Community Preservation Committee Meeting

Thursday, August 17, 2023 at 7:00 PM
Remote Participation Only

Agenda

Pursuant to Chapter 2 of the Acts of 2023, the meeting will be conducted with remote opportunities for participation. Remote participation and access methods include:

ACCESS INFORMATION:

A. This meeting will be held on August 17, 2023 at 7:00 PM. Location: Remote Participation Only

B. The meeting will be recorded by WCATV for viewing on demand at wcatv.org

C. The Public may join the virtual meeting online: https://watertown-ma.zoom.us/j/91525442843

D. Public may join the virtual meeting audio only by phone: (877) 853-5257 or (888) 475-4499 (Toll Free) and enter Webinar ID: 915 2544 2843

E. Public may comment prior to meeting via email: lhandy@watertown-ma.gov

F. Please Visit the Community Preservation Committee Website here: https://www.watertown-ma.gov/352/Community-Preservation-Committee

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1. Call to Order
2. Acceptance of Minutes
   A. 2023-7-20-Draft CPC Minutes
3. Committee Discussion
   A. Belmont Watertown United Methodist Church Eligibility
   B. Eligibility Forms - Follow-up Comments and Questions for Applicants
   C. CPA Project Permanent Signage
4. Coordinator Update
   A. Irving Park Celebration Planning
5. Adjournment

CITY OF WATERTOWN
Community Preservation Committee

Minutes of CPC Meeting Monday, July 20, 2023, at 7:00 PM, held remotely via Zoom.

Committee Members Present: Mark Kraczkiewicz, Chair; Jon Bockian, Vice Chair; Bob DiRico; Jason Cohen; Dennis J. Duff; Jamie O’Connell; Elodia Thomas; and Matt Walter. (Allen Gallagher was absent)

Others Present: Lanae Handy, Community Preservation Coordinator; Mike Albano, Department of Public Works; Chris Golden, Michael D’Angelo Landscape Architects; John Seger, Seger Architects; Anthony Palomba, City Council; Larry Field, Department of Community Development and Planning Joyce Kelly, Historical Society of Watertown, Annie Martin, Belmont Watertown United Methodist Church; Jamie Gordon; Jacky Van Leeuwen; Libby Shaw; Josh Rosmarin; and Margie Wayne.

1. **Call to Order**

   Mark Kraczkiewicz opened the meet at 7:02pm and announced the meeting was being held remotely under the Governor’s order extending the suspension of certain provisions of Open Meeting Law.

2. **Acceptance of 2023-6-15 Minutes**

   Mark asked if there were requested changes and Lanae Handy mentioned Jon Bockian’s request to change the acronym MAHT to WAHT on page 2.

   Motion: Jon Bockian moved to approve the minutes with the change above and Elodia Thomas seconded the motion.

   Vote: Elodia Thomas, Mark Kraczkiewicz, Jamie O’Connell, Dennis J. Duff, Jason Cohen voted in favor. Matthew Walter and Bob DiRico were absent from that meeting and did not vote.

3. **Committee Discussion**

   A. **Request for Extension - Saltonstall Park Application**

   Elodia Thomas was concerned that the project went out to bid before the CPC had a chance to review the plans. Also, she wondered why Joe Levendusky, who according to him had been asked by the City Manager to review the plans for the pavilion, had not been invited to the three meetings regarding the pavilion.

Jamie O'Connell was concerned about changes to the amount of impervious surface and reduction of tree canopy when the summers are going to be hotter. She felt the CPC was constrained in providing feedback on the plans because the project had already gone out to bid.

Jon provided his understanding of the process now regardless of whether the CPC should have gotten time to review the plans. He explained the current plans were the plans to be used and bid numbers will be provided by the time CPC meets in September. He asked if the CPC should proceed with the September presentation and decide whether to recommend the project for funding or not.

Jason said taking the project out of cycle was not working for this project and it needed to return to the queue for 2024.

Dennis Duff stated there may be some merit to that. He asked why caliper was being used to measure trees as opposed to DBH and why four inches of mulch was specified when the standard is 2-3 inches.

Chris Golden said the specifications could be changed.

Elodia shared Joe's comments regarding building infrastructure with the room for lighting and sound mixing equipment as well as making room for future additions and improvements. He also was concerned about the power levels specified.

