

Circuit Court for Montgomery County
Case No. 426602V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 448

September Term 2017

BOARD OF APPEALS FOR MONTGOMERY
COUNTY

v.

DEVIN BATTLE, ET AL.

Meredith,
Fader,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon. J.

Filed: July 20, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this appeal the appellant is the Board of Appeals for Montgomery County, Maryland (“Board”); the Board is represented by Montgomery County (“the County”). The appellees are Devin Battley and the Lindberg Park Owners Association (“LPOA”). The LPOA is a commercial association representing the owners of twenty-three commercial real estate properties located in a business park adjacent to Lindberg Drive in Gaithersburg, Maryland.

In January 2015, Battley and the LPOA, on behalf of its members, submitted an application to the Montgomery County Department of Environmental Protection (“DEP”) requesting credits against a Water Quality Protection Charge (“WQPC”) billed to the owners’ tax accounts for the properties located within Lindberg Park. The DEP, on October 30, 2015, granted a credit to five of the tax accounts for the 2015 tax levy year but denied a tax credit to Battley for one of his lots and also denied tax credits for sixteen other lot owners represented by the LPOA.

Battley, on his own behalf and the LPOA, on behalf of the 16 other property owners who have been denied WQPC credits, filed an appeal of the DEP decision to the Board. On August 25, 2016, the County filed a motion for summary disposition of the administrative appeal. Battley and the LPOA filed a timely opposition to the motion as well as a cross-motion for summary disposition.

A hearing was held before the Board on September 14, 2016. The Board, on October 10, 2016, filed an eight-page decision in which it granted the County’s motion for summary disposition and dismissed the administrative appeal filed by Bailey and the LPOA.

Battley and the LPOA filed a petition for judicial review in the Circuit Court for Montgomery County in which they sought to overturn the Board’s decision.

A hearing on the petition was held in the Circuit Court for Montgomery County on April 20, 2017. At the conclusion of the hearing, the circuit court judge, in an oral opinion, set forth the reasons he believed that the decision of the Board was erroneous. Subsequently, on April 25, 2017, the court filed an order reversing the Board’s grant of Montgomery County’s motion for summary disposition and remanded the case back to the Board “for a full hearing consistent with this order.”

Montgomery County, on behalf of the Board, filed an appeal to this Court on May 10, 2017 in which it raised one question that it phrased as follows: “Is the Board’s decision supported by substantial evidence and legally correct?”

In their response brief, Battley and the LPOA raise three questions, *viz.*:

- I. Was the decision of the Board of Appeals for Montgomery County made under an erroneous conclusion of law, as the Montgomery County Circuit Court unequivocally ruled it to be?
- II. Is the WQPC, as construed and applied by the Board and the County, unconstitutional, as containing unlawful and unreasonable differing treatment of landowners whose storm water is treated versus those who have no storm water management treatment in place.
- III. Was the action of the Board in granting summary disposition below unsupported by sufficient evidence so that its action is arbitrary, unreasonable and capricious and, therefore, illegal and void?

I.

JURISDICTION

At oral argument before this panel, held April 6, 2018, Montgomery County, on behalf of the Board, argued that the appellees should have challenged the defendant's denial of the WQPC credits to the County's finance director and then, if unsuccessful, the Maryland Tax Court. Moreover, according to appellant, the Circuit Court for Montgomery County should have dismissed appellees' petition for judicial review due to appellees' failure to exhaust administrative remedies. In other words, appellant contends that the Board never had jurisdiction to hear the appellees' challenge to the denial of the tax credit.

We granted appellees permission to file a supplemental brief to address the aforementioned issues, which had not been raised in appellant's opening brief. We did so because an appellate court may consider failure to exhaust administrative remedies even when the issue is not raised by the parties. *See Dep't of Human Resources v. Wilson*, 286 Md. 639, 645 (1979).

