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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) (Vol. II)

Date: November 20, 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 following pending proposals for CPC consideration:

- **The Acton's Women's Club Preservation and Handicap Accessibility**
- **Open Space Acquisition/Protection Set Aside**
- **Basketball Court Renovation – Goward and Gardner Playgrounds**
- **Windsor Ave. Door and Bay Window Replacement**
- **Restoration of Original Paint Colors at Town Hall**

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.

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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).

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 4. The Acton Women’s Club Preservation and Handicap Accessibility [YES]**

The Acton Women’s Club (“AWC”) requests \$248,400 for an accessibility project at its building located at 504 Main Street. The building is a Federal period house constructed in 1829 and is located in the Acton Center Historic District. The AWC first applied for and received CPA funding in 2011 for historic preservation, protection and restoration to the building. That work primarily involved the redesign of entranceways and the installation of a properly sloped walkway to provide handicap accessibility.

According to the current proposal, AWC and the Massachusetts’ Architectural Access Board (“AAB”) entered into an agreement to require full accessibility at the building. This proposal is designed to meet that requirement. Specifically, CPA funds are requested to:

- Construct an addition to the building to add a vertical lift to the second floor and a handicap accessible bathroom. To preserve the property’s historic features, this addition will be placed in the “cut-out” area of the building, flush with the 1920’s kitchen addition to the rear of the building;
- Relocate the building’s air-conditioning system and ductwork, as a result of the addition;
- Install a new air-conditioner/heat pump system and associated electrical work;
- Remove a wall to increase hall width to correspond with the addition;
- Install or extend railings;
- Widen the kitchen entryway from the dining room on the first floor; and
- Place laminated safety film on windows in stairwells.

Under G.L. c. 44B, § 5(b)(2), the “acquisition, preservation, rehabilitation and restoration of historic resources” are legitimate uses of CPA funds. The following amended definitions apply under the CPA:

- “Historic resources” means “a building, structure, vessel, real property, document or artifact that is listed or eligible for listing 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.”
- “Preservation” means “protection of personal or real property from injury, harm or destruction.”
- “Rehabilitation” means, in relevant part “**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; . . .” (emphasis added).
- Restoration is not defined.

The CPA does not expressly limit expenditures to historic resources on public property. Where the Town has obtained a preservation restriction on the subject private property, as is the case here, the CPA funds may be used on private properties that qualify as historic resources. *See* DOR IGR 02-208, p. 1.<sup>2</sup>

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<sup>2</sup> A preservation restriction for the benefit of the Town was recorded on the property on October 19, 2011. In a February 9, 2007 Opinion involving the proposed use of CPA funds by the Town of Norfolk to the Norfolk Grange (DOR 2007 CPA Workshop B Materials, at page 41), the Massachusetts Department of Revenue indicated 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](http://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

Given the building's age, its location within the National Register Acton Center Historic District, its existing historic preservation restriction and its prior qualification for CPA funding, we infer that the building "has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture" of the Town and therefore qualifies as an "Historic Resource" under the CPA.

The proposed project is eligible for CPA funding because it consists of rehabilitation and preservation costs. The bulk of the proposed costs will be incurred to "comply with the Americans with Disabilities Act and other federal, state or local building or access codes" and thus qualifies as rehabilitation or preservation costs. The construction of the addition specifically to house this accessibility upgrade is designed to preserve the historic features of the building and avoid their destruction due to the necessary accessibility upgrades. It is thus a valid use of CPA funding as a "preservation" cost. While a portion of the project (*i.e.* the relocation and replacement of HVAC systems) does not directly create accessibility; the CPC would be acting within its reasonable discretion were it to conclude that this portion of the project can be funded as "capital improvements" or "extraordinary repairs" to make the building functional for its intended use as a club.

**Proposal 5. Open Space Acquisition/Protection Set Aside [YES]**

The Open Space Committee requests \$450,000 to be set aside for future open space acquisition and/or land protection projects. This request is essentially the same as that made in previous years, except in the amount requested. The amount appropriated for this purpose has ranged from \$300,000 to \$500,000 between FY2009 and FY2014. The amount requested this year is in line with those amounts.

CPA § 6 provides as follows (emphasis added):

In each 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 [\$450,000] 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.

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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.

