



MEMORANDUM

To: ACTON COMMUNITY PRESERVATION COMMITTEE (“CPC”)

cc: Roland Bartl, Planning Director

From: Stephen D. Anderson, Town Counsel
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 2 and 12).

Date: January 23, 2013

You have asked us whether various Community Preservation Act (“CPA”) applications for FY 2014 appropriations are eligible for funding under the CPA. This memorandum analyzes two pending proposals for CPC consideration – 2 and 12 (Sachem Way and the HDC Loan Program).

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 2. Sachem Way Roof and Siding Replacement [CONDITIONAL YES]

The Acton Housing Authority (“AHA”) is requesting \$203,000 to restore the siding and roof at the Sachem Way community housing development. The total cost of the design and construction will be approximately \$354,000, with the Commonwealth (through DHCD) providing the additional funding. The AHA believes that designing and bidding the roof and siding projects together would increase project efficiency and reduce costs.

The property consists of 12 units of family rental housing and 23 units of elderly rental housing, reserved for families and individuals under 80% of median income. Since initially constructing the development, AHA has not replaced the roof or the siding. The AHA asserts that the roofs in both the family and elderly developments have deteriorated to such a state that if they are not replaced in the near future, the interior of the units will suffer considerable damage. Similarly, the siding on the family development is pulling away from the framing at an accelerating rate. The application indicates that “[t]he goal of the project is to prevent interior damage caused by leaking roofs and siding and to keep the residents in a moisture and mold free environment.”

According to the AHA, “the project will include, but is not limited to:”

- Stripping roofs to bare sheathing;
- Shingle replacement;
- New flashings and ice and water shield;
- Replacement of roof vents;
- Selected sheathing repairs if necessary;
- New gutters and gutter guards (re-using the downspouts if possible); and
- Removal of existing siding at the family development and installation of new sheathing, vapor barrier and cement or vinyl siding.

“CPA funds may be used for the “preservation” of community housing, which includes “protection from injury, harm or destruction, but not including maintenance.” The CPC should determine whether the proposed capital improvements serve to protect the community housing

units from “injury, harm or destruction” from leaks and mold, and whether they exceed routine “maintenance,” defined as “upkeep of real . . . property.” G. L. c. 44B, § 2. If so, the project qualifies for CPA funding as “preservation” of community housing. *See* letter from Daniel J. Murphy to Jay Gonzalez, May 23, 2002 (Department of Revenue concurs that roof replacement qualifies as an allowed preservation activity).

If the particular Sachem Way units covered by the application were acquired or created using CPA funds (which the application does not address),¹ the CPC could also determine that the proposed project is eligible for CPA funding as “rehabilitation or restoration” of community housing “acquired or created [with CPA funds].” However, in the absence of confirmation that the particular units covered by the application were acquired or created under using CPA funds, the project would not be eligible on the ground of “restoration” or “rehabilitation.”

Accordingly, the CPC should carefully consider the category into which the project falls before making a final determination of eligibility. In addition, to the extent that AHA has indicated that “the project will include, but is not limited to” certain specified work, the CPC should make clear in its decision, if approved, that any funds awarded by Town Meeting may not be used for maintenance.

Proposal 12. Historic Preservation Loan Program [CONDITIONAL YES]

The Historic District Commission (“HDC”) requests \$150,000 to create a loan program to “encourage preservation or restoration of appropriate exterior architectural details for both residential and commercial building projects.” The details of the Loan Program as currently proposed are as follows (in relevant part):

- Funds will be available to restore or preserve residential or commercial buildings in the historic districts, on the Historical Commission’s inventory or the National Register Multiple Resource Listing, and others “deemed significant” by the HDC or Historic Commission.
- Applications will be reviewed by a subcommittee – including 1 HDC member, 1 CPC member and 1 Historical Commission member. The Selectmen will have veto power over any loan applications approved by the subcommittee.
- The loan would be administered by a local bank.
- The loan term will be 3, 5 or 10 years.
- Interest rate for 2013 would be half of the current prime rate as of January 1.
- Loans of less than \$7,500 will require a lien and a preservation restriction for twice the length of the loan term if the property is not within any Historic District.
- Loans of more than \$7,500 will require a mortgage and a preservation restriction for twice the length of the loan term if the property is not within any Historic District.
- The applicants will not be charged any points or credit reporting, appraisal or attorneys’ fees, but will be responsible for recording fees and loan processing fees of 0.5 % of the loan or \$50 (whichever is more) to cover administrative costs.

¹ CPA funds were used to acquire and create 12 new units of rental housing at Sachem Way, but those units are currently under construction and are not the focus of this application.