Jamie was concerned that there was no opportunity to provide feedback because the plans were at 100%. She suggested the DPW may be able to approve change orders or make modifications to fund some items raised by the CPC or the Committee may be forced to reject funding the project.

Jason said he didn't see a path to vote for the extension since Greg St. Louis was not at the meeting to answer questions. He added that it was his impression the DPW was viewing the CPA as an automatic source of funding, and it was a precedent he did not want to set.

Mark questioned what would be done if the bids exceeded the amount of funds the CPC would likely grant to the project. He raised whether the project could be value engineered to bring it back within reasonable costs.

CPC members agreed that there should be a new application and that the DPW seemed to be taking CPC funding for granted or feeling certain they will receive CPA funds without the benefit of the Committee's input on the design plans.

Motion: Jon Bockian moved to deny the DPW's request for a presentation in September and invite the DPW to submit a new CPA Funding Application for FY 2024 without the need to submit the Project Eligibility form. Jamie added an amendment to reject their application without prejudice. Jon restated the motion with the amendment denying the project application for FY 2023 without prejudice. Elodia seconded the restated motion.

In the discussion, Elodia said she felt very bad for the project architects and assured them they were not to blame.

Vote: Mark Kraczkiewicz, Jason Cohen, Jamie O'Connell, Matthew Walter, Elodia Thomas, Dennis J. Duff, Jon Bockian, Bob DiRico voted in favor.

B. FY2024 Project Eligibility Forms

Walker Pond - The Committee deemed the project eligible though found it there was minimal information provided and the application may be premature.

Councilor Palomba suggested there were a number of ideas as to how the Park might be used and the city was committed to hiring someone to conduct a robust community engagement process.

HVAC Upgrade for Fowle House - The Committee deemed the project eligible.

Watertown Historical Records Preservation– The Committee deemed the project eligible pending a local historic significance designation from the Historical Commission. Larry Field noted the application was on the Commission's September agenda. Mark added the project should adhere to preservation guidelines for documents.

North Branch Library Rehabilitation Planning - The Committee deemed the project eligible. Elodia had a letter from David Russo concerning the property and will forward it to Lanae.

80 Mt. Auburn St. Historic Building Safety and Accessibility Redevelopment – Lanae said she forwarded the Project Eligibility form to the city attorney. Jon agreed with getting an opinion from the city attorney and thought more information may be needed based on that legal opinion. Matt wanted to hear from the attorney and said Newton approved a similar project.

Scots' Charitable Society Fence Preservation - The Committee deemed the project eligible. Dennis remarked that CPA funds were for projects that would not otherwise be done, and Mt. Auburn Cemetery just sold property for a lot of money.

Brown House Structural Engineering - The Committee deemed the project eligible.

4. Chair Update

Mark summarized his meeting with Cliff Cook, (Watertown Affordable Housing Trust Chair), Larry Field and Lanae Handy. He described the WAHT process to identify potential sites for affordable housing projects, noting an intern had been hired and sites were narrowed down to 19. Larry had narrowed that number down further and the Trust planned to hire consultants to determine the feasibility of sites identified. If there were suitable sites the Trust planned to work with an affordable housing developer. Though the Trust is not seeking funds now, if they obtain site control of a property that may change.

5. Coordinator Update

A. Status of CPA Projects

FY 2022

City Hall Paintings – Lanae reported that the initial work of removal, stabilization, and some cleaning had been performed. The project was stalled due to delays in obtaining a contract for the conservator. Some of the initial delays were caused because of the conservator's confusion about the Certificate of Insurance requirements, and now the Purchasing Department needed to produce a contract.

Irving Park – Lanae believed some pathway and the ornamental fencing remained to be installed. She asked Bob to confirm, and he said the pathway had been completed and the fencing was in production. Bob added the bike racks would be installed outside of the park and more street trees would be planted in the fall.

Elodia suggested adding signage to notify park users the park was not a dog park. Bob agreed this was a good idea since dogs had badly damaged the turf at some other parks. Elodia also suggested sending an update to the park neighbors.

FY 2023

Lanae informed the CPC that all the Grant Agreements and Memoranda of Agreement had been executed and she is getting purchase orders and contracts produced for the projects so they can begin.

B. FY 2023 Tracking Project Expenditures

The invoices for the initial work on the City Hall Painting had been paid. The Irving Park account was within budget and funds were available from the contingency for the change orders for the addition of irrigation and sod.