**Proposal 6. Basketball Court Renovation – Goward and Gardner Playgrounds** [YES]

The Recreation Commission requests \$57,000 to resurface and permanently line the basketball courts at the Gardner and Goward Playgrounds, and to replace the adult basketball hoops at both playgrounds with “junior size & up” adjustable hoops. Under the proposed project, the Gardner court would remain a junior court, while the current adult Goward half-court would be reconfigured as a junior court. The upgrades are planned to take advantage of the completion of the new Goward Playground and the West Acton WAVE project parking improvements near the Gardner playground. The Recreation Commission has explained that a citizen is also interested in fundraising for these improvements.

This proposal is eligible for CPA funding. The CPA, (§ 5(2)) permits the use of CPA funding “for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use.” The following amended definitions apply under the CPA (§ 2):

- “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.”
- “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. ‘Recreational use’ shall not include horse or dog racing or the use of land for a stadium, gymnasium or similar structure.”
- “Rehabilitation” means “capital improvements, or the making of extraordinary repairs, to...lands for recreational use...for the purpose of making such...lands for recreational use...functional for their intended uses...; 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 application requests funding for a “recreational use” (the use of land as a “playground or athletic field” and for “noncommercial youth and adult sports”). As amended, the CPA specifically provides that “rehabilitation” includes “capital improvements...which make the land or the related facilities more functional for the intended recreational use.” The proposed project would replace the aging adult hoops with adjustable hoops at both playgrounds, making the courts more functional for youth basketball players. In addition, by creating a junior court at the Goward playground, the proposal makes that playground more functional for junior full-court basketball.

While some routine resurfacing of the courts may be considered “maintenance” under certain circumstances, the resurfacing proposed here is intended to address safety concerns as part of the overall rehabilitation of the courts and the creation of the new Goward junior court. The improvements can be expected to “materially add to the value” of the courts as community resources and prolong their lifespan so that they will be “functional for their intended use.” As

such, the work is distinguishable from routine maintenance. *See Seideman v. City of Newton*, 452 Mass. 472, 479 (2008) (holding [under prior definition of “rehabilitation] that proposed projects which included among other things “resurfaced basketball and tennis courts” fall “squarely within the definition of ‘rehabilitation,’ which includes ‘the remodeling, reconstruction and making of extraordinary repairs’ to ‘lands for recreational use’ so that they will be ‘functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act”).

**Proposal 7. Windsor Ave and Bay Window Replacement [JUDGMENT CALL]**

The Acton Housing Authority (“AHA”) is requesting up to \$150,000 to replace certain exterior doors and windows at its Windsor Avenue elder/disabled community housing development.<sup>3</sup> AHA explains that the doors and windows to be replaced are all original, 30 year-old doors and windows installed when the development was built. The doors are rusting at the bottoms and some of the wood door jams are rotting caused by years of treating walkways and entrances for ice and snow. The windows to be replaced are in the development’s community room and are rotting from moisture. Replacing the doors and windows will make the structures more weather-tight and increase their energy efficiency.

The following amended definitions apply under the CPA (§ 2):

"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.”

"Preservation" means “protection of personal or real property from injury, harm or destruction.”

"Rehabilitation" means “capital improvements, or the making of extraordinary repairs, to ... community housing for the purpose of making such ... community housing 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; ....”

Thus, CPA funds may be used for the “preservation” of community housing, which includes “protection from injury, harm or destruction,” but not for “maintenance.” G.L. c. 44B, §§ 2, 5(a)(2). G.L. c. 44B, § 2. CPA funds cannot be used for “rehabilitation or restoration” of community housing that was not “acquired or created [with CPA funds].” *Id.*

The CPC should determine whether the proposed capital improvements will serve to protect the community housing from “injury, harm or destruction” from weather and mold (as distinguished from routine “maintenance”). G. L. c. 44B, § 2. If so, the project qualifies for CPA funding as “preservation” of community housing, unless the work is more accurately characterized as

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<sup>3</sup> If approved, the AHA will obtain a full scope and budget from an architect for the work and will not request more than the \$150,000 amount.

“rehabilitation or restoration” of community housing that was not “acquired or created [with CPA funds].” *Compare* Department of Revenue Bulletin 2002-12B (September 2002) (Providing examples of preservation, including “the repair or replacement of a roof to protect a structure from damage from the elements or installation of a sprinkler system to protect it from fire damage.”) and Letter from Daniel J. Murphy to Jay Gonzalez, May 23, 2002 (Department of Revenue concurs that roof replacement qualifies as an allowed preservation activity) *with Seideman v. City of Newton*, 452 Mass. 472, 478-479 (2008) (work [on parks under prior statutory definition] was “not designed for the ‘protection of ... real property from injury, harm or destruction”” but was for “extensive improvements and upgrades” and was “not encompassed by the statutory definition of ‘preservation’”).<sup>4</sup>

If the Windsor Avenue property was not acquired or created using CPA funds (which the application does not address), and if the CPC views the work as “rehabilitation or restoration” of community housing (*i.e.* “capital improvements, or the making of extraordinary repairs ... for the purpose of making such ... community housing functional for [its] intended uses”), the project would not be eligible for CPA funds.

