



MEMORANDUM

To: Acton Community Preservation Committee (“CPC”)

cc: Roland Bartl, Planning Director
Stephen D. Anderson, Town Counsel

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

Re: Acton/CPA – Allowable Uses of CPA Funds for FY 2014 Appropriations
(Proposals 5, 6, 7, 10 and 11).

Date: January 9, 2013

You have whether various Community Preservation Act (“CPA”) applications for FY 2014 appropriations are eligible for funding under the CPA. This memorandum analyzes five pending proposals for CPC consideration – 5, 6, 7, 10 and 11.

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), against using CPA funds to rehabilitate or restore recreational facilities. The amendments now permit 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; and
- (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. The following table provides a summary of the allowable uses:

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

® = If acquired or created using CPA funds.

Proposal 5. NARA Park Picnic Pavilion [YES]

The Town is requesting an additional \$230,000, to be used in conjunction with \$250,000 set aside in 2008, to construct a permanent Picnic Pavilion on the grounds of NARA Park. The additional funds are needed to accommodate changes in the project that arose since 2008 when the project was on put on hold in anticipation of the *Seidman* decision. The Picnic Pavilion consists of three different covered areas with an overall roof footprint of 3,539 sq. ft. and includes plumbing, water spigots, electrical outlets, a wood dance floor, and a large 2,000 sq. ft. concrete patio surrounding the roofed structure. This permanent structure would replace two large tents, which currently function as a Summer Camp facility, picnic and event space, and a source of revenue to support NARA Park. The Town has repaired the tents and corresponding frames multiple times and concludes that both structures are beyond their useful life and repair at this point.

Since 2008, the project has evolved from a modular concept to a custom framed pavilion. As a result, there is a need for additional funding to cover: (1) installation and materials of a custom built three-winged pavilion; (2) installation and materials of a concrete patio (not included with modular pavilion);¹ (3) prevailing wage increase; (4) higher quality products resulting in longer lifespan; (5) material cost increase; and (6) allowance of 2% Design contingency and 5% construction contingency.

Under the amended CPA, “rehabilitation” means “capital improvements . . . to . . . lands for recreational use . . . for the purpose of making such . . . lands for recreational use . . . functional for their intended uses including, but not limited to, improvements to comply with the Americans with Disabilities Act . . . provided further, that with respect to land for recreational use, ‘rehabilitation’ shall include . . . capital improvements to the land or the facilities thereon which make the land or the related facilities more functional for the intended recreation use.”

The Picnic Pavilion project is eligible for CPA funding because the amended CPA permits the use of CPA funds for rehabilitation of recreational lands. The project would not only “make

¹ The inclusion of the concrete paving would provide handicapped accessibility to the new structure.

extraordinary” repairs to the picnic area and “capital improvements to the land” but also would ensure that the facility complies with the ADA’s access requirements. By increasing the picnic and event space, the project would “make [the park] more functional for the intended recreational use.” Accordingly, the NARA Park Picnic Pavilion qualifies for CPA funding.²

Proposal 6. NARA Park Improvements (Comfort Building Only) [YES]

The Town is requesting \$25,000 to obtain engineering and architectural plans for a multi-use Comfort Building in NARA Park. The Town is in the process of obtaining funding for the conceptual design, which is estimated between \$9,000 and \$12,000, with the first \$5,000 provided at no-cost and offered as a donation of services.

In August of 2012, NARA Park became home to the first handicap accessible ball field in New England, Joseph Lalli Miracle Field. Due to Miracle Field’s popularity, there is now a strong need for handicapped accessible restroom facilities located near the field. The Comfort Building proposes a public restroom with handicap accessible changing tables, storage space for equipment, a field viewing area to meet the needs of those with limited mobility, a covered porch with a picnic seating area, a concession area that can be used by sports leagues and Town recreation, and access to water spigots and electrical outlets.

This proposed project fits the definition of rehabilitation under the amended CPA because the design constitutes a necessary first step in the process of making “capital improvements to the land” to “make [the park] more functional for the intended recreational use” by providing park users with essential public restrooms, covered seating, and a picnic area. The project proposes will comply with the ADA’s accessibility requirements and further the mission of NARA Park as a fully accessible recreational facility. Accordingly, the NARA Park Comfort Building design project qualifies for CPA funding.

Proposal 10. West Acton Baptist Church Belfry Restoration [YES]

The West Acton Baptist Church requests \$20,625 to “restore” its iconic belfry’s interior structure. The belfry was constructed in 1854 in an open air configuration, which is essential to the ringing of the bell but results in rain and snow entering the belfry. Over the past decade, the usual maintenance methods have proven inadequate to prevent water from seeping into the supporting wooden structure. Due to the extensive rotting of the belfry’s base and roof, professional contractors advised the West Acton Baptist Church not to ring the bell until the tower is restored. The continuing seepage from the belfry also risks permanent damage to the tin ceiling of the sanctuary. CPA funds have been proposed for:

- Removal and reinstallation of the historic bell;
- Removal of the existing roof, and any damaged and rotten wood;

² We understand that the CPC considers the remainder of the \$250,000 Picnic Pavilion appropriation in 2008 to be vested under Town Charter Section 6-5 (“Authorization for any capital project shall not lapse if such project shall have commenced within such period” of three years and one month following the effective date of such appropriation vote.) In an abundance of caution, the CPC could recommend and Town Meeting could vote to re-appropriate those funds for the project pursuant to the amended CPA.

