

## Monterey Town Administrator

---

**From:** Steven Weisz <steve@montereyma.gov>  
**Sent:** Friday, March 4, 2022 3:59 PM  
**To:** Monterey Town Administrator  
**Subject:** Fwd: Use of ARPA funds

FYI.

Begin forwarded message:

**From:** Brian Riley <BRiley@k-plaw.com>  
**Date:** March 4, 2022 at 2:45:43 PM EST  
**To:** Steven Weisz <steve@montereyma.gov>  
**Cc:** "Brian M. Maser" <BMaser@k-plaw.com>, "Matthew V. Sirigu" <MSirigu@k-plaw.com>  
**Subject:** RE: Use of ARPA funds

Hi, Steve. Matt Sirigu of our office has extensively reviewed the ARPA regulations and advisories and put together the analysis of your questions below. Feel free to contact us if this leads to further questions.

**1. To pay all our employees a bonus/HAZARD PAY (not premium pay) and if this is allowed can you provide us some guidance on how best to do this and report on it without it falling under "premium pay". WOULD ALL EMPLOYEES BE ELIGIBLE REGARDLESS OF POSITION AND IF THEY ARE LOW-MODERATE INCOME WORKERS**

In my opinion, there is no material distinction, for ARPA purposes, between hazard pay and premium pay; the terms are synonymous in this context. Treasury has explained that premium pay may be funded with ARPA funds where the pay "is designed to compensate workers that, by virtue of their employment, were forced to take on additional burdens and make great personal sacrifices as a result of the COVID-19 pandemic. Premium pay can be thought of as hazard pay by another name." See Final Rule, p. 219.

With respect to eligible employees, no, not all employees would be eligible for hazard pay regardless of position, but many would. There are three requirements for a hazard/premium pay programs funded with ARPA dollars: the pay must (1) "respond to" (2) "eligible workers" (3) performing "essential work." Under ARPA and the U.S. Treasury Department's Final Rule, all municipal employees are "eligible workers." See Final Rule, §35.3 ("...any work performed by an employee of a State, local, or Tribal government..."). However, some municipal employees may not have been performing "essential work" at all times or throughout the pandemic, as this term is defined as work (1) not performed remotely, and (2) that involves regular in-person interactions with patients, the public, or coworkers or regular handling of physical items that were, or are to be, handled by patients, the public, or coworkers. Id. Admittedly, this is a fairly broad definition and perhaps most if not all of the Town's employees qualify under this definition, and the pay may be provided retroactively for any work that qualified under that definition. However, I do not have facts sufficient to form a conclusion on that point, and recommend individual determinations be made for each employee (or employee group) being considered for hazard pay.

Based on your question, it appears you understand the third requirement for payment of premium or hazard pay with ARPA funds, that being that it "respond to" eligible workers performing essential work. Treasury has explained that hazard pay will be presumed to "respond to" essential workers needs if it is provided to low- and moderate-income persons because of the significant share of essential workers that are low- or moderate-income, and because these workers are less able to bear the costs

associated with illness. However, if an ARPA recipient would like to provide hazard/premium pay to higher-income employees, they may provide a written justification to Treasury explaining how the pay “responds to” the needs of eligible workers performing essential work. This written justification must be “a brief, written narrative justification of how the premium pay or grant is responsive to workers performing essential work during the public health emergency...[which] could include a description of the essential workers’ duties, health or financial risks faced due to COVID-19, and why the recipient determined that the premium pay was responsive despite the workers’ higher income.” Final Rule, p. 230. Moreover, following the notice and comment period for the Interim Final Rule, Treasury expanded the universe of presumptively eligible employees so that not only low- and moderate-income employees may receive premium/hazard pay without the employer having to submit a written justification for the payment. Now, under the Final Rule, you may also provide this pay to employees not exempt from the overtime provisions of the FLSA, and that will presumptively satisfy the “responds to” requirement of ARPA with respect to hazard/premium pay.

In sum, you may provide hazard pay (which may be provided in hourly or lump sum increments and up to an additional \$13 per hour or \$25,000 total per employee) to employees that (1) are low- or moderate-income or exempt from the overtime provisions of the FLSA and (2) performed in-person duties interacting with the public or regularly handling items handled by the public during the period for which the hazard pay is being provided.

**2. To contribute towards a new ambulance through the volunteer ambulance service in Gt Barrington (they are requesting this of all towns that use their ARPA monies for this purpose)**

Yes, this would be a capital expenditure that responds to the COVID-19 public health emergency. See Final Rule, §35.6(b). Eligible expenditures under this category include “[a]cquisition of equipment for COVID-19 prevention and treatment, including ventilators, ambulances, and other medical or emergency services equipment[.]” Final Rule, p. 61.

**3. To use as matching funds on grants applied to do road maintenance, drainage/flood control culvert replacement.**

Whether this proposed use is eligible depends on the specific nature of the project.

To begin, ARPA funds may be used to meet the Town’s matching funds obligations if the project towards which the funds are being applied would otherwise qualify as an eligible ARPA fund use. Road maintenance alone is not an eligible use of ARPA funds. However, stormwater management is an eligible use. Final Rule, §35.6(e)(ii). Originally, under the Interim Final Rule, stormwater management projects had to be eligible under the Clean Water State Revolving Fund (CWSRF) program, which includes “measures to manage, reduce, treat, or recapture stormwater or subsurface drainage water.” Final Rule, p. 276. While the CWSRF generally focuses on stormwater projects that improve drinking water quality, Treasury expanded the eligible uses for this purpose under the Final Rule such that all stormwater management projects, including culverts, are eligible regardless of their apparent or immediate impact on the clean water drinking supply. See Final Rule, p. 282 (“Treasury is expanding the eligible uses under the final rule to include stormwater system infrastructure projects regardless of whether there is an expected water quality benefit from the project.”). Therefore, a culvert replacement project would, in my view, be an eligible use of ARPA funds. Significantly, if the culvert replacement necessitates road repairs or replacement (as it often would), that expense may be rolled in as well. Treasury explained:

[T]he final rule now permits the use of SLFRF funds for the repair, replacement, or removal of culverts or other road-stream crossing infrastructure to the extent the purpose of the project is to manage stormwater. In addition, Treasury understands that the repair, replacement, or removal of culverts may necessitate the repair or upgrade of roads. As noted in guidance issued after the interim final rule, recipients may use SLFRF funds for road repairs and upgrades that interact directly with an eligible stormwater infrastructure project.

Final Rule, p. 282 (emphasis added).

Separately, road maintenance and improvements would qualify as “government services” that may be covered with lost revenue replacement ARPA funds, discussed below.

**4. Pay the privately owned company Fiber Connect to get us closer to 100% coverage with Fiber (currently they are getting MBI funds to cover up to 97%)**

Yes, this would be an eligible use, in my opinion. ARPA allows the use of local fiscal relief funds for investments in broadband infrastructure, and this investment may be made through private companies. See Final Rule, §35.6(e)(2). The Town, as the funding recipient, has the discretion to determine which local households and businesses are in need of such broadband infrastructure investments, and may fund the investments with ARPA money so long as the infrastructure is designed to reliably provide 100 Mbps download and upload speed. Id. I understand Fiber Connect generally strives to provide 1 Gbps speeds, therefore their service would appear to qualify. Thus, where the funds would be used to provide broadband service to the remaining 3% of the Town without connectivity to Fiber service, this project would, in my opinion, meet both requirements for the use of ARPA funds for broadband infrastructure investments.

I note that the service provider for completed broadband infrastructure investment projects must, “for as long as the {ARPA}-funded broadband infrastructure is in use,” participate in the FCC’s Affordable Connectivity Program or otherwise provide access to a broad-based affordability program for low-income consumers in the service area. Final Rule, §35.6(e)(2)(i)(C). It appears, from the company’s website, that Fiber Connect has a low-income subsidy program. Nevertheless, I recommend, if this project were pursued further, that this point be raised with the company to ensure its program complies with this requirement.

**5. Create (and pay for) a new administrative position in town hall**

I cannot opine on this position without additional information, but can provide the guiding principles for funding new hires with ARPA money. In sum, the eligibility of this payroll expense depends on the number of employees, if any, the Town laid off during the pandemic, and the administrative duties the position would perform. ARPA funds may be used to “support public sector capacity and workforce,” which includes, amongst other things, “[c]osts associated with addressing administrative needs of recipient governments that were caused or exacerbated by the pandemic.” Final Rule, §35.6(b)(3)(ii)(E)(4). Moreover, such support for the public sector workforce may include payroll, covered benefits, and other workforce costs (1) to hire staff to fill budgeted full-time equivalent positions that existed on January 27, 2020 but were unfilled or eliminated as of March 3, 2021, or (2) increase the number of budgeted full-time equivalent employees as of January 27, 2020 by 1.075 of the number of such employees employed as of that date. Final Rule, §35.6(b)(3)(ii)(E)(2).

Therefore, this administrative position may be created and paid with ARPA funds to the extent that (1) the position’s duties will address administrative needs caused or exacerbated by the pandemic, (2) the Town’s staff decreased since the pandemic began (i.e. January 27, 2020), or (3) the Town’s staff has not increased beyond 1.075 times the Town’s staffing level as of January 27, 2020

**6. Create (and pay for) 2 new full time police officer positions**

The discussion above concerning staffing levels applies equally here. If the Town has reduced its police force or not expanded it beyond 1.075 times what it was as of January 27, 2020, these salaries could be covered.

