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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1977CV00629

MICHAEL SILVERIO & others[1]

vs.

TOWN OF NORTH ANDOVER

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The plaintiffs, seventeen taxpayers of the Town of North Andover (the "taxpayers"), filed the Complaint against the defendant, the Town of North Andover (the "Town"), challenging

[1] Kimberly J. Adami, John Bradfield, Nancy J. Claussen, Steven A. Faucher, Susan D. Faucher, Joan Kulash, Joseph Kulash, Margaret Legal, Steven Legal, Jeannine McEvoy, Daniel N. Morin, III, Kyle N. Morin, Joseph A. Reardon, Kimberly L. Reardon, Charlotte M. Tullgren, and Eric S. Tullgren

the Town's appropriation of $6 million from its Community Preservation Fund to finance the development of a sports and recreation facility (the "Project"). The taxpayers moved for summary judgment contending that the expenditures were unauthorized under the Community Preservation Act. The Town responded with a cross-motion for summary judgment contending that the taxpayers lack standing and there is no harm or injury. For the reasons explained below, both the taxpayers' motion and the Town's cross-motion will be **DENIED** in part and **ALLOWED** in part.

BACKGROUND

I. Statutory Framework

The Community Preservation Act (the "CPA"), enacted on September 14, 2000, see St. 2000, c. 267, "provides a method for municipalities to fund 'the acquisition, creation and preservation of open space, the acquisition, creation and preservation of historic resources and the creation and preservation of community housing.'" Seidman v. Newton, 452

Mass. 472, 473 (2008), quoting G. L. c. 44B, § 2. "[T]o prevent or to curtail the visual blight and communal degradation that growth unencumbered by guidance or restraint may occasion,' a municipality may . . . accept[] the provisions of the CPA . . . to 'limit growth by physically limiting the amount of land available for development.'" Id., quoting Zuckerman v. Hadley, 442 Mass. 511, 517-518 (2004).

The CPA authorizes the Community Preservation Committee (the "CP Committee"), which is established by ordinance or by-law, to make recommendations to a municipality's legislative body for the acquisition, creation and preservation of open space and for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use. G. L. c. 44B §5(b)(2). After receiving recommendations from the CP Committee, the legislative body shall take such action and approve such appropriations from the Community Preservation Fund (the "CP Fund"), and such additional non-CP Fund appropriations as it deems appropriate to carry out the recommendations of the CP Committee. G. L. c. 44B, § 5.

The CPA was amended in 2012, see St. 2012, c. 139, §§ 69-73. The current version provides as follows:

> (b)(1) The community preservation committee shall study the needs, possibilities and resources of the city or town regarding community preservation, including the consideration of regional projects for community preservation. The committee shall consult with existing municipal boards, including the conservation commission, the historical commission, the planning board, the board of park commissioners and the housing authority, or persons acting in those capacities or performing like duties, in conducting such studies. As part of its study, the committee shall hold one or more public informational hearings on the needs, possibilities and resources of the city or town regarding community preservation possibilities and resources, notice of which shall be posted publicly and published for each of two weeks preceding a hearing in a newspaper of general circulation in the city or town.
>
> (2) The community preservation committee shall make recommendations to the legislative body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use; for the acquisition, creation, preservation and support of community housing; and for the rehabilitation or restoration of open space and community housing that is acquired or created as provided in this section; provided, however, that funds expended pursuant to this chapter shall not be used for maintenance. With respect to community housing, the community preservation committee shall recommend, whenever possible, the reuse of existing buildings or construction of new buildings on previously developed

> sites. With respect to recreational use, the acquisition of artificial turf for athletic fields shall be prohibited; provided, however, that any project approved by a municipality for the acquisition of artificial turf for athletic fields prior to July 1, 2012 shall be a permitted use of community preservation funding.

