

MEMORANDUM

TO: Acton Community Preservation Committee

FROM: Stephen D. Anderson, Town Counsel

DATE: January 3, 2011

RE: Acton/CPA - Allowable Uses of CPA Funds for FY 2011 Appropriation  
(Proposals 5, 8 and 9)

You have asked us to review various Community Preservation Act (“CPA”) FY 2011 funding applications, and have requested our opinion as to whether these proposals may be funded under the CPA. This memorandum analyzes four pending proposals for CPA funding set forth below.

By way of background, the CPA permits municipalities to use CPA funds for the following purposes (G. L. c. 44B, § 5(b)(2)):

- (a) acquisition, creation and preservation of open space;
- (b) acquisition, preservation, rehabilitation and restoration of historic resources;
- (c) acquisition, creation and preservation of land for recreational use;
- (d) acquisition, creation, preservation and support of community housing;
- (e) rehabilitation and restoration of open space, land for recreational use and community housing that is acquired or created using monies from the fund.

With respect to the three projects discussed below, the following definitions apply under the CPA:

- “Acquire” means “obtain by gift, purchase, devise, grant, rental, rental purchase, lease or otherwise. “Acquire” shall not include a taking by eminent domain, except as provided in this chapter.”
- “Historic resources” means “a building, structure, vessel, real property, document or artifact that is listed or eligible for listing on the state register of historic places or has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture of a city or town.”
- “Preservation” means “protection of personal or real property from injury, harm or destruction, but not including maintenance.” (“Maintenance” means “the upkeep of real or personal property.”)
- “Rehabilitation” means “the remodeling, reconstruction and making of extraordinary

- Restoration is not defined.

**Proposal 5. Acton Community Center, Inc. (dba Theatre III) [YES]**

Acton Community Center, Inc. d/b/a Theatre III<sup>1</sup> is seeking \$229,500.00 from the CPA for restoration of the exterior building, including the exterior walls, gothic steeple, granite foundation, doors, decorative trim, roof trusses and replacement of non-historic windows. These renovations will also provide handicapped accessibility. The need for this work was determined by Gorman Richardson Lewis Architects, who were contracted to conduct a complete survey of the property for historic renovation purposes using the CPA funds received from the CPC last year. This figure comprises 90% of the proposed restoration costs, with Theatre III supplying the remainder. As a reminder, Theatre III occupies the former Universalist Church building which is located at 250 Central Street, dates from 1868, is situated in the historic district of West Acton Village, is listed on the West Acton Historic District Property Inventory Listing, and is used as a community theater.

Under G.L. c. 44B, § 5(b)(2), the “acquisition, preservation, rehabilitation and restoration of historic resources” are legitimate uses of CPA funds. CPA § 2 defines “historic resources” to include “a building, structure, vessel, real property, document or artifact that is listed or eligible for listing on the state register of historic places or has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture of a city or town.”

The CPA does not expressly limit expenditures to historic resources on public property; however, the intent of the Act is to support and expand community assets. *See* DOR IGR 02-208, p. 1. Previously, Acton Community Center, Inc. sought and was awarded CPA funds for a restoration project on the 16 original windows in the historic building, subject to the grant of a Preservation Restriction Agreement on the property, which has since been granted and recorded.<sup>2</sup> It also received FY 2010 CPA funds to develop a proposed plan for restoration of the

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<sup>1</sup> As noted last year, according to the on-line records of the Massachusetts Secretary of State, Acton Community Center, Inc. was a non-profit corporation which was involuntarily revoked on April 4, 1984, and which was revived by the Secretary of the Commonwealth by Revival Certificate dated January 8, 2008. Its most recent Annual Report dated October 26, 2010 has been filed with the Secretary of the Commonwealth.

<sup>2</sup> In a February 9, 2007 Opinion involving the proposed use of CPA funds by the Town of Norfolk to the Norfolk Grange (DOR 2007 CPA Workshop B Materials, at page 41), the Massachusetts Department of Revenue indicated that (emphasis added):

The second appropriation is for the restoration of an historic building owned by the Norfolk Grange, which is a private, non-profit organization. **Rehabilitation or restoration of historic properties is an allowable**

church.

In the present case, the proposed activity (phase I of the historic renovation) qualifies as the “preservation, rehabilitation and restoration of historic resources.” Therefore, it is eligible for funding by the CPC.

