



MEMORANDUM

To: Acton Community Preservation Committee (“CPC”)

cc: Roland Bartl, Planning Director

From: Stephen D. Anderson and Jessica A. Wall
ANDERSON & KREIGER LLP

Re: Acton/CPA – Allowable Uses of CPA Funds for FY 2015 Appropriations
Volume II of II

Date: January 5, 2014

You have asked us to review certain 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:¹

- **11. Discovery Museum, Discovery Woods and Creativity Playscape**
- **12. Town of Acton Recreation Commission, NARA Safety Improvement**
- **13. Town of Acton Recreation Commission, NARA Picnic Pavilion Restroom**

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
- (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

¹ The application numbers used in this memorandum reflect those on the CPA Project Applications List 2015 (<http://doc.acton-ma.gov/dsweb/Get/Document-48789/CPA%20Project%20Apps%20-%20hearing%20schedule%2012-05-14.pdf>).

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).

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 11. The Discovery Museums, Discovery Woods and Creativity Playscape
QUALIFIED YES

The Discovery Museums, Inc., a Massachusetts non-profit corporation, requests \$177,072 to create new outdoor spaces and programming at the Discovery Museums and a gateway to the Town’s Great Hill Conservation and Recreation Area trails. For the reasons explained below, this request is a permissible use of CPA funds.

The Discovery Museums, Inc., proposes to build two main outdoor areas, called Discovery Woods and Creativity Playscape, and to relocate parking and to build a gateway/portal to allow better access to Town conservation and recreation land. The two main outdoor areas will create a number of different recreation activities. The Discovery Woods will feature a treehouse, a mud kitchen, a climbable cargo net, an instrument corner, a family slide, and an elevated boardwalk and path, both of which will comply with accessibility requirements under the Americans with Disabilities Act. The Creativity Playscape will feature a natural amphitheater for community gatherings, performances, and picnics, and will also be ADA accessible. The proposed work seeks to “preserve and enhance open space” on the Discovery Museum’s property by relocating parking and building a gate where the Discovery Museums’ property connects to the Town’s Great Hill Conservation and Recreation Area trails. The project will cost \$1.3 million of which the project proponent requests \$177,072 of CPA Funds.

There are two parts to the analysis of this funding request, the first relating to the Anti-aid Amendment to the Massachusetts Constitution and the second relating to the CPA itself.

I. Anti-aid Amendment to the Massachusetts Constitution

The Anti-aid Amendment to the Massachusetts Constitution prohibits the grant, appropriation or use of public money to or by private entities for private purposes.³ The CPC has previously addressed the Anti-aid Amendment with respect to various historic preservation projects on private property, which projects were approved in part based on the grant by the project proponent to the Town of an historic preservation restriction on the historic property in question. See DOR Opinion regarding the Norfolk Grange (February 9, 2007).⁴ The Discovery Museums' proposal presents a variation of the Anti-aid Amendment issue in that the Town will not receive an historic preservation restriction (or the equivalent) in return for the grant of the CPA funds. In these circumstances, the question is whether the grant of CPA Funds to the non-profit corporation is consistent with the Anti-aid Amendment

In *Helmes v. Com.* 406 Mass. 873, 877 (1990), which upheld the payment of public funds by Commonwealth to a charitable committee to meet committee's expenses in rehabilitating a memorial battleship, the SJC explained the anti-aid amendment's purpose (citations omitted):

The anti-aid amendment was focused on the practice of granting public aid to private schools The language of art. 46, however, reads more broadly by forbidding the use of public money for the purpose of "maintaining or aiding any ... institution ... or charitable or religious undertaking which is not publicly owned."

³ The Anti-aid Amendment, Mass. Const. Amend. Article 46, § 2, as amended by Article 103, provides as follows (emphasis added):

No grant, appropriation or use of public money or property or loan of credit **shall be made** or authorized **by** the Commonwealth or **any political subdivision** thereof **for the purpose of** founding, maintaining or **aiding any** infirmary, hospital, institution, primary or secondary school, or **charitable** or religious **undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents** authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institutions or to students or parents or guardians of students attending such institutions.

⁴ The CPC's funding of these historic preservation projects is consistent with the advice of the Community Preservation Coalition at <http://www.communitypreservation.org/enews/FundPrivateProjectsJP.htm>: "The bottom line is this: CPA funds can be used to fund a project on private property if the project is advancing a public purpose, such as the public acquiring a deed restriction, providing public access to the property or some other benefit."

In *Helmes* and its predecessor *Commonwealth v. School Comm. of Springfield*, 382 Mass. 665, 675 (1981) (involving payment of public funds to private schools to aid children with special needs), the SJC listed three guidelines to decide whether a particular expenditure of public funds would violate the anti-aid amendment: “(1) whether the purpose of the challenged statute is to aid [a private charity]; (2) whether the statute does in fact substantially aid [a private charity]; and (3) whether the statute avoids the political and economic abuses which prompted the passage of art. 46.”

