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SUBSTANTIAL EVIDENCE AND INSUBSTANTIAL REVIEW IN TEXAS

by

Thomas M. Reavley

TEXAS now has some seventy administrative agencies performing important legislative, executive, and judicial functions. A governmental body which may investigate, make rules, adjudicate, and enforce the law has great potential for arbitrary, capricious, and discriminatory action. It is my contention that after all these years we still lack effective judicial review of administrative decisions.

Three primary objectives of judicial review of administrative action have been stated: (1) to assure that the agency has acted within its statutory authority; (2) to determine whether the proceedings of the agency met the requirements of due process; and (3) to determine whether the agency acted arbitrarily, capriciously, and without regard to the evidence. It is submitted that under the established pattern of judicial review, the Texas courts have been inattentive to the second objective and actually have prevented the third.

The usual Texas judicial inquiry is whether substantial evidence supports the administrative action, but no mind is paid to the evidence that was before the agency. A new proceeding is conducted in court, and the substantiality of the evidence introduced in the new proceeding is examined. This is the object of my dissatisfaction, and I shall refer to it as substantial evidence de novo review.

I. DEVELOPMENT OF SUBSTANTIAL EVIDENCE DE NOVO REVIEW

Substantial evidence de novo review had its inception in Shupee v. Railroad Commission. The Railroad Commission had denied Shupee's application for a certificate of authority to operate a bus line. Shupee appealed the denial, alleging in the district court that the Commission's order was
unjust because not supported by the facts in evidence before the Commission. The district court, without a jury, set aside the order denying the certificate as "unjust and unreasonable" and enjoined the Commission from interfering with operation of the bus line over the designated route. The court of civil appeals reversed the order of the trial court and dissolved the injunction. Shupee contended in the supreme court that the trial court should substitute its own finding based upon the preponderance of the evidence adduced on the trial de novo for that of the Commission. In affirming the court of civil appeals, the supreme court said:

"We think it clear that the intention of the statutory provisions is that the decisions of the Railroad Commission upon the granting or refusing of any permit to operate a bus line over any highways in Texas should be final and conclusive, unless it acted unreasonably and unlawfully, or unless its decisions had no basis in fact and were arbitrary or capricious. In other words, if the findings and orders of the Railroad Commission in such matters had any reasonable basis in fact, and were not shown to be arbitrary and unreasonable, they must be supported by the court. The court cannot substitute its judgment for that of the commission, unless it be shown that said judgment of the commission was without foundation in fact, or was unreasonable or arbitrary."\(^9\)

Three cases\(^10\) involving orders of the Oil and Gas Division of the Railroad Commission intervened between Shupee and 1946, at which time substantial evidence de novo review was finalized by the supreme court in *Trapp v. Shell Oil Co.*\(^11\) Trapp had been given a rule 37 permit to drill a second oil well on a small tract in the East Texas field. The question was one of confiscation and turned on the amount of acreage to be considered in determining Trapp's right to a second well. Chief Justice Alexander believed that such a question of property right should be determined independently by the court, though the burden of proof would be on the party appealing, as provided in the statute.\(^12\) But the other members of the court concluded that Railroad Commission decisions would be upheld so long as the prevailing party could produce substantial evidence in support thereof. Furthermore, it was decided that examination would be made of the evidence presented to the trial court, rather than the evidence presented to the administrative agency, to determine whether the required support existed. It is submitted that the decision in *Trapp* served neither...
the objectives of the Trapp majority nor those of Chief Justice Alexander. To uphold the agency’s findings, if supported by substantial evidence, is a large concession; to look only at the trial court record concedes much more. In formulating this rule in Trapp, the court adopted Chief Justice Alexander’s reasoning in a former case to the effect that it would be foreign to the law of Texas to bind a court to evidence and findings of fact adduced by an administrative agency unfamiliar with the principles of admissibility of testimony and the weight to be given thereto.13

II. OPERATION OF SUBSTANTIAL EVIDENCE DE NOVO REVIEW

As indicated above, one aspect of the rule set down in Trapp apparently resulted from a judicial lack of confidence in agency fact determination. But since the question on appeal becomes one of law, the court is allowed to make no fact finding at all. The order is presumed to be valid and reasonably supported by substantial evidence, and the burden is on the party complaining to show that the order was not reasonably supported by facts existing at the time of the entry of the order. Under this form of the substantial evidence rule, the agency action itself is not being reviewed. In fact, the record compiled before the agency is usually not even admissible before the trial court.14

Unless the particular review statute requires otherwise, the administrative agency need give no reason for its action. The court will presume a proper finding and a sufficient reason so long as there is substantial evidence to support the presumed basis of the agency’s decision.15 However, if the agency gives its reason by finding a certain fact and is silent as to any other reason, the order cannot be upheld on the basis of a finding which was not made.16 To circumvent this rule, the agencies have become even less specific about the reasons for their orders. For example, when it was decided in Gulf Land Co. v. Atlantic Refining Co.17 that a Railroad Commission order could not be upheld on the ground of waste prevention when the order gave as its reason the prevention of confiscation, the Commission thereafter simply put into its printed order that its action was to “prevent waste and/or confiscation.”18

