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Via Email (civilrights.fhwa@fhwa.dot.gov) & U.S. Mail

Office of Civil Rights
Federal Highway Administration
U.S. Department of Transportation
8th Floor E81-314
1200 New Jersey Avenue, SE
Washington, D.C. 20590

**Re: Title VI Complaint against the Department of Public Works of
Baltimore County, Maryland**

Dear Office of Civil Rights:

On behalf of my client (b) (6) Privacy, this requests that the Federal Highway Administration (“FHWA”) open a race-discrimination complaint against the Department of Public Works of Baltimore County, Maryland (“BCDPW”) under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000 to 2000d-7, and the implementing regulations of FHWA and the Department of Transportation (“DOT”), 23 C.F.R. pt. 200 (“FWHA”); 49 C.F.R. pt. 21 (DOT), for BCPWD’s discriminatory allocation of curbing and sewer service.

INTRODUCTION

The complainant resides at (b) (6) Privacy Halethorpe, Maryland, within Baltimore County, where her family has lived since 1944 and she has lived since her birth.¹ Should you have any questions of her, please let me know, and I will relay them to her and provide her responses. If you need to contact her directly, please let me know.

(b) (6) Privacy is not aware of the name or title of an appropriate BCDPW contact person for this matter, but Edward C. Adams, Jr., serves as BCPWD’s Director. BCPWD’s offices are located at 111 West Chesapeake Avenue, in Towson, Maryland, and its phone number is 410-887-3300.

As indicated above, the complaint concerns BCPWD’s discriminatory allocation of curbing and sewers for roads and residential developments in Baltimore County. For example, comparing the adjacent Caucasian neighborhood of Oak Park and the complainant’s African-

¹ Provided that FHWA informs BCDPW that retaliation against complainants is prohibited not only by the implementing regulations, 49 C.F.R. §21.11(e), but also Title VI itself, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005), (b) (6) Privacy has no objection to FHWA’s identifying her as the complainant or providing the complaint to BCDPW.

American neighborhood in Halethorpe, predominantly all of the blocks in Oak Park have curbs and sewers, whereas fewer than half of the blocks in the complainant's neighborhood had curbs and sewers.² (For Caucasian neighborhoods, the same high levels of curbing and sewers are present in in other predominately white communities such as Arbutus and Catonsville.) Indeed, the development of Oak Park exacerbated the runoff to – and thus caused residential flooding in – the adjacent, downhill (b) (6) Privacy in complainant's African-American neighborhood. But even without the extra runoff from Oak Park, BCPWD's skewed allocation of municipal services such as sewers and curbs clearly harms the complainant's neighborhood, with a strong correlation to that neighborhood's racial makeup. To evaluate this type of claim, courts determine the likelihood of the actual result, assuming for the sake of argument that the two factors – here, race and municipal services – were *not* related. *Castaneda v. Partida*, 430 U.S. 482, 494-96 & n.17 (1977). If that likelihood is too small (*e.g.*, beyond two standard deviations) to have occurred by mere chance, courts can infer that the two factors indeed *are* related. Here, averaging the rate of Caucasian services at a conservatively low 75% and the rate for Halethorpe services at a conservatively high 60% yields almost *three and a half* standard deviations' difference.³ Even with that statistical padding in BCPWD's favor, the BCPWD policies and practices here disparately affect African-American neighborhoods like Halethorpe.

Significantly, curbing and sewers are not merely aesthetic fixtures but also avoid runoff and the associated flooding of residential units. The flooding causes structural damage to property and introduces mold into homes. As such, discriminatory allocation of these important services has a profound negative impact on the quality of life in the affected African-American neighborhoods.

The complainant anticipates that BCPWD will claim that it bases its allocation of curbing and sewers on factors other than race, such as requiring new developments to pay for those services as part of the construction process. Even assuming that that were true, BCPWD cannot deny either (1) that a "services-to-new-developments" policy disparately impacts older, minority neighborhoods, or (2) the development of the Oak Park neighborhood on wetlands exacerbated the runoff to (b) (6) Privacy and thus also caused residential flooding in complainant's adjacent, downhill African-American neighborhood.

(b) (6) Privacy has not previously filed a complaint with DOT, FHWA, or any other DOT agencies about these – or any other – matters. (b) (6) Privacy previously filed an administrative

² Given that the areas compared consist of hundreds of residential blocks and that the rate of these municipal services in predominantly Caucasian and African-American neighborhood differ by well over thirty percent, there clearly is correlation between what neighborhoods have service and the racial makeup on the neighborhood.

