The Circuit Court for Baltimore City
Case No. 24-C-17-004805

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 610

September Term, 2018

---

IN THE MATTER OF THE PETITION OF
PROVEN MANAGEMENT, INC.

---

Fader, C.J.,
Graeff,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

---

Opinion by Eyler, J.

---

Filed: January 10, 2020

This appeal arises out of a contract dispute between ProVen Management, Inc. ("ProVen"), appellant, and the Mayor and City Council of Baltimore ("the City"), appellee, specifically, the City's Department of Public Works ("the Department"). The parties entered into a contract pursuant to which ProVen agreed to clean approximately 12,000 linear feet of the City's sewer lines. The project did not proceed as originally contemplated. ProVen submitted to the Department claims for additional time and compensation pursuant to the contract's dispute clause. The Department's Office of Engineering and Construction ("OEC"), reviewed ProVen's claims, initially by a supervisor then by its Chief, and denied its requests for additional compensation, but recommended 15 days of additional non-compensable time. ProVen appealed the decisions of the OEC to the Director of the Department. After a hearing on June 29, 2017, the Director issued a final decision affirming the OEC's denials of ProVen's claims.

ProVen filed in the Circuit Court for Baltimore City a Petition for Judicial Review with respect to three of its claims for compensable delay. A hearing was held on May 2, 2018. In a written order filed on May 8, 2018, the circuit court affirmed the Department's decision, finding that it "was neither arbitrary nor capricious," was "supported by substantial evidence," and that there was no error of law. This appeal followed.

## ISSUES PRESENTED

Appellant presents the following issues for our consideration:

I. Whether the Department's final administrative decision provided a sufficient determination of questions of fact as required under the law;

II. Whether the Department's administrative process violated ProVen's due process rights under the law;

III. Whether the Department's final decisions as to ProVen's hazardous material, work stoppage and work hours, and unanticipated field conditions claims were arbitrary and capricious, unsupported by substantial evidence on the record, and based on errors of law; and,

IV. Whether the Department's final decision eliminating previously agreed-upon extensions of contract time was arbitrary or capricious, unsupported by substantial evidence on the record, constitutes a violation of due process under the law, or constitutes an error of law.

The City filed a motion to dismiss the appeal for lack of jurisdiction. For the reasons set forth below, we shall (1) deny the motion to dismiss; (2) neither affirm nor reverse, but (3) remand this case to the circuit court with instructions to remand the case to the agency for further proceedings and the filing of a decision that complies with ministerial requirements.

## PROCEDURAL AND FACTUAL BACKGROUND

The basic facts giving rise to this appeal are not in dispute, but we shall discuss them in some detail in order to provide context to explain our decision to remand the case. On or about April 23, 2014, ProVen entered into a contract with the City to clean sediment and debris from more than 12,000 linear feet of underground sewer lines that run from North Schroeder and West Lexington Streets to North Wolfe and East Chase Streets. The work was to be performed according to the Department's detailed design specifications and drawings. Bidders on the contract were advised of the conditions they might encounter in the sewer lines and were provided sonar sediment profiles showing the volume of debris that could be expected. Bidders were also instructed that they could assume that the unit

weight of extracted material would be 0.9 tons per cubic yard, based on a similar sewer cleaning project that had occurred in Baltimore City.

The contract divided the sewer lines to be cleaned into 37 segments, 21 of which were west of Greenmount Avenue and 16 of which were east of Greenmount Avenue. Sewage flowed in the sewer lines from west to east. Pursuant to the contract, the contractor was to use special equipment to push the debris down the sewer line to the end of each segment, where it would be extracted through a manhole and transported to a waste management facility.

The contract restricted roadway and lane closures during daytime hours, provided 365 days for completion, and stated that time was of the essence. It also provided for compensable time extensions for changes in the work made by the Department. ProVen was awarded the contract. The Department issued a notice to proceed with the work on July 29, 2014, and July 30, 2015 was set as the completion date.

The parties agree that the project did not go well. For example, on or about October 10, 2014, ProVen encountered hazardous waste material and a suspension of work order was issued by the City. The parties developed testing procedures to be used throughout the duration of the contract and ProVen returned to work about 38 days later. On April 15, 2015, ProVen requested permission to work on certain west side segments during daytime hours and the Department approved that request in June 2015. On July 31, 2015, the Department ordered ProVen to cease working at night on the west side of the project because a complaint had been made about the noise level. On the east side of the project, ProVen encountered a large amount of rags in the extracted material, which were more

difficult to remove than the typical sediment. The Department did not issue conditional acceptance of the work until December 12, 2016.

Throughout the project, the Department made several adjustments in time and compensation, but ProVen asserted that it was entitled to additional compensation and time extensions. ProVen submitted to the OEC 13 claims requesting 392 compensable days and 232 non-compensable days. It calculated the total cost of the compensable days to be $1,680,540.09. On initial review, the OEC granted ProVen a 15-day non-compensable extension, but denied the remaining claims.

By letter dated March 21, 2017, ProVen appealed the decision to the Chief of the OEC. On May 23, 2017, Acting Chief of the OEC, Azzam Ahmad, found "no grounds to change OEC's denial of the claim[,]" but agreed to approve "a total of 15 non-compensable calendar days" so as to extend the authorized completion date of the project from September 21, 2015 to October 6, 2015. Mr. Ahmad advised ProVen that the City was "considering and reserving the right to access [sic] liquidated damages in the amount of $500.00 per day as detailed in the contract documents. The liquidated damages from the October 6, 2015 completion date to the actual completion date of December 12, 2016 total $216,500.00."

### A. Hearing Before Director Chow

ProVen appealed the OEC's determination to the Department's Director, Rudolph Chow. A hearing was held before Director Chow on June 29, 2017. Director Chow began the hearing by stating:

> Okay. Good morning everybody. Thank you for coming in. Let me just explain a bit about the ground rules first, all right. So I don't intend this to be a long drawn out argument going back and forth, right, because I do have what I call all the information, the exchange, hearings or discussions or email exchanges and all that – all the background information here.
>
> Now, if either side feels that additional information needs to be provided to me for consideration, please do so during this hearing. I will not be accepting any additional supplemental information afterwards.
>
> Are we clear on that? That means the only thing that I'm going to consider is what I have. So if you're not sure I have everything, make sure you give me everything, all right, because after today I will be rendering a decision based on what I have.

Counsel for ProVen asked if the parties would have an opportunity to review the material contained in a "fancy book" that the Department had prepared for Director Chow, and the Director asked the Department to provide a copy to counsel. Counsel for ProVen commented on the record that the book contained "just the claim and then [the Department's] letter."

The Director explained how the hearing would proceed, stating:

> Okay. So this is how it's going to go, right, six steps. We're going to start with you making an opening statement, right, basically to whatever – say anything you need to say stating why you feel this is worth it, right. And follow with the City side making an opening statement.
>
> And then you will have an opportunity, as a third stop, sort of rebut against some of the things that the City has said. And the fourth step is City will have an opportunity to rebut some of your opening statement. Then we go into closing statement with you going first and City going last. Pretty simple six steps, right?
>
> Like I said, make sure everybody is clear, if you need me to review any information, by all means, give it to me today. I have all the history here, right, and I'll be rendering my decision based on what is here. Are we good?

Counsel for ProVen questioned whether the parties would have a chance to review the transcript of the hearing and submit a summary statement, and the Director denied that request, stating:

> No. So what I'm saying today, this is the time for you to make your case because I don't want this to be a long drawn out. [sic] I don't want this comes back, you revise it, you want to supplement additional questions then I got to get the City to review it and then there's no end in sight. I want to be able to draw a conclusion on this based on today's hearing. That's why I'm sort of taking that stance is that – make sure anything you want to say today, this is the time to say it.
>
> But I don't want to get into the details about the actual – the claim itself because I have all the information here, right. I will be rendering my decision based on facts. But if you are uncertain that I have certain facts, by all means, let me have it.

The Director asked counsel for ProVen if he had a "file copy" to submit for his consideration and counsel replied:

> Ordinarily, my experience is when an agency decision is issued, which it is here, the agency puts into the record the formal pleadings, the formal papers, the contract, whatever else has happened. But again, there's no – that's how – that's my experience, but there's no rules or regulations here.
>
> All I'm saying – all I'm suggesting, Director Chow, is that we believe that if this is the exchange that has occurred, we have no objection to everything that's in here being a part of the record. We just request an opportunity at the end of the hearing because it's pretty difficult to do as we're speaking and making a presentation to make sure that what we have is what's in here. (Inaudible) and it will only take five minutes to look through it. That's all I'm asking for.

The Director responded, "That's fine."

Counsel then clarified that ProVen's issue on appeal was essentially that there was a differing site condition in that a physical condition existed at the work site that differed

"materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract, which is to say it's something that nobody expected to find." As a result of the differing site condition, ProVen requested an adjustment to the contract either in time or compensation.

Ben Hermann, a project manager for ProVen, presented the opening statement on behalf of the company. He argued that neither the City nor ProVen knew what would be discovered in the pipeline before the work began, and that ProVen had to use far more manual labor to remove debris "than could be reasonably expected at the inception of the contract." He acknowledged that ProVen was aware of the possibility of bulk items in the sewer pipes, but stated that workers encountered far more "rag content" than could be reasonably expected, which "required far more manual entry and basically rendered our normal cleaning equipment, you know, ineffective at times."

In addition, ProVen encountered additional delays due to severe pipe deterioration, problems with mobilizing equipment because the City had difficulty providing adequate parking, and an inability to work either 24-hour shifts or with multiple crews. At the conclusion of Mr. Hermann's opening statement, ProVen provided Director Chow with a written opening statement, an email that Mr. Hermann had referenced in his opening statement, a COMAR regulation, and a "segment-by-segment breakdown" giving the length and weight of material removed from each segment of sewer line. ProVen also provided the Director with a "scheduling breakdown" that showed the anticipated activity duration, the actual activity duration, and the actual material removed from each segment

along with notes detailing difficulties encountered and explanations for the longer durations.

Engineer Mohamad Alkhatib gave the opening statement for the City. He asserted that ProVen did not start working until four months after the notice to proceed was issued, that it fell behind on its work every month, that it failed to provide a second crew of workers in order to keep from falling behind schedule, and failed to catch up. Mr. Alkhatib pointed out that in February 2015, ProVen requested to work in additional segments and that, in response, the City allowed it to work in adjacent segments and encouraged the company to deploy another crew.

On rebuttal, Mr. Hermann explained that after ProVen received the notice to proceed with the work, it had to obtain "submittals for approval" which were required before work could begin. Director Chow commented on that testimony, stating, "[y]eah, but that all should be prior to" the notice to proceed with the work. According to Mr. Hermann, ProVen requested the ability to work 24 hours, which the City initially granted, but later rescinded. He stated that ProVen began work in September 2014, but then encountered hazardous waste in October and November 2014. In December 2014, Mr. Hermann requested permission to have multiple crews work in multiple areas. According to Mr. Hermann, it took until June 2015 to get his request approved and, once the approval was received, ProVen began working with multiple crews, one working evenings on the west side and another working during the day on the east side. In August 2015, the City ordered that evening work be stopped because a complaint had been made about the noise at night, notwithstanding that the contract stipulated the work hours were to be from 7 p.m.

to 6 a.m. After three to four weeks, the City provided substitute work hours during the day, but permitted ProVen to work only between 9 a.m. and 3 p.m. Mr. Hermann submitted a change order to the City for the time lost due to the change in hours. He explained:

> So I submitted a change order to the City for the additional time needed when comparing that smaller shift and the City rejected that change order and then told me that 9 a.m. to 3 p.m. shift was actually – they were doing me a favor because I was violating the noisy work clause and that 9 a.m. to 3 p.m. work was, you know, an olive branch to help me finish in time.
>
> So then I went back and forth with the City on those segments and I just went straight to DOT after, you know, six months of back and forth on the cost of those shortened shifts. I went just DOT myself and was able to open up the work hours from the ones that I got from the Office of Engineering and Construction. And so by that time we had finished work on the east side and we were able to continue on the west side.

Mr. Hermann explained that because of the nature of the work it was not possible to have multiple crews working in the same area. He did not "think there was ever a time when the City told [him he] needed multiple crews and [he] didn't supply them." He stated that he "tried to make every effort possible to work as many hours as possible."

ProVen challenged the City's assertion that there was an unreasonable delay between the time the notice to proceed with the contracted work was issued and the time the work commenced. Mr. Bill Gilmartin, a Vice President of ProVen, ProVen's counsel, and Corbin Marr, another representative of ProVen, made the following statements:

> MR. GILMARTIN: I have found a copy of notice to proceed that was signed by the chief contract administrator on July 25th, 2014 and so that is an inaccurate statement. Four months was inaccurate. Our start date was in September. We were issued notice to proceed on July 29th. So that is a month, one month, not four.
>
> [Counsel for ProVen]: And so the actual start date –

MR. GILMARTIN: The end of July, the last day of July.

