He testified that the hatched areas and the area south of Shady Grove Road are not part of the Shady Grove Development Park. He testified that there used to be a stormwater pond on the southeast quadrant of I-270 and Shady Grove Road, but that this corner is being redeveloped and that pond has been removed. He noted that the area south of Shady Grove Road is in the City of Rockville, which requires quality control but not quantity control. Properties in the City of Rockville are subject to a Rockville water quality protection charge. Mr. Bossong testified that the hatched area north of Shady Grove Road, where the Home Depot and Best Buy are located, is in the City of Gaithersburg. He testified that the Washingtonian Lake is also in the City of Gaithersburg, and that properties in Gaithersburg are not subject to the County's Water Quality Protection Charge.

Mr. Bossong testified that he had researched the history of the stormwater ponds serving the Shady Grove Development Park, and found the following. The ponds were

constructed in the mid-1970s. The dashed line on the April 1975 drainage area map shows the drainage area. See Exhibit 11, page M102. The drawings of engineering firm Cordero, Steadman & Ward depict a plan for the construction of the ponds circa 1977. See Exhibit 11, page M103. He testified that these construction drawings were approved. In response to a Board question asking if any of these drawings would allow an engineer to calculate the volume or quality of the water treated, Mr. Bossong testified that the drawings did not allow for quality calculations because back in the 1970's, stormwater ponds were intended for flood control. Mr. Bossong testified that in 1985, Cordero, Steadman & Ward drew up changes to the ponds, which were necessitated by the State's decision to widen I-270. See Exhibit 11, page M104. Because of delays at the State Highway Administration in completing the plans for the expansion of the highway, the construction drawings for the stormwater ponds were revised and updated in 1988 by engineering firm Gutschick, Little & Weber (GLW). These plans were approved by the Department of Environmental Protection as well as by the State Highway Administration. See Exhibit 11, page M128. Mr. Bossong testified that the stormwater management computations in the record at Exhibit 11, page M115 et seq., were part of the submission that was approved by DEP in 1988, and would have been reviewed by that Department, since at that time, DEP was the authoritative body in Montgomery County.<sup>3</sup> He testified that these are both quantity and quality calculations. He testified that today it would cost about \$16,000 to have an engineer recreate those calculations through as-built surveys and computer modelling.

Mr. Bossong explained that while in the 1970's and the early 1980's, stormwater management was about flood control, in the mid-1980's, the theory and approach changed to introduce water quality as well as quantity control. He testified that there were different measures of how to do water quality control, and that in the case of these ponds, they were converted from dry facilities with a grass bottom to wetland marsh-type facilities with extended water quality facility elements. He testified that when these ponds were rebuilt or upgraded, they incorporated the then-applicable water quality requirements of Montgomery County and the State of Maryland. Mr. Bossong testified that these ponds were also designed for quantity control, and explained that as long as he has been practicing, the State Highway Administration has required quantity storage (capacity) for two 10-year storms and one 100-year storm for facilities such as this one that discharge or connect into their right-of-way. He testified that these ponds were designed to handle that quantity. He testified that the computations illustrate the amount of water quality that was being provided not only to the Shady Grove Development Park, but to the entire drainage area (approximately 150 acres). See Exhibit 11, page M115 et seq.

Mr. Bossong testified that from the mid-1980's until the State regulations in 2000, the County was looking for one-half inch of water quality, in addition to quantity control. He testified that in 2000, the County was looking for a minimum of one inch of water quality storage in addition to quantity storage. He testified that in 2008, the methodology of doing stormwater, which had been tweaked but had essentially remained the same

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<sup>3</sup> Mr. Bossong testified that he received these calculations from the engineer of record at GLW, who he knows personally.

since the 1970's, was changed. He testified that it no longer involved only channel protection volume, etc., but was now based on State criteria and implementing environmental site design to the maximum extent possible. He testified that instead of just wanting one-half inch or one inch for quality, the calculations were totally changed so that each project is now unique in how you calculate that project versus another project. He testified that different parameters are now used in these calculations.