A party appealing an administrative decision may have a difficult burden, for “substantial evidence” need not be much evidence. Though “substantial” means more than a mere scintilla or some evidence,19 it is cer-

13 Id. at 330, 198 S.W.2d at 429-30.
14 Whether evidence heard by the agency is admissible at the trial on appeal must depend upon its own merits under the rules of evidence, and without regard as to whether it was introduced at the hearing. Railroad Comm’n v. Shell Oil Co., 139 Tex. 66, 80, 161 S.W.2d 1022, 1030 (1942); Magnolia Petroleum Co. v. New Process Prod. Co., 129 Tex. 617, 104 S.W.2d 1106 (1937).
15 Railroad Comm’n v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.2d 967 (1937).
16 City of San Antonio v. Texas Water Comm’n, 407 S.W.2d 752 (Tex. 1966). As to implied findings, see Gibraltar Sav. & Loan Ass’n v. Falkner, 371 S.W.2d 548 (Tex. 1963); Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S.W.2d 73 (1939).
17 134 Tex. 59, 131 S.W.2d 73 (1939).
19 Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946); Board of Firemen’s Relief & Retirement Fund Trustees v. Marks, 150 Tex. 433, 242 S.W.2d 181 (1951); Comment, Some Aspects of the Texas “Substantial Evidence” Rule, 33 Tex. L. Rev. 717, 723 (1955).
tainly less than is required to sustain a verdict being attacked as against the great weight and preponderance of the evidence. In *Trapp* the court quoted *Trem Carr v. Shell Oil Co.* as follows: "If the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside."

The primary difference between the federal form of substantial evidence review and Texas substantial evidence de novo review is that the federal courts confine their search for substantial evidence to the record made at the administrative hearing. The amount of evidence considered substantial appears to be the same. In *Consolidated Edison Co. v. NLRB* the Supreme Court of the United States observed that "[s]ubstantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In *NLRB v. Columbia Enameling & Stamping Co.* the Court said that substantial evidence means, "evidence which is substantial, that is, affording a substantial basis of fact from which the fact in question can be reasonably inferred. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury . . . ."

The typical appeal from a Texas administrative agency consists of a lengthy trial with a large accumulation of elaborate exhibits and much expert testimony. After considering all of this evidence, the trial court is supposed to approve the act of the agency if substantial evidence before the court reasonably supports what the agency did. But what is the connection between the two proceedings? The trial court has no way of knowing why the agency acted or even what evidence it considered. Much of the evidence introduced in the trial court was not even compiled, and certainly not considered, at the time of the agency hearing. What does substantial evidence before the trial court indicate as to the wisdom or reason of the agency's decision? There is a judicial hearing, but it is not review.

As a matter of common practice an applicant's theory and evidence change between the time of the agency hearing and the court trial. If we are correct in assuming that the agency has an expertise in such matters, why should it not have the benefit of the voluminous evidence that sees the light of day only in the courthouse? And what kind of game is it that justifies an order, or warrants a presumption to support its finding, in

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139 Tex. 66, 161 S.W.2d 1022 (1942).
145 Tex. at 349-50, 198 S.W.2d at 441.
2 K. Davis, Administrative Law Treatise § 29.02 (1958); Walker, supra note 10, at 642.
305 U.S. 197 (1938).
Id. at 229.
Id. at 299-300.
To be admissible in the trial court on appeal, evidence must pertain to conditions as they existed at the time of the administrative order. Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S.W.2d 1035 (1942); Railroad Comm'n v. Magnolia Petroleum Co., 130 Tex. 484, 109 S.W.2d 967 (1937); Magnolia Petroleum Co. v. New Process Prod. Co., 129 Tex. 617, 104 S.W.2d 1106 (1937). The evidence itself need not have been adduced nor discovered at the time of the order. Pickens v. Railroad Comm'n, 387 S.W.2d 35 (Tex. 1965).
a mountain of evidence that could not have been considered because it did not exist at the time the order in question was issued?

I submit that the doctor cannot diagnose me by examining you, and that we cannot determine the nature of the surface of Mars by studying the moon. If we are to review the procedure and the decision of the agency, we should review what it did, what it considered, and the reasons it gave for its decision. Then there would be a basis for determining the fairness of the decision and whether the reasons the agency gave for its action were reasonably supported by the facts which were before it.

The case of Alamo Express, Inc. v. Railroad Commission is a typical example of substantial evidence de novo review in operation. Missouri Pacific Truck Lines applied for a permit to use an alternate route, direct between Houston and San Antonio, rather than a route that paralleled its rail line by way of Victoria. The hearing before the Commission examiner, in March of 1963, elicited the limited advice of eight witnesses. Those witnesses established the obvious point that to give Missouri Pacific a direct route from Houston to San Antonio would improve its competitive advantage, but otherwise the witnesses were satisfied with matters and made very few complaints about existing service. Nevertheless, the Commission granted the permit. Seven competing motor carriers appealed the grant.

