ANDERSON & KREIGER LLP

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) (Vol. IV)

Date: November 27, 2013

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 following pending proposals for CPC consideration:

- **2.[1] West Acton Baptist Church Rehabilitation of "Tin" Upper Level Ceiling**
- **3. West Acton Baptist Church Rehabilitation of Fire Safety System**
- **6. Wright Hill Open Space Committee**
- **15. Nature Play Spaces Planning Grant**
- **16. Acton Arboretum Parking Lot Improvement**
- **17. Acton Arboretum Bog Boardwalk Rehabilitation**

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; [2]
(d) acquisition, creation, preservation and support of community housing; and

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[1] The application numbers used in this memorandum reflect those on the CPA Project Applications List 2014 (http://doc.acton-ma.gov/dsweb/Get/Document-39999/CPA%20Project%20Applications%20List%202014.pdf). We did not have this list when preparing the first two volumes of recommendations and therefore did not use this numbering system.

[2] 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).

(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:

	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. West Acton Baptist Church Rehabilitation of "Tin" Upper Level Ceiling [JUDGMENT CALL]

The West Acton Baptist Church (the "WABC") requests $42,961 to rehabilitate its historic sanctuary's pressed metal ceiling.[3] This amount represents 90% of the cost of the project. The WABC will fund the remaining 10%. The WABC was constructed in 1854, but over the past decade normal maintenance methods have proven inadequate to prevent water from seeping into the belfry and roof, damaging the ceiling. The metal ceiling is currently rusting and its paint is peeling. The WABC proposes to remove the peeling and loose paint from the ceiling and clean it, repair the rusted areas, and repaint the ceiling. The WABC will use a contractor with expertise in historical restoration and acoustics for this work to preserve both the historic features of the ceiling and the WABC's acoustics.

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 include "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."

- "Maintenance" means "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."

[3] Although referred to as the "tin" ceiling, the ceiling is actually made of pressed steel.

- "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.

We determined in our FY 2014 CPA recommendations that 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 CPA does not expressly limit expenditures to historic resources on public property; however, the CPA's intent is to support and expand community assets. *See* DOR IGR 02-208, p. 1. The WABC and other privately-owned Historic Resources in Acton (such as Acton Community Center and Exchange Hall) have sought and been awarded CPA funds, subject to the grant and recording of historic preservation restrictions on the property.[5] *See* DOR IGR 02-208, p. 1 (subject to the grant of an historic preservation restriction, CPA funds may be used on a

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[4] *See* http://www.acton-ma.gov/DocumentCenter/Home/View/373.

[5] 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.

private property that qualifies as an historic resources). The Town is negotiating a preservation restriction on the WABC based on a prior year's award. Whether this particular project qualifies for CPA funding is a matter for the CPC's discretion.

Repainting of buildings is typically considered "maintenance," and not eligible for CPA funding. The project, as described by the WABC, consists largely of activities typically conducted in connection with routine repainting: removing old-paint, preparing surfaces for a new coat of paint, and applying the new paint. The CPC could therefore determine that the project consists of maintenance and is not eligible for funding.

Alternatively, the CPC may determine that the project includes sufficient features of "restoration," "preservation" or "rehabilitation," to be eligible for funding:[6]

- The term "restoration" is not defined, but the proposed project may fit into the meaning of the term if, like the proposed Town Hall restoration, the repainting will restore the WABC to its historic design, including its original paint scheme. *See* FY 2015 Recommendations, Vol. II.

- All or a portion of the project may also be eligible for funding as "preservation." WABC will not only repaint the ceiling but remove existing rust from the deteriorating metal ceiling. To the extent this work is needed to protect the property "from injury, harm or destruction," such as further deterioration to the ceiling or structural damage due to water infiltration, it may be characterized as "preservation."

- Similarly, the proposed project may qualify for funding as "rehabilitation" of an historic resource, because the repainting is an "extraordinary repair," meant to reverse the deterioration of the ceiling and preserve its historic function, as well as its acoustics for use as a church and meeting place. If the CPC funds this project as "rehabilitation" it should require the WABC to 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 to the extent practical.

Proposal 3. West Acton Baptist Church Rehabilitation of Fire Safety System [YES]

The WABC also requests $55,100 to upgrade its fire safety system by:

(1) Installing an ADA compliant fire alarm panel with strobes and speakers in assembly areas and interior pull stations at all exists;
(2) Installing smoke, heat, and carbon monoxide detectors throughout the building;
(3) Updating the WABC's sprinkler system by replacing all of the current sprinkler heads;
(4) Tying in current sprinkler system controls with a new control panel to produce an integrated system;
(5) Installing a new ADA compliant emergency battery system with interior LED exit signs

[6] Determining the exact category for funding for historic resources is not as critical as it is with community housing or open space because an historic resource is not subject to the same limitation that it must be acquired or created with CPA funds to qualify for "rehabilitation" or "restoration" funding.

and emergency light fixtures at all egress locations and corridors, intervening spaces, exterior doors, and toilet rooms; and

(6) Making associated electrical system upgrades.

