

PRESENTED AT

13th Annual Advanced Texas Administrative Law Seminar

August 16-17, 2018

Austin, Texas

Disentangling the Standards of Review

**Susan A. Kidwell
Locke Lord LLP
600 Congress Ave., Suite 2200
Austin, TX 78701
(512) 305-4766
skidwell@lockelord.com**

TABLE OF CONTENTS

	Page
Index of Authorities	iii
Disentangling the Standards of Review	1
I. Introduction.....	1
II. Judicial Review under the APA	1
A. The right to judicial review	1
B. Determining the applicable standard of review	1
C. The APA’s “substantial evidence rule”	2
III. Historical Origins of the Substantial Evidence Rule	4
A. Early Texas cases.....	4
B. Judicial review under APTRA	5
C. Judicial review under the APA	7
IV. Disentangling the APA Grounds for Reversal under the “Substantial Evidence Rule”	7
A. De novo review for purely legal determinations.....	8
B. Statutory construction: de novo review or deference to agency’s interpretation?..	8
1. Plain-language analysis.....	9
2. Deference to agency’s interpretation	9
3. Rules construction.....	10
4. Reversible errors involving statutory construction	10
5. Conclusions.....	11
C. Substantial-evidence review for fact-based determinations	12
1. The standard.....	12
2. The quantum of evidence required to exceed a “mere scintilla”	12
3. The scope of review	13
4. Application of the standard.....	13
5. Conclusions.....	15
D. Arbitrary, capricious, or abuse of discretion.....	15
1. Arbitrary and capricious vs. abuse of discretion.....	15
2. Arbitrary and capricious vs. substantial evidence.....	17
3. Conclusions.....	18
V. Judicial Review in Cases <i>Not</i> Governed by the APA’s “Substantial Evidence Rule”	18

A.	Trial de novo	18
B.	Review of decisions not made in contested cases.....	21
VI.	Implications for Practitioners.....	23
VII.	Conclusion	25

INDEX OF AUTHORITIES

	Page(s)
CASES	
<i>AEP Tex. Commercial & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Tex.</i> , 436 S.W.3d 890 (Tex. App.—Austin 2014, no pet.)	11, 23
<i>Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson</i> , 209 S.W.3d 644 (Tex. 2006).....	9, 10
<i>Austin Chevrolet, Inc. v. Motor Vehicle Bd.</i> , 212 S.W.3d 425 (Tex. App.—Austin 2006, pet. denied).....	17
<i>BankDirect Capital Fin., LLC v. Plasma Fab, LLC</i> , 519 S.W.3d 76 (Tex. 2017).....	9
<i>Blue Skies Alliance v. Tex. Comm'n on Env'tl. Quality</i> , 283 S.W.3d 525 (Tex. App.—Amarillo 2009, no pet.)	8
<i>Bosque River Coal. v. Tex. Comm'n on Env'tl. Quality</i> , 347 S.W.3d 366 (Tex. App.—Austin 2011), rev'd, 413 S.W.3d 403 (Tex. 2013)	22
<i>Bustamante v. Ponte</i> , 529 S.W.3d 447 (Tex. 2017).....	13
<i>Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n</i> , 518 S.W.3d 318 (Tex. 2017).....	8, 9
<i>CenterPoint Energy Houston Elec., LLC v. Pub. Util. Comm'n of Tex.</i> , 408 S.W.3d 910 (Tex. App.—Austin 2013, pet. denied).....	10, 16, 17
<i>Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	9
<i>Cire v. Cummings</i> , 134 S.W.3d 835 (Tex. 2004).....	15
<i>City of Dallas v. Stewart</i> , 361 S.W.3d 562 (Tex. 2012).....	12
<i>City of El Paso v. Pub. Util. Comm'n of Tex.</i> , 883 S.W.2d 179 (Tex. 1994).....	15, 17
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005).....	13

