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# ADMINISTRATIVE LAW

## I. TIGER INTERNATIONAL, INC.: JUDICIAL REVIEW OF INFORMAL AGENCY ADJUDICATIONS

### A. INTRODUCTION

In *Tiger International, Inc. v. CAB,*[1] the Ninth Circuit upheld two orders of the Civil Aeronautics Board (CAB).[2] In so doing, the court determined the standard the CAB must meet to deny or modify a transaction proposed pursuant to a condition included in a CAB order. The crux of the decision, however, is the court's holding that the proper standard of judicial review of CAB orders promulgated without a hearing is whether the orders are arbitrary and capricious. The *Tiger* court applied the arbitrary and capricious test even though the CAB's enabling statute, the Federal Aviation Act (FAA), appears to mandate a "substantial

1. 554 F.2d 926 (9th Cir., May 1977) (per Wallace, J.), *cert. denied*, 98 S. Ct. 532 (1977) (the other panel members were Goodwin, J. and Ferguson, D.J.).

2. Petitioners challenged three orders in which the CAB (1) claimed jurisdiction over a proposed reorganization of Tiger International (TI) (1970 Order, No. 70-6-119), (2) refused to approve TI's reorganization plan and substituted its own plan (1973 Order, No. 73-12-106), and (3) denied reconsideration of the 1973 Order (1975 Order, No. 75-2-1). *Id.* at 928-30.

The panel held that it had no jurisdiction to review the 1970 Order because petitioners did not make a timely appeal. *Id.* at 931-32.

Review of orders of the CAB is governed by the Federal Aviation Act of 1958 § 1006(a), 49 U.S.C. § 1486(a) (1970), which provides, in pertinent part, that review may be had in the Courts of Appeals

> upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

TI and FTL pressed three arguments in support of the court's jurisdiction to review the 1970 Order. First, they argued that the 1970 Order was a "necessary predicate" to the later orders, and therefore the sixty day requirement could be waived. 554 F.2d at 931. Conceding the connection between the 1970 Order and the later orders, the court nonetheless concluded that it could decide the merits of the 1973 and 1975 Orders without reviewing the 1970 Order. *Id.* Second, the court rejected TI's and FTL's contention that because the reorganization was conditioned on complete acceptance of the 1970 Order, their "all or nothing situation" constituted "reasonable grounds" within the meaning of § 1486(a) for not filing a timely appeal. *Id.* The *Tiger* court did not define "reasonable grounds" but merely noted that the choice of whether or not to appeal is often difficult and that TI and FTL made their choice. *Id.*

Finally, TI and FTL argued that since the action by the CAB exceeded its statutory authority, they were not bound by the normal statutory review provisions, citing *Leedom v. Kyne*, 358 U.S. 184 (1958). 554 F.2d at 931-32. The *Tiger* court distinguished *Leedom* and its progeny on the ground that in each of those cases the court had had an independent basis of jurisdiction, while in *Tiger*, the only source of the court's jurisdiction was the Federal Aviation Act. *Id.* at 932. The court noted that TI and FTL had brought a district court suit collaterally attacking the 1970 Order and that it was expressing no views as to

evidence" standard.[3] Furthermore, the court showed great deference to the agency by "measuring the bare rationality of the CAB's decision[s]."[4] Although *Tiger* concerns only two actions by the CAB,[5] it indicates that the Ninth Circuit is willing to circumvent statutory language and allow extreme deference to an agency, thereby abdicating responsibility for meaningful judicial review.

## B. Background

In 1969, the Flying Tiger Line, an airline engaged in transporting cargo, asked the CAB to "disclaim jurisdiction"[6] over a proposed corporate reorganization plan. Under the plan, Flying Tiger would create a holding company, Tiger International, Inc. (TI), and a wholly-owned subsidiary (FTL), which would continue in the air transport business. The CAB issued an order (the 1970 Order)[7] asserting jurisdiction and approving the plan with certain conditions. The conditions were promulgated pursuant to section 408(b) of the FAA,[8] which provides that the CAB, when setting forth an order approving a consolidation, merger or purchase of an air carrier, may include "such terms and conditions as it shall find to be just and reasonable."[9] The most important provision of the 1970 Order was condition 3, which required that TI and its corporate affiliates and subsidiaries not enter into any transactions with or affecting FTL valued at $100,000 or more without the prior approval of the CAB.[10] In the 1970 Order, the Board noted that the underlying purpose of condition 3 was "to protect the public against any impairment of the air carrier's certificate obligations . . . ."[11] TI and FTL began their diversification in 1970, and, in 1973, entered into a tax allocation agreement with two new subsidiaries. The tax allocation agreement was an intercompany transaction within the meaning of condition 3 of the 1970 Order, so TI and FTL applied to the CAB for ap-

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the jurisdiction of the district court to entertain that suit. *Id.* at 932 n.13.

