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MEMORANDUM

TO: Members of the Affordable Housing Transformational Task Force

FROM: Bob Lackner, Office of Legislative Legal Services

DATE: September 14, 2021

SUBJECT: Requirements of the "American Rescue Plan Act of 2021" relating to affordable housing¹

Introduction

This memorandum addresses two issues: 1) The permissible uses of money allocated to the state for housing purposes under the "American Rescue Plan Act of 2021"(ARPA); and 2) Whether ARPA or its accompanying regulations provide any specificity as to the populations, households, or geographic areas disproportionately impacted by the COVID-19 public health emergency (COVID).

1. The permissible uses of money allocated to the state for housing purposes under ARPA

The federal government enacted ARPA to provide support to state, local, and tribal governments in responding to the impact of COVID and to assist their efforts to

¹ This memorandum results from a request made to the authoring attorney in the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly, in the course of performing bill drafting functions for the general assembly. This memorandum reflects the legal analysis of the authoring attorney. This memorandum does not represent an official legal position of the OLLS, the general assembly, or the State of Colorado and does not bind the members of the general assembly. The memorandum is intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

contain the effects of COVID on their communities, residents, and businesses. Under ARPA, the state of Colorado received over \$3 billion to be used for the purposes identified in the federal legislation and accompanying regulations.²

The regulations construing ARPA promulgated by the United States Treasury³ identify a nonexclusive list of uses that address the disproportionate negative effects of COVID, including building stronger communities through investments in housing and neighborhoods. Noting that the economic impacts of COVID have been most acute in lower-income neighborhoods, including concentrated areas of high unemployment, limited economic opportunity, and housing insecurity, the regulations go on to specify that services in the category of "building stronger communities through investments in housing and neighborhoods" include services that alleviate the immediate economic impact of COVID on housing insecurity, while addressing conditions that contributed to poor public health and economic outcomes during the pandemic, namely concentrated areas with limited economic opportunity and inadequate or poor-quality housing. Such eligible services include:⁴

- Services to address homelessness such as supportive housing, and to improve access to stable, affordable housing among unhoused individuals;
- Affordable housing development to increase the supply of affordable and high-quality living units; and
- Housing vouchers, residential counseling, or housing navigation assistance to facilitate household moves to neighborhoods with high levels of economic opportunity and mobility for low-income residents, to help residents increase their economic opportunity and reduce concentrated areas of low economic opportunity.⁵

²See § 24-75-229 (1)(c) in H. B. 21-1329, "Concerning the use of money the state receives from the federal government under the "American Rescue Plan Act of 2021" to make investments in housing to assist persons disproportionately impacted by the COVID-19 public health emergency facing housing insecurity, and, in connection therewith, making an appropriation", First Regular Session, Seventy-third General Assembly.

³Coronavirus State and Local Fiscal Recovery Funds, 31 CFR 35 ("ARPA Regulations"), at II.A.2. <https://www.federalregister.gov/documents/2021/05/17/2021-10283/coronavirus-state-and-local-fiscal-recovery-funds>

⁴*Id.*

⁵*Id.*

To assess whether a program or service is included within the category of eligible uses, a recipient should consider "whether and how the use would respond to [COVID]." Assessing whether a program or service "responds" to COVID requires the recipient to: 1) Identify a need or negative impact of COVID; and 2) Identify how the program, service, or other intervention addresses the identified need or impact. "While [COVID] affected many aspects of American life, eligible uses under this category must be in response to the disease itself or the harmful consequences of the emergency disruptions resulting from or exacerbated by [COVID]."⁶

H.B. 1329 specifies requirements for the use of money the state receives from the federal government under ARPA to make investments in housing to assist persons disproportionately impacted by COVID. Under H.B. 1329, three days after the act's effective date (June 25, 2021), the state treasurer was required to transfer \$550 million from the ARPA cash fund created by S. B. 21-288⁷ into the affordable housing and home ownership cash fund (Housing Fund) created under HB 1329.⁸

For the 2021-22 state fiscal year, \$98,500,000 was appropriated from the Housing Fund to the Department of Local Affairs for use by the Division of Housing (Division). H.B. 1329 directs the Division to use this appropriation for programs or services of the type and kind financed through the housing investment trust fund⁹ and the housing development grant fund¹⁰ to support the programs or services that benefit populations, households, or geographic areas disproportionately affected by COVID to obtain affordable housing focusing on programs or services that address housing insecurity, lack of affordable and workforce housing, or homelessness.¹¹

HB 1329 required the Executive Committee of the Legislative Council, by resolution, to create a task force to meet during the 2021 interim and to issue a report with recommendations to the general assembly and the Governor on "policies to create

⁶*Id.*

⁷"Concerning the creation of the American Rescue Plan Act of 2021" cash fund to hold money that the state receives from the federal coronavirus state fiscal recovery fund until allocation by separate action", First Regular Session, Seventy-third General Assembly.

⁸See §24-75-229 (3)(b)(I), C.R.S., created in section 1 of H.B. 1329.

⁹See §24-32-717, C.R.S.

¹⁰See § 24-32-721, C.R.S.

