

Circuit Court for Montgomery County  
Case No. 441012-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 894

September Term, 2018

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BEN PORTO & SON, LTD., *et al.*

v.

MONTGOMERY COUNTY, MARYLAND

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Kehoe,  
Friedman,  
Wilner, Alan M.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Friedman, J.

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Filed: April 23, 2020

\*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.

Ben Porto & Son, Ltd. (“Porto”) is engaged in the business of operating a rock quarry, mining rock, and selling rock building materials in Montgomery County, Maryland. Porto doesn’t want to pay Montgomery County’s Water Quality Protection Charge. We won’t decide whether it must. Instead, we will hold that the decision of whether it has to pay the charge must be made, in the first instance, in the Maryland Tax Court, the administrative agency to which this decision is entrusted.

### **FACTS**

Porto’s 2016 property tax bills included Montgomery County’s Water Quality Protection Charge. Porto challenged the assessment with the Montgomery County Department of Environmental Protection (“MCDEP”), both denying that it was liable for the assessment and seeking a credit against the assessment. A year later, Porto made the same challenge and request concerning its 2017 assessment. MCDEP denied all four. Porto then sought reconsideration. While reconsideration was pending, Porto filed suit in the Circuit Court for Montgomery County, seeking a declaratory judgment that the Water Quality Protection Charge was invalid as applied to Porto.

Montgomery County moved to dismiss Porto’s lawsuit because Porto had failed to exhaust its administrative remedies, which at the time should have involved an appeal from the decision of the MCDEP to the Montgomery County Board of Appeals, and thereafter, a petition for judicial review to the circuit court. The Circuit Court denied the motion. Montgomery County sought reconsideration of the denial, noting the pendency of a county council bill that would change the administrative appeal process by replacing the Board of Appeals with, first, the County’s Director of Finance, and then, the Maryland Tax Court.

This time, the Circuit Court granted Montgomery County’s motion to dismiss for Porto’s failure to exhaust administrative remedies. This appeal timely followed.

### DISCUSSION

The parties agree, as they must, that the Maryland Tax Court has exclusive jurisdiction over taxpayer challenges to the Montgomery County Water Quality Protection Charge. *See Holzheid v. Comptroller*, 240 Md. App. 371, 388-89 (2019) (identifying three types of administrative agency jurisdiction: exclusive, primary, or concurrent).<sup>1</sup>

Porto argues that its claims are not subject to the requirement for administrative exhaustion, however, because they fit within the so-called “constitutional exception.” Senior Judge Lynne A. Battaglia recently explained the contours of the constitutional exception:

The “constitutional exception” may be invoked under certain circumstances by a litigant when a challenge to the constitutionality or validity of a particular enactment is mounted. If validly raised, the exception permits a litigant to circumvent statutorily provided administrative remedies and invoke the jurisdiction of the courts. The “constitutional exception” to the requirement that administrative remedies must be exhausted, however, is “an extremely narrow one.”

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<sup>1</sup> The cases are clear that we look to the legislative intent to determine what type of jurisdiction was intended: exclusive, primary, or concurrent. *Holzheid*, 240 Md. App. at 389 (quoting *Zappone v. Liberty Life Insurance Co.*, 349 Md. 45, 60-61 (1998)). It is not entirely clear, however, which legislature’s intent we look to when, as here, the agency is created separately from the administrative decision it reviews. Here, fortunately, it is apparent that both the General Assembly, which created the Maryland Tax Court, and the Montgomery County Council, which created the Montgomery County Water Quality Protection Charge pursuant to State law, intended that the Maryland Tax Court’s jurisdiction be exclusive. *See* MD. CODE TAX-GENERAL (“TG”) § 3-103(a); MONT. COUNTY CODE, § 19-35(i).