[Counsel for ProVen]: So the actual start date was less then 40 days from the issuance of the NTP. That's perfectly reasonable.

[MR. MARR]: Yeah. My name is Corbin Marr. We attended the contract pre-construction meeting on Wednesday, July 30th of 2014. At that time our equipment was in use on another contract that had been engaged far before award on this contract. So when we came out to work was as very soon as it could possibly be done to complete the other work we had going. We also talked about this condition in the pre-construction meeting. Thank you.

[Counsel for ProVen]: But the point was that we – you know, we started less than 45 days after the NTP which is not irregular or unusual at all. It wasn't even near four months as had been suggested.

Immediately following this exchange, Director Chow stated that he wished to ask a "clarifying question" and the following exchange occurred:

DIRECTOR CHOW: So you're saying your equipment was at another job site that's not City's work, right?

MR. MARR: That's correct.

DIRECTOR CHOW: So that machine or the equipment was still being used by another job and is not readily available to start on the City's job until that job is wrapped up? Is that – did I hear that correctly?

MR. MARR: That was at – that was on September 30th. Or, excuse me, July 30th, 2014, our pre-construction meeting.

MR. HERMANN: That's right.

MR. MARR: We started the project in September.

MR. HERMANN: That's right.

DIRECTOR CHOW: So when did that machine become available?

MR. HERMANN: I would have to go back and have a look.

DIRECTOR CHOW: Okay. So just so we're all clear, from my perspective when you are awarded a contract, from the responsibility analysis we all understand very well, right, on contracting rules and regulations, when you bid on a job, your equipment should be readily available to start on the first day.

Just so we're all on the same page. Because I expect you guys to continue to work with us, the City, right, so we need to be on the same page. So as a director, I'm hearing that my equipment is not ready because that equipment is used by somebody else at another job site is not music to my ears.

MR. HERMANN: Understood.

MR. GILMARTIN: I'm not sure that that's the suggestion we were making.

DIRECTOR CHOW: That's why I asked that question. I gave you an opportunity to help me understand why is the equipment not readily available on the first day?

MR. GILMARTIN: NTP was issued on July 29th. We had our pre-construction meeting on the 30th of July. We started in September which is less than 45 days after NTP. I don't think anybody in this room would argue that we would be expected to start the job the day of NTP in the field.

DIRECTOR CHOW: But that was not my question. That was just a statement.

MR. GILMARTIN: Right.

DIRECTOR CHOW: So we're all on the same page.

MR. GILMARTIN: Understood. That's well understood, yeah.

Immediately following this exchange, the Director gave the City an opportunity to rebut ProVen's arguments. Mr. Alkhatib questioned Mr. Hermann about whether the contract permitted the cleaning of multiple segments at the same time. He responded that, according to the contract, it could be done with permission, but that ProVen did not use multiple crews to clean adjacent segments because, in his "professional opinion it's not an

effective way to clean sewers." Mr. Alkhatib asked whether, during the pre-bid meeting ProVen asked any questions or sought any clarification about cleaning multiple segments. Mr. Hermann stated that he did not and Mr. Gilmartin said he would have to review the bid documents to determine whether any questions had been submitted. Director Chow then commented:

> So which is a question we generally ask, right, during pre-bid. One of my typical questions is that during the pre-bid sort of meeting that were there any supplemental questions submitted and what were they and that was really the heart of the question. Were there any clarifying questions that ProVen need to have asked or not? That's okay. So I'm the only [sic] that get to ask cross-examination, let's put it that way. So I'm the king here, unfortunately, right, so let's play by that rule, all right?

The Director then asked each party to present a closing statement. ProVen stood by the claims it had submitted and argued that there was no evidence to contradict the conditions that it encountered, that the conditions were not reasonably anticipated, and that the relief it was seeking was reasonable and fair. The City argued that the contract stated exactly what might be encountered in the sewer pipes, that when the nighttime work was halted, ProVen was not "stopped completely from the work," and that it stood behind its response to ProVen's claims and its recommendation that ProVen be granted "only 15 non-compensable days."