The HDC made a similar request for funds last year. At that time, we recommended that the Town seek review of the proposed loan program from DOR or seek home rule legislation for the program. The Town requested a formal opinion from DOR, and the DOR response is attached to the HDC's application.

In relevant part, DOR found that "[t]he CPA does not expressly grant municipalities the power to loan money to further its objectives" but that "Acton could adopt a by-law to provide for such a loan program" as a means of granting "additional powers consistent with the statute." Thus, where CPA funds can be used for the "acquisition, preservation, rehabilitation and restoration of historic resources" (G.L. c. 44B, § 5(b)(2)), and those are the very goals of the proposed loan program, CPA funds could be used to fund this loan program if the Town were to adopt a by-law to provide for the loan program.

As currently proposed, the loan program must be modified to conform to CPA requirements and DOR directives concerning the administration of the loan funds. Those issues are described in more detail below.

A. Required Loan Program Elements and Modifications

Maintenance.

Each loan must qualify as an eligible expenditure of CPA funds under § 5(b)(2). The proposed loan program envisions that this review will be done by the "Fund subcommittee." To comply with the CPA, the loan funds cannot be used for maintenance of historic resources, a use prohibited by the CPA under G.L. c. 44B, §5(b)(2) ("funds expended pursuant to this chapter shall not be used for maintenance"). However, the HDC's application suggests in places that the funds may be used for maintenance. *See* Application at 2 (benefits is for those "who might not otherwise consider a historic home due to maintenance issues") and at 3 (noting that although not to be used "*primarily* for maintenance...[s]ometimes the Fund can assist with a part of a larger restoration project, in which case the Fund will support those aspects which can be seen by the public visibility [*sic*] and are most essential to the character of the building.").

Recommendation: Any approval of the program and the underlying bylaw should specify that loan funds can *only* be used for acquisition, preservation, rehabilitation and restoration of historic resources, not for maintenance.

Definition of Historic Resources.

The HDC's application identifies historic resources eligible for loan funds under this program to include those "buildings both inside and outside the Town of Acton's Historic Districts, including the areas, catalogued in any of the Historical Commission's surveys, the National Register Multiple Resource Listing, as well as other buildings or structures which are otherwise deemed significant by the Historic[] District Commission and/or Historical Commission." This proposed pool of eligible buildings is broader than that allowed by the CPA, which defines historic resources as "a building, structure, vessel, real property, document or artifact 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."

Recommendation: Any approval of the program and the underlying bylaw should specify that the loan program is open to those buildings in Acton that qualify as historic resources, as defined by the CPA, rather than the definition supplied by the HDC's application.

Preservation Restrictions.

In its October 23, 2012 Letter, the DOR makes clear that any CPA funds used for loans would need to be accompanied by a preservation restriction on the benefitted property to "ensure loan recipients use the funds for public purposes and in strict accordance with the CPA." This is the necessary safeguard to confirm the public benefit and comply with the Anti-Aid Amendment of the Massachusetts Constitution, which prohibits public funds benefitting private persons for private purposes. The HDC's application proposes that such preservation restrictions attach to only those buildings *outside* of Acton's Historic Districts (i.e., those already under the jurisdiction of the HDC), which is narrower than required.

Recommendation: Any approval of the program and the underlying bylaw should require an historic preservation restriction on all loans, regardless of the property's location.

Revolving Fund.

The HDC's application proposes a "revolving loan program." The DOR has rejected the establishment or use of any revolving fund under G.L. c. 44, § 53E½, for the purposes of loaning CPA funds. It opines that G.L. c. 44B, § 7(iii), which states that the CPA fund includes "all funds received from ... any other source for such purposes," requires that the repaid loan funds received by the Town must be paid into the Town's CPA Fund, *not* any newly created revolving fund. Then, according to DOR, the CPA funds can only be spent according to the statute and with an appropriation from Town Meeting.

Recommendation: Any approval of the program and the underlying bylaw should require a system for repayment, transfer to the CPA Fund, and appropriation that conforms to the DOR's opinion. A working group is developing a workable mechanism, both from a legal and administrative perspective. Those developments are outlined in more detail below.

