24.10 STANDARD OF REVIEW

In a preenforcement rule challenge, the court of appeals determines if, on the record, the agency acted reasonably or arbitrarily and capriciously, and if it acted in accordance with the constitution and the law.[1] The court is not required, as in a contested case, to use the "substantial evidence" standard.[2] In other words, the standard of review is more restrictive in judicial review of a preenforcement rule challenge.[3] A preenforcement challenge tends to consider the rule in an abstract or hypothetical setting, and it would be premature for the courts to apply a more searching or stricter standard of review at this stage based on hypothetical facts.[4]

Under the arbitrary and capricious standard, the court makes a "searching and careful" inquiry of the record to determine if the agency action has a rational basis.[5] Deference is to be shown to agency expertise, but the agency must explain on what evidence it is relying and how that evidence connects rationally to the rule involved.[6]

---

1 Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238, 241-44 (Minn. 1984); Minn. Chamber of Commerce v. Minn. Pollution Control Agency, 469 N.W.2d 100, 102-03 (Minn. Ct. App. 1991).

2 *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

3 Minnesota-Dakotas Retail Hardware Ass'n v. State, 279 N.W.2d 363 (Minn. 1979); *see also* Rocco Altobelli v. Dept. of Commerce, 524 N.W.2d 30, 36 (Minn. Ct. App. 1994) (in declaratory judgment petitions, this court has a limited scope of review); Minn. Educ. Ass'n v. Minn. State Bd. of Educ., 499 N.W.2d 846, 849 (Minn. Ct. App. 1993) (in a pre-enforcement challenge, the standard of review is necessarily more restricted); *Minn. Chamber of Commerce*, 469 N.W.2d at 102-103 ("In a pre-enforcement action the reasonableness of the rule as applied cannot be considered, but the reasonableness of the application may be considered in a contested-case hearing").

4 *Minnesota-Dakotas Hardware*, 279 N.W.2d at 363*; see also Minn. Chamber of Commerce*, 469 N.W.2d at 107 ("This court should not engage hypothetical applications in a pre-enforcement challenge.").

5 *Manufactured Hous. Inst.*, 347 N.W.2d at 244; *see* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); *see also In re* Lawful Gambling License of Thief River Falls Amateur Hockey Ass'n, 515 N.W.2d 604 (Minn. Ct. App. 1994) ("An administrative rule violates substantial due process if it is not rationally related to the objective sought to be achieved as set forth by legislature."); *Minn. Chamber of Commerce*, 469 N.W.2d at 103 (applying "a 'searching and careful' inquiry of the record to ensure that the agency action has a rational basis").

6 *Manufactured Hous. Inst.*, 347 N.W.2d at 244*; see also* Boedingheimer v. Lake Country Transp., 485 N.W.2d 917, 922 (Minn. 1992) (noting the court ordinarily defers to agency expertise where complex matters are involved); Drum v. Minn. Bd. of Water & Soil Res., 574 N.W.2d 71, 73 (Minn. Ct. App. 1998) (noting that court should defer to agency's expertise and special knowledge); *In re* Insurance Agent License of Casey, 540 N.W.2d 854, 859 (Minn. Ct. App. 1995) *rev. in part on other grounds*, 543 N.W.2d 96 (Minn. 1996) (finding commissioner's rule interpretation "overly narrow and rigid" but deferring to that interpretation as applied to the facts of this case); *In re Lawful Gambling License of Thief River Falls Amateur Ass'n*, 515 N.W.2d at 606 (noting that minimal judicial scrutiny is correct standard of review for contested case: "It is not for the courts to question the political wisdom of a regulation."); *Minnesota Chamber of Commerce*, 469 N.W.2d at 103-4 (giving deference to the agency where case "involves technical issues of public health and the environment"); *In re* Crown CoCo, Inc., 458 N.W.2d 132, 136 (Minn. Ct. App. 1990) ("Although an agency's decision is entitled to some deference . . . when an agency's authority to act is called into question, . . . we need not defer to agency expertise."); City of Morton v. Minnesota Pollution Control Agency, 437 N.W.2d 741, 748 (Minn. Ct. App. 1989) ("The court will defer to the agency's expertise in determining how best to allocate grant resources to achieve best pollution control results, and will not substitute its judgment for that of the agency in pre-enforcement or facial challenge.").