3. Federal Aviation Act § 1005(f), 49 U.S.C. § 1485(f) (1970), states in pertinent part that "[e]very order of the Administrator or the Board shall set forth the findings of fact upon which it is based" and Federal Aviation Act § 1006(e), 49 U.S.C. § 1486(e) (1970), states in pertinent part that "[t]he findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive."

4. 554 F.2d at 937 n.21.

5. See note 2 *supra.*

6. 554 F.2d at 928.

7. Order 70-6-119. *Id.*

8. 49 U.S.C. § 1378(b) (1970).

9. *Id.*

10. 554 F.2d at 928-29. The limit was subsequently raised to $1 million. *Id.* at n.5.

11. *Id.* at 933.

proval.[12] Although the facts indicated that TI was favoring FTL rather than impairing its ability to perform its certificate obligations,[13] the CAB rejected the plan as proposed and instituted a plan of its own (the 1973 Order).[14] The CAB denied TI's and FTL's petition for reconsideration of the 1973 Order (the 1975 Order).[15] TI and FTL never requested a hearing, nor did the CAB order one, sua sponte.[16] Following denial of reconsideration, TI and FTL petitioned the Ninth Circuit for review of all three orders.[17]

### C. The Court's Holding

The Ninth Circuit panel first determined that the appropriate CAB standard for denial or modification of a condition 3 transaction was whether it was "likely to impair FTL's ability to perform its certificate obligations."[18] The court found that this language, taken from the statement of purpose of condition 3 in the 1970 Order, was necessary to render the "just and reasonable" guidelines of section 408(b) of the FAA adequately precise and objective.[19] Without such clarification, the court noted that the "just and reasonable" language created a risk of allowing the CAB to engage in inconsistent, arbitrary or capricious action.[20]

The court next considered the appropriate standard of judicial review. The court held, in spite of language in the FAA mandating a substantial evidence standard of review, that the test was not required in a case such as *Tiger* because no hearing was held.[21] The court determined that when there has been no hearing, the arbitrary and capricious standard should apply.[22] The

12. *Id.* at 929.
13. *Id.* at 937 n.21.
14. Order 73-12-106. *Id.* at 929.
15. Order 75-2-1. *Id.* at 930.
16. *Id.* at 936 and n.18.
17. See note 2 *supra.*
18. *Id.* at 933.
19. *Id.*
20. *Id.* TI and FTL agreed that the "impairment standard" is valid but argued, unsuccessfully, that it should be applied as a "but for" test. According to petitioner, unless the tax allocation agreement places the subsidiary in a worse position that it would have been in had it been outside the holding company structure, the CAB may not find likely impairment. The *Tiger* panel rejected this test because it would require the CAB to engage in needless speculation and it is conceivable that a transaction might meet the "but for" test and still tend to impair a carrier's ability to fulfill its certificate obligations. *Id.* at 934.
21. 554 F.2d at 934-35.
22. *Id.* at 935-36.

panel found support for its conclusion in the United States Supreme Court decision of *Camp v. Pitts*,[23] in which the Court reviewed an adjudication by the Comptroller of the Currency, who was acting under authority of the National Banking Act.[24] The Court reasoned that the critical factor was whether or not a hearing had been held. In the absence of a hearing record, the *Camp* Court held that the appropriate review standard was the arbitrary and capricious test of the Administrative Procedure Act (APA).[25]

The Ninth Circuit reasoned that the facts of *Tiger* supported the application of the arbitrary and capricious test. It noted that no hearing was held, that the CAB was neither constitutionally nor statutorily required to hold a hearing,[26] and that no opponents of the TI and FTL plan had come forward with countervailing arguments or evidence. Because the record therefore consisted solely of TI's and FTL's own documentation, there was no adequate record to allow a determination of whether there was substantial evidence to support the agency's action.[27]

Additionally, the court concluded that to apply the substantial evidence test to *Tiger* would defeat the intent of Congress to expedite those CAB proceedings which it had authorized to be held without a hearing.[28] The court noted that the FAA review provisions requiring substantial evidence to support agency decisions were enacted in 1938.[29] At that time, a hearing was required in all cases similar to *Tiger*. In 1960, Congress provided an excep-

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23. 411 U.S. 138 (1973).

