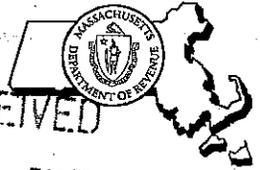


Massachusetts Department of Revenue Division of Local Services

Amy A. Pitter, Commissioner Robert G. Nunes, Deputy Commissioner & Director of Municipal Affairs



RECEIVED

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TOWN OF DARTMOUTH
SELECT BOARD

September 9, 2013

*cc: Select Board
Gros Barnes
Buddy Baker Smith
Frank Groene
FVJ
JBE
9/12/13*

Anthony C. Savastano, Esq.
Dartmouth Town Counsel
The Joseph Arthur Beauvais House
404 County Street
New Bedford, MA 02740-4936

Re: Community Preservation Fund - Community Farm Building Rehabilitation
Our File No. 2013-271

Dear Mr. Savastano:

You asked for an opinion about the proposed use of Community Preservation Act (CPA) funds for renovation of a building owned by the Dartmouth YMCA (Y). The following recitation of facts is based on information you supplied in your request, as well as the Y's "Application for Community Preservation Funding" and a March 8, 2013 letter from the Chair of the Dartmouth Community Preservation Commission (DCPC). You also emailed correspondence between the DCPC and the state Community Preservation Coalition (CPC) during the period January 6, 2013 to January 10, 2013 and the conservation restriction on the adjacent property. In addition, we obtained some information regarding the property from on-line assessor and registry of deeds records. Your questions relate to the recreational use of the building, as you state that it has no historical significance.

Based on this information, we understand that the building to be renovated is located on land shown as lot 5 on Assessor's Map 35, which contains about 4 acres of land. The Y's "Sharing the Harvest Community Farm" (Farm) is located on the adjacent lot also owned by the Y. The adjacent lot, lot 3 on Assessors Map 35, is approximately 57 acres and is subject to a conservation restriction (CR) held by a non-profit conservation organization, the Dartmouth Natural Resources Trust (Trust), for the purpose of maintaining the land, in perpetuity, in a predominately natural, scenic and undeveloped condition. The restriction permits certain agricultural, educational and outdoor passive recreational uses to the extent they are compatible with maintaining the property in a natural condition.

The Farm is operated by the Y and relies to a large extent on volunteers to supply the labor. It is used to educate the public about agriculture and provides significant amounts of produce each year for donation to another non-profit entity, the Hunger Commission of the United Way of Greater New Bedford. There are no individual plots, membership fees or rules and regulations, and members of the public cannot obtain membership in the Farm, use the Farm for personal use or otherwise obtain a portion of the crops produced in exchange for their volunteer labor. The produce is used to feed low income persons, a traditional charitable purpose. The major objectives for "Sharing the Harvest" program, as stated in the Y's application, are to alleviate hunger, promote volunteerism and teach volunteers about agriculture.

The proposed use of CPA funds for the renovation of the building raises three issues:

- (1) Is the Farm a “community garden” within the CPA definition of “recreational use?”
- (2) Does the proposed rehabilitation of the building qualify as “rehabilitation” of “land for recreational use” under the CPA?
- (3) Does the Anti-aid Amendment to the Massachusetts Constitution preclude the funding of renovations to property owned by the Y, which is a private, non-profit organization?

We respond below to these questions and, as explained in this opinion, we conclude that no CPA funds can be used for the renovation of the building.

CPA Definitions and Allowable Spending Purposes

Monies in the CPA fund may be used “for the acquisition, creation and preservation of open space; ... for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use; ... and for the rehabilitation or restoration of open space ... that is acquired or created” under the act. (Emphasis supplied). G.L. c. 44B, § 5(b)(2).

Section 2 of G.L. c. 44B defines various terms for CPA purposes:

“Open space”, shall include, but not be limited to, *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. (Emphasis supplied.)

“Recreational use”, 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. (Emphasis supplied.)

“Rehabilitation”, 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. (Emphasis supplied.)

A “capital improvement” to land for recreational use or related facilities on the land is a more or less permanent reconstruction or alteration that “materially adds value” or “appreciably prolongs the useful life” of the land or facilities. G.L. c. 44B, § 2.

