



February 9, 2007

[REDACTED]

Re: Community Preservation Act
Our File No. 2006-230

Dear [REDACTED]

This is in reply to your letter questioning certain appropriations from the Community Preservation Fund that were voted by the Town of Norfolk at its 2006 annual meeting. You question whether Community Preservation Act (CPA) monies may be used to fund these projects. G.L. c. 44B. We apologize for the delay in responding.

The CPA is relatively new and as is usually the case, there are many issues regarding its interpretation and application with respect to particular projects. Many of the questions are very fact specific so we generally defer to municipal counsel to advise about the appropriateness of any given expenditures. The reason is that under the law, all CPA spending decisions are made locally and we do not have the power to invalidate any municipal appropriations from CPA fund monies (or any other municipal financing source). From the general information presented, however, the projects in question would appear to come within the purposes of the statute.

Monies in the Community Preservation Fund may be used "for the acquisition, creation and preservation of open space; for the acquisition, preservation, **rehabilitation and restoration** of historic resources; for the acquisition, **creation and preservation** of land for recreational use; for the **acquisition, creation, preservation and support** of community housing; and for the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created" under the act. (Emphasis added). G.L. c. 44B, §5(b)(2).

The first appropriation you question is to assist town residents and employees make a down payment on a home within the town. We understand there are various programs that provide such financial support to low and moderate-income persons seeking to own a home and in exchange, the municipality acquires an affordable housing restriction on the unit. As a result, the home becomes part of the community's affordable housing stock. This type of program would appear to be eligible for CPA funding since acquisition of property interests for affordable housing – in this case an affordable housing restriction – is clearly an allowable

purpose. Even if a restriction is not being acquired under this program, the statute allows monies to be used in support of affordable housing. Support is not defined in the statute, but it could include a broad range of programs to provide affordable housing. We think the statute contemplates that these programs result in additional affordable housing units in the community, but some have interpreted it to allow support or assistance to individuals needing affordable housing as well.

The second appropriation is for the restoration of an historic building owned by the Norfolk Grange, which is a private, non-profit organization. Rehabilitation or restoration of historic properties is an allowable purpose. There is nothing in the CPA that prohibits the use of funds for this project simply because the property is privately owned. However, under the Anti-aid Amendment to the Massachusetts Constitution, public funds cannot be given or loaned to private individuals or organizations for their private purposes. Mass. Const. Amend. Article 46 §2, as amended by Article 103. Any expenditure must be to advance a public purpose. The preservation of historic assets is generally understood to have legitimate public purposes. Both the federal and state governments, for example, have various historic grant programs, which include grants to non-profit organizations. www.sec.state.ma.us/mhc/mhcidx.htm. Typically, these programs result in the public acquiring an historic preservation restriction or receiving some other benefit to ensure that the grant is for public rather than private purposes. For example, in an anti-aid case involving state monies given to a non-profit group to rehabilitate the U.S.S. Massachusetts for use as a memorial and museum, the Supreme Judicial Court found the expenditure was for a public purpose because the property would be open to the public as a place to contemplate and honor those who died in the service of their country and to educate school children, who were admitted free of charge, about history. *Helmes v. Commonwealth*, 406 Mass. 873. In the case of the Grange property, we understand the town will acquire an historic preservation restriction and the organization must use the funds received in exchange to finance the rehabilitation. In other words, it appears the town is receiving an interest in the property to ensure that its investment of public funds benefits the public through the preservation of a piece of the town's history.

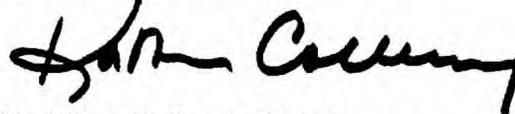
The last appropriation was to create and preserve recreational facilities at a town owned pond. From information provided, the Community Preservation Committee and Recreation Department sought the monies to restore the pond and beach area and to make it suitable for recreational purposes, such as swimming, picnicking and boating. Apparently, the pond was once used for swimming and fishing, but it was closed many years ago due to contamination from poor drainage in the area. You claim that the monies will actually be used to build a water treatment plant near the pond. We are obviously not in a position to evaluate that claim, although the \$85,000 appropriated would not seem sufficient to build such a facility. In any event, given that the site is not currently used for recreational purposes, any expenditure to restore the pond and beach area would probably qualify as creation of a recreational asset.

Creation is not defined in the act, but its ordinary and generally understood meaning is bringing into being, causing to exist or production. American Heritage Dictionary 338 (2nd New College Edition 1985); Black's Law Dictionary 440 (4th ed. 1968). Creation could include a number of activities, such as a wholly new use, conversion from one use to another, or restriction of future use, that effectively cause property not used for recreational purposes to become a recreational asset. Even if the appropriation were for some sort of treatment facility or other improvement designed to prevent further contamination of the pond, it might possibly qualify as preservation, which the act defines as protection of property from injury, harm, or destruction.

If ten taxpayers believe particular expenditures are unlawful, they can bring suit to enjoin the municipality from spending those funds. G.L. c. 40, §53. Ultimately, the voters may consider whether they believe local officials are acting appropriately with respect to implementing the CPA, or carrying out any municipal responsibility.

I hope this information is helpful.

Very truly yours,



Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC