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of Transportation
**Federal Highway
Administration**

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Washington, DC 20590

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In Reply Refer To: HCR-1
DOT #2012-0020

Mr. Michael Cornell
City Manager
City of Beavercreek, Ohio
Beavercreek City Hall
1368 Research Park Drive
Beavercreek, Ohio 45432

Mr. Stanley A. Hirtle
Attorney at Law
Advocates for Basic Legal Equality, Incorporated
333 West First Street, Suite 500B
Dayton, Ohio 45402

Mr. Ellis Jacobs
Senior Attorney
Advocates for Basic Legal Equality, Incorporated
333 West First Street, Suite 500B
Dayton, Ohio 45402

Dear Mr. Cornell, Mr. Hirtle, and Mr. Jacobs:

The Federal Highway Administration's ("FHWA") Office of Civil Rights has reviewed the administrative complaint filed on behalf of Leaders for Equality and Action in Dayton ("LEAD") against the City of Beavercreek, Ohio ("City"), alleging a violation of Title VI of the Civil Rights Act of 1964 ("Title VI") (42 U.S.C. § 2000d *et seq.*) and the United States Department of Transportation's ("USDOT") regulations implementing that statute (49 C.F.R. Part 21). This letter serves as FHWA's determination related to LEAD's complaint.

LEAD's complaint, dated August 10, 2011, alleges that the City failed to comply with Title VI and USDOT's regulations, which prohibit discrimination on the basis of race in federally-assisted programs, when the City Council voted on March 28, 2011, to deny the Greater Dayton Regional Transit Authority's ("RTA") application to place bus stops on Pentagon Boulevard near the Fairfield Commons Mall in the City.

FHWA's Office of Civil Rights works to ensure non-discriminatory, equitable, accessible, and safe public transportation in support of FHWA's mission to enhance the social and economic

quality of life for all Americans. This responsibility includes ensuring that recipients of FHWA's funds comply with Title VI.¹

When an individual or organization files a discrimination complaint under Title VI and related policies, the Office of Civil Rights investigates the complaint and determines the merits of the allegations based on collected evidence relevant to USDOT's regulations and procedures.

The remainder of this letter provides background on the City's decision to deny the RTA's bus stop application, summarizes LEAD's Title VI allegations, discusses the investigation, references the applicable regulations and guidance, analyzes the merits of the complaint, and states FHWA's conclusions.

I. FACTUAL BACKGROUND²

This case arises out of the RTA's effort, beginning in March 2010, to install new bus stops along Pentagon Boulevard in the City of Beavercreek near the Fairfield Commons Mall ("Mall"). This location is just to the south of Interstate 675 (I-675), approximately 8 miles east of Dayton.³ At the time the RTA first approached the City in 2010, the RTA operated a bus route (Route 1), which originates in west Dayton and runs along Colonel Glenn Highway to the north of I-675, serving Wright State University. Route 1 transit riders wishing to access the Mall or other businesses or locations near the Mall (including a medical center) would have to walk approximately 1.5 miles from the Wright State bus stop to the Mall entrance. Approximately 0.75 miles of that walk occurs along the six-lane North Fairfield Road from Colonel Glenn Highway to Pentagon Boulevard. There is no sidewalk for this portion of the walk, and pedestrians must walk in the grass along the road or along the shoulder of the road as it passes over I-675. Alternatively, also in 2010, an on-demand ride service known as Greene CATS was available to transport individuals within Greene County (which includes Beavercreek and Wright State University). The service required a rider to make an advance reservation.

In March 2010, the RTA proposed installing six bus stops along Pentagon Boulevard in order to serve various commercial, education, and medical facilities along that street, including the Mall. The proposed bus stops would constitute an extension of the existing Route 1 RTA bus service, which would also still serve Wright State University.

Through an ordinance enacted in September 2000 (Ordinance No. 00-39), the City required a transit service agency to meet certain criteria for installing new transit stops. The ordinance also granted the City Council power to "modify or expand upon the recommendations of the Director of Public Works prior to approval of any such application."

The RTA worked for several months with the City's Public Service Division of the Department of Public Works to prepare an application meeting the design criteria required by the City's

¹ Title VI states 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 otherwise subjected to discrimination under any program receiving Federal financial assistance." 42 U.S.C. § 2000(d).

² Factual information in the Background section is drawn from exhibits attached to Complainant's August 2010 Complaint, public records from the City, information submitted by the City during the course of FHWA's investigation, as well as other publicly available information.

³ See FHWA Exhibit 1 (map of Beavercreek).

ordinance. In November 2010, the City's Public Administrative Services Director deemed the RTA's application "suitable" for forwarding to the City Council. The final application sought three bus stops instead of the originally proposed six stops.

The City Council held a public hearing on the RTA application on February 14, 2011. In advance of this hearing, the Public Service Division staff prepared an Agenda Item Report for the City Council, which stated that the RTA's application "was determined to meet the City of Beavercreek – "Design Criteria for Public Transit Stops." At the hearing, the RTA Executive Director described the RTA's interest in installing the new stops to provide access to persons seeking jobs as well as educational and other services along the Pentagon Boulevard corridor. The City's Public Administrative Services Director gave an overview of the application itself, describing the proposed route and stops.

Following brief public input from three individuals, all of whom supported the application, the City Council closed the public hearing and members discussed the application. Some members expressed concerns about benefits to the City, safety issues, and negative popular opinion among City residents. Other members commented on supporting the RTA and/or questioned the City Council's options in considering the RTA's application. The City Council ultimately tabled a decision on the application until a later date.

By letter dated February 18, 2011, the RTA Executive Director provided information to the City Council addressing concerns that City Council members expressed at the February 14 hearing.

On March 14, 2011, the City Council held a second public meeting to consider the RTA application. At this meeting, some Council members expressed concerns about pedestrian safety near the proposed stops; increased city services costs; ridership surveys; safety issues experienced at the RTA's transit hub in downtown Dayton; the size of the buses that would serve the proposed stops; and trash pickup, among other issues. The Council then tabled a decision on the application a second time.

On or about March 14, the City Council identified 19 transit stop design issues that it wanted the RTA to address, including issues related to pedestrian access, maintenance, construction, traffic and ridership studies, and costs. Some of the listed criteria drew from the City's existing design criteria adopted by ordinance, but 11 of the criteria went beyond the standard requirements of the ordinance. City staff discussed these issues with RTA on or about March 24 and informed the City Council by memo dated March 24 that the RTA agreed to approximately half of the design issues (including all of the design criteria adopted by ordinance in 2000). By memo dated March 25, 2011, the RTA Executive Director provided additional information to the City Manager to clarify RTA's position on the various design issues the City Manager had summarized for the City Council. Also on March 25, the RTA's Director of Planning provided additional information to the City Manager and the City's Public Administrative Services Director, including estimated ridership for the route along Pentagon Boulevard, shelter design, and comments on the City's request for a traffic study.

On March 28, 2011, the City Council held a third public meeting on the RTA application. At this meeting, several City Council members noted negative public opinion among City residents as a reason for opposing the RTA application, citing a city survey and emails received from residents. Other Council members cited safety and cost concerns, and others expressed concerns

about a lack of data on jobs and ridership numbers. Following this discussion, the Council voted 6-0 to deny the RTA's application.

The Complainants subsequently filed their Title VI complaint with the FHWA on August 10, 2011.

II. ALLEGATIONS

LEAD's complaint made the following allegations:

- African Americans in the Greater Dayton Regional Transit Authority's ("RTA") service area disproportionately rely on public transportation when compared with their white counterparts. Accordingly, lack of public transportation disproportionately affects African Americans in the region. Indeed, inability of African American job seekers to obtain transportation to the Beavercreek area has been a major barrier to employment.⁴
- The City of Beavercreek's criteria and methods for deciding whether to allow RTA transit stops in Beavercreek, which resulted in denial of the application for those stops had the effect of subjecting African Americans, who disproportionately ride public transit, to discrimination.
- The City's refusal to allow the RTA to site transit stops in Beavercreek had the effect of excluding minority transit riders from full use of its roads, many of which are federally funded.

III. INVESTIGATION

On February 22, 2012, FHWA Office of Civil Rights staff prepared an investigative plan and developed a list of City of Beavercreek representatives to be interviewed during an On-Site investigation. FHWA's Office of Chief Counsel requested additional documentation that would identify the specific division of the City of Beavercreek that received FHWA funds. Analysis and documentation obtained by the FHWA Ohio Division Office confirmed that the City of Beavercreek, the City Manager, and the City Council had managed and accepted FHWA funds.

FHWA's Office of Civil Rights staff conducted an on-site investigation during the week of April 9, 2012, where staff met with the Complainant(s), interviewed representatives from the City of Beavercreek, met with staff from Ohio Department of Transportation ("ODOT"), Miami Valley Regional Planning Commission ("MVRPC"), Greene County Transit Board ("Greene CATS"), RTA members, all members of the City Council and the City of Beavercreek Attorney McHugh. The Office of Civil Rights staff also requested documentation to determine whether the City of Beavercreek is a sub-recipient of FHWA funds.

On Monday, April 9, 2012, Office of Civil Rights staff met with the Complainant(s) through an evening Open Forum. The Open Forum consisted of taking a bus tour and listening to attendees

⁴ As per the Department of Justice's Title VI guidance, allegations are written exactly as complainants have articulated each allegation of discrimination; however, FHWA has made minor non-substantive changes to the allegations for consistency throughout the document, as well as including abbreviations for terms to make the document more understandable. The changes do not alter the plain meaning of the allegations.

expressing their personal stories. During the Open Forum, attendees recommended Office of Civil Rights staff walk the overpass.

During the On-Site investigation, staff walked the I-675 overpass to determine access to the Mall from the Wright State University Campus. Pedestrians wishing to travel to the Mall area must cross over I-675, a six-lane expressway, walking on bridges alongside the Pentagon Blvd/Fairfield Road highway roadside with no walkways. Staff documented pedestrian's access and took pictures of the walkway.

Also during the On-Site investigation, staff reviewed the documents considered in the record by the City Council regarding the Ordinance to allow RTA to place bus stops on Pentagon Boulevard near the Mall in the City.

During the summer of 2012, FHWA received approximately 40 postcards from supporters of LEAD's complaint expressing support for the investigation conducted by FHWA.

On November 14, 2012, FHWA received an email from Attorney Jeffrey Shane, representing the City of Beavercreek. The email informed FHWA that Greene CATS, the on-demand and "flex route" public transportation provider that serves Beavercreek, would launch a new flex route that would extend service to Beavercreek, including the Mall, among other destinations.

In December, 2012, FHWA's Office of Civil Rights received a petition by members of LEAD opposing the City of Beavercreek's refusal to grant the RTA's application. The petition was signed by 424 University of Dayton students and professors in support of FHWA's investigation.

On December 5, 2012, FHWA Associate Administrator Warren Whitlock held a conference call with Office of Civil Rights staff; Beavercreek Attorney Mr. Jeffrey Shane, City Attorney Mr. Steve McHugh and Amy Blankenship, requesting the City to communicate the Greene CATS proposal directly to the complainants to ensure transparent dialogue amongst all parties.

