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Killebrew v. Donohue [State of Nevada], 139 Nev. Adv. Op. 43 (Sept. 28, 2023)¹

FEE INCREASE FOR USE OF PIERS AND BUOYS WAS STATUTORILY PERMISSIBLE
AND NOT SUBJECT TO ARBITRARY AND CAPRICIOUS REVIEW

Summary

Legislative action in 2017 allowed the State Land Registrar (Registrar) to increase usage fees for piers and buoys in Nevada waters to reflect fair market prices and fees in comparable areas. Subsequently, the Registrar issued regulation NAC 322.190, which increased the rates by 1400%. This administrative action was challenged by Lake Tahoe property owners under NRS 233B.110 as invalid for being outside of the scope of statutory authority allotted to the Registrar. The Nevada Supreme Court affirmed the district court's grant of summary judgment for the Registrar holding that because the regulation did not violate any constitutional or statutory authority given to Registrar, it was valid. In affirming the decision, the Nevada Supreme Court also clarified that arbitrary and capricious review does not apply when assessing the validity of a regulation.

Background

In 2017, NRS 322.120 was modified by the legislature to allow the State Land Registrar to set usage fee prices for piers and buoys in Nevada waters. The Registrar serves as the Administrator of the Division of State Lands of the State Department of Conservation and Natural Resources (the Division). After considering ample evidence, including history of similar fees, fees in surrounding areas for similar services, fair market value, and other considerations, the Division promulgated regulation NAC 322.195 which included a fee schedule. The Division proposed these changes to specific stakeholders, including the appellant, Tahoe Lakefront Owners Association, for comments and feedback. Public meetings were also held to discuss the regulation. The Division responded to comments and reduced the proposed schedule. The fees were last updated in 1995 and were \$50 for piers and \$30 for buoys. NAC 322.195 increased these to \$750 and \$250, respectively. Those changes were approved by the Legislative Commission, a legislative body that reviews agency regulations for validity.

In March of 2020, appellants sought a declaratory judgment under NRS 233B.110 that the fee schedule was invalid. The Division moved for summary judgment claiming that the regulation did not violate statutory or constitutional authority and that the Division did not exceed its statutory scope. The district court granted summary judgment for the Division, and the appeal followed.

Discussion

Standard for reviewing the validity of a regulation

Appellants contended that because the district court failed to review validity of the fee setting regulation under arbitrary and capricious review the district court erred and applied the wrong standard. The Court rejected that argument because the plain language of NRS 233B.110(1)², the statute that sets the standard of review of the validity of a regulation, is clear

¹ By Weston T. Robinson.

² NEV. REV. STAT. ANN. § 233B.110 (1977).

and unmistakable. The statute requires the court to declare a regulation invalid if it violates constitutional or statutory provisions or exceeds the statutory authority of the agency. Citing case law, the Court emphasized that when a statute is clear and unambiguous, courts are not permitted to look beyond it.

Appellants argued for the application of arbitrary and capricious review because *State, Division of Insurance v. State Farm Mutual Automobile Insurance Co.*³ included arbitrary and capricious review as a method for invalidating agency regulations. The Court acknowledged that as an error. The Court also identified three subsequent cases that cited the *State Farm* standard. However, neither in *State Farm* nor the other three cases discussed how to apply the arbitrary and capricious standard. Further, though it was mentioned in a few cases as a way to review agency regulations, other cases since have omitted the arbitrary and capricious standard.

The Court clarified that arbitrary and capricious review is not a part of reviewing agency regulations. Although the arbitrary and capricious language may be present in a few cases, the arbitrary and capricious standard has not been applied in reviewing the validity of an agency regulation. NRS 233B.110 provides a clear standard for the review of agency regulations and should not be expanded unnecessarily.

Application of the standard of review in the promulgation of NAC 322.195

Appellants argued that the Division exceeded its statutory authority in promulgating the new regulation because the fee schedule did not comport with the statutory standard for setting fees. The Division created the updated fee schedule based on legislative changes made to NRS 322.120⁴ which mandate that the Registrar charge a fee when issuing permits for the use of piers and buoys. The statute does not specify the amounts to be charged or how they should be calculated. The Court relied on NRS 322.100⁵ which provides that any fee for land permits must be reasonable and based on the fair market value of the use. The Court found that, when read together, these statutes permit the Registrar to determine a reasonable price for pier and buoy permits based on fair market value of the land use.

Appellants argued that the Division should have only considered the value of the submerged land the buoy or pier occupied while ignoring other factors. The Court was not persuaded by that argument and found that the Division had done extensive market research to identify a fair market fee. The Court held that the Division did not exceed its statutory authority in considering various factors and issuing an updated, uniform fee schedule.

Conclusion

Because the Division did not exceed the statutory authority provided by NRS 322.120 and NRS 322.100 in issuing NAC 322.195, the updated fee schedule was valid. Arbitrary and capricious review was not applicable to this agency action and will not be applicable to agency regulations in the future. Summary judgment for the Division was affirmed.

³ *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 995 P.2d 482 (2000), abrogated by *Killebrew, Tr. of Killebrew Revocable Tr., 5TH ADM 1978 v. State ex rel. Donohue*, 139 Nev. Adv. Op. 43 (2023).

⁴ NEV. REV. STAT. ANN. § 322.120 (2017).

⁵ NEV. REV. STAT. ANN. § 322.100 (1993).