Applying those three guidelines to the Discovery Museums’ application may lead the CPC to a judgment call that the payment of CPA funds to the Discovery Museums does not violate the anti-aid amendment. First, the public purpose of the expenditures is to help create, rehabilitate and restore land for recreational use by the public and to connect the museum property to the Town’s Great Hill Conservation and Recreation Area trails. The purpose is not to aid the Discovery Museums “as such” but to use public funds for the designated public purpose. Second, while the proposed grant of CPA Funds to the Discovery Museums is substantial, the public funds will not benefit the nonprofit corporation “beyond permitting it to carry out its essential enterprise. The public moneys involved here substantially aid the private charity in the sense indicated.” Third, using public funds to create and interconnect recreational land and opportunities for the public (and particularly children) to enjoy does not violate the third guideline in that the proposed use of public funds does not “aid[] a charitable undertaking in a way that is abusive or unfair, economically or politically;” “no private person appears likely to benefit specially from the expenditure;” “[t]here is no indication that, on dissolution of the [non-profit corporation], its assets would be distributable to other than a public charitable use;” and the museums’ charitable objective and the means for achieving that objective are generally accepted.

If the CPC recommends the use of and Town Meeting appropriates CPA Funds for this project, the CPC should ensure, as a condition of the grant funding, that the CPA Funds are in fact used to help create, rehabilitate and restore land for recreational use and that the property remains available to the public for this use going forward. The CPC may want to consider whether it would be appropriate to tie the CPA grant to other public benefits, such as a use restriction, trail easement, or other property interest in the benefitted property. For example, the CPC may consider a combination of a trail easement (across a portion of The Discovery Museums’ property to the Town’s Great Hill Conservation and Recreation Area) and a conservation restriction (preserving and authorizing active recreation on that portion of the Discovery Museums’ property subsidized with CPA Funds) to be an appropriate property interest to ensure that its investment of public funds continues to benefit the public.⁵ In addition, the combination

⁵ Pursuant to CPA § 12, a “real property interest that is acquired with [CPA funds] shall be bound by a permanent restriction, recorded as a separate instrument, that meets the requirements of [G.L. c. 184, §§ 31 to 33] limiting the use of the interest to the purpose for which it was acquired. The permanent restriction shall run with the land and shall be enforceable by [the town].” A “real property interest” is “a present or future legal or equitable interest in or to real property, including easements and restrictions, and any beneficial interest therein” but does not include “a

of the two property interests would be more likely to satisfy the requirement of CPA § 5(f) that “no such real property ... interest ... shall be acquired by any ... town for a price exceeding the value of the property as determined by such ... town through procedures customarily accepted by the appraising profession as valid.”⁶

II. CPA Analysis

The CPA permits funding for the “creation . . . rehabilitation and restoration of land for recreational use” as well as the “preservation . . . of open space.” G.L. c. 44B, § 5(b)(2). The following definitions apply to this application under the CPA, § 2:

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

reversionary right, condition or right of entry for condition broken” or mortgagee interest. CPA § 2. Under Chapter 184, a conservation restriction is “a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed . . . or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid [specific activities].” G.L. c. 184, § 31.

⁶ The CPA’s definition of “real property interest” favors the use of property interests that are permanent, rather than more temporary options. A “claw back agreement” that set restrictions in which the Town could recover its CPA funds amortized over a period of 10-15 years if certain conditions were not met would resemble a “reversionary right” or “mortgagee interest”, which the CPA excludes from the definition of “real property interest”. CPA § 2. For this reason, a claw back agreement is a less desirable tool to ensure that The Discovery Museums’ property remains available for public recreational use.

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.”

Subject to the analysis of the Anti-aid Amendment above, this proposed project is a permissible use of CPA funds because it fits within the definition of “creation . . . of land for recreational use” as well as the “rehabilitation” of land for its “intended recreational use.” CPA §§ 2, 5.

A. The Discovery Woods and Creativity Playscape Qualify as “Creation” of Land for Recreational Use.

The Discovery Woods and Creativity Playscape qualify as “creation” of land for “recreational use.” CPA §§ 2, 5. They fit the definition of “recreational use” because they will be used for active recreation in the form of nature-based playground areas, and passive recreation in the form of an amphitheater. Although “creation” is not defined in the CPA, a common dictionary definition of this term is “the act of making or producing something that did not exist before.”⁷ The use of CPA funds to establish new nature-based playgrounds for active recreation and an amphitheater for passive recreation fits within this definition. Thus these two aspects of the proposed project qualify as “creation” of land for “recreational use.” CPA § 5. Other towns have appropriated CPA funds for similar playscapes on public property.⁸ The Discovery

⁷ Merriam-Webster’s Online Dictionary.

