COLORADO MUNICIPAL LEAGUE

NEWSLETTER

Vol. 48, No. 2, January 28, 2022

Unprecedented investment in bridges through the Bipartisan Infrastructure Law

By Meghan MacKillop, CML legislative and policy advocate

On Friday, Jan. 12, the Federal Highway Administration released an updated federal bridge formula program based on the passage of the Bipartisan Infrastructure Law (BIL). The program represents the largest investment ever made in fixing bridges, dedicating $26.5 billion to states, the District of Columbia, and Puerto Rico over the next five years, as well as $825 million for Tribal transportation facilities. The total amount that will be available to states in 2022 is $5.3 billion.

Nationwide, the Bridge Formula Program is expected to help improve as many as 15,000 highway bridges. In addition to providing funds to states to replace, rehabilitate, preserve, protect, and construct highway bridges, the program has dedicated funding for Tribal transportation facility bridges and "off-system" bridges, which are typically locally owned facilities not on the federal-aid highway system.

The Department of Transportation (DOT) is asking governors and states to take advantage of this incentive to make their federal dollars go farther by addressing these local bridges. Likewise, DOT encourages counties, municipalities, and mayors to work closely with their state departments of transportation to help prioritize bridge funding decisions. DOT encourages the funding to be used toward improving the condition of existing bridges as well as on the construction of new bridges that would address equity, barriers to opportunity, challenges faced by individuals and underserved communities in rural areas, or restoring community connectivity. The funding can be used to improve accessibility and address safety for all highway bridge users, which includes the needs of cyclists and pedestrians in municipalities as well.

The Colorado Department of Transportation will receive approximately $45 million per year for the next five years in dedicated bridge program funding. Because the BIL is putting an emphasis on off-system bridges, 15% of that funding will go directly to Colorado's Off-System Bridge Program. This will result in an additional $6.7 million in total funding per year for the next five years for the program.

The BIL also funds a new Bridge Investment Program, which is a discretionary program with the goal of improving bridge and culvert condition, safety, efficiency, and reliability. $12.5 million is available, and state and local governments are eligible to receive allocations.

Stay tuned for more updates on available funding through the BIL. If you have questions, contact Meghan MacKillop at *mmackillop@cml.org*.

UPCOMING EVENTS

FEBRUARY 8:
bit.ly/33CUoGH
Municipal Caucus Meeting

FEBRUARY 11:
bit.ly/3IcsVKX
Statehouse Report Webinar

FEBRUARY 17:
bit.ly/3ndU6Na
Legislative Workshop

FEBRUARY 25:
bit.ly/3GOaJa5
Statehouse Report Webinar

Empowered cities and towns, united for a strong Colorado

Congratulations

We're celebrating Legislative and Policy Advocate Meghan MacKillop's one year anniversary on Jan. 25. Congratulations, Meghan!

CML welcomes new associate counsel, Rachel Bender

Rachel Bender comes to CML from the Jefferson County Attorney's Office and has significant experience in civil litigation and legal issues impacting local government. At CML, she provides legal services, which includes assistance for the legislative advocacy team, educational support for municipalities around the state, and advocacy for municipal interests in the courts. Rachel joined the League earlier this month.

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Innovative Affordable Housing Strategies Grant Program

HB21-1271 (*bit.ly/3nJTcs3*) created three new grant programs to offer assistance to local governments to promote innovative solutions to the development of affordable housing across the state.

The Planning Grant Program provides grants to local governments to help them understand their housing needs and adopt policy and regulatory strategies to qualify for the Affordable Housing Development Incentives Grant Program. Of note, the Planning Grant Program can fund housing needs assessments to help local governments guide their policy and regulatory approach to reducing barriers to affordable housing development, but the application for funding must also include work to adopt a qualifying strategy (from the options listed in the bill).