In May of 1965, two years and two months later, the case came on for trial in Travis County district court where testimony was presented for a month. An expert described in great detail the economic development of the affected area. Ninety witnesses, either shippers or receivers, testified. From this testimony it appeared that dissatisfaction did exist with the services. Thus, the supreme court found that the grant of the certificate was reasonably supported by substantial evidence of inadequacy of existing services.

I make no objection to the outcome of this case, but I wonder if the reason for the Commission's order had any relation to the inquiry to which the trial court devoted a month of its time. There was no justification visible to the judiciary for presuming that the agency had brought to bear some vast knowledge, or had done its job well, or had made a sound fact determination.

III. Due Process in Agency Proceedings

I submit that it is poor process for the court to hear the evidence after the agency has already decided the facts. If the agency is to do the deciding it should hear the evidence. And if the court is to review the agency's verdict the only evidence which it should review is that which the agency considered. This must be our focus if the objective is to detect a denial of due process or to detect a decision made without regard to the evidence.

The basic elements of due process at the agency level are notice, hear-
ing, and an impartial trier of facts. Notice and hearing are not required unless the particular agency exercises powers which may deprive a person of liberty or property. In cases of license revocation, for example, the question is whether the licensed activity is considered a right or a privilege; if it is only the latter, license revocation may be accomplished without notice or hearing. If an activity may be prohibited under the police power it is merely a privilege. In *House of Tobacco v. Calvert* the Texas supreme court extended the benefits of notice and hearing to holders of cigarette license permits by refusing to classify the interest as a privilege. Another recent case indicating the court's increasing concern that notice and hearing be provided is *City of Houston v. Fore*. In that case the city made improvements to the street upon which defendant's property abutted. Notice of the hearing at which the improvements were authorized was published three times in the *Houston Press* pursuant to a city ordinance. Defendant did not read the notice and failed to attend the hearing. The record showed that defendant's address was known to the city. The court held that notice by publication was insufficient under the due process clause of the fourteenth amendment to the United States Constitution because such notice was not reasonably calculated to apprise interested parties of the pendency of the action.

The Texas courts, though requiring notice and hearing, have not been overly concerned with the procedure followed at the hearing itself. This is because the hearing has been rendered of secondary importance by substantial evidence de novo review. In Texas, administrative agencies have no established rules of evidence and do not follow the rules of evidence that govern judicial procedure.

Due process does not require that the hearing conform to judicial process. However, in *Warren Independent School District v. Southern Neches Corp.*, a court of civil appeals held that a protesting taxpayer was deprived of due process in a hearing before the Board of Equalization because he was denied the right to cross-examine witnesses. The court reasoned that cross examination was necessary to allow the protesting taxpayer a reasonable opportunity to develop the facts upon which its protest was based. The supreme court refused the application for writ of

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31 The theory behind this distinction is that since the activity may be prohibited, a license to engage in it may be withdrawn whenever the state so desires. This reasoning has been criticized as illogical. Note, *Administrative Procedure—Due Process Requires that the Holder of a Cigarette Permit Be Given Notice and a Hearing Prior to Forfeiture of the Permit*, 44 Tex. L. Rev. 1360 (1966), and authorities there cited.
32 394 S.W.2d 654 (Tex. 1965).
33 412 S.W.2d 35 (Tex. 1967).
36 405 S.W.2d 100 (Tex. Civ. App. 1965), error ref. n.r.e.
37 Id. at 104-05.
error, n.r.e., but held in a per curiam opinion38 that there was no denial
of due process. However, the approach of the court of civil appeals may
yet see its day.

One area of questionable due process is the practice of taking official
notice of administrative records not introduced into evidence during the
hearing.39 The United States Supreme Court has often held that due pro-
cess is violated when evidence is treated as such without being introduced.
In United States v. Abilene & Southern Railway40 a finding of the Interstate
Commerce Commission rested, in part, upon data taken from annual re-
ports filed with the Commission and not introduced into evidence. The
Supreme Court held that the reports could not support a finding since the
carriers had no notice that they were being confronted by such evidence
until after the finding.41 In Ohio Bell Telephone Co. v. Public Utilities
Commission42 the Court held that "fundamentals of a trial were denied"
by the Ohio Utilities Commission because the commission considered cer-
tain price trends that were not in the administrative record. The Court
said it was "as if a judge were to tell us, 'I looked at the statistics in the
Library of Congress, and they teach me thus and so.' This will never do
if hearings and appeals are to be more than empty forms."43

