
Coates' Canons Blog: American Rescue Plan Act of 2021: Local Government Authority to Expend their Allocations

By Kara Millonzi

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On March 11, 2021, the federal American Rescue Plan Act of 2021 (ARP) became law. There is still a lot to be deciphered in this \$1.9 trillion stimulus package; the third such major relief act since the onset of the COVID-19 pandemic. We do know that the law includes substantial aid for state and local governments. With respect to local governments, some monies will be distributed directly to them (specifically, allocations to counties and municipalities with populations over 50,000). Other monies will be allocated to the State for distribution to qualifying local governments (all other municipalities). See Part 8, Subtitle M—Coronavirus State and Local Fiscal Recovery Funds of H.R. 1319 American Rescue Plan Act of 2021. The monies will be distributed in tranches, with the first payment made within 60 days' of the law's enactment. The second tranche will be distributed a year after the first. The monies may be used for costs incurred by December 31, 2024.

Aside from their expected allocation amount, local government officials want to know the purposes for which the monies may be spent and whether or not the grant of funds from the federal government is sufficient to provide North Carolina local governments expenditure authority. This blog post addresses these two issues. As a caveat, this post is based on interpretations of the federal law and current state law. There may be different interpretations promulgated by the agencies charged with implementing the aid to local governments and there may be changes to state law to facilitate the receipt and expenditure of funds by local governments. I will update this post as more information becomes available, particularly guidance on reporting and accountability measures.

Note also that this post only deals with monies allocated directly to local governments by the ARP. The General Assembly may appropriate additional monies from the State's ARP allocation to local governments, and to certain special districts and public authorities, and will set the expenditure parameters for those funds. And the ARP provides funding for many other programs, services, activities, and projects, that will directly aid a local government's citizens, utility customers, community groups, businesses, nonprofits, and other government entities. (For a brief overview of key provisions of the ARP, see this National Conference of State Legislatures' **summary**.) Local government officials will want to understand how all of this targeted relief will impact their communities as they make their own appropriation decisions.

Turning back to the purpose of this post, let's look at local government authority to spend ARP allocations for the specified purposes.

General Authority to Spend ARP Funds

In North Carolina, local governments must have statutory authority to undertake any activity, including the receipt and expenditure of federal grant/aid monies. The fact that the federal government is providing monies either directly or indirectly to NC local governments does not, alone, give those local governments authority to spend that money. We have to look to state law for that authority—specifically **G.S. 160A-17.1**, which allows

the governing body of any city or county ... to make contracts for and to accept grants-in-aid and loans from the federal and State governments and their agencies for constructing, expanding, maintaining, and operating any project or facility, or performing any function, which such city or county may be authorized by general law or local act to provide or perform.

Thus, a local government has specific authority to accept ARP funds, but must spend the monies consistent with federal requirements and within the contours of state law authority. Note, also, that once grant proceeds are received by a local government, they are public funds and subject to the same budgeting, fiscal management, expenditure control, and

accounting rules as all other local government monies, according to the **Local Government Budget and Fiscal Control Act, G.S. Ch. 159, Art. 3.**

ARP Expenditure Parameters for Local Government Allocations

That leads to the second issue. What does ARP authorize local governments to spend the stimulus monies on and do local governments have state law authority to spend the monies for these purposes?

According to new Sect. 603(c) of 42 USC 801 (Coronavirus Local Fiscal Recovery Fund), monies received by any of the qualifying local government entities (whether directly from the federal government or from the State as a pass-through) may be used for the following four categories of expenditures. Under each purpose stated in the federal law (which is in bold italics), I detail whether, and to what extent, state law authority currently exists for a local government to spend monies for this purpose.

To respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality.

This provision encompasses a broad array of potential local government expenditures. There are myriad ways that counties and municipalities might provide assistance to community members and organizations to mitigate the negative economic impacts of COVID-19. As detailed above, though, a local government must have state law authority to undertake any specific program, service, activity, or project (collectively, programs). A local government may use this money to fund existing or new local government programs, to make grants to nonprofits or other community organizations, and to provide aid to small businesses.

Local government programs. A local government has broad authority to undertake programs that benefit its citizens. It will be difficult to catalogue all of the possible state statutes that authorize such programs. They may range from public health and social services programs, to community and economic development programs, to social, cultural, and recreational programs.

Under **G.S. 160D-1311**, for example, a local government has wide-ranging authority to provide “programs concerned with employment, economic development, crime prevention, child care, health, drug abuse, education, and welfare needs of persons of low and moderate income.” A local government may use some (or all) of its ARP monies to fund current or new programs related to the negative economic impact of COVID-19 on its low- or moderate-income citizens. And these programs could be structured to provide services, supplies, infrastructure, or even direct monetary aid to qualifying citizens.

