

Understanding Standards of Appellate Review

by George A. Somerville

The “standard of review” describes an appellate court’s analytical process. It determines how stringently the court will review the decision below.

The standard typically depends on the nature of the decision under review (*i.e.*, conclusion of law, finding of fact, exercise of discretion, etc.). Where such guideposts are indistinct, however, selection of applicable standards of review often depends on judgments regarding institutional competence, *i.e.*, whether trial or appellate judges are better positioned or equipped to make the decision, and distinct but related considerations regarding appropriate allocations of judicial resources. *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75 (1985); *Koon v. United States*, 518 U.S. 81, 98 (1996) (“District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.”).

The most common standards of review are:

1. legal error;
2. abuse of discretion;
3. “clearly erroneous” review of trial court findings of fact in the federal courts;
4. “plainly wrong or without supporting evidence” review of trial court and jury findings of fact, in Virginia courts;
5. “rational basis” review of jury findings of fact, in federal courts;
6. “substantial evidence in the record as a whole,” applied (1) to administrative agency findings of fact in cases subject to the Virginia Administrative Process



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- Act (VAPA), (2) to federal administrative agency findings of fact in rulemaking proceedings and (3) to federal administrative agency findings of fact in cases decided on the record of an evidentiary hearing;
7. “arbitrary [or] capricious,” applied to substantive (*i.e.*, policy) decisions of state administrative agencies and to both findings of fact and substantive decisions of federal administrative agencies; and
 8. “fairly debatable,” applied to “legislative” decisions of local governing bodies.

That list states the most frequently used standards *roughly* in descending order of stringency, *i.e.*, from the most demanding to the most forgiving tests applied to decisions under review.

In the U.S. Courts of Appeals, F.R.A.P. 28(a)(9)(B) and 28(b) require “a concise statement of the applicable standard of review” for each issue, in each party’s initial brief. (The appellee may omit the statement of the standard of review, however, unless she is “dissatisfied with the appellant’s statement.” F.R.A.P. 28(b)(5).)

Virginia’s appellate courts have similar requirements for all petitions for appeal and briefs on the merits. Rule 5:17(c)(6), for example, provides that “[w]ith respect to each assignment of error, the standard of review and the argument – including principles of law and the authorities – shall be stated in one place and not scattered through the petition [for appeal].” *See also* Rules 5:27(d), 5:28(d), 5:28(e)(2), 5A:12(c)(5), 5A:20(e), and 5A:21(d).

A thoughtful statement of the standard of review and the analyses that precede it (and perhaps accompany it) may focus the Court as well as counsel on the nature of the issues. Counsel who review potential appellate issues

through the “filter” of applicable standards of review are better able to select the best issues for appeal and to present those issues in terms that facilitate a favorable decision. Appellants, for example, should emphasize (to the extent possible) that the issues are purely legal and subject to *de novo* review. Appellees should emphasize (when possible) that rulings challenged by the appellant may be reviewed only for abuse of discretion or for clear error in factual findings.

For appellants’ counsel, potential assignments of error *cannot* be evaluated intelligently without consideration of the standards of review. For appellees’ counsel, careful evaluation (and research) regarding the issues on appeal will allow effective “policing” of appellants’ counsel – and sometimes the court as well, which may need to be reminded at oral argument (for example) that the appellant has challenged only the discretionary aspects of the trial court’s decision, and not the court’s selection of factors to be considered in its exercise of discretion or the basic proposition that the issue is committed to the trial court’s discretion.

Standards of review sometimes can be “manipulated” by careful argument. Issues that may seem governed by an abuse of discretion standard, for example, may include a legal component, such as the choice of factors that must be considered in the exercise of discretion. The appellant usually should, if possible, focus on the legal components of the mixed question and even disavow any challenge to the way that the trial court or agency exercised its discretion, addressing instead its selection of factors to consider. *Cf.*, *e.g.*, *Keener v. Keener*, 278 Va. 435, 441-42, 682 S.E.2d 545, 548 (2009) (appellate argument focusing on legal issues, avoiding disputed questions of fact). The appellee, on the other hand, should emphasize the discretionary aspects of the decision below, and if appropriate she may even argue that the choice of factors is itself committed to the lower court’s discretion or that its choice of factors merits some deference on appeal.

