

MEMORANDUM

TO: Roland Bartl, Town Planner

FROM: Stephen D. Anderson, Town Counsel

DATE: December 29, 2005

RE: Acton/CPA - Allowable Uses of CPA Funds for 2006 Appropriation

Bruce Freeman Rail Trail [YES]

This application seeks \$125,000 for the first installment of engineering design services for the proposed "Bruce Freeman Rail Trail," a proposed 4.6 mile multi-use path along the former Penn Central Railroad right-of-way from the Concord line in East Acton, to the Carlisle line in North Acton. We reviewed a similar application for funding last year, which requested an appropriation for the "start up costs" associated with the planning of the BFRT. The anticipated total project cost is \$4.4 million, most of which is expected to come from matching funds from federal and state governmental sources. The trail is one link in a proposed 22-mile trail running from Sudbury to Lowell.

CPA Funds can be used to "create" a recreational or open space resource. "Recreational use" is defined as:

[A]ctive 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.

As we observed last year, the BFRT, upon completion, would provide a new recreational resource for the Town of Acton, and as such, costs associated with the creation of the BFRT are eligible for CPA funding. CPA Funds may be used as "matching funds" for state and federal grants, as long as the grants themselves are for allowable CPA purposes, which would be the case here. G.L. c. 44B, ' 14; DOR IGR 02-208.

CPA Administrative Expenses [YES]

The Town Manager has requested that 5% of the annual revenues from the Town's Community Preservation Fund be set aside for the Town's administrative expenses in managing the CPA program within the Town. The application observes that the CPA has added a considerable administrative burden on town staff, in implementing and managing the real estate tax surcharge and processing funding requests and town meeting appropriations of community preservation funds. Municipalities may recoup the administrative and operating expenses of the community preservation committee. G.L. c. 44B, § 6. These expenses must be included either in the community preservation committee's annual budget that is presented at Town Meeting, or in the Town's omnibus budget. DOR IGR 00-209 (as amended).

MEMORANDUM

TO: Acton Community Preservation Committee

FROM: Stephen D. Anderson, Town Counsel Kevin D. Batt

DATE: December 8, 2008

RE: Acton/CPA - Allowable Uses of CPA Funds for FY 2009 Appropriation

Woodlawn Cemetery, Mt. Hope Cemetery, North Acton Cemetery [YES]

The Historical Commission requests \$28,000 of CPA Funds to prepare documentation to submit three Acton cemeteries for nomination to the National Register of Historic Places, contingent on preliminary eligibility approval by the Massachusetts Historical Commission. The listing on the National Historic Register would help preserve these historic resources by requiring state and/or federal review of certain development projects abutting on, or otherwise impacting, the cemeteries, and would make the cemeteries eligible for state and federal rehabilitation and restoration grants. In view of these benefits from the listing on the Register, the CPC could determine that the documentation to be prepared by a preservation consultant for the purpose of nominating the cemeteries serves both "preservation" and "rehabilitation" purposes of CPA funding under §5.

Restoration Of Historic Streetscapes Through Planting Of Public Shade Trees In Acton's Historic Districts [YES]

The Town's Municipal Properties Department requests \$10,000 to plant 35-50 public shade trees to replace dead or dying trees in the three Historic Districts in Acton. The application includes photographs of historic streetscapes illustrating the shade tree canopy that once existed in historic Acton, as well as examples of deteriorated and dying trees. The Acton Centre Historic District, South Acton Village Historic District and West Acton Village Historic District are all listed on the state register of historic places and are well recognized as significant to the history, archeology, architecture or culture of the Town. CPA funds may be used for the "restoration of historic resources." G. L. c. 44B, § 5.

"Restoration" has no statutory definition in the CPA. Its dictionary definition in Merriam-Webster.com includes "a bringing back to former position or condition." The federal "Rehabilitation Standards"¹ define "restoration" as: [t]he act or process of accurately depicting the form, features, and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period.

36 C.F.R. § 68.2.

The CPC could reasonably find that, under either the common dictionary definition of restoration or its definition in the "Rehabilitation Standards," replacement of the historic shade tree streetscapes of the Historic Districts would bring the streetscapes back to their former condition and would accurately depict the form, features and character of Acton's streetscapes in historic times. Accordingly, such a project would qualify as restoration of historic resources eligible for CPA funding.

MEMORANDUM

TO: Roland Bartl, Town Planner

FROM: Stephen D. Anderson, Town Counsel

DATE: December 29, 2005

RE: Acton/CPA - Allowable Uses of CPA Funds for 2006 Appropriation

Acton Housing Authority – Consulting Services [YES]

This application seeks a grant of \$25,000 to fund the retention of a consultant to advise the Housing Authority how it may leverage its new regulatory powers to increase the supply of affordable rental housing in Acton. Housing authorities are closely regulated by DHCD, and prior to this year, authorities could not access private funding sources to increase its rental housing inventories. Recent regulatory changes have opened new doors to housing authorities, and the Acton Housing Authority wishes to retain professional advice on how it can expand its current rental housing inventory.