³ For a 100-block sample, the 15% gap in BCPWD services generally versus Halethorpe services specifically is 3.46 times the standard deviation of .043 ($\sqrt[2]{(.75)(1.00 - .75)/(100)}$), which equates to a probability of virtually zero that the observed 15% would occur by chance.

complaint with the federal Department of Housing and Urban Development regarding similar issues in 1996, but (b) (6) Privacy is unaware of any litigation concerning these or related matters.⁴

DISCUSSION

As set forth in the following three sections, FHWA has jurisdiction over the BCPWD actions challenged here, Title VI and the implementing regulations prohibit not only race-based disparate treatment but also actions that disparate effects or impacts by race, and the challenged BCPWD actions violate those prohibitions. Accordingly, (b) (6) Privacy requests that FHWA either direct BCPWD to cure the discrimination or cease funding BCPWD. In addition, pursuant to the authorities cited in note 1, *supra*, (b) (6) Privacy requests that FHWA include within its order a prohibition against BCPWD's retaliating against her or her neighborhood for the bringing of this complaint.

I. FHWA Has Jurisdiction over BCDPW under Title VI of the Civil Rights Act of 1964 and FHWA's Implementing Regulations

At the outset, BCPWD is subject to FHWA's jurisdiction under Title VI. That statute's prohibition against race-based discrimination applies to recipients of federal funds:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance*.

42 U.S.C. §2000d (emphasis added). Moreover, although Congress initially intended that prohibition to apply only to a specific "program or activity" that received federal funds, *Grove City College v. Bell*, 465 555, 575 (1984), the Civil Rights Restoration Act of 1987, 100 Pub. L. No. 100-259; 102 Stat. 28 (Mar. 22, 1988), subsequently defined "program or activity" to encompass "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government ... any part of which is extended Federal financial assistance". 42 U.S.C. §2000d-4a(1)(A). Thus, if an entity like BCPWD receives and federal funding for anything, then Title VI covers *all* of that entity's operations. As such, for jurisdictional purposes, (b) (6) Privacy need not establish that BCPWD received federal funds for curbs or sewers on FHWA-funded projects; she need establish only that BCPWD received any funds whatsoever.

⁴ Insofar as Title VI relies on state law for statutes of limitations, the applicable statute appears to be Maryland's three-year limit for torts. MD. CODE ANN., Cts. & Jud. Proc. § 5-101. Because the complained-of conduct is a continuing violation, however, the statute of limitations would not apply: "to establish a continuing violation ... the plaintiff must establish that the unconstitutional or illegal act was a ... fixed and continuing practice." *Nat'l Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991) (internal quotations omitted, alterations in original). Here, BCPWD's policies represent "fixed and continuing practices." Because BCPWD receives federal funds, it must cease its ongoing reliance on its discriminatory "services-to-new-developments" policy and develop a non-discriminatory policy that allocates these services without discrimination.

That, of course, would be an easy fact to establish for any major metropolitan county. Here, BCPWD received federal funds for the following FHWA projects:

Project Number	FHWA's Project Description
000A279-0	Baltimore County (West Of I-83) Grind, Mill, Patch & Resurface @ Various Locs.
000A505-0	Various Locations in Baltimore County - Resurfacing
000A626-0	Cleaning & Painting of Three Bridges in Baltimore County (B-0254, B-0423, B-0118)
000A645-0	Baltimore Co: East Of I-83: Grind, Mill, Patch, Resurface Various Routes
000A646-0	Baltimore Co: West Of I-83: Grind, Mill, Patch , Resurface Various Routes
000A712-0	Areawide: Traffic Barrier Improvements Baltimore County. (Constr.)
000A814-0	I-70, I-83, I-95, I-195, I-695, I-795, Md 295 & Md 695 - Various Locations in Baltimore County - Roadway Patching – Constr.
000A852-0	Various Locations: Cleaning & Painting of 8 Existing Bridges in Baltimore County.
000A878-0	Mill/Grind, Patch & Resurface Roadway Pavements - Various Locations East of I-83 in Baltimore County
000A879-0	Mill/Grind, Patch & Resurface Roadway Pavements - Various Locations West of I-83 in Baltimore County
000A959-0	Various Rtes.: Cleaning & Painting of Existing Bridge Nos. 0313100, 0315900, 0328600, 0329102 & 0330500 - Baltimore Co.
000S929-0	Baltimore County - W of I-83 - Var Loc Mill & Resurface
0832222-0	I 83 And Shawan Road Interchange Lighting - Baltimore County - Construction

Because it has received federal funds for its operations, Title VI covers all BCPWD operations.

