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Standards of Judicial Review in the Virginia Administrative Process Act

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NOTES

STANDARDS OF JUDICIAL REVIEW IN THE VIRGINIA ADMINISTRATIVE PROCESS ACT

I. INTRODUCTION

Section 9-6.14:17 of the Virginia Administrative Process Act¹ sets forth two standards by which courts may review the validity of a state agency's decisions.² In formal rulemaking and adjudicatory proceedings, the statute requires an agency to keep a record of all evidence it receives and to make decisions based on this record. Upon review, a court will look to see if there is "substantial evidence" in the record to support the agency's findings of fact.³ In informal rulemaking and adjudicatory proceedings, the statute does not require an agency to keep an evidentiary record. If the agency has not voluntarily made a record, the reviewing court will look at "the agency file, minutes, and records of its proceedings," and allow the agency to add more information or to prove facts in court if necessary to complete the impromptu record.⁴ In such a case, the court reviewing the agency's decision will only check to see "whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency."⁵

1. VA. CODE ANN. §§ 9-6.14:1 to 25:3 (Michie 1993 & Cum. Supp. 1995).

2. *Id.* § 9-6.14:17.

3. *Id.*

4. *Id.*

5. *Id.*

Although the Virginia statute explicitly lists these two distinct standards of review, the comments by the drafters of the legislation have caused considerable confusion as to exactly when each standard applies. Two Virginia cases, *Virginia Alcoholic Beverage Control Commission v. York Street Inn*⁶ and *State Board of Health v. Godfrey*,⁷ serve to highlight this confusion. In *York Street Inn*, the Supreme Court of Virginia applied the "scope of the legal authority" standard⁸ where arguably the substantial evidence standard should have been applied. Conversely, in *Godfrey* the Supreme Court of Virginia applied a substantial evidence test⁹ when it was unclear which standard should apply. Although this conclusion in *Godfrey* might have passed legal muster, the court went on to equate the substantial evidence standard with the arbitrary and capricious, or scope of the legal authority, standard.¹⁰ Why would the legislature have created two separate standards of review if it intended for courts to treat them as identical? A review of these cases and the legislative history, language, and comments for section 9-6.14:17 will show that Virginia courts have struggled and sometimes lost their fight to make sense of this enigmatic statute.

II. LEGISLATIVE HISTORY OF SECTION 9-6.14:17

A. *House Bill 140—1944*

In 1942, the Virginia General Assembly commissioned the Virginia Advisory Legislative Council to study the amount of protection citizens enjoyed from the actions of administrative agencies.¹¹ The Council found that, with both the power to

6. 257 S.E.2d 851 (Va. 1979).

7. 290 S.E.2d 875 (Va. 1982).

8. *York Street Inn*, 257 S.E.2d at 853.

9. *Godfrey*, 290 S.E.2d at 880.

10. *Id.* at 881.

11. VIRGINIA ADVISORY LEGISLATIVE COUNCIL, REPORT TO THE GOVERNOR & THE GEN. ASSEMBLY OF VA., H. DOC. NO. 5, 1944 Sess., at 3 (1943) [hereinafter H. DOC. NO. 5]. The Virginia Advisory Legislative Council was created in 1936 and composed of four state senators and five state representatives, each appointed by the appropriate presiding officer. VA. CODE ANN. § 580a (Michie 1942), *recodified at* VA. CODE ANN. §§ 30-29 to 30-34 (Michie 1950), *repealed by* 1980 Va. Acts 237. In 1942, the General Assembly directed the Council "to make a thorough study of the laws of

make rules and to bestow and revoke licenses, "a board thus empowered is a virtual dictator in the particular field."¹² Among the Council's recommendations was the creation of a Commission on Administrative Agencies, which would monitor and approve or disapprove all rules made by certain agencies.¹³ The agencies selected for review were those which purportedly overstepped the bounds of their rulemaking authority.¹⁴ The Council's proposed bill also included judicial review provisions for persons aggrieved by agency action, including license nonrenewal.¹⁵ A reviewing court was to decide whether the agency's factual findings "[were] supported by substantial

Virginia which create and define the jurisdiction and powers of administrative agencies, commissions, boards or officials . . ." 1942 Va. Acts 995. The Council was also directed to "study the decisions of the Supreme Court of Appeals of Virginia which relate to controversies involving such administrative agencies, and consider . . . whether the present laws adequately protect the fundamental rights and privileges of the public who are subject to the jurisdiction of such administrative agencies." *Id.* To study this topic, the Council approved a committee made of Council member John B. Spiers, as well as Judge Leon M. Bazile of the Fifteenth Judicial Circuit, John N. Sebrell of the Alcoholic Beverage Control Board, and M. Ray Doubles, Dean of the T.C. Williams School of Law. H. DOC. NO. 5, at 4.

12. H. DOC. NO. 5, *supra* note 11, at 5.

13. *Id.* at 5, 9. The Commission was created as part of the Administrative Agencies Act. VA. CODE ANN. §§ 580(1)-(8) (Michie 1942). The Commission consisted of the Speaker of the House and five delegates appointed by him, as well as three state senators appointed by the President of the Senate. *Id.* In 1944, the Commission's membership consisted of Thomas B. Stanley (Chairman), Maitland H. Bustard (Vice-Chairman), Robert F. Baldwin, Jr, Thomas H. Blanton, John B. Boatwright, Robert K. Brock, John H. Daniel, C.G. Quesenberry, and Joseph J. Williams, Jr. COMMONWEALTH OF VIRGINIA, VIRGINIA STATE REGISTER (Director of Division of Statutory Research & Drafting, ed., 1944).

14. The Commission was to meet twice a year to approve or disapprove certain agencies' rules before they became effective. The agencies involved were the following: Board of Medical Examiners, Virginia State Board of Dental Examiners, Board of Pharmacy, State Board of Examiners for Graduate Nurses, Board of Veterinary Examiners, State Board of Embalmers and Funeral Director, State Board of Examiners in Optometry, State Board for the Examination and Certification of Architects, Professional Engineers, and Land Surveyors, State Registration Board for Contractor, State Board of Accountancy, Virginia Real Estate Commission, State Dry Cleaners Board, State Board of Photographic Examiners, and State Apprentice Council. VA. CODE ANN. § 580(4) (Michie 1942).

The Commission on Administrative Agencies was short-lived; the General Assembly repealed its enabling statute in 1952. VA. CODE ANN. §§ 9-1 to -6 (Michie 1950), *repealed by* 1952 Va. Acts. 703. Its publications include the Administrative Code of Virginia. ADMINISTRATIVE CODE OF VIRGINIA (Director of Division of Statutory Research and Drafting, ed., 1946 & Supp. 1948).

15. H. DOC. NO. 5, *supra* note 11, at 10-11.

and reliable evidence" in the agency's record.¹⁶ This was a considerable burden to place on state agencies, especially because at some hearings no evidence could become part of the record unless that evidence would have been admissible in a Virginia court.¹⁷ House Bill 140 included the "substantial and reliable evidence" standard as introduced into the House of Delegates and unanimously passed by the bicameral legislature.¹⁸ This standard remained the law through the 1950 session of the General Assembly.¹⁹

B. *Senate Bill 81, 1952*

In 1950, concerned by the "marked lack of uniformity in the procedure prescribed for those agencies . . . having the rule-making power in the issuance of orders, licenses or taking of action affecting property rights," the General Assembly commissioned the Virginia Advisory Legislative Council to conduct another study.²⁰ Once again, the Council was to formulate draft legislation to implement any recommendations it made.²¹ The Council viewed its main purpose as providing procedural tools to keep agencies within the rein established by the General Assembly.²² This purpose would be accomplished by ensuring a right to judicial review by all persons affected by final agency action.²³

16. *Id.* at 11.

