

Circuit Court for Montgomery County  
Case No. 483226-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0109

September Term, 2021

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SAGRES CONSTRUCTION CORPORATION

v.

WASHINGTON SUBURBAN SANITARY  
COMMISSION

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Zic,  
Ripken,  
Eyler, James R.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Zic, J.

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Filed: May 9, 2022

\* 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.

This case arises from a contract for excavation and water main relocation services between Sagres Construction Corp. (“Sagres”), a contractor, and the Washington Suburban Sanitary Commission (“WSSC”), an administrative agency. While working on the project, Sagres encountered an underground duct bank and subsurface rock conditions. Sagres submitted two claims to WSSC’s designated Engineer for additional payment and time extensions for the extra work it performed related to the conditions. The Engineer denied both claims. Sagres appealed the Engineer’s final decisions to WSSC’s Chief Procurement Officer. The Chief Procurement Officer issued two final decisions and orders, which affirmed the Engineer’s final decisions. Sagres then filed a Petition for Administrative Mandamus in the Circuit Court for Montgomery County. The circuit court affirmed the Chief Procurement Officer’s final decisions.

Sagres thereafter appealed to this Court, raising three questions.<sup>1</sup> WSSC filed a motion to dismiss the appeal in connection with its brief, alleging that this Court lacks

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<sup>1</sup> Sagres presented the following questions:

- I. Was Sagres’ reliance on the accuracy of a construction site drawing unreasonable, thereby undermining Sagres’ differing site conditions claim, when that drawing was provided by WSSC and wholly failed to indicate the presence of a concrete duct bank interfering with Sagres’ work?
- II. Did Sagres assume the risk that it would encounter an undisclosed concrete duct bank containing telecommunications lines at any location on a construction site, simply because WSSC disclosed to Sagres the existence of a telecommunications line (but not a concrete duct bank) at a different location on the site?
- III. Was WSSC estopped from relying on a general waiver of liability for rock-related site conditions where WSSC provided an erroneous subsurface conditions report which did not show rock on the

jurisdiction. As set forth more fully herein, we agree with WSSC that we lack jurisdiction and grant the motion to dismiss.

### **BACKGROUND**

In January 2015, WSSC<sup>2</sup> issued a solicitation to enter into an indefinite delivery, indefinite quality contract<sup>3</sup> for water main replacements and relocations located in Montgomery County and Prince George’s County. Sagres, a contractor that specializes in construction excavation and pipe laying and replacement, was one of the awardees under the solicitation. Sagres subsequently submitted a bid for the project. In March 2018, WSSC notified Sagres that it was selected as the winning bidder and awarded Sagres the contract for \$1,275,960.50. The Notice to Proceed date was April 2, 2018.

The contract documents included General Conditions, drawings, specifications, and a soil report. Article 17, titled “Changed Conditions,” sets forth the following:

17.1 The Contractor shall within 7 days, and before such conditions are disturbed, except in the event of an emergency, notify the Engineer by Written Notice of:

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construction site, specifically stated that the report was made for this project site, and did not provide Sagres with sufficient time to verify subsurface conditions itself?

<sup>2</sup> WSSC is a bi-county entity that governs the Washington Suburban Sanitary District and primarily provides “the public water supply and sewerage collection and treatment services for Montgomery and Prince George’s Counties.” *Washington Suburban Sanitary Comm’n v. Phillips*, 413 Md. 606, 630 (2010); *see* Md. Code Ann., Pub. Util. §§ 16-101(k), 17-101.

<sup>3</sup> Procurement contracts with WSSC are governed by §§ 20-101 to 20-105 of the Public Utilities Article and § 6.15 of the WSSC Code of Regulations. *See* WSSC Code of Regulations § 6.15 (Nov. 17, 2021), <https://wssc.district.codes/Code/6.15>.