C. FY 2023 CPC Administrative Expenses Detail

The only additional from the Administrative Expenses as of May 17th are the coordinator's salary from May 17th through June 30th.

D. Events

Lanae asked if Committee members thought it was a good idea to host an event to celebrate the first completed CPA project. Also, she asked if some committee members would volunteer to help with planning. Mark and Dennis were interested in working on the event.

Lanae asked about interest in hosting a booth at Faire on the Square again. The CPC was interested and Lanae planned circulate a sign-up.

6. Adjournment

Motion: Dennis J. Duff moved to adjourn, and Matt Walter seconded the motion.

Vote: Dennis J. Duff, Elodia Thomas, Bob DiRico, Jason Cohen, Jamie O'Connell, Mark Kraczkiewicz, Matt Walter, and Jon Bockian voted in favor.

Adjournment: 8:40 PM

Dear Ms. Handy and members of the CPC Committee,

As a Trustee of Belmont Watertown UMC, I was interested to observe the CPC eligibility meeting on June 20th. It was helpful to hear the concerns of the committee. I understand the reasons to be cautious about engaging the town with a religious community. Committee members made clear that, to be considered, the benefits to the community must outweigh the risks involved in that relationship. I want to try to lay out what the church's situation is, and why we believe that to be true. I would appreciate it if you forward this letter to all members of the Community Preservation Committee, and if you feel appropriate, to the town's lawyer as part of his review.

Our congregation cannot afford to maintain two old historic buildings. We need to sell at least one to have any hope of becoming financially sustainable. We believe whole-heartedly that Watertown is the place we should be. However, the building needs extensive repairs and maintenance in order to make this possible. The church's current project plan is a basic renovation to bring the building up to code. Our intention (hope) is that we are able to make a simple, accessible space that can be used for a number of community groups. In addition to bringing the building up to code and making it ADA compliant, we are downsizing the large sanctuary into a smaller worship space with additional general purpose meeting rooms so that more spaces can be used by more non-worshipping groups. We are selling everything we have and using our existing endowment to invest 7 million dollars in this move. We have value-engineered the plans to be as economical and practical as possible, yet we cannot afford to do it without help.

If we are not able to fund the remainder of this plan, the most likely outcome would be:

1. We would pivot to concentrate our future home in our Belmont site. This site is not ideal, but needs less immediate maintenance then the Watertown site, and could possibly become financially sustainable.
2. We would re-list the entire Watertown campus for sale. Because we would no longer be moving to the Watertown campus, we would remove the restriction that we sell it to a community-oriented neighbor.
3. The Watertown site might be bought by a large developer, with a likely renovation plan for either luxury condos or more lab space. I do not think any non-profit would be able to bring in 7 million dollars to contribute to preserving such an important piece of Watertown's history, and a critical part of its current community. Nor would the town, if they wanted to intervene, be willing to foot the bill for the full amount. So a large developer seems like the only realistic outcome.
4. If the Watertown Square planning project extends the Watertown Square commercial overlay district to include the entire BWUMC Watertown campus, that would remove the property from the Historic District Committee's oversite. Then any kind of building could go in, ignoring the neighborhood concerns about over development, the historic value, and the preciously limited green space.
5. The historic value of the building would be eliminated in such a scenario. The food pantry, community fridge, and scouting groups would need to find new homes. I can tell you from the difficulties they had in planning for space during our 18-month renovation, this will be a difficult process, but I believe those groups will be able to eventually find something. The 20+ recovery groups, serving hundreds of Watertown residents living in recovery every week, will likely fare much worse. I encourage you to talk to some of these groups. They are the most likely to

experience extreme difficulties in finding places to meet. Many people refuse them outright. Others do not see them as a community benefit, and will only rent space to them at full-rate market rents, which none of these groups can afford.

6. This outcome would be a tremendous and unrecoverable loss for Watertown.

That is the situation. Whether or not the City of Watertown, and the Community Preservation Committee, feel like the benefits outweigh the risks of collaborating with a church is something you will all have to decide. I remind the committee that for something like 30 years, the church has housed the municipal food pantry without incident or interference. I did notice in the meeting that one committee member said something to the effect of "if this weren't a church, we wouldn't even be having this discussion, it clearly has the historical value." I take my faith seriously. My faith is the reason why I am fighting so hard to preserve this building, and all the critical work that happens inside of it. I sincerely hope that the town will see value in what we bring to Watertown, as part of this community. If not, I think that would be a loss for all of us.