The requested funding represents 90% of the cost of the project. The WABC will fund the remaining 10%.[7]

Assuming the Town finalizes an historic preservation restriction on the WABC property, this WABC qualifies for CPA funding because (a) the church is an "historic resource" and (b) the project constitutes rehabilitation of an historic resource. The following definitions apply under the CPA:

- "Capital improvement" means "reconstruction or alteration of real property that: (1) materially adds to the value of the real property or appreciably prolongs the useful life of the real property; (2) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (3) is intended to become a permanent installation or is intended to remain there for an indefinite period of time."

- "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 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;…"

The proposed fire safety system upgrade fits the definition of rehabilitation for two reasons. First, the project consists of "capital improvements, or the making of extraordinary repairs" to make the church functional for its intended use. The existing fire protection system is outdated and will need to be upgraded. The sprinkler system, for instance, is over 50 years old. The improvements are not mere maintenance, but rather a complete overhaul of the existing fire protection system. The improvements are a "capital improvement" because they consist of "reconstruction or alteration of real property that:… materially adds to the value of the real property or appreciably prolongs the useful life."

Second, the proposed project includes several features intended "to comply with the Americans with Disabilities Act and other federal, state or local building or access codes." The project involves installation of an ADA compliant fire alarm panel and emergency battery system, and the upgrades are generally intended to modernize the church's fire protection system in accordance with modern building and fire codes. Although the WABC asserts that the church currently meets required fire inspection standards, it is also clear that the church's fire protection systems are outdated based on the WABC architects' recommendations and may soon need to be

[7] The requested amount includes a 10% margin added for cost overruns and other incidental expenses.

upgraded to meet applicable requirements.[8]

Proposal 6. Wright Hill Open Space Purchase [YES]

The Town's Open Space committee requests $1,280,000 to purchase the Wright Hill Open Space property, an approximately 13 acre hill top open space parcel in West Acton. The property is owned by the Wright Hill Association ("WHA"), which also owns an adjacent four acre parcel containing a residence. WHA bought both parcels for preservation and intends to sell the land to the Town and retain the house for the time being. The proposal notes that the WHA may grant the Town an easement to the house parcel to allow for parking and/or pedestrian access to trails on the Wright Hill Open Space property.

The purchase has the following benefits:

- Conservation of historic land and structures including a farm corn crib, building foundations, outbuildings, stone walls, and a cart path and scenic vistas;
- Expansion of the property's open space trail system;
- Creation of a new walking loop and recreation and nature study area between West Acton Village and the Guggins Brook Conservation Area;
- Recreational use opportunities including walking, picnicking, cross-country skiing, mountain biking, and kite flying;
- Preservation of open meadows and a wildlife corridor extending from the Guggins Brook/Jenks Conservation Land, including upland meadow, orchards, and forested area contiguous to existing conserved wetlands; and
- Water resource protection through preservation of natural flows at and from Wright Hill.

CPA funds may be used for the "acquisition" or "creation" of open space and land for recreational use. The following definitions apply under the CPA:

- "Acquire" means "obtain by gift, purchase, devise, grant, rental, rental purchase, lease or otherwise. 'Acquire' shall not include a taking by eminent domain, except as provided in this chapter."

- "Open space" includes "land to protect existing and future well fields, aquifers and recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands, ocean, river, stream, lake and pond frontage, beaches, dunes and other coastal lands, lands to protect scenic vistas, land for wildlife or nature preserve and land for recreational use."

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[8] The Community Preservation Coalition's CPA Projects Database also includes several examples of approved proposals for funding to upgrade fire protection systems in historic buildings. *See* *https://tpl.quickbase.com/db/bcstwv3d3?a=API_GetRecordAsHTML&key=37818* *and* *https://tpl.quickbase.com/db/bcstwv3d3?a=API_GetRecordAsHTML&key=3375* (Restoration of Historic Buckman Tavern in Lexington); *https://tpl.quickbase.com/db/bcstwv3d3?a=API_GetRecordAsHTML&key=37875* (Historic Westford Community Center); https://tpl.quickbase.com/db/bcstwv3d3?a=API_GetRecordAsHTML&key=3962 (Orleans Playhouse); http://communitypreservation.org/projects/report?category=historic (Keyword: Fire, listing other projects).

- "Real property" means "land, buildings, appurtenant structures and fixtures attached to buildings or land, including, where applicable, real property interests."