- 17.1.1 Subsurface or latent physical conditions at the site differing materially from those indicated in the Contract Documents; or
- 17.1.2 Unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered, and generally recognized as inherent in Work of the character provided for in the Contract Documents.
- 17.1.3 The provisions of 17.1.1 and 17.1.2 *shall not apply to rock and/or water conditions* that may be encountered during the construction of this Project. The provisions set forth in General Conditions, Article 18, “Physical Data,” or the appropriate sections of the Contract Documents, including Drawings and/or Specifications shall be applicable.

(emphasis added).

Article 18 of the General Conditions, titled “Physical Data,” states, in part, that “[e]ach Bidder shall determine to their own satisfaction the actual subsurface conditions including the character and type of soil and other material he will encounter in the Work to be done under the Contract” and that WSSC “will not be responsible for the completeness [of the soil report], nor for any deductions, interpretations or conclusions drawn therefrom, including specifically the physical conditions between boring locations.” Pursuant to Article 32, titled “Claims and Disputes,” any claim or dispute by Sagres against WSSC is governed by WSSC Procurement Regulation § 6-104.01, which

added § 6.15.560 of the WSSC Code of Regulations governing “[c]ontract dispute resolution.”<sup>4</sup>

During the project, Sagres encountered two underground site conditions: an underground Verizon utility duct bank and subsurface rock and boulders. Sagres subsequently instituted administrative proceedings to recoup additional expenses and work time related to the additional excavation required to address the underground conditions.

***Administrative Proceedings Before the Engineer***

Pursuant to the contract documents and § 6.15.560 of the WSSC Code of Regulations, Sagres submitted two claims to the designated Engineer for additional payment and time extensions related for extra work it performed related to the subsurface conditions: Claim II (Duct Bank) and Claim IV (Rock Excavation).

As to Claim II, Sagres alleged that the duct bank was a changed condition and sought \$17,431.12 and a four-day extension for the additional excavation for a water main under the duct bank. In its Final Decision on Claim II, the Engineer noted that Sagres had “already been fully compensated for their work in this area” and “WSSC is not responsible for any additional compensation required because Sagres failed to take the necessary precautions.” The Engineer determined that encountering the duct bank was not a changed condition because the duct bank was marked on the plans WSSC

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<sup>4</sup> See WSSC Code of Regulations § 6.15.560 (Nov. 17, 2021), <https://wssc.district.codes/Code/6.15.560>.

provided to Sagres and Sagres failed to test pit in accordance with the contract documents. The Engineer denied Claim II.

As to Claim IV, Sagres alleged that the subsurface rock conditions that it encountered constituted a differing site condition and sought \$217,586.17 and a 31-day extension. In its Final Decision on Claim IV, the Engineer determined that Sagres “failed to properly investigate soil conditions prior to construction” and that “the rock and hard materials were identified in the contract documents.” The contract documents “provided soil boring test results[,] which indicated rock and dense material was present in the subsurface.” Even if rock conditions were not identified, the Engineer noted that the contract documents “explicitly state that the presence of rock does not represent a change of conditions.” The Engineer denied Claim IV.

***Administrative Proceedings Before the Chief Procurement Officer***

Sagres subsequently appealed the Engineer’s final decisions by filing a written appeal to WSSC’s Chief Procurement Officer. In its written appeal of Claim II, Sagres argued that the duct bank qualified as a Type I differing site condition.<sup>5</sup> As to Claim IV,

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<sup>5</sup> In Maryland, “[u]nder all of the standard contract clauses, unforeseen site conditions are categorized as either Type I or Type II.” Maryland State Bar Association, *Maryland Construction Law Deskbook* 113 (2d ed. 2017). “With small variations, the standard contract clauses generally describe Type I conditions as subsurface or latent physical conditions at the site differing materially from those indicated in the contract.” *Id.* “There is also little variation in how the different standard contract clauses describe Type II conditions. The clauses generally describe Type II conditions as unknown physical conditions at the site.” *Id.* at 115.

