**U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**
WASHINGTON, DC 20410-2000

OFFICE OF FAIR HOUSING
AND EQUAL OPPORTUNITY

May 16, 2022

**CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Texas General Land Office
George P. Bush
Commissioner
1700 Congress Avenue
Austin, TX 78701-1495

Northeast Action Collective
c/o Doris Brown
9926 Woodwick Street
Houston, TX 77016

Texas Housers
c/o David Wheaton
1800 West 6th Street
Austin, TX 78703

SUBJECT: Letter of Determination of Noncompliance
06-21-1483-6/9

Dear Parties:

By letter dated April 1, 2022, The Texas General Land Office ("GLO") submitted a timely request for review of the Letter of Finding ("LOF") of Noncompliance in the above-referenced case under Section 109 of Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5309, and its implementing regulations at 24 CFR Part 6 ("Section 109"). The U.S. Department of Housing and Urban Development ("HUD" or the "Department") issued the LOF on March 4, 2022. HUD also investigated the Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and its implementing regulation at 24 CFR Part 1 ("Title VI") (under which a LOF was issued) and has an open investigation under the Fair Housing Act. This letter sustains the Department's LOF of Noncompliance and constitutes a Formal Determination of Noncompliance in the subject case, pursuant to 24 C.F.R. § 6.11(c)(3).

## Background

Section 109 mandates that "no person in the United States shall, on the ground of race, color, national origin, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded [under the Housing and Community Development Act of 1974]." 42 U.S.C. § 5309; 24 C.F.R. § 6.4(a).

GLO receives federal financial assistance under the Housing and Community Development Act of 1974. HUD's Section 109 regulations apply to its respective programs and activities, including the Community Development Block Grant ("CDBG") Mitigation program.

In the complaint filed on June 24, 2021, Complainants Texas Housers and Northeast Action Collective alleged that GLO's design and operation of the CDBG-Mitigation program's Hurricane Harvey State Mitigation Competition ("the Competition") discriminated on the basis of race and national origin in violation of Section 109 through the use of scoring criteria that substantially disadvantaged Black and Hispanic residents.

HUD's investigation found that GLO utilized two scoring criteria that substantially and predictably disadvantaged Black and Hispanic residents. First, GLO excluded areas designated by HUD as most impacted and distressed ("HUD MID areas") from competing for 50 percent of the Competition funds, even though nearly 90 percent of the eligible population resided in those areas. Second, GLO scored applicants based on jurisdiction size, providing more points to a smaller jurisdiction than it would to a larger jurisdiction for an equivalent project. GLO utilized both criteria even though they disadvantaged areas with the greatest mitigation needs by GLO's own measure and ran counter to the intended focus on low-and-moderate income households. Neither criterion was supported by a substantial legitimate justification. The Department found these measures discriminated based on race and national origin.

As noted above, GLO requested review of the LOF by letter dated April 1, 2022. The Department has reviewed the information submitted in support of the request.

## Analysis

Based on a thorough review of the investigative record pursuant to 24 C.F.R. § 6.11(c)(3) this letter sustains the LOF and constitutes a formal determination of noncompliance with Section 109.

HUD's regulations prohibit recipients from denying a person housing, providing housing in a different manner, or subjecting a person to segregation or separate treatment under the program or activity on the ground of race, color, or national origin. 24 C.F.R. § 6.4. HUD regulations also prohibit recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination" or "substantially impairing accomplishment of the objectives of the program" on the basis of race, color, or national origin. 24 C.F.R. § 1.4(b)(2)(i). These regulations proscribe policies or practices that are intentionally discriminatory as well as those that have an unjustified discriminatory effect based on a protected characteristic.[1]

As noted above, HUD's LOF found that the GLO utilized two scoring criteria that disproportionately disadvantaged otherwise eligible Black and Hispanic residents, without justification. GLO contends in its letter requesting review that no adverse impact occurred. To support this contention, GLO calculates and references the overall proportion of "minority" beneficiaries. Merely asserting though that minority residents benefited from the Competition,

[1] Department of Justice, Title VI Legal Manual, Section VII, at 2 (explaining disparate impact liability under Title VI). The manual notes that twenty-six federal agencies have Title VI regulations that include provisions prohibiting policies that have an unjustified disparate impact. *Id.* at 3, fn. 3.

without more, provides no basis to question HUD's findings that the scoring criteria at issue in the LOF *disproportionately* harmed Black and Hispanic residents. The GLO also does not proffer any justification for the use of these discriminatory criteria. Overall, the Department finds that the request does not contain information that warrants modification of the findings.