17. *Id.* at 10.

18. VA. CODE ANN. § 580(8)(d) (Michie 1942 & Supp. 1944).

19. VA. CODE ANN. §§ 9-1 to -6 (Michie 1950), *repealed by* 1952 Va. Acts 703.

20. VIRGINIA ADVISORY LEGISLATIVE COUNCIL, REGULATION OF ADMIN. AGENCIES, S. DOC. NO. 7, 1952 Sess., at 3 (1951) [hereinafter S. DOC. NO. 7]. The General Assembly passed Senate Joint Resolution No. 12, requiring the Council "to make a study [of] . . . the procedure prescribed for administrative agencies of the State relative to issuing orders, licenses or taking other action affecting property rights of the citizens of this Commonwealth." *Id.* Council member Senator Ben T. Gunter, Jr., was assigned to this task, along with a committee made up of A.R. Bowles, Jr., Judge Ralph T. Catterall, Judge M. Ray Doubles, and T. Justin Moore. Committee Secretaries were John B. Boatwright, Jr. and G.M. Lapsley. *Id.*

21. *Id.* at 3. "The Council shall accompany its report and recommendations with drafts of such legislation as it deems appropriate to carry its recommendations into effect." *Id.*

22. *Id.* at 4.

23. *Id.* To carry out its purposes, the Council annihilated the administrative control structure it had fashioned eight years earlier. The Council recommended abolishment of the Administrative Code of Virginia, a compilation of agencies' rules that had

Although the Council's proposed bill defined "contested case" and set out a requirement that agencies make written factual findings when conducting formal hearings, the proposed bill failed to provide any guidelines for informal agency actions.²⁴ The Council's recommended bill and Senate Bill 81, as introduced, listed six grounds upon which a court could review an agency's factual findings.²⁵ These were:

- (1) [the agency's decision was] in violation of constitutional provisions; or
- (2) in excess of the statutory authority or jurisdiction of the agency; or
- (3) made upon unlawful procedure; or
- (4) affected by other error of law; or
- (5) unsupported by the evidence on the record considered as a whole; or
- (6) arbitrary, capricious, or an abuse of discretion.²⁶

In its report accompanying the proposed bill, the Council admitted that these six standards were more like variations on one theme than six distinct standards, claiming that they "all boil

been approved by the Commission on Administrative Agencies. The Council found that the Administrative Code was not widely used, came with no guarantee that it contained the most current rules, and was unnecessary in light of each agency's own pamphlet publications of rules, which "the careful lawyer" would always check. *Id.* at 6.

Because the 1952 Act would apply in whole or in part to almost all Virginia agencies, the Council abolished the Commission on Administrative Agencies, believing that a requirement that the Commission review the rules of every agency before they became effective would be overbearing. *Id.* In the alternative, the Council allowed individual parties to seek a declaratory judgment in the Circuit Court of the City of Richmond. *Id.* Therefore, the court could review agency rules for their legal validity and not for policy reasons, as the Commission had been prone to do. *Id.* at 6-7. One need not have to suffer an irreparable harm, exhaust other remedies, or prove a controversy to bring such a declaratory judgment. *Id.* at 7.

The Council may have been searching for a way to double check agency power without overburdening state resources. If so, a declaratory judgment may have seemed ideal because almost anyone had standing to receive one. However, in making this change the Council shifted the burden for double checking agency decisions from another state agency to the individual citizen. In the 1975 Virginia Administrative Process Act, § 9-6.14:16 allowed court review anywhere such review was allowed under the Rules of the Supreme Court. The authors of the Act did not want to be more specific "because the Code Commission presently has under review the provisions of Title 8 and the Committee did not want to recommend procedural steps that might be inconsistent with recommendations of that study." VIRGINIA CODE COMM'N, ADMIN. PROCESS ACT, H. DOC. NO. 26, 1975 Sess., at 28 (1975) [hereinafter H. DOC. NO. 26].

24. H. DOC. NO. 26, *supra* note 23, at 4.

25. S. 81, 1952 Sess. (1952) (enacted). S. DOC. NO. 7, *supra* note 20, at 13.

26. S. DOC. NO. 7, *supra* note 20, at 13.

down to one ground, namely, that the agency exceeded its authority."²⁷ This standard appears far more flexible than the 1944 standard, especially considering that the Council's proposed bill did not require agencies to use many formal evidentiary rules when taking evidence.²⁸ Exactly what the term "exceeded its authority" encompassed remains a mystery, however, for the Council left it undefined in any report.²⁹ In addition, although this language appeared in the General Administrative Agencies Act passed by the General Assembly on April 8, 1952,³⁰ no court specifically interpreted the clause "in excess of statutory authority" in any case decision.³¹

C. *House Bill 1055, 1975*

Although the 1952 Act was a step in the right direction in streamlining the administrative process, its inadequacies outweighed its benefits. The Virginia Code Commission received the task of evaluating the General Administrative Agencies Act and in 1975 made a report to the General Assembly and Governor Mills E. Godwin, Jr.³² In its report, the Commission la-

27. *Id.* at 7.

28. *Id.* at 11-12. Section 9-6.11 of the proposed bill required that:

(a) All relevant and material evidence shall be received, except that: (1) the rules relating to privileged communications and privileged topics shall be observed; (2) hearsay evidence shall be received only if the declarant is not readily available as a witness; and (3) secondary evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a witness or document is readily available the agency shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence is the more effort should be made to produce the eye-witness or the original document.

Id.

29. *Id.* at 7-8.

30. 1952 Va. Acts 703.

31. VA. CODE ANN. §§ 9-6.1 to .14 (Michie 1950), *repealed by* 1975 Va. Acts. 503; *see* H. DOC. NO. 26, *supra* note 23, at 3. House Document No. 26 does not specify which case cites the General Administrative Agencies Act. H. DOC. NO. 26, *supra* note 23. In *Spindel v. Jamison*, however, the Supreme Court of Virginia does reference § 9-6.10 of the Act when discussing the applicant's demand for and receipt of a formal agency hearing before the Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors. 103 S.E.2d 205, 208 (Va. 1958).

32. H. DOC. NO. 26, *supra* note 23. The General Assembly created the Virginia Code Commission in 1946. 1946 Va. Acts 400. While the Commission's main duties

mented that "the act in its present form [was] largely unused and unusable," and that the act was "inoperable, if not indeed substantially meaningless."³³ The Commission found the act defective because it did not distinguish between adjudication and rulemaking, or between formal and informal decision making processes.³⁴ The Commission sought to make the administrative process both more efficient and user-friendly by categorizing regulation processes as "informational" or "evidential" and adjudicatory processes as "trial [or] nontrial fact finding incident to decision making."³⁵ The Commission maintained these distinctions throughout its proposed bill.³⁶

The Commission also reexamined the provisions for judicial review of agency action. Specifically, the Commission proposed that where a statute required an agency to make a record, as in formal rulemaking or adjudicatory proceedings, the standard of review was "substantial evidence in the agency record" to support the agency's findings.³⁷ The Commission viewed this standard as the one traditionally applied by courts deciding cases of judicial review of administrative action.³⁸

Where the agency used informal proceedings and thus did not make a record, the court would act as factfinder and reverse

include publication and clerical correction of the Virginia Code and Administrative Code, the Commission also has a duty to "monitor the operation of the Administrative Process Act, § 9-6.14:1 to :24 and the Virginia Register Act, § 9-6.15 to :22 to ensure that those laws provide the most practical means to administrative agencies of the Commonwealth for the promulgation, amendment and repeal of administrative law within the powers granted to such agencies by the General Assembly, and to recommend from time to time such changes as it deems appropriate." VA. CODE ANN. § 9-77.12 (Michie 1993 & Cum. Supp. 1995).