Shortly after oral argument, appellees filed a written response to appellant's jurisdictional argument in which appellees conceded that they should not have appealed the denial of the tax credits to the Board but should have filed an appeal of the denial to Montgomery County's financial director and, if unsuccessful, should have then appealed to the Maryland Tax Court. The reasons for those concessions are as follows:

1. State law assigns jurisdiction to hear appeals from final tax-related decisions to the Maryland Tax Court. *See* Maryland Code Annotated (2016 Repl. Vol.), Tax General Article § 3-103.
2. State law provides that a tax payer may not appeal to the tax court unless the tax payer has first exhausted all available administrative remedies before the appropriate tax determining agency. *See* Tax-General Article § 13-514.

3. In Montgomery County, the appropriate tax determining agency is the County's finance director. *See Abbott v. Administrative Hearing Board*, 33 Md. App. 681 (1976) (a county, by local law, cannot provide for judicial review of an administrative decision in a manner that conflicts with public general law.).

The appellees' failure to exhaust administrative remedies is understandable. At the time the appellees were denied tax credits, Montgomery County Code § 19-35(h), (i) and

(j) read:

(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 30 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 (c) may appeal the Director's decision to the County Board of Appeals within 30 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. (2001 L.M.C., ch.27, § 1; 2002 L.M.C., ch. 18, § 1; 2013 L.M.C., ch. 11, § 1; 2015 L.M.C., ch.14, § 1; 2015 L.M.C., ch. 54, § 1; 2016 L.M.C., ch. 20, § 1.)

The problem was, however, that the just quoted Montgomery County Code provision was, as all parties now agree, preempted by State law.¹

¹ On April 5, 2018, which was the day before oral argument in this case, the Montgomery County local law was changed (*see* expedited County Bill 01118), so that County law would be the same as State law insofar as it involved credits for WQPC charges.

The parties to this appeal are at odds as to what should next be done. The proper procedure, according to the County, is for this Court to remand the case to the circuit court with instructions to dismiss the petition for judicial review for failure to exhaust administrative remedies.

At first blush, the County's suggested remedy may seem harsh. But the County admits that Mr. Battley and the other lot owners, who were denied WQPC credits, may still have a remedy. In its supplemental brief, appellant makes the following judicial admission:

Any Appellee-Property Owner who timely applied for a credit against the WQPC before September 30, 2015 and was denied by the Department of Environmental Protection must exhaust his or her administrative remedies by seeking a final decision from the Finance Director, as provided under Local Gov't § 20-113. That property owner must present the claim to the Finance Director within 3 years of the date that the WQPC was paid. Local Gov't § 20-115. That property owner may appeal an unfavorable decision from the Finance Director to the Tax Court as provided under Local Gov't § 20-117. A property owner's ability to exhaust applicable administrative remedies was not dependent upon the passage of Expedited Bill 01-18, as that bill merely made County law consistent with the tax review process already set out in State law.

(Footnotes omitted.)

The appellees' position, as set forth in their supplemental brief, is that, in order to conserve public resources, we should "affirm the [c]ircuit [c]ourt's ruling that the Board of Appeals made an erroneous ruling" and "remand to the [T]ax [C]ourt for a full hearing on the merits[.]"

We decline appellees' invitation. Instead, we shall reverse the judgment of the circuit court on the grounds that appellees did not exhaust administrative remedies. The

16 individual property owners² and Bailey should, if they choose to do so, file a request for a refund with the finance director for Montgomery County on or before September 15, 2018. If such a request is made, it will be up to the finance director, at least initially, to decide whether any of the property owners are entitled to a refund. If a refund is denied by the finance director, the property owners will have a right to file an appeal to the Maryland Tax Court.

**JUDGMENT REVERSED; COSTS TO BE
PAID BY APPELLEES.**

² The 16 individual property owners, and not the LPOA, should file any such request by the September 15, 2018 deadline. We say this because Montgomery County Code § 19-35(c) provides that only a property owner may apply for a WQPC refund. The LPOA is not a “property owner” within the meaning of that code provision.