January 11, 2013, the FHWA Office of Civil Rights received a letter from the Complainant to the Respondent regarding the Greene CATS proposal. The letter stated that the proposal does not meet the needs of the residents of Montgomery County and the City of Dayton.

IV. DOT LEGAL AUTHORITY

FHWA's legal authority is derived from: 1) Title VI of the Civil Rights Act of 1964; and 2) 49 C.F.R. Part 21.

Section 601 of Title VI of the Civil Rights Act of 1964⁵ provides:

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.

⁵ 42 U.S.C. § 2000d.

Section 602 of the Act⁶ provides the authority for Federal agencies to effectuate the provisions of section 601 by issuing regulations of general applicability.

The USDOT's Title VI regulations are set forth in Title 49 C.F.R. Part 21. The regulations apply to all recipients of Federal financial assistance from USDOT, and prohibit both intentional (disparate treatment) and unintentional (disparate impact) discrimination. The provision prohibiting disparate impact discrimination is in 49 C.F.R. § 21.5(b), in relevant part:

(b) Specific discriminatory actions prohibited.

...

(2) 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.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or under any program to which this regulation applies, on the grounds of race, color, or national origin; or which the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

Notably, 49 C.F.R. § 21.5(b)(7) provides, “[e]ven in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program of activity on the grounds of race, color, or national origin.”

V. ANALYSIS

a. FHWA Has Jurisdiction Over the City of Beavercreek Under Title VI

USDOT's Title VI regulations at 49 C.F.R. Part 21 apply to “any program for which Federal financial assistance is authorized under a law administered by [USDOT]”⁷ The regulations define a “program” as “all of the operations” of an entity, “any part of which is extended Federal financial assistance.”⁸ Further, an “entity” includes the “entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local

⁶ 42 U.S.C. § 2000d-1

⁷ 49 C.F.R. § 21.3(a).

⁸ *Id.* § 21.23(e).

government entity) to which the assistance is extended, in the case of assistance to a State or local government.”⁹

The City of Beavercreek is a recipient of Federal highway funds through ODOT. Complainants’ Exhibit 19 identifies a list of infrastructure projects undertaken by the City along with funding amounts, including funding sourced from FHWA. Complainants’ Exhibit 20 is a City-prepared document that describes the City’s active capital infrastructure projects as of July 29, 2011. The document identifies several projects that include federal funding, which is provided by USDOT/FHWA. Complainants’ Exhibit 12, Minutes of the City Council’s March 14, 2011, meeting, shows the Council’s consideration of a resolution authorizing the City Manager to enter into a Local Public Agency (“LPA”) Federal Project Agreement with ODOT for the North Fairfield Road Widening Project, with construction being funded 75 percent by federal funds.¹⁰ In addition, ODOT supplied to FHWA copies of several LPA Federal Project Agreements between the City and ODOT, signed by the City Manager, which demonstrate the City’s receipt of federal financial assistance for transportation infrastructure projects.¹¹ In signing these agreements, the City agreed that it “shall comply with all applicable Federal and State laws, regulations, executive orders . . .,” which includes Title VI and USDOT’s Title VI regulations.¹² ODOT also provided to FHWA a spreadsheet showing ODOT’s allocation of federal funds to the City for numerous infrastructure projects from 2009 through 2012.¹³ Moreover, the City itself admits that it is a recipient of federal funds.¹⁴

The federal highway funding agreements between ODOT and the City are signed by the City Manager under authorization by the City Council. The City Manager is appointed by the City Council and serves as the chief executive officer of the City, providing overall management direction and oversight of the City’s organization and operations.¹⁵ As an “instrumentality” of a local government and as representatives of the City’s government to which federal highway funds are extended, the City Council and all of its operations constitute a “program” under USDOT’s Title VI regulations.¹⁶ Furthermore, the federal highway funds received through the City Council and City Manager are assigned to and managed by the City’s Department of Public Works, which is responsible for the City’s infrastructure. As a result, all operations of the Department of Public Works, including those of the Public Administrative Services Division, constitute a “program” under the USDOT’s Title VI regulations. The Public Administrative Services Division of the Department of Public Works was responsible for managing the RTA’s bus stop application.¹⁷ Thus, the Division’s activities with respect to the RTA application, in addition to the City Council’s action in denying the application, fall under USDOT’s Title VI regulatory authority.

⁹ *Id.* § 21.23(e)(1)(ii).

¹⁰ Complainants’ Exhibit 12 at 8-9.

¹¹ *See, e.g.*, FHWA Exhibit 2 (LPA Federal Project Agreement between the City and ODOT for the Colonel Glenn Highway Resurfacing Project); FHWA Exhibit 3 (LPA Federal Project Agreement for Colonel Glenn Intersection Project).

¹² *See* FHWA Exhibit 2, at Provision 2.2.

¹³ *See* FHWA Exhibit 4 (ODOT List of Federal Highway Funds Allocated to City Road Projects).

¹⁴ *See* FHWA Exhibit 5 (April 5, 2012, Letter from S. McHugh to L. Finkle) at 2.

¹⁵ *See* City Manager Overview, <http://ci.beavercreek.oh.us/city-offices/city-manager/> (last visited May 29, 2013).

¹⁶ *See* 49 C.F.R. § 49.23(e)(1).

¹⁷ *See, e.g.*, Complainants’ Exhibit 2 (Letter from D. Beach, Public Administrative Services Director, to R. Bailey, RTA).