Two months later, in a letter addressed to counsel for ProVen, Director Chow issued his decision. The letter included a section titled "Factual Background" which provided, in part:

> ProVen claims that it is entitled to payment of $1,680,540.09. ProVen asserted that it encountered a differing site condition which caused the delay. However, in the appeal, ProVen acknowledged that the contract documents

state that the Contractor could expect any type of material to be found during the cleaning operations. ProVen further stated they were aware of the possibility of bulk items, and explained the assumptions they made at bid time based on the contract documents. ProVen acknowledged that the conditions it encountered were outside of what it expected when ProVen formulated its bid. It is clear to me that the contract specifications stated exactly what might be encountered in the pipes and that ProVen was fully aware of these facts prior to bidding.

In addition, at the Appeal Hearing, it was established that [notice to proceed] was issued on July 30, 2014. ProVen did not start work until September 17, 2014. ProVen testified that equipment that was needed on this project for the City was in use on another project being worked by ProVen. This initial delay was caused by ProVen. ProVen continued to fall behind, and its request to work in multiple areas at once did not occur until December 2014. By this time, approximately half of the contract time had been used and it was too late to recover the initial delay. The evidence presented to me establishes that ProVen caused the initial delay and was not stopped from working at any time by the City. Due to ProVen's initial delay, which increased over time, recovery was not possible.

Director Chow went on to make the following findings:

I heard and have considered all the argument and testimony presented on behalf of ProVen and the City. I have also reviewed and considered all documents presented to me by ProVen and OEC, including the documents presented and discussed at the hearing by both OEC and ProVen. All documents presented to me were admitted into the record and considered by me. After review and consideration, I find that no new factual information was presented by either ProVen or OEC. Therefore, I can find no reason to overturn OEC's prior denial of the claim and hereby affirm the denial of ProVen's claim in its entirety. In addition, I am affirming OEC's reservation of the right to assess liquidated damages at the contractually agreed rate of $500.00/day for 433 days or $215,500.00.

### B. Judicial Review

ProVen filed a petition for judicial review of three of its compensable delay claims. The first claim involved a delay of 38 days caused when ProVen encountered hazardous material in the sewer lines. The second claim involved the presence of an unanticipated

amount of rag content in the sewer lines on the east side of the project which resulted in a delay of 78 days. The third claim involved the shutdown and subsequent change in work hours on the west side of the project resulting from a complaint about ProVen's construction work exceeding the allowable level of noise. That claim involved a delay of 231 days.

ProVen argued that the proceeding before the Department lacked due process, that, with respect to each of the claims raised in the petition, the Department's final decision was arbitrary, capricious, unsupported by substantial evidence on the record, and based on errors of law. According to ProVen, the Director failed to consider the record evidence, failed to understand "the facts and contract law at stake," and merely rubberstamped the agency's initial denials of its claims. ProVen maintained that the City presented no evidence to dispute its allegations regarding hazardous material, work stoppages, and unforeseen site conditions. It argued that Director Chow allowed only a short time for the hearing and ended it abruptly, resulting in the lack of opportunity for ProVen to fully address its claims. ProVen further asserted that Director Chow's final decision demonstrated that he had little understanding of the delays to the project, that he "blindly latched onto the Department's unsupported and factually incorrect claims," and that he failed to account for time extensions of 140 days that had previously been granted by the Department.

The City took the position that ProVen had waived any claim of procedural due process. ProVen disagreed, arguing that it did not waive its procedural due process challenge because it did not know that the Department had committed procedural due

process errors until it received Director Chow's final decision and became aware that, contrary to his statements on the record, he did not review the entire record. ProVen maintained that "Director Chow's Final Decision is rife with substantive errors that would not be made by someone who had adequately reviewed the record[,]" and that the decision failed to mention the hazardous material, the excessive rag content, or the west side work stoppage. Further, the lack of substance in Director Chow's final decision was "problematic" because it failed to apprise the parties of the facts relied on in reaching the final decision and, therefore, precluded meaningful review of the findings. ProVen pointed out that it was "largely undisputed by the parties" that ProVen started work in accordance with the approved baseline schedule and that, thereafter, the Department stopped ProVen from working at various times. In addition, Director Chow's final decision erroneously eliminated time extensions that previously had been granted.

On May 2, 2018, the court entered an order affirming the decision of the Department. The circuit court held that it was "satisfied that the decision of the Department was neither arbitrary nor capricious and was supported by substantial evidence. Furthermore, the Court does not find that there was an error of law."

Less than 30 days after the circuit court's order was entered, ProVen filed a notice of appeal to this Court.

## DISCUSSION

### A. Jurisdiction

As a preliminary matter, the City argues that this appeal should be dismissed for lack of jurisdiction. Under Maryland law, except as constitutionally authorized, appellate

jurisdiction is determined entirely by statute. Although Md. Code (2013 Repl. Vol., 2019 Supp.), § 12-301 of the Courts and Judicial Proceedings Article ("CJP"), generally allows appeals to this Court from a final judgment of a circuit court, CJP § 12-302(a) explicitly removes from that general authorization any "appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of . . . an administrative agency" unless an appeal is expressly granted by another statute. *See generally Kant v. Montgomery County*, 365 Md. 269, 273-74 (2001). According to the City, because there is no statutory authority allowing for the instant appeal, the case must be dismissed. ProVen argues that jurisdiction is appropriate and that it is entitled to relief in the form of a common law writ of mandamus.

"Mandamus is an original action, as distinguished from an appeal." *Goodwich v. Nolan*, 343 Md. 130, 145 (1996)(internal quotations and citations omitted). Maryland law recognizes two distinct forms of mandamus actions, administrative and common law. Administrative mandamus is utilized "for judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law." Md. Rule 7-401(a). Administrative mandamus is an extension of common law mandamus, which

> is 'an extraordinary remedy' that 'is generally used to compel inferior tribunals, public officials or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which the party applying for the writ has a clear legal right. The writ ordinarily does not lie where the action to be reviewed is discretionary or depends on personal judgment.'

*Falls Road Community Ass'n v. Baltimore County*, 437 Md. 115, 139, 85 A.3d 185 (2014)(quoting *Goodwich*, 343 Md. at 145). *See also* Md. Rule 15-701 *et seq.*

In the instant case, judicial review of the Department's decision was available by way of a petition for judicial review to the circuit court.[1] There is no express right of appeal to this Court. ProVen argues, however, that its proceedings in the circuit court, and in this Court, are substantively analogous to a request for a common law writ of mandamus and should be treated as such. Proven argues here, as it did below, that the Department failed to comply with non-discretionary duties, specifically that it failed to take evidence and create a proper record, to allow witnesses to be sworn and examined, and to give adequate reasons for its decision. According to ProVen, the Department's decision was arbitrary, capricious, and based on errors of law, and unsupported by the record evidence so as to preclude meaningful review. ProVen asserts that it sought below, and continues to seek, to have the Department compelled to provide adequate reasons for its decision.

Maryland appellate courts have not applied CJP § 12-302(a) "to preclude appeals in actions, however styled or captioned, which are essentially common law mandamus actions." *Murrell v. Mayor & City Council of Baltimore*, 376 Md. 170, 192 (2003). The non-appealability rule of § 12-302(a) depends upon the overall substance of the circuit court action. "The issue is whether the action, as a whole, 'should in substance be viewed as a . . . mandamus action' or whether it more resembles 'a typical statutory judicial review

[1] The Baltimore City Charter provided that ProVen's claim was:

> subject to a determination of questions of fact by an officer or official body of Baltimore City, subject to review on the record by a court of competent jurisdiction.

Baltimore City Charter, Art. II, § 4A(g).

action.'" *Murrell*, 376 Md. at 195 (quoting *Prince George's County v. Beretta*, 358 Md. 166, 183 (2000). In *Gisriel v. Ocean City Elections Board*, 345 Md. 477, 499-500 (1997), *cert. denied*, 522 U.S. 1053 (1998), the Court of Appeals explained that:

> "whether sound or not, the non-appealability principle [of CJP § 12-302(a)] was based entirely on the conclusion that the trial court was exercising a statutory type of jurisdiction unknown to the common law.
>
> "Consequently, the principle embodied in § 12-302(a) has no application to common law actions. Both before and after the enactment of § 12-302(a), this Court has regularly exercised appellate jurisdiction in mandamus actions against administrative agencies and officials."

*Gisriel*, 345 Md. at 499-500.