GLO also makes a variety of arguments challenging the legal validity of the LOF. First, GLO asserts that discriminatory effects liability does not exist under Title VI, citing *Alexander v. Sandoval*, 532, U.S. 275, 293 (2001).[2] GLO misconstrues the holding of that case. Although the Court in *Sandoval* held that there is no *private* right of action to bring discriminatory effects claims under Title VI, the Court did not disturb its prior holding in *Alexander v. Choate*,[3] that an agency may promulgate regulations prohibiting recipients of federal funds from using policies or methods of administration that have an unjustified discriminatory effect (under Section 504 of the Rehabilitation Act of 1973 and by extension under Title VI and Section 109).[4] HUD has promulgated such regulations.[5]

Second, GLO argues that the LOF failed to meet the concept of robust causality outlined by the Supreme Court in *Texas Dep't of Hous. and Cmty. Affairs v. Inclusive Cmty. Project Inc.*, 571 U.S. 519 (2015). HUD does not find this argument persuasive as the LOF outlines direct causality, including for example, between the HUD MID exclusion and the amount of funds available to residents of HUD MID areas.

Third, GLO argues that there is no constitutionally permissible race neutral remedy. However, *Inclusive Communities* provides that the "elimination of the offending practice" is such a remedy, as can be "additional measures … design[ed] … to eliminate racial disparities through race-neutral means."[6]

Finally, the GLO notes that its Action Plan was approved by HUD. As HUD has made clear to recipients and to the GLO specifically, approval of an action plan does not constitute a determination that actions taken to implement the plan are in compliance with civil rights laws.[7] The GLO certified to HUD that it would *conduct* and *administer* the CBDG-MIT grant in conformity with Title VI of the Civil Rights Act and its implementing regulations.[8]

---

[2] HUD's LOF focused on evidence that the GLO's criteria for administering the competition at issue had an unjustified discriminatory effect. While the evidence identified was sufficient to constitute a violation of Title VI, the fact that these criteria had an anticipated and foreseeable disparate impact may also indicate that the GLO's use of the criteria was enacted with a discriminatory intent. *See, e.g., Columbus Bd. Of Educ. V. Penick*, 443 U.S. 449, 464-65 (1979).

[3] 469 U.S. 287 (1985).

[4] *Id.* at 293; s*ee also Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

[5] *See* 24 C.F.R. § 6.4(a)(1)(ix), and 24 C.F.R. § 1.4(b)(2)(i).

[6] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

[7] *See* Letter from Jesse Kome, Director, Office of Block Grant Assistance, HUD Office of Community Planning and Development to Mark Havens, Deputy Land Commissioner, Texas General Land Office, disapproving GLO's Substantial Amendment, which states "[a]s a reminder, the Department's approvals of action plans and APAs mean that the plan and amendments are substantially complete but do not constitute approval of the grantee's implementation of the activities described in the plan. Grantees are responsible for ensuring that grant funds are used in accordance with all program requirements" (March 18, 2022).

[8] *State of Texas CDBG-MIT Action Plan*, at 289. The governing Federal Register Notice, 84 FR 45838 (August 30,

**Conclusion**

Section 109 regulations at 24 C.F.R. § 6.11(d) state that Recipients have ten calendar days from receipt of the Formal Determination of Noncompliance to come into compliance by executing a Voluntary Compliance Agreement ("VCA") or contact the Responsible Official for settlement discussions. The Department will seek that such VCA also resolves the Complainant's allegations under Title VI and Title VIII. If the Recipient fails to effect voluntary compliance and conciliation, the Department may take measures pursuant to 24 C.F.R. §§ 1.8 and 6.12 to assure compliance with Title VI and Section 109 and pursuant to 24 C.F.R. § 103.400 to enforce Title VIII.

As this determination sustains the Department's LOF of Noncompliance, the Recipient may remain ineligible for discretionary funding until this matter is resolved to the Department's satisfaction.

The Recipient should contact Jacy Gaige, Director for Compliance and Disability Rights in the Office of Fair Housing and Equal Opportunity, via email at jacy.d.gaige@hud.gov with any questions.

Sincerely,

Lynn M. Grosso
Director of Enforcement
Office of Enforcement and Programs

cc:
Relman Colfax PLLC
c/o Sara Pratt
1225 19th Street NW
Suite 600
Washington, D.C. 20036

Luis A. Reyes
Ashcroft Sutton Reyes
919 Congress Ave
Suite 1325
Austin, Texas 78701

Cory R. Liu
Ashcroft Sutton Reyes
919 Congress Ave
Suite 1325
Austin, Texas 78701

2019), also required the GLO to certify that the grant would be conducted and administered in conformity with the Fair Housing Act, 42 U.S.C. 3601-3619, and that the GLO will affirmatively further fair housing.