<i>City of League City v. Tex. Water Comm’n</i> , 777 S.W.2d 802 (Tex. App.—Austin 1989, no writ).....	8
<i>City of Waco v. Tex. Comm’n on Env’tl. Quality</i> , 346 S.W.3d 781 (Tex. App.—Austin 2011), <i>rev’d on other grounds</i> , 413 S.W.3d 409 (Tex. 2013).....	4, 21, 22
<i>Combs v. Roark Amusement & Vending, L.P.</i> , 422 S.W.3d 632 (Tex. 2013).....	9, 10, 17
<i>Donnelly Garment Co. v. NLRB</i> , 123 F.2d 215 (8th Cir. 1941)	16
<i>Downer v. Aquamarine Operators, Inc.</i> , 701 S.W.2d 238 (Tex. 1985).....	17
<i>In re Edwards Aquifer Auth.</i> , 217 S.W.3d 581 (Tex. App—San Antonio 2006, no pet.).....	1
<i>Employees Retirement Sys. of Tex. v. Garcia</i> , 454 S.W.3d 121 (Tex. App.—Austin 2014, pet. denied).....	10, 23
<i>Enter. Leasing Co. of Houston v. Harris Cnty. Toll Road Auth.</i> , 356 S.W.3d 85 (Tex. App.—Houston [1st Dist.] 2011, no pet.)	7, 20
<i>Entergy Gulf States v. Summers</i> , 282 S.W.3d 433 (Tex. 2009).....	9
<i>Entex v. R.R. Comm’n of Tex.</i> , 18 S.W.3d 858 (Tex. App.—Austin 2000, pet. denied).....	8, 9
<i>Fiess v. State Farm Lloyds</i> , 202 S.W.3d 744 (Tex. 2006).....	10
<i>Fire Dep’t of City of Fort Worth v. City of Fort Worth</i> , 217 S.W.2d 664 (Tex. 1949).....	20
<i>Firemen’s & Policement’s Civil Serv. Comm’n v. Brinkmeyer</i> , 662 S.W.2d 953 (Tex. 1984).....	20
<i>Flores v. Employees Retirement System of Texas</i> , 74 S.W.3d 532 (Tex. App.—Austin 2002, pet. denied).....	10, 16
<i>Freestone Power Generation LLC v. Tex. Comm’n on Env’tl. Quality</i> , No. 03-16-00692-CV et al., 2017 WL 304457 (Tex.App.—Austin July 11, 2017, pet. filed).....	8, 17, 22

<i>Froemming v. Tex. State Bd. of Dental Examiners</i> , 380 S.W.3d 787 (Tex. App.—Austin 2012, no pet.)	8
<i>Gerst v. Nixon</i> , 411 S.W.2d 350 (Tex. 1966).....	21
<i>Gilder v. Meno</i> , 926 S.W.2d 357 (Tex. App.—Austin 1996, writ denied)	1, 4, 19
<i>Gomez v. Tex. Educ. Agency, Educator Certification & Standards</i> , 354 S.W.3d 905 (Tex. App.—Austin 2011, pet. denied).....	3, 7, 11
<i>Grimes Cnty. Bail Bond Bd. v. Ellen</i> , 267 S.W.3d 310 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)	19
<i>Gulf, C. & S., Ry. Co. v. Mannewitz</i> , 8 S.W. 66 (Tex. 1888).....	13
<i>Harris Cnty. Appraisal Dist. v. Tex. Workforce Comm’n</i> , 519 S.W.3d 113 (Tex. 2017).....	12, 20
<i>Hawkins v. Tex. Co.</i> , 209 S.W.2d 338 (Tex. 1948).....	4, 5, 13, 14
<i>Heritage on San Gabriel Homeowners Ass’n v. Tex. Comm’n on Envtl. Quality</i> , 393 S.W.3d 417 (Tex. App.—Austin 2012, pet. denied).....	17
<i>Hinkley v. Tex. State Bd. of Med. Examiners</i> , 140 S.W.3d 737 (Tex. App.—Austin 2004, pet. denied).....	17, 18
<i>Imperial Am. Res. Fund, Inc. v. R.R. Comm’n of Tex.</i> , 557 S.W.2d 280 (Tex. 1977).....	5, 6, 7
<i>Jenkins v. Crosby Indep. Sch. Dist.</i> , 537 S.W.3d 142 (Tex. App.—Austin 2017, no pet.)	3, 12, 18
<i>Jones v. Marsh</i> , 224 S.W.2d 198 (Tex. 1949).....	20
<i>Kawasaki Motors Corp. U.S.A. v. Tex. Motor Vehicle Comm’n</i> , 855 S.W.2d 792 (Tex. App.—Austin 1993, no writ).....	11, 16
<i>Lewis v. Metro. Sav. & Loan Ass’n</i> , 550 S.W.2d 11 (Tex. 1977).....	16, 21
<i>McKinley Iron Works, Inc. v. Tex. Emp’t Comm’n</i> , 917 S.W.2d 468 (Tex. App.—Fort Worth 1996, no writ)	20