⁸ The Community Preservation Coalition’s CPA Projects Database includes several examples of approved proposals for funding to create or replace playscapes:

- Concord (Playscape at Ripley School):
 - Construction of a fully accessible nature-based recreation area adjacent to the Ripley School, including a new natural playscape that will include a fully accessible path connecting the Ripley School area to swamp trail system (April 2012) - https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=33428;
 - Funding to continue construction (April 2013) - https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=37793;
 - Infrastructure improvements necessary to complete new nature based, fully accessible play area that will include new landforms, water and sand play areas, and the installation of new fully accessible equipment (May 2014) – https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=40911;
- Hampden; replacement of playscape at Memorial Park - https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=41596;

Museums has recruited landscape architect Jennifer Brooke to ensure environmental sustainability and responsibility for the project. Ms. Brooke worked on the Town of Concord's CPC-funded Playscape at Ripley School (described at footnote 9). Subject to the analysis of the Anti-aid Amendment above, the Town's award of CPA funds for this project would be consistent with other towns' decisions to fund similar projects.

B. The Parking Lot Relocation and Portal to the Town's Great Hill Trails Qualify as "Rehabilitation" of Land for Recreational Use.

The proposed relocation of parking to "create a prominent portal" to the Town's Great Hill trails qualifies as "rehabilitation" of land for "recreational use." Currently, the path to the Town's Great Hill Conservation and Recreation Area and trails begins at the parking lot close to the Discovery Museum. The project proponent Discovery Museums proposes that, when it constructs the Discovery Woods playscape, it will build a more prominent connection and path from that playscape to the Great Hills trails. Those trails are "recreation lands". CPA § 2. In its cost estimate, the Discovery Museums sets aside \$5,000 for a "Great Hill Gate."

While the project proponent characterizes this proposed path construction to "preserve and enhance open space at the Discovery Museums," this work should actually be considered as "rehabilitation" of "recreational land" for purposes of the CPA for the following reasons:

1. The Project Involves Recreational Land, Not Open Space.

The CPA's "land for recreational use" definition better characterizes the Discovery Museums' property than the "open space" definition. The Discovery Museums' land is used for active and passive recreation rather than for open space (defined as "land to protect existing and future well fields, aquifers . . . , watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands . . . land for wildlife or nature preserve and land for recreational use"). Although somewhat overlapping, the distinction between "recreational use" and "open space" is significant. 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. Since the Discovery Museums' property was not acquired or created using CPA funds, "recreational use" is not only a more accurate description of the proposal, but also a description that permits CPA funding for rehabilitation or restoration purposes.

2. The Project Involves Rehabilitation, Not Preservation.

Similarly, "rehabilitation" is a better fit for the proposed work than "preservation" because "preservation" is defined as work that will protect "personal or real property from injury, harm or

• Agawam; playscape on town property - https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=605.

destruction.” CPA § 2. The proposed path work is not intended to protect real property from injury, harm, or destruction, but rather will improve access to conservation land and restore a natural landscape to a portion of the property. Thus, “preservation” does not accurately describe the Great Hill Gate work for purposes of the CPA.

3. The Parking Lot Relocation and Gates are Rehabilitation of Recreational Land.

The proposed parking lot relocation and Great Hill Gates also fall more closely under the definition of “rehabilitation.” CPA § 2. The gate and parking lot relocation are “capital improvements” because they involve “alteration of real property that appreciably prolongs the useful life” of the Discovery Museums property and Town recreational land, are “permanently affixed” to the property such that removal would cause damage, and are “intended to be [] permanent installations.” CPA § 2. The improved path will connect Town recreational use trails to the Discovery Museums’ recreational use land and “restore a natural landscape along Great Hill.” In this way, the Discovery Museums may “encourage[e] families to move from [its] indoor exhibits through a continuum of outdoor experiences – from the Discovery Woods tree house, to on-the-ground activities in Discovery Woods, and then beyond, into the beautiful Great Hill trails”, thereby making recreational land more functional for its intended use.⁹ Therefore, the parking lot relocation and gates are improvements that further the recreational use of both the Discovery Museums’ and the Town’s properties, and, subject to the analysis of the Anti-aid Amendment above, are permissible uses of CPA funds.

Proposal 12. Town of Acton Recreation Commission, NARA Safety Improvement [YES]

The Town of Acton’s (the “Town”) Recreation Commission requests \$20,515 to install two automatic barrier gates at the top and bottom of the NARA interior road, which connects the upper and lower parking lots. For the reasons explained below, this request is a permissible use of CPA funds.

