



January 16, 2009

[REDACTED]

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

Dear [REDACTED]

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.

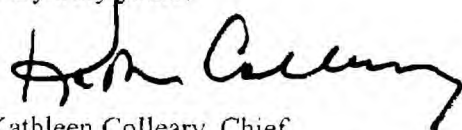
A question arises as to whether the reference to "noncommercial youth and adult sports" as non-limiting examples of eligible recreational pursuits precludes kayak or canoe rental and storage operations conducted by a private business. We do not conclude that the illustrative allusion to "noncommercial 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