# MEMORANDUM

TO: Sheila Millar

FROM: Joan Cohen

RE: Standard of Review of Administrative Action in New York

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## Summary and General Considerations

As you requested, I have researched the standard of review applied to administrative action in the State of New York. In general, one of two standards is applied, the arbitrary, capricious or unreasonable standard (rational basis test) or the substantial evidence test.[1/] These tests are supposed to be applied in different contexts but there is a blurring of the distinctions in their application, and it may be that the arbitrary and capricious standard is more often applied.

The general rule is that the substantial evidence standard is to be applied where the agency has acted in its judicial or quasi-judicial capacity whereas the arbitrary and capricious standard is to be applied where the agency has act d

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1/ Some courts even use a "clearly erroneous" standard, see, e.g. People v. Chapman, 274 App. Div. 715, 87 N.Y.S. 2d 41 (3d Dept. 1949), but this test is not considered to be substantively different from the substantial evidence test.

in its administrative capacity or its "quasi-legis-lative" function. Quasi-legislative actions can include promulgation of rules.

Proceeding Under Article 78 or Declaratory Judgment

A petitioner has the option of proceeding, as you know, through an Article 78 or Declaratory Judgment action. However, the courts seem to prefer that the petitioner employ Article 78 if judicial review is available under that article rather than seeking declaratory judgment. See, e.g., Greystone Managem nt Corp. v. Conciliation and Appeals Board, 94 A.D. 2d 614, 462 N.Y.S. 2d 13, aff'd 62 N.Y. 2d 763, 477 N.Y.S. 2d 315 (1984).

It has been asserted that Article 78 proceedings should not be used to seek review of an action of an administrative agency which is considered "legislative" in nature. A l gis-lative act involves a rule of general applicability rather than an ad hoc determination of an individual's rights. Costantakos v. Board of Education of City of New York, 105 A.D. 2d 825, 482 N.Y.S. 2d 27 (1984). See also Thompson Waterworks Company, Inc. v. Diamond, 44 A.D. 2d 487, 356 N.Y.S. 2d 130 (1974), and Abbott v. City of Poughkeepsie, 98 Misc. 2d 601, 414 N.Y.S. 2d

458 (1979). More specifically, Article 78 is not supposed to be used to review legislative acts where those seeking review are questioning the wisdom of the legislation or trying to change the legislation. Barile v. City Comptroller of City of Utica, 56 Misc. 2d 190, 288 N.Y.S. 2d 191 (1968). However, some courts have distinguished between using a declaratory judgment action to test the whole scope of the statute and an Article 78 proceeding to force an agency to act or prohibit it from acting. Mandelkern v. City of Buffalo, 92 Misc. 2d 425, 400 N.Y.S. 2d 285 (1977), reversed on other grounds, 64 A.D. 2d 279, 409 N.Y.S. 2d 881, and, in at least one instance, the courts allowed an Article 78 proceeding where the petitioners did not challenge the statute but only the legality of the administrative action taken pursuant to the statutory directive. First District Dental Society v. Sencer, 166 Misc. 2d 528, 455 N.Y.S. 2d 734 (1982). In that case, the court permitted a dental society to bring an Article 78 proceeding to challenge the Health Commissioner's interpretation of a provision in the Health Code since the interpretation and not the constitutionality of the health code was at issue.

There have been cases where both Article 78 and Declaratory judgement proceedings were allowed to deal with two different issues in a single case (see discussion below). However, mainly, where issues raised in Article 78 proceedings require the court to pass on the validity of the regulations promulgated by an agency, a declaratory judgment proceeding is usually called for. New York Coalition of Public Employers v. New York State Department of Labor, 89 A.D. 2d 283, 456 N.Y.S. 2d 465, aff'd 60 N.Y. 2d 789, 469 N.Y.S. 2d N.Y.S. 2d 679, 457 N.E. 2d 785 (1982).

Standard of Review

The New York (NY) Civil Practice Law and Rules (CPLR) set out the standards for review. Article 78 is meant to replace certain common law writs, i.e., Mandamus, Prohibition and Certiorari. Under each of these writs the standard of review differs, and this leads to an interpretative difficulty. The writs are gone but the separate rationales for each are said to remain, at least vestigially. Thus, under Certiorari, the standard is supposed to be "substantial evidence"; under Mandamus, the standard is supposed to be "arbitrary and capricious." A writ of Certiorari is considered to be reviewing a judicial determination whereas a writ of Mandamus is only available from an administrative determination. That distinction between judicial actions of an agency, for which the standard is "substantial evidence," and administrative actions for which the standard is "arbitrary and capricious" seems to remain, at least in part. See, Gabrelli and Nonna, "Judicial Review of Administrative Action in New York: an Overview and Survey," 52 St. John's Law Review (Spring 1978 No.3) 361, at 372.