Article 17.1.1 of the General Conditions—“[s]ubsurface or latent physical conditions at the site differing materially from those indicated in the Contract Documents”—reflects a Type I differing site condition. Article 17.1.2—“[u]nknown

Sagres asserted that the rock qualified as a Type II differing site condition under Article 17. It further claimed that the limitations in Article 17.1.3—that rock does not qualify as a Type I or Type II differing site condition—is against Maryland law and public policy and, consequently, is not enforceable.

The Chief Procurement Officer informed Sagres and the Engineer that she wished to hold an “informal hearing” on the claims. The “informal hearing,” however, was postponed due to the coronavirus pandemic, and the Engineer and Sagres ultimately requested that the “informal hearing” be waived. The Chief Procurement Officer granted the joint request and subsequently issued two Final Decisions and Orders.

In the Final Decision on Claim II, the Chief Procurement Officer analyzed whether the duct bank qualified as Type I differing site condition. To determine whether Sagres was entitled to additional compensation, Sagres had the burden of proving, by the preponderance of the evidence, the following six elements:

1. the solicitation affirmatively indicated or represented the subsurface conditions which form the basis of the claim;
2. it acted as a reasonable, prudent contractor in interpreting the solicitation;
3. it reasonably relied upon the indications of subsurface conditions contained in the solicitation;
4. the subsurface conditions actually encountered differed materially from those indicated in the solicitation;
5. the actual subsurface conditions must have been reasonably unforeseeable; and

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physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered, and generally recognized as inherent in Work of the character provided for in the Contract Documents”—reflects a Type II differing site condition.

6. its claims for excess costs must be shown to be solely attributable to the materially different subsurface conditions.

*See Weeks Dredging & Contracting, Inc. v. United States*, 13 Cl. Ct. 193, 218 (1987) (listing the six elements of a Type I differing site condition). The Chief Procurement Officer determined that Sagres met its burden for the first element, but it failed to prove the second element that it “acted as a reasonable, prudent contractor in interpreting the solicitation.” The Chief Procurement Officer explained that the “[c]ontract [d]rawings placed Sagres on notice of the existence of an underground utility line” and the contract documents “required Sagres to take necessary precautions and protect underground utility lines.” The Chief Procurement Officer declined to address elements three to six. The Chief Procurement Officer denied Claim II and affirmed the Engineer’s final decision.

In the Final Decision on Claim IV, the Chief Procurement Officer first observed that, at common law, contractors bore the risk of unforeseen site conditions. It noted that the Maryland Board of Public Works later promulgated a rule requiring “an unforeseen site conditions clause in all Maryland state construction contracts.” The Chief Procurement Officer explained, however, that such a “mandatory clause” is not applicable to WSSC because it only applies to entities subject to the General Procurement Law of the State Finance and Procurement Article.<sup>6</sup> The Chief Procurement Officer

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<sup>6</sup> The Chief Procurement Officer explained that WSSC is not governed by the State Finance and Procurement Article because WSSC is not a “unit” of State government. A “unit” does not include a “bicounty . . . governmental agency,” “sanitary district,” or “water supply district.” *See* Md. Code Ann., State Fin. & Proc. §§ 11-



concluded that “WSSC was not required by law to have a specific ‘differing site conditions’ clause . . . or to even have a ‘differing site conditions’ clause in the Contract.” Under the principles of freedom of contract, WSSC was permitted to exempt rock conditions from Article 17 and “Sagres agreed to assume the risks associated with encountering rock and forego filing a claim for alleged unforeseen conditions related to encountering rock.” The Chief Procurement Officer determined that “Article 17 and Article 18 of WSSC’s General Conditions are neither illegal [n]or against public policy” and that rock does not qualify as a Type I or Type II differing site condition, pursuant to Article 17.1.3. The Chief Procurement Officer denied Claim IV and affirmed the Engineer’s final decision.