33. H. DOC. NO. 26, *supra* note 23, at 3.

34. *Id.* at 4.

35. *Id.* at 7.

36. *See id.* at 5-7, 11-15.

37. *Id.* at 16; *see* VA. CODE ANN. § 9-6.14:17 (Michie 1993).

38. *Id.* at 29 cmt. 55. The Commission does not go into any lengthy discussion to support this assumption. It merely states:

Where the agency is the trier of the facts, th[e] sentence ["When the decision on review is so to be made on such agency record, the duty of the court with respect to issues of fact is limited to ascertaining whether there was substantial evidence in the agency record upon which the agency as the trier of the facts could reasonably find them to be as it did."] merely puts in statutory form the "substantial evidence" rule long adhered to by courts in reviewing administrative action.

Id. at 16, 29 cmt. 55.

the agency's decision only if the agency acted outside "the scope of [its] legal authority."³⁹ However, in comments accompanying the proposed bill, the Code Commission noted that informal proceedings did not absolve agencies of their duty to record the reasons for their decisions.⁴⁰ The Commission believed that "it would defeat justice to allow agencies to make fact decisions in the first instance without the necessary factual basis therefor in reliance on a later opportunity to do so in court or to contest in court any contrary showing."⁴¹ This statement implies that agencies in informal proceedings would act as the trier of fact in at least some situations. If so, "the scope of the legal authority" standard would apply only where the reviewing court allowed the parties to introduce new evidence. The court would then act as the factfinder for any facts proven by this new evidence. Where the agency acted as the complete trier of fact, there would be no special role for the court to play and the only issue left for the court to decide would be "the substantiality of the evidential support for [the agency's] findings of fact."⁴² The Commission's comments specifically allowed the parties to introduce additional proof in court where the party bringing the action claimed bad faith or that the agency's act was "arbitrary, capricious, or otherwise contrary to law."⁴³ The comments did not specify whether these allowances operated in appeals from solely informal hearings or any type of hearing, whether formal or informal.

Whether or not the agency was the factfinder, the Commission required the reviewing court to remember several factors, including the "presumption of official regularity," any special experience the agency possessed, and the agency's purpose when deciding whether to uphold or overturn an agency decision.⁴⁴ In comments, the Commission asked courts to consider public policy aspects of the agency decision.⁴⁵ House Bill 1055, offered in the General Assembly on January 8, 1975, included the same language in its section entitled "Issues on Review" as

39. *Id.* at 16.

40. *See id.* at 29 cmt. 56.

41. *Id.*

42. VA. CODE ANN. § 9-6.14:17(iv) (Michie 1993).

43. H. DOC. NO. 26, *supra* note 23, at 29 cmt. 56.

44. *Id.* at 16; VA. CODE ANN. § 9-6.14:17.

45. H. DOC. NO. 26, *supra* note 23, at 29 cmt. 57.

that recommended by the Commission.⁴⁶ The legislature approved the bill on March 22, 1975 without change in the judicial review section.⁴⁷ This language remains in section 9-6.14:17 of the current Virginia Code.⁴⁸

III. INTERPRETATIONS OF SECTION 9-6.14:17 IN THE VIRGINIA COURTS

A cursory glance at section 9-6.14:17 leaves the reader with the impression that the "substantiality of the evidence" standard of review applies when the agency acts as factfinder in a contested case and that the "scope of the legal authority" standard of review applies when the agency is not the trier of fact.⁴⁹ However, the statutory language fails to account for the reality that in most if not all informal proceedings, an agency will determine some factual issues before it makes any decision. The statute offers no explicit guidance as to the applicable standard of review when the agency and a reviewing court share factfinding duties. These ambiguities have caused difficulties for Virginia courts when they have applied the statute to specific parties. A brief look at *Virginia Alcohol Beverage Control Commission v. York Street Inn*⁵⁰ and *State Board of Health v. Godfrey*⁵¹ illustrates this confusion.

A. Virginia Alcohol Beverage Control Commission v. York Street Inn

Virginia Alcoholic Beverage Control Commission v. York Street Inn was decided August 30, 1979,⁵² four years after the passage of the Virginia Administrative Process Act (VAPA). When the York Street Inn owners remodeled their restaurant, they chose to install a counter with five built-in backgammon boards.⁵³ After informal proceedings, the Virginia Alcoholic

46. H.R. 1055, 1975 Sess. (1975) (enacted); see VA. CODE ANN. § 9-6.14:17.

47. 1975 Va. Acts 503.

48. VA. CODE ANN. § 9-6.14:17.

49. See *id.*

50. 257 S.E.2d 851 (Va. 1979).

51. 290 S.E.2d 875 (Va. 1982).

52. *York Street Inn*, 257 S.E.2d at 851.

53. *Id.* at 852.

Beverage Commission decided that this counter did not meet the agency's definition of "counter" or "table" because customers would use it to play backgammon and not to hold beverages and food served at the restaurant.⁵⁴ In addition, the Commission reasoned that use of the counter might encourage illegal gambling.⁵⁵

The restaurant owners removed the counter for fear of jeopardizing the restaurant's status as a licensee but sought a declaratory judgment from the Circuit Court for the City of Richmond.⁵⁶ Using an arbitrary and capricious standard of review, the circuit court found that, because the backgammon counter conformed to the ABC Commission's regulations, the agency was wrong to object to the counter's use.⁵⁷ The ABC Commission appealed to the Supreme Court of Virginia.⁵⁸

In reviewing the lower court's decision, the supreme court invoked the language of section 17 of the VAPA stating that "the function of the court shall be to determine only whether the result reached by the agency could reasonably be said . . . to be within the scope of the legal authority of the agency."⁵⁹ The court considered several definitions in the Alcohol Beverage Control Act, particularly the definition of a "mixed beverage restaurant" as a restaurant that receives less money from alcoholic and other beverage sales than from customers' purchases of meals and nonalcoholic beverages.⁶⁰ The court also examined the purpose of the Commission's regulations regarding "table[s]" and "counter[s]."⁶¹ It found that these regulations were necessary to keep establishments licensed as "mixed beverage restaurant[s]" from acting in reality like establishments that mainly serve alcohol and offer food only as an extra service.⁶² An establishment licensed as a "mixed beverage restaurant" had to meet guidelines regarding lighting and amount of table and counter space, and it could only serve alcohol to those

54. *Id.* at 854.

55. *Id.*

56. *Id.* at 852.

57. *Id.*

58. *Id.*

59. *Id.* at 853 (quoting VA. CODE ANN. § 9-6.14:17 (Michie 1978)).

60. *Id.* at 854 (citing VA. CODE ANN. § 4-98.2).

61. *Id.* (citing VA. CODE ANN. § 4-98.10(j), *repealed by* 1978 Va. Acts 69).