Thus, where the agency's regulations spell out and mandate a hearing process, the standard of review is supposed to be substantial evidence. See e.g., Rozakis v. Beame, 54 A.D. 2d 399, 388 N.Y.S. 2d 613 (1976). Where a hearing is discretionary with the agency, the standard appears to be "arbitrary and capricious." See e.g., Matter of Pasta Chef Inc. v. State Liquor Authority, 54 A.D. 2d 1112, 389 N.Y.S. 2d 72, aff'd 44 N.Y. 2d 766, 406 N.Y.S. 2d 36, 377 N.E. 2d 480 (1976). The arbitrary and capricious standard is used to describe improper or unreasonable administrative action of a non-judicial nature whereas the substantial evidence test applies to judicial types of administrative action. An administrative regulation which is legislative in nature will be upheld as valid if it has a rational basis, that is, if it is not unreasonable, arbitrary or capricious. Triolo v. Johnson, 65 Misc. 2d 424, 318 N.Y.S. 2d 589, aff'd 40 A.D. 2d 953, 338 N.Y.S. 2d 403 (1970). The reviewing court must apply the substantial evidence test upon a determination that the agency action was judicial in nature, whereas it must the apply the arbitrary and capricious criteria if the nature of the action is considered to be administrative.

In practice, it would seem that recent cases under Article 78 almost automatically apply the arbitrary and capricious standard. Thus, e.g., "in a proceeding under this article the Court's function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." 272-4-8 East Seventh Street Tenants Association v. City of New York, 117 Misc. 2d 783, 459 N.Y.S. 2d 346 (1983). In this case, the court upheld an agency decision to force vacation of deteriorating city-owned buildings on grounds that the agency followed the rational criteria it had established to determine which buildings were to become part of the consolidation program. The court held that where th r is a rational and supportable basis for the administrative decision, the court's function is exhausted. Similarly, in Trump-Equitable Fifth Avenue Company v. Gliedman, 98 A.D. 2d 487, 471 N.Y.S. 2d 580 (1984) the court upheld the agencys denial of the Trump Company's application for an exemption from real property taxation which it claimed on grounds that it had improved formerly underutilized land. The court said that the denial was neither arbitrary nor capricious nor lacking in a rational basis and therefore should be upheld. The court refused to consider further the entire meaning and interpretation of the agency's regulations, even though the court's original decision had been reversed by the Court of Appeals which had held that the agency's determination had been based upon a regulation clearly inconsistent with the plain words of the governing statute. The Court maintained its position that the case did not involve a question of substantial evidenc and therefore that the scope of judicial review was limited to a determination of whether the agency's determination had a rational basis or was arbitrary or capricious and thus was an abuse of discretion.

Other cases making this same point include: Molina v. Games Management Services, 89 A.D. 2d 69, 454 N.Y.S. 2d 730 (1982), in which the plaintiff sought damages from an agency which refused to pay off a lottery winnings ticket in the absence of a microfilm record of the ticket. The court once again asserted the principle of law that regulations promulgated by administrative agencies have the force and effect of law and will be upheld unless shown to be arbitrary and capricious. See also Great Neck Electric Inc. v. City of New York, 123 Misc. 2d 280, 473 N.Y.S. 2d 686 (1984), and City of New York v. Barbara Blum, 121 Misc. 2d 982, 470 N.Y.S. 2d 308

(1982). In the latter case the court held that the agency had the right under the statute to disallow a certain reimbursement to the city for its operation of shelters. In Phillips v. Mauer, 109 A.D. 2d 998, 486 N.Y.S. 2d 804 (1985), a petitioner sought to restrict the Board of Education from using funds to persuade voters as to a specific ballot proposition. The standard of review, the court said, of an administrative determination is whether the decision was arbitrary and capricious or lacked a rational basis. The court went on to say that the agency could rationally have concluded that its actions wer appropriate.

Finally, in another case upholding the arbitrary and capricious standard of review, the court went on to say that since a hearing was not constitutionally required where a finding had already been made as to the fact that the petitioner had committed a felony, the arbitrary and capricious standard would apply. Had there been an adjudicatory proceeding required, then the substantial evidence test would have been employed. This case cited the Administrative Procedure Act's definition of "ajudicatory proceedings" as "any activity which is not a rulemaking proceeding or an employee disciplinary action." Broadway Catering Corp. v. New York State Liquor Authority, 106 Misc.2d 1025, 436 N.Y.S. 2d 909 (1980).

**Substantial Evidence Test**

The Broadway Catering Corp. case raises the issue of the relationship between ajudicatory proceedings and the application of the substantial evidence test. As indicated above, this application is not consistent. The commentary in the Code on Article 78 proceedings and standard of review notes that the standards, i.e. the rational basis test and the substantial evidence test, have become virtually indistinguishable. The Commentary cites, to this point, Matter of 125 Bar Corp. v. State Liquor Authority, 24 N.Y. 2d 174, 299 N.Y.S. 2d 194 (1969) and Matter of Johnson v. Ambach, 74 A.D. 2d 986, 426 N.Y.S. 2d 173 (1980). Gabrielli and Nonna, in the law review article cited above, have come to similar conclusions. The fact is, that where the reviewing authority believes the agency to have acted unfairly, it frequently ignores the usual judicial deference to agency construction of its own statutes and regulations. See Gabrielli and Nonna at 390. A case often cited for the employment of the substantial evidence test is Rozakis v. Beame, 54 A.D. 2d 399, 388 N.Y.S. 2d 613 (1976), in which the court claimed to have employed the substantial evidence test to overthrow a ruling by the New York City Fire Commissioner that some of his officers had been guilty of violating departmental rules. The court said that on the record in this proceeding the evidentiary support for the finding was too precarious to be sustained. Where an administrative agency engages in an adjudicatory proceeding, a review of the actions of the hearing officer appears to apply the substantial evidence standard. See, for example, Acosta v. Wollett, 55 N.Y. 2d 761, 447 N.Y.S. 2d 241 (1981). Thus, a hearing officer properly applied the substantial evidence standard in reviewing the State Comptroller's decision denying an application for accidental disability retirement benefits. De Giacomo v. Regan, 84 A.D. 2d 629, 444 N.Y.S. 2d 273 (1981). The distinction seems to be between rulemaking and the ajudication of an individual's rights. When the individual's rights are determined through a judicial type procedure, the standard seems to be the substantial evidence test. Agencies are supposed to base decisions on the record and then the record only is supposed to be reviewed. See, e.g., Henry v. Wilson, 85 A.D. 2d 885, 446 N.Y.S. 2d 730 (1981).

However, the courts seem to use a "reasonableness" standard at the same time, thus confusing the issue. The classic case of the application of dual standards comes in Tommy and Tina, Inc. v. Department of Consumer Affairs of the City of New York. In this case, a number of courts considered an agency's decision to revoke the petitioners' license to show video games at their pizza place on grounds that the building line of the pizza place was located within 200 feet of the property line of a school. The courts went back and forth on this, applying the arbitrary and capricious standard and ultimately upholding the agency on grounds that it could decide how to apply the 200 foot perameter rule even though its rule did not define how the 200 feet were to be measured. What is interesting about this case is that petitioners chose an Article 78 proceeding to challenge the revocation of the license. The court said that an Article 78 proceeding was a type of certiorari request. In reviewing a determination of an administrative agency after a judicial hearing, the court said, it would generally not reconsider if the agency's determination had been based on substantial evidence. Where the question was raised concerning whether the hearing was based in fact on substantial evidence, the case would have to be transferred to the appellate division to decide that issue. However, in this instance, the standard of review applied did not appear to be challenged. The next question was whether or not an Article 78 proceeding was the proper method for testing the constitutionality of the regulation. The court said that a declaratory judgment action would be the proper remedy to consider th constitutionality of a statute or regulation. However, where the court already had jurisdiction over the parties, an Article 78 proceeding could be converted into a declaratory judgment action to address the constitutional question. Also, where part of the action could be treated as an Article 78 review and another as a declaratory judgment action, there could be a hybrid action. Therefore, the same proceeding would be a declaratory judgment action challenging the constitutionality of the regulation as well as an Article 78 proceeding. In the ultimate resolution of this case, the arbitrary and capricious standard was applied, but the preliminary analyses are instructive for what they tell us about the New York state system in judicial application of standards of review and the bifurcation of those standards based upon the underlying writs.

## Summary

To sum up, the standard of review of agency action appears to be the arbitrary and capricious or rational basis standard unless there is mandated a complete judicial review within the agency, in which case the courts are usually instructed to follow the substantial evidence test. However, as noted above, the courts will apply whatever standard they wish, frequently, in order to reach the result they had in mind. It seems likely that the arbitrary and capricious test is employed more frequently that the substantial evidence test in reviewing agency regulations and their application.