ANDERSON & KREIGER LLP

MEMORANDUM

TO: Acton Community Preservation Committee

FROM: Stephen D. Anderson, Town Counsel
Nina L. Pickering-Cook, Associate

DATE: January 5, 2012

RE: Acton/CPA - Allowable Uses of CPA Funds for FY 2013 Appropriations

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You have asked us to review various Community Preservation Act ("CPA") FY 2013 funding applications, and have requested our opinion as to whether these proposals may be funded under the CPA. This memorandum analyzes the 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.

The following table provides a helpful summary of these purposes:

	Open Space	**Historic Resources**	**Land for Recreational Use**	**Community Housing**
Acquisition	√	√	√	√
Creation	√	-	√	√
Preservation	√	√	√	√
Rehabilitation	®	√	®	®
Restoration	®	√	®	®
Support	-	-	-	√

® = If acquired or created using monies from the fund

Proposal 1. CPA Administrative Support. [YES]

Steve Ledoux, the Town Manager, seeks 5% of the CPA revenues available for appropriation at the 2012 Town Meeting (approximately $50,000) to help defray the costs of the "administrative and program support [provided] to the CPA Program through staff in [the Town's] Planning and Finance Departments."[1]

General Laws Chapter 44B, § 6, states that, "[i]n each fiscal year, the legislative body shall make such appropriations from the Community Preservation Fund as it deems necessary for the administrative and operating expenses of the community preservation committee, but the appropriations shall not exceed 5 per cent of the annual revenues in the Community Preservation Fund." Where the request for appropriation of administrative expenses does not exceed 5%, this application is eligible for funding under the CPA.

Proposal 2. ACHC Regional Housing Services Program. [YES]

The Acton Community Housing Corporation ("ACHC") requests $40,000 of CPA funds to join the Regional Housing Services Program, which "oversees affordable housing programs in area towns" in order to "assist the ACHC in "meeting the administrative, compliance and monitoring needs for the Town's existing affordable housing units" and "work to further regional housing goals and efforts." The requested funds would be added to the ACHC's Community Housing Program Fund and would cover the fees of a two-year contract.

The Act permits CPA funds to be used for the "preservation and support of community housing." "Preservation" means "protection of personal or real property from injury, harm or destruction, but not including maintenance." The phrase "[s]upport of" is not defined in the statute. In prior guidance to the Town, the Department of Revenue ("DOR") has opined that "support of" community housing "in the context of municipal expenditures ordinarily means to provide funds for a particular activity." Letter to Stephen D. Anderson from Daniel J. Murphy, dated August 25, 2004. Eligible activities under this portion of the statute include, for example, payments for operating expenses and annual payments to the housing authority to preserve or expand the affordable housing supply. DOR Informational Guideline Release No. 00-209. Where this funding request is for a program whose goal is to assist the local housing programs, ensure compliance with restrictive covenants and further affordable housing solutions for the region, it is preserving and supporting community housing as provided in the Act. Therefore, this application is eligible for CPA funding.

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[1] The CPC has funded these support services "[s]ince the inception of the CPA Program in 2004"; however, this year the requested appropriation will cover less of the Town's expenses than previous years, due to a reduction in State matching funds.

Proposal 3. AHA Development Fund. [YES]

The Acton Housing Authority ("AHA") requests $300,000 of CPA funds to develop 12 units of affordable rental housing on 2.5 acres of undeveloped land on Sachem Way. The CPC initially approved a funding application for this development in FY 2009. The total development costs are now estimated to be $4,415,000, with state agencies providing the primary funding. This current total for development costs is $300,000 more than estimated total under the FY2009 CPA funding application.

CPA Funds can be used "for the acquisition, creation, preservation and support of community housing." G.L. c. 44B, § 5(b)(2). The development of 12 new units of affordable rental family housing for families below 80% of median income constitutes the "creation" of "community housing" under the CPA, defined as "low and moderate income housing for individuals and families, including low or moderate income senior housing." G.L. c. 44B, § 2.

The proposed development funds are therefore an allowable use of CPA funds. As with other CPA-funded projects, the Town should require a permanent deed restriction that meets the requirements of G.L. c. 184 to ensure that the subsidized housing remains affordable in perpetuity and that the unit(s) are added to the Town's Subsidized Housing Unit Count.

Proposal 4. 468 Main Street Handicap Access. [YES]

The Town's Municipal Properties Department requests $70,000 to make the Town offices at 468 Main Street handicapped accessible. The property at 468 Main Street contains a red 1913 bungalow on Main Street (between Woodbury Lane and Newtown Road), now being used as town offices. This property is located in the Acton Center Historic District, and is on the Cultural Resources List.

CPA Funds can be used for the "preservation, rehabilitation and restoration of historic resources." G.L. c. 44B, § 5(b)(2). 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." Where the property at 468 Main Street is within the historic district and is on the Cultural Resources List of the Historic Commission, it satisfies this test.

The proposed work qualifies as "rehabilitation" which explicitly includes "improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes." Where the application is to make this historic Town building handicapped accessible, it is eligible for CPA funding.

Proposals 5, 6 and 7. Restoration of Historic Municipal Properties [YES]

There are three restoration projects proposed for Town properties on this year's list of potential CPA projects:

- The Town's Municipal Properties Department requests $12,000 for the restoration of 18 wood windows in the attic area and fireplace room in the 1889 wing of the Acton Memorial Library. The Library is located in the Acton Center Historic District and was listed in the National Register in 1983. The attic and fireplace room was designated as meeting space for the Grand Army of the Republic. The Library is publicly owned and open to the public.

- The Town's Municipal Properties Department requests $14,000 to restore the Town Hall Clock Tower. Town Hall was built in 1864, listed in the National Register in 1983, and is located in the Acton Center Historic District. The clock tower is an iconic part of that Historic District and its two faces are no longer operational. The requested funds would be used to replace the hands, electronic movement and controller.

- The Town's Municipal Properties Department requests $225,000 to complete restoration and rehabilitation of the Windsor Building in West Acton. The exterior of this building was restored with CPA funds in FY2009 and 2010. The Windsor Building is the Town's original fire station and is located in the West Acton Historic District, which is listed on the state register of historic places. It is it significant to the history, architecture or culture of the Town.

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 Memorial Library, Town Hall and Windsor Building all qualify under this test. In addition, all of the work described falls within the definition of restoration[2] or rehabilitation,[3] and not prohibited maintenance work. As such, each is eligible for CPA funding.

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[2] Restoration is not defined in the Act. According to Merriam-Webster, it means "a bringing back to a former position or condition." Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/restoration.

[3] Rehabilitation includes both "the remodeling, reconstruction, and making of extraordinary repairs to historic resources . . . for the purpose of making [them] . . . functional for their intended use" and "improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes."

Proposal 8. **Lower Fields Multi-Purpose Recreation Complex**
[YES] and [VERY CLOSE CALL, IMA REQUIRED, BOND COUNSEL CONSULTATION ADVISABLE]

I. Request

The Friends of Leary Fields, Inc. (d/b/a Friends of Lower Fields or "FOLF") requests $979,846 for construction of part of the Lower Field Multipurpose Recreational Complex ("Rec Complex") and improvements to the T.J. O'Grady Skate Park ("Skate Park"), located at and proximate to the Acton-Boxborough Regional High School. According to the application, the Acton-Boxborough Regional School District (the "District") (an entity separate from the Town) owns the location of the proposed Rec Complex (the Lower Fields) and they are currently used as recreational fields. According to the application, current use of the fields is severely curtailed by the poor field conditions.

FOLF requests $899,846 in CPA funds for the Rec Complex to construct: (1) athletic field lighting; (2) electrical and utility infrastructure; (3) improved walkways; and (4) parking. FOLF also requests $80,000 for the Skate Park to (1) install chain link fence; (2) construct a "beginner bowl" for skating; (3) pave ramps; and (4) dedicate parking. The application proposes that the overall request be funded over five years by a bond issue.

Given their relative complexity, the two parts of this application will be analyzed separately and in reverse order.

II. Eligibility

a. *T.J. O'Grady Skate Park* [YES]

The Town acquired the land for the Skate Park from the Commonwealth in 2003. The Skate Park was created on the land with a mix of private monies ($138,000), Town General Funds ($80,000) and CPA funds ($67,000). The deed from the Commonwealth restricts the use of the property to "Open Space and Recreational purposes only."

The CPA permits municipalities to use CPA funds for the "rehabilitation and restoration of open space [and] land for recreational use … that is acquired or created using monies from the fund." G.L. c. 44 § 5(b)(2). "Rehabilitation" is defined in the Act as "the remodeling, reconstruction and making of extraordinary repairs to open spaces [and] lands for recreational use … for the purpose of making such open spaces [and] lands for recreational use … 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." G.L. c. 44, § 2.

Where the Skate Park was originally acquired and created (in part) with CPA funds, CPA funds may be used to restore or rehabilitate it. The proposed beginner bowl, fencing, ramps and parking likely qualify as rehabilitation because those additions make the Skate Park fully functional and safe for all levels of skaters. The deed restriction is

not implicated in the expansion because the Skate Park will continue to be used for Recreational purposes. Accordingly, CPA funds may be expended for this purpose.

If the CPC recommends appropriation of CPA funds for the Skate Park, the CPC should consider awarding and tracking expenditures for the Skate Park separately from expenditures for the Rec Complex, as the CPA funding justification differs between the two components of the project. In addition, the award of these funds should be conditioned on their use exclusively for the proposed Skate Park improvements.

b. ***Rec Complex Proposal***
[VERY CLOSE CALL, IMA REQUIRED, BOND COUNSEL CONSULTATION ADVISABLE]

FOLF requests CPA funds to construct or improve the utilities, walkways and parking at the Rec Complex, in furtherance of the larger project to install three new turf fields. The proponents state that the new fields are needed because the current fields are inadequate to meet the demand for sports fields by the school-age programs, as well as the community, due to the poor field conditions. As described in more detail below, in its current form, the CPA bars the use of CPA funds for the purposes proposed in the application for the Rec Complex, unless the application fits within the "acquisition" prong of the CPA based on (a) a footnote in the *Seideman* case, and (b) the proposed use of an inter-municipal agreement between the Town and the District under which the Town will acquire an enforceable right to use the Rec Complex from the District. Even then, eligibility is a very close call and, given the amount requested and the proposed bond issuance, may not pass muster with conservative bond counsel, who should be consulted early in the process if the CPC intends to recommend issuance of bonds for this project.

The Rec Complex is a recreational use under the CPA. G.L. c. 44B, § 2 (defined to include "noncommercial youth and adult sports, and the use of land as a park, playground or athletic field"). It is the property of the District and was not acquired or created with CPA funds. In the context of recreational uses, CPA monies may only be expended for:

1. "acquisition, creation and preservation of land for recreational use;"

2. "rehabilitation and restoration of open space [and] land for recreational use … that is acquired or created using monies from the fund." G.L. c. 44 § 5(b)(2).

The *Seideman* case made it clear that CPA funds cannot be used to improve current recreational fields not acquired or created with CPA funds under the theory that such improvement involves the "creation" or "preservation" of land for recreational use. *Seideman v. City of Newton*, 452 Mass. 472, 478-479 (2008). The SJC found that such improvements and upgrades "fall more squarely within the definition of 'rehabilitation.'" *Seideman*, 452 Mass. at 479. After *Seideman*, the proposed utility, walkway and parking improvements at issue here would be characterized as "rehabilitation" in the same way as were the upgrades to Newton's parks. Because the Rec Complex was not previously

acquired or created with CPA funds, FOLF's proposal to improve the Lower Fields is not eligible for CPA funds under the "creation" or "preservation" prongs of the statute.

A footnote in the *Seideman* case left open the possibility of structuring the proposed transaction as one involving the use of CPA funds for the "acquisition" of land for recreational use. Thus, the Court observed (452 Mass. at 479 n. 12; italics original; bold emphasis added):

> The parties do not discuss the appropriation of CPA funds for the "acquisition" of land for recreational use, as permitted under G.L. c. 44B, § 5(b)(2). Nonetheless, pursuant to G.L. c. 44B, § 2, a municipality can "[a]cquire" land for recreational use "by gift, purchase, devise, grant, rental, rental purchase, lease or *otherwise*" …. In its simplest form, this language means that a municipality can, **for example**, purchase real property for the specific purpose of devoting it to recreational use. Alternatively, the word "otherwise" is **broad enough to include** a "transfer" of land for recreational use. In that situation, real property already owned by a municipality and designated for a particular purpose could be "acquired" for recreational use, a wholly different purpose, by transferring it from one municipal entity to another. See G.L. c. 40, § 15A (whenever board or officer having charge of land, with certain exceptions, determines that land is no longer needed for particular purpose, legislative body may transfer care, custody, management, and control of such land to another board or officer for another municipal purpose); *Harris v. Wayland*, 392 Mass. 237, 242–243, 466 N.E.2d 822 (1984). See also D.A. Randall & D.E. Franklin, Municipal Law and Practice § 27.3 (5th ed.2006) (control and use of municipal property).