- Installation of a new roof, a new base for the bell, and any other wooden beams needed to restore the belfry's structure;
- Replacement of old trim with PVC trim.

CPA funds may be used for the “acquisition, preservation, rehabilitation and restoration of historic resources.” The following definitions apply under the CPA:

- “Historic Resources” are defined to mean “a building [or] structure . . . that is listed 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.”
- “Rehabilitation” means “capital improvements, or the making of extraordinary repairs, to historic resources . . . for the purpose of making such historic resources . . . functional for their intended uses . . . provided, that with respect to historic resources, ‘rehabilitation’ shall 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.P.R. Part 68.”
- Restoration is not defined.

The CPA does not expressly limit expenditures to historic resources on public property; however, the intent of it is to support and expand community assets. *See* DOR IGR 02-208, p. 1. Other privately-owned Historic Resources in Acton (such as Acton Community Center, Inc., Exchange Hall, among others) have sought and been awarded CPA funds for a restoration projects, subject to the grant and recording of preservation restrictions on the property.³ If the

³ In a February 9, 2007 Opinion involving the proposed use of CPA funds by the Town of Norfolk, DOR stated 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 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. DOR 2007 CPA Workshop B Materials, at page 41.

CPC is inclined to recommend this project, it would be prudent to insist on a perpetual historic preservation restriction in exchange for the commitment of CPA funds (as has been required in other similar projects in Acton).

The West Acton Baptist Church qualifies as an historic resource under the CPA because the Acton Historical Commission includes it on the Cultural Resource List.⁴ The proposed project requests funds for eligible restoration and rehabilitation work at that Church where these “extraordinary repairs” are necessary for the bell to be rung as it was intended when originally constructed in 1854. The proposed project is also likely eligible for funding under the definition of preservation, as it proposes a new roof and belfry flooring to save the church structure from water damage. It also does not appear to encompass prohibited “maintenance,” where the repairs are not typical upkeep, but rather removal and replacement of structural elements. Where, however, the proposal lists “replacement of old trim with PVC trim” as one of the uses for the funds, the CPC will want to ensure that such replacement of trim is done in accordance 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.P.R. Part 68, as is required by the CPA’s definition of “rehabilitation.” Accordingly, restoration of the belfry qualifies for CPA funds, subject to qualifications noted here.

Proposal 11. West Acton Baptist Church Master Plan [Judgment Call/Requires More Information]

The West Acton Baptist Church seeks \$25,000 to create a Master Plan for “restoring and rehabilitating the interior of the church building.” The application notes that the Master Plan will involve the following:

- Researching the history of the church building;
- Performing a full code analysis (including building and access codes) to understand the issues involved in changing use or renovation;
- Studying the current uses of the building including what is working and what is not;
- Discussing the impacts of any potential renovation in terms of structure, building systems, long term operating costs, etc.; and
- Considering the feasibility of various concepts based on budget and phasing.

As noted above, the West Acton Baptist Church qualifies as an historic resource. It is a judgment call for the CPC whether, in its entirety, the Master Plan project is eligible for CPA funding. Under G.L. c. 44B, § 5(b)(2), CPA funds can be used for acquisition, preservation, rehabilitation and restoration of historic resources, but not for ordinary maintenance. Historic preservation, rehabilitation and restoration require both proper planning and actual physical work. Such projects are complicated and can involve (a) “the 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

⁴ The Cultural Resource List is available at <http://www.acton-ma.gov/DocumentCenter/Home/View/373>.

of Historic Properties codified in 36 C.F.R. Part 68.” Some elements of the proposed project (e.g. historical research, full code analysis, a feasibility analysis of rehabilitation options, and the like) appear to comfortably fit as master planning to preserve, rehabilitate and restore the historic resource. Other elements of the project such as reviewing a “sustainable approach for building and landscape” are a closer call.

The CPC should satisfy itself that the Master Plan’s goals, objectives and scope of work comport with the three standards for eligible funding – rehabilitation, restoration or preservation – and do not encompass maintenance or other work not within the scope of the CPA. Again, where this is a privately-owned property seeking CPA funds, if the CPC is inclined to recommend this project, it would be prudent to insist on a perpetual historic preservation restriction in exchange for the commitment of such funds. This restriction may serve as a mechanism to ensure that Master Plan (or at least the portion of a Master Plan funded with CPA funds) only encompasses components consistent with the CPA.