Community Garden

You asked whether the Farm is a “community garden” within the definition of “recreational use.” Clearly, the building where the renovations are proposed is not itself a community garden. As we understand it, the DCPC proposes funding a portion of the renovations of that building on the grounds that those features will support or facilitate the use of the cultivated area as a recreational site. If the Farm is not a community garden, however, then it is agricultural land and since it was not acquired with CPA funds, rehabilitation is not an allowable CPA purpose. G.L. c. 44B, § 5(b)(2).

The term “community garden” is not defined in the CPA or as best we can determine, elsewhere in the general laws. We are also not aware of any cases that construe the meaning of “community garden” generally or specifically with respect to the CPA. One must conclude, however, through its inclusion in the definition of “recreational use” that the legislature considered land used as a “community garden” as distinguishable from agricultural land. In the absence of a statutory definition, we look to the usual and generally understood meaning of the phrase from sources known to the legislature such as use in other legal contexts and dictionary definitions. See *Seideman v. Newton*, 452 Mass. 472, 477-478 (2008).

You have cited three cases in your letter that include references to “community gardens” that are instructive. In the case of *Lovering v. Beaudette*, 30 Mass. App. Ct. 665, 666 (1991), the court referred to land used by a college campus for “community gardens, i.e., small plots gardened by community residents, the produce to be for their use only, not for commercial sale.” In the case of *Commonwealth v. Robinson*, 444 Mass. 102, 103 (2005), the court noted that one of the incidents occurred at the victim’s plot at the community gardens. In the superior court case of *Graney v. Metropolitan District Commission*, 13 Mass. L. Rep. 492 (2001), the court described a local active and passive recreation park as including various amenities, including 180 community garden plots.

We also reviewed G.L. c. 128, §§ 7A-7F, which authorize the Department of Food and Agriculture to grant permits or leases for use of available vacant public land and vacant land owned by private parties for garden, arbor or farm purposes, and the Department’s implementation regulations. 330 CMR 18.01 (*Farm Land*) and 18.02 (*Community Gardens*).¹ “Community garden” is not defined in the statute or regulations. However, the statute defines a farm as “a body of land devoted to agriculture” and a garden as a “piece of land appropriate for cultivation of herbs, fruits, flowers and vegetables.” G.L. c. 128, § 7A. The *Community Gardens* regulations allow the use of the vacant public and private land by civic groups or groups of individuals organized for gardening purposes. The group must elect a person within the group to act as coordinator; prepare a garden plan showing plots, paths, access and parking; make provisions for fencing and security as necessary; provide for water, composting of organic waste and disposal of non-organic waste. Priority is given in the allotment of land for gardening purposes to elderly persons of low income, families of low income and children between the ages of 7 and 16. G.L. c. 128, § 7C. Other applicants for plots are eligible after the priority groups. In the allotment of plots, food production is encouraged over other gardening.

¹ These regulations were issued under G.L. c. 20, § 18 to implement the program authorized in 1974 to encourage the use of vacant land by members of the public for gardening or farming under G.L. c. 20, §§ 13-18. See St. 1974, c. 654, § 2. Those sections were repealed, but reenacted as G.L. c. 128, §§ 7A-7F. See St. 2003, c. 26, §§ 60 and 377.

Although the sale of the products grown in the gardens is prohibited, G.L. c. 128, § 7C, free distribution of the products is not. The *Farm Land* regulations, on the other hand, are directed at persons or groups of persons raising agricultural or horticultural products for sale, i.e., for the commercial production of farm products.

Looking to other sources, we note that the term “community garden” does not appear in the Merriam-Webster online dictionary, but Dictionary.com provides two main entries for it. The first defines community garden as “a piece of land cultivated by members of a community, esp. in an urban area” and the second as “a piece of land gardened by a cooperative group of people living in the area.” Another online dictionary, thefreedictionary.com, defines a community garden as “a garden project actively maintained by members of a community.” It further expands on the basic definition in significant detail as follows:

...[M]ost community gardens are open to the public, and provide green space in urban areas, along with opportunities for social gatherings, beautification, education and recreation. However, in a key difference, community gardens are managed and maintained with the active participation of the gardeners themselves, rather than tended only by a professional staff. A second difference is food production: Unlike parks, where plantings are ornamental (or more recently ecological), community gardens often encourage food production by providing gardeners a place to grow vegetables and other crops. To facilitate this, a community garden may be divided into individual plots. However, you'll find a wide diversity in successful community gardens - not all grow food, and not all are organized into plots!