62. *Id.*

seated at a counter or table.⁶³ Based on this purpose behind the ABC Commission's basic law and agency regulations, combined with the agency's present concerns about the actual use of the counter, the supreme court found that the ABC Commission did not act arbitrarily or in a way that abused its discretion. Thus, the Commission remained within the bounds of its legal authority in ordering removal of the counter.⁶⁴

The court treated the "scope of the legal authority" test as the same standard a reviewing court would use to decide whether an agency has acted arbitrarily or capriciously and by looking to the agency's basic law and the purposes behind its regulations.⁶⁵ Previous Virginia cases had equated the arbitrary and capricious standard with the scope of the legal authority standard, and the *York Street Inn* court specifically invoked a 1960 Virginia Supreme Court decision, *Board of Zoning Appeals v. Fowler*,⁶⁶ for this principle.⁶⁷ In *Fowler*, the Supreme Court of Virginia deferred to the expertise of the Board of Adjustment and stated that "judicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of the delegated discretion."⁶⁸ The court stated that it could not overturn an agency decision unless the Board had applied the wrong law to the facts or the evidence showed "that the Board's decision [was] plainly wrong and violative of the purpose and intent of the zoning ordinance."⁶⁹ Thus, for the reviewing court to overturn the Board's decision, the court had to find the Board's decision "plainly wrong" considering the basic law creating the Board,

63. *Id.*

64. *Id.* at 855.

65. *Id.* at 853-55.

66. 114 S.E.2d 753, 758 (Va. 1960).

67. *York Street Inn*, 257 S.E.2d at 855. For other Virginia cases equating these two standards, see, e.g., *Azalea Corp. v. Richmond*, 112 S.E.2d 862, 866 (Va. 1960) (questioning whether refusal to grant a variance from zoning regulations was "an unreasonable and arbitrary abuse of discretion"); *Board of Zoning Appeals v. Combs*, 106 S.E.2d 755, 759 (Va. 1959) (requiring a reviewing court to overturn an agency decision that is "contrary to law or is arbitrary and constitutes an abuse of discretion"); *Hopkins v. O'Meara*, 89 S.E.2d 1, 3 (Va. 1955) (requiring a reviewing court to uphold an agency decision that is not "arbitrary or contrary to the law").

68. *Fowler*, 114 S.E.2d at 758 (quoting YOKELY, ZONING LAW & PRACTICE § 187 (1953)).

69. *Id.*

the agency's record presented to the court, and any additional evidence the court received.⁷⁰ The Virginia Advisory Legislative Council had also treated the arbitrary and capricious standard the same as the scope of authority standard.⁷¹ Thus, the supreme court in *York Street Inn* was acting in accordance with a well-established principle of law when it found that the ABC Commission had not acted arbitrarily or beyond the scope of its authority in prohibiting use of the gaming counter.⁷²

The supreme court erred, however, by choosing to apply the "scope of the legal authority" standard at all, since section 9-6.14:17 did not call for this method of analysis.⁷³ Because the agency had decided all the facts and the circuit court took no new evidence, a reviewing court should have applied the "substantial evidence" test.⁷⁴ In short, to be faithful to the direction of the General Assembly apparent in section 17 of the VAPA, the supreme court should have undertaken the following analysis in *York Street Inn*:

(1) Is the agency action under review formal or informal?

(2) If formal, the substantial evidence test applies as long as the court has not allowed new evidence to be submitted, such as where the complainant has alleged bad faith or arbitrary and capricious action.

(3) If informal, the court should determine if a party has introduced new proof. If so, the "scope of the legal authority" test applies. If not, the court should apply the "substantial evidence" test because there is no reason for the court to apply the lesser standard.

70. *Id.*

71. See S. DOC. NO. 7, *supra* note 20, at 7 cmt. 9, 13. The Council's proposed bill states in § 9-6.11(g), "The court may . . . reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the findings, conclusions or decisions are . . . (2) in excess of statutory authority or jurisdiction of the agency . . . or (6) arbitrary, capricious, or an abuse of discretion." *Id.* at 13. In its report explaining the proposed bill, the Council noted, "The six enumerated grounds on which the court on appeal may reverse the agency all boil down to one ground, namely, that the agency exceeded its authority." *Id.* at 7 cmt. 9.

72. *York Street Inn*, 257 S.E.2d at 855.

73. See VA. CODE ANN. § 9-6.14:17.

74. *Id.* § 9-6.14:17(iv).

This is not to say that a reviewing court is wrong to consider the agency's basic law, regulations, and the purposes of those regulations. In commenting on the "substantial evidence" test, the Code Commission advocated court review based on these factors.⁷⁵ However, a reviewing court searches these materials while testing for substantial evidence and not merely to detect whether the agency acted within the scope of its authority.

B. State Board of Health v. Godfrey

In *State Board of Health v. Godfrey*, the Supreme Court of Virginia muddied the waters considerably by applying the substantial evidence standard.⁷⁶ The case involved the Board of Health's denial of a septic tank permit to Godfrey because of the rocky soil in the region, poor and uneven absorption, and the presence of a water table at certain times of the year.⁷⁷ Such conditions were indicators to the Board that the land would not adequately absorb sewage wastes, thereby contaminating the surrounding water supply.⁷⁸ Godfrey had used both informal and formal agency proceedings to get the Board to reconsider the matter several times.⁷⁹ Because there were many other functioning septic systems in the geographical area and because of personal animosity between Borders, a member of the Board, and Miller, a prospective buyer of Godfrey's property, Godfrey brought action in the Circuit Court of Culpeper County claiming that the Board's denial of the permit was arbitrary.⁸⁰

The circuit court invited both parties to introduce evidence beyond that which was currently in the agency record.⁸¹ The Board chose not to introduce new evidence, but Godfrey and

75. H. DOC. NO. 26, *supra* note 23, at 29 cmt. 57. "This last sentence, applicable whether the agency is the trier of fact or not, directs reviewing courts to take account of the role for which agencies are created and the public policy evidenced by the basic laws under which they operate." *Id.*

76. State Bd. of Health v. Godfrey, 290 S.E.2d 875 (Va. 1982).

77. *Id.* at 877-78.

78. *Id.*

79. *Id.* at 877.

80. *Id.* at 876, 878-79.

81. *Id.* at 876.

Miller, the prospective purchaser, both testified.⁸² The court found that the Board had acted arbitrarily and entered an order requiring the Board to grant the permit.⁸³

The supreme court reversed the circuit court's decision, finding that Godfrey had not met the conditions explicitly laid out by the State Health Commissioner on which he would grant the permit.⁸⁴ While the Commissioner required "a layer of weathered diabase" three feet below the tile trenches throughout the drain field, soil analysis performed by the environmental geologists hired by Miller showed that this layer was only two feet deep on the drain sites under consideration.⁸⁵ This, combined with the water table and the presence of hard rock close to the surface, gave ample justification for the Board's refusal to grant the permit.⁸⁶ Nor did the supreme court find any taint of prejudice because of personal animosity between the applicants and Borders.⁸⁷ Several Board members studied the septic site and reported on the inadequate conditions, and there was "no evidence that anyone other than Borders acted arbitrarily toward the Godfreys or Miller."⁸⁸ This fact, combined with the presumption of official regularity mandated by section 17 of the VAPA, led the supreme court to conclude that the Board did not act arbitrarily in denying the permit.⁸⁹

In looking for substantial evidence to support the agency's decision against Godfrey, the court pointed out the specific requirements the Commissioner had set for approval of the septic tank permit.⁹⁰ It noted the Commission's concerns about the geographical composition of the area.⁹¹ The court also found that there was no prejudice because numerous people were part of the agency's decision making process and because the agency record contained "substantial and conclusive evidence other than Borders' findings" for rejecting the proposed

82. *Id.*

83. *Id.* at 880.