Mr. Bossong testified regarding the regional aerial photo in the record at Exhibit 11, page M142, that everything within the dashed blue line drains to the Shady Grove Development Park stormwater ponds, eventually ending up in Pond 2 because of a connection under the parking lot between the ponds which facilitates drainage from Pond 1 to Pond 2. He testified that the hatched areas within the blue dashed line, and the area south of Shady Grove Road but also within that line, are not owned or controlled by entities related to the Shady Grove Development Park. He testified that the hatched area north of Gaither Road does not have stormwater management facilities, and that the hatched area west of Shady Grove Road (the Home Depot/Best Buy shopping area), which was developed in the early 1990's, has a hydrodynamic type of water quality structure, which settles out suspended solids. He testified that this shopping area, which is in the City of Gaithersburg, was given a quantity control waiver because of the stormwater ponds on the Shady Grove Development Park properties, and because of the 10 acres Washingtonian Lake, which has an average depth of 8 feet and its own cleansing properties.

Mr. Bossong testified that he had analyzed the treatment of the Shady Grove Development Park for Water Quality Protection Charge purposes compared to comparably developed properties in Montgomery County. When the Chair questioned the relevance of this line of testimony, counsel for the Appellant proffered that other County properties comparable in history, such as the Hillandale and Glenmont shopping centers, which have no stormwater management facilities, are charged the same rate as the Shady Grove Development Park. Counsel asserted that this is relevant because it goes towards the share of stormwater services which the County is providing to these properties, which she asserted is substantially higher than the services provided to the Shady Grove Development Park, since it has its own stormwater facilities. She stated that it is inequitable to charge her client the same amount as someone who has no private stormwater management facilities, responsibilities, or investment.

Mr. Bossong testified that based on the computations and the year of the construction drawings, the stormwater management facilities at the Shady Grove Development Park incorporate water quality control, and have water quantity control sufficient to address the drainage area. He testified that under the 1991 agreement, the County is responsible for the structural maintenance of these stormwater facilities. He testified that structural maintenance typically involves concrete structures or pipes, adding that the normal life expectancy for concrete structures and pipes is 50 years (up to 75 years). He testified that because these stormwater ponds were redone in the mid-1980's, he did not see any need for structural remedies in the immediately foreseeable future. With regard to sediment removal, which would also be the County's

responsibility, he testified that because the Shady Grove Development Park and surrounding drainage area are built out and nearly all paved, there would be miniscule amounts of sediment entering the ponds. Thus he concluded that the County's cost to maintain these ponds at present was essentially nonexistent, explaining that Minkoff was taking care of all of the elementary maintenance needed for the facilities.

Mr. Bossong stated his opinion that the credit against the Water Quality Protection Charge provided to the Properties comprising Shady Grove Development Park did not fairly reflect the installation and costs incurred by the property owners. He opined that because of the cost of construction, the cost of maintenance, the liability associated with the ponds, and the value of the land committed to use for stormwater purposes, the 25 percent credit was not equitable.

When asked on cross-examination if the computations provided almost 30 years ago, when these stormwater ponds were renovated, would be useful in assessing the effectiveness of the stormwater management facilities today, Mr. Bossong testified that they would be useful. He testified that they show that certain volumes of water are being controlled, and that they also show quality control. He testified that extended detention has an intrinsic value of cleaning water. He testified that the computations show that certain volumes of water are either being contained or retained. He noted that the ponds have water on the bottom. He testified that by knowing the size of the drainage area and the volume of water being controlled, you can calculate the value of removing suspended solids.

#### **PRELIMINARY MATTER**

The County filed a Motion for Summary Disposition of this appeal on grounds that a 100 percent credit against the Water Quality Protection Charge was not available under Section 19-35 of the County Code. The County further asserted that this appeal should be dismissed because the Properties were not eligible for the maximum allowed at the time by the regulations (60 percent) since the stormwater on the Properties was not treated exclusively by environmental site design practices, that in fact the maximum credit for which the Properties were eligible was 50 percent under the (then-effective) regulations, and that because the Appellant had failed to provide DEP with calculations necessary to allow the Director of DEP to assess the effectiveness of the treatment for those Properties, the 50 percent credit had been reduced by half, as specified on the application.