24. 554 F.2d at 935-36. However, *Camp* can be distinguished because unlike the FAA, the National Banking Act does not establish a standard of judicial review.

25. 411 U.S. at 142. The Administrative Procedue Act § 6, 5 U.S.C. § 706 (1976) provides, in pertinent part:

> The reviewing court shall . . .
> * * *
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

26. TI and FTL argued that the CAB was constitutionally required to afford them a hearing before the 1973 and 1975 Orders were entered. But the court concluded that since "they did not make the argument to the CAB, they cannot raise it on appeal." 554 F.2d at 936 n.18.

27. *Id.* at 936.

28. *Id.* at 936-37.

29. *Id.* at 935 n.17. Civil Aeronautics Act of 1938, Pub. L. No. 706 §§ 1005(f), 1006(e), 52 Stat. 973, 1024.

tion to the hearing requirement[30] under which the CAB proceeded in *Tiger*. In light of the fact that the hearing exception was created after Congress had established the standard of review, the court was not persuaded that Congress intended the original review provisions to provide the sole standard.[31]

Although the court noted that the CAB might properly be criticized, it nevertheless affirmed the 1973 and 1975 Orders as reasonable "in light of *potential* problems within the scope of the CAB's regulatory authority."[32] According wide deference to the agency,[33] the court applied the arbitrary and capricious test by "measuring the bare rationality of the CAB's decision[s]."[34] Applying this minimal standard, the court found that the CAB's orders "reflect rational decisionmaking and, in particular, a not unreasonable evaluation of the . . . agreement's potentially adverse impact on FTL's performance of its certificate obligations."[35]

## D. Analysis of the *Tiger* Decision

### 1. *The Arbitrary and Capricious Test*

The *Tiger* court's analysis of the appropriateness of the arbitrary and capricious test has some merit. As the panel pointed out, if there is no hearing, the majority of the record would be

30. Act of Sept. 13, 1960, Pub. L. No. 86-758, 74 Stat. 901, amended 49 U.S.C. § 1378(b) by adding:

> *Provided further*, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of air craft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

31. 554 F.2d at 935 n.17.

32. *Id.* at 937 n.21.

33. The Ninth Circuit enunciated a minimal arbitrary and capricious standard in *Superior Oil Co. v. F.P.C.*, 322 F.2d 601 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964), a case involving informal rulemaking. For a critique of the Ninth Circuit's position, see Verkuil, *Judicial Review of Informal Rulemaking*, 60 Va. L. Rev. 185, 207 (1974). [hereinafter Verkuil]

34. 554 F.2d at 937 n.21.

35. *Id.* at 937.

comprised of the petitioner's evidence supporting its application.[36] Application of the substantial evidence standard when the CAB proceeds by informal adjudication would impose a heavy burden on the agency by requiring it to ferret out information adverse to an applicant's position. An agency should not be precluded from denying an application merely because no opponent comes forward. Yet despite the apparent logic of the *Tiger* decision, the court's holding raises serious problems.

First, *Tiger* apparently conflicts with language in an opinion by virtually the same panel rendered less than a year earlier. In *Union Oil Co. v. F.P.C.*,[37] the court reviewed an order of the Federal Power Commission adopted pursuant to a rulemaking proceeding authorized by the APA.[38] Like *Tiger*, the agency's enabling statute contained a substantial evidence standard of review.[39] The *Union Oil* court stated that an agency decision would be arbitrary and capricious under the APA unless "the factual premises upon which it rests are supported by substantial evidence."[40] The panel explained that "Congress expected greater scrutiny when the enabling statute contains a substantial evidence test."[41] Further, the *Tiger* opinion is in direct conflict with *Pillai v. CAB*,[42] in which the D.C. Circuit, emphasizing the same statutory language as in *Tiger*, applied the substantial evidence

36. *Id.* at 936.