*...There are many different organizational models in use for community gardens. Some elect boards in a democratic fashion, while others can be run by appointed officials. Some are managed by Non-profit organizations, such as a community gardening association, a church, or other land-owner; others by a city's recreation or parks department, a school or University.
...*

The American Community Garden Association also provides a broad definition of “community garden” at www.communitygarden.org/learn:

Any piece of land gardened by a group of people.... It can be urban, suburban, or rural. It can grow flowers, vegetables or community. It can be one community plot, or can be many individual plots. It can be at a school, hospital, or in a neighborhood. It can also be a series of plots dedicated to "urban agriculture" where the produce is grown for a market.

From these cases, statutes, regulations and other sources, we believe that the most commonly understood feature of a “community garden” individual plots of land available to members of the community for gardening purposes. In addition, the gardeners generally choose what to grow, retain what is produced for their personal use and collectively operate and manage the community garden.

In that regard, the attributes of the Y’s operation make it less like a “community garden” and more like a “community farm.” You submit the Northampton Community Farm as an example of a “community farm” and we found other examples of such farms in Massachusetts using the same or a

similar model. See, e.g., Waltham Fields Community Farm, www.communityfarms.org; Fletcher Community Farm, www.fletchercommunityfarm.com; Heirloom Harvest Community Farm, www.heirloomharvestcsa.com. The Northampton Community Farm provides agricultural education, leases large acreage areas to commercial farms and promotes community supported agriculture (CSA) where a person or entity supports a farmer's operation by pre-buying a share of the produce from the farm. It has also set aside a portion of its land for a "community garden" that will be divided into individual plots for gardening by individual members of the public. Generally, "community farms" promote local agriculture and food access, provide opportunities for volunteers to work at the farm, provide education and outreach programs and sell CSA memberships in the farm. They are single operations and not divided into individual plots, although as in the Northampton model, they may also set aside some land for such purposes. Their primary purpose is the commercial production of farm products for sale to the public through retailers, farmers markets, food cooperatives or other means, although all or a part of it may be produced for other non-personal use such as donation to charity.

The Y itself refers to its operation as the "Sharing the Harvest Community Farm." No land is set aside for individual plots available to gardeners. The Y operates and manages the Farm and retains all the food produced through the work of the volunteers, albeit for charitable distribution. It appears that the Y directs the volunteers' activities, chooses what is grown and determines where the produce is sent. Its stated purposes also include providing education about agriculture. Those features of its operation are consistent with a farming or agricultural operation. Consequently, we do not believe that the Farm is a "community garden" for CPA purposes.

Building Rehabilitation

As you point out, in our previous Opinion 2007-292 (copy enclosed), we concluded that the statutory definition of "recreational use" indicates that the legislature intended for the CPA "to promote outdoor recreational pursuits which take place on open land in a relatively natural state." The issue in that opinion was whether improvements to be constructed with non-CPA funds and used for a commercial kayak rental and storage operation could be placed on land acquired in part with CPA funding for a water based park. We stated that they could be so placed as their use and function was consistent with and enhanced the outdoor recreational use of the land. We did not address whether CPA funds could be used to construct them.

In that regard, the CPA specifically permits funding for "building" construction for historic preservation and community housing purposes. The definition of "historic resources" includes historic "buildings" which may be rehabilitated with CPA funds. G.L. c. 44B, § 2; G.L. c. 44B, § 5(b)(2). With respect to "community housing," construction and re-use of "buildings" for community housing is also specifically permitted. G.L. c. 44B, § 5(b)(2). There are no similar statutory references, however, regarding the construction or rehabilitation of buildings on open space or recreational land. The emphasis with regard to "open space" throughout the CPA is on the "*land*." It is found in the definition of "open space," which includes "*land* for recreational use." The definition of "recreational use" is also *land*-based: "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.” Where the definition does reference a building (a gymnasium), the building is prohibited. We do not think that means the CPA bars spending funds on structures or improvements when creating or rehabilitating open space or recreational land. Given the statutory definitions of those assets and rehabilitation, however, we believe those structures or improvements must be used in a manner that is directly related to and congruent with the open space or recreational use of the land, i.e., they must support and enhance the use of the land in its natural condition or for its outdoor recreational activities.