Counsel for the Appellant submitted an Opposition to Appellee's Motion for Summary Disposition, arguing that the Charge imposed by the County did not comport with Section 4-202.1 of the Environment Article, Maryland Code, because (1) the Charge has to be based on the share of County stormwater services provided to the property, (2) the County must have a credit system against the Charge that accounts for private stormwater management and the costs incurred by the owner in that regard, and (3) that the regulations of the County must set forth the method for calculating the credit. Counsel argued that 20 percent of the Charge collected by the County is not used for

stormwater management but rather goes to trash removal and street cleaning, and that the 50 percent reduction in the credit is not in the regulations but rather is set forth on the credit application itself.

Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that Section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of the hearing. The Board finds that in this appeal, the Appellant seeks full credit against the Water Quality Protection Charge, which the Appellant characterizes alternately as either a 100 percent credit or the maximum allowable under the current regulations. See Exhibit 4. Although the County seeks to characterize the request for the maximum credit allowed as a request for a 60 percent credit, which is the maximum allowed for any property under the regulations, the Board views this appeal as seeking the maximum credit allowed for these Properties under the regulations. Indeed, both sides acknowledge that the subject Properties are not treated entirely by environmental site design, making the 60 percent credit set forth in Section 19.31.01.05(A) unavailable. After noting that Section 19-35 of the County Code and the implementing regulations at Section 19.35.01.05 of COMCOR do not allow for a 100 percent credit against the Water Quality Protection Charge, and after determining that there were questions of fact pertaining to the correctness of the credit calculation for these Properties, on a motion by Member Edwin Rosado, seconded by Member Carolyn Shawaker, the Board voted 5-0 to grant the County's Motion for Summary Disposition with respect to Appellant's assertion that he was entitled to a 100 percent credit under the law, and to deny the County's Motion with respect to the correctness of the credit to which the Appellant was entitled.

### **CONCLUSIONS OF LAW**

1. Section 2-112 of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code. Subsection (d) of that Section provides that "[t]he Board must hear and decide any other appeal authorized by law."

2. Section 4-202.1 of the Environment Article of the Maryland Code reads as follows:

#### **Section 4-202.1. Watershed protection and restoration programs.**

(a)(1) Except as provided in paragraph (2) of this subsection, this section applies to a county or municipality that is subject to a national pollutant discharge elimination system Phase I municipal separate storm sewer system permit.

(2) This section does not apply to a county or municipality that, on or before July 1, 2012, has enacted and implemented a system of charges under § 4-204 of this subtitle for the purpose of funding a watershed protection and restoration program, or similar program, in a manner consistent with the requirements of this section.



(b) On or before July 1, 2013, a county or municipality shall adopt and implement local laws or ordinances necessary to establish a watershed protection and restoration program.

(c) A watershed protection and restoration program established under this section shall include:

- (1) A stormwater remediation fee; and
- (2) A local watershed protection and restoration fund.

(d)(1) A county or municipality shall maintain or administer a local watershed protection and restoration fund in accordance with this section.

(2) The purpose of a local watershed protection and restoration fund is to provide financial assistance for the implementation of local stormwater management plans through stormwater management practices and stream and wetland restoration activities.

(e)(1) Except as provided in paragraph (2) of this subsection and subsection (f) of this section, a county or municipality shall establish and annually collect a stormwater remediation fee from owners of property located within the county or municipality in accordance with this section.

(2) Property owned by the State, a unit of State government, a county, a municipality, or a regularly organized volunteer fire department that is used for public purposes may not be charged a stormwater remediation fee under this section.

(3)(i) 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.