The Court continued:

> Furthermore, even where a particular action against an administrative agency was allegedly brought under a statutory judicial review provision, and did not purport to be a mandamus action, this Court has looked to the substance of the action, has held that it could be treated as a common law mandamus or certiorari action, and has exercised appellate jurisdiction. *Criminal Inj. Comp. Bd. v. Gould*, *supra*, 273 Md. at 500-506, 331 A.2d at 64-68.
>
> Since Gisriel's action was in substance a common law mandamus action, the Court of Special Appeals had jurisdiction to entertain the appeal under § 12-301 of the Courts and Judicial Proceedings Article.

*Id.* at 500.

The critical question before us then, is whether this case involves a statutory judicial review action encompassed by CJP § 12-302(a), or whether it is more appropriately treated as a common law mandamus action. If it is the former, dismissal is appropriate. If it is the latter, the judgment of the circuit court is appealable under CJP § 12-301.

**B. Common Law Mandamus**

Mandamus is an "extraordinary remedy," and is not granted as a matter of course, but only in the "sound legal discretion" of the trial court. *Ipes v. Bd. of Fire Comm'rs of Baltimore*, 224 Md. 180, 183 (1961). As such we will not disturb a trial court's denial of a petition for mandamus absent a clear abuse of that discretion. *Goodwich v. Nolan*, 102 Md. App. 499, 506-07 (1994), *aff'd*, 343 Md. 130 (1996). A trial court abuses its discretion "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Alexis v. State*, 437 Md. 457, 478 (2014)(internal quotation marks omitted). A circuit court's legal conclusions are reviewed *de novo*. *Romero v. Perez*, 463 Md. 182, 196 (2019).

"The fundamental purpose of a writ of mandamus is 'to compel inferior tribunals, public officials, or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative and to the performance of which duty the party applying for the writ has a clear right.'" *Baltimore County v. Baltimore County Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 569-70 (2014)(quoting *Town of LaPlata v. Faison-Rosewick, LLC*, 434 Md. 496, 511 (2013)). "[A] writ of mandamus will not be granted where the petitioner has a specific and adequate legal remedy to meet the justice of the particular case and where the law affords [another] adequate remedy." *Philip Morris v. Angeletti*, 358 Md. 689, 712 (2000)(internal quotations omitted). The Court of Appeals has observed that a writ of mandamus is "appropriate where the relief sought involves the traditional enforcement of a ministerial act (a legal duty) by recalcitrant public officials, but not where there is any vestige of discretion in the agency

action or decision.'" *Baltimore County Fraternal Order of Police Lodge No. 4*, 439 Md.. at 570 (quoting *Faison-Rosewick*, 434 Md. at 511).

In *Baltimore County Fraternal Order of Police Lodge No. 4*, the Court of Appeals held that, in order to prevail, a party seeking mandamus must satisfy two conditions:

> First, the party against whom enforcement is sought must have an imperative, "ministerial" duty to do as sought to be compelled, . . . *i.e.*, a duty prescribed by law[.] Therefore, mandamus should not issue ordinarily when the act sought to be compelled of the official or administrative agency is discretionary in nature. [Second], the party seeking enforcement of that duty must have a clear entitlement to have the duty performed. The writ should not be issued where the right to the performance of the duty is doubtful. Where the obligation to perform some particular duty is unclear or involves the exercise of any 'vestige of discretion,' or where the party seeking enforcement of the duty does not have a clear right to the performance of the duty it seeks to compel, the writ of mandamus will not be granted.

*Id.* at 571-72 (internal quotations and citations omitted).

The Court of Appeals' decision in *Murrell v. Mayor & City Council of Baltimore*, 376 Md. 170 (2003), is particularly instructive. Murrell, a property owner, challenged an administrative decision by Baltimore City's Department of Housing and Community Development to condemn and raze certain buildings. *Murrell*, 376 Md. at 175-81. Murrell filed in the Circuit Court for Baltimore City, an action to review the administrative decision. *Id.* He argued that the department failed to comply with mandated procedures set forth in the building code and that the department's actions violated certain constitutional rights. *Id.* at 182. Following a hearing, the circuit court affirmed the decision of the department. *Id.* Thereafter, Murrell filed a notice of appeal to this Court. *Id.* The department argued that CJP § 12-302(a) precluded the appeal. *Id.* Murrell countered that his contention in the circuit court was "in the nature of a mandamus proceeding" and was,

therefore, authorized by CJP § 12-301. *Id.* at 182-83. We rejected his argument and concluded that Murrell's action in the circuit court "was an ordinary statutory judicial review action." *Id.* at 183.