Approximately $6,816,000 is available for Planning Grant awards. Individual Planning Grant awards are expected to be approximately $50,000-$200,000. Applicants are strongly encouraged to consult with their DOLA Regional Manager and to get input from DOLA staff before submitting a Planning Grant Program application. Applications can be submitted anytime through the Division of Local Government at *bit.ly/33ulf6Z*. **The next application deadline for this grant is Jan. 30, 2022.**

Contact Carrie Latimer, Planning Specialist, at *carrie.latimer@state.co.us* or (303) 551-3580.

USDA seeks applications for technical assistance grants to preserve affordable rural rental housing

United States Department of Agriculture (USDA) Under Secretary for Rural Development Xochitl Torres Small announced that USDA is accepting applications for grants to assist in the preservation of affordable rural rental housing.

USDA is making available up to $3 million in technical assistance grants. Grant recipients will provide services to Multi-Family Housing (MFH) borrowers and applicants. These services will help facilitate the transfer of properties financed with USDA direct loans to non-profit organizations and public housing authorities. In addition, the funds may be used for such costs as financial analysis, capital needs assessments, appraisals, and other non-construction services that required as part of the transfer application process.

USDA Rural Development encourages applications for projects that advance the recovery from the COVID-19 pandemic, promote equitable access to USDA programs and services, and reduce the impacts of climate change on rural communities. For more information, visit *bit.ly/3421nZW.*

Qualified public and private nonprofit organizations, tribal housing nonprofits, public housing authorities and tribally designated housing entities are eligible to apply for this technical assistance grant funding. Grant recipients must have experience with affordable housing development and preservation.

The deadline to submit applications is 11:59 p.m., EDT on Feb. 8, 2022. For additional information, visit the Federal Register at *bit.ly/3qMIF1g*.

Final rule on ARPA State and Local Fiscal Recovery Fund grants: 10 things for municipal leaders to know

This content was originally published by the National League of Cities "CitiesSpeak" blog.

For the first eight months of the groundbreaking State and Local Fiscal Recovery Fund (SLFRF) grant program, enacted under the American Rescue Plan Act (ARPA), local government grantees operated under an "interim final rule." The interim rule was sufficiently clear on eligible expenditures to address immediate emergency needs related to losses stemming from COVID-19, and many cities and towns made their first grant expenditures to address those immediate needs. The interim rule also provided additional flexibilities for local governments to intervene in declines impacting individual households and small businesses in their communities; and to make community-wide improvements in water, sewer, and broadband. However, to meet the urgent need to deliver grants to state and local governments quickly, the interim rule was published without clear direction for every category of spending, and many questions from local leaders were not answered. As a result, some cities and towns pressed pause on grant expenditures until a final rule was released.

Last week, on Thursday, Jan. 6, the U.S. Department of Treasury (Treasury) released their Final Rule for the Coronavirus State and Local Fiscal Recovery Funds (SLFRF). The new Final Rule is more comprehensive and significantly longer than the interim rule, arriving at over 400 pages. Most of the new content is aimed at providing greater clarity, direction, and examples for rules that were already in effect under the interim rule. There are also a few important changes that local leaders should know. Promisingly, most of the questions and recommendations raised by NLC in its comment letter to Treasury *(bit.ly/3tJ9c18)* on the rule have been answered or acted on.

For cities and towns that have delayed obligations and expenditures of their initial ARPA SLFRF grant, and before any local government obligates the second half of their grant, here are 10 things to know about the final rule:

1. The final rule provides more direction and greater certainty for local governments.

The Coronavirus Local Fiscal Recovery Fund (CLFRF) remains an urgent lifeline for local governments, and their residents, that experienced losses or other declines related to the COVID-19 pandemic. In recognition of the fact that thousands of local governments continue to operate at some level of reduced capacity, the final rule has significantly expanded to cover both activities that grantees can do and provides significant new direction and examples of how to do it. In that sense, the final rule goes beyond typical "government speak" to be more useful for both experienced practitioners and those who are new to federal grant management.

Many expenditures that were implied by interim rule are fully spelled out in the final rule, including expenditures oriented to long-term recovery efforts such as rehabilitation and construction of affordable housing, facilities and services for childcare and early learning, violence intervention and deterrence activities, job training and workforce supports, and financial services for unbanked residents. To navigate the significantly expanded rule, Treasury has published a separate, short overview document for quick reference at *bit.ly/3Akme6H*.

The final rule also points to new Treasury resources to make it easier for local governments to determine if specific neighborhoods or households meet the conditions for expenditures addressing low-income and disproportionately impacted residents. While the interim rule reduced regulatory and compliance burdens for expenditures made within qualified census tracts *(bit.ly/3qMdV0l)*, Treasury is also releasing a new tool for determining low- and moderate-income households *(bit.ly/3IkPGMA)* in conjunction with the release of the final rule.

2. The final rule does not penalize local governments for rule changes that impact already spent funds.

The final rule takes effect on April 1, 2022, and until that time, the interim final rule remains in effect. However, grantees have been permitted flexibilities and protections during the transition. For one, local governments do not need to wait until April to take advantage of rules changes and expanded eligibilities. They can start spending in accordance with the final rule immediately. Secondly, local governments will not be penalized with enforcement actions for expenditures made before April 1, 2022, that are consistent with the interim final rule, but that may be subject to greater limitation or restriction by the final rule. In a statement *(bit.ly/3qLOCeM)*, Treasury provides a list of reasonably anticipated differences between the interim and final rules that may impact grantees' plans. But the transition flexibilities and protections end when the final rule takes effect. Bottom line, all state and local governments must comply with the final rule beginning on April 1, 2022.

3. The final rule makes it easier for small cities and towns (NEUs) to spend in familiar ways.

The most flexible spending category under the SLFRF grant program is "Replacement of Lost Revenue" for government services, which the final rule says generally includes any service traditionally provided by local governments. To take advantage of this category of spending, the interim rule required all grantees, regardless of size, to perform a complex calculation to determine how much revenue a locality could claim as lost.

The final rule presents a significantly simpler option by permitting local governments to choose a "standard allowance" for lost revenue of $10 million for the lifetime of their grant. Local governments may continue to use the amount provided under the calculation, but for those that select the standard allowance, they may use up to $10 million for government services with streamlined reporting requirements compared to those that choose to stay with their calculated amount.

In practice, almost no Non-Entitlement Unit of local governments received a grant larger than $10 million under the SLFRF program. So, in effect, the rule excuses

almost local governments with fewer than 50,000 residents who received their grant through their state from requirements associated with the calculation of lost revenue, if they choose, and instead allows all those smaller cities and towns to claim the standard allowance.

4. The final rule more accurately reflects municipal budgeting by expanding sources of revenue.

The final rule removes a limitation imposed by the interim rule on the type of local revenue sources that could be included in calculations of lost revenue. The interim rule specifically excluded municipally owned utility revenue from calculations of general revenue. In the final rule, Treasury adjusts the definition of general revenue to allow governments to choose whether to include revenue from their utilities in their revenue loss calculation. The final rule also clarifies that municipal revenue derived from liquor store revenue is part of general revenue. Although the new standard allowance has made these changes less consequential under the SLFRF program, the more accurate definition of general revenue embraced in the final rule is welcome and has the potential to positively impact federal legislation and regulation impacting cities in the future.

5. The final rule eases limits on hiring and retention activities, and other capacity building measures.

The interim final rule permitted local governments to use grant funds to address furloughs and lay-offs by allowing expenditures to bring municipal employment up to pre-pandemic levels, but not to support hiring above the number of those employed by a municipality on Jan. 27, 2020. The final rule adds local government capacity to their consideration of expenditures for municipal employment. Among the changes, recipients may use SLFRF funds to rehire staff for pre-pandemic positions that were unfilled or eliminated due to the pandemic without undergoing further analysis. Alternatively, local governments may pay for payroll and covered benefits to increase its number of budgeted full-time equivalent employees up to 7.5% above its pre-pandemic employment baseline, which would help local governments make up for underinvestment in the public workforce since the Great Recession.