This is a complicated proposal with multiple moving pieces that need to come together to make it possible. All we are asking for, at this point, is to be found eligible to apply for CPA funds. During this process, the committee will have access to substantially more information about the specific renovations and use of the building so they can make an informed decision to best benefit the community.

Best,

Annie Martin

Watertown Resident, 17 Avon Rd

BWUMC Trustee

Attached is prior guidance provided regarding applications for Community Preservation Act (CPA) funds.

The application received by the Town's Community Preservation Committee (CPC) from the Belmont-Watertown United Methodist Church seeks funding for numerous repairs to the church building consideration and represents a project related to a church in active use.

As noted in the attached prior guidance, the Supreme Judicial Court in the case of Caplan v. Town of Acton, 479 Mass. 69 (20118) considered a challenge to use of CPA funds voted by the Acton Town Meeting for two projects at the Acton Congregational Church on the grounds that award of those funds violated the so-called anti-aid amendment to the Massachusetts Constitution (Article 18 of the Amendments to the Constitution, as amended by Articles 46 and 103), which prohibits the "grant, appropriation or use of public money . . . for the purpose of founding, maintaining or aiding any church, religious denomination or society." In Caplan, the Court referenced a three prong test to evaluate the constitutionality of public funding grants to active churches. That test involves consideration of whether a motivating purpose of a grant is to aid the church, whether the grant will have the effect of substantially aiding the church, and whether the grant avoids the risks of the political and economic abuses that prompted the passage of the anti-aid amendment (e.g., entanglement of the government and public monies in religious institutions). At issue was a grant for restoration of stained glass windows which included religious images and a grant to fund a master plan for preservation of the church and its related buildings. The Court in the Caplan case ruled that the plaintiffs had a likelihood of success with respect to the grant for restoration of stained glass windows and remanded the matter to the Superior Court for entry of a preliminary injunction against disbursement of the grant. As to the master plan grant, the Court remanded the matter for further proceedings. The Court also concluded that, "in light of the history of the anti-aid amendment, a grant of public funds to an active church warrants careful scrutiny." (slip opinion at p.3).

The current application similarly seeks funding for restoration of a church in active use largely for the benefit of the church itself. The application references community groups which use the church building. The application also references the intent of the Belmont-Watertown United Methodist Church to the City (incorrectly referenced as "Town") for the location of its congregation. It is clear from this application that the restoration work would be beneficial to the continued use of the building as a church in active use. However, the application proposed the work for the purpose of historic preservation, citing to the location of the church building in the City's historic district and its having been designed by a prominent Watertown architect.

The CPA contains the following definition:

> "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.

The application indicates that the Watertown Historic Commission has deemed the building to be significant, satisfying the definitional requirement for a historic resource. The Court in Caplan reviewed the extent to which the CPA grant would be "for the purpose of founding, maintaining or aiding [a]church." However, since the stated purpose of the grants was historic preservation, the Court noted that a proper inquiry was whether there was an impermissible "hidden" purpose, but ruled that the record before it was insufficient to permit such a determination. The Court reviewed whether the CPA grant provided a substantial support for church purposes as opposed to historical preservation, looking at the amount of funding for the total project and references with the project application to support of the church activity generally as indicators that this grant would substantially aid the church. While the Court raised issues with the expenditure of CPA funds for the restoration of stained glass windows, it required further review regarding the overall master plan to determine whether the grant would primarily benefit historic preservation.

The CPC, in reviewing this application, will need to determine whether the historic preservation intent of the application is paramount to the benefit rendered to a church in active use. In this application, reference is made to the historical nature of the building. However, the intended purpose of the grant is to restore the building for its use as a church. As previously noted, the limited case law regarding use of CPA funds strictly analyzes these issues, and any grant to a church in active use is subject to some level of risk. The City Council will review and rely upon the recommendation of the CPC in determining whether to authorize funding for this application. The CPC should carefully review the historical and community significance of the proposed projects against their religious significance to determine whether the grants should be recommended for approval.