If the CPC is inclined to recommend this project, the existing Preservation Restriction Agreement should be reviewed to ensure that it is broad enough to encompass the work under the Project, and perpetual (as has been required of other CPA projects on private land), and that the work will be consistent with the Preservation Restriction Agreement. That agreement can and should be amended if necessary to ensure that an appropriate preservation restriction is in place in exchange for the commitment of CPA funds.

**Proposal 8. Acton Historical Society – Jonathan & Simon Hosmer House [YES]**

The Acton Historical Society is requesting \$62,095 to conduct the following restorations on the Jonathan & Simon Hosmer House: (1) re-roofing and window and siding replacement on the Mowry Storage Shed; (2) replace windows, restore exterior doors and replace rotted sill on the Hosmer House; and (3) replace the roof of the Jenks Library. The Jonathan & Simon Hosmer House is located at 300 Maine Street (the “House”). It consists of an 18<sup>th</sup> century House, serving as a local history museum, the Mowry Storage Shed, which houses larger items from the society’s collection and a stone garage built in 1922, which has been converted to the library. It is a unique example of a rear-leanto double-saltbox house and was listed in the National Register of Historic Places in 2002. The House is owned by the Acton Historical Society, which received it from the Town in exchange for a Preservation Restriction requiring the Acton Historical Society to restore the exterior of the House “in accordance with its original architecture using materials compatible with and as nearly similar to original materials as practicable.”

The House qualifies as an historic resource under the CPA (it is on the National Register of Historic Places). The proposed project fits into the definition of both preserving this historic

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**purpose. There is nothing in the CPA that prohibits the use of funds for this project simply because the property is privately owned.** However, under the Anti aid Amendment to the Massachusetts Constitution, public funds cannot be given or loaned to private individuals or organizations for their private purposes. Mass. Const. Amend. Article 46 §2, as amended by Article 103. Any expenditure must be to advance a public purpose. The preservation of historic assets is generally understood to have legitimate public purposes. **Both the federal and state governments, for example, have various historic grant programs, which include grants to non-profit organizations.** [www.sec.state.ma.us/mhc/mhcidx.htm](http://www.sec.state.ma.us/mhc/mhcidx.htm). **Typically, these programs result in the public acquiring an historic preservation restriction or receiving some other benefit to ensure that the grant is for public rather than private purposes.** For example, in an anti aid case involving state monies given to a non-profit group to rehabilitate the U.S.S. Massachusetts for use as a memorial and museum, the Supreme Judicial Court found the expenditure was for a public purpose because the property would be open to the public as a place to contemplate and honor those who died in the service of their country and to educate school children, who were admitted free of charge, about history. *Helmes v. Commonwealth*, 406 Mass. 873. In the case of the Grange property, we understand the town will acquire an historic preservation restriction and the organization must use the funds received in exchange to finance the rehabilitation. In other words, it appears the town is receiving an interest in the property to ensure that its investment of public funds benefits the public through the preservation of a piece of the town’s history.

resource that is in danger of water damage and rehabilitating the House to make historically accurate improvements (as opposed to simple maintenance of the House, which is not eligible for CPA funding). Furthermore, the House is used for public benefit through the local historical museum and library located within its grounds.

If the CPC is inclined to recommend this project, the existing Preservation Restriction Agreement should be reviewed to ensure that it is broad enough to encompass the work under the Project, and perpetual (as has been required of other CPA projects on private land in the past), and that the work will be consistent with the Preservation Restriction Agreement. That agreement can be supplemented or amended if necessary to ensure that an appropriate preservation restriction is in place in exchange for the commitment of CPA funds.

**Proposal 9. Acton Historic District Commission and Historical Commission – Asa Parlin House [YES and JUDGMENT CALL]**

The Acton Historic District Commission (“HDC”) and the Acton Historical Commission (“AHC”) request \$388,787 of CPA Funds to demolish renovate and preserve parts of the town-owned Asa Parlin House, located at 17 Woodbury Lane in the Acton Center Historic District. The Asa Parlin House is located to the rear of Town Hall and is surrounded by the parking lots for Town Hall and Memorial Library. The building is on the State’s Inventory List. It is not currently used for any purpose. The HDC and the AHC propose to renovate the Asa Parlin House by preserving and rehabilitating the front section to be repurposed as meeting space, demolishing the rear portion and constructing a replacement wing and constructing a garden terrace and surrounding landscaping. The purpose of this project would be to provide the Town with additional indoor and outdoor meeting space, which could also be rented to the public (if desired).