¹¹See § 24-75-229 (3)(c), C.R.S., created in section 1 of H.B. 1329.

transformative change in the area of housing using money the state receives from ARPA".¹²

S.B. 288 requires that money in the Housing Fund (along with other state funds derived from ARPA) be expended or obligated by December 31, 2024. Any money obligated by December 31, 2024 must be expended by December 31, 2026.¹³

In summary, the federal money received by the state must be broadly used to build stronger communities through investments in housing and neighborhoods to assist those disproportionately affected by COVID. Such eligible uses encompass programs or services that alleviate the immediate economic impact of COVID on housing insecurity, as well as programs or services that address conditions that contributed to poor public health and economic outcomes during the pandemic, namely concentrated areas with limited economic opportunity and inadequate or poor-quality housing.

2. Populations, households, or geographic areas disproportionately impacted by COVID

At the first hearing of the Affordable Housing Transformational Task Force (Task Force), Chair Jackson inquired whether controlling legal authority provides any further specificity with respect to the populations, households, or geographic areas disproportionately impacted by COVID. Information that addresses this question is provided in the ARPA regulations.

The regulations note that, although the impacts of COVID have been widespread, both the public health and economic impact of the pandemic have fallen most severely on communities and populations disadvantaged before it began. The regulations state that low-income communities, people of color, and Tribal communities have faced higher rates of infection, hospitalization, and death, as well as higher rates of unemployment and lack of basic necessities like food and housing. "Pre-existing social vulnerabilities magnified the pandemic in these communities, where a reduced ability to work from home and, frequently, denser housing amplified the risks of infection."¹⁴

The ARPA Regulations explore these effects in greater detail:

¹²*Id.*, at § 24-75-229 (6)(a).

¹³Section 24-75-226 (4)(d) in section 1 of S.B. 288.

¹⁴ARPA Regulations, at I.A.

While the pandemic affected communities across the county, it disproportionately impacted some demographic groups and exacerbated health inequities along racial, ethnic, and socioeconomic lines. The CDC has found that racial and ethnic minorities are at increased risk for infection, hospitalization, and death from COVID, with Hispanic or Latino and Native American or Alaska Native patients at higher risk.

Similarly, low-income and socially vulnerable communities have seen the most severe health impacts. For example, counties with high poverty rates also have the higher rates of infections and deaths, with 223 deaths per 100,000 compared to the U.S. average of 175 deaths per 100,000 as of May 2021. Over the last year, Native Americans have experienced more than one and a half times the rate of COVID infections, more than triple the rate of hospitalizations, and more than double the rate compared to White Americans. Low-income and minority communities also exhibit higher rates of pre-existing conditions that may contribute to an increased risk of COVID mortality.

In addition, individuals living in low-income communities may have had more limited ability to socially distance or to self-isolate when ill, resulting in faster spread of the virus, and were over-represented among essential workers, who faced greater risks of exposure... The combination of these underlying social and health vulnerabilities may have contributed to more severe public health outcomes within these communities, resulting in an exacerbation of pre-existing disparities in health outcomes.¹⁵

The ARPA Regulations further state that economic disparities that existed prior to COVID amplified the impact of the pandemic among low-income and minority groups. "These families were more likely to face housing, food, and financial insecurity; are over-represented among low-wage workers; and may have seen their livelihoods deteriorate further during the pandemic and economic contraction. In recognition of the disproportionate negative impact on certain communities and populations, the interim final rule identified services and programs that will be presumed to be responding to the negative economic impacts of COVID when provided in these communities."¹⁶

¹⁵*Id.*, at II.A.1.

¹⁶ *Id.*, at II.A.2.

According to the ARPA Regulations, the United States Treasury will presume that certain types of services, including the services identified in part 1 of this memorandum, are eligible uses of ARPA funds when provided in a qualified census tract (QCT) to families and individuals living in QCTs, or when those services are provided by Tribal governments.¹⁷ "Recipients may also provide these services to other populations, households, or geographic areas disproportionately impacted by the pandemic. In identifying these disproportionately impacted communities, recipients should be able to support their determination that the pandemic resulted in disproportionate public health or economic outcomes to the specific populations, households, or geographic areas to be served."¹⁸

The interim final rule identifies a nonexclusive list of uses that address the disproportionate negative effects of COVID, including building strong communities through investments in housing and neighborhoods by means of the services and programs identified in part 1 of this memorandum.¹⁹ As stated above, the services outlined alleviate the immediate economic impacts of COVID on housing insecurity, while addressing conditions that contributed to poor public health and economic outcomes during the pandemic, namely concentrated areas with limited economic opportunity and inadequate or poor-quality housing.

By way of summary, the ARPA Regulations make clear that the effects of the pandemic have most severely fallen upon low-income communities, people of color, and Tribal communities and, therefore, those are the persons disproportionately impacted by COVID. As low-income communities, people of color, and Tribal communities are concentrated in certain QCTs, the ARPA Regulations specify a presumption that certain types of services, including the services identified in part 1 of this memorandum, are eligible uses of ARPA funds when provided in a QCT to families and individuals living in a QCT, or when those services are provided by Tribal governments. These services may also be provided to other populations, households, or geographic areas disproportionately impacted by the pandemic. In identifying these disproportionately impacted communities, a recipient of ARPA funds must be able to support their determination that the pandemic resulted in disproportionate public

¹⁷A qualified census tract is any census tract or equivalent geographic area define by the Census Bureau in which at least 50% of the households have an income less than 60% of the area median gross income. <https://catalog.data.gov/dataset/qualified-census-tracts>

¹⁸ARPA Regulations, at II.A.2.

¹⁹*Id.*

health or economic outcomes to the specific populations, households, or geographic areas to be served.

Conclusion

Please contact Bob Lackner at (303) 866-4350 with additional questions concerning this matter.