84. *Id.* at 881-82.

85. *Id.* at 877, 881-82.

86. *Id.* at 882.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 881-82.

91. *Id.*

sites.⁹² The problem with the decision lies in the supreme court's use of the substantial evidence standard as identical to the scope of the legal authority standard.

Throughout the briefs submitted to the Supreme Court, both appellees and appellants had suggested that the arbitrary and capricious standard ought to apply because the agency had based its decision on an inspection or test.⁹³ According to section 9-6.14:15, an agency "decision resting entirely upon an inspection, test, or election" is exempt from Article 4, the judicial review provision of the APA.⁹⁴ However, Section 9-6.14:15 also makes an exception to this exemption where the party aggrieved claims fraud, arbitrary action, or lack of authority for its agency actions.⁹⁵ Thus, if the agency bases its decision on an inspection, Article 4 ordinarily will not apply. But if the party aggrieved by that inspection-oriented decision is complaining of fraud or arbitrariness, then Article 4 will apply. In *Godfrey*, the plaintiff was complaining that the Board acted arbitrarily in denying the septic tank permits.⁹⁶ The Appellee's Brief notes:

[The] evidence demonstrates a classic confrontation between, on the one hand, a private individual and, on the other, a bureaucracy whose arm is acting independently from its central core. At first, Miller and Godfrey attempted to do everything that the local official suggested. Four applications, two engineers, one trip to Richmond, numerous attempts at post-hearing compliance, Five Thousand dollars and two and one-half years of steadfast efforts later, these gentlemen presented to the review[ing] court evidence of dogged resistance by Borders [the local Board of Health official] and outright refusal to act any further on conditional recommendations.⁹⁷

92. *Id.* The court here was referring specifically to the rejection of the two Thomas sites and the first Houston site. *See infra* note 99.

93. Brief of Appellees at 25, State Bd. of Health v. Godfrey, 290 S.E.2d 875 (Va. 1982) (No. 790756); Reply Brief of Appellant at 2, *Godfrey* (No. 790756).

94. VA. CODE ANN. § 9-6.14:15.

95. *Id.*

96. *Godfrey*, 290 S.E.2d at 876.

97. Brief of Appellees at 23-24, *Godfrey* (No. 790756).

Since arbitrariness was the allegation before the reviewing court, both appellants and appellees agreed that the arbitrary and capricious standard ought to apply.⁹⁸

The supreme court did not agree with the parties regarding the applicable standard. Since the court was reviewing formal agency action according to Section 12 of the VAPA, the Court found that a substantial evidence standard applied.⁹⁹ However, the Board held further informal hearings to consider alternate sites for a septic system even after the formal hearing.¹⁰⁰ Because the circuit court had invited the parties to introduce additional evidence regarding the Board's conduct in these informal proceedings, the scope of the legal authority standard would also apply according to section 17 of the VAPA.¹⁰¹

98. Brief of Appellees at 25, *Godfrey* (No. 790756); Reply Brief of Appellant at 2, *Godfrey* (No. 790756).

99. *Godfrey*, 290 S.E.2d at 880. It would appear that the parties stipulated that the arbitrariness test applied. Why, then, did the supreme court invoke the substantial evidence standard? A closer look at the procedural history of the case provides the answer. Originally, Miller applied for a permit to install a septic system and the Board denied the application. *Id.* at 877. Miller then employed Thomas, a civil engineer, who chose two possible septic system sites. *Id.* Godfrey and Miller applied for permits for both Thomas sites, and the Board denied them. *Id.* Godfrey requested an informal appeal and then a formal appeal when the informal appeal failed. *Id.* While the formal appeal for the two Thomas sites was pending before the agency, Miller hired Houston, who recommended a special septic design system that could be installed at any of three locations which Houston chose. *Id.* Houston's Site 1 overlapped in geographical area with Thomas Site 2. Because of the overlap, the local Board would not consider application on the Houston sites until the formal appeal was resolved. *Id.* at 877-78.

On formal appeal, both Thomas sites were turned down by the Commissioner. *Id.* at 878. Godfrey then brought suit in the Circuit Court of Culpeper County. *Id.* at 879. While the suit was pending, the local Board informally considered the three possible Houston sites but turned them down also. *Id.* Neither Miller nor Godfrey appealed any of these decisions. *Id.* However, at the trial before the circuit court, Miller and Godfrey testified as to events that occurred after the formal hearing with the agency. *Id.* at 879. Therefore, the court simultaneously considered both an official appeal from formal agency action and an appeal from the later informal agency actions because Miller specifically alleged bad faith based on rejection of the Houston sites. *Id.* This left the reviewing court to consider the substantiality of the evidence for the formal agency action as well as the scope of the agency's authority for its later informal actions. *Id.* The lower court chose to apply the scope of the legal authority standard. *Id.* at 876. The supreme court chose the substantial evidence standard, but then decided that the two standards were not that different. *Id.* at 880-81.

100. *Id.* at 879.

101. *Id.* at 880.

The court creatively handled this tension between the two standards. It first said that the lower court was not wrong to allow additional evidence, but that only evidence "purporting to show that the agency denied the applicant a fair and impartial review of his application in accordance with proper procedures" should have been allowed.¹⁰² The court went on to say that it did not matter whether the substantial evidence test or the arbitrary and capricious test applied because the two standards were in essence the same test.¹⁰³ The court's reasoning to reach this conclusion ran as follows:

(1) On a federal level, courts have had trouble articulating any distinction between agency action that meets the arbitrary and capricious test and that which meets the substantial evidence test.¹⁰⁴ "Thus, one federal court has noted 'an emerging consensus of the Courts of Appeals' that the distinction between the two is 'largely semantic.'"¹⁰⁵

(2) Prior Virginia cases and legislative councils have considered the arbitrary and capricious standard to be the same as the standard of what is beyond the scope of an agency's legal authority.¹⁰⁶

(3) Section 9-6.14:17 states that the standard for review where the court acts as the trier of fact is whether the action was beyond the scope of the agency's legal authority.¹⁰⁷

Although unstated by the court in its decision, the following steps are necessarily implied in order for the court to reach the decision it did:

(1) By the principle of substitution, the standard of review where the court acts as the trier of fact is whether the agency action was arbitrary and capricious.

(2) If there is no distinction between what is arbitrary and capricious and the substantial evidence test, then agency ac-

102. *Id.* at 880-81.

103. *Id.* at 881.

104. *Id.*

105. *Id.* (quoting *Pacific Legal Found. v. Department of Transp.*, 593 F.2d 1338, 1343 n.35 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 830 (1979)).

106. *See id.*; *see, e.g.*, *Virginia Alcoholic Beverage Control Comm'n v. York St. Inn*, 257 S.E.2d 851 (Va. 1979); S. DOC. NO. 7, *supra* note 25 at 7, 13.

107. *Godfrey*, 290 S.E.2d at 879-80; *see* VA. CODE ANN. § 9-6.14:17.

tions alleged to be arbitrary must be supported by substantial evidence to be sustained on review.