In terms of retention in the face of economic hardship that many local government employees faced during the pandemic, the final rule allows local governments to use grant funds to provide additional funds to workers who experienced pay cuts or were furloughed. According to the final rule, a local government "must be able to substantiate that the pay cut or furlough was substantially due to the public health emergency or its negative economic impacts (e.g., fiscal pressures on state and local budgets) and should document their assessment. As a reminder, this additional funding must be reasonably proportional to the negative economic impact of the pay cut or furlough on the employee."

6. The final rule clarifies which employees are eligible for premium pay in both the public and private sector; and makes it clear that elected officials are not eligible for premium pay.

Under the interim rule, there was ambiguity about whether employees of public works; public utilities; courthouse employees; police, fire, and emergency medical services; and waste and wastewater services employees were eligible for premium pay as public sector employees. The final rule clarifies "all public employees of local governments are already included in the definition of 'eligible worker.'"

Non-public employees can also be eligible for premium pay, and the final rule simplifies requirements on local governments governing these expenditures. The chief executive of a local government may designate these workers "as critical, in order to receive premium pay." However, non-public workers still must meet the other requirements for premium pay such as performing essential work. Treasury will defer to the chief executive's discretion in making the designation, and a local government does not need to submit for approval its designation to Treasury.

Although local governments can award premium pay to non-hourly or salaried employees, as well as part-time employees, the final rule clarifies that elected officials are not eligible for compensation under the premium pay category. Volunteers are also excluded from eligibility for premium pay.

7. The final rule recognizes a broader set of eligible activities that respond to public health, economic harm, and disproportionate impact.

The final rule improves on the interim rule by providing expanded lists of enumerated eligible uses that are responsive to questions submitted by local government grantees. The expanded lists of eligible activities fall under the following categories:

- public health,
- assistance to households,
- assistance to small businesses,
- assistance to nonprofits,
- aid to impacted industries, and
- public sector capacity.

The final rule also clarifies and expands the types of populations that may be presumed to be "impacted" and "disproportionately impacted" by the pandemic without additional documentation. "Impacted" and "disproportionately impacted" are defined categories that unlock grant spending for broader ranges of activities. Among the simplifications resulting from this change, local governments may presume any small business or nonprofit operating inside a Qualified Census Tract is eligible for aid as a disproportionately impacted entity.

8. The final rule clarifies whether certain capital expenditures are allowable or not.

The final rule clarifies that local governments can use grant funds for capital expenditures that support an eligible COVID-19 public health or economic response. For example, local governments may build certain affordable housing, childcare facilities, schools, hospitals, and other projects consistent with final rule requirements. The final rule also prohibits certain capital expenditures, including those for construction of new correctional facilities (jails) in response to rising crime; construction of new congregate facilities to decrease the spread of COVID-19 within such facilities (such as large congregate homeless shelters); or construction of convention centers and stadiums.

9. The final rule expands eligible water, sewer, and broadband projects.

The final rule broadens eligible broadband infrastructure investments to address

challenges with broadband access, affordability, and reliability, and adds additional eligible water and sewer infrastructure investments, including a broader range of lead remediation and stormwater management projects. Like other expenditure categories, the final rule expands the list of specific enumerated uses for water, sewer, and broadband to simplify determinations of eligibility.

10. The final rule maintains restrictions on spending that is not prospective.

The final rule is consistent with the interim rule on overarching spending restrictions irrespective of category. In general, restrictions reflect the principle that grant funds must be used prospectively, rather than retrospectively. Among the specific restrictions, local governments may not use grant funds to address pension fund liabilities; to replenish financial reserves; for payments on bonds or other debt services; or payments required by settlement, judgment, or consent decree.