USDOT's Title VI regulations allow "any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by" the Title VI regulations to submit a written complaint. LEAD qualifies as a "person" for these purposes. In addition, a written complaint must be filed not later than 180 days after the date of the alleged discrimination. Here, LEAD alleges that the City Council's March 28, 2011, decision to deny the RTA's bus stop application constituted discrimination. LEAD filed its written complaint on August 10, 2011, 158 days after the alleged discrimination, and well within the 180-days limitation period.

b. Complainants' Disparate Impact Claim Is Supported

To establish Title VI liability under a disparate impact theory, a complainant must show that a recipient of federal funds used a facially neutral policy or practice (use of criteria or methods of administration) that had a disproportionate impact on a group protected by Title VI.¹⁸ A disproportionate impact is shown by comparing the effects of the policy or practice on members of the protected class relative to the effects on persons outside the protected class.¹⁹ If the data shows a statistically significant adverse impact on members of a protected class, a recipient can avoid liability if it can articulate a "substantial legitimate justification" for the challenged policy or practice.²⁰ A "substantial legitimate justification" means that the recipient's policy or practice was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission."²¹ If the recipient identifies a "substantial legitimate justification," the justification must be examined to determine whether it is merely a pretext for discrimination.²²

1. The City's Facially Neutral Criteria for Approving RTA's Bus Stop Application Had a Disparate Impact on African Americans

a) City's decision to deny RTA's Application was based on facially neutral criteria

When the RTA first applied to install new bus stops along Pentagon Boulevard, the City had in place a bus stop ordinance that set forth design criteria required for approval. Basic requirements included a boarding pad, a bench, a sign, and a trash receptacle.²³ Transit stops on heavily traveled streets required, in addition, a vehicle turnout, a shelter, a transit pad, and a schedule holder.²⁴ Other requirements included the placement and design of bus stops and amenity requirements and placements.²⁵ All of these design criteria are facially neutral.

The City's Public Administrative Service Division determined that the RTA's November 2010 bus stop application met the City's "Design Criteria for Public Transit Stops," and forwarded the application to the City Council for consideration.²⁶ Following a public hearing and a second public meeting, the City Council identified 19 "issues"/criteria that it required the RTA to meet

¹⁸ See U.S. Department of Justice, Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes (Sept. 1998), at Part V.B.3.b.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See Complainants' Exhibit 5, Part 2.1.

²⁴ See *id.*, Part 2.2.

²⁵ See *id.*, Parts 3 and 4.

²⁶ See Complainants' Exhibits 2 and 6.

to obtain approval of its bus stop application, 11 of which went beyond the criteria required to be met by ordinance.²⁷ The City justified the Council's imposition of these additional criteria by noting that the City's transit stop ordinance empowers the City Council "to modify or expand upon the recommendations of the Director of Public Works prior to approval of any such application."²⁸ The 11 additional criteria included:

- (1) Do the adjoining intersections have painted crosswalks and, if a potential destination is across a heavily traveled street, is the intersection signalized;
- (2) Posting of Rules of Behavior/Consequence Cards;
- (3) Provision of a Police Phone Call box;
- (4) Have surveillance cameras been provided? Surveillance cameras shall be state of the art and provide full coverage of each transit stop and transmit real-time surveillance pictures to the Beaver Creek Police Department;
- (5) Provide study that indicates projected ridership for the extension of Route 1;
- (6) Provide heated and air conditioned shelters;
- (7) Provide a thickened concrete pad. Eighteen (18) inches instead of the required ten (10) inches;
- (8) Limit the use of the transit stops to small (airport shuttle type) buses;
- (9) Place deposit of \$150,000 in case the establishment of a transit stop results in the need for new traffic signal installation;
- (10) Invoice the GDRTA for any Police Services directly related to the transit stop(s);
- (11) Restrict the use of the Pentagon Blvd. transit stop to only Route 1 buses and prohibit use by other GDRTA routes or vehicles, or by other transit providers.²⁹

All of the additional criteria identified by the City Council are also facially neutral. The RTA rejected items (3), (4), (6), (7), (8), (9), (10), and (11), above; the RTA agreed with or expressed willingness to discuss the other items.³⁰

At the final meeting on the RTA's application, the City Council rejected the application by a vote of 6-0.³¹ The Council members' stated reasons for rejecting the application included the following (Council Member who noted the reason appears in parentheses):

- Popular opposition to the application based on city survey; lack of evidence that RTA sought to meet with citizens; lack of studies; 74 emails from residents opposed to the stops compared with 4 yes's (Howard);
- Council took ideas discussed in Dayton police report called "Corner of Chaos" and applied them to its consideration of RTA's application; RTA said "no" to a number of the Council's additional requirements; citizen input is 90% no and 10% yes; RTA has access to all of Beaver Creek, as he has seen RTA buses at the Mall (Petrak);
- City Council has power to add conditions to bus stop approval, so any conditions added are within bounds; 128 emails against the application and 7 emails for it; RTA should follow the Greene CATS model, which is demand-response; sides

²⁷ See Complainants' Exhibit 14.

²⁸ Complainants' Exhibit 4 (Section IV of Ordinance 00-39).

²⁹ Complainants' Exhibits 14 and 15.

³⁰ See Complainants' Exhibit 15 and 16.