Appellants' counsel have an advantage, however; they select the assignments of error, and therefore they have the opportunity to define the debate with precision. *See, e.g., Technical Land, Inc. v. Firemen's Insurance Co.*, 756 A.2d 439, 443 (D.C. 2000) ("Whether a person has an insurable interest is a question of fact.... Although Firemen's Insurance contends that Technical Land is seeking review of the trial court's finding of fact that Technical Land did not have an insurable interest, Technical Land maintains that the trial court's finding ... is wrong as a matter of law because the trial court did not consider the appropriate factors. We agree with Technical Land and review the trial court's ruling *de novo*").

De novo review, for legal error, is the most stringent standard in general use. The appellate court accords the lower court's or agency's conclusion no deference at all; it decides the issue for itself. A lower court's *reasoning* may be persuasive or even compelling, but the very nature of the relationship between trial and appellate courts dictates that appellate courts not review legal issues with any predisposition to sustain lower courts' conclusions. Appellate courts must make their own, independent decisions.

Federal appellate review of trial courts' findings in civil cases is governed by Fed. R. Civ. P. 52(a), which provides (in pertinent part), "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *See, e.g., Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985):

"[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ... This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would

have decided the case differently.... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Review of jury findings of fact in the federal courts is among the least stringent of any processes of judicial review known to the American legal system. Federal appellate courts are particularly sensitive to jury findings because the Seventh Amendment of the U.S. Constitution forbids reexamination of jury findings, "except according to the rules of the common law." If *any* reasonable jury *could* have reached the same conclusion, its findings should not be set aside on appeal. *See, e.g., Haines v. Liggett Group Inc.*, 975 F.2d 81, 92 (3d Cir. 1992) ("So long as there is some evidence from which the jury could arrive at the finding by a process of reasoning, the jury's findings of fact, especially those resolving conflicts in testimony, will not be disturbed. Facts found by a judge alone need a stronger evidentiary base").

Essentially the same standard is applied to a directed verdict or judgment as a matter of law. It is sometimes referred to as "rational basis" review. *See generally, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 514 (1988); *United States v. Chong Lam*, 677 F.3d 190, 198-200 (4th Cir. 2012).

In Virginia, appellate review of *both* juries' and trial courts' findings of fact, in both civil and criminal cases, is governed by Va. Code § 8.01-680. Section 8.01-680 provides that where a party challenges *either* the trial court's decision to grant or to deny a motion to set aside a jury verdict and order a new trial *or* the trial court's own findings of fact, on the ground that it is (or they are) contrary to the evidence, the judgment shall not be set aside

“unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it.” Under this statute, in both civil and criminal cases, trial courts’ findings are “given the same effect as a jury verdict.” *City of Richmond v. Beltway Properties, Inc.*, 217 Va. 376, 379, 228 S.E.2d 569, 572 (1976); *Pugh v. Commonwealth*, 223 Va. 663, 667, 292 S.E.2d 339, 341 (1982).

The standard is not entirely toothless. The Supreme Court occasionally has reversed a judgment on the ground that there was *no* evidence to support a finding for a prevailing party, on one or more issues as to which it had the burden of proof (*e.g.*, *Thompson v. Bacon*, 245 Va. 107, 111-12, 425 S.E.2d 512, 515 (1993)), or on the ground that undisputed evidence established a disputed fact as a matter of law, contrary to the trial court’s finding (*e.g.*, *Schweider v. Schweider*, 243 Va. 245, 250, 415 S.E.2d 135, 138 (1992)), and even on the ground that the evidence was insufficient to prove beyond a reasonable doubt that a defendant committed a crime (*Hickson v. Commonwealth*, 258 Va. 383, 520 S.E.2d 643 (1999)).

Review of federal administrative agency decisions generally is governed by the federal Administrative Procedure Act (APA), 5 U.S.C. § 706. Reviews of most state agency decisions are governed by cognate state statutes such as the VAPA, Va. Code § 2.2-4027. The principal standards of review of agency findings are: (1) “arbitrary [or] capricious” and (2) “substantial evidence on the record as a whole.” Those standards are highly deferential. It has been said, for example, that the “arbitrary [or] capricious” standard requires only a “rational basis” for the agency’s “treatment of the evidence.” *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). The Virginia Supreme Court has defined “substantial evidence” consistently with federal case law, as “such relevant evidence as a reasonable mind *might* accept as adequate to support a conclusion” and held that under this standard, “the court may reject the agency’s

findings of fact ‘only if, considering the record as a whole, a reasonable mind would *necessarily* come to a different conclusion.’” *Virginia Real Estate Commission v. Bias*, 226 Va. 264, 269, 308 S.E.2d 123, 125 (1983) (citations omitted; first emphasis added in *Bias*, second in the original source).