37. 542 F.2d 1036 (9th Cir. 1976). The panel members were Duniway, J., Goodwin, J., and Wallace, J. Judge Duniway wrote the opinion.

38. At issue was a notice and comment rulemaking proceeding held pursuant to APA § 4(c), 5 U.S.C. § 553(c) (1976), which provides:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate into the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

39. The Natural Gas Act § 19(b), 15 U.S.C. § 717r(b) (1970).

40. 542 F.2d at 1041.

41. *Id.*

42. 485 F.2d 1018 (D.C. Cir. 1973). The *Pillai* court found that the portion of the rulemaking decision founded on finding of fact was unsupportable on a substantial evidence theory, *id.* at 1023, and that portion of the decision involving an agency policy "judgment call" unsupportable as arbitrary and capricious. *Id.* at 1027-38. *Tiger*, being an adjudication, presumably "involved factual predicates." *Id.* at 1023.

test to a review of agency rulemaking in which no hearing had been held.[43]

Second, the legislative history of the relevant statutes undermines the *Tiger* rationale. The panel reasoned that it was not bound by the original 1938 substantial evidence standard because the exception to the hearing was not added until 1960.[44] However, the fact that Congress amended parts of the review provisions in 1960 and in 1961[45] but left the substantial evidence language untouched indicates that the legislative intent may have been to keep the standard the same in non-hearing cases. The legislative history of the amendment which allowed the CAB to dispense with hearings in some cases[46] also supports this view. The House Committee reporting the 1960 amendment noted that the CAB had requested the change in the law because "[e]xperience has shown that there are many cases where the Board can make the findings necessary to grant approval without going through the process of a hearing."[47] The Committee further stated, "The Board's action, of course, would be subject to court review, so that the public and interested parties would be protected against arbitrary action."[48] These statements suggest that Congress expected

43. The *Tiger* court could have distinguished *Union Oil* and *Pillai* from *Tiger* and *Camp* because the former cases involved informal rulemaking whereas the latter cases involved informal adjudication. For a discussion of the differences between informal rulemaking and informal adjudication, see Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 54-61 (1975). [hereinafter Currie & Goodman].

The APA provides a procedural framework for informal rulemaking which assures that there will be some meaningful record, no matter how informal, on appeal. APA § 4, 5 U.S.C. § 553 (1976). See note 38 *supra* for relevant portions of this provision. The APA does not, however, mandate any particular kind of procedure for informal adjudication; thus, it does not ensure that any record will be presented to a reviewing court. If the *Tiger* court had made this distinction, it would have provided more support for its decision and would have explained its rejection of the holdings of other courts on apparently similar issues.

The Supreme Court, in Camp v. Pitts, 411 U.S. 138 (1973), also failed to discuss the standard of review in terms of the adjudication-rulemaking dichotomy. 554 F.2d at 936. The *Tiger* court further noted that the Ninth Circuit, in an earlier decision, had "refused to apply the substantial evidence test" in Island Airlines v. C.A.B., 363 F.2d 120 (9th Cir. 1966), 554 F.2d at 936. But note, in *Island,* the test on review was not at issue: petitioner had alleged "arbitrary and capricious" acts by the CAB. 363 F.2d at 125.

44. 554 F.2d at 935 n.17.

45. Act of Sept. 13, 1961, Pub. L. No. 87-225 § 2, 75 Stat. 497, amended 49 U.S.C. § 1486(d); Act of June 29, 1960, Pub. L. No. 86-546, 74 Stat. 255, amended 49 U.S.C. § 1486(c).

46. See note 30 *supra* for the language of the amendment.

47. H.R. Rep. No. 2171, 86th Cong., 2d Sess., reprinted in [1960] U.S. Code Cong. & Ad. News 3557, 3558.

48. *Id.* at 3560.

the CAB to base its informal decisions on adequate findings of fact and that Congress contemplated judicial review. Failure to amend the review provisions can reasonably be interpreted to mean that Congress intended to maintain the extant standard.