³¹ See Complainants' Exhibit 13.

with the good of the community over the good of RTA; impact of bus stops on residents' safety and adverse impact on economic development documented in "Corner of Chaos" report; fixed route mass transit has caused problems around numerous malls and in downtown Dayton (Jarvis);

- 147 contacts from residents opposed to the application versus 10 in support; current residents of Beavercreek satisfied with current bus transportation and Greene CATS because it meets their needs; concerns about potential push by RTA for sales tax in Greene County (Wallace);
- RTA can use city streets and put bus stops on private land; not comfortable with accepting bus stops without conditions that protect City from increased costs; all kinds of safety issues; no data to back need for bus route to allow people access to jobs; no ridership data; no public safety studies (Giambrone);
- City Council speaks for the people of the City; people do not want the bus stops (Mayor Hadley).³²

All of the reasons set forth by the Council Members are facially neutral.

b) City's decision to reject RTA's application had a disparate impact on African Americans

Greene County, Ohio, which includes the City of Beavercreek, is approximately seven percent African American and 86 percent white, while the City of Beavercreek is approximately three percent African American and 89 percent white.³³ Montgomery County, which borders Greene County and is the primary county served by the RTA, is approximately 21 percent African American and 74 percent white, while the City of Dayton, located in Montgomery County, is approximately 43 percent African American and 52 percent white.³⁴

In 2009, the RTA commissioned a study on the racial and ethnic makeup of its ridership as part of its Title VI compliance efforts.³⁵ The RTA's Title VI survey shows that in Montgomery County, a disproportionate percentage of minorities, predominantly African Americans, relies on public transportation compared to white residents. Approximately 73 percent of RTA riders are minority, while only 27 percent are white; African Americans make up the largest portion of RTA's ridership, at 64 percent of the total ridership.³⁶ Complainants alleged that nearly 12 percent of African Americans in Dayton ride public transportation to work compared to 3.7 percent of Caucasian riders.³⁷ Complainants also alleged that the percentage of African

³² *Id.*

³³ See 2010 US Census Data, <http://factfinder2.census.gov> (showing Greene County population as 7.2 percent African American and 86.4 percent white); <http://factfinder2.census.gov> (showing Beavercreek population as 2.5 percent African American and 88.5 percent white)

³⁴ See 2010 US Census Data, <http://factfinder2.census.gov> (showing Montgomery County population as 20.9 percent African-American and 73.9 percent white); (showing Dayton population as percent 42.9 African American and 51.7 percent white).

³⁵ See Complainants' Exhibit 21 (2009 Title VI Baseline and Trip Characteristics Study).

³⁶ See *id.*

³⁷ See Complainants' Letter at 6; see also <http://factfinder2.census.gov>, MEANS OF TRANSPORTATION TO WORK (BLACK OR AFRICAN AMERICAN ALONE) Universe: Black or African American alone workers 16 years and over: database B08105B (showing data from the 2011 American Community Survey 1-year estimates which indicates that approximately 13 percent of African Americans in Dayton use public transportation to commute to work), and MEANS OF TRANSPORTATION TO WORK (WHITE ALONE) Universe: White alone workers 16

Americans in Montgomery County who ride public transportation to work is 8.2, compared with 1.5 percent of Caucasian riders.³⁸ The City did not dispute these figures in its written response to the LEAD complaint.

Based on the above statistics, it is clear that African Americans disproportionately rely on RTA transit service compared with whites. As a result, African Americans are disproportionately affected by the City's denial of RTA's application to install bus stops providing access to the Mall and other services along Pentagon Boulevard in the City.

2. The City Did Not State a Substantial Legitimate Justification For Its Decision To Deny The RTA's Application

As stated above, to avoid a finding of Title VI non-compliance for disparate impact, the City must articulate a "substantial legitimate justification" for its decision to deny the RTA's bus stop application. A "substantial legitimate justification" means that the recipient's policy or practice was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission."³⁹ Based on FHWA's investigation—which included review of appropriate documents, including the relevant City Council meeting minutes and the City's written response to LEAD's complaint, as well as interviews with City representatives—the City did not make the required showing.

The City adopted numerous, specific design criteria for transit stops by ordinance in 2000. Following nine months of discussions with the City's technical staff in the Public Administrative Services Division of the Department of Public Works, the RTA submitted an application in November 2010 that the technical staff determined met the City's "Design Criteria for Public Transit Stops." Upon consideration of the RTA application, the City Council required the RTA to meet 11 additional criteria that went beyond the adopted "Design Criteria." The ordinance, however, does not provide any metrics and/or parameters to the City Council to determine if any staff recommendation needs to be modified or expanded upon.

FHWA does not question the City Council's authority to impose additional requirements. The ordinance clearly empowers the Council to do so, although with no limiting parameters. The question under Title VI is whether the additionally required criteria (to which the RTA could not agree) were *necessary* to meeting a legitimate, important goal integral to the City's mission. For those additionally required criteria, FHWA finds no reasonable support for the contention that the criteria were necessary to meet such a legitimate, important goal.

years and over: database B08105A (showing 2011 American Community Survey 1-Year Estimates which indicates that approximately 2.7 percent of whites in Dayton use public transportation to commute to work).

³⁸ See Complainants' Letter at 6-7; see also <http://factfinder2.census.gov>, MEANS OF TRANSPORTATION TO WORK (BLACK OR AFRICAN AMERICAN ALONE) Universe: Black or African American alone workers 16 years and over: database B08105B (showing data from the 2011 American Community Survey 1-year estimates which indicates that approximately 8.7 percent of African Americans in Montgomery County use public transportation to commute to work), and MEANS OF TRANSPORTATION TO WORK (WHITE ALONE) Universe: White alone workers 16 years and over: database B08105A (showing 2011 American Community Survey 1-Year Estimates which indicates that approximately less than 1 percent of whites in Montgomery County use public transportation to commute to work).

