

# ANDERSON KREIGER

## MEMORANDUM

To: Town of Concord, Community Preservation Committee

cc: Stephen Crane, Town Manager  
Elizabeth Hughes, Town Planner  
Heather Gill, Senior Planner

From: Mina S. Makarios and Annie E. Lee  
Anderson & Kreiger LLP

Re: FY2022 Community Preservation Act Funding Applications

Date: December 23, 2020

The following project summaries provided to us describe the applications received this year by the Concord Community Preservation Committee (“CPC”). Following each project summary are Anderson & Kreiger’s (“A&K’s”) comments on each application. Please note that several of the projects below are proposed by private parties, rather than the Town. We recommend the Town enter into a grant agreement with any such party in connection with the disbursement of Community Preservation Act (“CPA”) funds.

### **1-20 White Pond Beach Improvements, Town of Concord (\$300,000)**

The Town requests funds to manage earthwork and stormwater at the White Pond Beach Area, as well as make access and ADA modifications to the property. This activity is part of a project previously funded with CPA funds for landscape development and management to the White Pond Beach Area to create a more sustainable and accessible environment.

**A&K Comments:** Consistent with our previous recommendations on funding for this project, the proposal consists of extraordinary repairs and/or capital improvements to land for recreational use, including trails resulting in greater ADA compliance. Both capital improvements and extraordinary repairs to land for recreational use, as well as measures to ensure compliance with the ADA, qualify as “rehabilitation” under the CPA. This is a permissible use of CPA funds.

### **2-20 Emerson Field Flagpole, Melissa Saafeld/Town of Concord (\$14,250)**

The Town requests funds to repair and refurbish rust and flaking paint on the flagpole located in the center of Concord’s Emerson Field.

**A&K Comments:** Section 2 of the CPA defines “historic resources” as buildings, structures, vessels, real property, documents or artifacts that are either listed on the State Register of Historic Places or determined by the local Historic Commission to be significant in the history, archeology, architecture, or culture of the city or town. Based

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on a review of the State Register of Historic Places and Concord's Historic Masterplan, the Emerson Field Flagpole does not meet these requirements to qualify as a "historic resource" under the CPA, though the CPA application describes the flagpole as historic. If the Flagpole is later listed on the State Register of Historic Places or the Concord Historic Commission determines the flagpole is significant in the history or culture of the town, then such described repair and refurbishment activities will be permissible use of CPA funds as "extraordinary repairs," qualifying as "rehabilitation" under the CPA.

### **3-20 Bruce Freeman Rail Trail, Town of Concord (\$25,000)**

The Town requests funds to provide additional landscaping, fencing, paving, and other amenities to enrich and enhance the visitor experience of the Bruce Freeman Rail Trail.

**A&K Comments:** Consistent with our previous recommendation on funding for this project, this project is eligible for CPA funding as the rehabilitation of land for recreational use.

### **4-20 Wheeler Harrington House and Land, Town of Concord (\$20,000)**

The Town requests funds to hire a consultant to assist with public outreach in determining future use and plans as they relate to the Wheeler Harrington House and Harrington Park. This activity is part of a project previously funded with CPA funds to conduct a historic survey of the Wheeler Harrington House, survey of Harrington Park, and to evaluate the potential relocation of the Ball-Benson house and barn to Harrington Park.

**A&K Comments:** The CPA allows the creation and acquisition of open space, meaning the obtaining of property interest or bringing into being or causing to exist open space, respectively. The full application by the Town describes the use of the consultant as part of a larger project that has, among other things, developed a new trail system linking the Wheeler Harrington House and Harrington Park to other open spaces throughout the Town and surrounding areas. In this context, the use of a consultant to determine future use and plans may be considered creation and acquisition of open space, so long as the future use and plans considered by the consultant include the continued development of the house and the park as open spaces.

Alternatively, the CPA allows rehabilitation and restoration of both open spaces and historic resources. Section 2 of the CPA defines "rehabilitation" and restoration as remodeling, reconstruction and making of extraordinary repairs for the purpose of making historic resources and open spaces functional for their intended use. Determining future use and plans as they relate to the Wheeler Harrington House and Harrington Park does not appear to qualify as remodeling, reconstruction, or extraordinary repairs, though the end goal would be to keep the house and park functional as a historic resource and/or open space. Use of a public outreach consultant to evaluate the potential relocation of the Ball-Benson house and barn to Harrington Park may also qualify as a cost of

reconstruction and extraordinary repairs to make the Ball-Benson house and barn functional for its intended use as a historic resource.