As noted above, CPA Funds can be used for “the creation, preservation and support of community housing.” G.L. c. 44B, § 5. The scope of the permitted uses of CPA Funds for community housing is broad, particularly in the use of the term “support.” The Department of Revenue (“DOR”), which has administrative oversight of the CPA, has opined that annual payments to a local housing authority for the expansion of housing opportunities is a permissible use of CPA Funds. DOR IGR 00-209, p. 11 (as amended). Last year, the Town sought a formal opinion from DOR as to whether CPA Funds could be spent to support the Housing Authority’s operating expenses. DOR determined that this was permissible. See Letter from DOR, dated August 25, 2004. The retention of a consultant to study the feasibility of expanding the Housing Authority’s rental inventory through private funding sources is an operating expense, and is otherwise an expenditure “in support” of community housing.

Therefore, this application is eligible for funding under the CPA.

T.J. O’Grady Skate Park [YES]

The Town acquired the land for the Skate Park from the Commonwealth in 2003. The Skate Park was created on the land with a mix of private monies (\$138,000), Town General Funds (\$80,000) and CPA funds (\$67,000). The deed from the Commonwealth restricts the use of the property to “Open Space and Recreational purposes only.”

The CPA permits municipalities to use CPA funds for the “rehabilitation and restoration of open space [and] land for recreational use ... that is acquired or created using monies from the fund.” G.L. c. 44 § 5(b)(2). “Rehabilitation” is defined in the Act as “the remodeling, reconstruction and 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.” G.L. c. 44, § 2.

Where the Skate Park was originally acquired and created (in part) with CPA funds, CPA funds may be used to restore or rehabilitate it. The proposed beginner bowl, fencing, ramps and parking likely qualify as rehabilitation because those additions make the Skate Park fully functional and safe for all levels of skaters. The deed restriction is not implicated in the expansion because the Skate Park will continue to

be used for Recreational purposes. Accordingly, CPA funds may be expended for this purpose. If the CPC recommends appropriation of CPA funds for the Skate Park, the CPC should consider awarding and tracking expenditures for the Skate Park separately from expenditures for the Rec Complex, as the CPA funding justification differs between the two components of the project. In addition, the award of these funds should be conditioned on their use exclusively for the proposed Skate Park improvements.

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

Community Housing Program Fund [YES] (6)

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:

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: (7) 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 units are added to the Town’s Subsidized Housing Unit Count (8).
- 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. (9)

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.(10)

(6) 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.

(7) 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.

(8) 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.”

(9) 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 area wide 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 area wide median income” as determined by the United States Department of Housing and Urban Development.

(10) 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>.

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

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.

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. III)

Date: November 22, 2013

Morrison Farm Community Garden Well & Irrigation [YES]

The Recreation Commission requests \$20,000 to install a private water well and irrigation system to deliver water to plots in the Morrison Farm Community Garden and a 200 amp electrical service to operate the well. The actual cost of the project is \$23,249, with \$3,249 offset by funding from the Recreation revolving fund. A portion of the revolving fund amount will come from annual Community Garden rental fees. The Plan (described in connection with Proposal 1 above) proposes preserving farming at the site in the form of 41 organic community garden plots and an active orchard. Due to the high demand for municipal water and the current restriction on using hoses to water gardens, the MFC determined it would be beneficial to have a water source for the Community Gardens independent from the municipal water supply. The Recreation Commission consulted with the Acton Water District, which recommended use of an independent well. The Recreation Commission believes such a well would be a cost-effective and reliable water supply alternative for the community gardens compared to more expensive treated municipal water.¹⁰ The CPA defines recreational uses to include, “the use of land for community gardens.” It defines rehabilitation to include, “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.” The improvement to the on-site water system to service the community gardens is a capital improvement benefitting a statutorily enumerated recreational use to make it more functional for its intended use and therefore qualifies for CPA funds.

MEMORANDUM

To: Acton Community Preservation Committee ("CPC")

From: Stephen D. Anderson and Mina S. Makarios 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

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 and 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 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.