<i>Mercer v. Ross</i> , 701 S.W.2d 830 (Tex. 1986).....	20
<i>Mireles v. Tex. Dep’t of Pub. Safety</i> , 9 S.W.3d 128 (Tex. 1999).....	12
<i>Mont Belvieu Caverns, LLC v. Tex. Comm’n on Env’tl Quality</i> , 382 S.W.3d 472 (Tex. App.—Austin 2012, no pet.)	22
<i>Montgomery Indep. Sch. Dist. v. Davis</i> , 34 S.W.3d 559 (Tex. 2000).....	12
<i>Nobles v. Emps. Retirement Sys. of Tex.</i> , 53 S.W.3d 483 (Tex. App.—Austin 2001, no pet.)	8
<i>Oncor Elec. Delivery Co., LLC v. Pub. Util. Comm’n of Tex.</i> , 406 S.W.3d 253 (Tex. App.—Austin 2013, no pet.)	16
<i>Patel v. Harris County Appraisal Dist.</i> , 434 S.W.3d 803 (Tex. App.—Houston [14th Dist.] 2014, no pet.).....	21
<i>Pension Bd. of Police Officers Pension Sys. of City of Houston v. Colson</i> , 492 S.W.2d 307 (Tex. Civ. App.—Beaumont 1973, writ ref’d n.r.e.)	7
<i>Pretzer v. Motor Vehicle Bd.</i> , 138 S.W.3d 908 (Tex. 2004).....	9, 11
<i>Pub. Util. Comm’n of Tex. v. City Pub. Serv. Bd. of San Antonio</i> , 53 S.W.3d 310 (Tex. 2001).....	11
<i>Pub. Util. Comm’n of Tex. v. Gulf States Utils. Co.</i> , 809 S.W.2d 201 (Tex. 1991).....	3, 13, 14, 17
<i>R. E. Janes Gravel Co. v. Tex. Comm’n on Env’tl. Quality</i> , 522 S.W.3d 506 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)	8
<i>R.R. Comm’n of Tex. v. Magnolia Petroleum Co.</i> , 109 S.W.2d 967 (Tex. 1937).....	4, 5
<i>R.R. Comm’n of Tex. v. Shell Oil Co.</i> , 161 S.W.2d 1022 (Tex. 1942).....	4, 5, 7, 13
<i>R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water</i> , 336 S.W.3d 619 (Tex. 2011).....	8, 9, 10
<i>R.R. Comm’n v. Torch Operating Co.</i> , 912 S.W.2d 790 (Tex. 1995).....	12

<i>Reliant Energy, Inc. v. Public Utility Commission of Texas</i> , 153 S.W.3d 174 (Tex. App.—Austin 2004, pet. denied).....	14, 15, 16
<i>Rodriguez v. Service Lloyds Ins. Co.</i> , 997 S.W.2d 248 (Tex. 1999).....	1, 16
<i>Rogers v. Tex. State Bd. of Pub. Accountancy</i> , 310 S.W.3d 1 (Tex. App.—Austin 2008, no pet.)	11
<i>Sanchez v. Tex. State Bd. of Med. Examiners</i> , 229 S.W.3d 498 (Tex. App.—Austin 2007, no pet.)	3, 14, 15, 17
<i>Scally v. Tex. State Bd. of Med. Examiners</i> , 351 S.W.3d 434 (Tex. App.—Austin 2011, pet. denied).....	12
<i>Shupee v. R.R. Comm’n of Tex.</i> , 73 S.W.2d 505 (Tex. 1934).....	4
<i>Sierra Club v. Tex. Comm’n on Env’tl Quality</i> , 455 S.W.3d 214 (Tex. App.—2014, pet. denied)	22
<i>Slay v. Tex. Comm’n on Env’tl. Quality</i> , 351 S.W.3d 532 (Tex. App.—Austin 2011, pet. denied).....	3, 12
<i>Starr Cnty. v. Starr Indus. Servs., Inc.</i> , 584 S.W.2d 352 (Tex. Civ. App.—Austin 1979, writ ref’d n.r.e.)	16
<i>State v. Pub. Util. Comm’n of Tex.</i> , 344 S.W.3d 349 (Tex. 2011).....	2, 11, 12
<i>State v. Pub. Util. Comm’n of Tex.</i> , 883 S.W.2d 190 (Tex. 1994).....	3, 15
<i>Tex. Coast Utils. Coalition v. R.R. Comm’n of Tex.</i> , 423 S.W.3d 355 (Tex. 2014).....	10, 11
<i>Tex. Comm’n on Env’tl. Quality v. Bosque River Coalition</i> , 413 S.W.3d 403 (Tex. 2013).....	21, 22
<i>Tex. Comm’n on Env’tl. Quality v. City of Waco</i> , 413 S.W.3d 409 (Tex. 2013).....	21
<i>Tex. Dep’t of Ins. v. Am. Nat’l Ins. Co.</i> , 410 S.W.3d 843 (Tex. 2012).....	9
<i>Tex. Dep’t of Ins. v. State Farm Lloyds</i> , 260 S.W.3d 233 (Tex. App.—Austin 2008, no pet.)	7, 21