The CPA defines “rehabilitation” as:

“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 ...; 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. (Emphasis supplied.)

Thus, with respect to rehabilitation, CPA funds may be used for improvements to “land for recreational use” or related facilities on that land that are necessary and related to making them functional for the intended outdoor recreational use. Some examples of such improvements would be a hiking path or boardwalk, outdoor tennis and basketball courts, athletic fields, a golf course, water lines and pathways in a community garden.

This project, however, does not involve the rehabilitation of any land for recreational use or even a building on such land. Instead, it proposes to rehabilitate an existing building located on a lot adjacent to the land on which the purported recreational use takes place, the Farm. Even if the Farm is a community garden and the land on which the building is located is also considered to be “land for recreational use,” the building being renovated will be used by the Y mostly for multiple indoor activities unrelated to the particular recreational use of the land. Specifically, the Y’s application states that it seeks to “renew and further develop an existing building located on the property into a community supported agricultural center. This project would include the development of a dedicated space for community supported agriculture activities which would be provided to residents as a form of recreation at no cost. The project would include the renovation of an existing building to provide space for community supported agricultural education, community meeting space, community kitchen space, and volunteer engagement opportunities.” The CPA funding is requested to: complete site work; fully enclose building and provide adequate siding and insulation; construct addition to accommodate nutritional innovation center/commercial kitchen; install overhead doors and operational entrances and exits; construct a 20 x 67 foot glass, climate and irrigation controlled greenhouse; provide adequate plumbing and HVAC needs; install new partitions, classrooms, offices and restrooms; provide doors, windows and construction needs; and install and upgrade electrical needs and life safety devices.

The DCPC reviewed the Y’s project expenses and determined that only the following work items directly support the Farm/community garden: the greenhouse, the equipment storage area, the cold storage area and the restrooms. The outdoor recreational aspects of a community garden involve

the gardener's work outdoors in the soil with an opportunity to interact with other gardeners. In our opinion, the improvements identified by the DCPC do not enhance or make the outdoor recreational aspects of a community garden more functional for those uses. The primary use of the greenhouse, equipment storage area and cold storage area will be for the food distribution purposes of the Farm, i.e., its production, harvesting and distribution operation. In many cases, an equipment storage shed placed at a community garden, or a restroom installed at an outdoor recreational site, would be a facility or amenity related to the recreational use for which CPA funds could be used. Here, however, the storage area and restrooms, along with the other items identified by the DCPC, are not distinct improvements to the land. They are essential components of a renovation project intended to create an indoor "community supported agricultural center" that will mostly house non-CPA programs and activities sponsored or conducted by the Y, including educational and nutritional programs, Y office and commercial kitchen operations and community meetings. The main purpose of the building, and therefore, of the improvements, is to serve these other functions.

Therefore, we conclude that renovation of the building does not constitute rehabilitation of land for recreational use or related facilities under G.L. c. 44B, § 5(b)(2). The building is an indoor facility that will primarily be used for indoor activities that do not directly support or enhance community gardening or other outdoor recreational activities.

Anti-Aid Amendment

Although we do not believe the proposed building rehabilitation can be funded with CPA funds, we also address the "Anti-Aid Amendment" issue on the assumption that some or all of the proposed expenditures are for allowable CPA purposes. Because the property being rehabilitated is owned by a private non-profit organization, the project squarely poses the question of whether the expenditures are prohibited by the Anti-Aid Amendment to the Massachusetts Constitution. Mass. Const. Amend. Article 46, § 2, as amended by Article 103. That amendment provides, in relevant part:

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... (Emphasis supplied.)