The SJC has thus read the term "or otherwise" liberally, and not exclusively, by listing various ways in which a municipality may legitimately "acquire" land for recreational use. Read in the light most favorable to the proposed transaction, *Seideman* arguably supports the proposition that the CPA's definition of "acquire" may be broad enough to include the Town's "acquisition" of a long-term enforceable right to use the improved Rec Complex pursuant to an Inter-Municipal Agreement ("IMA") between the Town and the District (a separate entity) under G.L. c. 40, § 4A (which authorizes an inter-municipal agreement between a town and regional school district for any services, activities or undertakings which any of the contracting units is authorized by law to perform). Such an IMA was one rationale supporting the original Leary Field project, and may remain viable today after the *Seideman* decision.[4]

To underpin a valid CPA "acquisition," the IMA between the Town and the District must grant the Town an enforceable interest in/right to use the Rec Complex. That right should be generally proportional to the Town's investment of CPA funds relative to other funds invested in the project. The IMA should allocate field time between the District and the Town, and could allocate revenues generated as well (*but see*

[4] The *Seideman* case was decided after Acton's CPC recommended, Town Meeting approved, and CPA funds were spent on the Leary Field project. As a result, the current application must be viewed in light of the *Seideman* case and not with the assumption that the Leary Field project is necessarily or in all respects a "favorable precedent" for the current application.

infra Section III(b)). The IMA would, for at least the term of the IMA, restrict the use of the Rec Complex to recreational and/or open space uses. Before it is finalized, the draft IMA should be reviewed and approved by counsel for the Town and the District.

If, and only if, the application is structured to reflect the Town's acquisition of an enforceable right to use the Rec Complex through an IMA would the project be eligible for CPA funding under the current version of the CPA. Even then, the approach is not without legal risk and, if a bond issuance is contemplated, bond counsel may be less willing to opine that it is a legitimate "acquisition" of recreational lands and use of CPA funds under the circumstances, particularly where the land to be used for the Rec Complex is currently being used for recreation purposes and the "creation" and "preservation" prongs of the statute are clearly ruled out by *Seideman*. Accordingly, given the size of the proposed appropriation and the request to bond the appropriation over five years, the Town/CPC should seek an early opinion from bond counsel as to its view of the legitimacy of this use of CPA funds.

III. Other Considerations.

Before the CPC recommends awarding funds for use at the Rec Complex, it must consider a number of other factors, beyond the eligibility of the application under the CPA. They are described briefly below.

a. *Impact of Pending Legislation.*

Bills pending in the General Court may, if enacted into law, create both a benefit and a risk were the Town to fund a portion of the Rec Complex with CPA funds. Thus, House Bill No. 00765[5] and accompanying Senate Bill No. 1841[6] would retroactively (a) allow the expenditure of CPA funds for restoration and rehabilitation of recreational uses *not* originally acquired or created with CPA funds (thereby removing a primary limitation of *Seideman* and reinforcing the legitimacy of the appropriation of funds for this project), and yet (b) prohibit "the acquisition of artificial turf for athletic fields" with CPA funds. The House bill has been favorably reported by committee and referred to the House committee on Ways and Means, and it reportedly continues to enjoy significant legislative support.

The application specifies that the CPA funds requested for the Rec Complex would not be used for the new turf fields, but rather for utilitarian improvements such as lighting, walkways and parking. Under the current version of the CPA, the need for an IMA to justify CPA funding eligibility at all calls this rationale into question: CPA funds can only be used for the project at this time because the Town is acquiring an enforceable right to use the Rec Complex – including the turf fields – not the lighting, walkways and parking alone. Given this basis, if the proposed legislation is later enacted, it would be difficult to distance the Town from the inevitable conclusion that the turf for the fields

[5] http://www.malegislature.gov/Bills/187/House/H00765

[6] http://www.malegislature.gov/Bills/187/Senate/S01841

has been acquired, at least in part, using CPA funds. As such, use of at least a portion of the CPA funds may be prohibited under the proposed retroactive legislation.