### 2. *The "Bare Rationality" Standard*

The *Tiger* version of the arbitrary and capricious standard, which measures only the "bare rationality" of the CAB's decision in light of potential problems, is deferential to the agency in the extreme. All the facts pointed to the conclusion that TI was favoring FTL's operation over its other subsidiaries, not endangering FTL's ability to perform its certificate obligations.[49] By focusing entirely on potential problems, the court has indicated to the CAB that mere speculation about future occurrences will suffice to insulate its decisions from careful judicial scrutiny. In informal adjudications like *Tiger*, even though the record may be too sparse for application of a strict substantial evidence standard,[50] a less deferential arbitrary and capricious test could still provide meaningful review.[51] For example, the court could have formulated a rational basis test under which the CAB's decisions would have been upheld if there was a clear connection between the evidence presented and the conclusion of likely impairment of FTL's ability to perform its certificate obligations. The standard adopted by the Ninth Circuit allows abdication of responsibility for review of CAB decisions like those in *Tiger*.

## E. Conclusion

The purpose of judicial review of agency decisions is to ensure reasoned decision-making. Because of the nebulous nature of informal adjudication,[52] it would be impracticable to formulate

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49. 554 F.2d at 937 n.21.

50. The substantial evidence on the whole record test was announced in Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951). Some courts, however, have applied a substantial-evidence-without-a-record review standard in cases involving informal rulemaking. *See, e.g.*, Bunny Bear, Inc. v. Peterson, 473 F.2d 1002 (1st Cir. 1973) (review of informal rulemaking by the Secretary of Commerce); Associated Industries of N.Y.S. v. Dept. of Labor, 487 F.2d 342 (2d Cir. 1973) (review of informal rulemaking by Secretary of Labor).

51. *See* McCabe, *Recent Developments in Judicial Review of Administrative Actions: A Developmental Note*, 24 Ad. L. Rev. 67, 95 (1972), Verkuil, *supra* note 33, at 248. Both of these authors explore the possibility of a strict-scrutiny arbitrary and capricious test.

52. Currie & Goodman, *supra* note 43, describe informal adjudication as an

> amorphous and miscellaneous category . . . defined by the absence of a record based upon a formal adjudicatory hearing. Subject to that constraint, the myriad types of adjudication

any single test for judicial review. In non-hearing adjudications like *Tiger*, however, it can safely be said that congressional intent and judicial integrity require the agency to have some factual predicate to support its decision. The *Tiger* court could have applied a substantial evidence test which was less demanding than the traditional "whole record" approach,[53] and thus could have achieved a more just resolution of the "dilemma between the time and cost saving advantages of informal [proceedings] and the need for an adequate record on review."[54] Instead, the Ninth Circuit has adhered to a "bare rationality" arbitrary and capricious formula which not only ignores the legislated standard of review, but also avoids judicial responsibility for all but the most blatantly arbitrary CAB actions.

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> vary almost infinitely in procedural characteristics . . . . They range from structured discretionary decisions of enforcement agencies whether or not to prosecute to quasi-formal decisions of the Comptroller of the Currency . . . whether to grant a bank charter.

*Id.* at 54-55.

53. Many courts and commentators have suggested that there is only a semantic difference between a lenient substantial evidence test and a strict arbitrary and capricious test. Judge Friendly, for example, in his opinion in Associated Industries of N.Y.S. v. Dept. of Labor, 487 F.2d at 342, 349-50 (2d Cir. 1973) questioned the usefulness of the traditional judicial review terms. In addition, some courts have reviewed agency decisions without reference to the traditional formulations of the judicial review standards. *See, e.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) (review of informal rulemaking by Administrator of the Environmental Protection Agency, looking to whether "the agency has exercised a reasoned discretion," *id.* at 648); S.E.C. v. Chenery Corp. 318 U.S. 80 (1943) (review of informal adjudication by Securities and Exchange Commission, holding that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action could be sustained." *Id.* at 95).

A number of commentators have also criticized the utility of traditional formulations of standards of review. *See, e.g.*, Gelhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975), Verkuil, *supra* note 23, at 222. Gelhorn & Robinson, *supra* at 780, write:

> It is perhaps a testament to lawyers' awe of words that they have invested words such as "arbitrary and capricious" and "substantial evidence" with importance when experience immediately shows them to be virtually devoid of practical content. At best, concepts such as "arbitrary and capricious" and "substantial evidence" tend to be little more than convenient labels attached to results reached without their aid . . . .
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> In expressing our opinion that the rules governing judicial review have no more substance at the core than a seedless grape, we profess no unique insight . . . . Nevertheless, despite this recognition of the essential meaninglessness of the accepted formulae of judicial review, the rules unaccountably command endless attention in the classroom and legal literature.