The amendment bars expenditures of public funds for the purpose of supporting or assisting private organizations or institutions in carrying out their essential missions and operations, or otherwise providing them with a substantial benefit, in a way that is unfair, economically or politically. See *Bloom v. School Committee of Springfield*, 376 Mass. 35 (1978) (Loan of textbooks purchased with public funds to students attending private schools violates the Amendment because it aids the schools in carrying out their essential mission); *Commonwealth v. School Committee of Springfield*, 382 Mass. 665 (1981) (Public funds appropriated for contracts with private schools providing special education to students for which no public school programs are available does not violate the Amendment because it aids public schools to provide and children to obtain required special education services in an economically feasible manner).

Therefore, a city or town may not generally make a grant or donation of public funds to a charitable organization under the Anti-aid Amendment unless it advances a public purpose. A decision of the Supreme Judicial Court on this issue is instructive. In *Helmes v. Commonwealth*, 406 Mass. 873 (1990), the Commonwealth entered into a contract with a non-profit corporation, the U.S.S. Massachusetts Memorial Committee, to rehabilitate an historic battleship donated to the Committee by the United States Navy in the mid-1960s. Under the contract, the Commonwealth agreed to fund the costs of rehabilitating the ship which had been open to the public for no charge since its acquisition by the Committee and used as a memorial to World War II veterans and operated as an educational facility for the general public. The contract was challenged in part based on a claim it resulted in a violation of the Anti-aid Amendment. The Supreme Judicial Court concluded that the use of state funds for a public war memorial open to the general public for educational purposes was for a public purpose and resulted in a public benefit and was not a violation of the Amendment. In that case, the court stated the purpose of the expenditure was not to aid the private organization as "[t]he... public funds must be used for the designated public purpose, and, once repaired, the ship must be used to further public purposes." *Helmes* at 877.

To the extent a community provides public funds to a private organization, we believe (1) the funds must be used for a designated public purpose and (2) the benefits of that expenditure must continue to accrue to the public, not the private organization. In the *Helmes* case, the public funds were provided to rehabilitate the ship which itself was used and would continue to be used as a public war memorial open to the general public. In this case, however, the funds are going to rehabilitate portions of a privately-owned and controlled building which is not open to the public and will be used for the Y's private offices and programs. The primary benefit of the public funding inures to the private organization; any benefit that may inure to the general public is incidental and secondary. We doubt a court would determine that the funding in this case is for a public purpose. This does not mean that the project is not a worthy one; the issue is whether public taxpayer dollars may fund it.

If all other requirements of the CPA were satisfied and a public purpose were determined to exist, the second requirement of the *Helmes* case would need to be satisfied - ensuring the continuation of the designated public purpose after the funding. In this case, the funding purports to be for "rehabilitation" of "land for recreational use," with the recreational use being located at the Farm/community garden. However, the benefits of the Farm are not available to the general public, nor is there any requirement or guarantee that the Farm/community garden will continue to be operated for recreational purposes. Because it is owned and controlled by a private entity, the use of the property can be changed as the entity so determines. To ensure the continuing recreational use and benefits of the Farm/community garden and that they be for public recreation, a restriction or easement for public use or other binding commitment would be required. In addition, because the funding is for building rehabilitation, a similar restriction, easement or other binding legal commitment would be required regarding the portions of the building (and access thereto) that were rehabilitated with public funds to ensure the continuation of the designated public benefit. These restrictions would be required notwithstanding that the Farm is subject to a CR held by a third party. The existing CR does not ensure the continued use of the Farm/community garden or the rehabilitated building components for the designated CPA purpose and in a manner that advances the public purpose.

Anthony C. Savastano, Esq.
Dartmouth Town Counsel
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For the reasons set forth above, we do not believe that CPA funds may be used to fund, in whole or in part, the proposed renovation project.

If you have further questions, please do not hesitate to contact us again.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kathleen Colleary". The signature is written in a cursive style with a large initial "K".

