



Kevin J. Murphy
City Manager
Michael McGovern
Assistant City Manager

June 1, 2017

Mayor Edward J. Kennedy, Jr.
and
Members of the City Council

REFERENCE: **8.11. 4/11/17 M. Kennedy** - Req. City Mgr. provide City Council and the LHS Building Committee with clarification regarding the apparent conflict between 963 CMR 2.21 and the recent Skanska response to the inquiry regarding Section 3.1.8 (Regarding Past Projects) of the MSBA Preliminary Design Program Review, report to include an estimate of the financial impact of this provision should the high school leave the downtown area.

Dear Mayor Kennedy and Members of the City Council:

Attached, please find a copy of a letter from the Massachusetts School Building Authority General Counsel Dennis Ryan addressing the above motion request.

Please feel free to contact me if you have further questions regarding this matter.

Sincerely,

Kevin J. Murphy
City Manager

Massachusetts School Building Authority

Deborah B. Goldberg
Chairman, State Treasurer

James A. MacDonald
Interim Chief Executive Officer

John K. McCarthy
Executive Director / Deputy CEO

May 9, 2017

Honorable Edward Kennedy
City of Lowell
Lowell City Hall
375 Merrimack Street, Second Floor, Room 43
Lowell, MA 01852

Re: Your email of April 12, 2017/Lowell High School

Dear Mr. Mayor,

This is in response to your email of April 12, 2017. In my April 11, 2017 letter, I advised that the MSBA does not intend to recoup any pro-rated portion of the financial assistance that Lowell previously received for the Lowell High School Reconstruction Project. That financial assistance was approved by the Department of Education ("DOE") under the former School Building Assistance Program ("SBA") and the project was completed in 1998. You are asking that I reconsider that opinion based upon a 2006 MSBA Regulation which provides that the MSBA "*may recapture a portion of the financial assistance that [an] Assisted Facility has received*" if the Assisted Facility is "*removed from service prior to the end of a 50 year anticipated useful life*". (963 CMR 2.21). You further reference a repealed DOE Regulation which applied to projects that were approved and funded by the SBA. The Regulation contained a similar recoupment provision which could be waived for a variety of reasons, including, when a "*facility [was] being removed from service pursuant to [an approved] school construction plan ... for the replacement of the school building*". (603 CMR 38.16).

The MSBA was established in 2004 to remedy grant administration problems that eventually overwhelmed the 1948 SBA Program. (Chapter 210 of the Acts of 2004). Under the SBA Program, some municipalities funded and constructed school facilities prior to funds being available at the state level to provide the reimbursement. The DOE did not have a dedicated revenue source nor was there any limitation placed upon the number of Projects that could be constructed and/or entitled to state reimbursement. As a consequence, demand quickly out-paced the ability of the DOE to fund and the DOE was forced to establish an ever growing "Waiting List" of municipalities who were entitled to future reimbursement. Ultimately, the SBA ad-hoc system had to be replaced with a more structured sustainable program through which proposed projects could be approved for funding, prospectively. In addition, all outstanding SBA funding obligations had to be paid down. Under its enabling act, the MSBA is given the authority to review, approve and award funding for new school projects and the direction to reimburse municipalities for the cost of projects that have been previously approved under the SBA. Those projects included projects that had received grant reimbursements from the DOE prior to the formation of the MSBA ("Prior Grant Projects") and projects that were then on the DOE Waiting List for future reimbursement when the MSBA was established ("Waiting List Projects"). (MGL Chapter 70B: Section 45).

The Lowell High School Renovation was a \$28,407,855 SBA Grant Project that was completed in 1998. The SBA began making Grant payments in 1997 and the obligation to pay the balance of that Grant was transferred to the MSBA in 2004 when the SBA was discontinued. At the time of transfer, \$16,492,179 in accumulated costs remained to be reimbursed and the MSBA paid that amount to Lowell in equal



installments. The final installment was paid in 2016. Lowell is currently considering multiple options including the construction of a new High School that would replace the current school facility.

My opinion remains unchanged for the following reasons:

- (1) The amount that the MSBA is authorized to recoup from a Prior SBA Grant is limited. Chapter 70B: Section 15 (a) of the MSBA enabling statute provides: *"In the event that an eligible applicant sells or leases [a] facility ... [for] which it is receiving grant payments, ... the proceeds from the sale or lease shall be divided between the authority and the general funds of the applicable eligible applicant in proportion to the ... prior investments in the assisted structure or facility [provided], in the case of [a] school project approved before July 1, 2004, the authority's share of the proceeds shall reduce the balance of outstanding grant payments ... and shall not exceed that amount."* Lowell is not "receiving grant payments" for the SBA Project nor is there any remaining "balance of outstanding grant payments".
- (2) In conformance with the intent of Chapter 70B and established practice, the MSBA has not previously sought to recoup any portion of an SBA Prior Grant once twenty (20) years have passed from the date of the first SBA Grant payment. The Lowell High School Reconstruction Project was funded with an SBA Approved Grant and completed in 1998. Lowell received its first SBA Grant payment from the DOE in 1997 and the final SBA Grant payment was made by the MSBA in 2016.
- (3) Given the age of the existing High School Campus Facility, the date of last renovation and Lowell's stated intention to replace the Campus with a new Facility, had the Project been funded by an MSBA Approved Grant the opinion would be no different. The decision to recapture any portion of a school construction grant is a factually dependent exercise of discretion. Thus, each decision to waive recoupment rests entirely upon the reason that a District takes a facility out of service prior to the end of the facility's anticipated useful life. Lowell's intention to replace a facility which includes structures that were constructed in the 1890s, 1920s and 1980s and were last renovated in the 1990s, would certainly justify a decision to waive recoupment of any portion of the \$28,407,855 SBA Project Grant that was used to fund the last renovation. Moreover, although the DOE has repealed the SBA Program Regulations to which you refer, those Regulations explicitly provide that the DOE could waive any right to recoup in the event that an SBA funded facility was removed from service if the *"[removal] from service [was done] pursuant to a school construction plan approved by the [DOE] for the replacement of the school building"*. (See former 603 CMR 38.16). Similarly, if Lowell removes the current facility from service as part of an approved plan to construct a new High School, the MSBA will not seek to recoup any portion of the Prior SBA Grant.

Please contact me if you have further questions.

Best regards,

Dennis M. Ryan
General Counsel