The limited scope of the exception is grounded, in part, in the rationale that, “administrative agencies are fully competent to resolve issues of constitutionality and the validity of statutes or ordinances in adjudicatory administrative proceedings which are subject to judicial review.” The Court of Appeals has further recognized that “when a constitutional issue is raised in an adjudicatory administrative proceeding, and resolution of the issue is necessary for a proper disposition of the case, the agency’s failure to decide the constitutional issue constitutes error.”

To come within the “constitutional exception,” a challenge must be to “the statute as a whole” where the “sole contention raised in the court action is based on a facial attack on the constitutionality of the governmental action[.]” enabling a litigant to “proceed immediately to the court to seek a declaratory judgment or equitable remedy, regardless of the availability of an administrative remedy[.]” The attack “must be made to the constitutionality of the statute as a whole and not merely as to how the statute has been applied.” The constitutional exception is only available when an aggrieved party “attacks the validity of the statute as a whole, and not merely a portion of the statute or the statute’s application in a particular circumstance.”

*Holzheid*, 240 Md. App. at 398-99 (internal citations omitted). The result is that Porto’s challenges can only be brought in the circuit court as an exception to the exclusive jurisdiction of the Maryland Tax Court if they are facial constitutional challenges to the Water Quality Protection Charge.

Porto makes three<sup>2</sup> arguments:

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<sup>2</sup> Porto also makes a fourth argument: that by entering into certain settlement agreements with the County, it has contracted to be excluded from the Water Quality Protection Charge. There is no reasonable argument that this claim cannot and should not be resolved by the Maryland Tax Court. Porto’s argument to the contrary—that the Maryland Tax Court’s jurisdiction over contracts is concurrent—is both wrong and a *non sequitur*.

- *First*, Porto argues that the State’s surface mining law, MD. CODE, ENVIRONMENT (“EN”) § 15-801 *et seq.*, is a comprehensive regulatory scheme that preempts Montgomery County’s efforts to tax Porto’s quarry;
- *Second*, Porto argues that it is subject to an existing NPDES permit and, as a result, pursuant to state law, EN § 4-202.1(e)(2), it is required to be exempted from Montgomery County’s Water Quality Protection Charge; and
- *Third*, Porto argues that the Water Quality Protection Charge isn’t uniform when applied to mines in violation of Article 15 of the Maryland Declaration of Rights.<sup>3</sup>

All three of these challenges are “as applied” challenges, not facial constitutional challenges.<sup>4</sup> Porto isn’t claiming that the Water Quality Protection Charge was adopted in a manner that violates the federal or state constitution, or that the Water Quality Protection Charge is unconstitutional in every circumstance. Rather, Porto is claiming that the Water Quality Protection Charge is unconstitutional when applied to mines or when applied to Porto’s mine. Those claims must be litigated in the Maryland Tax Court.

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<sup>3</sup> We will generally refrain from commenting on the merits of Porto’s substantive arguments against the imposition of the Water Quality Protection Charge to its mining operations. We cannot help but notice, however, that Porto’s Article 15 challenge appears foreclosed by our opinion in *Shaarei Tfiloh Congregation v. Mayor & City Council of Baltimore*, 237 Md. App. 102, 142 (2018). In *Shaarei Tfiloh*, we held that Baltimore City’s Stormwater Fee is an excise tax. *Id.* The same analysis likely applies to Montgomery County’s Water Quality Protection Charge. If the Water Quality Protection Charge is an excise tax, it cannot be subject to Article 15’s uniformity requirement, which applies only to property taxes. *Weaver v. Prince George’s County*, 281 Md. 349, 355 (1977).

<sup>4</sup> Porto insists that its preemption challenges are of constitutional dimension and ought to qualify automatically for the constitutional exception. We are not persuaded. Certainly, federal preemption has a constitutional dimension as it is predicated on the Supremacy Clause of the U.S. Constitution. But Maryland has thus far declined to apply a similar constitutionally-based element to state preemption. *See Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 516-17 (2004) (discussing differences between federal preemption of state statutes and state preemption of local ordinances).

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANTS.**