Revitalizing Main Streets: Notice of Additional Funding for Larger Safety Infrastructure Grants

The Revitalizing Main Streets Program began as a part of Colorado's COVID-19 Recovery Plan (*bit.ly/3FLgeor*), with a $30 million allocation from the state legislature in March 2021. In June 2021, Senate Bill 260 provided $85 million in additional funding for the program over the next 10 years. This program is intended to help communities across the state implement transportation-related projects that improve safety and yield long-term benefits to community main streets. As of Dec. 6, 2021, this grant opportunity now has an additional $22,160,000 available to support transportation infrastructure projects across the state of Colorado. Eligible applicants are encouraged to submit transportation infrastructure projects of up to $2 million that will improve safety and transform streets and street spaces across the state, especially for vulnerable users. **The deadline for submission is Friday, Feb. 4, 2022. Please visit *bit.ly/3AiAnB8* for more information.**

photo courtesy of The Colorado Tourism Office

CML's Election Webinar series

We're excited to provide clerks with essential information concerning elections throughout the next few months. CML will host Karen Goldman, MMC, on a series of webinars focused on essential election practices. Goldman has provided training for municipal clerks in the elections arena during her almost 20 years as a municipal clerk in Colorado and currently runs the League Municipal Clerk Advisor Program. You can register for the next webinar at *bit.ly/3nhUuu7.*

CML LEGAL CORNER

The impact of "exceptional" campaign donations on recusal in quasi-judicial matters

By Robert Sheesley, CML general counsel

While Colorado's elected officials are still presumed to act with "integrity, honesty, and impartiality," the Colorado Court of Appeals recently determined that campaign donations from a party in a quasi-judicial proceeding can require recusal of an elected official in "rare, exceptional, or extreme" cases. In a quasi-judicial proceeding, local officials act like judges in a court of law as they consider land use applications, licensing decisions, and other matters in which existing law is applied to facts developed at a hearing. In that role, decision-makers must act in a fair and neutral manner, as required by the 14th Amendment to the U.S. Constitution. A biased decisionmaker who cannot fairly and impartially apply the law to the facts should not participate in the hearing or decision.

Whether bias reaches a constitutionally intolerable level depends on many factors, including the decisionmaker's own belief in their impartiality. If a person believes they cannot be fair and impartial, recusal is unquestionably appropriate. The law also has traditionally required recusal, even if a person believes they can be impartial, where they have a direct, personal, substantial, pecuniary (or financial) interest in the outcome of a case. Beyond this direct interest or subjective bias, recusal in quasi-judicial proceedings has not been mandated for constitutional reasons in the absence of proof of actual bias.

Caperton v. Massey Coal Co.

In 2009, the United States Supreme Court required recusal of a West Virginia appellate judge because extraordinary campaign contributions from a litigant's executive helped get the judge elected while its case (a $50 million judgment) was on appeal. The contributions ($3 million) vastly exceeded the expenditures of the candidate and his opponent. Although he claimed to have no bias, the newly-elected judge voted to overturn the judgment. Viewed objectively, the probability of actual bias was too high to be constitutionally tolerable under the rare circumstances of the case.

The Court highlighted three elements as creating an intolerable risk of bias that would make an average judge unlikely to remain neutral, even without proof of actual bias:

- The contribution's size compared to the campaign's total receipts and the total spent in the election.
- The temporal connection between the contribution and a pending case that was likely to come before the candidate, if elected.
- The apparent effect of the contributions on the election outcome.

In that "extreme" case, the Supreme Court found that the significant and disproportionate contributions were suspect considering the pending appeal.

***Caperton* now applies to Colorado quasi-judicial proceedings**

In *No Laporte Gravel Corp. v. BOCC of Larimer County*, an incumbent county commissioner received contributions from stockholders in a company that was planning to submit a land use application for a gravel mining operation. After his re-election, the commissioner later voted to approve the application in a 2-1 decision. For the first time in Colorado, the Court of Appeals determined that neighboring landowners could challenge the decision based on the commissioner's participation because, under *Caperton*, the campaign contributions could give rise to an unconstitutional risk of bias that would undermine the fairness of the proceedings.

The Court of Appeals, however, confirmed that only "rare, exceptional, or extreme" facts would result in a constitutional violation and rejected the neighbor's challenge. The donations were 7.65% of the total amount raised by the candidate and 5.44% of all spending in the election. The application was submitted after the election and the actual proceeding did not occur for two years. As a result, the campaign contributions were found to not be so extreme or exceptional as to violate the neighbors' due process rights.

