Legal Opinion: GCH-0065

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Subject: Estab. of Minimum Score for HOPE 1 Planning Grants

July 15, 1992

MEMORANDUM FOR: Joseph G. Schiff, Assistant Secretary
Office of Public and Indian Housing, PR

FROM: Robert S. Kenison, Associate General Counsel for
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SUBJECT: Establishment of Minimum Score for HOPE l
Planning Grants - Legal Analysis

This responds to your request for an opinion concerning the legal issues involved in establishing a minimum score for the selection of HOPE l Planning Grants in the middle of the FY '92 funding round. As we understand it, the purpose of establishing a minimum score would be to guard HUD against having to fund planning grant applications that scored extremely low on the selection criteria, even though such applications are, technically, fundable.

We believe that HUD may have some discretion to impose a minimum score on the basis that it has a responsibility to ensure that only very sound applications are funded. However, as we have indicated, there are countervailing impediments to such an action. If HUD were to be challenged in court by these applicants, there is a significant likelihood that HUD could be found to have violated the requirements of the Administrative Procedure Act (APA). Section 706(2) of the APA states that a reviewing court "shall...hold unlawful and set aside agency action...found to be ...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In the instant case, four factors lean toward HUD vulnerability in this regard:

l. A reviewing court might find an amendment to the HOPE guidelines, in the middle of a funding round, to be arbitrary, capricious and an abuse of discretion, since the establishment of a minimum score would result in disqualifying planning grant applicants who otherwise would have been funded under the original NOFA and Guidelines.

Of course, HUD could attempt to defend its actions by stating that it has a statutory

responsibility to ensure that poorly qualified applications are not funded in any competitive, non-entitlement, program. HUD could also argue that the Department originally anticipated that it would receive more planning grant applications than it actually did, and that the reduced number of applications had the unexpected result of requiring HUD to fund poor quality applications. Then, plaintiffs could be expected to respond to this assertion by stating that HUD should have considered the possiblity of having fewer applications than it anticipated being submitted, and that the plaintiffs are "entitled" to the competitive ground rules established in the Notice and NOFA.

2. A plaintiff could further buttress its argument that HUD's actions were arbitrary, capricious, and an abuse of discretion by pointing to the fact that HUD specifically included such a minimum threshold in the l99l and l992 HOPE Guidelines for HOPE l implementation grants, but did not do so with respect to planning grants. As such, the plaintiff could argue that HUD's failure to include such a minimum threshold for planning grants was not an oversight but, rather, a deliberate policy call which it should not be permitted to reverse in the middle of a funding round.

3. Furthermore, the plaintiff could also argue that the establishment of a minimum threshold for planning grants is contrary to the stated purpose of HOPE l planning grants, which is to develop an applicant's capacity to carry out a homeownership program.

4. A related APA concern is raised by section 706(2)(D), which states that a reviewing court shall hold unlawful and set aside agency action found to be "without observance of procedure required by law." Since the HOPE statute requires at section 4l8 that HUD issue a notice to implement the provisions of the statute, and that such notice be subject to notice and comment rulemaking pursuant to 5 U.S.C. section 553, a court could well strike down the amendment to the HOPE Guidelines on the basis that such an amendment affected substantive rights in the middle of a funding round and failed to comport with the notice and comment requirements established in the HOPE statute. We believe that

this provision of the APA would be more difficult

for HUD to refute.

In conclusion, we believe that significant APA concerns are raised by PIH's proposals; ultimately, however, the issue becomes whether or not the proposed amendments could be deemed to be arbitrary and capricious, or violative of procedural requirements prescribed by the HOPE statute, and whether HUD is willing to assume the risk of such litigation. As discussed above, we believe that HUD could establish a defensible argument to claims that it acted arbitrarily and capriciously, but would have an even more difficult time defending against the failure to comply with notice and comment rulemaking, as specifically required by the HOPE statute.