The automatic barrier gates will restrict unauthorized vehicle entrance to the pedestrian walkway that connects NARA’s upper and lower parking lots. Some NARA visitors ignore posted signs labeled “No Unauthorized Vehicles”. Motorists travel at unsafe speeds on the paved walkway, which is primarily used by walkers, cyclists, and dog walkers. The barrier gates will allow keypad access only. By erecting the barrier gates the Recreation Commission hopes to increase public safety in the recreational use of the property and curtail abuse of NARA’s rules, both during and after operating hours. The cost estimate includes approximately \$16,000 for the gates, including digging and pouring concrete footings, \$4,000 for electrical installation, and \$325 for a memory card to access the gates.

⁹ For Concord’s playscape, the initial grant of funding included proposed work for a fully accessible path connecting the playscape to a swamp trail system, a similar connection from the playscape here to established trails. See https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=33428.

The CPA permits funding for the “preservation, rehabilitation and restoration of land for recreational use”. G.L. c. 44B, § 5(b)(2). The following definitions apply under the CPA, § 2:

- “Capital improvement” (see p. 3, *supra*, for definition);
- “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” (see p. 3, *supra*, for definition);
- “Recreational use” (see p. 3, *supra*, for definition); and
- “Rehabilitation” (see p. 3, *supra*, for definition).

This proposed project is a permissible use of CPA funds because it fits within the definition of preservation and rehabilitation of land for recreational use. NARA is a recreational use property. The construction of the proposed gates to prohibit unauthorized vehicular access qualifies as preservation which defined as “protection of personal or real property from injury, harm or destruction.” The project also qualifies as a “capital improvement” and thus “rehabilitation” because it involves the “alteration of real property that appreciably prolongs [its] useful life;” will be “permanently affixed” to the NARA property, and “is intended to be a permanent installation.” CPA § 2. The gates will make that land more functional for its intended recreational use (CPA §§ 2, 5(b)(2)) and will prevent danger to the public who walk, bike, and enjoy NARA’s recreational uses. The project is not “maintenance” because it is not an “incidental repair” that will not add value or appreciably prolong the property’s life. CPA § 2. Rather, the project is an improvement that furthers NARA’s recreational use. Accordingly, the proposed erection of safety barrier gates at NARA qualifies as eligible for CPA funding.¹⁰

Proposal 13. Town of Acton Recreation Commission, NARA Picnic Pavilion Restroom

YES

The Town of Acton’s (the “Town”) Recreation Commission requests \$105,000 to construct a handicap accessible restroom across from the NARA Picnic Pavilion. For the reasons explained below, this request is a permissible use of CPA funds.

¹⁰ Other towns have approved the use of CPA funds to construct gates or fencing for recreational use properties:

- In 2013, Falmouth approved the use of CPA funds to purchase and install parking lot gates at three town-owned beaches. See https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=41087.
- In 2014, Belchertown approved the use of CPA funds to “install a fence, gate, and pedestrian pathway to clarify vehicular parking areas in efforts to protect playing fields.” See https://tpl.quickbase.com/db/bcstvw3d3?a=API_GetRecordAsHTML&key=40989.

NARA Picnic Pavilion is increasingly used as a venue for large formal events like weddings, reunions, and company outings. Current facilities make it inconvenient for guests to use portable toilets for these events or to walk to NARA's current restrooms. Patrons have complained about the lack of restroom availability. These ADA accessible bathrooms will remedy that problem.

The CPA permits funding for the "rehabilitation and restoration of land for recreational use". G.L. c. 44B, § 5(b)(2). The following definitions apply under the CPA, § 2:

- "Capital improvement" (see p. 3, *supra*, for definition);
- "Recreational use" (see p. 3, *supra*, for definition); and
- "Rehabilitation" (see p. 3, *supra*, for definition).

This proposed project fits within the definition of "rehabilitation . . . of land for recreational use". NARA is a recreational use property. The proposed restroom construction satisfies the definition of "rehabilitation" as a "capital improvement" on recreational land that the Town will construct for the purpose of making the land more functional for its intended recreational use. CPA §§ 2, 5(b)(2). By altering the property to add permanent restrooms, patrons can more comfortably enjoy NARA's recreational activities. Further, the restrooms also qualify as "rehabilitation" because they will increase compliance with the Americans with Disabilities Act.¹¹ For these reasons, the NARA Picnic Pavilion Restroom project is a permissible use of CPA funds.

¹¹ In reviewing CPA applications for FY 2014, Anderson & Kreiger advised the CPC that CPA funds could be used to commission engineering and architecture plans for a multi-use Comfort Building in NARA that included a public handicap accessible restroom. The current request is consistent with that determination.