MEMORANDUM

To: Acton Community Preservation Committee ("CPC")

cc: Stephen D. Anderson, Town Counsel

From: Nina Pickering-Cook, Ivria Fried, Law Clerk

ANDERSON & KREIGER LLP

Re: Acton/CPA - Allowable Uses of CPA Funds for FY 2014 Appropriations (Proposals 1, 3, and 4)

Date: December 13, 2012

Wildflower Boardwalk [YES]

The Town seeks \$24,000 to rehabilitate the Acton Arboretum Wildflower Boardwalk. The boardwalk was originally built in 1994, and has become popular with thousands of visitors per year. For the past four years volunteers have been making the necessary repairs. Presently, there is substantial rot underneath the supporting structure of the stringers, sill, and posts, and creating a hazard for recreational users. These funds would be used for rehabilitation of the boardwalk, but will also improve the recreational opportunities for persons with disabilities. This proposal will also be leveraged with \$5,000 contribution from the Friends of the Acton Arboretum. The Town projects that these repairs will last 20-30 years.

Under the amended CPA, “Rehabilitation” 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.”

The proposed project to repair the Wildflower Boardwalk comports with the amended CPA permitting 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 the improve ADA access. Overall, by improving the boardwalk, the project would “make [the Arboretum] more functional for the intended recreational use.” Accordingly, the Wildflower Boardwalk qualifies for CPA funding.

EMAIL

From: Stephen D. Anderson [mailto:SAnderson@AndersonKreiger.com]

Sent: Monday, November 03, 2014 12:00 PM

To: Steve Ledoux; Nina Pickering Cook

Subject: RE: Acton/CPC - Proposed CPA Project to **Remove Water Chestnuts from Ice House Pond and Robbins Mill**

The question is whether the CPC will view this project as “preservation” or “maintenance” of open space:

- “Preservation” means “protection of personal or real property from injury, harm or destruction.”
- “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.”
- “Open space” shall include, but not be limited to, ‘land to protect existing and future well fields, aquifers and recharge areas, watershed land, ... fresh and salt water marshes and other wetlands, ... river, stream, lake and pond frontage ...land for wildlife or nature preserve and land for recreational use.”

If it’s a preservation project, it qualifies for CPA funding; if it is maintenance, it does not. Based on projects approved in other communities, the CPC would likely view this as a “preservation” project eligible for CPA funds.

CPA Appropriations in Other Communities

CPA Appropriations in Other Communities According to the Community Preservation Coalition website’s posting of January 2008

(http://www.communitypreservation.org/enews/Water_ResourcesJP.htm):

Although rehabilitation of open space with CPA funds is not allowed on existing municipal open space, several CPA communities have used CPA funds to preserve important water resources that are integral to their unique character. Water-related projects have taken several different forms - from purchasing land for the protection of drinking water sources to eliminating invasive species from key water bodies.

Harvard Bare Hill Pond

Bare Hill Pond, located in the Nashua basin, is a 321-acre municipally-managed pond where citizens can enjoy swimming, sailing, canoeing, ice skating, and cross country skiing. The Pond suffered from elevated nutrient levels and associated negative impacts including uncontrolled growth of invasive species such as variable milfoil, water chestnut, and fanwort. How did the town overcome the excessive growth of these invasives in order to preserve the pond? They came up with an idea to develop a floating mounted pump to enable a deeper drawdown of the pond and thus more complete and

efficient removal of the weeds. As a result of this project, the community views the Bare Hill Pond differently now, both enjoying more local flora and fauna and being more aware of best management practices that will keep this important resource in healthy condition.

For more information, view the Harvard Bare Hill Pond Project Q & A Handout, the Bare Hill Pond Watershed Management Commission website, and a project report by Bare Hill Pond Watershed Management Committee.

The Harvard project was more of a capital investment in a system to preserve the pond, so it fit clearly within the definition of “preservation” of “open space” under the CPA in existence at that time. However, since that time, there have been CPA-funded projects to remove water chestnuts and other invasive species from ponds and open space in other communities such as:

- Inman Pond in Mendon (11/16/09, 11/29/10, 5/4/12, 3/29/13; <http://www.communitypreservation.org/projects/new?page=73>),
- Altmann Conservation Area in Bedford (Fall2008;http://www.bedfordma.gov/sites/bedfordma/files/file/file/cpc_progpln_fall_2013.pdf),
- Hemlock Grove in Lincoln (2008; <http://www.lincolntown.org/DocumentCenter/View/106>),
- Fannie Stebbins Wildlife Refuge in Longmeadow (2012;http://www.masslive.com/politics/index.ssf/2012/07/gov_deval_patrick_approves_mor.html)

Maynard’s CPC has recently opined that CPA funds can be used for “Open Space projects that, for example, ... remove invasive plant species” (<http://www.townofmaynard-ma.gov/gov/committees/cpc/>)

Conclusion

So under the circumstances, the CPC would be acting consistently with other town CPCs were it to approve the proposed project as “preservation” of open space.