Handling due process questions based on campaign donations

At this point, whether campaign contributions will result in many viable due process challenges in quasi-judicial proceedings is an open question. Another case from Larimer County involving similar facts is pending in the Court of Appeals. That case could further define the threshold for an "extreme" case. Ultimately, the matter may be resolved in the Colorado Supreme Court.

For now, officials should continue to be aware of any bias that would prevent them from providing fair and impartial quasi-judicial proceedings. The receipt of campaign contributions alone does not require recusal (unless a local requirement for recusal based on a campaign contribution exists). If a campaign contributor has a personal stake in a quasi-judicial proceeding, the contributions should be assessed to determine if they are so rare or exceptional that they would objectively create an unconstitutional risk of bias, despite the official's belief in their impartiality.

This column is not intended and should not be taken as legal advice. Municipal officials are always encouraged to consult with their own attorney.

Research Corner: Wildfire in Colorado

The Colorado Wildfire Risk Public Viewer is designed to increase wildfire awareness, provide a comprehensive view of wildfire risk and local fire history, and educate users about wildfire prevention and mitigation resources available from the Colorado State Forest Service (CSFS).

A tool is provided that summarizes the potential fire intensity for any specific location on the map. It is intended to inform homeowners and business owners of the impending risk for their location based on surrounding fire behavior conditions.

A quarter-mile buffer around the location is used to retrieve data and derive a potential fire intensity rating. The potential fire intensity rating is dependent on the landscape conditions surrounding a location, not the conditions at the specific site. A link is provided to the CSFS web site where you can explore opportunities to mitigate your risk by leveraging the experience and programs available from CSFS.

Explore the Colorado Wildfire Risk Public Viewer at *https://bit.ly/3KrUjX3*

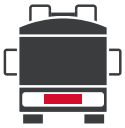
COLORADO WILDFIRE RISK

5,281 wildfires
occur on private and public land in Colorado annually

12%
of wildfires are caused by lightening

99% of wildfires
are contained at less than 100 acres

$500,000
typical daily costs for a large wildfire



400
fire departments, counties, state, tribal, and federl agencies cooperate in wildfire protection

243
Community Wildfire Protection Plans in Colorado

190
Firewise Communities in Colorado

On Jan. 18, U.S. Department of Agriculture (USDA) Secretary Tom Vilsack and Forest Service Chief Randy Moore announced the launch of a comprehensive response to the nation's growing wildfire crisis – "Confronting the Wildfire Crisis: A Strategy for Protecting Communities and Improving Resilience in America's Forests." The strategy outlines the need to significantly increase fuels and forest health treatments to address the escalating crisis of wildfire danger that threatens millions of acres and numerous communities across the United States.

The Forest Service will work with other federal agencies, including the Department of the Interior, and with Tribes, states, local communities, private landowners, and other partners to focus fuels and forest health treatments more strategically and at the scale of the problem, based on the best available science.

Learn more at *https://bit.ly/3qK2hmG* .

$3 billion – funding provided by Bipartisan Infrastructure Law to reduce hazardous fuels and restore America's forests and grasslands, and invest in fire-adapted communities and post fire reforestation

10 years – covered by the new USDA strategy

10 million – acres burned in wildfires nationwide in 2020

<10% Of fire-prone forests in the West account for roughly 80% of the fire risk to communities

20 million – increase in number of acres of national forests and grasslands to receive treatment under new USDA strategy

30 million – increase in number of acres of other federal, state, Tribal, private, and family lands to be treated

327% - increase in running 5-year average number of structures destroyed by wildfire between 2014 and 2020

80% of reforestation needs created by wildfires

6% of post-wildfire reforestation needs currently being addressed

4 million acres – current National Forest System reforestation needs

Source: United States Forest Service

2-3 million
number of acres currently being treated per year for fuels and forest health

Treatments typically involve thinning fuels and removing vegetation to reduce heavy fuel loads that can increase the risk of extreme wildfire events and using a risk-based approach to restore healthy fire to fire-adapted ecosystems

Source: Colorado Wildfire Risk Public Viewer, Colorado State Forest Service

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