<i>Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.</i> , 145 S.W.3d 170 (Tex. 2004).....	1
<i>Tex. Dep’t of Pub. Safety v. Alford</i> , 209 S.W.3d 101 (Tex. 2006).....	2
<i>Tex. Dep’t of Pub. Safety v. Williams</i> , 303 S.W.3d 356 (Tex. App.—El Paso 2009, no pet.).....	8
<i>Tex. Emp’t Comm’n v. Holberg</i> , 440 S.W.2d 38 (Tex. 1969).....	20
<i>Tex. Health Enters. v. Tex. Dep’t of Health</i> , 954 S.W.2d 168 (Tex. App.—Austin 1997, no pet.)	17
<i>Tex. Health Facilities Comm’n v. Charter Med.-Dallas, Inc.</i> , 665 S.W.2d 446 (Tex. 1984).....	5, 8, 12, 13, 16, 17, 18
<i>Tex. Indus. Energy Consumers v. CenterPoint Energy Houston Elec., LLC</i> , 324 S.W.3d 95 (Tex. 2010).....	15, 17
<i>TracFone Wireless, Inc. v. Comm’n on State Emergency Commc’ns</i> , 397 S.W.3d 173 (Tex. 2013).....	9, 10
<i>Trapp v. Shell Oil Co.</i> , 198 S.W.2d 424 (Tex. 1946).....	3
<i>Universal Camera Corp. v. Nat’l Labor Relations Bd.</i> , 340 U.S. 474 (1951).....	13
<i>Weslaco Fed’n of Teachers v. Tex. Educ. Agency</i> , 27 S.W.3d 258 (Tex. App.—Austin 2000, no pet.)	8

STATUTES AND RULES

TEX. EDUC. CODE § 25.092(d).....	18
TEX. EDUC. CODE § 37.009(f)	18
TEX. GOV’T CODE § 33.034.....	18
TEX. GOV’T CODE § 571.133(d).....	18, 20
TEX. GOV’T CODE § 2001.003(1).....	2, 21
TEX. GOV’T CODE § 2001.171	1

TEX. GOV'T CODE § 2001.173(a).....	19
TEX. GOV'T CODE § 2001.174	1, 2, 3, 7, 8
TEX. GOV'T CODE § 2001.174(2)(A)	10
TEX. GOV'T CODE § 2001.174(2)(B)	10
TEX. GOV'T CODE § 2001.174(2)(C)	22
TEX. GOV'T CODE § 2001.174(2)(D)	22
TEX. GOV'T CODE § 2001.174(2)(E).....	13
TEX. GOV'T CODE § 2001.174(2)(F)	15, 22
TEX. GOV'T CODE § 2001.175(e).....	7
TEX. LAB. CODE § 21.261(a).....	18
TEX. LAB. CODE § 61.062(a).....	21
TEX. LAB. CODE § 61.062(e).....	20
TEX. LAB. CODE § 212.202(a).....	20
TEX. OCC. CODE § 1704.256	18, 19
TEX. R. DISCIPLINARY P. 2.15	18
TEX. TAX CODE § 42.23(a).....	18, 20
TEX. TRANSP. CODE § 372.108(d).....	18
TEX. TRANSP. CODE § 521.308(e)	18
TEX. TRANSP. CODE § 524.043.....	2
TEX. TRANSP. CODE § 724.047.....	2
TEX. UTIL. CODE § 15.001	2
TEX. WATER CODE § 5.351(a).....	1

OTHER AUTHORITIES

30 TEX. ADMIN. CODE § 55.211(a)	21
Douglas Bryant et al., <i>Agencies, Follow Your Statutes: The Substantial Evidence Rule in Judicial Review of Administrative Agency Decisions</i> , 4 Tex. Tech. J. Admin. L. 137 (2003)	4
W. Wendell Hall et al., <i>Hall's Standards of Review in Texas</i> , 42 St. Mary's L.J. 3, 70-75 (2010).....	1
Kerry McGrath, <i>Substantial Evidence Review in Texas—Still Insubstantial After All These Years</i> , 44 Baylor L. Rev. 223 (1992)	4, 13, 14, 19
Oscar Javier Ornelas, <i>Justified Reasoning for Reasonable Minds: The Reasoning Behind Standards of Judicial Review of Administrative Decisions in Texas</i> , 1 Tex. Tech. J. Tex. Admin. L. 235 (2000)	4
Thomas M. Reavley, <i>Substantial Evidence and Insubstantial Review in Texas</i> , 23 Sw. L.J. 239 (1969)	4, 5

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”).¹ 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 decisions²:

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

¹ A Westlaw search reveals more than 80 statutes with similar language.

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

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Disentangling the Standards of Review

Also available as part of the eCourse

[2018 Advanced Texas Administrative Law eConference](#)

First appeared as part of the conference materials for the
13th Annual Advanced Texas Administrative Law Seminar session
"Disentangling the Standards of Review"