The Community Preservation Coalition (a prime proponent of the pending legislation) has in its FAQ responses concerning the proposed legislation taken a pragmatic approach to cost allocation on turf field projects:[7]

> Does the Act have any provisions allowing or disallowing the use of CPA funds on artificial turf?
>
> Yes, after taking into account feedback received from legislators, the public, communities, and state agencies, a committee hearing this bill in a previous legislative session included in its recommendation a provision prohibiting the use of CPA funds for artificial turf. **If the bill is passed, communities that want to install artificial turf as part of a CPA project will still be able to do so, but CPA funds will not be able to be used for the costs associated with the acquisition or installation of the artificial turf playing surface. CPA funding could still be used for other portions of the project.**

In light of the current "acquisition" justification for the project and the need for the IMA on the one hand, and the retroactive spending limitations of the proposed legislation on the other, we think that a more credible cost allocation approach would be to state that the CPA funds being appropriated for this project are to be allocated to each aspect of the project in proportion to that component's percentage of the overall cost of the project (rather than using the more artificial allocation of the CPA funds to the lighting, walkways and parking only). Under this allocation methodology, the amount of the CPA funds allocated to the acquisition of the turf alone would be calculated as follows:

(Turf Cost Alone/Total Project Cost) X CPA Appropriation Used

If (for round number illustration purposes), the cost of the turf itself is $.5 million and the total cost of the project is $3 million, then 1/6th of the CPA appropriation used for the project would be allocated to the acquisition of the turf.

If the CPC recommends funding of the Rec Complex based on an IMA between the Town and the District, the IMA should specify (a) the allocation methodology and (b) the repayment requirements in the event any CPA funds used toward acquisition of the turf must be repaid to the CPA fund balance after the enactment of the pending bills into law. For example, the IMA could include a provision to the following effect:

> The CPA funds appropriated and used under this IMA shall be allocated to each aspect of the project in proportion to that component's percentage of the overall

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[7] *See* Community Preservation Coalition's Frequently Asked Questions on An Act to Sustain Community Preservation, **http://www.communitypreservation.org/2011%20FAQ**s%20for%20CPA%20Bill.pdf (emphasis added).

cost of the project. For example, CPA funds shall be deemed allocated to the acquisition of the turf for the fields in accordance with the following formula:

(Turf Cost Alone/Total Project Cost) X CPA Funds Appropriated

In the event that future retroactive legislation disallows the acquisition of artificial turf for athletic fields (or other component of this project), the District shall repay that allocated cost to the Town's CPA fund balance in equal annual installments over the remaining life of the IMA.

Alternatively, the CPC and the Town may want to take a proactive approach by requesting that the legislative delegation advocate to delete from the bills (a) the prohibition on turf acquisition and/or (b) the retroactivity provision.

b. *Recreational Use Statute.*

FOLF proposes to rent the Rec Complex to generate cash-flow to service the debt incurred to construct the project. The ability to rent out the Rec Complex is advanced as a benefit for the Town to re-coup some of the expended CPA funds. The Town and the District need to be cognizant of the potential impact charging such fees may have under the Recreation Use Statute, G.L. c. 21, § 17C.

The Recreational Use Statute provides a qualified defense to liability for any governmental body that allows the public to use its land for recreational (among other) purposes. G.L. c. 21, § 17C(a).[8] That defense does not apply if the person charges the public a fee for use of the land. G.L. c. 21, § 17C(b).[9]

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[8] Section § 17C(a) provides, "Any person having an interest in land including the structures, buildings, and equipment attached to the land, including without limitation, railroad and utility corridors, easements and rights of way, wetlands, rivers, streams, ponds, lakes, and other bodies of water, who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor, or who leases such land for said purposes to the commonwealth or any political subdivision thereof or to any nonprofit corporation, trust or association, shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of wilful, wanton, or reckless conduct by such person. Such permission shall not confer upon any member of the public using said land, including without limitation a minor, the status of an invitee or licensee to whom any duty would be owed by said person."

[9] Section § 17C(b) provides, "The liability of any person who imposes a charge or fee for the use of his land by the public for the purposes described in subsection (a) shall not be limited by any provision of this section. For the purposes of this section, "person" shall include the person having any interest in the land, his agent, manager or licensee and shall include, without limitation, any governmental body, agency or instrumentality, a nonprofit corporation, trust, association, corporation, company or other business organization and any director, officer, trustee, member, employee, authorized volunteer or agent thereof. For the purposes of this section, "structures, buildings and equipment" shall include any structure, building or equipment used by an electric company, transmission company, distribution company, gas company or railroad in the operation of its business. A contribution or other voluntary payment not required to be made to use such land shall not be considered a charge or fee within the meaning of this section."

If the CPC recommends and Town Meeting appropriates CPA funds for the Rec Complex, the Town should inquire of MIAA Property and Casualty Group, Inc., the Town's insurer, as to any effect this arrangement (charging for use of the Rec Complex) would have on the Town's insurance coverage or premiums.