The Chief Procurement Officer’s final decisions also notified Sagres of its right to appeal<sup>7</sup>:

You are advised you have the right to appeal this Final Decision and Order pursuant to WSSC Code of Regulations, Title 6, Chapter 6.15.560(a)(8). You may appeal this Final Decision and Order via an administrative mandamus action

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101(y)(2), 11-202. WSSC is a bicounty governmental agency, a sanitary district, and a water supply district.

<sup>7</sup> WSSC Code of Regulations § 6.15.560(a)(7) instructs:

*Final Decision.* If the internal appeal is not settled, the Chief Procurement Officer will issue a final decision in writing within 45 days after receipt of the Engineer’s written response or within 60 days of the conclusion of an informal hearing. The final decision shall:

- (i) State the reasons for the action taken; and
- (ii) Inform the contractor of his right to appeal to circuit court the written decision pursuant to subsection (a)(8) of this section.

filed in the Circuit Court for Montgomery County or Circuit Court for Prince George’s County pursuant to [Maryland] Rules, Rule 7-402, et. seq. within thirty (30) days of the date of this Final Decision and Order.

***Circuit Court Proceeding***

After the Chief Procurement Officer issued the final decisions, Sagres appealed to the Circuit Court for Montgomery County by filing a Petition for Administrative Mandamus, which was submitted pursuant to Maryland Rules 7-401, 7-402, and 7-403. In filing its petition, Sagres relied on the appeal procedure set forth in § 6.15.560(a)(8) of the WSSC Code of Regulations:

*Appeal to Court.* The contractor may appeal the final decision to the Circuit Court for Montgomery County or the Circuit Court for Prince George’s County *under the Maryland rules governing administrative mandamus actions.*

(second emphasis added).

In its memorandum in support of its petition, Sagres petitioned the circuit court “for judicial review and administrative mandamus.” Sagres stated that the underground subsurface conditions “caused [it] a significant loss of planned labor productivity and realized revenue and have required [it] to acquire and employ additional manpower and equipment, all at Sagres’s sole expense” and that it “had substantial rights prejudiced by . . . WSSC’s arbitrary, capricious, and otherwise unsupported denials of its claims.”

Regarding Claim II, Sagres argued that the Chief Procurement Officer’s Final Decision “was not based on substantial evidence and should be reversed because it prejudiced [Sagres’] substantial right to payment for the performance of its Work on the

Contract.” Sagres further contended that the Chief Procurement Officer’s decision not to analyze the remaining four factors “was arbitrary and capricious and not based on substantial evidence” and that Sagres “suffered prejudice as a result of the denial of a comprehensive analysis on the merits of Claim II.” In its prayer for relief, Sagres asked the court to “reverse” the Chief Procurement Officer’s Final Decision, “order WSSC to pay Sagres \$17,431.12,” and “grant a four (4) day time extension.” Alternatively, Sagres asked the court to remand for further proceedings.

As to Claim IV, Sagres similarly argued that the Chief Procurement Officer’s Final Decision “was arbitrary and capricious and was unsupported by competent, material, and substantial evidence.” Sagres claimed that the decision was “wrong as a matter of law and should be reversed because it prejudiced [Sagres’] substantial right to payment for the performance of significant additional work on the Contract.” Specifically, Sagres contended that the differing site conditions clauses in the contract documents were unenforceable as a matter of law and that it acted as a reasonably prudent contractor. For relief, Sagres asked the court to “reverse” the Chief Procurement Officer’s Final Decision, “order WSSC to pay Sagres \$217,586.17,” and “grant a thirty-one (31) day time extension.” In the alternative, Sagres asked the court to remand for further proceedings.