I recommend reviewing the attached prior guidance as consideration is given to this application, as a careful review of the competing interests in this church building by the CPC will be necessary to determine whether to recommend funding of this grant.

Please contact me with any further questions regarding this matter.

Thank you.

Mark

Attachment

Ms. Handy –

You have submitted for review two applications received by the Town's Community Preservation Committee (CPC) for funding consideration. Each of these applications involves projects related to a church in active use. I will provide some initial general comments on the state of legal review for such projects, and then discuss the two projects separately.

In reviewing this matter, it is important to consider the Supreme Judicial Court's decision in the case of Caplan v. Town of Acton, 479 Mass. 69 (20118). In the Caplan case the Court considered a challenge to use of Community Preservation Act (CPA) funds voted by the Acton Town Meeting for two projects at the Acton Congregational Church on the grounds that award of those funds violated the so-called anti-aid amendment to the Massachusetts Constitution (Article 18 of the Amendments to the Constitution, as amended by Articles 46 and 103), which prohibits the "grant, appropriation or use of public money . . . for the purpose of founding, maintaining or aiding any church, religious denomination or society."

In Caplan, the Court declared that the constitutionality of public funding grants to active churches must be evaluated under the three-prong test previously set out in Commonwealth v. School Comm. of Springfield, 382 Mass. 665, 675 (1982) for grants to other private institutions. That test involves consideration of whether a motivating purpose of a grant is to aid the church, whether the grant will have the effect of substantially aiding the church, and whether the grant avoids the risks of the political and economic abuses that prompted the passage of the anti-aid amendment (e.g., entanglement of the government and public monies in religious institutions). At issue was a grant for restoration of stained glass windows which included religious images and a grant to fund a master plan for preservation of the church and its related buildings. The Court ruled that the plaintiffs had a likelihood of success with respect to the stained glass windows grant and remanded to the Superior Court for entry of a preliminary injunction against disbursement of the grant. As to the master plan grant, the Court remanded the matter for further proceedings. The Court also concluded that, "in light of the history of the anti-aid amendment, a grant of public funds to an active church warrants careful scrutiny." (slip opinion at p.3)

In my opinion, the Caplan ruling does not necessarily prohibit the use of CPA funds for a project which benefits a religious institution under the anti-aid amendment. Rather, in my opinion, an evaluation of the project according to the three-prong test described by the Court must be undertaken to determine whether appropriation of the funds requested is a permissible action under both the Community Preservation Act and the anti-aid amendment.

In the Caplan case, the Court reviewed the extent to which the CPA grant would be "for the purpose of founding, maintaining or aiding [a]church." Where the stated purpose of the grants was historic preservation, the Court noted that a proper inquiry was whether there was an impermissible "hidden" purpose, but ruled that the record before it was insufficient to permit such a determination. The Court reviewed whether the CPA grant provided a substantial support for the church purposes as opposed to historical preservation, looking at the amount of funding for the total project and references with the project application to support of the church activity generally as indicators that this grant would substantially aid the church.

On whether the grants would avoid the risks associated with passage of the anti-aid amendment, the Court repeated the particular risks, as previously stated in Bloom v. School Comm. of Springfield, 376 Mass. 35, 39 (1978):

> [F]irst, the risk that "liberty of conscience" would be infringed "whenever a citizen was taxed to support the religious institutions of others"; second, the risk that public funding would result in improper government entanglement with religion, undermining the "independence and dignity" of churches; and third, the risk that the public support of religious institutions would threaten "civic harmony," making the divisive "question of religion" a political question. (slip opinion at p. 37)

On the record before it, the Court found the risks "significant" (slip opinion p. 38), noting they would preserve a worship space and stained glass windows with "explicit religious imagery and language;" (Id. at p. 39) that the Town was requiring a preservation restriction that would limit the church's ability to make future alterations (which the Court considered an infringement on religious liberty); (Id. at 39-41) and that the grants risked "threatening civic harmony," by making the "question of religion" a political one. (Id. at p. 42, quoting Bloom, 376 Mass. at 39)

Notably, the Court concluded its analysis with a comment on the breadth of its decision:

> We do not suggest that fair consideration of the risks that prompted the passage of the anti-aid amendment means that every historic preservation grant for a church building will be unconstitutional. We only caution that any such grant to an active church warrants careful scrutiny under the three-factor Springfield test. The third factor is by no means a dispositive factor, only an important one. Indeed, we can imagine various circumstances where such grants would survive careful scrutiny, including, for instance, where historical events of great significance occurred in the church, or where the grants are limited to preserving church property with a primarily secular purpose. (slip opinion at p. 43

The two applications at issue, being funding for the bell tower rehabilitation at the Watertown-Belmont United Methodist Church and the funding of window replacement at the rectory of the Church of Good Shepherd, both involve requests for grant funding to active churches and would provide aid to those churches, thus implicating the Caplan decision and the test found therein. I will review each application below.