(4) A stormwater remediation fee established under this section is separate from any charges that a county or municipality establishes related to stormwater management for new developments under § 4-204 of this subtitle, including fees for permitting, review of stormwater management plans, inspections, or monitoring.

(f)(1) A county or municipality shall establish policies and procedures, approved by the Department, to reduce any portion of a stormwater remediation fee established under subsection (e) of this section to account for on-site and off-site systems, facilities, services, or activities that reduce the quantity or improve the quality of stormwater discharged from the property.

(2) The policies and procedures established by a county or municipality under paragraph (1) of this subsection shall include:

(i) Guidelines for determining which on-site systems, facilities, services, or activities may be the basis for a fee reduction, including guidelines:

1. Relating to properties with existing advanced stormwater best management practices;

2. Relating to agricultural activities or facilities that are otherwise exempted from stormwater management requirements by the county or municipality; and

3. That account for the costs of, and the level of treatment provided by, stormwater management facilities that are funded and maintained by a property owner;

(ii) The method for calculating the amount of a fee reduction; and

(iii) Procedures for monitoring and verifying the effectiveness of the on-site systems, facilities, services, or activities in reducing the quantity or improving the quality of stormwater discharged from the property.

(3) For the purpose of monitoring and verifying the effectiveness of on-site systems, facilities, services, or activities under paragraph (2)(iii) of this subsection, a county or municipality may:

(i) Conduct on-site inspections;

(ii) Authorize a third party, certified by the Department, to conduct on-site inspections on behalf of the county or municipality; or

(iii) Require a property owner to hire a third party, certified by the Department, to conduct an on-site inspection and provide to the county or municipality the results of the inspection and any other information required by the county or municipality.

(g)(1) A property may not be assessed a stormwater remediation fee by both a county and a municipality.

(2)(i) Before a county may impose a stormwater remediation fee on a property located within a municipality, the county shall:

1. Notify the municipality of the county's intent to impose a stormwater remediation fee on property located within the municipality; and

2. Provide the municipality reasonable time to pass an ordinance authorizing the imposition of a municipal stormwater remediation fee instead of a county stormwater remediation fee.

(ii) If a county currently imposes a stormwater remediation fee on property located within a municipality and the municipality decides to implement its own stormwater remediation fee under this section or § 4-204 of this subtitle, the municipality shall:

1. Notify the county of the municipality's intent to impose its own stormwater remediation fee; and

2. Provide the county reasonable time to discontinue the collection of the county stormwater remediation fee within the municipality before the municipality's stormwater remediation fee becomes effective.

(3) A county or municipality shall establish a procedure for a property owner to appeal a stormwater remediation fee imposed under this section.

(h)(1) A county or municipality shall determine the method, frequency, and

enforcement of the collection of the stormwater remediation fee.

(2) A county or municipality shall deposit the stormwater remediation fees it collects into its local watershed protection and restoration fund.

(3) There shall be deposited in a local watershed protection and restoration fund:

(i) Funds received from the stormwater remediation fee;

(ii) Interest or other income earned on the investment of money in the local watershed protection and restoration fund; and

(iii) Any additional money made available from any sources for the purposes for which the local watershed protection and restoration fund has been established.

(4) Subject to paragraph (5) of this subsection, a county or municipality shall use the money in its local watershed protection and restoration fund for the following purposes only:

(i) Capital improvements for stormwater management, including stream and wetland restoration projects;

(ii) Operation and maintenance of stormwater management systems and facilities;

(iii) Public education and outreach relating to stormwater management or stream and wetland restoration;

(iv) Stormwater management planning, including:

1. Mapping and assessment of impervious surfaces; and

2. Monitoring, inspection, and enforcement activities to carry out the purposes of the watershed protection and restoration fund;

(v) To the extent that fees imposed under § 4-204 of this subtitle are deposited into the local watershed protection and restoration fund, review of stormwater management plans and permit applications for new development;

(vi) Grants to nonprofit organizations for up to 100% of a project's costs for watershed restoration and rehabilitation projects relating to:

1. Planning, design, and construction of stormwater management practices;

2. Stream and wetland restoration; and

3. Public education and outreach related to stormwater management or stream and wetland restoration; and

(vii) Reasonable costs necessary to administer the local watershed protection and restoration fund.