In its answering memorandum, WSSC argued that the Chief Procurement Officer’s Final Decisions satisfied the substantial evidence test because the “conclusions [are] rationally supported by the evidence in the Administrative Record” and a “reasoning

mind” could have reached such conclusions. WSSC also asserted that the Chief Procurement Officer’s conclusions “are not the result of an error of law [and are not] arbitrary or capricious.” As to Claim II, WSSC argued that Sagres did not meet its burden of proof in establishing a differing site condition during the administrative proceedings and that it was not arbitrary or capricious for the Chief Procurement Officer to not analyze all six elements of an unforeseen conditions claim. As to Claim IV, WSSC asserted that the Chief Procurement Officer’s determination—that Sagres could not maintain an unforeseen conditions claim under the contract—was the only issue addressed by the Chief Procurement Officer and the merits of Claim IV were not properly before the court on judicial review. WSSC asked the court “to issue an Order denying the Writ of Mandamus.” Sagres subsequently filed a reply memorandum.

The court held oral argument on February 5, 2021. In its Memorandum Opinion and Order, the court affirmed the Chief Procurement Officer’s final decisions. This appeal followed. WSSC moved to dismiss this appeal for lack of jurisdiction. Additional facts will be provided as necessary.

## **DISCUSSION**

In its motion to dismiss, WSSC argues that this Court lacks jurisdiction over this appeal. Specifically, WSSC asserts that Sagres has no basis to appeal under § 12-301 of the Courts and Judicial Proceedings Article and that this appeal does not fall under this Court’s jurisdiction to review common law and administrative mandamus actions. Conversely, Sagres contends that the circuit court proceeding was an administrative

mandamus action under Rule 7-401 and that this Court exercises original jurisdiction over such actions.

## **I. APPELLATE JURISDICTION**

We begin by addressing the principles and law governing appellate jurisdiction. “The right to an appeal is not a right required by due process of law, nor is it an inherent or inalienable right.” *Mayor & City Council of Baltimore v. ProVen Mgmt., Inc.*, 472 Md. 642, 664-65 (2021) (quoting *Crim. Injuries Comp. Bd. v. Gould*, 273 Md. 486, 500 (1975)). Instead, “unless constitutionally authorized, appellate jurisdiction ‘is determined entirely by statute,’ and therefore, a right of appeal only exists to the extent that it has been ‘legislatively granted.’” *ProVen*, 472 Md. at 665 (quoting *Gisriel v. Ocean City Bd. of Supervisors of Elections*, 345 Md. 477, 485 (1997)).

Courts and Judicial Proceedings § 12-301 grants parties a general right of appeal to this Court “from a final judgment entered by a [circuit] court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law.” Section 12-302 of the Courts and Judicial Proceedings Article, however, limits the right to appellate review. Specifically, § 12-302(a) provides: “Unless a right to appeal is expressly granted by law, § 12-301 . . . does not permit an appeal from a final judgment of a [circuit] court entered or made in the exercise of appellate jurisdiction in reviewing the decision of . . . an administrative agency[.]”

Put another way, “a party can obtain appellate review of a circuit court decision concerning the propriety of an agency action provided that the circuit court is deemed to have been exercising *original*, rather than appellate, jurisdiction.” Kevin F. Arthur, *Finality of Judgments and Other Appellate Trigger Issues* 118 (3d ed. 2018) (emphasis added). Conversely, if “the circuit court is deemed to have been exercising *appellate* jurisdiction, as when a statute or ordinance describes the right of review in the circuit court as an appeal, an aggrieved party has no further right of appeal to the Court of Special Appeals.” *Id.* (emphasis added).<sup>8</sup>

**A. Judicial Review of Administrative Agency Decisions Pursuant to the Title 7, Chapter 200 Rules**

When an administrative agency grants the right to appeal to the circuit court, Chapter 200 of Title 7 of the Maryland Rules apply.<sup>9</sup> The Title 7, Chapter 200 Rules do not independently grant a right of appeal to the circuit court, but instead “govern actions

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<sup>8</sup> The Court of Appeals has explained that “appellate” jurisdiction under § 12-302(a) is a “misnomer.” *Kant v. Montgomery County*, 365 Md. 269, 274 (2001). A “circuit court action reviewing the adjudicatory decision of an administrative agency . . . is not an ‘appeal.’ Instead, it is an original action for judicial review.” *Id.* Section 12-302(a) “refers to an original circuit court action, authorized by statute, judicially reviewing an adjudicatory decision of an administrative agency . . . when it acts in a quasi-judicial capacity.” *Id.* (quoting *Prince George’s County v. Beretta U.S.A. Corp.*, 358 Md. 166, 175 (2000)).