G. L. c. 44B, § 5(b).

II. Factual Background

The Town adopted the CPA in 2001. SOF, para. 1. The Town then adopted the CP Committee Bylaw (the "CP Bylaw") and appointed members to the CP Committee. SOF, para. 2. In 2018, the Town approved an appropriation of $6,000,000 from the CP Fund, under the category of Open Space/Recreation for Recreation Complex, to be used in connection with the Project. SOF, para. 7. The Project's "Conceptual Layout – Preliminary Budget" listed various components, including, among other things: baseball and softball field; playgrounds; various multi-purpose sporting courts; an exercise course; walking paths; restrooms and concession buildings; a gazebo and shade pavilion; and parking areas. In addition, the Preliminary Budget identified costs associated with, among other things, the construction and/or placement of artificial turf, drainage systems,

fencing, furnishings, field lighting, driveways, curbing, stairways, signage, landscaping, demolition, and earthmoving. SOF, para. 9.

The CP Committee voted to approve the funding for the Project on six conditions, one of which was that the funding can only be used on those elements allowed by law. SOF, para. 13. The Finance Committee and the Board of Selectmen also reviewed the CP Committee's recommendations, requests, and articles and recommended funding and favorable action. SOF, para. 15-16. The parties in this action disagree on what components of the Project are eligible for CP Funds. SOF, para. 10-13.

DISCUSSION

In their motion for summary judgment, the taxpayers contend that the CPA does not authorize funding for public school projects, stadiums, artificial turf fields, service roads, parking facilities, field lighting, site lighting, concession buildings, restroom buildings, storage buildings, or storage units. The taxpayers further claim that funding for this Project is not

authorized under the CPA because the Project does not involve the "rehabilitation" of land for recreational use, but rather the Project redevelops the site into a sports complex with new recreational uses.

The Town contends that the taxpayers do not have standing to bring this action because they are not suffering from a direct threat of harm to their tax dollars. The Town also claims that rehabilitation of outdoor recreational uses on Town owned property is eligible for funds appropriated pursuant to the CPA.

I. Standard of Review

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56.

II. Analysis

A. Standing

The taxpayers filed the Complaint under G. L. c. 40, § 53, also known as the ten-taxpayer statute, which states,

> If a town, regional school district, or a district . . . or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town . . . for any purpose or object or in any manner other than that for and in which such town . . . has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town, or not less than ten taxable inhabitants of any town in the regional school district, or not less than ten taxable inhabitants of that portion of a town which is in the district, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

Since enactment in 1847, G. L. c. 40, § 53, has provided a vehicle by which concerned taxpayers may enforce laws relating to the expenditure of their tax money by local officials. Edwards v. City of Boston, 408 Mass. 643,646 (1990). The words of the statute and the cases interpreting it demonstrate that a violation of any law designed to prevent abuse of public funds is, by itself, sufficient harm to justify an injunction. Id. The taxpayer has a right to insist that provisions intended for his security shall be observed, notwithstanding the fact that, in a particular case, he

may have suffered no harm by reason of the neglect of the authorities to comply with them. Id. In cases brought under G. L. c. 40, § 53, the taxpayer plaintiffs act as private attorneys general, enforcing laws designed to protect the public interest. Id. Before issuing the preliminary injunction, a judge is required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public. Id. at 647. Where a statutory violation is alleged, the judge who decides whether an injunction should issue needs to consider specifically whether there is a likelihood of statutory violations and how such statutory violations affect the public interest. Id.

The Town argues that only persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the courts to assume the difficult and delicate duty of passing upon the validity of the acts of another branch of the government. However, pursuant to the standards set forth in Edwards for a ten-taxpayer suit, specific personal harm or injury is not required. Thus, the taxpayers in this case have standing,

as the public has an interest in ensuring funds appropriated via the CPA are lawfully spent.

B. The Community Preservation Act

"After receiving recommendations from the Community Preservation Committee, the legislative body shall take such action and approve such appropriations from the Community Preservation Fund . . . and such additional non-Community Preservation Fund appropriations as it deems appropriate to carry out the recommendations of the Community Preservation Committee." G. L. c. 44B, § 5.