In addition, public health and safety payroll expenses may also be covered “to the extent that the employee’s time is spent mitigating or responding to the COVID-19 public health emergency.” I assume these police officers would not be exclusively responding to or mitigating the effects of the COVID-19 public health emergency, and therefore their wages or salaries could not be entirely covered by ARPA funds. However, to the extent they are performing COVID-19-related tasks, that portion of their salary or wages could. Treasury explained that, “responding to COVID-19 for a public safety worker may entail working in an emergency operations center to coordinate pandemic-related supply distribution, responding to an increased volume of 911 calls, or implementing COVID-19 prevention and mitigation protocols in a carceral setting.” Final Rule, p. 176.

It may be better to consider the amount of the police department's staff time that is dedicated to COVID-19 measures, and the commensurate payroll or hours that are dedicated to this purpose, overall, and applying ARPA funds to those wages (i.e. a portion of several employees' wages, instead of all of two employees' wages). In turn, the police department's budget may be reorganized such that there are the resources to fund these two new positions with the Town's existing resources, and to fund the wages paid to any officers whose time is dedicated to COVID-19 measures with ARPA funds.

Separately, public safety costs, including payroll, are a "government service" that may also be covered with lost revenue replacement ARPA funds, discussed immediately below.

- 7. Replace the fire truck hose (Fire equipment IS owned by the town)**
- 8. Install security cameras on the outside of town hall**
- 9. To help pay for milfoil removal in Lake Garfield (a great pond) (we are thinking this would be "environmental remediation" as mentioned in the CLA presentation?)**
- 10. To build an outdoor pavilion on the Community Center (Town) property**
- 11. To pay for capital improvements on our fire house which is owned by the Monterey Fire Company and NOT the town.**
- 12. To purchase electronic voting equipment.**

These six items could all, in my view, be covered as "government services" funded with ARPA money designated to replace lost revenue, but otherwise do not fall within one of the enumerated eligible uses of ARPA funds. One of the eligible uses of ARPA funds is to replace lost revenue resulting from the pandemic. Originally, under the Interim Final Rule, recipients had to conduct a complex calculation to determine what one's estimated lost revenue was. Under the Final Rule, however, recipients may take the so-called "standard allowance" and designate up to \$10 million as lost revenue. Given the amount of ARPA funding received, the Town could designate all of its ARPA money for this purpose. ARPA funds used for this purpose may be spent on any "government service" and is subject to a streamlined reporting process. Government services is not specifically defined, but is very broad and includes most services provided by ARPA recipients. Government services include, but are not limited to, "maintenance or pay-go funded building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; and the provision of police, fire, and other public safety services." Final Rule, p. 260. The only things Treasury has said will not qualify as a government service are (1) deposits into pension funds or reserve accounts, (2) satisfaction of judgments or settlements, and (3) costs associated with issuance or payment of debt. Final Rule, p. 211.

Therefore, costs associated with fire services (even where such services are provided through the Fire Company), capital improvements to Town Hall or the Community Center, "environmental remediation" costs, and new voting equipment would all, in my opinion, be government services eligible for coverage with any amount of the Town's ARPA funds that are designated to replace lost revenue.

### **13. Augment Town nursing services**

Like police officers' payroll costs, this expense would be eligible to the extent the nurses time is dedicated to responding to the COVID-19 pandemic. With nurses, this may be more readily demonstrated, but I do not know what specific duties are fulfilled by the Town's nursing service providers, and it may therefore be worth explaining the rules for this eligible use in more detail here, especially since the nurses' time might be entirely dedicated to "mitigating or responding to the COVID-19 public health emergency."

The focus here is whether the employee, or the employee's division or operating unit, is primarily dedicated to COVID-19 response measures. Treasury has explained that recipients do not need to track hours to determine if and to what extent an employees' time is dedicated to COVID-19 response tasks, though this could be done if the employer wishes to only cover a portion of the employee's wages with ARPA money (i.e. the portion of the employee's time spent on COVID-19 mitigation efforts). Instead, recipients may make presumptions about certain employees or roles, and may make assessments at a division or operating unit level. The Town could "estimate, based on discussions with staff, the general share of time that employees in a specific role or type of position spend on COVID-19 related tasks and apply that share of time to all employees in that position." Final Rule, p. 174. The Town should periodically reconsider such presumptions and assessments, and must keep records that enable it to justify these assumptions or designations for employees, such as payroll records, attestations from supervisors, or work product. If a presumption or assessment that an entire division or department's work

is dedicated to this purpose, and therefore payroll for the entire division or unit will be covered, the determination must be that the majority of the employees in that unit are fully dedicated to responding to COVID-19. Finally, while the response to COVID-19 continues to evolve, payroll for these employees may be covered through December 31, 2024, assuming the employee's or unit's duties are still primarily dedicated to COVID-19 response; the employer must periodically reassess the employee's or unit's duties from time to time if it will continue to cover these payroll expenses with ARPA funds for an extended period of time.