54. 542 F.2d at 1041.

## II. LOCAL BUSINESS PREFERENCE IN MODEL CITIES CONTRACTS

### A. INTRODUCTION

*Ramirez, Leal & Co. v. City Demonstration Agency*[1] is important because it is the first case to hold that Model Cities programs are covered by preferential contracting provisions of the Housing and Urban Development Act.[2] In October of 1973, Ramirez, Leal & Co. (Ramirez) and a number of other accounting firms were invited by the City Demonstration Agency of San Francisco (CDA) to bid on the job of auditing the books of the various programs involved in the Mission Model Cities project in San Francisco. Although Ramirez was the only invitee located in the project area, the contract was awarded to a national accounting firm.[3] Ramirez appealed to the Department of Housing and Urban Development (HUD).[4] When HUD did not act, Ramirez brought an action against CDA in the district court[5] to enforce the preference provisions of 12 U.S.C. § 1701u, enacted as section 3 of the Housing and Urban Development Act.[6] This section pro-

1. 549 F.2d 97 (9th Cir. Oct., 1976) (per Duniway, J.; the other panel members were Goodwin, J. and Curtis, D.J.).

2. 12 U.S.C. § 1701u (1968), as amended by the Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 404, 83 Stat. 395 (current version at 12 U.S.C. § 1701u Supp. V, 1975).

3. 549 F.2d at 99. Ramirez' original bid of $30,000 omitted the cost of auditing two small agencies. The director of administration of CDA, who was responsible for awarding the Model Cities contracts, notified Ramirez of this oversight and, further said that he thought the original bid was too low. After the deadline for presenting bids had passed, Ramirez submitted a revised bid of $40,000. The panel noted that the late submission was not the reason for the rejection of the bid. *Id.*

4. *Id.*

5. *Id.* Ramirez also named HUD as a defendant but subsequently agreed to dismiss the action as to HUD with prejudice. While the suit was pending, CDA requested bids for 1974. Ramirez' offer to match Haskins & Sells' low bid of $25,000 was rejected by CDA on the ground that it was submitted after the deadline. Ramirez amended his complaint to include the 1974 contract. *Id.*

6. 12 U.S.C. § 1701u (1968) as amended by the Housing and Urban Development Act of 1969, Pub. L. No. 91-152, § 404, 83 Stat. 395 (current version at 12 U.S.C. § 1701u Supp. V, 1975) provides in pertinent part:

> In the administration by the Secretary of Housing and Urban Development of programs providing direct financial assistance in aid of housing, urban development, redevelopment, or renewal, public or community facilities, and new community development, the Secretary shall . . . (2) require . . . that to the greatest extent feasible contracts for work to be performed in connection with any such project be awarded to business concerns, including but not limited to individuals or firms doing business in the field of planning, consulting, design, architecture, building construction, rehabilitation, maintenance,

vides that the Secretary of HUD shall require that preference be given, "to the greatest extent feasible," to local businesses in awarding contracts for work to be performed in connection with programs that receive direct financial assistance from HUD.[7] The trial court granted CDA's motion to dismiss and, alternatively, for summary judgment; Ramirez appealed.[8]

The Ninth Circuit reversed, holding that the contract preference provisions were applicable to CDA's grant of an auditing contract for a Model Cities program.[9] The court added, in dicta, that the Standard Grant Agreement between HUD and CDA, which contains language similar to section 1701u regarding awards to neighborhood businesses, is binding on CDA, and that Ramirez had standing to enforce the Agreement as a third party beneficiary.[10] The court also found that the requirement that preference be given to neighborhood concerns imposed a heavy burden on the city officials.[11] Finally, the court announced that a higher standard than mere rational basis scrutiny should be employed to determine if HUD and CDA attempted to award contracts to local businesses "to the greatest extent feasible."[12]

## B. THE *Ramirez* DECISION

CDA argued against the applicability of section 1701u because here the Model Cities program was not specifically a housing or urban renewal project, and the legislative history of section 1701u did not reveal any congressional intent to extend its coverage to non-housing programs.[13] The panel rejected these arguments.