**5-20 Housing Production Plan, Town of Concord (\$30,000)**

The Town requests funds for its five year update of its Housing Production Plan, last updated in 2015. The updated Housing Production Plan will recalculate the Town's required number of subsidized housing units as listed on the State's Subsidized Housing Inventory.

**A&K Comments:** Consistent with our previous approval of funding for this project, the proposed housing production plan is a study of community housing needs with the goal of creating specific project. It is akin to feasibility studies that are routinely funded under the CPA and is eligible for funding.

**6-20 Regional Housing Services Program, Town of Concord (\$25,000)**

As in years past, the Town of Concord requests funds for the Town's participation in the Regional Housing Services Office, an inter-municipal organization which provides professional housing staff for the administration of the affordable housing programs in Concord and six neighboring communities.

**A&K Comments:** Consistent with our previous recommendation on funding for this project, support for the RHSO is generally eligible for funding as "support of community housing," which, pursuant to G.L. c. 44B, § 2, includes programs that provide grants, loans, rental assistance, security deposits, interest-rate write downs or other forms of assistance directly to individuals and families who are eligible for community housing or to an entity that owns, operates or manages such housing, for the purpose of making housing affordable." RHSO engages in resident assistance, project development, and program administration, among other functions, to support affordable housing, and is therefore eligible for CPA funding.

**7-20 Staff and Technical Services, Town of Concord (\$40,000)**

The Town of Concord seeks funds for administrative expenses related to the CPC.

**A&K Comments:** Consistent with our previous approval of funding for this project, section 6 of the CPA authorizes up to 5% of annual CPA revenues to be used for administrative expenses. The amount requested falls well under 5% of the annual revenues in years past and the anticipated revenues in FY 2022. This proposal is eligible for funding.

**8-20 Emerson Conservation Restriction, Town of Concord Natural Resources Division (\$210,000)**

The Town Natural Resources Division requests funds towards the acquisition of a Conservation Restriction on a portion of the Ralph Waldo Emerson property. The acquisition would restrict a 0.68 acre area of woods between the Emerson House and the Heywood Meadow for conservation and passive recreation purposes, while providing public access over the Emerson-Thoreau Amble.

**A&K Comments:** The CPA allows for the creation of open space, meaning bring into being or causing to exist open space. The acquisition of a restriction to restrict an area for conservation and passive recreation uses falls squarely within this definition, and is an eligible use of CPA funds.

**9-20 Warner’s Pond Dredging, Town of Concord Natural Resources Division (\$250,000)**

The Town requests supplemental funds for limited dredging of Warner’s Pond and for boat access improvements. This activity is part of a project previously funded with CPA funds to dredge the pond and improve ecological health while also providing improved recreational opportunities for swimming, boating, fishing, and ice-skating.

**A&K Comments:** In previous years, we provided our opinion that a preliminary study to better estimate Warner’s Pond dredging costs was eligible for CPA funding. Consistent with that opinion, we view the dredging project as an “extraordinary repair[]” to the pond that qualifies as “rehabilitation” or “restoration” of land for recreational use. Alternatively, it qualifies as the “creation” of recreational or open space. Accordingly, this project is a permissible use of CPA funds.

**10-20 Chamberlin Park Bridge – Survey and Permitting, Town of Concord Natural Resources Division (\$35,000)**

The Town requests funds for survey and permitting services to replace the footbridge and repair the walkway between Chamberlin Park and the Keyes Road municipal parking lot.

**A&K Comments:** Consistent with our previous recommendation of funding for this project, this project is eligible for funding as a rehabilitation of open space and land for recreational use because it would provide for the design of ADA compliant capital improvements to a key access point to Chamberlain Park, thereby making the park functional for its intended use.

**11-20 Old Rifle Range – Survey and Permitting, Town of Concord Natural Resources Division (\$34,500)**

The Town requests funds for survey, design, and permitting services to improve a 0.25 mile section of the main trail through the Old Rifle Range that is otherwise seasonally impassable due to its narrow width at the edge of a steep hill.