1. CPA Funds for Public School Projects

The taxpayers first argue that the CPA does not authorize the use of funds for public school projects. The taxpayers also claim that the Town Manager decided to rebrand the Project, in order for it to be eligible to receive CPA funding. The taxpayers further claim that from the early stages of the Project, the use of the complex by public school sports teams played a central role in the shaping of the Project. The taxpayers point out that: the proposed parking area, playing fields, and multipurpose courts

would also, in addition to the general public, serve the kindergarten; the amphitheater would have an educational purpose; the high school baseball and softball teams would use the facilities; and the sub-varsity soccer, baseball, and football teams would use the fields. In response, the Town states that the Project takes a run-down town owned recreational area and transforms it to a multiuse outdoor recreation area for youth, adults and seniors, for all abilities with a variety of recreational activities. The CPA allows for funds to be allocated for the rehabilitation and restoration of land for recreational use. G. L. c. 44B, § 5.

The term "[r]ehabilitation" is defined to include:

> capital improvements, or the making of extraordinary repairs, to historic resources, open spaces, lands for recreational use and community housing for the purpose of making such historic resources, open spaces, lands for recreational use and community housing 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; provided, that with respect to historic resources, "rehabilitation" shall comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties codified in 36 C.P.R. Part 68; 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.

G. L. c. 44B, § 2. Meanwhile, the term "[r]ecreational use" is fined as:

> 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.

G. L. c. 44B, § 2.

The CPA's provisions do not provide guidance as to whether incidental use by public schools is permissible when allocating funds. There are, however, past completed projects funded by the CPA that involve use by other public schools.[2] In 2018, $96,400 in CPA Funds was approved to "create a new multi-use athletic field at Smith Academy Public High School." *CPA Projects Database.* In 2013, CP Funding was also approved for an outdoor

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[2] *CPA Projects Database,* Community Preservation Coalition (hereinafter, "CPA Projects Database") (last visited on February 25, 2021), https://www.communitypreservation.org/databank/projectsdatabase/access.

recreation project at Whitman Hanson Regional High School. *CPA Projects Database.* While the taxpayers' position that the primary purpose of a project should not be to benefit a public school is correct, that does not mean that a public school cannot incidentally benefit from a project that is funded with CP Funds.

2. Redevelopment or Rehabilitation

The taxpayers argue that the Project is not eligible for funding from the CP Fund because the Project does not "rehabilitate" land for recreational use, but rather redevelops the site into a sports complex with new recreational uses. In support of this argument, the taxpayers point out that the Project proposes several amenities that are not currently on the site. In response, the Town argues that the current language of the CPA is straightforward, and it specifically allows for this type of redevelopment plan.

As noted in the previous section, "rehabilitation" is defined to include:

> 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 . . . 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; . . . "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.

G. L. c. 44B, § 2. And, while the CPA does not define the term "redevelop," the term, as defined by the Merriam-Webster online dictionary, means "to develop again" and the synonyms are "redesign" and "rebuild." Redevelop, Merriam-Webster, https://www.merriam-webster.com/dictionary/redevelop (last visited February 18, 2021). The CPA states that, "the community preservation committee shall make recommendations to the legislative body for the acquisition, *creation* and preservation of open space . . . [and] for the acquisition, *creation*, preservation, *rehabilitation* and *restoration* of land for recreational use." G. L. c. 44B, § 5. The Town is correct in arguing that the creation of land for recreational use is part of the updated statute. Because the creation of land for recreational use is permissible, the argument that new recreational purposes are not eligible for CPA funds fails. The Project plans that the Town has provided include

the replacement of equipment and improvements that make the Project more functionable. The Project's design plans fit within the definition of rehabilitation of open space recreation for a recreation complex.