Because the town-owned Asa Parlin House qualifies as an historic resource under the CPA (it is on the State’s Inventory List in the Acton Center Historic District), all aspects of the project that constitute “preservation, rehabilitation and restoration” of the property’s historic resources are eligible for CPA funding. As the project encompasses a variety of activities and work, however, the CPC will need to exercise appropriate judgment to determine which aspects of the proposed project are eligible and which (if any) are not.

Generally speaking, the project costs fall into the following categories:

Type of Cost	Use of CPA Funds	Explanation
<p>Demolition Costs:</p> <ul style="list-style-type: none"> <li>To demolish the “various and sundry additions” to the original structure.</li> </ul>	<p>Judgment Call</p>	<p>Demolition is not an approved use of CPA Funds, and is generally antithetical to historic preservation. However, demolition of non-historic elements of a building which is essential to preserve, rehabilitate and restore the primary historic elements of the resource and which (I suggest) represents a modest percentage of the overall eligible project costs may, in the CPC’s judgment, qualify for CPA funding.</p> <p>The CPC should ask the the HDC and AHC to demonstrate that the demolition of the non-historic additions to the original historic structure are essential to preserve, rehabilitate and restore the historic Asa Parlin House, and the CPC should (I recommend) evaluate the comparative costs of demolition versus the other preservation, rehabilitation and restoration components of the project to determine the primary purpose of this proposed use of the funds and therefore whether these costs are an eligible use of CPA Funds.</p>
<p>Construction Costs:</p> <ul style="list-style-type: none"> <li>To make the building functional as a large one room meeting space on the first floor.</li> <li>To remove the upper floor to raise and open the ceiling from the first floor.</li> <li>To construct a “small historically correct wing” in the rear housing a sanitary, kitchenette and breezeway facilities.</li> </ul>	<p>Judgment Call.</p>	<p>To the extent these construction costs preserve, rehabilitate and restore an otherwise dilapidated historical structure, they are eligible for CPA funding.</p> <p>Without limitation, the CPC should evaluate whether these costs involve (a) “the remodeling, reconstruction and making of extraordinary repairs to historic resources ... for the purpose of making such historic resources ... functional for their intended use;” (b) “improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes;” or (c) “work to comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties codified in 36 C.F.R. Part 68.”</p> <p>The CPC may find that some of these costs are eligible and some are not. For example, the construction of a new “small historically correct wing” which did not exist as part of the original structure may be a stretch for eligibility unless the CPC finds that the work is otherwise necessary “for the purpose of making such historic resources ... functional for their intended use.”</p>
<p>Other Costs:</p> <ul style="list-style-type: none"> <li>Creation of a garden terrace and improve landscaping.</li> </ul>	<p>Judgment Call.</p>	<p>These costs do not involve work on the historic structure itself but rather on the real property on which the historic structure is situated. However, the “historic resources” at the site include both the building and the real property itself. To the extent these costs preserve, rehabilitate and restore the historic setting of the Asa Parlin House, they are eligible for CPA</p>

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		<p>funding.</p> <p>Without limitation, the CPC should evaluate whether these costs involve (a) “the remodeling, reconstruction and making of extraordinary repairs to historic resources ... for the purpose of making such historic resources ... functional for their intended use;” (b) “improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes;” or (c) “work to comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties codified in 36 C.F.R. Part 68.”</p> <p>The CPC should carefully consider whether it views the costs for the garden terrace and improved landscaping as being integral to the “preservation, rehabilitation and restoration of historic resources” at this property. If they are, CPA funds can be used for this purpose.</p> <p>Note: If the CPC determines that these costs are not eligible for historic purposes, the CPC may want to consider whether this component of the project qualifies as the creation of open space or land for recreational use (an eligible use of CPA funds) or whether the improvements would be more appropriately described as the “rehabilitation and restoration of open space” (an ineligible use of CPA funds because such funds cannot be expended for this purpose unless the property was acquired in the first instance using CPA funds - which I assume is not the case here). See G.L. c. 44B, § 5. If the CPC goes down this path, we should review the applicability of the principles established by the <i>Seideman v. Brookline</i> case to this work.</p>

The project description in the application is somewhat vague on the various components of historic preservation that the applicants envision undertaking. In exercising its judgment, the CPC should request more specificity as to the preservation, rehabilitation and restoration aspects of the work on the historic resources at this location.