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**MEMORANDUM**

To: Acton Community Preservation Committee ("CPC")

cc: Stephen D. Anderson, Town Counsel

From: Nina Pickering-Cook  
Ivria Fried, Law Clerk  
ANDERSON & KREIGER LLP

Re: Acton/CPA - Allowable Uses of CPA Funds for FY 2014 Appropriations  
(Proposals 1, 3, and 4)

Date: December 13, 2012

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You have asked us to review various Community Preservation Act ("CPA") funding applications for FY 2014 appropriation, and have requested our opinion as to whether these proposals are eligible for funding under the CPA. This memorandum analyzes the first three pending proposals for CPC consideration – 1, 3 and 4.

By way of background, in 2012, the General Court substantially amended the CPA to, among other things, respond to the SJC's prohibition in *Seidman v. City of Newton*, 452 Mass. 472, 473 (2008), on using funds to rehabilitate or restore recreational facilities using CPA funds. As amended, 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, preservation, rehabilitation and restoration of land for recreational use;
- (d) acquisition, creation, preservation and support of community housing;
- (e) rehabilitation and restoration of open space and community housing that is acquired or created using monies from the fund; provided, however, that funds expended pursuant to this chapter shall not be used for maintenance.

CPA funds cannot be expended for maintenance under any circumstances. The following table provides a helpful summary of these purposes:

	<b>Open Space</b>	<b>Historic Resources</b>	<b>Land for Recreational Use</b>	<b>Community Housing</b>
<b>Acquisition</b>	√	√	√	√
<b>Creation</b>	√	-	√	√
<b>Preservation</b>	√	√	√	√
<b>Rehabilitation</b>	®	√	√	®
<b>Restoration</b>	®	√	√	®
<b>Support</b>	-	-	-	√
<b>Maintenance</b>	-	-	-	-

® = If acquired or created using CPA funds.

**Proposal 1. Open Space Acquisition/Protection Set-Aside [YES]**

The Open Space Committee requests \$400,000 to be set aside for future open space acquisition and/or land protection projects. This request is essentially the same as last year’s request, but this year’s request notes that “there is a high probability that the town will be bringing forward a significant open space purchase opportunity this spring.”

CPA § 6 provides as follows (emphasis added):

“In every fiscal year and upon the recommendation of the community preservation committee, the legislative body shall spend, or **set aside for later spending, not less than 10 per cent of the annual revenues in the Community Preservation Fund for open space**, not less than 10 per cent of the annual revenues for historic resources and not less than 10 per cent of the annual revenues for community housing.”

We stand by our review last year and similar proposals in past years, which stated:

“Setting aside \$400,000 for Open Space Acquisition & Protection would be consistent with previous fiscal year recommendations made by the CPC and approved by Town Meeting. The CPC should of course be mindful that the overall balance is preserved among the three main 10% categories listed in § 6.”

**Proposal 3. Wildflower Boardwalk. [YES]**

The Town seeks \$24,000 to rehabilitate the Acton Arboretum Wildflower Boardwalk. The boardwalk was originally built in 1994, and has become popular with thousands of visitors per year. For the past four years volunteers have been making the necessary repairs. Presently, there is substantial rot underneath the supporting structure of the stringers, sill, and posts, and creating a hazard for recreational users. These funds would be used for rehabilitation of the boardwalk, but will also improve the recreational opportunities for persons with disabilities. This proposal

will also be leveraged with \$5,000 contribution from the Friends of the Acton Arboretum. The Town projects that these repairs will last 20-30 years.

Under the amended CPA, “Rehabilitation” means “capital improvements, or the 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, ... and provided further, that with respect to land for recreational use, ‘rehabilitation’ shall include the replacement of playground equipment and other capital improvements to the land or the facilities thereon which make the land or the related facilities more functional for the intended recreational use.”

The proposed project to repair the Wildflower Boardwalk comports with the amended CPA permitting the use of funds for rehabilitation of recreational lands. The project would not only “make extraordinary” repairs to the boardwalk and “capital improvements to the land”, but ensure that the improve ADA access. Overall, by improving the boardwalk, the project would “make [the Arboretum] more functional for the intended recreational use.” Accordingly, the Wildflower Boardwalk qualifies for CPA funding.

**Proposal 4. Restoration of Historic Streetscapes. [YES]**

The Town’s Municipal Properties Department requests \$10,000 to plant approximately 25 public shade trees to replace dead or dying trees throughout various Historic Districts in Acton. The application includes photographs of historic streetscapes illustrating the shade tree canopy that once existed in historic Acton, as well as examples of deteriorated and dying trees. The Acton Centre Historic District, South Acton Village Historic District, and West Acton Village Historic District are all listed on the state register of historic places and are well recognized as significant to the history, archeology, architecture, or culture of the Town. A similar project, funding in FY 2010, which included the replanting of 24 new trees in the various historic districts, was well received by the community.

CPA funds may be used for the “restoration of historic resources.” G. L. c. 44B, § 5. “Restoration” has no statutory definition in the CPA. Its dictionary definition in Merriam-Webster.com includes “a bringing back to former position or condition.” The federal “Rehabilitation Standards”<sup>1</sup> define “restoration” as:

[t]he act or process of accurately depicting the form, features and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period.

36 C.F.R. § 68.2.

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<sup>1</sup> The definitions of allowable “rehabilitation” of historic resources includes complying with the Standards for Rehabilitation of the United States Secretary of the Interior’s Standard for the Treatment of Historic Properties codified at 36 C.F.R. Part 68 (“Rehabilitation Standards”).

The CPC could reasonably find that, under either the common dictionary definition of restoration or its definition in the “Rehabilitation Standards,” replacement of the historic shade tree streetscapes of the Historic Districts would bring the streetscapes back to their former condition and would accurately depict the form, features, and character of the Town’s streetscapes in historic times. Accordingly, such a project likely qualifies as restoration of historic resources eligible for CPA funding.