United States Supreme Court cases notwithstanding, the Texas supreme
court long has held that agencies may consider extra-record data.44 In
Phillips v. Brazosport Savings & Loan Ass'n45 the court was concerned
with the validity of an order of the Banking Commissioner granting a
charter and certificate of authority to American Savings & Loan Associa-
tion. Brazosport Savings & Loan Association attacked the order in the
district court and that court rendered judgment upholding the order of
the Commissioner. The court of civil appeals reversed on grounds of pro-
cedural irregularity, one of which was reliance by the Commissioner on an
investigator's report not introduced at the administrative hearing. The
supreme court reversed the court of civil appeals and affirmed the judg-
ment of the trial court. In holding that consideration of the investigator's
report did not constitute denial of due process, the court distinguished
out-of-state cases on the basis that they were decided under statutes that
expressly limited judicial review to the record made at the hearing.46 The
United States Supreme Court denied a writ of certiorari in Brazosport,
indicating perhaps that minimal requirements of due process were met.

38 404 S.W.2d 809 (Tex. 1966).
39 See Annot., 99 L. Ed. 460 (1955); Annot., 18 A.L.R.2d 552 (1951); 2 K. Davis, supra
note 22, §§ 15.01–14.
40 265 U.S. 274 (1924).
41 Id. at 289.
42 301 U.S. 292 (1937).
43 Id. at 303.
44 See, e.g., Alamo Express, Inc. v. Union City Transfer, 158 Tex. 234, 309 S.W.2d 815 (1958).
45 366 S.W.2d 929 (Tex. 1964).
46 Id. at 935: "In any event, we think that respondents have not been deprived of their pro-
cedural rights in this case. It has repeatedly been held by the Texas decisions that the Commissioner
is not confined to the evidence actually brought out at the hearing, but may rely upon information
disclosed by the office records."
IV. INATTENTION TO THE ADMINISTRATIVE HEARING

The ultimate test of due process of law in any administrative hearing is the presence or absence of "the rudiments of fair play long known to our law." Though minimal constitutional requirements may be met by Texas administrative agencies, fair play cannot be assured under the present system. Both parties often hold back the bulk of their evidence for the trial court, leaving the agency with little data upon which to base a reasoned decision. In such cases the decision may be affirmed on a showing of substantial evidence despite the errors in the proceedings of the agency. In *Southwestern Greyhound Lines v. Railroad Commission*44 petitioners attacked an order of the Railroad Commission granting All American Bus Lines a certificate of convenience and necessity to operate a motor carrier service. The Commission’s order, in stating that the existing carriers did not “conclusively establish” their ability to immediately remedy the existing inadequate service, erroneously placed the burden of proof upon them. In holding that the order should be affirmed, the court of civil appeals said:

> It has been stated many times by our courts that the Commission is an expert, technical body which devotes its time and talents to the administration of some of our largest and most complex businesses. While it is a quasi-judicial body, it is not a court; its members need not be attorneys. Its actions, proceedings and orders are not subject to the same critical scrutiny as would be accorded those of a court. . . . Viewed most favorably for appellants, the use of the word conclusively in that portion of the order of the Commission under consideration, merely reflects an erroneous reason for the Commission’s finding that appellant was unable immediately to render adequate service, as well, perhaps, as an erroneous reason for granting the certificate to appellee. The courts are not bound by the stated reasons of the Commissioner in making an order. The order is to be upheld if it has a valid basis. The valid basis here is substantial evidence to show public convenience and necessity as found by the Commission. We are most unwilling to make any departure from this rule which was established only after long and tedious judicial travail.45

Perhaps the burden was misplaced, and perhaps the matter was inconsequential. The point is that the court cannot know without looking at the record before the Commission. So why the proud fixation with “long and tedious judicial travail”?

The primary fault of substantial evidence de novo review is that it renders the agency proceeding of virtually no importance. The courts apparently believe that defects in the administrative hearing may be cured upon appeal. In *Cook Drilling Co. v. Gulf Oil Corp.*46 the validity of an order of the Railroad Commission was in question. The court said:

> Since there is to be a full hearing of the facts in the district court, whether the Commission actually heard sufficient evidence to sustain the order is not material. As is well known, hearings before the Commission are informal. In the vast majority of instances its orders are not contested. It would be

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45 208 S.W.2d 793 (Tex. Civ. App. 1947), error ref. n.r.e.
46 Id. at 196.
47 159 Tex. 80, 161 S.W.2d 1035 (1942).
placing a useless and intolerable burden on the Commission to require it to make an 'appeal proof' record in every instance. The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or did not, then exist sufficient facts to justify the entry of the same.\(^{55}\)

The Texas courts are singularly unconcerned with the motives of administrative agencies. Judicial inquiry is limited to the legal effect of the administrative act upon the parties affected\(^{56}\) and whether there is substantial evidence to support the decision.\(^{57}\)

V. Statutory Review Provisions

Substantial evidence de novo review is strictly by direction of Texas courts, for it has never been prescribed by statute. Generally, review statutes are of five basic types.\(^{58}\) The first type provides for review by a "civil suit." A good example is the statute providing for appeals from orders of the Oil and Gas Division of the Railroad Commission.\(^{59}\) The statute provides that, "[a]ny interested person affected by the conservation laws of this State . . . and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas."\(^{60}\) It is further provided that the burden of proof shall be on the complaining party and the order shall be deemed prima facie valid.

