

# Maryland 'Rain Tax' Ruling May Offer Hope For Tax Credits

By **Alyssa Domzal** (August 6, 2024)

On July 9, in *Ben Porto & Son Ltd. v. Montgomery County, Maryland*,<sup>[1]</sup> the Appellate Court of Maryland delivered a mixed decision regarding the imposition of stormwater charges in the state's most populous county, upholding the so-called rain tax as a valid excise tax, but loosening the standards for credits that may be applied against the charge.



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This echoes earlier case law upholding the validity of controversial stormwater charges, but offers new analysis for a broader scope of potential credits that may reduce property owners' liability.

Montgomery County first imposed its stormwater charge, known as the Water Quality Protection Charge, in 2001. The county amended its statute in 2012 to include all nonexempt property and to allow for credits against the charge.

In response to a 2015 challenge to the stormwater charge's validity, the county expressly defined the charge as an excise tax. In general, an excise tax is a tax imposed on an action, occupation, or use of land, whereas a property tax is a charge to a property owner by reason of ownership alone. The county law currently defines the charge as "an excise tax charged to a property owner for the privilege of maintaining impervious surface on the owner's property."

Ben Porto & Son Ltd. owns an operating dimension stone quarry, one of the few remaining quarries in Montgomery County. The Porto quarry holds both a state mining license and a surface mining permit, as well as a county sediment control permit.

Between 2016 and 2018, Porto filed for various forms of relief from the stormwater charge, which the county denied. Porto eventually prevailed in an appeal to the Maryland Tax Court, which found that Porto was subject to the stormwater charge, but that it qualified for a full exemption from the charge because it demonstrated that it treated all of its stormwater on-site. Both Porto and the county appealed on various grounds.

The court first assessed if the stormwater charge is a valid excise tax, rather than a regulatory fee or property tax. Porto argued that the charge is a regulatory fee that would be preempted by state and federal regulations. The court found that the charge is not a regulatory fee, as the primary purpose of the enactment is to raise revenue. Furthermore, no further conditions other than payment of the tax need to be met for the property owner to carry on its business.

To determine whether the stormwater charge is a property tax or an excise tax, the court applied a three-part test,<sup>[2]</sup> looking at: (1) the label of the tax given by the Legislature, (2) the actual operation and effect of the tax, and (3) the methods used to fix the amount of the imposition.

The court found that the first two factors weighed overwhelmingly in favor of the stormwater charge being an excise tax, not a property tax.

First, the county statute expressly labels the stormwater charge as an excise tax.

Second, the stormwater charge operates as an excise tax because it is based solely on the use of the land as impervious surface.

The court found that the third factor of methods of calculation was significantly closer. On one hand, the stormwater charge does not require any calculation of property value, as a property tax would.

On the other hand, nonpayment of the stormwater charge results directly in a lien on the property, which is typically true of a property tax. The court ultimately concluded, however, that the first two factors weighed overwhelmingly in favor of the stormwater charge being an excise tax, which was determinative.

Having determined that the stormwater charge is a valid excise tax, the court quickly determined that the stormwater charge would apply to the Porto quarry, finding that none of the purported exemptions cited by Porto — for example, an exemption arising out of state regulation of mines — were applicable.

The court then addressed the county's challenge of the tax court's award of a 100% credit to the stormwater charges payable by Porto, which was based on uncontroverted evidence that Porto treats 100% of its stormwater on-site.

The County Code provides for credits if a property contains a stormwater management system for which the county does not perform structural maintenance, which system either treats only on-site drainage or both on-site and off-site drainage from the same drainage area.

The county first argued that Porto failed to demonstrate compliance with the 2000 Maryland stormwater design manual. However, the court rejected this argument, citing the county's own procedures manual, which stated that "stormwater management system practices are generally based" on the manual, without a strict compliance requirement.

The county also argued that the tax court, in considering Porto's on-site erosion and sediment control measures, improperly conflated erosion and sediment control and stormwater management.

The court found, however, that the erosion and sediment measures were properly considered, noting the "clear overlap between the County's goals and purposes" of the two regulatory frameworks.

Two avenues went unexplored by the Porto court which could shape future treatment of this issue.

First, the court emphasizes that the county did not define "treatment" in its regulations that allow for credits based on "total volume of water treatment." More robust credit regulations could result in more constrained interpretations of what mitigation measures qualify for a credit.

Second, the court did not address Porto's argument that the stormwater charge is impermissible as a retroactive excise tax, finding that Porto did not preserve the issue for appeal.

The Appellate Court of Maryland's finding in Porto is consistent with recent precedent

upholding the validity of county-level stormwater charges. In 2018, the same court found that a similar stormwater remediation fee in Baltimore City was a valid excise tax, and therefore not subject to property tax exemptions applicable to religious institutions.[3]

However, the Porto court goes further into exploring the fact-intensive area of credits that may be eligible to be applied against a stormwater charge. Both factors the court considered in determining that Porto qualified for a credit — relaxed compliance with the statewide design manual and consideration of erosion and sediment control measures — could open the door for broader interpretation of county-level mitigation credits in the future.

While the rain tax appears to be here to stay, Porto may signal a willingness for courts to consider a variety of factors in what property owners are actually required to pay.

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[1] No. 2183, September Term 2022, July 9, 2024.

[2] *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15 (1994).

[3] *Shaarei Tfiloh Congregation v. Mayor and City Council of Baltimore*, 237 Md. App. 102 (2018).