<sup>9</sup> We additionally note that while WSSC is a State agency under the Administrative Procedure Act (“APA”), *Phillips*, 413 Md. at 631, the APA does not create a basis for appellate jurisdiction in this case because the administrative proceeding was not a “contested case.” *See* Md. Code Ann., State Gov’t § 10-202(d)(1) (stating that a “[c]ontested case” is a proceeding in which “a right, duty, statutory entitlement, or privilege of a person” or “the grant, denial, renewal, revocation, suspension, or amendment of a license” is “required by statute or constitution”).

for judicial review of . . . an order or action of an administrative agency, *where judicial review is authorized by statute.*” Md. Rule 7-201(a) (emphasis added). The party seeking judicial review must file a petition within 30 days of the agency’s order, *see* Md. Rules 7-202, 7-203, and “assert[] that the decision is unsupported by substantial evidence and is arbitrary and capricious.” *ProVen*, 472 Md. at 670.

The matter is heard on the record and the parties submit written memoranda pursuant to Rules 7-206 and 7-207. After a hearing, which may be waived by the parties in writing, the court may: (1) “dismiss the action for judicial review,” (2) “affirm, reverse, or modify the agency’s order or action,” (3) “remand the action to the agency for further proceedings,” or (4) may order relief that is “an appropriate combination of the above.” Md. Rules 7-208, 7-209.

“The scope of judicial review of administrative agency decisions is limited.” *ProVen*, 472 Md. at 667. When a court reviews an agency’s factual findings, it applies the substantial evidence test, “which has been defined as ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512 (1978)). In applying that test, a court does not substitute its judgment for the expertise of the agency but instead “review[s] the agency’s decision in the light most favorable to the agency.” *ProVen*, 472 Md. at 667. A court, however, is not constrained when “reversing an administrative decision which is premised solely upon an erroneous conclusion of law.” *Id.* (quoting *People’s Couns. for Baltimore County v. Md. Marine Mfg. Co.*, 316 Md. 491, 497 (1989)). While conducting

statutory judicial review of an agency action, “the court may not uphold the agency order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.” *ProVen*, 472 Md. at 667 (quoting *United Steelworkers of America AFL-CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984)). Likewise, “judicial review cannot occur in the absence of an administrative agency’s stated findings of fact and conclusions of law to support its decision.” *ProVen*, 472 Md. at 668-69 (noting that “where the administrative decision or order fails to supply detailed findings of fact or conclusions of law, the appropriate disposition is for the reviewing court to remand the matter to the administrative agency for further proceedings”).

**B. Administrative Mandamus Actions Pursuant to the Title 7, Chapter 400 Rules**

Where there is no statutorily authorized right to judicial review, two types of mandamus actions arise: common law mandamus and administrative mandamus. “Common law mandamus seeks the judicial enforcement of ministerial non-discretionary acts.” *ProVen*, 472 Md. at 669 n.9. “[W]here the exercise of discretion is permitted, mandamus ordinarily will not lie.” *Wilson v. Simms*, 380 Md. 206, 223-24 (2004).

Administrative mandamus, which is the focus of our discussion, “is a remedy that authorizes judicial review of administrative decisions ‘where there is both a lack of an available procedure for obtaining review *and* an allegation that the action complained of is illegal, arbitrary, capricious or unreasonable.’” *ProVen*, 472 Md. at 669 n.9 (quoting *Wilson*, 380 Md. at 228). In other words, administrative mandamus “serves as a substitute for an action for judicial review under Md. Rule 7-201, et seq., when neither



statute nor local law creates a right of judicial review of a quasi-judicial order or action of an administrative agency.” *Reese v. Dep’t of Health & Mental Hygiene*, 177 Md. App. 102, 144 n.21 (2007).<sup>10</sup>