(5) A county or municipality may use its local watershed protection and restoration fund as an environmental fund, and may deposit to and expend from the fund additional money made available from other sources and dedicated to environmental uses, provided that the funds received from the stormwater remediation fee are expended only for the purposes authorized under paragraph (4) of this subsection.

(6) The funds disbursed under this subsection are intended to be in addition to any existing State or local expenditures for stormwater management.

(7) Money in a local watershed protection and restoration fund may not revert or be transferred to the general fund of any county or municipality.

(i) Beginning July 1, 2014, and every 2 years thereafter, a county or municipality shall make publicly available a report on:

(1) The number of properties subject to a stormwater remediation fee;

(2) The amount of money deposited into the watershed protection and restoration fund over the previous 2 fiscal years; and

(3) The percentage of funds in the local watershed protection and restoration fund spent on each of the purposes provided in subsection (h)(4) of this section.

(j)(1) A county or municipality shall establish a program to exempt from the requirements of this section a property able to demonstrate substantial financial hardship as a result of the stormwater remediation fee.

(2) A county or municipality may establish a separate hardship exemption program or include a hardship exemption as part of a system of offsets established under subsection (f)(1) of this section.

(k) The Department may adopt regulations to implement and enforce this section.

3. Section 4-204 of the Environment Article of the Maryland Code reads as follows:

**Section 4-204. Submission of plan.**

(a) After July 1, 1984, unless exempted, a person may not develop any land for residential, commercial, industrial, or institutional use without submitting a stormwater management plan to the county or municipality that has jurisdiction, and obtaining approval of the plan from the county or municipality. A grading or building permit may not be issued for a property unless a stormwater management plan has been approved that is consistent with this subtitle.

(b) The developer shall certify that all land clearing, construction, development, and drainage will be done according to the plan.

(c) Each county or municipality may provide by ordinance for the review and approval of stormwater management plans by the local soil conservation district.

(d)(1) Each governing body of a county or municipality may adopt a system of charges to fund the implementation of stormwater management programs, including the following:

(i) Reviewing stormwater management plans;

(ii) Inspection and enforcement activities;

(iii) Watershed planning;

(iv) Planning, design, land acquisition, and construction of stormwater management systems and structures;

(v) Retrofitting developed areas for pollution control;

(vi) Water quality monitoring and water quality programs;

(vii) Operation and maintenance of facilities; and

(viii) Program development of these activities.

(2) The charges shall take effect upon enactment by the local governing body.

(3) The charges may be collected in the same manner as county and municipal property taxes, have the same priority, and bear the same interest and penalties.

4. Section 19-35 of the Montgomery County Code authorizes the County to assess the Water Quality Protection Charge on certain residential and non-residential properties, as follows:

**Sec. 19-35. Water Quality Protection Charge.**

(a) As authorized by State law, the Director of Finance must annually impose and collect a Water Quality Protection Charge, as provided in this Section. The Director must collect the Charge in the same manner as County real property taxes, apply the same interest, penalties, and other remedies (including tax sale) if the Charge is not paid, and generally treat the Charge for collection and administration purposes as if it were a County real property tax. The Director may treat any unpaid Charge as a lien on the property to which the charge applies.

(b) The Charge must be imposed on each property, as specified in regulations adopted by the Executive under Method (1) to administer this Section. The regulations may define different classes of real property, depending on the amount of impervious surface on the property, stormwater runoff from the property, and other relevant characteristics, for purposes of applying the Charge.