First, the panel explained that the terms of section 1701u apply to Model Cities contracts. It acknowledged that the original

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> or repair, which are located in or owned in substantial part by persons residing in the area of such project.

*Id.*

7. *Id.*

8. 549 F.2d at 98.

9. *Id.* at 104-05.

10. *Id.* at 103. The Standard Grant Agreement provision stated: "In all work made possible or resulting from this contract, affirmative action will be taken to ensure that . . . business concerns located in or owned in substantial part by residents of the model neighborhood are to the greatest extent feasible, awarded contracts." *Id.*

11. *Id.* at 105.

12. *Id.* After applying the higher standard, the court concluded that the evidence indicated that CDA's actions "had the effect, whether intentionally or not, of preventing Ramirez from getting the contract." *Id.*

13. *Id.* at 100.

section was limited to four enumerated housing programs and did not include Model Cities.[14] However, the language of the 1969 amendment, which governed the contract award in *Ramirez,* expanded this coverage to include a broad variety of programs administered by HUD.[15] The court reasoned that Model Cities programs are administered by the Secretary of HUD and that the Demonstration Cities & Metropolitan Development Act (Model Cities Act) is replete with provisions regarding the Secretary's authority and responsibility.[16] In addition, HUD provides direct financial assistance to Mission Model Cities, and the congressional declaration of policy in the Model Cities Act enumerates potential activities and programs which fall within the broad language of section 1701u.[17] Therefore, the panel concluded that by 1969 Congress, concerned with enhancing the standard of living in the target areas,[18] considered the Model Cities Act and section 1701u as part of the same legislative "ball of wax."[19]

Second, the court found that the legislative history of the 1969 amendment to section 1701u supports the conclusion that this section applies to Model Cities programs. The panel noted that although the statement of congressional intent employs the word "housing," it is clear that the term should not be interpreted literally.[20] The very next paragraph of the committee report[21] re-

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14. *Id.* Section 1701u, as adopted in 1968, applied to "programs authorized by . . . the National Housing Act, [to] the below-market interest rate program . . . of such Act, [to] the low-rent public housing program under the United States Housing Act of 1937, and [to] the rent supplement program [under HUD] . . ." 12 U.S.C. § 1701u, enacted in 1968, Pub. L. No. 90-448, 82 Stat. 476.

15. *See* note 6 *supra* for relevant portions of the text of § 1701u, as amended in 1969.

16. 549 F.2d at 101.

17. Demonstration Cities and Metropolitan Development Act of 1966, § 101, 42 U.S.C. § 3301 (1977) (the Model Cities Act) states, in part:

> The purposes of this subchapter are to provide additional financial and technical assistance to enable cities . . . to plan, develop, and carry out locally prepared and scheduled comprehensive city demonstration programs containing new and imaginative proposals to rebuild or revitalize large slum and blighted areas; to expand housing, job, and income opportunities; to reduce dependence on welfare payments; to improve educational facilities and programs; to combat disease and ill health; to reduce the incidence of crime and delinquency; to enhance recreational and cultural opportunities; to establish better access between homes and jobs; and generally to improve living conditions for the people who live in such areas.

*Id.*

18. 549 F.2d at 101-02.

19. *Id.* at 101.

20. *Id.* at 102-03.

fers to Model Cities programs.[22] Moreover, the amendment and the extension of the Model Cities program were part of the same omnibus bill.[23]

Third, the court stated that when, as here, it is a "close question"[24] whether section 1701u embraces model cities programs, it must look to the interpretation placed upon the statute by the government agency concerned.[25] In regulations promulgated to implement section 1701u, HUD defines the area of a project covered by section 1701u as "[w]ithin a geographic area designated as Model Cities areas. . . ."[26] Furthermore, the court noted that the Assistant U.S. Attorney representing HUD stipulated that section 1701u applied to Model Cities projects such as the one involved in this case.[27]

Apparently, CDA also argued that even if the preferential contracting provisions applied to some Model Cities contracts, an auditing contract was not covered by the section.[28] The court disagreed. It noted that the contract was funded directly by HUD and auditing furthered the objectives of section 1701u because it protected the integrity of federal grants. The court also found that the language in section 1701u which directs that contract awards be made to local business concerns "including but not limited to individuals or firms doing business in [various specified fields]"[29] was not restrictive, and Congress did not wish to exclude auditing contracts.[30]

The court of appeals ruled that the district court applied the wrong legal standard in determining whether CDA complied with

21. SENATE COMM. ON BANKING AND CURRENCY, S. REP. NO. 392, 91st Cong., 1st Sess., *reprinted in* [1969] U.S. CODE CONG. & AD. NEWS 1524.

