

Town of Acton

Memo

To: Board of Selectmen
From: John Murray
Date: November 13, 2006
Re: CPC Project Eligibility

Selectperson Aston asked staff to include background material in respect the applicability of the use of CPC funds for the Elm Street Playground Lighting Project. While I did not locate a prior decision on the specific matter of the Elm Street lights, I did pull an excerpt of Town Counsel's opinion on last year's project submission for the Arboretum. I believe this excerpt addresses the underlying legal question.

(16) **ARBORETUM RECREATIONAL IMPROVEMENTS [JUDGMENT CALL]**

The Board of Selectmen has requested a \$253,560 grant to create a new "multifunction universal access entry" to the Acton Arboretum and a new universal access trail in the main portion of the Arboretum leading from the entryway to a newly created sensory garden and the existing trail by the butterfly garden. The proposal "creates recreational opportunities for an under-served population – persons with disabilities, especially the visually impaired and those in wheelchairs ... and meets the needs of multiple populations, such as elderly citizens and disabled persons ... and those with small children in strollers."

Assuming that the Arboretum does not qualify as an "historic resource" under the CPA, the proposal must be evaluated under the open space and recreational land provisions of G.L. c. 44B, § 5. In general, CPA Funds can be used for "the acquisition, creation and preservation of open space," and for the "acquisition, creation and preservation of land for recreational use" where "open space" is defined under G.L. c. 44B, § 2, to include, "land for recreational use." However, CPA Funds cannot be used for the "the rehabilitation and restoration of open space [and] land for recreational use" unless it is land "that is acquired or created as provided in this section."¹

CPA § 2 defines "rehabilitation" as:

the remodeling, reconstruction and making of extraordinary repairs to historic resources, open spaces, lands for recreational use and community housing for the

¹ Under CPA § 5, rehabilitation and restoration of historic resources is an acceptable use of CPA Funds whether or not the historic resources were acquired with CPA Funds; however, rehabilitation and restoration of open space and land for recreational use is not permissible unless the land was "acquired or created as provided in this section [§ 5]."

purpose of making such historic resources, open spaces, lands for recreational use and community housing functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes. With respect to historic resources, rehabilitation shall have the additional meaning of work to comply with the Standards for Rehabilitation stated in the United States Secretary of Interior's Standards for the Treatment of Historic Properties codified in 36 C.F.R. Part 68.

So the question comes down to whether this project involves the "creation" of open space and land for recreational use (in which case it is a permissible use of the funds) or the "rehabilitation" of open space and land for recreational use (in which case it is not a permissible use of CPA Funds because the Arboretum was not acquired or created using CPA Funds). The question is a close one and requires the exercise of judgment by the CPC.

On the surface, the CPA's definition of "rehabilitation" appears to touch upon some aspects of the proposed project. However, on a closer reading, the CPC may determine that it is appropriate to distinguish the proposed project from "rehabilitation" as defined by the CPA. For example:

- The CPA's definition of "rehabilitation" involves "remodeling, reconstruction and making of extraordinary repairs to ... open spaces [and] lands for recreational use ... for the purpose of making [them] ... functional for their intended use." By contrast, the proposal involves the creation of a new multifunctional universal access entry to the Arboretum and a new universal access trail within the Arboretum. The proposal does not contemplate "extraordinary repairs" to an existing trail system but rather anticipates the creation of a completely new universal access entry to the Arboretum and universal access trail within the Arboretum. The focus is not on "retrofitting" the space but on creating a new recreational opportunity for various underserved segments of the population.
- The definition of "rehabilitation" does specifically refer to "improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes." While the proposed facilities will comply with ADA or other access codes as described in the application, the purpose of the project is not simply "to comply" with the ADA and such codes. Rather, the purpose as described is to create a new and unique recreational opportunity for various underserved segments of the population.

Put another way, with the exception of historic resources, the CPA does not contemplate the use of CPA Funds just to do what is required to make the open space "functional for [its] intended use" or "to comply" with the ADA. However, the CPA does authorize a town to "create" a new open space recreational opportunity – even one aimed at underserved segments of the population.

Accordingly, if the CPC determines that this proposal involves the "creation" of open space land for recreational use, it is a permissible use of CPA Funds. If on the other hand the CPC determines that the proposal involves the "rehabilitation" of open space and land for recreational use as defined above, it is not a permissible use of CPA Funds because the Arboretum was not acquired or created using CPA Funds.²

² The CPC may view the two major aspects of the proposed project differently, finding for example that multifunctional universal access entry to the Arboretum involves "rehabilitation" whereas the new universal access trail within the Arboretum involves "creation" of open space land for recreational use. Making such distinctions is within the purview of the CPC.