The court concluded that "under the APA, whether the agency action is formal or informal, the sole determination by the reviewing court as to issues of fact before the agency is whether there was substantial evidence in the agency record to support the agency decision."¹⁰⁸

This reasoning is summarized in the following syllogism:

IF (exceeding legal authority test) THEN (arbitrary and capricious test);

IF (arbitrary and capricious test) THEN (substantial evidence test);

THEREFORE:

IF (exceeding legal authority test) THEN (substantial evidence test).

The supreme court based its mixture of these standards of review on a careless treatment of federal law.¹⁰⁹ Although the list of errors subject to court review found in section 9-6.14:17 is similar to that found in the federal APA, a reviewing court should not rely unquestionably on federal courts' interpretations of the appropriate standard of review and apply these interpretations to Virginia cases. The language of the two statutes is similar but not exact.¹¹⁰ The federal APA states that "[t]he

108. *Godfrey*, 290 S.E.2d at 881.

109. *See id.*

110. H. DOC. NO. 26, *supra* note 23, at 28. Compare 5 U.S.C. § 706 (1994) with VA. CODE ANN. § 9-6.14:17. According to section 9-6.14:17,

Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidential support for findings of fact.

VA. CODE ANN. § 9-6.14:17.

According to 5 U.S.C. § 706:

The reviewing court shall—

. . . (2) hold unlawful and set aside any agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion,

reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (E) unsupported by substantial evidence.”¹¹¹ The APA states that “[s]uch issues of law [subject to review by the court] include: . . . (iv) the substantiality of the evidential support for findings of fact.”¹¹²

Second, these clauses are not *in pari materia*. Clauses in statutes are *in pari materia* when they “relate to the same person or thing, or to the same class of persons or things, . . . [or] have a common purpose.”¹¹³ Ordinarily, such clauses “must be construed as one system, and governed by one spirit and policy, and the legislative intention must be ascertained . . . from a view of the whole system of which it is but a part.”¹¹⁴ The federal and Virginia statutes do not relate to or govern the same class of things. While both set forth administrative procedure, the federal statute controls one group of agencies while the Virginia statute governs an entirely different set of agencies. Congress passed the federal statute in 1946; the General Assembly passed the APA in 1975.¹¹⁵ Since distinct legislative bodies enacted the statutes at different times, the same legislative intention, or spirit, should not be presumed to underpin both administrative bodies. In addition, while courts

or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706

The Virginia Code Commission commented that “[t]his listing [in § 9-6.14:17] has come to be customary in drafting provisions defining issues on judicial review, particularly since the adoption of the federal Administrative Procedure Act in 1946.” H. DOC. NO. 26, *supra* note 23, at 28.

111. 5 U.S.C. § 706 (1994).

112. VA. CODE ANN. § 9-6.14:17.

113. 82 C.J.S. *Statutes* § 366 (1953); *see also* Prillaman v. Virginia, 100 S.E.2d 4, 7 (Va. 1957) (citing 50 AM. JUR. *Statutes* § 350 (1944); 17 MICHIE’S JUR. *Statutes* § 40 (1994)).

114. 82 C.J.S. *Statutes* § 366 (1953); *see also* Prillaman, 100 S.E.2d at 7.

115. *See* VA. CODE ANN. § 9-6.14:17 (originally enacted at 1975 Va. Acts 503); H. DOC. NO. 26, *supra* note 23, at 28.

should strive to interpret state and federal statutes in a way that avoids conflict, the meanings of federal statutory provisions do not necessarily control the meanings of state statutory provisions.¹¹⁶ Thus, without any indication from the Virginia legislature that it intended its statute governing administrative agencies to be read *in pari materia* with the federal administrative statute, a Virginia reviewing court should not conclude that the standards of arbitrariness and substantial evidence are to be treated identically.

Yet this is just what the Supreme Court of Virginia did. To support its conclusion that the arbitrary and capricious standard is the same as the substantial evidence standard, the *Godfrey* court looked to a federal circuit case, *Pacific Legal Foundation v. Department of Transportation*, in which the United States Court of Appeals for the District of Columbia stated that there was no real difference between the arbitrary and capricious and the substantial evidence standards.¹¹⁷ However, when the *Pacific Legal Foundation* court made this comment, it was deciding a case that arose from a rulemaking, not a case decision.¹¹⁸ The four cases that the court relied on for this proposition were also cases that arose from rulemaking procedures.¹¹⁹ In one such case, *Associated Industries v. United States Department of Labor*, the Court of Appeals for the Second Circuit made an explicit distinction between the treatment of these standards in adjudication and rulemaking.¹²⁰ The court stated:

116. See *Department of Indus. Relations v. Drummond*, 1 So.2d 395, 398-99 (Ala. Ct. App. 1941) (holding that the federal definitions of labor dispute in 19 U.S.C.A. § 113(c) and 29 U.S.C.A. § 152(9) are not imputed to the Alabama Unemployment Compensation Law because the purpose of the Alabama Act would be destroyed); 82 C.J.S. *Statutes* § 366a (1953); cf. *Miners in Gen. Group v. Hix*, 17 S.E.2d 810, 815 (W. Va. 1941) (holding that the federal definitions of labor dispute in 19 U.S.C.A. § 113(c) and 29 U.S.C.A. § 152(9) do not bind the West Virginia court in construing its own Unemployment Compensation Act, but that the federal statutes are persuasive evidence of what the definition of labor dispute should be in West Virginia).

117. *Pacific Legal Found. v. Department of Transp.*, 593 F.2d 1338, 1343 n.35 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).

118. *Id.* at 1343.

119. See *id.* at 1343 n.35 (citing *Paccar, Inc. v. National Highway Traffic Admin.*, 573 F.2d 632 (9th Cir. 1978); *American Pub. Gas Ass'n v. FPC*, 567 F.2d 1016 (D.C. Cir. 1977); *National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir. 1975); *Associated Indus. v. Department of Labor*, 487 F.2d 342 (2d Cir. 1973)).

120. *Associated Indus.*, 487 F.2d at 342.

While we still have a feeling that there may be cases where an adjudicative determination not supported by substantial evidence within the test of *Universal Camera Corp. v. NLRB* . . . would not be regarded as arbitrary and capricious, . . . in the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge.¹²¹

Thus the sole basis for the Supreme Court of Virginia's decision to treat the two standards as one in a formal adjudicatory setting was in reality a case about rulemaking, supported by other cases about rulemaking, which themselves specifically stated that these tests applied differently in adjudicatory decisions.

This is especially surprising because in *Godfrey*, the court was interpreting the 1975 VAPA, a statute designed to separate rulemaking from adjudicative functions.¹²² In its report accompanying a proposed version of the 1975 act, the Code Commission had called the previous Administrative Agencies Act "technically defective" for failing to separate these two agency functions.¹²³ The Commission designed a proposed statute to cure this defect by specifically referring to when and how agencies were to use rulemaking and adjudication.¹²⁴ The supreme court appears to have overlooked this legislative history when it equated the substantial evidence standard with the arbitrary and capricious standard.

IV. THE ASSESSMENT

Because the authors of section 9-6.14:17 were less than clear in drafting this section, Virginia courts have struggled in applying it. After *York Street Inn* and *Godfrey*, the meaning of this section is less clear than ever. So what are the basics of section 9-6.14:17? First, there are two standards of review: the scope of legal authority standard and the substantial evidence standard. These standards are distinct. The structure of the text shows that a reviewing court should apply the scope of legal authority

121. *Id.* at 350 (citation omitted).

122. H. DOC. NO. 26, *supra* note 23, at 5.

123. *Id.* at 4.