II. FHWA's Regulations Prohibit Both Disparate Treatment and Disparate Impacts Based on Race, and FHWA Has an Obligation to Enforce those Regulations

Title VI mandates that that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. §2000d. Although that statutory prohibition has been held to prohibit only intentional race-based discrimination, *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001), Title VI also “authorize[s] and direct[s] [funding agencies] to effectuate the provisions of [42 U.S.C. §2000d] ... by issuing rules, regulations, or orders of general applicability.” 42 U.S.C. §2000d-1. In implementing that statutory prohibition, DOT has promulgated regulation that prohibit not only actions that intentionally discriminate based on race but also actions that have that effect:

A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, *utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially*

impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

49 C.F.R. §21.5(b)(2) (emphasis added). Indeed, DOT recently affirmed its commitment to identifying and addressing instances of “disproportionately high and adverse effects.” *See* Ray LaHood, Secretary of Transportation, Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (May 2, 2012) (“Order 5610.2(a”). Moreover, DOT and its constituent agencies like FHWA have an obligation to follow their own regulations to protect individual rights: “Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Accordingly, if FHWA’s investigation into (b) (6) Privacy complaint shows that BCPWD has adopted policies that disproportionately impact African-American neighborhoods, FHWA has the obligation to address those impacts.

Significantly, DOT’s Title VI regulations expressly allow the consideration of race in an affirmative-action program or remedy that seeks to remedy the exclusion of individuals by prior discriminatory policies: “Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage.” *See* 49 C.F.R. §21.5(b)(7).

III. BCDPW’s Curb and Sewer Policies Disparately Impact African-American Neighborhoods in Violation of Title VI and FHWA’s Implementing Regulations

Applying Title VI and the DOT/FHWA implementing regulations to the facts outlined in the Introduction above, BCPWD plainly has violated those anti-discrimination provisions in its policies on providing curb and sewer services in (b) (6) Privacy neighborhood. Moreover, it does not matter whether FHWA and DOT proceed under Title VI itself or the regulations because the facts set forth not only an inference of intentional discrimination but also disparate impacts and effects based on race. Insofar as either situation requires affirmative action by BCPWD, 49 C.F.R. §21.5(b)(7), it is not even critical that FHWA and DOT resolve which type of violation BCPWD has committed. It simply matters that FHWA and DOT order BCPWD to remedy those violations or cease receiving federal funds.

FHWA and DOT can infer intentional race-based discrimination from the number of instances in which BCPWD’s policies favor Caucasian neighborhoods over African-American neighborhoods. Just as a fair coin does not always come up heads, a fair policy would not consistently favor one group over another so regularly. As indicated above, BCPWD’s skewed services fall well outside the two-standard-deviation range that might attribute the discrepancies in municipal services to mere random distribution or bad luck. That statistical anomaly allows the inference of discrimination that BCPWD cannot, in (b) (6) Privacy view, rebut. *Castaneda*, 430 U.S. at 494-96 & n.17. Here, the fact that BCPWD’s policies consistently favor Caucasians over African-Americans allows the inference of intentional discrimination.

But even if BCPWD could put forward a racially neutral justification for its policies (e.g., a policy to put curbs and sewers only in newly built neighborhoods and developments, that would not excuse the racially non-neutral *effect* of those policies under the regulations and DOT's policies on environmental justice. 49 C.F.R. §21.5(b)(2), (b)(7); Order 5610.2(a). Simply put, BCPWD has an obligation not only to devise new policies, without racially discriminatory effects, but also to take affirmative action to address the past effects.

REQUESTED RELIEF


For the foregoing reason, the complainant (b) (6) Privacy respectfully requests that FHWA and DOT commence an investigation of BCPWD and, upon confirming the allegations made herein, enter an order directing BCPWD to take the following actions:

- Eliminate race-based disparities in the providing of sewer and curbing services on BCPWD roads, 20 U.S.C. §2000d; 49 C.F.R. §21.5(b)(2), (b)(7);
- Establish a process through which BCPWD will cure the ongoing effects of past race-based disparities in the providing of sewer and curbing services on BCPWD roads, 49 C.F.R. §21.13(a), (d)(3) (requiring corrective action); and
- Prohibit BCPWD's retaliating against the complainant or her neighborhood for the bringing of this complaint, 49 C.F.R. §21.11(e); *Jackson*, 544 U.S. at 178.

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Please do not hesitate to contact me with any questions about this mater.

Respectfully submitted,


Lawrence J. Joseph

cc: (b) (6) Privacy
DOT Office of Civil Rights