Similarly broad is the authority under **G.S. 160A-497**, which allows a county or municipality to “undertake programs for the assistance and care of its senior citizens [defined as those who are at least 60 years of age] including but not limited to programs for in-home services, food service, counseling, recreation and transportation....” A local government may use its ARP monies to support its senior citizens dealing with pandemic-related issues.

These are, of course, just two examples. There are many other sources of state law authority that allow a local government to use ARP monies to fund its own programs that will aid its community members in responding to COVID-19 and mitigating its financial impact. And the only expenditure limitation under the federal law is no ARP monies may be used to fund pensions.

Grants to nonprofits. What about providing grants or donations to private entities, such as nonprofits, chambers of commerce, or other organizations that are serving the community during the pandemic? This is a little more complicated. The ARP specifically authorizes a local government to transfer any of these monies to a private nonprofit organization (as defined by 42 USC 11360(17)) or a public benefit corporation involved in the transportation of passengers or cargo.

However, unless pursuant to a specific, statutorily authorized program, a local government may not simply grant, appropriate, or donate monies to nonprofit entities, even if it only uses ARP dollars. Under current law,* though, a local government may contract with a private individual or entity to carry out an activity/program/project that the

local government has statutory authority to undertake. See **G.S. 160A-20.1** (municipalities); **G.S. 153A-449** (counties).

In other words, if a municipality or county has statutory authority to finance a particular program, then it may contract with a private entity to perform that program. But a municipality or county may not appropriate public monies to a private entity, including a non-profit, if the monies ultimately will be spent on a program that the government could not fund directly.

Further, a local government that contracts with a nonprofit for a particular purpose has an obligation to ensure that the nonprofit carries out the public purpose that it was contractually obligated to undertake. There are a number of ways that a local government may go about monitoring the expenditures of public funds by a nonprofit—and the methods likely will vary depending on the size of the unit and the types of expenditures at issue. The North Carolina Supreme Court has provided some guidance to local governments on this issue—sanctioning a particular oversight method in *Dennis v. Raleigh*, 253 N.C. 400 (1960). That case involved a challenge to an appropriation of funds by the City of Raleigh to a local chamber of commerce, to be spent on advertising the city. The chamber of commerce engaged in a variety of activities, some of which were unlikely to be considered public purposes. Thus, the city sought to ensure that the public funds it appropriated to the chamber of commerce were spent appropriately. The city put in place three separate “controls.” First, the appropriation to the chamber of commerce was specific—it stated that the monies were to be used “exclusively for . . . advertising the advantages of the City of Raleigh in an effort to secure the location of new industry.” Second, the city council reserved the right to approve each specific piece of advertising. Third, the chamber of commerce had to account for the funds at the end of the fiscal year. On the basis of the control exercised by the city over the expenditure of the public funds, the court upheld the appropriation.

The first and third “controls” placed on the chamber of commerce by the City of Raleigh in *Dennis* likely are particularly instructive. These controls parallel the appropriation and annual audit requirements placed by the **Local Government Budget and Fiscal Control Act** on moneys spent directly by a municipality or county. At a minimum, a local government should provide clear guidelines and directives to the private entity as to how and for what purposes public monies may be spent, and the unit should require some sort of accounting from the private entity that it fully performed its contract obligations. See this **previous post** for more information on the performance accounting options.

**Note that it is possible that the General Assembly will give local governments authority to make these grants directly to nonprofits. At least one bill has been introduced that would allow the City of Durham to provide such grants —H268. (As of this writing the bill has not been enacted by the General Assembly.)*

Aid to small businesses. With respect to providing aid to small businesses, my colleague, Tyler Mulligan, has summarized a local government’s state law authority to provide that type of assistance here and here. (Note that at least one of those blog posts was written to address issues related to the first federal stimulus bill, known as the CARES Act. Although the ARP is a different federal law, the state law considerations are the same.)

To respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers of the [qualifying local government] that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work. Eligible workers are “those workers needed to maintain continuity of operations of essential critical infrastructure sectors” and additional sectors that a local government’s manager, administrator, or mayor designates as critical to protect the health and well-being of the local government’s residents. Premium pay is defined as “an amount of up to \$13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency.” The total amount of premium pay per worker may not exceed \$25,000.

Under current law, local governments have broad statutory authority to provide for employee compensation and fringe benefits (see **G.S. 160A-162** for municipalities and **G.S. 153A-92** for counties). This state law authority is sufficient to allow local governments to use ARP funds to award premium pay to essential workers, consistent with federal law. Local government officials will need to work with their attorney to determine who qualifies and how to implement the premium pay, consistent with other employment laws and the local unit’s personnel policies.

Counties, in particular, need to be careful in how premium pay is structured because of statutory prohibitions on reducing the compensation of certain employees, including sheriff office employees and register of deed employees. County commissioners also do not have direct control over the compensation of certain county employees, including election office employees (other than the director of elections).