3. CPA Funding for Stadium

The taxpayers next argue that the appropriation of funding is null and void because the Project entails the construction of stadium/stadia, which is prohibited under the CPA. In the list of bid items that will be paid for with CPA funds, bleachers are listed as a subsection of the item titled "Baseball and Multipurpose Field as well as the West Softball Field and Recreation Field." J.A., Ex. 2.40. The Town persuasively argues that there is a difference between bleachers installed at a youth athletic field and the construction of a stadium, which is really what the CPA intended to prohibit. According to the Town, a little league program does not only provide the ball player with an opportunity to participate in an organized sport, but also provides the player's family with the opportunity to watch them play. The Town claims that baseball is a spectator sport, and a cheering crowd enhances the

game. The Town distinguishes between bleachers for noncommercial use and stadium seating with tiers of seats. The bleachers planned in connection with the Project will be low seating and 27 feet long. In the event that the bleachers are found ineligible for CPA funding, the Town promises that they will follow the guidelines provided by the CP Committee and the Department of Revenue.

In Seich v. Canton, which discusses the Massachusetts Recreational Use Statute, G. L. c. 21, § 17C, the Supreme Judicial Court cited with approval the Appeals Court's interpretation that the term "recreation" includes "'not only active pursuits (playing baseball and the like) . . . but also passive pursuits, such as *watching* baseball, strolling in the park to see animals, flowers, the landscape architecture, or other sights, picnicking, and so forth.'" 426 Mass. 84, 85 n.4 (1997) (emphasis in original), quoting Catanzarite v. Springfield, 32 Mass. App. Ct. 967, 967 (1992). The CPA defines "[r]ecreational use" as "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," specifically excluding use of land for "horse or dog racing or use of land for a stadium, gymnasium or similar structure." G. L. c. 44B, § 2. Given prior case interpretations of the term "recreation" and the CPA's definition of "[r]ecreational use," the court is persuaded that the bleachers associated with the Project are within the category of items that may be eligible for CPA funding. The bleachers are not akin to those used in a large commercial stadium, which the CPA prohibits; rather, the bleachers are a means by which community members may make passive recreational use of the land in question. The court concludes CPA funds may be allocated to pay for these bleachers.

4. CPA Funding for Artificial Turf

The taxpayers argue that the CPA does not authorize expenditures on artificial turf fields. Both parties agree that money from the CP Fund cannot be used for artificial turf, but the taxpayers are concerned with the site preparation work that is necessary for the turf. The relevant language from the CPA states: "With respect to recreational use, the acquisition of

artificial turf for athletic fields shall be prohibited." G. L. c. 44B, § 5. The argument that the taxpayers present is persuasive. Synthetic turf fields are constructed as a system of interconnected parts, and it is not logical to allow funding for the work needed to ready a site for the installation of a turf field (removal of grass, drainage, plumbing, curbing . . .) but not for the turf itself. The Town may not spend any funds appropriated through the CPA on the construction and/or installation of the Project's artificial turf fields. The Project must use either the private donations or the general funds to finance this portion of the Project.

5. CPA Funding for Service Road/Walkway

The taxpayers also argue that the CPA does not authorize spending on the Project's walkway because it is a service road, and it is not in a relatively natural state. The taxpayers claim that the purpose of the path includes an internal service road, security road for police to monitor, and an emergency path. The Town counters that the paved walking paths are a recreational amenity that will make the field more functional and extend the

recreational use of the field. According to the Town, the paths may be used for jogging, walking, wheelchairs, strollers, bikes, and skateboards. Both parties agree that the hard surfaced walking paths are consistent with the design guidelines for the American with Disabilities Act trail surfaces. SOF, para. 10. The CPA states that recreational use includes the use of land for "community . . . trails[.]" G. L. c. 44B, § 2. The current state of the site would require users to maneuver through grassy and uneven areas. Paved paths would make the Project more accessible to people with disabilities and senior citizens. There is no indication in the CPA itself that a path or community trail constructed primarily for a recreational purpose cannot be incidentally used as a service road. For persuasive authority, in Mauch v. Town of Norwell, the court considered whether the use of CPA funds for a "Pathwalk" was appropriate. Plymouth Superior Court No. 2015 CV 517. The Pathwalk was to include 2.6 miles of five-and-one-half foot wide paved pedestrian-bicycle path along a highway. Id. The court held that the CPA funding was inappropriate because the pathway was solely running