**A&K Comments:** This project is eligible for CPA funding as the rehabilitation of land for recreational use.

**12-20 Affordable Housing Buy-Down, Concord Housing Development Corporation (\$500,000)**

The CHDC requests funds for a Buydown Program to create at least one unit of affordable housing through the buy-down or conversion of existing market rate unrestricted housing to restricted affordable housing.

**A&K Comments:** Section 5(b)(2) of the CPA authorizes funding for the “creation” of community housing (defined as low and moderate income housing). This project falls within such authorization and is eligible for CPA funding.

**13-20 110 Walden Street Preservation – Phase 3, Concord Home for the Aged (\$185,000)**

The Concord Home for the Aged requests funds for Phase 3 of the Walden Street Preservation Project, including the implementation of several of the major projects recommended in Section III of the Historic Structures Report. The work needed includes roof replacement, replacement of the fascia and gutter system, structural and masonry repairs, and the inspection, repairs, and painting of all 62 windows.

**A&K Comments:** Consistent with our previous recommendation of funding for this project, the efforts described in the project application prevent the penetration of damaging elements, rot, and wildlife into the building, and prevent more serious structural problems. This project protects the Home for the Aged “from injury, harm or destruction” and therefore constitutes “preservation” (and, in part, “restoration”) of a historic resource. This is a permissible use of CPA funds.

**14-20 58 Monument Square Roof Replacement and Historic Structures Report, Concord Masonic Corporation (\$107,261)**

The Concord Masonic Corporation requests funds to replace the roof on the Corinthian Lodge, as well as complete a Historic Structures Report on the building. In recent years, the building’s roof has allowed rainwater to infiltrate the building, deteriorating the integrity of the roof and exposing artifacts to the elements.

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**A&K Comments:** Consistent with our previous recommendation of funding for this project, this project is eligible for CPA funding as the “preservation” of a historic resource. Section 5(b)(2) of the CPA authorizes funding for “preservation” of historic resources – defined in Section 2 as “protection of . . . real property from injury, harm or destruction” – and “rehabilitation and restoration” – defined as “making extraordinary repairs” --of historic resources. The project falls under either authorized activity and is therefore eligible for CPA funding

## **15-20 Trustees of Parish Donations – First Parish, Repair, Stabilize and Renovate Wright Tavern (\$500,000)**

The Trustees of Parish Donations of First Parish Concord requests funds to help preserve the Wright Tavern and make it safe for increased public access. The proposed work includes structural repairs, stabilization of the roof, addition of insulation, update of mechanical systems, and updates to fire, smoke, and carbon monoxide systems.

**A&K Comments:** In previous years, we have provided opinions regarding the eligibility of projects submitted by religious organizations based on recent cases calling into question the grant of CPA funds to churches under the Massachusetts Anti-Aid Amendment. The Anti-Aid Amendment prohibits the provision of public funds to private organizations; however, the provision of public funds to a private organization, including a church, does not violate the Anti-Aid Amendment where (1) there is a permissible public purpose, rather than a purpose to aid the church; (2) the assistance does not substantially aid the entity; and (3) the provision of funds is not abusive or unfair, politically or economically, but for the general good of all inhabitants of the municipality.

The requested \$500,000 grant of CPA funds would be used to make capital repairs to the Wright Tavern, a historic resource listed on the State Register of Historic Places. The repairs would allow the building to be used for educational programs and public visitation in the coming years, including the 250<sup>th</sup> anniversary of the meeting of the Continental Congress at First Parish in 2024. The preservation of a historic resource, and the anticipated use of the historic resource as a result of repairs funded by the CPA, serves solely a public purpose, not a private religious purpose.

Because the repair of the Wright Tavern would serve solely a public purpose, this project likely falls within the constitutional protection for government grants on an equal basis to churches as to other non-denominational organizations as recently addressed by the Supreme Court in *Trinity Lutheran Church of Columbia v. Comer*. Like grants for playground resurfacing in *Trinity Lutheran* and unlike the stained glass windows at issue in the Supreme Judicial Court decision of *Caplan v. Town of Acton*, the repairs to the Wright Tavern has no denominational or sectarian significance. Furthermore, the Wright Tavern does not appear to bear any symbols associated with the First Parish or religion. The grant funding does not appear to supplant other church funds used for religious purposes, but instead enhances funding needed for historic preservation in accordance with Historic District requirements and by opening up more public space.