The second type of statute provides for review by "petition for certiorari."\(^{61}\) Such a statute is article 1011g,\(^{62}\) which governs proceedings for review of the actions of local boards of adjustment. In Huley v. Board of Adjustment\(^{63}\) article 1011g was held to require application of substantial evidence de novo review.

The third type of review statute provides for review by a "civil suit explicitly based upon the substantial evidence rule." A statute of this kind is article 4551e,\(^{64}\) which authorizes appeals from decisions of the Texas State Board of Dental Examiners suspending or revoking a dental hygienist license.

The fourth type of review statute provides that appeal will be by "trial
de novo." This type of statute apparently was passed by the legislature because of dislike of substantial evidence de novo review. However, the legislature underestimated the affinity of the Texas courts for this method of review. *Fire Department v. City of Fort Worth* involved article 1269m which established a civil service system for policemen and firemen in cities of over 10,000 population. Section 18 of the statute provided that a fireman or policeman who was dissatisfied with a disciplinary order could file a petition in the district court asking that his order of suspension or dismissal be set aside. The statute provided that such a case was to be tried de novo. In this case, the court of civil appeals held the statute unconstitutional on the ground that it imposed upon the district court administrative, as distinguished from judicial, functions. The supreme court reversed, holding that substantial evidence de novo review was to be used. The court said:

The extent of such review has been rather generally held to be limited to an ascertainment of whether there was substantial evidence reasonably sufficient to support the challenged order. . . . There is nothing in Section 18 to suggest that the district court is empowered to do more. Although the statute provides for trial de novo, this term as applied to reviews of administrative orders has come to have a well-defined significance in the decisions of this state, and as a rule has been taken to mean a trial to determine only the issues of whether the agency's ruling is free of the taint of any illegality and is reasonably supported by substantial evidence.

Since the early 1950's the legislature has often enacted the fifth type of statute, which provides for true de novo review as that "term is commonly used and intended in an appeal from the Justice Court to the County Court." An appeal from justice to county court renders the original judgment null and void for all purposes and a new trial is held at which all issues are determined anew. One court has held that this type of statute entitles the appellant to a trial de novo in its broadest sense. By

63 147 Tex. 505, 217 S.W.2d 664 (1949).
65 147 Tex. at 510, 217 S.W.2d at 666. Jones v. Marsh, 148 Tex. 362, 224 S.W.2d 198 (1949), involved an appeal from the denial of an application for a retail license to sell beer. The case was appealed to district court under a statute providing that "The trial shall be de novo under the same rules as ordinary civil suits." Tex. Pen. Code Ann. art. 666-14 (1912). In holding that the substantial evidence rule should apply, the court said:

[T]he statute does not expressly provide that there shall be in district court a full retrial of the facts as if there had been no finding made by the county judge, nor does the statute specify what issue or issues shall be tried in the district court. It may, therefore, reasonably be concluded, in view of the subject matter involved and the nature of the order to be reviewed, that only a limited review is intended, and that in so far as the facts which are the basis for the order of the county judge are concerned the question or issue to be determined in the district court is whether or not the findings of the county judge are reasonably supported by substantial evidence. Such a trial is one kind of a trial de novo, and the somewhat limited trial can be held, as the statute requires, under the rules applicable to ordinary civil suits.

148 Tex. at 367, 224 S.W.2d at 201.
68 Rockett v. State Bd. of Medical Examiners, 287 S.W.2d 190 (Tex. Civ. App. 1956), error ref. n.r.e. See also Scott v. Board of Medical Examiners, 184 S.W.2d 686 (Tex. 1964).
contrast, some of the statutes providing for such review on appeal from administrative agencies have been held by the courts to run afoul of the Texas Constitution. Article II, section 1\(^6\) of the constitution precludes any of the three branches of government from exercising powers properly belonging to another.\(^7\) In *Davis v. City of Lubbock*\(^8\), a property owner sought to enjoin the city of Lubbock from condemning his property pursuant to urban renewal law. The city had declared the area in which his property was located as a slum area. A statute provided that in all suits brought to review orders or decisions of a city or its agency, “the trial shall be de novo as that term is used or understood in an appeal from a Justice of the Peace Court to the County Court.”\(^9\) The statute provided further that: “It is the intent of the Legislature that such trial shall be strictly de novo and that the decision in each such case shall be made independently of any action taken by the board, upon preponderance of the evidence adduced at such trial and entirely free of the so-called ‘substantial evidence’ rule enunciated by the courts in respect to orders of other administrative or quasi-judicial agencies.”\(^10\)

The Texas supreme court held the statute unconstitutional since it invested the courts with authority to determine a legislative question. Having struck down the de novo review provision, the court implied a right to review and held that the substantial evidence rule should apply.