(c) The Council must set the rate or rates for the Charge by a resolution adopted each year after holding a public hearing with at least 15 days' notice. The resolution must be adopted no later than the date the Council approves the annual operating budget and presented to the Executive within 3 days after the Council adopts it. If the Executive disapproves a resolution adopted under this Section within 10 days after the Council adopts it and the Council readopts it by a vote of six Councilmembers, or if the Executive does not act within 10 days after the Council adopts it, the resolution takes effect. Unless the resolution specifies otherwise, the rates must take effect on the July 1 after the resolution is adopted.

(d) In the resolution adopted under subsection (c), the Council may set a different rate for each type of property defined by regulation. If different rates are set, the rates must generally reflect the relative amount of impervious surface on each type of property.

(e)(1) A property owner may apply for, and the Director of Environmental Protection must grant, a credit equal to a percentage, set by regulation, of the Charge if:

(A) the property contains a stormwater management system that is not maintained by the County;

(B) the owner participates in a County-approved water quality management practice or initiative;

(C) the property treats off-site drainage from other properties located within the same drainage area; or

(D) the property does not contain a stormwater management system, but is located in the same drainage area as another that contains a

stormwater management system and both properties have the same owner.

(2) To receive the credit, the property owner must apply to the Director of Environmental Protection in a form prescribed by the Director not later than October 31 of the year before payment of the Charge is due. Any credit granted under this subsection is valid for 3 years.

(3) The owner of an owner-occupied residential property, or any non-profit organization that can demonstrate substantial financial hardship may apply for an exemption from all or part of the Charge for that property, based on criteria set by regulation. The owner or organization may apply for the exemption to the Director of Finance not later than April 1 of the year when payment of the Charge is due.

(f) The Director must deposit funds raised by the Charge, and funds for this purpose from any other source, into a stormwater management fund. Funds in the stormwater management fund may be applied and pledged to pay debt service on debt obligations to finance the construction and related expenses of stormwater management facilities as approved in the Capital Improvements Program. Funds in the stormwater management fund must only be used for:

(1) construction, operation, financing, and maintenance of stormwater management facilities, and related expenses, including debt service payments related to construction and related expenses of stormwater management facilities;

(2) enforcement and administration of this Article; and

(3) any other activity authorized by this Article or state law.

(g) This Charge does not apply to any property located in a municipality in the County which notifies the County that it has imposed or intends to impose a similar charge to fund its stormwater management program in that municipality.

(h) A person that believes that the Director of Environmental Protection has mistakenly assigned a Charge to the person's property or computed the Charge incorrectly may apply to the Director of Environmental Protection in writing for a review of the Charge, and request an adjustment to correct any error, not later than September 30 of the year that payment of the Charge is due. An aggrieved property owner may appeal the Director's decision to the County Board of Appeals within 10 days after the Director issues the decision.

(i) A person that believes that the Director of Environmental Protection has incorrectly denied the person's application for a credit or exemption under subsection (e) may appeal the Director's decision to the County Board of Appeals within 10 days after the Director issues the decision.

(j) The Board of Appeals may hear and decide all appeals taken from a decision of the Director of Environmental Protection under this Section as provided in Article I of Chapter 2A.

5. Section 19.35.01.05 of the Code of Montgomery County Regulations (COMCOR), implementing Section 19-35(e), provides for credits against the Water Quality Protection Charge:

**19.35.01.05 Credits.**

A. The Director must award a maximum credit of 50 percent, based on the volume of water treated by a combination of environmental site design and other stormwater management systems, or a maximum of 60 percent, based on the volume of water completely treated by environmental site design practices alone, as specified in the application provided to a nonresidential or multifamily residential property owner if the property contains a County approved stormwater management system and the system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection. A property must be credited for treatment of off-site drainage from other properties located within the same drainage area as that property. A property that does not contain a stormwater management system must be credited if located within the same drainage area as another property that contains a stormwater management system if both properties have the same owner. However, a property owner must not receive a credit based on a calculation that exceeds the total impervious area on the property for which the credit is issued.

B. The Director must award a maximum credit of 50 percent based on the volume of water treated as specified in the application provided by the Department to the owner of a single family residential property if the property contains a County approved stormwater management system and the system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection.