Bell Tower Rehabilitation at the Watertown-Belmont United Methodist Church

The application indicates that the funds will be used for the repair and restoration of the historic bell tower which is part of the Church building. The bell tower is a prominent landmark structure, and is an integral part of the Church building. While the application does reference the historical prominence of this structure, the primary public benefits cited are uses by community groups of the Church structure itself. Bell towers, much like steeples and spires, are associated closely with the church structures with which they are associated. It is important to note that in the case of Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001), the Court, in reviewing whether the erection of a church spire was protected by the so-called Dover Amendment which protects religious uses from zoning restrictions, determined that a church spire has aesthetic character but, as part of the structure of the church, is consistent with the religious use of that building. Steeples, or spires, pointing skywards, are central to the significance of churches as religious centers. Therefore, great care should be used in determine whether a grant of public funds for the repair of a bell tower, which has significance similar to a steeple, would constitute the use of public funds for a religious purpose.

Looking to the three-part test enumerated in the Caplan decision, it is difficult to determine that the grant of the requested funds would not be a direct benefit to the Church and result in entanglement of the government and public monies in religious institutions. It is simply not clear that the historic significance of the structure as a landmark would outweigh the risks referenced by the Caplan court as the repair and restoration of the structure would be of primary benefit to the Church itself, and any public benefit would be ancillary and primarily related to the use of the Church building itself by certain groups. The CPC, in recommending the grant, would need to make its analysis based not simply upon the use of iconography (as referenced in the Caplan case with respect to stained glass windows) but as to whether the bell tower has historical significance which clearly outweighs the religious significance of the bell tower itself. This is a factual determination which should be based upon information available to the CPC.

Window Replacement at the Rectory of the Church of Good Shepherd

This application seeks funding for a window replacement as part of the overall renovation of Rand House, the rectory at the Church of Good Shepherd. The Church is within a historic district. The rectory serves as a home for the rector and family. While the Church provides space for use by community groups, Rand House provides low-income housing for the rector and family as well as office space for the rector. No indication is made of the historic nature and significance of the rectory itself, and there is no indication that the rectory would provide space for use of the community. From the very language of the application, it appears that the rectory serves functions specifically to support the Church operations by housing the rector and family and proving the rector with a place to work. When viewed through the lens of the Caplan decision, it appears that these grant funds would directly benefit the Church and its religious functions, and would result in the use of public funds for the benefit of a religious institution. It is difficult to see how funding of this grant would avoid the entanglement noted in the Caplan and Bloom decisions referenced above.

The lack of case law interpreting the use of Community Preservation Act funds makes review of each grant application more difficult. However, whenever a church project is to be funded, the analysis must be carefully undertaken. Given the strict manner in which courts have analyzed the few grants subjected to challenge, and the extensive analysis and review outlined in the Caplan case, it must be understood that any grant to a church in active use is subject to some level of risk. Ultimately, it is the Town Council, with the recommendation of the CPC, which must decide whether to provide a grant in the face of such risk. The Town Council will, of course, rely heavily upon the review undertaken by the CPC in making its recommendation. I do recommend that the CPC carefully review the historical and community significance of the proposed projects against their religious significance to determine whether the grants should be recommended for approval.

It is critical that the historical nature of the buildings be paramount to the grant of public funding. In the absence of considerable historical significance of the two project areas, and a clear separation from their religious significance, a challenge to these grants may be successful.

Please contact me with any further questions regarding this matter.

Thank you.