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC:GAB/PFH

CC: David Cressman, Town Administrator

Enclosure: Opinion 2007-292



January 16, 2009

Mr. Harry Ives
P.O. Box 372
West Dennis, MA 02670

Re: Recreational Use of Land under the Community Preservation Act ("CPA")
Our File # 2007-292

Dear Mr. Ives:

You have sought our opinion on the planned use of 2.5 acres of waterfront property in Dennis, formerly known as the "Bass River Park," acquired by the Town of Dennis using, in part, CPA funds. According to documents submitted with your request, the Town of Dennis envisions the creation of "an actively used, primarily water based park." See "Vision Statement" at Exhibit B to your letter request. Planned "passive recreation facilities may include boardwalks, viewing platforms, [and] picnic areas..." *Id.* Moreover, bids were solicited for a private business to conduct a kayak and canoe rental and storage operation at the site. See "Invitation for Proposals to Use Bass River Park Property for Kayak/Canoe Rentals," at Exhibit C to your letter request. You inquire whether the planned activity of kayak and canoe rentals and storage by a private contractor is consistent with a "recreational use" of the site under the CPA. We are of the opinion that the planned use of the former Bass River Park qualifies as "recreational" for purposes of the CPA.

The CPA permits the expenditure of funds, on the recommendation of the local Community Preservation Committee, for "the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created" with CPA money. See G.L. c. 44B, § 5(b)(2). "Recreational use" is in turn defined at G.L. c. 44B, § 2 as follows:

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.

The statutory definition of "recreational use" in the first sentence lists qualifying activities by way of illustration, but without limiting the term to the enumerated examples of "recreational use." The second sentence identifies certain activities which are excluded from the scope of "recreational use" even though they might be covered under the first sentence of the definition. Horse or dog racing and stadium or gymnasium sports are plausibly recreational activities which are nevertheless ineligible for consideration as "recreational use[s]" of CPA land. The exclusion of sports which take place in stadia, gymnasia, or "similar structures" suggests that the CPA is

intended to promote outdoor recreational pursuits which take place on open land in a relatively natural state.

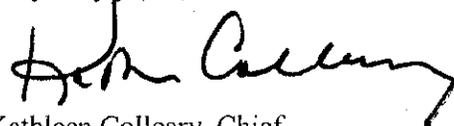
A question arises as to whether the reference to "noncommercial youth and adult sports" as non-limiting examples of eligible recreational pursuits precludes kayak or canoe rental and storage operations conducted by a private business. We do not conclude that the illustrative allusion to "noncommercial youth and adult sports" is intended to exclude all recreational pursuits that involve a private business in some incidental way. The term "noncommercial" ensures that popular sports activities that take place at race tracks or in stadia or gymnasia, to which an entrance fee is typically required as a condition of access, are not employed to exemplify qualifying "recreational uses", given their exclusion from the definition. We think the term "non-commercial" relates to the nature of the sports activity involved, and does not sweep so broadly as to bar any commercial activity from the site.

Canoe and kayak rentals and storage are distinct from commercial sports activities like professional football, baseball, and basketball, which fall outside the statutory definition of recreational uses. Recreational equipment is being made available to members of the public, but they are not under obligation to rent canoes or kayaks or store their own equipment on site in order to enjoy the recreational opportunity. The rental and storage service expands the number of people able to enjoy a given recreational activity, but does not "commercialize" the activity altogether. Citizens are free to enjoy non-commercial recreational opportunities at the site, including kayaking and canoeing with their own watercraft notwithstanding the rental and storage operation. Moreover, given the size of the former Bass River Park and plans to remove one of the preexisting structures, the site as envisioned will not be so built-up as to marginalize qualifying recreational pursuits.

You further inquire as to whether the former Bass River Park would qualify as "open space" as opposed to a "commercial site" in light of the plans for development. "Land for recreational use" comes within the definition of "open space" at G.L. c. 44B, § 2. As we have concluded, the availability of kayak and canoe rentals and storage is not inconsistent with "recreational use" under the CPA, so as planned the site would be considered "open space." Finally, you ask what constitutes the principal use of the site. While the CPA does not frame the inquiry into land use in terms of a "principal use" versus other, secondary uses, we think that an incidental commercial activity on the site that is an amenity to the recreational opportunity is consistent with use for a noncommercial sport.

We hope this information proves helpful.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC: DG