Maryland Rules 7-401, 7-402, and 7-403 govern administrative mandamus actions in the circuit court. Rule 7-401(a) provides that “[t]he rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency *where review is not expressly authorized by law.*” (emphasis added). A Committee Note to Rule 7-401 further emphasizes that administrative mandamus “is an appropriate remedy . . . only when no other right of appeal is provided by state or local law.” Such an action “is commenced by the filing of a petition, the form, contents, and timing of which shall comply with Rules 7-202 and 7-203.” Md. Rule 7-402(a). After the filing of such a petition, the court may hold a hearing. Md. Rule 7-402(f).

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<sup>10</sup> Indeed, this Court has explained “[t]he key difference between . . . an action . . . for administrative mandamus and a petition for judicial review of agency action” as follows:

A petition for judicial review under Title 7, Chapter 200 of the Maryland Rules is authorized when judicial review of an “order or action” of an agency is authorized by statute. Md. Rule 7-201(a). On the other hand, an administrative mandamus action is authorized to review a “quasi-judicial order or action” of an agency when review “is not expressly authorized by law.” Md. Rule 7-401(a).

*O’Brien v. Bd. of License Comm’rs for Washington County*, 199 Md. App. 563, 577 (2011).

In disposing of the petition, “[t]he court may issue an order denying the writ of mandamus” or “may issue the writ . . . remanding the case for further proceedings.” Md.

Rule 7-403. Alternatively, the court may issue the writ:

[R]eversing or modifying the decision if any substantial right of the plaintiff may have been prejudiced because a finding, conclusion, or decision of the agency:

- (A) is unconstitutional,
- (B) exceeds the statutory authority or jurisdiction of the agency,
- (C) results from unlawful procedure,
- (D) is affected by any error of law,
- (E) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted,
- (F) is arbitrary or capricious, or
- (G) is an abuse of its discretion.

Md. Rule 7-403. In other words, for a court to issue a writ reversing or modifying the agency’s decision, it must find that a substantial right of the plaintiff was prejudiced due to one of the reasons listed above. *Id.*

## **II. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL.**

We now apply the principles set out above to the instant case. In its motion to dismiss, WSSC argues that the proceeding before the circuit court was not an administrative mandamus action because review in the circuit court was authorized by the WSSC Code of Regulations. Conversely, Sagres maintains that the proceeding below was an administrative mandamus action and that it followed the appeal procedure set forth by the WSSC Code of Regulations.

**A. The WSSC Code of Regulations Statutorily Authorized Judicial Review.**

“[C]ourts have the inherent power to take action ‘invoking the original jurisdiction of the circuit court, through the writ of mandamus, by injunction, declaratory action, or by certiorari.’” *Maryland-Nat’l Cap. Park & Plan. Comm’n v. Anderson*, 179 Md. App. 613, 629 (2008) (quoting *Armstrong v. Mayor & City Council of Baltimore*, 169 Md. App. 655, 667 (2006)). Administrative mandamus, however, “may not be utilized when the statutory right of judicial review is available.” *ProVen*, 472 Md. at 669 n.9 (quoting *State Dep’t of Assessments & Tax’n v. Clark*, 281 Md. 385, 402 (1977)).

Here, there was a statutory basis for the circuit court’s review of the Chief Procurement Officer’s final decisions. We first note that the WSSC Code of Regulations have “the force and authority of law” pursuant to the Public Utilities Article. Md. Code Ann., Pub. Util. § 17-403(a), (c) (stating that WSSC “may adopt regulations to carry out the provisions of this division and any other laws the administration and enforcement of which are vested in [WSSC]”). Section 6.15.560(a)(7) of the WSSC Code of Regulations instructs the Chief Procurement Officer to inform Sagres of its “right to appeal to circuit court . . . pursuant to subsection (a)(8).” In turn, § 6.15.560(a)(8) provides:

*Appeal to Court.* The contractor may *appeal* the final decision to the Circuit Court for Montgomery County or the Circuit Court for Prince George’s County *under the Maryland rules governing administrative mandamus actions.*

(second and third emphasis added).