³⁹ See *id.*

First, the City Council required the RTA to provide police phone call boxes at the proposed stops. FHWA accepts that the City has a legitimate, important goal to ensure public safety, but there is no evidence to support that police phone call boxes at the proposed bus stops is necessary to meeting that goal. The RTA Executive Director reported that the RTA has no such technology at *any* of its 3,300 bus stops.⁴⁰ The City Council offered no evidence to show that the lack of such call boxes at all of the RTA's other bus stops presented a public safety risk. FHWA finds it unreasonable to accept that installation of such call boxes at the proposed RTA bus stops in Beavercreek is necessary to meeting the City's public safety goal.

Second, the City Council required the RTA to provide "state of the art" surveillance cameras providing full coverage of each bus stop with real-time transmission of images to the Beavercreek Police Department. The City Council minutes indicate that the Council included this requirement on the contention that closed-circuit cameras were installed at the RTA's transit hub in downtown Dayton and that such cameras were necessary to ensure public safety at the bus stops in Beavercreek.⁴¹ FHWA does not dispute that public safety is a legitimate, important goal that is integral to the City's mission; however, the City offers no reasonable support for why installation of cameras at the three proposed RTA bus stops is necessary for public safety. The RTA Executive Director explained that the RTA employs such surveillance systems *only* in its transit hubs due to the heavy vehicle and pedestrian traffic created by the consolidation of multiple routes at those locations.⁴² RTA proposed to run "six or so" bus trips per day along the Pentagon Boulevard Route 1 extension.⁴³ This compares with 1,200 bus trips per day that run through the RTA's Wright Stop Plaza transit hub in Dayton, where security cameras are located. The City Council failed to take such distinctions into consideration. The City offered no evidence that security and public safety are serious issues at other bus stops along RTA's routes that are more comparable to those proposed for Pentagon Boulevard. FHWA finds that it is unreasonable to accept the contention that security cameras at the RTA bus stops are "necessary" to meet the City's public safety goals.

Third, the City required submission of a ridership study for the proposed Route 1 extension along Pentagon Boulevard. The City did not articulate a clear goal for why this information was required. One Council Member suggested that approving a fixed route system along Pentagon Boulevard in the City could lead to the RTA or Greene County seeking additional taxpayer funds from the federal government, which could be a waste if few people ride the buses on that route.⁴⁴ The Council Member admitted that the taxpayers of Beavercreek generally would not pay for additional costs because Beavercreek is not a member of the RTA.⁴⁵ For these reasons, FHWA finds that the City did not articulate a substantial legitimate justification for this criterion. In addition, the RTA did in fact provide the City with ridership estimates, based on the RTA's experience with similar routes in its system, prior to the City Council's vote.⁴⁶ The City Council failed to take note of this information.

⁴⁰ See Complainants' Exhibit 16.

⁴¹ See Complainants' Exhibit 12 (March 14, 2011, City Council Minutes), at 2-3.

⁴² See Complainants' Exhibit 16.

⁴³ See Complainants' Exhibit 17.

⁴⁴ See Complainants' Exhibit 12 (March 14, 2011, City Council Minutes), at 3.

⁴⁵ See *id.*

⁴⁶ See Complainants' Exhibits 16 and 17.

Fourth, the City required the RTA to provide heated and air conditioned bus shelters for its proposed, open-air bus stops. Again, the City did not articulate a clear goal that this criterion was intended to address. One Council Member suggested that such “environmental controls” may be necessary for the comfort of patients using the hospital on Pentagon Boulevard.⁴⁷ The City did not provide any evidence to support the reasonableness of this requirement, much less its necessity to meet a legitimate, important goal that is integral to the City’s mission.

Fifth, the City required the RTA to install 18-inch thick concrete pads at the proposed bus stops instead of the normally required 10-inch thick pads. FHWA accepts that the City has a legitimate and important interest in maintaining the structural integrity of its roads, but there is simply no reasonable evidence in the record to suggest that requiring an 18-inch thick concrete pad is necessary to achieving that goal. As the City itself admits, its own “Design Criteria for Transit Stops” require a 10-inch pad.⁴⁸ The RTA Executive Director stated that the transit pad at its Wright Stop Plaza hub is 10 inches, which adequately handles 1,200 bus trips each day, as opposed to the approximately six trips the Pentagon Boulevard stops would handle. Again, FHWA finds it is unreasonable to accept that an 18-inch concrete transit pad is necessary to meet the City’s road maintenance goals.

Sixth, the City required the RTA to limit the use of the transit stops to small, airport-shuttle type buses, rather than the typical, larger transit buses that RTA currently uses for Route 1. Again, FHWA accepts that the City has a legitimate and important interest in maintaining the structural integrity of its roads, but there is simply no reasonable evidence in the record to suggest that the existing buses on the RTA’s Route 1 would cause unusual damage to Pentagon Boulevard. In addition, this criterion would require the RTA to run a completely different type of vehicle on this route, rather than the simple extension of its current Route 1 service. The RTA Executive Director noted that smaller buses could not efficiently function on the Route 1 service. Moreover, the standard size, Route 1 buses already currently operate on Colonel Glenn Highway in the City’s jurisdiction. The City provided no evidence of damage resulting from such use. For the foregoing reasons, FHWA finds it is unreasonable to accept that requiring smaller buses is necessary to meet the City’s road maintenance goals.

Seventh, the City required the RTA to provide a \$150,000 deposit in case the new transit stops require the need to install new traffic signals. FHWA accepts that the City has a legitimate and important interest in managing its infrastructure costs, but there is no reasonable evidence to support a contention that this requirement is necessary to meeting that goal, especially when the City’s Design Criteria already require construction of vehicle turnouts at the bus stops, which RTA agreed to meet. The RTA Executive Director noted that in light of the proposed bus stop locations, no new signals should be necessary.⁴⁹ The City offered no evidence to the contrary. For these reasons, FHWA finds it is unreasonable to accept that requiring a deposit for potential new signal installation is necessary to meet the City’s infrastructure cost management goals.