- "Real property interest" means "a present or future legal or equitable interest in or to real property, including easements and restrictions, and any beneficial interest therein, including the interest of a beneficiary in a trust which holds a legal or equitable interest in real property, but shall not include an interest which is limited to the following: an estate at will or at sufferance and any estate for years having a term of less than 30 years; the reversionary right, condition or right of entry for condition broken; the interest of a mortgagee or other secured party in a mortgage or security agreement."

- "Recreational use" means "active or passive recreational use including, but not limited to, the use of land for community gardens, trails, and noncommercial youth and adult sports, and the use of land as a park, playground or athletic field."

- Creation is not defined under the CPA.

The proposal calls for the acquisition by purchase of the Wright Hill Open Space Property. Because the Wright Hill Open Space Property fits comfortably within the definition of "open space" and "land for recreational use," the purchase is eligible for CPA funding. The property includes several of the enumerated features of open space including "grasslands, fields, forest land, lands to protect scenic vistas, land for wildlife or nature preserve, and land for recreational use." The application also suggests that the property could be considered "watershed land" because of Wright Hill's effect on area hydrology. In addition, the property's existing and proposed "recreational uses" include trails, and active and passive recreation such as biking, cross-country skiing, walking, kite flying and picnicking.

If the CPC recommends this proposal, it should keep in mind the following requirements for real property acquisitions made with CPA funds in CPA §§ 5 and 12:

1. A real property interest acquired with CPA funds must be bound by a permanent restriction, recorded as a separate instrument, that:
    a. meets the requirements of G.L. c. 184, §§ 31-33; and
    b. limits the use of the interest to the purpose for which it was required.
2. The permanent restriction must be enforceable by the Town, the Commonwealth or a nonprofit organization selected by the Town.
3. The Town may delegate management of the property to, among other entities, the conservation commission, the historical commission, or a nonprofit organization.
4. The Town may not use CPA funds for acquisition in excess of the property's appraised value. Based on the proposal, it appears that the appraised value here matches the requested CPA funding (i.e., $1.28 million). To the extent additional funds are necessary for the acquisition, they must be separately appropriated.

Proposal 15. Nature Play Spaces Planning Grant [YES]

The Acton Public Schools ("APS") requests $30,375 for a "planning grant" to hire a landscape architect to develop designs and a final master plan for handicap accessible nature play spaces at six sites: the Douglas, Conant, Gates, McCarthy-Towne and Merriam Schools, and the Acton Public Schools administration building (for pre-school use). Nature play spaces integrate natural elements of the site with play areas, allowing for independent play by children that connects with the natural environment.

The proposal includes the following tasks:

(1) Site visits and information collection for each of the six sites ($9,000).[9]
(2) A kick-off meeting with the landscape architect regarding the project ($9,000).
(3) Development of schematic design sketches for each site and associated meetings ($9,000);
(4) Development of a Final Master Plan for each site and associated meetings ($13,500).[10]

CPA funds may be used for the "creation" of "land for recreational use." G.L. c. 44B, § 5(b)(2). "Recreational use" means "active or passive recreational use including, but not limited to, the use of land for community gardens, trails, and noncommercial youth and adult sports, and the use of land as a park, playground or athletic field." G.L. c. 44B, § 2. The CPA does not define "creation."

Nature play spaces fit comfortably within the definition of "recreational use." Such spaces are designed to allow children to interact both actively and passively with natural elements of the space by providing opportunities to "build with natural materials, gather for a story with a seat on a log, and have the chance to draw, paint, read or explore in a natural setting." APS Application at 2. Nature play spaces are also a form of playground areas and, like playgrounds, are located adjacent to school buildings for use during recess periods and as part of the educational curriculum. The planning process is the first step in "creating" natural play spaces and is thus eligible for funding.[11]

Currently the Town owns and APS administers the school properties in question. However, as part of the K-8 regionalization process, on or about June 30, 2014, various school properties will be conveyed to the Acton Boxborough Regional School District, and the Acton Public School Committee will cease to exist. This will occur prior to the expenditure of the CPA funds. As a

[9] The application states that this task was scheduled for November 2013.

[10] Although the costs of these tasks total $40,500, APS proposes to offset the costs with a 25% ($10,125) cost sharing from non-appropriated funds.

[11] The Community Preservation Coalition's CPA Projects Database includes examples of CPA funding for natural play areas in Concord (https://tpl.quickbase.com/db/bcstwv3d3?a=API_GetRecordAsHTML&key=33428) and Tisbury (https://tpl.quickbase.com/db/bcstwv3d3?a=API_GetRecordAsHTML&key=39053).

result, the Town Meeting warrant article and CPA award letter should address the mechanics of the award, including (a) whether the Selectmen will administer the appropriated funds, (b) whether the funds will be transferred to ABRSD as the successor to APS with respect to the land in question, and (c) whether the properties will ultimately be subject to any permanent restrictions regarding future town use of the nature play spaces which are to be later created with a future grant of CPA funds.

