



MEMORANDUM

TO: Acton Community Preservation Committee

FROM: Stephen D. Anderson, Town Counsel

DATE: December 15, 2010

RE: Acton/CPA - Allowable Uses of CPA Funds for FY 2011 Appropriation (Proposals 3 and 4)

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 two 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.

Proposal 3. Acton’s Women’s Club Preservation and Restoration Project [YES, and JUDGMENT CALL or NO as to certain aspects]

The Acton Woman’s Club requests \$99,590 for “preservation, protection and restoration” of the Club building located at 504 Main Street. The Club is a Federal period house constructed in 1829 and located in the Acton Center Historic District. Specifically, the CPA funds have been proposed for:

- Re-designing the walkways and entrances at the left and right sides of the building, including improvements to accommodate provisions of the Americans with Disabilities Act;
- Installation of brick courtyard and bench;

- Replace lighting around entryways;
- Landscaping in the Mabel Jenks Rose Garden to the rear of the building;
- Updating the wiring from knob and tube;
- Insulating the attic and walls;
- Repairing and repainting/repapering the walls to restore to proper historic period; and
- Installation of a Stair Chair.

Under G.L. c. 44B, § 5(b)(2), the “acquisition, preservation, rehabilitation and restoration of historic resources” are legitimate uses of CPA funds. The following definitions apply under the CPA:

- “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 repairs to historic resources ... for the purpose of making such historic resources ... 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 the Interior's Standards for the Treatment of Historic Properties codified in 36 C.F.R. Part 68.”
- Restoration is not defined.

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. 1.¹ As with prior grants of CPA funds for restoration of privately

¹ 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 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**

owned historic resources, if the Town decides to fund this project, it would be prudent to insist on a perpetual historic preservation restriction in exchange for the commitment of CPA funds.

Assuming that the Club building qualifies as an “Historic Resource” under the CPA given that it is in the Acton Center Historic District and within the State Register of Historic Places, the proposed project falls into the following categories:

TYPE OF COST	Permissible Use of CPA Funds
<p>Preservation Costs:</p> <ul style="list-style-type: none"> • To redesign and replace walkways and entrances on right and left of building to make the building handicapped accessible and provide a safer entrance. • To install a Stair Chair inside the building. • To replace outside lamps at both entrances and install a light post near the sidewalk, all to improve the safety of the buildings’ entrances. • To replace the crumbling and rusted bulkhead on the left side of the building, with a similar make and design. 	<p>Yes</p>
<p>Rehabilitation Costs:</p> <ul style="list-style-type: none"> • To insulate the attic, walls and cellar. • To replace the knob and tube wiring on the second floor, as required by the insulation installation. • To remove, repaper and repaint the upstairs and downstairs rooms.² 	<p>Yes and Judgment Call.</p>

include grants to non-profit organizations. 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.

² Maintenance costs are not permitted uses of CPA funds. Where the repapering of the walls is proposed to restore the historical accuracy of the interior, such a use is arguably “rehabilitation” under the CPA. However, typically repainting of rooms would be considered maintenance. It is a judgment call for the CPC regarding how to categorize this particular proposed use of funds.

TYPE OF COST	Permissible Use of CPA Funds
Beautification and Other Costs: <ul style="list-style-type: none"> • To design walkway and garden plantings for Mabel Jenks Rose Garden. • To install brick courtyard and benches. 	Judgment Call or No ³

Proposal 4. Trail Through Time [QUALIFIED YES and JUDGMENT CALL]

The innovative “Trail Through Time” historic preservation project seeks to reconstruct the 19th century Wheeler Farm and Mill Complex that was used for raising dry (beef) cattle and is comprised of a house foundation, rock-lined well, partial barn foundation, animal droving corridor, and corrals, into a bi-cultural heritage trail with access to Colonial and Native American sites. This year, the Town has requested \$97,900 to implement Phase III of the project, including demolition of an existing structurally unsound red building and replacement with a pavilion complete with informational panels, archaeological GPS surface survey, restoration of the raceway, the sluices and the three foundations, tree removal and landscaping, and continuation of handicapped accessible pathways. The Town previously applied and received CPC funds for other aspects of the “Trail Through Time.”

Again this year, the application presents a hybrid proposal: some elements of the application (such as demolition of the unsound red building replaced by the pavilion, historical research, and installation of informational panels) are directly focused on historic restoration and preservation of the Wheeler Farm historic resources; other elements (such as the tree work and landscaping) are focused on creating open space and recreational opportunities.

As to the historic restoration component, CPA Funds can be used for the “acquisition, preservation, rehabilitation and restoration of historic resources.” G.L. c. 44B, § 5. To be eligible for CPA funding, the resource must either be “listed or eligible for listing on the state register of historic places,” or be “determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture” of the Town. G.L. c. 44B, § 2. The application does not specifically indicate whether Wheeler Farm is on any register of historic places, or if it has been determined to be significant by the Acton Historic Commission. We assume that it is; however, as we have advised in the past, the Applicant needs to demonstrate to the satisfaction of the

³ During the project vetting process, the CPC should determine whether these costs qualify under prong (a) or (c) of the following test – otherwise these costs would not be eligible for CPA funding: Do the 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.” On the facts as we now know them, we think the answer is “no,” but more information may come to light in the project vetting process.

CPC that Wheeler Farm has been or is (a) listed or eligible for listing on the state register of historic places, or (b) “determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture” of the Town. *See* G.L. c. 44B, • 2.

As to the open space and recreational component of this year’s application, the CPC may view these components of the project as the creation or rehabilitation of open space or land for recreational use. Under G. L. c. 44B, § 5, CPA Funds can be used for “the acquisition, creation and preservation of open space,” where “open space is defined under G. L. c. 44B, § 2, to include “land for recreational use.” “Recreational use” is defined to include “active or passive recreational use including . . . trails . . . and the use of land as a park.” “Open space” is defined to include, among other things, “lands to protect scenic vistas.” To the extent that the CPC finds that the “Trail Through Time” seeks to create a new recreational use – a new trail system to new park-like, landscaped, historical vistas - the CPC may view these components of the project as creating open space and land for recreational use within the meaning of the CPA, and therefore eligible for funding.

CPA funds cannot not be used, however, the “rehabilitation and restoration of . . . land for recreational use” 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. So if these components of the project are not integrally related to the rehabilitation and restoration of the historic Wheeler Farm resource, and if these components do not “create” new open space or land for recreational use, then the CPC may view these components of the project solely as the “rehabilitation and restoration of . . . land for recreational use,” in which case these components would not be an eligible use of CPA funds. CPA § 2 defines “rehabilitation” as (emphasis added):

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

Furthermore, the Supreme Judicial Court has ruled that CPA Funds cannot be spent on improvements and upgrades to land currently in recreational use. *Seideman*, 452 Mass. at 478-479. This prohibition stands even when the proposed project increases accessibility to new users, including those who are disabled. *Id.* at 477. CPA Funds may be used for “preservation” of open space, narrowly construed as “protection . . . from harm, injury or destruction, but not including maintenance.” G. L. c. 44B, § 2. As a result, it is up to the judgment of the CPC in reviewing the project description to

determine whether the recreational components of this project are more appropriately categorized as creation or preservation of open space and recreational lands (permitted) or for rehabilitation and restoration of open space and recreational lands (prohibited).