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**Disentangling the Standards of Review**

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## DISENTANGLING THE STANDARDS OF REVIEW

### **I. Introduction**

The Administrative Procedure Act generally authorizes judicial review of contested-case decisions under the “substantial evidence rule.” The APA’s articulation of that “rule” sets forth six separate grounds for review, but Texas cases show that, when courts review agency decisions, they often confuse and conflate various standards. This paper attempts to disentangle the standards of judicial review by providing a framework for identifying, defining, and effectively applying the correct standard to uphold or challenge agency decisions.

### **II. Judicial Review under the APA**

#### **A. The right to judicial review**

The APA provides a statutory right to judicial review of final agency decisions in contested cases: “A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter [2001].” TEX. GOV’T CODE § 2001.171; *see also Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 197 (Tex. 2004) (holding that “section 2001.171 of the APA creates an independent right to judicial review when an agency enabling statute neither specifically authorizes nor prohibits judicial review”). A person may also be entitled to judicial review of agency decisions that do not arise from contested case proceedings. *See, e.g., TEX. WATER CODE* § 5.351(a) (permitting a “person affected by a ruling, order, decision, or other act of the commission” to seek judicial review). Whether the right to judicial review exists can be a thorny question in some instances. But that question is beyond the scope of this paper. Instead, this paper assumes that right exists and focuses on a related question: what is the standard by which a court should review the agency decision at issue?

#### **B. Determining the applicable standard of review**

Historically, Texas has recognized multiple standards of judicial review including: pure trial de novo, pure substantial evidence, and substantial evidence de novo. *See, e.g., In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 586 (Tex. App.—San Antonio 2006, no pet.); *Gilder v. Meno*, 926 S.W.2d 357, 365 (Tex. App.—Austin 1996, writ denied) (Jones, J., dissenting); W. Wendell Hall *et al.*, *Hall’s Standards of Review in Texas*, 42 St. Mary’s L.J. 3, 70-75 (2010). In addition, Texas has special forms of “modified de novo” review for certain types of administrative decisions. *See, e.g., Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 252-53 (Tex. 1999) (discussing “modified de novo” standard of review for workers’ compensation disputes regarding compensability or eligibility for benefits); *Gilder*, 926 S.W.2d at 365 (discussing “special rate-case classification referred to as ‘de novo fact trial’”). Although the default standard is the APA’s “substantial evidence rule,” TEX. GOV’T CODE § 2001.174, not all cases are governed by the that standard.

To determine whether what standard applies, begin with the agency’s enabling statute. Many statutes expressly provide for “judicial review under the substantial evidence rule.” *See*,

e.g., TEX. UTIL. CODE § 15.001 (“Any party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule”).<sup>1</sup> If so, the APA’s default standard applies. See *State v. Pub. Util. Comm’n of Tex.*, 344 S.W.3d 349, 355 (Tex. 2011) (applying APA standard to case involving judicial review under TEX. UTIL. CODE § 15.001).

If the agency’s enabling statute is silent, consider whether the decision you want to challenge arose from a “contested case proceeding.” The APA defines a “contested case proceeding” as “a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.” TEX. GOV’T CODE § 2001.003(1). Unless the enabling statute provides otherwise, the APA’s default standard applies to decisions arising from contested case proceedings. For example, Chapter 524 of the Texas Transportation Code governs appeals from orders suspending or denying issuance of a driver’s license. See TEX. TRANSP. CODE § 724.047. Although Chapter 524 establishes “rules for appeal,” it does not define the “scope of review.” See *id.* § 524.043. Accordingly, because a licensing proceeding is a “contested case,” the APA’s default standard applies. See *Tex. Dep’t of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006) (applying TEX. GOV’T CODE § 2001.174).

### C. The APA’s “substantial evidence rule”

The APA defines the scope of review to be applied by courts reviewing contested case decisions<sup>2</sup>:

If the law authorizes review of a decision in a contested case under the *substantial evidence rule* or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if *substantial rights of the appellant have been prejudiced* because the administrative findings, inferences, conclusions, or decisions are:
  - (A) in violation of a constitutional or statutory provision;
  - (B) in excess of the agency’s statutory authority;
  - (C) made through *unlawful procedure*;
  - (D) affected by other *error of law*;
  - (E) *not reasonably supported by substantial evidence* considering the reliable and probative evidence in the record as a whole; or

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<sup>1</sup> A Westlaw search reveals more than 80 statutes with similar language.

<sup>2</sup> The standards of review for cases not governed by APA § 2001.174 are discussed below. (See § V, *infra*.)

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