Proposal 16. Acton Arboretum Parking Lot [YES]

The Town's Natural Resources Department requests $53,000 to enlarge, improve and pave the Acton Arboretum parking lot. The Acton Arboretum is the only conservation land in Acton that currently has handicapped-accessible trails. The parking lot's current condition, however, limits the use of the Arboretum by this underserved population. The current parking lot is gravel and includes only one paved handicap-accessible parking spot located away from any accessible trail. Because it is not paved, the lot often becomes muddy and difficult to navigate. It is also frequently congested, requiring visitors to parallel park on its edges, further hindering navigation.

The Natural Resources Department proposes to redesign and pave the parking lot to accommodate more vehicles (including by creating more handicap-accessible spaces), and to relocate an existing viburnum shrub to accommodate the redesign.[12] The proposed project also involves construction of an informational kiosk and a rain garden to filter stormwater runoff from the parking lot. The kiosk and rain garden will be built using Natural Resources Department materials and supplies and with donations from Friends of the Acton Arboretum and will not require CPA funding.

While the Arboretum can be characterized both as "open space" and "land for recreational use" under the CPA, in our view "land for recreational use" is the appropriate classification given the proposed use of the funds. This distinction is significant because, the CPA (§ 5(b)(2)) permits the use of CPA funds for the "rehabilitation or restoration of" open space, only if it is "acquired or created" using CPA funds; however, that restriction does not apply to lands for recreational use.

The following definitions apply under the CPA:

- "Capital improvement" means "reconstruction or alteration of real property that: (1) materially adds to the value of the real property or appreciably prolongs the useful life of the real property; (2) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (3) is intended to become a permanent installation or is intended to remain there for an indefinite period of time."

- "Open space" includes "land to protect existing and future well fields, aquifers and

[12] The estimated cost of this work is $47,825. The Natural Resources Department has also included an additional $5,175 in its request for contingencies.

recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands, ocean, river, stream, lake and pond frontage, beaches, dunes and other coastal lands, lands to protect scenic vistas, land for wildlife or nature preserve and land for recreational use."

- "Recreational use" means "active or passive recreational use including, but not limited to, the use of land for community gardens, trails, and noncommercial youth and adult sports, and the use of land as a park, playground or athletic field…."

- "Rehabilitation" means "capital improvements, or the making of extraordinary repairs, to… open spaces, lands for recreational use…for the purpose of making such…open spaces, lands for recreational use…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; …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 consists of "capital improvements" or "the making of extraordinary repairs" to "land for recreational use…for the purpose of making such…lands for recreational use…functional for their intended uses." The parking lot improvements enhance access to the arboretum and enhance the use of the underutilized handicap-accessible trails. In addition, the parking lot improvements will materially enhance the value of the park to the community by making it accessible to a larger number of visitors by easing parking constraints.

Accordingly, the project is eligible for CPA funding even if the Acton Arboretum was not acquired or created using CPA funds.

Proposal 17. Acton Arboretum Bog Boardwalk Rehabilitation [YES]

The Town's Natural Resources Department seeks $30,000 to rehabilitate the Acton Arboretum Bog Boardwalk. The boardwalk was originally built in 1989 by two Eagle Scouts using recycled telephone poles and standard lumber. Over the past five years, it has required constant repairs due to rot and heavy foot traffic. It has also been buried by snow and submerged during seasonal flooding. Given these conditions, and the Arboretum's heavy traffic, the Boardwalk cannot sustain current use demands much longer.

The rehabilitation would raise the platform 18" above plant life, replace the rotting wood with new fiberglass decking, add a teak bench on a viewing platform, and make handicap accessibility improvements, including the addition of wheelchair curbs, and a universal access sidewalk ramp from Minot Ave.[13] The Town projects that these repairs will last 30 years.

This proposal will also be leveraged with private donations. Friends of the Acton Arboretum

[13] The Acton Commission on Disabilities endorses the project because it improves recreational opportunities to an underserved population.

have made a verbal commitment of $3,000 and a private donor has made a strong verbal commitment of $30,000. The Town's Engineering, Natural Resources, Highway Department, and Building Departments have also committed in-kind assistance and consultation.

The CPA permits funding for the "rehabilitation and restoration of land for recreational use." Under the amended CPA, "[r]ehabilitation" 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."

As with the prior project, the proposed Bog Boardwalk project comports with the amended CPA which permits 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 they improve ADA access. Overall, by improving the boardwalk, the project would "make [the Arboretum] more functional for the intended recreational use." Accordingly, the Bog Boardwalk project qualifies for CPA funding.