Eighth, the City required the RTA to accept invoicing for police services directly related to the proposed transit stops. The City Council suggested that this criterion was related to concerns about increased costs for city services as a result of the proposed bus stops.⁵⁰ FHWA accepts

⁴⁷ See Complainants’ Exhibit 12 (March 14, 2011, City Council Minutes), at 3.

⁴⁸ See Complainants’ Exhibit 5 (Standard Engineering Drawing for Transit Stop Turnout Detail) and Exhibit 14.

⁴⁹ See Complainants’ Exhibit 16.

⁵⁰ See Complainants’ Exhibit 12 (March 14, 2011, City Council Minutes), at 2.

that the City has a legitimate and important interest in managing its city services costs, but there is no reasonable evidence to support a contention that this requirement is necessary to meeting that goal. The City cited no evidence that installation of bus stops would result in increased police activity at those locations nor did it articulate how such invoiced charges would be attributed to the RTA. For these reasons, FHWA finds it is unreasonable to accept that requiring the RTA to accept invoicing for police costs directly related to the proposed bus stops is necessary to meet the City's cost management goals.

Ninth, the City required the RTA to agree to limit the proposed bus stops to use only by the RTA's Route 1 buses, prohibiting use by other RTA vehicles or other transit providers' vehicles. The City did not articulate a clear goal that this criterion was designed to meet. Even if the City could identify a legitimate and important goal, such as public safety or city services costs, there is no reasonable evidence to support a contention that this requirement was necessary to meet such goals. More importantly, because the bus stops are in the City's public right-of-way, it is not clear how RTA itself would enforce such a requirement with respect to other transit providers. For these reasons, FHWA finds it is unreasonable to accept that requiring the RTA to agree to limit the use of its proposed bus stops to its Route 1 buses is necessary to meet a legitimate, important goal that is integral to the City's mission.

In sum, none of the additional criteria that the City Council imposed upon the RTA's application, and which the RTA would not agree to meet, demonstrates that the City had a substantial legitimate justification for denying the RTA's bus stop application. For these reasons, LEAD's disparate impact claim is substantiated.

c. The City's Written Response to LEAD's Complaint Does Not Rebut LEAD's Disparate Impact Claim

In its written response to LEAD's complaint, the City stated two primary arguments against LEAD's disparate impact claim. First, the City argued that its decision to reject the RTA's bus stop application could not have had a disparate impact on African Americans because it simply maintained the status quo for transit in the City. Second, the City argued that there could be no disparate impact because the Mall is already "readily accessible" to RTA's riders. Neither of these arguments withstands scrutiny.

With respect to the first argument, it is unreasonable to argue that the City's rejection of the RTA's application simply maintained the status quo. Prior to the RTA's application, there had been no application to install new bus stops in the City since the City passed its transit stop ordinance in 2000. More importantly, the City's technical staff in the Department of Public Works determined that the RTA had satisfied the engineering and other design criteria required by the transit stop ordinance. The promise of the new fixed stop routes along Pentagon Boulevard presented an opportunity for expanded, and safer, access to jobs and services for RTA riders that did not previously exist.⁵¹

The City's second argument, that RTA riders already have ready access to the Mall and other locations along Pentagon Boulevard, is not credible. The existing Route 1 route ends at Wright

⁵¹ See, e.g., Complainants' Exhibits 23-25 (Affidavits of Jobs Counselors

State University, just off of Colonel Glenn Highway.⁵² From the Wright State University stop, RTA riders have three public ways to reach the Mall, none of which is reasonably comparable to the direct route service that the Route 1 extension to Pentagon Boulevard would provide:

- (1) Greene County provides both an on-demand and flex-route public transit (van share) service known as Greene CATS. At the time the City Council considered RTA's application in March 2011, the on-demand service was available to pick up RTA riders at Wright State University and transport them to other locations within Greene County, including the Mall. The service, however, is inadequate to meet the needs of regular transit commuters. In a contemporaneous news article, the Greene CATS Executive Director reported that the service denies 400 trips per month because of space and financial limitations.⁵³
- (2) The RTA provides an on-call para-transit service, but this service is limited to individuals with disabilities, so it is not a credible alternative for typical transit riders.
- (3) RTA riders can walk from the Wright State University Route 1 stop to the Mall. This option is not a realistic substitute for the RTA's proposed fixed-route stops along Pentagon Boulevard. As an initial matter, the walk from the Wright State University stop to the Mall is approximately 1.5 miles. Although this is not necessarily a prohibitive distance for able-bodied individuals in most circumstance, it adds a considerable inconvenience in time and effort to reach the Mall compared with the proposed RTA stops along Pentagon Boulevard. More importantly, however, approximately half of that walk (0.75 miles) occurs along North Fairfield Avenue from Colonel Glenn Highway, over I-675, to Pentagon Boulevard. There is no pedestrian walkway along this portion of North Fairfield Avenue. Individuals must walk in the grass along the road; cross four, unmarked (for pedestrians) turn lanes from North Fairfield Avenue onto the ramp for I-675; continue along the shoulder of North Fairfield on the overpass of I-675; returning to the grass along the road before reaching Pentagon Boulevard, where there is no crosswalk to reach the Mall side of the road.⁵⁴ The route is, by any reasonable standard, precarious in clear daylight, and even more dangerous in the dark and/or in foul weather. These facts are at odds with the City Council's stated concern for public safety.

