

CPA FUNDS—A LEGAL PERSPECTIVE

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The Community Preservation Act

- Local acceptance statute enacted in 2000 (Chapter 267 of the Acts of 2000)
- Revised several times
- Result of lobbying by several groups with varied interests
- Creates dedicated funding sources at both state and local level for those interests

Purposes of the CPA

Three basic purposes:

- Open Space
 - Land for Recreational Use
- Historic Resources
 - Structures, vistas, documents and other artifacts
- Community Housing
 - “affordable housing” subject to particular definitions

Purposes of the CPA – Open Space

- Open Space

Includes, but not 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.

Purposes of the CPA - Historic

- Historic Resources

A building, structure, vessel, real property, document or artifact that is listed on the state register of historic places or has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture of a city or town.

Purposes of the CPA - Housing

- **Community Housing**
Low and moderate income housing for individuals and families, including low or moderate income senior housing
 - “Low income housing” - housing for persons and families whose annual income is less than 80 per cent of the areawide median income set by HUD
 - “Low or moderate income senior housing” - housing for persons 60 or over who would qualify for low or moderate income housing
 - “Moderate income housing” - housing for persons and families whose annual income is less than 100 per cent of the areawide median income set by HUD

Purposes of the CPA - Land for Recreational Use

- 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.

Community Preservation Committee

- A community preservation committee must be created by bylaw or ordinance. G.L. c.44B, 5(a).
- The bylaw or ordinance must address: the composition of the committee, which must include five statutory members, and no more than 4 additional members; the length of its term; and the method of selecting its members, whether by election or appointment or a combination thereof
- The statutory members must be designees of the conservation commission, planning board, historic commission, parks and recreation commission, and housing authority, from among the members of the respective board, committee or commission

Community Preservation Committee - Role

- The CPC (sometimes called the CPAC) has a very important role
- The CPC must undertake an annual community preservation needs study and hold an annual hearing for which notice is provided in a newspaper at least one time in each of the two weeks prior to the hearing
- ***The CPC must make annual recommendations concerning the expenditure of CPA funds***
- The CPC must maintain a record of all its recommendations and the action taken on them as well as an inventory of all real property interests acquired, disposed of or improved using CPA funds

Community Preservation Committee - Role

- **No CPA funds may be expended without a recommendation from the CPC**
- The treasurer must keep a record of and should make available to the CPC information concerning the availability of CPA funds for expenditure
- The CPC should keep a similar record
- Many CPCs establish an application process for project funding, but the law does not require the same
- The CPC may recommend funding a project that qualifies under the CPA, but is not required to do so
- The CPC in a town should be cognizant of the timeline for preparing the warrant, or, in a city form of government, for the budget or other item to be presented for action

Community Preservation Committee - Role

- The statutory role of the CPC ends after its recommendation to Town Meeting – any further involvement of the CPC after an appropriation is made is simply a local practice
- The CPA does not authorize the CPC to sign contracts or grants
- The CPA does not authorize the CPC to acquire land or sell land
- The CPA does not even require articles proposing appropriation of CPA funds to appear on the warrant in the absence of a proper petition therefor

Allowable Expenditures from the CPF – Statutory Purposes

- CPA funds may be used for:
 - Acquisition, creation and preservation of open space
 - Acquisition, preservation, restoration and rehabilitation of historic resources
 - Acquisition, creation, preservation, rehabilitation and restoration of land for recreational use
 - Acquisition, creation, preservation and support of community housing
 - Restoration and rehabilitation of open space and community housing acquired or created using CPA funds

Allowable Expenditures from the CPF – Statutory Purposes

- The 2012 amendments to the CPA clarify the various activities that constitute “support of community housing” including:

Programs that provide grants, loans, rental assistance, security deposits, interest-rate write downs or other forms of assistance directly to individuals and families that are eligible for community housing, or to housing, for the purpose of making housing affordable [emphasis added]

Allowable Expenditures from the CPF – Statutory Purposes

- The 2012 amendments also specifically provide that CPA funds may be granted to a private, non-profit for the purpose of holding, monitoring or enforcing CPA deed restrictions

Allowable Expenditures from the CPF – Statutory Purposes

- The 2012 amendment to the CPA revised the definition of “rehabilitation”:

capital improvements, or the making of extraordinary repairs ...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. . . . 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 added]

Allowable Expenditures from the CPF – Statutory Purposes

- The amendment also inserted a definition of “capital improvement”, as follows:
 - 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.

Allowable Expenditures from the CPF – Statutory Purposes

- The definition of “maintenance” is now:
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.
- The definition of “preservation” is:
protection of personal or real property from injury, harm or destruction.

Allowable Expenditures from the CPF – Seideman v. City of Newton

- In the only appellate level case interpreting the CPA, Seideman v. City of Newton, 425 Mass. 472 (2008), the Court interpreted the then-existing version of the law strictly, prohibiting the City from using CPA funds to completely rehabilitate an existing park
- The General Court responded to this case by revising the CPA to allow for CPA funds to be used in connection with existing playgrounds and other land for recreational use
- The holding in Seideman is still relevant, however, because it shows the Court's inclination to interpret the provisions of the law strictly



Allowable Expenditures from the CPF – Other

- CPA funds may be appropriated to a Conservation Fund, Conservation or Municipal Affordable Housing Trust, or a Housing Authority
- CPA funds may also be appropriated for:
 - Administrative and operating expenses of the CPC
 - Annual principal and interest payments on CPA-related borrowings, and other bond-related costs
 - Damages to property owners for CPA-related takings
 - Matching funds for state and federal grants consistent with CPA purposes
 - Property acquisition costs including appraisals, surveys, title searches, closing fees