The ARP also allows a local government to give grants to private sector employers to provide premium pay to their essential workers. However, there is no clear state statutory authority for a local government to do this. It is possible, that a local government could establish a hazard pay program for low- or moderate- income workers (as per above), but that would not allow grants to eligible employers for all of their essential employees. Similarly, if a nonprofit or small business contracts with a local government to perform a specific function (as per above), it's possible that the private entity could use some of its payment from the local government to provide premium pay to its essential employees. But I am not aware of a current state statute that would allow a local government to grant monies to private entities solely for the purpose of providing premium pay to essential workers.

For the provision of government services to the extent of the reduction in revenue of such [qualifying local government] due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year of the [local government] prior to the emergency.

This provision allows a local government to use the stimulus funds to replace lost revenue due to the pandemic. A local government will need to document the loss by comparison to the 2018-2019 fiscal year (which was the most recent full fiscal year prior to the COVID-19 pandemic). These replacement revenues may replenish a local government's fund balance or be appropriated for other purposes by the local government's governing board. As mentioned above, the monies must be used to cover costs incurred by December 31, 2024. A local government should fully understand the reporting and accountability requirements before using ARP monies to replace lost revenue; more guidance on this issue from the federal and state agencies should be forthcoming.

To make necessary investments in water, sewer, or broadband infrastructure.

Many local governments provide water and sewer services. There is existing statutory authority to allow these governments to spend ARP monies on necessary water and sewer infrastructure projects. See **G.S. 153A-276** for counties and **G.S. 160A-313** for municipalities. The monies may not be used to cover operating expenses (although the revenue replacement provision in number (3) allows a local government to cover lost water and sewer revenues due to the pandemic). Pending further direction from the federal or state government, it will be up to the local government's governing board to determine what infrastructure investments are necessary.

The state law authority for broadband is much more limited. Currently, counties do not have authority to construct or fund broadband infrastructure, except as needed for county operations. Pursuant to G.S. 153A-459 (enacted by SL 2019-111), a county may

provide grants to unaffiliated qualified private providers of high-speed Internet access service, as that term is defined in G.S. 160A-340(4), for the purpose of expanding service in unserved areas for economic development in the county. The grants shall be awarded on a technology neutral basis, shall be open to qualified applicants, and may require matching funds by the private provider. A county shall seek and consider requests for proposal from qualified private providers within the county prior to awarding a broadband grant and shall use reasonable means to ensure that potential applicants are made aware of the grant, including, at a minimum, compliance with the notice procedures set forth in G.S. 160A-340.6(c). The county shall use only unrestricted general fund revenue for the grants. For the purposes of this section, a qualified private provider is a private provider of high-speed Internet access service in the State prior to the issuance of the grant proposal. Nothing in this section authorizes a county to provide high-speed Internet broadband service.

Counties may only use "unrestricted general fund revenue" to make these grants, though. That does not include ARP monies because these funds are restricted.

Municipalities have authority to fund broadband (and construct broadband infrastructure) as a public enterprise, see *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 606 S.E.2d 721 (2005), but the General Assembly

severely curtailed that authority several years ago. A municipality must be able to satisfy all of the process and substantive requirements in **G.S. Ch. 160A, Art. 16A** in order to construct broadband infrastructure other than for municipal government purposes, even dark fiber that it then leases or sells to private entities to provide broadband services. (See **this post** for more details.)

Outside of developing it for its own purposes, a local government likely will not be able to use ARP monies to construct broadband infrastructure more broadly absent additional legislative authority.

Sharing Allocations with Other Local Government Entities

A local government may wish to partner with another local government entity to use ARP funds to carry out one or more of the allowed purposes. The ARP specifically authorizes a local government to transfer any of its allocation to a “special-purpose unit of State or local government.” A special-purpose unit of State or local government likely encompasses all of the special districts and public authorities that are subject to the Local Government Budget and Fiscal Control Act. (See **this blog post** for a list of those entities).

Under state law, there also is broad authority for a local government to enter into an interlocal agreement with another government entity to accomplish a public purpose that the local government has statutory authority to undertake. See **G.S. Ch. 160A, Art. 20**.

Links

- www.congress.gov/bill/117th-congress/house-bill/1319/text#H65C66E46488F4CB6ACD99E77DF090885
- www.ncsl.org/Portals/1/Documents/statefed/The-American-Rescue-Plan-Act-Provisions_v01.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-17.1.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_159/Article_3.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160D/GS_160D-1311.html
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-497.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-20.1.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-449.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_159/Article_3.html
- www.ncleg.gov/Sessions/2021/Bills/House/PDF/H268v1.pdf
- ced.sog.unc.edu/using-federal-coronavirus-relief-funds-for-small-business-support/
- ced.sog.unc.edu/local-government-support-for-small-business-recovery-and-reopening/
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-162.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-92.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-276.html
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