In *Chemical Bank & Trust Co. v. Falkner*\(^11\) the supreme court held unconstitutional article 342-115 of the Banking Code\(^12\) which provided that “[t]he orders of the State Banking Board may be appealed to a court of competent jurisdiction and the trial . . . shall be de novo the same as if said matter had been originally filed in such court.”\(^13\) The court held that a determination of public necessity for a new bank involves a determination of public policy which is a matter of legislative discretion and cannot constitutionally be given to the judiciary.\(^14\)

The fifty-seventh legislature proposed a constitutional amendment which would authorize the legislature to provide for complete de novo

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\(^6\) Tex. Const. art. II, § 1.

\(^7\) The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to one of the others, except in the instances herein expressly permitted.

\(^8\) Id.

\(^9\) 160 Tex. 18, 326 S.W.2d 699 (Tex. 1959).


\(^11\) Id.

\(^12\) 369 S.W.2d 427 (Tex. 1963).


\(^14\) Id.

\(^15\) Key Western Life Ins. v. State Bd. of Ins., 161 Tex. 11, 350 S.W.2d 819 (1961) involved a direct appeal from a district court judgment upholding an order of the State Board of Insurance withdrawing approval of a policy form used by the petitioner. Appeal was provided by Tex. Ins. Code Ann. art. 21-44 (1963), which states that: “The action shall not be limited to questions of law and the substantial evidence rule shall not apply, but such action shall be tried and determined upon a trial de novo to the same extent as now provided for in the case of an appeal from the Justice Court to the County Court.” The court found article 21.44 to be constitutional since the function under consideration was of a judicial nature and thus could be exercised by the courts in a de novo proceeding.
review of any administrative action. The amendment was soundly defeated by the voters, thus the validity of complete de novo review statutes will continue to turn on subtle distinctions between judicial and legislative functions.

It is fortunate that the constitutional amendment was not passed. Complete de novo review is no more desirable than substantial evidence de novo review, and to imbed any error into the constitution renders it considerably harder to correct. One of the primary justifications for the existence of administrative agencies is their expertise in complex and technical areas. If administrative orders are nullified when an appeal is filed, the agency function is transferred to the courts; the agency becomes merely a conduit through which controversies must pass in order to reach the courts. In *Southern Canal Co. v. State Board of Water Engineers*, Justice Calvert indicated his reservations concerning trial de novo appeals from decisions of the Board of Water Engineers. He wrote:

No doubt before enacting such a statutory provision the Legislature would give careful consideration to some of its consequences—that decision of technical matters would be removed from the hands of trained personnel and lodged with the untrained; that an administrative agency of its own creation would become a useless appendage; and that whereas on conflicting testimony one judge or jury could and well might determine, for example, that there was not sufficient unappropriated water to justify the granting of a permit, or that the granting of the permit would be detrimental to the public welfare, another judge or jury trying the right to a subsequent application, on the same evidence, would determine that there was sufficient unappropriated water to require the granting of the permit and the granting of it would not be detrimental to the public welfare.

One writer has estimated that if all appeals from state agencies and political subdivisions were de novo, 105,000 cases per year would be added to the district court docket (purportedly a very conservative estimate), an increase of almost two hundred per cent.

VI. THE NEED FOR AN ADMINISTRATIVE PROCEDURE ACT

Having failed to obtain true de novo review of administrative agencies, the legislature should put mind to passage of an administrative procedure act approximating the Model Act or the Federal Administrative Procedure Act. The first proposed administrative procedure act for Texas was drafted by Professor Whitney R. Harris and published in the *Southwestern Law Journal*. The Administrative Law Committee of the State

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79 159 Tex. at 235, 318 S.W.2d at 625.
80 Comment, supra note 54, at 1012.
81 The Model State Administrative Procedure Act was approved by the National Conference of Commissioners on Uniform State Laws in 1946. The Model Act was revised beginning in 1958. The Revised Model State Administrative Procedure Act was adopted by the Conference of Commissioners in 1961. 2 F. Cooper, State Administrative Law 797 (1965).
Bar of Texas was created "to study and report on administrative law, procedure and practice, to the end that the operating processes and procedure of the administrative boards and agencies of the State may be standardized and made certain, and that adequate safeguards and controls be established and maintained to insure due regard for constitutional guarantees in the exercise of administrative action and discretion." The committee drafted a proposed act that was approved by a referendum of the bar in February 1953 but was not submitted to the legislature. In 1957 the committee abandoned an administrative procedure act and approved a measure that would require the various agencies to file their rules of procedure. Such an act was passed by the legislature in 1961. The committee is currently in the process of drafting another administrative procedure act. However, passage of such an act does not seem probable at this time. It is to be expected that some of the agencies would be opposed to the far-ranging changes effected by such an act. It is also likely that some administrative lawyers, adept at furthering their clients' interests through the current system, would be hesitant to make changes. However, the Rules of Civil Procedure were passed in the face of similar opposition and an administrative procedure act is no less desirable or necessary than the Rules. Ultimate passage of such an act will depend upon the concern and commitment of the bar.