In short, the City has offered no reasonable argument to support the contention that it had a "substantial legitimate justification" for its decision to deny the RTA's bus stop application. As a result, LEAD's discriminatory impact claim under Title VI remains valid.

VI. FINDINGS

The FHWA Office of Civil Rights, having examined the facts and the law, finds that LEAD has provided sufficient evidence to support its Title VI allegations that African Americans have faced discriminatory impact as a result of the City's decision to deny the RTA's application to install bus stops along Pentagon Boulevard in the City. FHWA finds that the City of

⁵² See Complainants' Exhibit 8 (RTA Feb. 14, 2011, Transit Stop Application, Slide 10 (Route 1 Map)); *see also*, FHWA Exhibit 1.

⁵³ See Complainants' Exhibit 18, "Greene County Public Transit Too Small to Fill Every Ride Request, Official Says," *Dayton Daily News*, March 30, 2011.

⁵⁴ See FHWA Exhibit 6 at pages 5-10 (photos showing walking route along North Fairfield Avenue from Colonel Glenn Highway to Fairfield Commons Mall).

Beavercreek's actions are not consistent with DOT's Title VI regulations (49 C.F.R. § 21.5(b)(2)-(3)).

Having determined that the City has violated Title VI, the FHWA makes the following recommendations to bring the Respondent into compliance:

1. The respondent will develop and implement a Transit Stops Application process specifically and a process for federally-funded programs generally that do not violate Title VI (whether intentional or unintentional discrimination). The process will not involve unreasonable or extensively costly criteria or other requirements which will have the effect of excluding RTA buses from the Respondent's jurisdiction. Requirements must be narrowly tailored to meet compelling interests.
2. The Ohio Department of Transportation (ODOT) will monitor the respondent and provide technical assistance, as appropriate, as the respondent develops and implements the Title VI-compliance process.
3. The FHWA Ohio Division Office will coordinate with the ODOT to ensure that the respondent develops and implements the Title VI-compliance process.
4. The respondent will re-hear the application for the three proposed bus stops submitted by RTA in 2010/2011 under the 2000 "*Design Criteria for Public Transit Stops*." The respondent shall not require the RTA to meet the nine additional criteria imposed by the City Council in March 2011, which the FHWA has found, through this investigation and letter of finding, to be not reasonably necessary to meeting a legitimate, important goal that is integral to the City's mission.⁵⁵ The respondent will ensure that the determination for approval/denial of three bus stops (six daily trips) is based upon whether the RTA's application meets the respondent's 2000 "*Design Criteria for Public Transit Stops*" and ensure that decisions regarding construction details, bonding requirements, maintenance standards, etc., are reserved until after the application is either approved or denied.

The respondent will document how it has or plans to implement each of the four (4) recommendations outlined above. The documents showing the implementation of the recommendations or the implementation of alternative measures are to be provided to the FHWA, Office of the Associate Administrator for Civil Rights, (HCR-1), 1200 New Jersey Avenue, SE, Washington, DC 20590, within 90 days of receipt of this Letter of Finding.

The intention of this letter is to provide the City an opportunity to correct the Title VI noncompliance identified herein informally through the recommendations identified above. If FHWA determines that the City has failed to correct its noncompliance within the noted 90-day

⁵⁵ The City shall not require the RTA to: (1) provide police phone call boxes at the proposed stops; (2) provide surveillance cameras at the proposed stops; (3) provide a ridership study for the proposed Route 1 extension along Pentagon Boulevard; (4) provide heated and air conditioned bus shelters for its proposed stops; (5) provide 18-inch thick concrete pads at the proposed bus stops instead of the normally required 10-inch thick pads; (6) limit the use of the transit stops to small, airport-shuttle type buses, rather than the typical transit buses that RTA currently uses for its Route 1 line; (7) provide a deposit for hypothetical new traffic signals required by the proposed stops; (8) accept invoicing for police services directly related to the proposed transit stops; (9) agree to limit the proposed bus stops to use only by the RTA's Route 1 buses, prohibiting use by other RTA vehicles or other transit providers' vehicles.

timeframe, the FHWA may seek to effect compliance through suspension or termination of federal highway financial assistance to the City, in accord with USDOT's regulations at 49 C.F.R. § 21.13. No suspension or termination of federal financial assistance would occur before notice to the City, an opportunity for a hearing, approval by the Secretary of Transportation, and the expiration of 30 days after notice to the appropriate U.S. House and Senate committees.⁵⁶ The FHWA may also refer the matter to the U.S. Department of Justice for appropriate proceedings to enforce any rights of the United States.⁵⁷

If you have any questions regarding this matter, please contact Mr. Lester Finkle, Office of Civil Rights, at 202-366-5991, or James Esselman, Special Counsel, at 202-366-6181.

Sincerely yours,



Warren S. Whitlock
Associate Administrator for Civil Rights

cc: Mr. Patrick J. Piccininni, Chief Legal Counsel and Deputy Director, Division of Chief Legal Counsel and Equal Opportunity, ODOT
Ms. Laura S. Leffler, Division Administrator, FHWA, HDA-OH
Ms. Cheryl Cattledge, Civil Rights Program Manager, FHWA, HDA-OH
Mr. James Esselman, Special Counsel, FHWA, HQ

FHWA:HCR-40:a:61595:aro:2/12/13

cc: HCR-1 Reader File HCR-1 Whitlock HCR-40 Reader File HCR-40 Case File
HCR-40 Finkle

⁵⁶ See 49 C.F.R. § 21.13(c).

⁵⁷ See *id.* § 21.13(a).