C. Application Schedule.

(1) To receive the credit, the property owner must apply to the Director of Environmental Protection in a form prescribed by the Director not later than October 31 of the year before payment of the Charge is due.

(2) Once approved, the credit is valid for three years. To renew the credit, the Property owner must reapply to the Director in a form prescribed by the Director not later than October 31 of the year before payment of the Charge is due.

D. Appeals.

(1) If the Director denies the credit, the property owner may seek reconsideration of the Director's decision by submitting a written request for reconsideration with supporting reasons to the Director within 10 days after the date of the Director's written decision.

(2) If the Director does not approve the request for reconsideration, the property owner may appeal the Director's final decision within 10 days after the Director issues that decision as provided in Chapter 2A, Article I, of the County Code.

6. In accordance with Section 26.17.04.02(A) of the Code of Maryland Regulations (COMAR) and as acknowledged by counsel for the County, the County is required to submit all proposed legislative or regulatory changes amending its stormwater management provisions to the Water Management Administration of the Maryland Department of the Environment. That Section reads as follows:

A. Each county and municipality shall adopt ordinances necessary to implement a stormwater management program. Subsequently, counties and municipalities shall submit any proposed amendments to the Administration for review and approval. By joint action with the county, a municipality may adopt the stormwater management ordinance of its respective county.

See Transcript, pages 19-20.

7. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

8. With respect to Appellant's argument that the County's Water Quality Protection Charge, as established by Section 19-35 of the County Code, is not fairly assessed and does not comport with Section 4-202.1 of the Environment Article, Maryland Code, the Board finds that Section 4-202.1(e) permits the County to base its stormwater remediation fee on, among other things, a flat rate or a graduated amount based on the amount of impervious surface on each property. Because, per the testimony of Ms. Wan and Mr. Knight, the County uses the amount of impervious surface to calculate the Water Quality Protection Charge, and leaving aside the issue of the credit calculation (which is addressed below), the Board finds that the way the County calculates this Charge is not inconsistent with State law. See also Exhibit 9, page 36 (indicating that impervious surface is used to calculate Charge).

9. Regarding the WQPC credit, Section 4-202.1(f)(1) of the Environment Article, Maryland Code, requires that counties "establish policies and procedures, approved by the Department, to reduce any portion of a stormwater remediation fee established under subsection (e) of this section to account for on-site and off-site systems, facilities, services, or activities that reduce the quantity or improve the quality of stormwater discharged from the property." With respect to the Appellant's argument that the County's implementation of this credit provision in its stormwater management law and regulations, at Section 19-35(e) of the County Code and Section 19.35.01.05 of COMCOR, does not comport with the State law, the Board notes that the County's law and regulations have been reviewed and approved by the State in accordance with Section 4-202.1(f)(1) of the Environment Article, Maryland Code, and Section 26.17.04.02 of COMAR, which require review and approval of changes to the County's stormwater management laws and regulations by the Maryland Department of Environment prior to their enactment and implementation. In addition, the Board notes that counsel for the County confirmed this when he stated that the only way the County's above-referenced legislative and regulatory provisions could have been enacted was if the Maryland Department of the Environment was satisfied that they met the requirements of



State law. See Transcript, page 21. Thus having of necessity been reviewed and approved by the State, the credit provisions in Section 19-35(e) of the County Code and Section 19.35.01.05 of COMCOR are presumably consistent with State law, and the Board so finds. The Board notes, as acknowledged by counsel for the County, that the application form used to apply for the WCPC credit was not reviewed and approved by the State. See Transcript, page 20.

