

MEMO: March 8, 2016

TO: Rep. Alice Emmons, Chair, House Committee on Corrections and Institutions

FROM: Brian J. Gearson, Chief Superior Judge

SUBJECT: H. # - Bill regarding access to confidential prisoner records. This memorandum is submitted in response to the committee's question regarding the applicability of V.R.C.P. 74 or V.R.C.P. 75 to the proposed legislation.

The two rules are often confused, and the standards are not always clearly stated.

Where a statute provides for an appeal of governmental action, Rule 74 applies. Sometimes, the statute providing for the appeal specifically references Rule 74, sometimes not, but it doesn't matter, because Rule 74 automatically applies when the statute specifically provides for appeal. Under Rule 74, the standard of review of governmental action in the superior court, and on appeal from the superior court to the Supreme Court, is deferential. The court will uphold the agency's factual findings unless clearly erroneous, and will generally defer to its judgment on matters within the scope of the agency's expertise. See *Burch-Clay v. Taylor*, 2015 VT 110, ¶ 15. Again, these are the standards that courts have developed in applying Rule 74. So, it's really unnecessary for a statute to specify a standard of review, and many don't, they simply provide that appeals will be pursuant to Rule 74. See, e.g., 10 V.S.A. § 6110 (a) (providing that a person aggrieved by a decision of the Secretary of the Agency of Transportation concerning "the establishment of a TID or the transportation impact fee for the TID may appeal to the Civil Division of the Superior Court under Rule 74 of the Vermont Rules of Civil procedure"); 6 V.S.A. § 4996(c) ("the Civil Division of the Superior Court shall review appeals under this section on the record pursuant to Rule 74 of the Vermont Rules of Civil Procedure."); 5 V.S.A. § 3788 ("Any person aggrieved by such order . . . may appeal from such order to the superior court in accordance with Rule 74 of the Vermont Rules of Civil Procedure.").

Rule 75 applies only where a party is seeking review of governmental action and the statutes do not specifically provide for a right of appeal. Basically, the Rule was designed to substitute for a host or what were called "extraordinary writs" under the common law, actions that evolved in the courts to review different types of governmental decisions. These included the writs of certiorari, supersedeas, mandamus, and others. See *Garbitelli v. Town of Brookfield*, 191 Vt. 76, (2011). The standard of review is also narrow and highly deferential; courts will generally not overturn a decision unless it is arbitrary or capricious or a patent abuse of discretion.

I hope that this is somewhat helpful. I do think, for what it is worth, that the easiest and clearest approach would be to simply provide for appeal pursuant to VRC.P. 74. There is ample precedent for that, and the standards of review are well settled and understood by the courts.

If there is any additional information you require, please let me know.