22. 549 F.2d at 103.

23. *Id.* at 102.

24. *Id.* at 103.

25. *Id.* The court cited Udall v. Tallman, 380 U.S. 1 (1965), in which the Supreme Court stated that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Id.* at 16.

26. 24 C.F.R. § 135.15(a)(ii)(1977). These regulations apply only to applications for assistance from HUD filed on or after November 23, 1973. 24 C.F.R. § 135.40 (1977). Although Ramirez submitted his bid prior to the effective date of this regulation, it does illustrate HUD's interpretation of the relationship between the HUD regulations and § 1701u.

27. 549 F.2d at 103.

28. *Id.* at 104.

29. See note 6 *supra* for the text of the statute.

30. 549 F.2d at 104.

the section.[31] The trial court construed the language "to the greatest extent feasible" as giving broad discretion to city officials.[32] According to the trial court, "[u]nless the facts clearly show these officials failed to apply a required standard or were clearly erroneous in determining feasibility, courts are prohibited from disturbing their decisions."[33] The appellate court rejected this standard however and held that CDA officials were "obliged to take every affirmative action that they could properly take to make the award to Ramirez."[34]

The language that "to the greatest extent feasible" contracts be awarded to local businesses was not only in section 1701u but also contained in a Standard Grant Agreement between HUD and CDA. Having found that the statute mandated compliance, it was not necessary for the court to consider the impact of the Standard Grant Agreement. However, it did so for two reasons. First, the panel felt that "the agreement strengthens the view that § 1701u applies."[35] Second, the court concluded that the provision of the Standard Grant Agreement was binding on CDA and Ramirez had standing as a third party beneficiary to enforce it.[36]

## C. CONCLUSION

In construing the language of section 1701u to require a seri-

31. *Id.*

32. *Id.* at 104-05.

33. *Id.* at 105.

34. *Id.*

35. *Id.* at 103. The panel offered no explanation for this statement.

36. *Id.* at 104. The court did not discuss the alternative of granting Ramirez standing as a disappointed bidder on an illegally awarded government contract. *See* Armstrong & Armstrong, Inc., v. United States, 514 F.2d 402 (9th Cir. 1975); Scanwell Laboratories v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970); Davis, *The Private Rights of a Bidder in the Award of a Government Contract: A Step Beyond* Scanwell, 24 CASE W. RES. L. REV. 559 (1973); Madden, *Providing an Adequate Remedy for Disappointed Contractors Under Federal Grants-in-Aid to States and Units of Local Government*, 34 FED. B.J. 201 (1975).

The *Ramirez* decision does not explain whether the preferential contracting provision in the Standard Grant Agreement has the force of a federal regulation, is binding as a contractual provision, or both. There are two theories under which the provision could have been found binding on CDA. Under one theory, the Agreement has the legal force of a rule promulgated by HUD. Under the second theory, the obligation imposed by the grant agreement is a contractual one between HUD and CDA which Ramirez has standing to enforce as a third party beneficiary. There is support in case law for the finding that Ramirez was an intended beneficiary. City of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1971). However, the cases cited by the court involved provisions that were found to have the force of federal regulations. The court cited Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), and Brown v. Housing Authority of Milwaukee, 471 F.2d 63 (7th Cir., 1972).

ous agency effort to award contracts to local businesses and in employing a strict standard of review, the Ninth Circuit has created a meaningful affirmative action requirement. The issue that remains is how HUD and local agencies should implement their "affirmative duty."[37] How far are city agencies to deviate from normal bidding procedures in order to effectuate this affirmative duty? The implications for future HUD contracts, including those with Model Cities, are unclear.

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37. *Ramirez* leaves undecided the question of whether the HUD regulations now in effect meet the requirements of § 1701u regarding affirmative action in awarding contracts. See 24 C.F.R. §§ 135.1-.140 (1977).