10. Appellant next argues that the credit provisions in Section 19-35(e) of the County Code allow for a 100 percent credit against the Water Quality Protection Charge because consideration should be given to all off-site drainage, regardless of ownership, and because the 50 percent credit limitation goes to the property and not to the property owner. The Board finds that the language of Section 19-35(e) clearly states that a "property owner" can apply for a credit against the Water Quality Protection Charge, and thus finds that the credit accrues to the owner and not to the property. The Board further finds that COMCOR Section 19.35.01.05(A) allows the Director of DEP to award "a maximum credit of 50 percent" for non-ESD treated properties. Thus under a plain reading of these provisions, and as supported by the testimony of Mr. Knight, who testified that the maximum credit for these Properties was 50 percent, the Board finds that the maximum credit against the Water Quality Protection Charge available for these Properties is 50 percent.

11. With respect to the Appellant's claim that the amount of its credit should not have been reduced to 25 percent for failure to submit computations, the Board notes that the Appellant and the County disagree about whether the County had the computations it needed to assess the quantity and quality of water controlled by the Appellant's stormwater facilities. The County points to a lack of response on the part of the Appellant to its requests for this information, and yet Mr. Knight, who did the stormwater analysis for the County, testified that he had access to a GIS system which provided information on the amount of impervious surface on the Properties, and testified that all of the runoff from that impervious surface drained into the Appellant's stormwater facilities. The Appellant testified that the computations pertaining to these ponds were provided to the County when the ponds were redone in 1988, and that DEP also sent him an email, dated October 11, 2013, which indicated that they had computations pertaining to the ponds. The Appellant questioned why he should send the County information that he did not have but that the County already had.

The Board finds that it need not answer the question of whether the County needed or was already in possession of computations related to these stormwater ponds, because the Board finds that the County lacked the authority to reduce the Appellant's credit by half for failure to submit these calculations. Section 19-35(e)(1) of the County Code provides that a property owner can apply for, and DEP must grant, a credit equal to a percentage "*set by regulation...*" The regulations implementing this Section, at COMCOR Section 19.35.01.05(A), provide that the Director of DEP "must award a maximum credit of 50 percent ... if the property contains a County approved stormwater management system and the system is maintained in accordance with the maintenance requirements of the Department of Environmental Protection." The regulations do not

requirements of the Department of Environmental Protection.” The regulations do not provide for any reduction of the credit for failure to supply engineering calculations, and the Board finds that under Section 19-35, DEP had no authority to unilaterally implement a credit reduction by including it on its credit application form. The Board notes that while the County’s law and regulations are approved by the State, the application form is not. The Board further notes that Ms. Wan testified that DEP relies on an “etc.” on the application form to extend the need for computations and the 50 percent reduction in credit for failure to submit those computations beyond ESD-controlled stormwater facilities, which are called out on the application form, to all facilities.<sup>4</sup> See Exhibit 9, page 63; Tr. page 49. Thus even if the County were able to implement this reduction through its application form, which the Board has found that it could not, the Board would have viewed this reduction as improper.

12. Based on the foregoing, the Board finds that the appeal in Case A-6439 should be granted to the extent that DEP approved a 50 percent reduction in the Appellant’s credit, and that the matter should be remanded to DEP for re-calculation of the credit against the Appellant’s Water Quality Protection Charge without the 50 percent reduction.

The appeal in Case A-6439 is **GRANTED**.

On a motion by Member John H. Pentecost, seconded by Member Carolyn J. Shawaker, with Chair David K. Perdue, and Members Stanley B. Boyd and Edwin S. Rosado in agreement, the Board voted 5 to 0 to grant the appeal and remand this matter back to DEP, and adopted the following Resolution:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

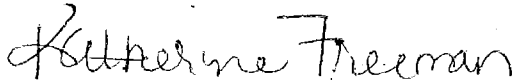


David K. Perdue, Chair  
Montgomery County Board of Appeals

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<sup>4</sup> The application form states that “Applicants must provide supporting documentation as attachments, including engineering drawings, photographs, aerial images, computations of ESD control volumes (ESDv), etc. If ESDv computations are not provided for facilities, then a 50 percent reduction factor is applied to credit calculation.” See Exhibit 9, page 63.

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 5<sup>th</sup> day of December, 2014.



Katherine Freeman  
Katherine Freeman  
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).