“Legislative” decisions of local governing bodies are reviewed very gently, under the “fairly debatable” standard of review. *E.g.*, *Gregory v. Board of Supervisors*, 257 Va. 530, 537-39, 514 S.E.2d 350, 354-55 (1999) (denial of rezoning); *Board of Supervisors v. McDonald’s Corp.*, 261 Va. 583, 589, 544 S.E.2d 334, 338 (2001) (special exceptions). An issue is “fairly debatable” if, measured both quantitatively and qualitatively, the evidence “could lead objective and reasonable persons to reach different conclusions.” *Gregory*, 257 Va. at 537, 514 S.E.2d at 354. “The burden of proof is on him who assails [a zoning ordinance] to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare.” *Turner v. Board of Supervisors*, 263 Va. 283, 288, 559 S.E.2d 683, 686 (2002).

Application of an ordinance to particular facts is not a legislative act. It is reviewed under principles similar to those applied to review of any other administrative action. *E.g.*, *Steele v. Fluvanna County Board of Zoning Appeals*, 246 Va. 502, 506-08, 436 S.E.2d 453, 457 (1993) (reversing BZA’s grant of a “hardship” exemption, for legal error). And even a “legislative” action may be reviewed for legal error – in choosing, interpreting, or applying the law that authorizes the action; in complying with the procedural mandates of such laws; or in exceeding the agency’s jurisdiction. *E.g.*, *City of Alexandria v. Potomac Greens Assocs. Partnership*, 245 Va. 371, 376-78, 429 S.E.2d 225, 227-29 (1993); *Andrews v. Board of Supervisors*, 200 Va. 637, 639-40, 107 S.E.2d 445, 447-48 (1959).

“Abuse of discretion” standards are applied to lower courts’ and agencies’ decisions on issues that, for one or more of a variety of

reasons, are committed initially to the lower tribunal's discretionary powers of decision – meaning primarily that the tribunal has less accountability and greater freedom to decide the matter as it sees fit in the particular case and to decide different cases differently with less justification. This standard “allows the trial judge a ‘limited right to be wrong’” and “requires the appellate court to assure itself only that certain ‘indicia of rationality and fairness’ have been met.” *United States v. Felder*, 548 A.2d 57, 62 (D.C. 1988) (citations omitted). The several opinions in *Aikens v. Ingram*, 652 F.3d 496 (4th Cir. 2011) (*en banc*), provide an instructive discussion of various appellate approaches to abuse of discretion standards of review.

“Abuse of discretion” is not a stringent standard, to be sure; but it is not a single, determinate (or determinable) standard, as often supposed. There are numerous shades to the stringency of discretionary review, which often depend on the reasons a matter is committed to the discretion of the lower tribunal in the first instance. *See, e.g., Le Sportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 74-75 (2d Cir. 1985), quoting Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 763 (1982):

The term “abuse of discretion” is capable of widely varying interpretations, ranging ... “from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.”

Accord, United States v. Evans, 526 F.3d 155, 166 n.1 (4th Cir.), *cert. denied*, 129 S.Ct. 476 (2008) (Gregory, J., concurring in the judgment).

The Supreme Court of Virginia recently described the nature of its review for abuse of discretion in *Landrum v. Chippenham & Johnston-Willis Hospitals, Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011):

An abuse of discretion ... can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.

Justice Millette, joined by Chief Justice Kinser, concurred “to emphasize a well-established principle concerning the abuse-of-discretion standard in appellate review in both the Commonwealth and other jurisdictions.” He argued that the three scenarios identified by the majority “are not all encompassing” and that abuse of discretion review should not be so limited. Specifically, “a [trial] court by definition abuses its discretion when it makes an error of law... The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.” *Id.* at 357, 717 S.E.2d at 139 (citations and additional quotation marks omitted).