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**MEMORANDUM**

To: Acton Community Preservation Committee ("CPC")

From: Stephen D. Anderson and Mina S. Makarious  
ANDERSON & KREIGER LLP

Re: Acton/CPA - Allowable Uses of CPA Funds for FY 2015 Appropriations (for consideration at 2014 Annual Town Meeting) (Proposals 1-3)

Date: November 11, 2013

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You have asked us to review the Community Preservation Act ("CPA") funding applications for FY 2015 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.

As amended in 2012, 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<sup>1</sup>;
- (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 under any circumstances.

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<sup>1</sup> The statute was amended again, effective February 2013, to allow the use of community preservation funding for the acquisition of artificial turf for athletic fields where the project to acquire such artificial turf was approved prior to July 1, 2012. G. L. c. 44B, § 5(b)(2) (as amended by St. 2013, c. 3, § 5).

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. Historic District Study and Design Guidelines & Standards [YES]**

The Town’s Planning Department requests \$45,000 to engage an expert consultant to conduct a detailed study of Acton’s three local Historic Districts, “district by district, block by block, and lot by lot,” and to recommend detailed design guidelines for the Districts. The consultant will evaluate each district’s “unique features and characteristics” and “work with the community to create detailed, justifiable, and predictable design principles, guidelines and codes custom-tailored for each of the three historic districts, subareas and buildings within them as needed and appropriate, using state-of-the-art, widely accepted historic preservation principles and practices.” Consistent with the dual purposes of Acton’s Local Historic District Bylaw (which include not only “preservation and protection of the distinctive characteristics and architecture of buildings and places significant in the history of the Town of Acton” but also “encouragement of new building designs compatible with the historically significant architecture existing in the Local Historic District”), the study will focus on design guidelines that properly regulate and guide development so as to facilitate each district’s “long-term economic viability and physical survival.”

The Planning Department indicates that the project is eligible for funding support from the Massachusetts Historical Commission’s competitive planning and survey grant program. The Planning Department is prepared to apply for an MHC grant upon CPA funding award as a means of leveraging the CPA funds with additional grant support.

The CPA permits funds to be expended for acquisition, preservation, rehabilitation and restoration of historic resources. G.L. c. 44B, § 5(b)(2). The CPA (§ 2) 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.

The Local Historic Districts include specifically defined areas of real property<sup>2</sup> which meet the definition of “historic resource” provided the district is either included in the State Register of Historic Places or is determined “significant” by the “local historical preservation commission.” The Acton Centre Historic District is on the National Register of Historic Places and is therefore automatically listed on the State Register as well. In adopting Chapter P, Town Meeting has determined that all three local historic districts include distinctive characteristics and architecture of buildings and places significant in the history of the Town of Acton. If the Acton Historical Commission has not already determined each district “to be significant in the history, archeology, architecture or culture of [the] ... town” for purposes of the CPA, we have no doubt that the Acton Historical Commission can and should make this determination at this time.

To be eligible for CPA funding the requested funds must be used for the “acquisition, preservation, rehabilitation and restoration of historic resources.” The Planning Department’s application indicates that the study will focus on “what to preserve and where to allow or encourage change, development, infill, and redevelopment consistent with the areas’ historic resources” so as to “create detailed, justifiable, and predictable design principles, guidelines and codes custom-tailored for each of the three historic districts, subareas and buildings within them as needed and appropriate, using state-of-the-art, widely accepted historic preservation principles and practices” and to properly control and regulate development “to facilitate [the Districts’] ... long-term economic viability and physical survival.” Properly performed and implemented, this study will contribute in specific and material ways to the “preservation,<sup>3</sup> rehabilitation<sup>4</sup> and restoration of historic resources” as those terms are defined or used in the CPA. While preservation and development within the districts are both the subject of the study, we read the application to focus on how to promote preservation and properly guide development,

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<sup>2</sup> Pursuant to M.G.L c. 40C and the Town’s Local Historic District Bylaw (Chapter P) creates the following three local historic districts:

1. **Appendix 1: South Acton District** The South Acton District shall be a DISTRICT area under this Bylaw. The location and boundaries of the South Acton District are defined and shown on the Local Historic District Map of the Town of Acton, Sheet 1 - 1990 which is a part of this bylaw. Sheet 1 is based on the 1989 Town Atlas. The delineation of the DISTRICT area boundaries is based on the parcel boundaries then in existence and shown therein, except as otherwise apparent on Sheet 1.
2. **Appendix 2: Acton Centre District** The Acton Centre District shall be a DISTRICT area under this Bylaw. The location and boundaries of the Acton Centre District are defined and shown on the Local Historic District Map of the Town of Acton, Sheet 2 - 1990 which is a part of this bylaw. Sheet 2 is based on the 1989 Town Atlas. The delineation of the DISTRICT area boundaries is based on the parcel boundaries then in existence and shown therein, except as otherwise apparent on Sheet 2.
3. **Appendix 3: West Acton District** The West Acton District shall be a DISTRICT area under this Bylaw. The location and boundaries of the West Acton District are defined and shown on the Local Historic District Map of the Town of Acton, Sheet 3 - 1990 which is a part of this Bylaw. Sheet 3 is based on the 1989 Town Atlas. The delineation of the DISTRICT area boundaries is based on the parcel boundaries then in existence and shown therein, except as otherwise apparent on Sheet 3.

<sup>3</sup> “Preservation” is defined in the CPA as “protection of personal or real property from injury, harm or destruction.”

<sup>4</sup> “Rehabilitation” is defined in the CPA in relevant part as “capital improvements, or the making of extraordinary repairs, to historic resources ... for the purpose of making such historic resources ... functional for their intended uses including, but not limited to, improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes; 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 ...”

rehabilitation and restoration so as to protect and preserve the long-term viability of the districts. As such, the study is eligible for CPA funding.

**Proposal 2. Participation in Regional Housing Services Office [YES]**

The Town and the Acton Community Housing Corporation (“ACHC”) request \$42,000 to continue participation in the Regional Housing Services Office (“RHSO”). The Town’s membership in the RHSO was originally funded in 2012 through a CPA appropriation as a pilot program for two years. The Town is currently a member of the RHSO with other area towns pursuant to Inter-Municipal Agreements among the towns. The RHSO oversees affordable housing programs in member towns and assists the ACHC in meeting the administrative, compliance and monitoring needs for the Town’s existing affordable housing units.

The CPA 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.” As amended in 2012, the CPA, G.L. c. 44B, § 2, defines the phrase “[s]upport of community housing” to “include, but not be limited to, programs that provide grants, loans, rental assistance, security deposits, interest-rate write downs or other forms of assistance directly to individuals and families who are eligible for community housing or to an entity that owns, operates or manages such housing, for the purpose of making housing affordable.” The funding request supports involvement in the RHSO, which aids the Town and ACHC’s operation and management of community housing for the purposes of making it affordable. It is eligible for CPA funding under the new statutory definition.<sup>5</sup>

**Proposal 3. Community Housing Program Fund [YES]<sup>6</sup>**

The ACHC requests \$150,000 to replenish the existing Community Housing Program Fund for “the acquisition, creation, preservation, and support of community housing in the Town of Acton.” The ACHC made similar requests for CPA funds for FY 2008, 2009, 2010 and 2011 for a similar set of programs. A summary of our response from prior years, updated for this year, is as follows:

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<sup>5</sup> Even if the requested funding did not fit squarely within the new statutory definition, the inclusion of the elastic clause “including, but not limited to” suggests that the new definition does not displace prior guidance on the meaning of the term “support of community housing.” As explained in our FY 2013 CPA recommendations (prior to the amendment of the statute), the Department of Revenue (“DOR”) opined in prior guidance to the Town that “support of” community housing “in the context of municipal expenditures ordinarily means to provide funds for a particular activity.” See Letter to SD Anderson from DJ 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 in order to ensure compliance with restrictive covenants and further affordable housing solutions for the Town within the region, it is preserving and supporting community housing as provided in the CPA.

<sup>6</sup> In our comments on the proposed 2011 CPA appropriations, we commented on the ACHC’s proposal for a financial literacy course and concluded that its eligibility for funding was a “judgment call.” The current funding application does not make clear whether this program is proposed to continue in FY 2015. To the extent that it is planned for FY 2015, please consult those comments for a more detailed analysis

The CHP Fund will be used to finance new affordable housing initiatives recommended by ACHC and approved by the Board of Selectmen under ACHC's enabling legislation (St. 1996 c. 143, § 1). ACHC proposes to use the CHP Fund to continue current programs and create new initiatives. These programs and initiatives include:

- A Condo Buy-Down Program: Under this program (begun in 2007), ACHC would “buy down” the selling price of existing housing units or new construction units in non-40B developments to a pre-determined affordable level so the unit could be sold to income eligible households earning up to 80% of the Area Median Income.
- First-Time Homebuyer Grant Program: Under this program, ACHC would provide a grant of \$60,000 for a 2-bedroom unit or \$80,000 for a 3-bedroom unit to eligible first-time homebuyers selected in a lottery process. This grant would be used to off-set the mortgage and would require a deed rider to keep the unit affordable in perpetuity. The ACHC would also consider using \$100,000 from the fund to subsidize a minimum of one unit for first-time homebuyers, again determined by the DHCD-approved lottery system.
- A Condo Purchase & Rental Program: Under this program, ACHC would partner with the Acton Housing Authority to buy existing condo units for AHA's low income rental program. A combination of CPA, AHA and housing funds would be used to fund these acquisitions.
- Affordable Housing Buyer Assistance Programs:<sup>7</sup> Under these programs, ACHC would provide down-payment and closing cost assistance, a first-time home buyer course, and foreclosure prevention and credit counseling for income-eligible households seeking to purchase affordable housing.
- Minor Capital Upgrades to Restricted Units: Under this program, ACHC would use portions of the fund to do inspections and minor capital upgrades for existing deed-restricted units as part of the resale process. This program would also cover the cost of an agent to handle the resale to an income eligible buyer.
- Housing Production Plan: A new initiative proposed in this application would provide for the creation of a Housing Production Plan to address the affordable housing goals developed during the Acton2020 process.

Each of the programs and initiatives listed above qualifies for CPA funds for “the acquisition, creation, preservation and support of community housing” under G. L. c. 44B, § 5 provided that:

- Permanent deed restrictions that meet the requirements of chapter 184 are utilized to ensure that the subsidized housing remains affordable in perpetuity and that the unit or

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<sup>7</sup> In our comments on the proposed 2007 CPA Appropriations, we commented at length on ACHC's proposal for a forgivable 5-year down payment assistance loan. Please consult those comments for a more detailed analysis with respect to any such proposed program this year.

units are added to the Town's Subsidized Housing Unit Count.<sup>8</sup>

- ACHC's initiatives are approved by the Board of Selectmen under ACHC's enabling legislation.
- The housing in question qualifies under the CPA's definition of "community housing" as "low and moderate income housing for individuals and families, including low or moderate income senior housing." G. L. c. 44B, § 2.<sup>9</sup>

In the case of minor capital upgrades for existing deed-restricted units, care must also be taken to ensure that the CPA funds are used for "preservation" purposes (i.e. "protection of ... real property from injury, harm or destruction") and not for "maintenance" (i.e. "incidental repairs which neither materially add to the value of the property nor appreciably prolong the property's life, but keep the property in a condition of fitness, efficiency or readiness" (G.L. c. 44B, § 2)).

With respect to the proposed Housing Production Plan preparation, the project is eligible for funding because it is in "[s]upport of community housing." As explained in regard to Project 2 above, this phrase is defined to "include, but not be limited to, programs that provide grants, loans, rental assistance, security deposits, interest-rate write downs or other forms of assistance directly to individuals and families who are eligible for community housing or to an entity that owns, operates or manages such housing, for the purpose of making housing affordable." The requested funding will assist the Town and the ACHC to address the affordable housing goals developed during the Acton2020 process and is therefore for the purposes of "making housing affordable." Preparation of the Housing Production Plan also "supports" community housing since identifying existing housing resources and needs serves as the first step towards the "acquisition, creation, [and] preservation" of community housing.<sup>10</sup>

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<sup>8</sup> See G.L. c. 44B, § 12(a) (emphasis added). The deed restriction "shall run with the land and shall be enforceable by the city or town or the commonwealth" or shall "run to the benefit of a nonprofit, charitable corporation or foundation selected by the city or town with the right to enforce the restriction."

<sup>9</sup> G.L. c. 44B, § 2 defines these terms as follows (emphasis added):

- "Low income housing" is defined as "housing for those persons and families whose annual income is less than 80 per cent of the areawide median income" as determined by the United States Department of Housing and Urban Development.
- "Low or moderate income senior housing" is defined as "housing for those persons having reached the age of 60 or over who would qualify for low or moderate income housing."
- "Moderate income housing" is defined as "housing for those persons and families whose annual income is less than 100 per cent of the areawide median income" as determined by the United States Department of Housing and Urban Development.

<sup>10</sup> The Community Preservation Coalition's CPA Projects Database also includes several examples of approved proposals for funding to prepare a Housing Production Plan in other municipalities. See <http://communitypreservation.org/projects/report?category=housing>.