124. *Id.* at 5.

standard only when that court or an earlier reviewing court has allowed the introduction of new evidence.¹²⁵ A reviewing court should apply the substantial evidence standard in all other cases.¹²⁶ But what do these standards actually mean? If the scope of the legal authority standard means that the agency is "plainly wrong,"¹²⁷ what does the substantial evidence test mean? What should it mean?

A. Universal Camera

One leading authority on this question is *Universal Camera Corp. v. National Labor Relations Board*,¹²⁸ in which the United States Supreme Court provided clear guidance as to the meaning of the phrase "substantial evidence" by tracing its legislative history through the Wagner Act and the Taft-Hartley Act.¹²⁹ The Court said of the substantial evidence test in the Wagner Act: "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³⁰ The standard was similar to a plaintiff's burden of production in presenting all the elements of his or her claim, for "it must be enough to justify, . . . a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."¹³¹

Concern arose, however, that federal courts reviewing Labor Board decisions determined "substantiality" by looking at the evidence that supported the Board's decisions alone, without considering any contrary evidence that was placed before the Board during its hearings.¹³² In 1941, the Attorney General's Committee made a report to Congress expressing this concern.¹³³ Three Committee members recommended that Con-

125. See *supra* notes 41-43 and accompanying text.

126. See *supra* notes 37-38 and accompanying text.

127. See *Board of Zoning Appeals v. Fowler*, 114 S.E.2d 753, 758 (Va. 1960).

128. 340 U.S. 474 (1951).

129. *Id.* at 477-91.

130. *Id.* at 477 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

131. *Id.* (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

132. *Id.* at 478-81.

133. *Id.* at 480.

gress set a judicial review standard for all agencies and that this standard be one of substantial evidence "upon the whole record."¹³⁴ Congress considered this remedy when it enacted the Federal Administrative Procedure Act.¹³⁵ Reports from the House and Senate committees deliberating upon the applicable standard of judicial review in the APA emphasized the need of courts to consider the entire record when deciding if substantial evidence existed for agency actions.¹³⁶

Thus, the federal APA and the Wagner Act were part of one legislative system and related to the same class of things, i.e., federal agencies.¹³⁷ The purpose of Congress when enacting the APA was to improve upon a standard that had been found unsatisfactory in an earlier statute. Courts can view the Wagner Act and the federal APA *in pari materia*, unlike the federal and Virginia APAs, which the *Godfrey* court erroneously treated as *in pari materia*.¹³⁸

The *Universal Camera* Court pointed out that similar concerns with the substantial evidence test arose when Congress was considering the Taft-Hartley Act in 1947.¹³⁹ The House and Senate considered several alternatives, including tests for "weight of the evidence" and "clearly erroneous" agency decisions.¹⁴⁰ However, as the Senate Committee Report states, Congress eventually decided to use the same standard as that found in the APA, namely "substantial evidence on the record considered as a whole."¹⁴¹ As Senator Taft explained the meaning of this phrase, "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record."¹⁴² The Supreme Court in *Universal Camera* interpreted the Taft-Hartley Act *in pari materia* with the federal APA because Congress explicitly

134. *Id.* at 481.

135. *Id.* at 482; see 5 U.S.C. §§ 551-59, 561-67, 571-82, 601-11, 701-06 (1994).

136. *Universal Camera*, 340 U.S. at 484 & n.17.

137. *Id.* at 477, 482.

138. See 82 C.J.S. *Statutes* § 366 (1953).

139. *Universal Camera*, 340 U.S. at 484.

140. *Id.* at 485.

141. *Id.*

142. *Id.* at 485 n.21.

intended the standard of review under the Taft-Hartley Act to parallel that of the APA.¹⁴³ Specifically, the Court held:

[T]he wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.¹⁴⁴

Whether the case being decided involved the Taft-Hartley Act or the federal APA, the same standard of substantial evidence based on the entire agency record applied.

Federal courts have relied heavily on *Universal Camera* since the Supreme Court decided the case in 1951. Since then, it has become a major federal authority for defining what the substantial evidence standard is, where a reviewing court should look to determine if substantial evidence is present in an agency decision, and when the reviewing court may set aside an agency decision.¹⁴⁵ Many state courts also use the *Universal Camera* analysis of the substantial evidence standard when deciding if there is substantial evidence for state agency decisions.¹⁴⁶ Vir-

143. *Id.* at 487.

144. *Id.*

145. *See, e.g.*, *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980) (citing *Universal Camera* for the principle that under the substantial evidence test, substantiality includes what detracts from the weight of the agency's decision); *NLRB v. Threads, Inc.*, 308 F.2d 1, 6 (4th Cir. 1962) (citing *Universal Camera* for the principle that under the substantial evidence test, substantiality includes what detracts from the weight of the agency's decision and that the court can set aside the agency decision when the court cannot conscientiously find substantial evidence based on the entire record); *NLRB v. Corning Glass Works*, 204 F.2d 422, 427 (1st Cir. 1953) (citing *Universal Camera* for the principle that the reviewing court must consider the entire record); *Diaz v. Secretary of Health & Human Servs.*, 791 F. Supp. 905, 907 (D. P.R. 1992) (citing *Universal Camera* for the principle that evidence must appear substantial when viewed in light of the entire record).

146. *See, e.g.*, *Department of Cent. Management Services v. Illinois State Labor Relations Bd.*, 575 N.E.2d 962, 966 (Ill. App. Ct. 1991) (citing *Universal Camera* for the principle that the reviewing court is not to overturn an agency decision if there is substantial evidence in the record); *Application of Eric J. Phinn v. Kross*, 186 N.Y.S.2d 469, 472-73 (N.Y. App. Div. 1959) (citing *Universal Camera* for the principle that the substantial evidence test includes consideration of what detracts from the weight of the agency decision and that the court may set aside an agency decision when the court cannot find that the evidence on the agency's side is substantial in light of the entire record).

ginia, however, has not relied explicitly on *Universal Camera* to make such determinations.

B. *How the Virginia Courts Should Interpret Standards of Review*

Virginia courts should not confuse the substantial evidence standard with the scope of the legal authority standard. Reviewing courts should interpret the substantial evidence standard as defined in *Universal Camera*.¹⁴⁷ The scope of the legal authority standard, however, should retain the meaning given to it by past Virginia courts.

Both the federal and Virginia APAs require that, where the substantial evidence standard applies, the reviewing court should look at the entire agency record.¹⁴⁸ In Virginia, this requirement first appeared in the General Administrative Agencies Act in 1952.¹⁴⁹ The Virginia Advisory Legislative Council recommended such a standard in its report on the *Regulation of Administrative Agencies*.¹⁵⁰ The Council believed the question of how much review an agency's decision should receive to be similar to a decision by a court to grant judgment notwithstanding a jury's verdict due to a lack of evidential support.¹⁵¹ In formulating a recommended statute for the General Assembly, the Council used

[t]he words "unsupported by the evidence on the record considered as a whole" . . . to make it clear that the appeal is not to be a trial de novo, and that a mere scintilla of evidence is not enough to support an agency decision. Between those two extremes the courts are expected to follow the usual rules that the appellant has the burden of persuasion and that the action of a public officer is presumed to be legal.¹⁵²

147. See *supra* notes 130-31 and accompanying text.

148. 5 U.S.C. § 706; VA. CODE ANN. § 9-6.14:17.

149. 1952 Va. Act 703, *codified at* VA. CODE ANN. § 9-6.1 to .14 (Michie 1950), *repealed by* 1975 Va. Acts 503.