Prohibited Expenditures from the CPF

- CPA funds may not be appropriated to:
 - Supplant funds being used for existing purposes consistent with the CPA
 - Pay for maintenance of any real or personal property
 - Restore or rehabilitate open space or community housing not created or acquired with CPA funds
- CPA funds may therefore not be used to “reimburse” the municipality for expenditures already made or authorized from other funding sources for CPA-related purposes

CPF – Required Expenditures or Set-Asides

- Each year, no less than 10% of the estimated annual revenues must be set aside or spent for each of the below three purposes
 - Open Space (now appears to include land for recreational use)
 - Historic Resources
 - Community Housing
- “Estimated annual revenues” are the total of the amount to be collected in the upcoming fiscal year under the local surcharge and the November 15 state matching funds for the prior fiscal year

Requirements Applicable to Acquisition of Interests in Land

- A real property interest acquired by a municipality under the CPA must be bound by a permanent deed restriction meeting the requirements of G.L. c.184
- The deed restriction runs with the land and must be enforceable by the municipality or the commonwealth
- The deed restriction may also run to the benefit of and be enforceable by a non-profit, charitable corporation, or foundation

Grants of Funds to Private Entities - Public Purpose

- Must meet “public purpose” test
- Cannot be solely for the benefit of individuals
- Must comply with the anti-aid amendment, cannot be solely for the benefit of a private non-profit educational or religious institution
- Can provide funds to a private entity or individual if the benefit is for the public, however
- Use a grant agreement to ensure that the municipality controls use of the funds

Grants of Funds to Private Entities – Public Purpose

- Possible resistance to this concept either at the board and committee level or from legislative body
- While there is a public benefit, it is obvious that a private entity will also benefit
- Municipality needs to act affirmatively to protect public interest, which may be in the form of a restriction
- Develop forms for grant agreements and restrictions that can be used as a “baseline” for negotiations
- Form is not provided for or dictated by state law

Grants of Funds to Private Entities - Grant Agreements - Elements

- Provide for a “claw back” if the money is used improperly
- Require appropriate record keeping, reporting, and access
- Require conveyance of an appropriate deed restriction (i.e., conservation, historic, or affordable housing) and/or public access or other public benefit
- Contracting authority for Town should sign agreement, with such support from CPC as to terms and conditions and negotiation of same as Town determines
- Warrant article authorizing project must also include authorization for acceptance of restriction

Community Preservation Fund

- Special, restricted, revenue fund that can only be used for the purposes set forth in the CPA
- Accounted for separate and apart from other municipal funds.
- Within that fund are three separate reserve accounts for each of the following purposes:
 - open space, excluding land for recreation purposes;
 - historic resources; and
 - community housing

Community Preservation Fund - Revenues

- Local surcharge
- State match
- Proceeds from all CPA borrowings
- All funds from public and private sources for the CPA
- Damages and penalties from persons who knowingly damage CPA properties
- Proceeds from sale of land acquired with CPA funds
- Interest

Community Preservation Fund - Sources

- State match – size based upon number of recordings at Registries of Deeds
 - Three “rounds” of distributions – distributed on November 15 based upon amount collected locally in prior fiscal year
 - First round, 80% evenly distributed
 - Second round “equity distribution”, to those municipalities with a 3% surcharge
 - Third round, “surplus distribution”, to those municipalities with a 3% surcharge
- State match has been erratic– for years it was at 100%, dropped to somewhere around 20%, and is variable at best

CPF – Available Funds

- The CPF is accounted for separately from other monies;
- Depending on when during the year an appropriation might be made, different funds are likely to be available
- This is similar to the regular municipal budget process; for example, after the tax rate is set, a municipality may not raise additional funds by taxation, and funds may only be available as previously appropriated, by transfer from other appropriations, or from special funds

CPF – Available Funds – Reserve Accounts

- Reserve accounts or “buckets” available for appropriation at any time during the fiscal year
- Some municipalities create a “budgeted reserve” which includes all estimated annual revenues not otherwise expended, which would also be available for appropriation at any time during the fiscal year

NOTE: Ensure all municipal parties agree on “names” of these funds

CPF – Available Funds – Estimated Annual Revenues

- Estimated annual revenues are available at any time until the tax rate is set
 - Include ***both*** the amount to be collected through the surcharge in the upcoming fiscal year, as well as the anticipated state matching funds
- If all of the estimated annual revenues are not appropriated, they become “unavailable” after the tax rate is set
- It is for this reason that many municipalities appropriate such funds to a “budgeted reserve”

CPF – Available Funds – Amounts Reserved for a Particular CPA Purpose

- CPA revenues may be set aside or reserved for a particular purpose, even though sufficient funds do not exist to allow them to be expended for that purpose at that time; they will be available for appropriation thereafter, even if the tax rate has been set
- Similar to a “special appropriation”, such funds will remain available for that purpose until further appropriated or transferred

CPF – Available Funds – Fund Balance

- Fund balance – funds remaining in the CPF at the close of the fiscal year that were not appropriated, set aside or reserved are reported to DOR ;
- After DOR “approves” the same, such funds are available at any time until the close of the then-current fiscal year

CPF – Available Funds –Articles/Votes and “Sunset Provisions”

- All CPA expenditures can be voted under a single warrant article or vote
- Alternatively, can vote annual budget article or vote, and then all project specific appropriations in separate articles or votes
- Recommendations can be given together or on each article/vote
- Some warrant articles contain a “sunset” providing that they must be expended within a particular period of time or close out

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