This regulation provides a statutory path for judicial review in the circuit court because it grants a right to “appeal” to the circuit court and has the force of law. *See* Pub. Util. § 17-403(a), (c). Even though the regulation states that Sagres may appeal “under the Maryland rules governing administrative mandamus actions,” the administrative mandamus rules under Title 7, Chapter 400 only apply “where review is not expressly authorized by law.” Md. Rule 7-401(a).<sup>11</sup> Because the circuit court reviewed an administrative agency decision pursuant to its statutory authority under § 6.15.560(a)(8), it exercised appellate jurisdiction when it reviewed Sagres’ claims. *See Ross Contracting, Inc. v. Frederick County*, 221 Md. App. 564, 576 (2015) (“A circuit court exercises ‘appellate jurisdiction’ when it reviews an administrative agency’s decision pursuant to statutory authorization.” (quoting *Gisriel*, 345 Md. at 492)). Administrative mandamus may not be utilized because there was a procedure for obtaining review. *See ProVen*, 472 Md. at 669 n.9 (“Our case law is clear that the ‘inherent power of a court to review an administrative agency’s determination,’ i.e., administrative mandamus, ‘may not be utilized when the statutory right of judicial review is available.’” (quoting *Clark*, 281 Md. at 402)); *see also O’Brien v. Bd. of License Comm’rs for Washington County*, 199 Md. App. 563, 580 (2011) (determining administrative mandamus was not an available remedy where a statute authorized judicial review); *City of Annapolis v. Bowen*,

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<sup>11</sup> During oral argument, WSSC admitted that its regulation “is mislabeled” and “acknowledge[d] that it confused the issue” and “could be written better.” It appears that WSSC may have meant to refer to the Title 7, Chapter 200 Rules. Although the wording of WSSC’s regulation could have been clearer, and WSSC may consider revising it in the future, the intent of its regulation was clear.

173 Md. App. 522, 534 (“Administrative mandamus is used to secure a circuit court’s review of an administrative agency’s adjudicatory decision where no agency code or other law provides for such review.”), *aff’d in part and rev’d in part on other grounds*, 402 Md. 587 (2007).

Accordingly, the proceeding in the circuit court, was “in both form and substance” a statutory judicial review action arising under the WSSC Code of Regulations, not an administrative mandamus action. *ProVen*, 472 Md. at 664. Sagres received judicial review of its claim and another review by this Court is not proper. Because there was a statutory basis for judicial review, § 12-302 applies and review ends in the circuit court. *See Madison Park N. Apartments, L.P. v. Comm’r of Hous. & Cmty. Dev.*, 211 Md. App. 676, 691, 696 (2013) (“[W]hen a statute provides for judicial review of an administrative decision by the circuit court, pursuant to [Courts and Judicial Proceedings] § 12-301, then that is where the review ends.”). Thus, we do not have jurisdiction to review the Chief Procurement Officer’s final decisions.<sup>12</sup>

**APPELLEE’S MOTION TO DISMISS  
GRANTED. COSTS TO BE PAID BY  
APPELLANT.**

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<sup>12</sup> In the alternative, even if the proceeding in the circuit court was an administrative mandamus action, this Court still would not have jurisdiction over this appeal. *See Gray v. Fenton*, 245 Md. App. 207, 213 (2020) (citation omitted) (“[E]ven where applicable, administrative mandamus provides an avenue for a litigant to obtain a circuit court’s review of an adjudicatory decision by an administrative body. Administrative mandamus does not authorize this Court’s direct review of a decision by an administrative body.”). Section 6.15.560(a)(8) of the WSSC Code of Regulations does not provide for any review beyond the circuit court and Sagres does not identify any other statutory provision authorizing its appeal to this Court.