Accordingly, the CPC should carefully consider the category into which the project falls before making a final determination of eligibility. In addition, the CPC should make clear in its decision, if approved, that any funds awarded by Town Meeting may not be used for maintenance.<sup>5</sup>

### **Proposal 8. Restoration of Original Paint Colors at Town Hall [YES]**

The Town’s Municipal properties department requests \$100,000 to restore the original paint colors at Town Hall. The proposal includes repair of rotted wood and repainting the building in its original 1864 color scheme. The project was endorsed by the Board of Selectmen on November 4, 2013. The project will be completed through a sealed bid public procurement process.<sup>6</sup>

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<sup>4</sup> According to the Community Preservation Coalition’s CPA Projects Database, several other communities have provided funding for the replacement of windows and doors at community housing developments as a permissible use of CPA funds. *See* <http://communitypreservation.org/projects/report?category=housing> (Keyword search: “windows”). Although it is not clear from the website whether all of these projects were funded as “preservation” rather than “rehabilitation” or “restoration” of housing acquired with CPA funds, we do know of at least one example in another town where the replacement of windows has been treated as “preservation” where the housing was not acquired with CPA funds.

<sup>5</sup> In prior years, we have made similar recommendations to the CPC with respect to other AHA projects. In our memorandum regarding FY2007 proposals we addressed the endowment of a capital improvement fund for the AHA’s affordable housing inventory. At the time, we provided our view that window and door replacements would qualify as “preservation,” while other projects such as heating system upgrades were “maintenance” or “rehabilitation.” We noted in that memorandum that “[t]he Committee may take a different view of certain of these categories (particularly those which we have classified as ‘preservation’).” We gave similar advice in our FY2009 memorandum, which addressed a request for appropriations to the capital improvement funds to replace, roofs, decks, and siding, including preserving the units from further rot.

<sup>6</sup> When the building was last painted in 2007, bids ranged from \$56,200 to \$127,750. Assuming a construction cost inflation factor of 6% per year, the same bids would run from \$84,504 to \$192,088. The Town anticipates that the proposed project may receive higher bids given (1) the more complex paint scheme; and (2) the need to repair rotted wood.

Under G.L. c. 44B, § 5(b)(2), the “acquisition, preservation, rehabilitation and restoration of historic resources” are legitimate uses of CPA funds. As noted with respect to the Acton’s Women’s Club proposal, the following definitions apply under the CPA:

- “Historic resources” means “a building, structure, vessel, real property, document or artifact that is listed or eligible for listing 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.”
- “Preservation” means “protection of personal or real property from injury, harm or destruction.”
- “Rehabilitation” means, in relevant part “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; . . .”.
- Restoration is not defined.

The historic portion of Town Hall was built in 1864, listed in the National Register in 1983, and is located in the Acton Center Historic District. It therefore qualifies as a “historic resource” under the CPA.

Repainting of buildings typically constitutes “maintenance.” However, in this case, the painting is proposed to restore the historical accuracy of Town Hall, a prominent building within the Acton Center Historic district. Although the term “restoration” is not defined, the proposed project fits the common meaning of the term. The purpose of the project is explicitly to restore Town Hall to its historic design, including its original paint scheme as it existed until the 1920’s and thus is eligible for funding.<sup>7</sup>

Removal and repair rotted wood would qualify for funding as either “preservation” or “rehabilitation or restoration.” (Determining the exact category for historic resource is not as

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<sup>7</sup> The Community Preservation Coalition’s CPA Projects Database also includes several examples of approved proposals for funding to restore historic resources to their original color schemes. *See, e.g.*, [https://tpl.quickbase.com/db/bcstvw3d3?a=API\\_GetRecordAsHTML&key=33433](https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=33433) (restoration of Cambridge City Hall interior); [https://tpl.quickbase.com/db/bcstvw3d3?a=API\\_GetRecordAsHTML&key=17005](https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=17005) (Hamilton Town Hall painting).

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critical as it is with community housing because an historic resource is not subject to same limitation that it must have been acquired or created with CPA funds to qualify for “rehabilitation or restoration” funding.) In either case, such repairs likely go beyond the scope of routine “maintenance.”