B. Required Legal Framework

DOR confirms that, properly structured, the CPA permits the creation of such a loan program. To effectuate this program, the Town must establish the proper legal framework. Two options are:

1. Local Bylaw: As indicated by DOR, Town Meeting could pass a bylaw establishing the loan program and specifying operational criteria, such the composition of the "subcommittee," the basic loan terms and conditions, interest guidelines, preservation restriction requirements, BOS supervision, loan agreements, mortgage requirements, and collection enforcement mechanisms.
2. Home Rule Petition or General Legislation: Alternatively, the Loan Program could be established by home rule legislation (approved by Town Meeting and passed by the General Court) or by general legislation (with a local acceptance option). Such

legislation could include items identified in the local bylaw as well as provisions to cure the administrative problems described below concerning appropriations, payment of administrative costs, repayment and collection options, and enforcement through local tax bills. This legislation would establish new ground rules for the loan program, distinct from the DOR’s interpretation of the CPA limits.²

If the CPC were to approve the proposed loan program, it should condition its approval on adoption of a suitable bylaw or legislation. There are pros and cons to each option. The local bylaw provides more control over the outcome and timeline but it comes with the administrative restrictions outlined in DOR’s letter. The legislation takes some control of the program away from the Town and is not assured of passage, but it helps solve some administrative issues under current law. Determining the legal framework is a necessary first step to setting up the loan program.

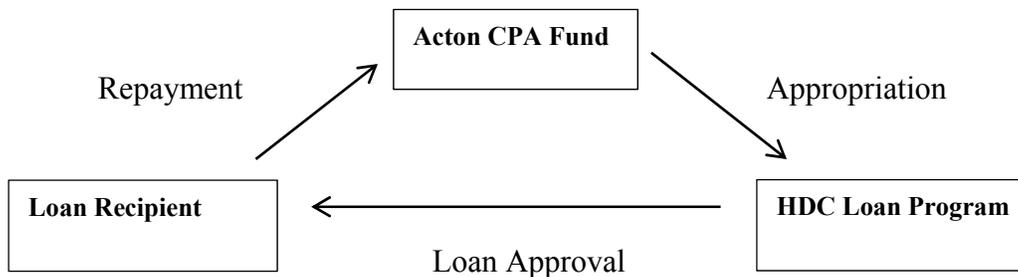
If the proponents seek to utilize a local bylaw or Home Rule legislation, it should be drafted in consultation with Town Counsel, vetted with the CPC, and placed on the Town Meeting warrant at the same time as the loan program appropriation.

C. Required Administrative Framework

If the loan program is approved for CPA funding, the details of how that program will work need to be determined. Structuring and operating the loan program involve significant administrative considerations, such as those outlined below. These items require input from the Board of Selectmen, the Town Manager and the Town Finance Department. The decision whether the loan fund is established pursuant to a local bylaw or legislation would affect some of these administrative considerations. For now, various issues with respect to these items are simply identified as in need of resolution.

Loan Administration

The loan program cannot be established as a revolving fund administered by a local bank, as envisioned by the HDC in its application. Instead, the basic lifecycle of the loan, simplified, would be as follows:



² The legislation could be modeled on G.L c. 111, §127B½, which involves a program used by the Acton Board of Health (“BOH”) to fund improvements or repairs to septic systems, or removal of underground fuel storage tanks and lead paint. Home owners petition the BOH for such funding assistance and, if approved, enter into a Betterment Agreement with the Town, including a lien on the property and recording of the betterment agreement. In this chapter, the property owner also agrees to be personally liable in the event that the underlying property is conveyed.

The Town Finance has provided initial figures for costs associated with the project's administration. Given the limitations imposed by G.L. c. 44B, § 6, on administrative uses of CPA Funds, given the Town's fiscal concerns, there would need to be a viable mechanism in place both to fund and to control the administrative costs associated with the program.³

Appropriation

Given DOR's opinion, there would need to be annual appropriations from the CPA Fund to the loan program to keep it a viable source of loan funds. These appropriations may include initial funding in year 1, expanded funding in subsequent years, and/or replenishment of the collected funds repaid to the CPA Fund and re-appropriated to the loan program. The mechanics for doing this should be carefully considered.

Legal Documents

Town Counsel would need to draft a number of documents to establish the program, including the bylaw or legislation, Town Meeting warrant articles, model loan documents, and model historic preservation restriction. There may be additional legal costs to review and finalize each project and agreement and to collect unpaid loan amounts from delinquent borrowers.

D. Conclusion

The HDC Loan Program, with the modifications described above, is eligible for CPA funds. Indeed, it may be a cutting edge model for community preservation of historic structures in a way that is self-generating, essentially compounding the impact of a finite CPA expenditure. There is a significant amount of work, however, to design, establish, and administer the program. This work is underway and could be finalized by the April Town Meeting, if the CPC recommends the program for funding.

³ This is a very real concern for designing a successful program. The Arlington Program, upon which much of this program was modeled, is apparently now defunct in part due to administrative cost overruns.