Among the main reasons for the passage of administrative procedure acts by many states are clarification and standardization of the administrative system and its procedures. Though this in itself is compelling reason to pass such an act, existence of substantial evidence de novo review in Texas has made necessary three basic changes which are more important.

First, a complete record should be made before the administrative agency. The Railroad Commission Order in Alamo Express Inc. v. Railroad Commission states at the outset of each paragraph of the findings: "The Commission further finds from the evidence and its own records . . ." If the agency possesses all of the expertise claimed for it, it should be able to place supporting exhibits and testimony into its record. There is surely no way the court will ever know whether such evidence was weighed by the agency, and it is only elemental fairness that a party know what evidence is being considered contrary to his position. The Federal Administrative Procedure Act provides that:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evi-
dence in the record, any party shall on timely request be afforded an opportunity to show the contrary.90

Secondly, the agency should state the reasons and the findings necessary to support its action.91 I believe this is an essential part of the decision making process. Prior to the passage of the Federal Administrative Procedure Act, the federal courts often were concerned with the lack or insufficiency of administrative findings.92 In 1935 in Panama Refining Co. v. Ryan93 the United States Supreme Court indicated that the lack of findings in support of an administrative order violated due process. In subsequent cases, however, the Court based such a requirement on statutory or other non-constitutional grounds.94

In Texas several statutes require specific fact findings to be made.95 Though no findings are required by the Oil and Gas Division of the Railroad Commission, findings are required by the Motor Transportation Division of that Commission, and the courts have enforced the requirement.96 In Miller v. Railroad Commission97 the Texas supreme court was confronted with findings of the Motor Transportation Division that were pre-printed with blanks to be filled in with the names of the parties, dates, etc. The court held that the findings were not supported by substantial evidence. In a concurring opinion, Judge Greenhill said:

In passing upon an application of this character, the Commission is acting in a quasi-judicial capacity. After the Commission rules, its findings are presumed to be valid; and the losing party must bear the heavy burden of overcoming its findings under the substantial evidence rule. For the Commission to print in advance and use forms containing its fact findings upon which the order is based, filling in the date, the names of the parties and the authority granted, in a contested case, is itself, in my opinion, a lack of procedural due process of law.98

90 Administrative Procedure Act § 7(d), 5 U.S.C. § 1006(d) (1964).
92 See 2 K. Davis, supra note 22, § 16.04; Comment, supra note 18, at 651; Some state courts have held that due process requires administrative agencies to make findings. See, e.g., Swars v. Council of City of Vallejo, 33 Cal. 2d 867, 206 P.2d 355 (1949); Laney v. Holbrook, 150 Fla. 622, 8 So.2d 465 (1942); Appalachian Power Co. v. Commonwealth, 132 Va. 1, 110 S.E. 360 (1922).
93 293 U.S. 388 (1935).
94 Comment, supra note 18, at 651.
95 See, e.g., Tex. Rev. Civ. Stat. Ann. art. 1269m, § 16 (1963), which provides for suspension of civil service employees. The statute provides that "[n]o employee shall be suspended or dismissed by the Commission except for violation of the civil service rules, and except upon a finding by the Commission of the truth of the specific charges against such employee." See City of Houston v. Melton, 163 Tex. 294, 354 S.W.2d 387 (1962), where the supreme court held that the following statement constituted sufficient findings under the statute: "[A]nd the evidence as a whole leaves no doubt in our minds as to the substance . . . of the issues. Based on such evidence, as well as upon the appearance and demeanor of the witnesses while testifying, we have no doubt that [respondent] was guilty of improper and wrongful conduct, well within said Specifications remaining before us . . . ." Id. at 297, 354 S.W.2d at 389. In a dissenting opinion, Justice Walker said: "The order states only that respondent was 'guilty of improper and wrongful conduct, well within the specifications remaining before us.' This falls somewhat short of a finding that he had committed each and all of the six alleged acts of misconduct." Id. at 299, 354 S.W.2d at 391.
96 The statute provides that, "in any contested hearing, the Commission shall, along with its order, file a concise written opinion setting forth the facts and grounds for its action, and such opinion shall be admissible as evidence on any appeal . . . ." Tex. Rev. Civ. Stat. Ann. art. 911(b), § 12(a) (1964).
97 365 S.W.2d 244 (Tex. 1962).
98 Concurring opinion, id. at 247.
Professor Davis has observed that, "[t]he practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, irrespective of a statutory requirement." Davis believes the most important reason for findings to be the facilitation of judicial review. Overlooking Texas administrative law, he has said that, "[i]f there were no law requiring findings, judges struggling with masses of evidence and hazy findings, trying their best to discover whether the agency has applied the proper principles, would surely invent such a requirement."