Separately, public health costs, including payroll, are a "government service" that may also be covered with lost revenue replacement ARPA funds, discussed above.

#### **14. Senior transportation?**

If the transportation is to a testing or vaccination site, yes without qualification, as this would be a covered COVID-19 mitigation and prevention measure in a manner consistent with CDC guidance, which Treasury has explained includes "support to vulnerable populations to access medical or public health services" Final Rule, §35.6(b)(3)(i)(A). Otherwise, this could be covered as a "government service" with any amount of ARPA funds the Town designates to replace lost revenue, as explained above.

As the above shows, each program or expense must be assessed based on the particulars of the expense or program and whether it complies with the spirit and intent of ARPA, which is, broadly speaking, to address the effects of the COVID-19 pandemic and provide aid and support to impacted populations and communities. What the above also shows is that, for many smaller funding recipients, there are benefits to designating all or a majority of their ARPA funds to replace lost revenue, as this expands the universe of eligible expenses that may be covered with ARPA funds (because "government services" is broader than the otherwise eligible uses listed in the Final Rule) and provides for a streamlined reporting process. To be sure, however, nothing said herein should be interpreted or understood as an endorsement or recommendation as to any particular expense. How to allocate ARPA funds is, ultimately, a highly discretionary policy decision, and we have only provided our opinion as to what uses would be eligible based on the information provided. I express no opinion on the relative merits of any of the proposed uses of ARPA funds listed above.

If you have any additional questions or potential uses, please do not hesitate to contact me.

Brian

Brian W. Riley, Esq.  
KP | LAW  
101 Arch Street, 12th Floor  
Boston, MA 02110  
O: (617) 654 1722  
F: (617) 654 1735  
C: (617) 909 9084  
briley@k-plaw.com  
www.k-plaw.com

This message and the documents attached to it, if any, are intended only for the use of the addressee and may contain information that is PRIVILEGED and CONFIDENTIAL and/or may contain ATTORNEY WORK PRODUCT. If you are not the intended recipient, you are hereby notified that any dissemination of this communication is strictly prohibited. If you have received this communication in error, please delete all electronic copies of this message and its attachments, if any, and destroy any hard copies you may have created and notify me immediately.

-----Original Message-----

From: Steven Weisz <steve@montereyma.gov>  
Sent: Tuesday, February 22, 2022 10:32 AM  
To: Lauren F. Goldberg <LGoldberg@k-plaw.com>; Brian Riley <BRiley@k-plaw.com>; Brian M. Maser <BMaser@k-plaw.com>  
Subject: Use of ARPA funds

All,

The town of Monterey has been notified that it will be receiving a total of \$ 276,190 in funds through the AMERICAN RESCUE PLAN ACT.

The Selectboard has discussed (in public session) the possibility of using the funds to offset some budgetary items and/or introduce new services to the taxpayers.

After hearing from our Accountant and reviewing the CLA presentation they attended, it was suggested that Town Counsel would have a better understanding of what can be legally used under this act.

Can you please confirm if the following would be allowable expenses to use ARPA monies on?

Thank you,

Steven Weisz, Chair  
Monterey Selectboard

1. To pay all our employees a bonus/HAZARD PAY (not premium pay) and if this is allowed can you provide us some guidance on how best to do this and report on it without it falling under "premium pay". WOULD ALL EMPLOYEES BE ELIGIBLE REGARDLESS OF POSITION AND IF THEY ARE LOW-MODERATE INCOME WORKERS
2. To contribute towards a new ambulance through the volunteer ambulance service in Gt Barrington (they are requesting this of all towns that use their ARPA monies for this purpose)
3. To use as matching funds on grants applied to do road maintenance, drainage/flood control culvert replacement.
4. Pay the privately owned company Fiber Connect to get us closer to 100% coverage with Fiber (currently they are getting MBI funds to cover up to 97%)
5. Create (and pay for) a new administrative position in town hall
6. Create (and pay for) 2 new full time police officer positions
7. Replace the fire truck hose (Fire equipment IS owned by the town)
8. Install security cameras on the outside of town hall
9. To help pay for milfoil removal in Lake Garfield (a great pond) (we are thinking this would be "environmental remediation" as mentioned in the CLA presentation?)
10. To build an outdoor pavilion on the Community Center (Town) property
11. To pay for capital improvements on our fire house which is owned by the Monterey Fire Company and NOT the town.
12. To purchase electronic voting equipment.
13. Augment Town nursing services
14. Senior transportation?