150. S. DOC. NO. 7, *supra* note 25.

151. *Id.* at 7-8.

152. *Id.* at 8.

The U.S. Supreme Court has also taken the approach that the substantial evidence standard is the same standard a judge would apply when deciding whether to withhold a case from a jury or to enter judgment notwithstanding a jury's verdict.¹⁵³ In *Universal Camera*, the Supreme Court stated:

[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.¹⁵⁴

Thus, in both the federal courts and in Virginia, a judge must apply the same standard when determining if there is substantial evidence in the record to support an agency's decision. The Virginia courts should follow the federal courts' interpretation of the substantial evidence test not because the Virginia and the federal APAs are *in pari materia*, but because both governments define "substantial evidence" the same way.

However, Virginia courts should not treat the arbitrary and capricious, or scope of the legal authority, test the same as federal courts. When a federal court considers whether an agency has acted arbitrarily or capriciously, the court looks to see if there is any "rational relationship" between the agency's decision and the evidence in the record.¹⁵⁵ If a court finds that the agency's decision is not reasonable, it could still find that the agency's decision passes the arbitrariness test.¹⁵⁶ Nevertheless, the reviewing court must find that the agency considered relevant factors and that the agency did not make a clear error when making its decision. The court's review of the facts must be both "searching and careful" to pass the arbitrary and capricious test.¹⁵⁷

153. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

154. *Id.* at 477 (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

155. *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994).

156. *National Audubon Soc'y v. U.S. Forest Serv.*, 46 F.3d 1437, 1443-45 (9th Cir. 1993).

157. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

In Virginia, reviewing courts need not search as deeply into the agency's decision when applying the arbitrary and capricious standard. Rather, the court reviewing an agency's decision should consider the agency's experience, the agency's basic law, and the purposes of the law under which the agency has acted.¹⁵⁸ In *Board of Zoning Appeals v. Fowler*, the Supreme Court of Virginia held:

[T]he court may not disturb the Board's decision unless it has applied erroneous principles of law or where the Board's discretion is involved, unless the evidence before the court proves to its satisfaction that the Board's decision is plainly wrong and violative of the purpose and intent of the zoning ordinance. . . . [J]udicial interference is permissible only for relief against the arbitrary or capricious action that constitutes a clear abuse of the delegated discretion.¹⁵⁹

Thus, to pass the arbitrary and capricious test in Virginia, an agency must show only that it acted according to its basic law without overstepping the bounds of its authority. Virginia courts are not required to perform a "searching and careful" review of the agency's action, but only to determine whether the decision was "plainly wrong" on its face.¹⁶⁰ Because the Virginia test for arbitrary and capricious action differs from the federal test, Virginia courts should not treat the arbitrary and capricious test as identical to the substantial evidence test.

The Virginia arbitrary and capricious test, in which a reviewing court checks merely to see whether the agency has acted contrary to its basic law or in a way that is clearly wrong, is a far cry from the substantial evidence test, in which a court reviews agency action to decide whether a reasonable factfinder could decide for either party in a lawsuit. Pursuant to the arbitrary and capricious test, the court reviews the "agency file, minutes, and records of its proceedings" and other evidence presented to the court to decide if the agency acted within its

158. *Virginia Alcoholic Beverage Control Comm'n v. York Street Inn*, 257 S.E.2d 851, 853 (Va. 1979).

159. *Board of Zoning Appeals v. Fowler*, 114 S.E.2d 753, 758 (Va. 1960) (quoting *Board of Zoning Appeals v. Combs*, 106 S.E.2d 755, 759 (Va. 1959); *YOKELY, ZONING LAW AND PRACTICE*, § 187 (1953)).

160. *Board of Zoning Appeals v. Combs*, 106 S.E.2d 755, 759 (Va. 1959).

authority.¹⁶¹ The reasonableness of the agency decision itself is not an issue. However, the reasonableness of the agency's decision is precisely the issue when the court looks for substantial evidence in the agency record.

V. CONCLUSION

In sum, the Virginia courts must fit agency action into one of three categories:

(1) The agency decision was based on a formal proceeding under section 12 of the VAPA and the reviewing court did not take any additional evidence. Here, the substantial evidence test applies. The reviewing court should apply the same standard it uses when deciding whether to submit a factual issue to a jury.¹⁶²

(2) The agency decision was based on an informal proceeding, but the reviewing court did not take any additional evidence. Here, the substantial evidence test applies, but because there is no official evidentiary record, the reviewing court may look to the agency's basic law, regulations, and the purpose for which the General Assembly created the agency.

(3) The agency decision was based on a formal or informal proceeding and the reviewing court took additional evidence. Here, the scope of the legal authority test applies because the agency did not act as the finder of all the facts. In this case, the reviewing court should uphold any agency decision not plainly wrong on its face or plainly wrong when the court considers the agency's purpose and basic law.¹⁶³

To treat the substantial evidence standard the same as the arbitrary and capricious standard violates the statutory language and the intent of the General Assembly that created the APA. In addition, such treatment creates an unreasonable burden upon agencies. For the arbitrary and capricious test to

161. VA. CODE ANN. § 9-6.14:17.

162. S. DOC. NO. 7, *supra* note 25, at 7-8; *see also* Virginia Electric & Power Co. v. Lowry, 104 S.E. 177, 181 (1936).

163. Virginia Alcoholic Beverage Control Comm'n v. York Street Inn, 257 S.E.2d 851, 853 (Va. 1979); *Fowler*, 114 S.E.2d at 758 (Va. 1960) (quoting Board of Zoning Appeals v. Combs, 106 S.E.2d 755, 759 (Va. 1959)).

apply, the reviewing court must allow the parties to present new evidence. The agency that is a party to the suit could be unfamiliar with new evidence presented by the individual aggrieved. Yet the reviewing court must consider this additional evidence, as part of the whole record, when deciding whether to overturn the agency's decision. To apply the substantial evidence standard in such a case would require the agency to somehow predict what new evidence will be presented to the reviewing court and to make a decision that will meet the test of substantiality in light of this enlarged and unfamiliar evidentiary record.¹⁶⁴

Agency decisions should not be subject to reversal because of the agency's failure to correctly forecast what additional evidence an aggrieved party may find to submit to a reviewing court. Crystal ball gazing is not typically an activity within an agency's expertise. Where the rights of individuals and agencies as representatives of the public are decided in courts of law, a reviewing judge should use the substantial evidence standard only where the agency is aware of all the evidence before making its decision. If the court receives new evidence, it should hold the agency to a lesser standard because the factfinding process and the evidentiary record are not complete when the agency makes its decision. To treat the two standards the same creates an injustice for the public that the agency and the courts serve.

Mary Renae Carter

164. Opening Brief of Appellant at 28-29, *State Bd. of Health v. Godfrey*, 290 S.E.2d 875 (Va. 1982) (No. 790756). In *Godfrey*, Mr. Miller had an opportunity to testify before the Board but refused to do so on the advice of his attorney. 290 S.E.2d at 880. However, Mr. Miller did testify before the Circuit Court. The Supreme Court of Virginia held that the trial court should only have heard Mr. Miller's complaints as to the agency's bad faith and not any additional evidence regarding the substance of the agency decision. However, the court made this decision because Miller specifically alleged that he had been treated unfairly. *Id.* *Godfrey* is not indicative of what type of additional evidence a reviewing court may allow where an individual is claiming agency mistake or misconduct other than bad faith.

