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Administrative Law

Appearing Before a Zoning, Planning and Land Use Board— A Perspective by Las Vegas City Attorney Bryan K. Scott

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What does "Arbitrary or Capricious" Mean?

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Unless exempted, government agencies in Nevada are bound by the Nevada Administrative Procedures Act ("NAPA"), NRS Chapter 233B, and federal agencies are bound by the federal Administrative Procedures Act ("APA"). 5 U.S.C. 500 *et seq*. Among other things, the NAPA and APA establish uniform standards for formal rulemaking and adjudication, and define the scope of judicial review.

NAPA instructs courts to invalidate any agency action that is "[a]rbitrary or capricious or characterized by abuse of discretion," NRS 233B.135(3)(f). The APA instructs courts to overturn an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Unless judicial review is further limited by legislation, this arbitrary-or-capricious test is one basis to challenge a final administrative decision.

What makes a decision arbitrary or capricious? These concepts are nuanced and hard to grasp.

The Supreme Court of Nevada has announced that "[w]here an agency's decision is challenged as arbitrary and capricious, this court will uphold the decision if it is supported by evidence that a reasonable mind might accept as adequate." *Desert Palace, Inc. v. Nevada Gaming Comm'n*, 130 Nev. 1170 (2014) (citing *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423–24, 851 P.2d 423, 424–25 (1993)). Conversely, an agency action is arbitrary or capricious if the decision is "'baseless' or 'despotic' and 'a sudden turn of mind without apparent motive; a freak, whim, mere fancy.'" *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994) (internal citations and quotations omitted). Thus, in Nevada, the substantial evidence test is intrinsically a part of the arbitrary-or-capricious standard.

Federal courts have enumerated that, under the APA,

> "'[a] decision is arbitrary and capricious if the agency [1] has relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] [has offered an explanation] so implausible that it could not be ascribed to a difference in view or product of agency expertise.'"

George v. Bay Area Rapid Transit, 577 F.3d 1005, 1010 (9th Cir. 2009) (internal quotation and citations omitted).

Why does the arbitrary-or-capricious standard matter? Because the standard can shape government law and policy. Recent decisions include:

Endangered species

In 2018, a federal district court ruled that the United States Fish and Wildlife Service violated the APA by "delisting" grizzly bears from a threatened species list: "all available evidence demonstrates that the Service made its decision not on the basis of science or the law but solely in reaction to the states' hardline position on

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recalibration. The Service cannot negotiate away its obligation to make decisions 'solely on the basis of the best available science.'" *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1018 (D. Mont. 2018) (remanded on other grounds) (quoting 16 U.S.C. § 1533(b)(1)(A)).

Contraception and religious exemptions

In July 2020, the Supreme Court upheld regulations enacted by the Department of Health and Human Services ("HHS") that allowed for-profit groups exemptions from the Affordable Care Act's contraceptive mandate. The Court held that HHS's new rules were implemented lawfully and all pertinent legal authority was considered. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020) ("If the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious . . . .").

Immigration

In 2020, the Supreme Court overturned a September 2017 Department of Homeland Security ("DHS") decision that would terminate the Deferred Action for Childhood Arrivals ("DACA") program:

> "We do not decide whether DACA or its rescission are sound policies. 'The wisdom' of those decisions 'is none of our concern.' We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner."

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1913 (2020).

Accordingly, although the standard can be "squishy" and highly-fact based, it can be both a powerful tool for both litigants and government agencies implementing policy.