alongside a highway. Id. at 10. The facts at hand are different because the paths are not solely running along a roadside. As the court in Mauch noted: "there may be specific CPA projects to install or restore suitable walkways within a playground, beach or other public recreational area, or to install or restore a bike path," which fall within the type of capital improvement that was contemplated by the legislature when enacting the CPA. Id. at 9. The court concludes the walkway at issue in connection with the Project fits that description because it is an installation of a walkway within a playground and/or a public recreational area. Accordingly, the appropriation of CPA funds for the construction or installation of the walkway is acceptable.

6. CPA Funding for Parking Facilities, Field Lighting, Concession Buildings, Restrooms, and Storage Facilities

Lastly, the taxpayers claim that the CPA does not authorize expenditures on parking facilities, field lighting, concession buildings, restrooms, or storage building or units. The Legislature considered adding a non-exclusive list of items that could be funded with CPA money. With respect to "recreational use," the

draft legislation included "any buildings, structures, appurtenances or other facilities necessary or desired to support any such recreational use, including, but not limited to restrooms, storage facilities, parking facilities, refreshment stands, and lighting." J.A., Ex. 1.48-1.49. The taxpayers contend that if the Legislature had wanted to include, in the definitions of "recreational use," improvements including parking, lighting, refreshments stands, and storage it could have done so explicitly. While this may be true, the court also notes that, if the Legislature wanted to affirmatively prohibit these items from being eligible for CPA funding, it could have expressly prohibited the use of CPA funds on restrooms, storage facilities, parking facilities, refreshment stands, and lighting, like it did for artificial turf, which it did not

The CPA Projects Database is an online tool that allows users to search, filter, and review completed CPA projects across Massachusetts. *CPA Projects Database*. Using that search tool, there are various completed projects that used CPA funds, under the Open Space and/or Recreation category, to pay for parking

facilities, field lighting, concession buildings, restrooms, and storage. For some persuasive value, the CPA Projects Database provides that, in 2017, the CPA approved funding for walking paths, recreation field space, fencing, and the *parking* lot at the Griffin Dairy Farm in Abington. *CPA Projects Database.* Examples of field lighting include: new lights that were approved, in 2018, installed at the Keith Field in Bourne; field lights that were approved, in 2016, at Walsh Field in Canton; and replacement and installation of field lights approved, in 2014, at Veterans Field in Chatham. *CPA Projects Database.* In 2016, CPA funding was approved for building a permanent concession stand at MV Baseball Field as part of a larger improvement to the field in Tisbury. *CPA Projects Database.* In 2017, funding was similarly approved for two handicapped accessible bathrooms at Lake Street Park in Tisbury. *CPA Projects Database.* A storage shed was approved for funding through the CPA, in 2013, for MacEwen Field in Phillipston. All of these completed projects demonstrate that CPA funds have been used in the past to pay for the costs associated with many of the items the taxpayers

currently dispute. Because the Legislature did not manifest a clear intent, within the CPA, to prohibit funding for these items the court concludes that the appropriation was proper.

CONCLUSION AND ORDER

For the reasons explained above, it is hereby **ORDERED** that the taxpayers' Motion for Summary Judgment is **DENIED** in part and **ALLOWED** in part; and the Town's cross-motion for summary judgment is **DENIED** in part and **ALLOWED** in part. The court **DECLARES** as follows:

1) The taxpayers have standing to bring this action;
2) The Project's funding is appropriate even though North Andover Public Schools may use the recreational facilities;
3) The Project's plans fit within the definition of rehabilitation or open space recreation for a recreational complex;
4) The Project's use of CPA funds for bleachers is permitted;
5) The use of CPA funds on artificial turf is not permitted;
6) The use of CPA funds for paved walkways is permitted;

7) The use of CPA funds on parking facilities, field lighting, concession buildings, restrooms, and storage building or units is permitted.

DATED: March 22, 2021

John T. Lu
Justice of the Superior Court