Requiring the agency to explain itself ensures that the agency action is not a result of "impermissible whim, improper influence, or misplaced zeal."[7]

At times, the subject matter to be regulated may involve an area where the technical or scientific knowledge is incomplete or the available data imperfect, and yet regulation is needed. In such instances, a rule adopted on the basis of incomplete or tentative information will still be upheld as valid, provided the agency explains itself adequately and acts reasonably.[8]

Decisions of administrative agencies enjoy a presumption of correctness.[9] Mindful of the constitutional prohibition against the delegation to the judiciary of duties that are essentially administrative in character, the court must exercise restraint in reviewing agency action so as not to substitute its own judgment for that of the agency.[10]

The APA states that the reviewing court may, if grounds exist, declare a rule invalid.[11] The reviewing court also may, if it finds the rulemaking process defective, remand to the agency for further proceedings.[12]

In determining the validity of a rule, the court may first have to interpret or construe the language of the rule. The rules of statutory construction are applicable to all rules becoming effective after June 30, 1981.[13] Although the reviewing court defers to the practical construction that an agency gives its rules or a statute, even long-standing administrative procedures may not be binding if erroneous or contrary to law.[14] And courts need not defer to the agency when the language of the rule or the standard delineated is clear and capable of being understood.[15] In construing a rule, courts must be careful of the separation of powers doctrine that prohibits delegation of nonjudicial functions to the

---

7 *Manufactured Hous. Inst.*, 347 N.W.2d at 244 n.4 (quoting Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 825 (Minn. 1977).

8 *Id.* at 244 (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir. 1976)); *see also* Amoco Oil Co. v. EPA, 501 F.2d 722, 739-41 (D.C. Cir. 1974) (demanding "reasons and explanations, but not 'findings'" where regulations turn on choice of policy, assessment of risk, or frontiers of scientific knowledge).

9 Crookston Cattle Co. v. Minn. Dep't of Natural Res., 300 N.W.2d 769, 777 (Minn. 1981); Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977); *In re* Eigenheer, 453 N.W.2d 349, 352 (Minn. Ct. App. 1990).

10 *Reserve Mining Co.*, 256 N.W.2d at 824-25.

11 MINN. STAT. § 14.45 (2014).

12 *Manufactured Hous. Inst.*, 347 N.W.2d at 246; *see also* Duncan H. Baird, *Remedies by Judicial Review of Agency Action in Minnesota,* 4 WM. MITCHELL L. REV. 277, 304-7 (1978).

13 MINN. STAT. § 645.001 (2014).

14 Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health, 257 N.W.2d 343, 348 (Minn. 1977); Ingebritson v. Tjernlund Mfg. Co., 289 Minn. 232, 237, 183 N.W.2d 552, 554-55 (1971); *see also* Mammenga v. Dep't of Human Servs., 442 N.W.2d 786, 791 (Minn. 1989) (finding commissioner's interpretation of statutory phrase "completing a secondary education program" to exclude GED courses was reasonable); Good Neighbor Ctrs., Inc. v. Dep't of Human Servs., 428 N.W.2d 397, 401 (Minn. Ct. App. 1988) (stating court does not defer to agency on questions of law).

15 Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs, 713 N.W.2d 817, 827 (Minn. 2006); Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981); *In re* Application of Q Petroleum, 498 N.W.2d 772, 777 (Minn. Ct. App. 1993) ("If the regulation is not ambiguous, no deference is given to the agency interpretation and the court may substitute its own judgment."); Wenzel v. Meeker Cnty. Welfare Bd., 346 N.W.2d 680, 684 (Minn. Ct. App. 1984).

court. A declaration of invalidity of agency action does not transfer the agency's legislative power to the court.[16]

The validity of a rule may be challenged in either a preenforcement challenge proceeding or in a contested case. In either instance, as explained in *Mammenga v. Department of Human Services*,[17] the constitutional rational basis challenge may be made. In a contested case, however, the agency's decision may also be challenged as being arbitrary or capricious, i.e., based on whim or devoid of articulated reasons.[18] Consequently, as *Mammenga* points out, in discussing the "unreasonableness" of agency action, it is important to remember that the kind of unreasonableness that will invalidate a rule (lack of rational basis) is different from the kind of unreasonableness that renders an agency decision arbitrary or capricious.

---

16 Minn. Distillers v. Novak, 265 N.W.2d 420, 422 (1978).

17 442 N.W.2d 786, 789 (Minn. 1989).

18 *In re* Investigation Into Intra-LATA Equal Access & Presubscription v. Minn. Pollution Control Agency, 532 N.W.2d 583, 588 (Minn. Ct. App. 1995) ("We will defer to agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable."); *In re* Assessment Issued to Leisure Hills Health Care Ctr., 518 N.W.2d 71, 75 (Minn. Ct. App. 1994) (finding Department of Health's failure to follow federal regulations, in the absence of an established state inspection process, did not constitute arbitrary and capricious action).