A further reason for findings is to inform a losing party as to why an agency decided a controversy in the manner it did. Without such knowledge, it is difficult to know whether to appeal, or upon which ground to base an appeal. If the factual basis for an unfavorable decision is unknown, a losing party may not know what change of conditions would result in a subsequent favorable determination. Further, it would seem that the process of formulating findings would help assure that an administrator understands the evidence and the issues of a case, thus preventing arbitrary or careless decisions.

The third basic change needed, as has been emphasized, is restriction of review to the record made in the administrative agency. For years we were concerned as to whether this procedure would be constitutional in Texas, largely because of some statements made by Chief Justice Alexander in the early cases. In *Gerst v. Nixon*, however, the supreme court had no difficulty in upholding the constitutionality of the new Savings and Loan Act in this respect. As originally passed, the review provisions of the Texas Savings & Loan Act provided for a method of review different from either the Federal APA or the usual form of Texas substantial evidence review. The Act provided that upon review of any order or decision of the Commissioner (except removal orders), the court is to re-try fact issues and resolve them by applying the preponderance of the evidence standard. However, no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing. In *Nixon* the supreme

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100. Id. § 16.01, at 445.
101. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(f) (1961) provides that, "The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs."
102. See, e.g., Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 72, 161 S.W.2d 1022, 1028 (1942).
104. TEX. REV. CIV. STAT. ANN. art. 812a (1964).
105. The review of any other act, order, ruling or decision of the Commissioner or of any rule or regulation shall be tried by the court without a jury in the same manner as civil actions generally and all fact issues material to the validity of the Act, order, ruling, decision or rule or regulation complained of shall be redetermined in such trial on the preponderance of the competent evidence, but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing.

TEX. REV. CIV. STAT. ANN. art. 812a, § 11.12 (1) (b) (1964).
court struck down the de novo provisions of the Act as violative of the separation of powers requirement of the Texas Constitution. However, the court upheld the requirement that review be limited to evidence contained in the administrative record. Thus, judicial modification of a hybrid form of review has resulted in Texas' closest approximation to federal type review.

Restriction of review to the agency record increases the desirability of more formal hearing procedure, and some procedural safeguards have been provided by the Commissioner. He has issued regulations stating that all witnesses offering testimony at a hearing must be under oath and that a reporter must record the testimony.

The recent case of Gerst v. Gibraltar Savings & Loan Ass'n presented another question yet to be resolved by the courts. The Commissioner had denied Gibraltar's application for a Houston branch office on the basis of three unfavorable findings. The Commissioner refused to consider an affidavit by one Dr. Yeager attesting to the public need for a new branch office. The affidavit, though hearsay, was part of the administrative record. The district court reversed and remanded, holding that there was no substantial evidence supporting the Commissioner's action. The court of civil appeals reversed, holding that the Commissioner acted properly in not considering the *ex parte* affidavit. The court further held that the court on appeal could not consider testimony given at the trial by Dr. Yeager. The court of civil appeals remanded the case to the Commissioner. The supreme court refused the application, no reversible error, but expressly refrained from deciding whether the court of civil appeals was correct in remanding the case to the Commissioner.

The question suggested by *Gibraltar* is whether all evidence that would be inadmissible in a judicial trial should be excluded from an administrative record. The federal rule and the majority rule in the state courts is that evidence can be considered, though inadmissible in a judicial trial, if it appears to be sufficiently trustworthy to be relied on in the ordinary conduct of serious business affairs, provided there is other competent evidence looking in the same direction.

When the problems presented by the Savings & Loan Act have been worked out by the courts, Texas will have an example of judicial review much superior to our traditional substantial evidence de novo review. We may hope that such a beginning will lead to legislative adoption of an

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106 The rest of the paragraph was saved by the statute's severance clause. The text of Tex. Const. art. II, § 1 is set out in note 69 supra.
107 On motion for rehearing in Nixon, it was asserted that the statutory and rules provision governing hearings before the Commissioner were defective for lack of power to issue subpoenas and take depositions. The court refused to rule on this question, stating that: "There is no showing that the lack of witness attendance or discovery procedures, if any there be, operated to the prejudice of said protesting association. . . . The present record does not present a question of procedural due process and we decline to rule on a purely hypothetical case." 411 S.W.2d at 360-61. For a general discussion of administrative subpoena power, see Benton, *Administrative Subpoena Enforcement*, 41 Texas L. Rev. 874 (1963).
109 413 S.W.2d 718 (Tex. Civ. App.), aff'd *per curiam*, 417 S.W.2d 584 (Tex. 1967).
administrative procedure act for Texas. Meanwhile, I suggest that the courts immediately drop the bar to admissibility of the administrative record and evidence of those proceedings in order that an appealing party may undertake to show that his cause was treated arbitrarily.