The Court of Appeals disagreed. It held that Murrell's suit was more appropriately treated as a common law mandamus action because the "gist of the petitioner's complaints, at this stage, is a failure of the Department of Housing to perform several non-discretionary mandatory duties under the Baltimore City Code and principles of Maryland administrative law." *Id.* at 196. Murrell's complaints concerned the failure to give required notices, the failure to render findings of fact and conclusions of law after the hearing, the failure of the person who presided at the hearing to render the decision, and the failure to make an adequate "record" of the hearing. *Id.* The Court acknowledged that "[t]here could be no issue at this stage of the case as to whether the administrative findings of fact were supported by substantial evidence because, in a real sense, there were no such findings of fact." *Id.* The Court explained:

> There was also no record of the evidence introduced at the hearing in order for a reviewing court to determine whether findings of fact, if they had been made, were supported by substantial evidence. There were no real conclusions of law for a reviewing court to determine if errors of law had been made. Finally, there was no proper final administrative decision to be judicially reviewed.
>
> To reiterate, all of these asserted failures were of a non-discretionary type. They were ministerial procedural duties which were mandated by the Baltimore City Code and principles of Maryland administrative law. The petitioner correctly argues that the substance of the circuit court action was a common law mandamus action … Accordingly, the decision by the Circuit Court for Baltimore City was appealable to the Court of Special Appeals under § 12-301 of the Courts and Judicial Proceedings Article.

*Id.* at 196-97

The Court went on to hold that the department's failure to comply with mandatory procedural duties required that the department's decision be reversed and the case be remanded for further administrative proceedings. Among other reasons for that determination, the Court found it most significant that the hearing officer's decision did not contain the reasons for the decision, in contravention of "the general requirement of Maryland administrative law that, following an adjudicatory hearing, there must be adequate findings of fact and conclusions of law." *Id.* at 197. Relying on *Harford County v. Earl E. Preston, Jr., Inc.*, 322 Md. 493, 505 (1991), the Court explained:

> "This requirement is in recognition of the fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings. In a judicial review of administrative action the court may only uphold the agency order if it is sustained by the agency's findings and for the reasons stated by the agency.

*Murrell*, 376 Md. at 197-98 (internal citations omitted).

With these principles in mind, we turn to the instant case.

### C. ProVen's Contentions

The appellate jurisdiction in the instant case exists to the extent appellant is correct in arguing that the Department failed to perform non-discretionary duties. ProVen contends that the Department failed to abide by procedural requirements and made procedural errors. As the Court of Appeals made clear in *Murrell*, an assertion of a failure to abide by procedural requirements or procedural errors by a local government is in the nature of

mandamus and is not subject to the exception from appellate review provided for circuit court orders reviewing administrative decisions.

Our review of the record convinces us that the Director failed to conduct a procedurally adequate hearing and failed to provide adequate reasons for his decision. The parties' contract required the Director to hold an administrative hearing on the record and § 4A of the Baltimore City Charter required the Director to make determinations on the questions of fact at issue. The hearing transcript and the record before us convince us that the Director failed to address adequately ProVen's claims with respect to hazardous waste material, the west side work stoppage, and excessive rag content. The Director's final decision consisted of mere conclusions, lacked specific findings of fact, and failed to address each of ProVen's claims. Importantly, we note our inability to identify the specific records considered by Director Chow. It is impossible to discern the factual basis for the Department's rulings on ProVen's claims. As a result, the Director's decision was arbitrary, capricious, and unlawful. We reiterate that it is a "fundamental right of a party to a proceeding before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings." *Harford County*, 322 Md. at 505. Because no meaningful review can be had on

the record before us, we shall remand this case to the circuit court with instructions to remand the case to the Department for further proceedings consistent with this opinion.

**APPELLEE'S MOTION TO DISMISS THE APPEAL IS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY NEITHER AFFIRMED NOR REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH INSTRUCTIONS TO REMAND THE CASE TO THE AGENCY FOR FURTHER PROCEEDINGS AND THE FILING OF A DECISION THAT COMPLIES WITH MINISTERIAL REQUIREMENTS; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**