Mark

From: Mark R. Reich <MReich@k-plaw.com>
Sent: Friday, October 8, 2021 7:59 PM
To: Handy, Lanae <lhandy@watertown-ma.gov>
Cc: Driscoll, Michael <mdriscoll@watertown-ma.gov>; Kraczkiewicz, Mark <mkracz@gmail.com>; Magoon, Steve <smagoon@watertown-ma.gov>; Tracy, Tom <ttracy@watertown-ma.gov>
Subject: RE: Legal Analysis for Potential CPA Applications

Ms. Handy –

In reviewing this matter, it is important to consider the Supreme Judicial Court's decision in the case of Caplan v. Town of Acton, 479 Mass. 69 (20118). In the Caplan case the Court considered a challenge to use of Community Preservation Act (CPA) funds voted by the Acton Town Meeting for two projects at the Acton Congregational Church on the grounds that award of those funds violated the so-called anti-aid amendment to the Massachusetts Constitution (Article 18 of the Amendments to the Constitution, as amended by Articles 46 and 103), which prohibits the "grant, appropriation or use of public money . . . for the purpose of founding, maintaining or aiding any church, religious denomination or society."

In Caplan, the Court declared that the constitutionality of public funding grants to active churches must be evaluated under the three-prong test previously set out in Commonwealth v. School Comm. of Springfield, 382 Mass. 665, 675 (1982) for grants to other private institutions. That test involves consideration of whether a motivating purpose of a grant is to aid the church, whether the grant will have the effect of substantially aiding the church, and whether the grant avoids the risks of the political and economic abuses that prompted the passage of the anti-aid amendment (e.g., entanglement of the government and public monies in religious institutions). At issue was a grant for restoration of stained glass windows which included religious images and a grant to fund a master plan for preservation of the church and its related buildings. The Court ruled that the plaintiffs had a likelihood of success with respect to the stained glass windows grant and remanded to the Superior Court for entry of a preliminary injunction against disbursement of the grant. As to the master plan grant, the Court remanded the matter for further proceedings. The Court also concluded that, "in light of the history of the anti-aid amendment, a grant of public funds to an active church warrants careful scrutiny." (slip opinion at p.3)

In my opinion, the Caplan ruling does not necessarily prohibit the use of CPA funds for a project which benefits a religious institution under the anti-aid amendment. Rather, in my opinion, an evaluation of the project according to the three-prong test described by the Court must be undertaken to determine whether appropriation of the funds requested is a permissible action under both the Community Preservation Act and the anti-aid amendment.

In the Caplan case, the Court reviewed the extent to which the CPA grant would be "for the purpose of founding, maintaining or aiding [a]church." Where the stated purpose of the grants was historic preservation, the Court noted that a proper inquiry was whether there was an impermissible "hidden" purpose, but ruled that the record before it was insufficient to permit such a determination. The Court reviewed whether the CPA grant provided a substantial support for the church purposes as opposed to historical preservation, looking at the amount of funding for the total project and references with the project application to support of the church activity generally as indicators that this grant would substantially aid the church.

On whether the grants would avoid the risks associated with passage of the anti-aid amendment, the Court repeated the particular risks, as previously stated in Bloom v. School Comm. of Springfield, 376 Mass. 35, 39 (1978):

> [F]irst, the risk that "liberty of conscience" would be infringed "whenever a citizen was taxed to support the religious institutions of others"; second, the risk that public funding would result in improper government entanglement with religion, undermining the "independence and dignity" of churches; and third, the risk that the public support of religious institutions would threaten "civic harmony," making the divisive "question of religion" a political question. (slip opinion at p. 37)

On the record before it, the Court found the risks "significant" (slip opinion p. 38), noting they would preserve a worship space and stained glass windows with "explicit religious imagery and language;" (Id. at p. 39) that the Town was requiring a preservation restriction that would limit the church's ability to make future alterations (which the Court considered an infringement on religious liberty); (Id. at 39-41) and that the grants risked "threatening civic harmony," by making the "question of religion" a political one. (Id. at p. 42, quoting Bloom, 376 Mass. at 39)

Notably, the Court concluded its analysis with a comment on the breadth of its decision:

> We do not suggest that fair consideration of the risks that prompted the passage of the anti-aid amendment means that every historic preservation grant for a church building will be unconstitutional. We only caution that any such grant to an active church warrants careful scrutiny under the three-factor Springfield test. The third factor is by no means a dispositive factor, only an important one. Indeed, we can imagine various circumstances where such grants would survive careful scrutiny, including, for instance, where historical events of great significance occurred in the church, or where the grants are limited to preserving church property with a primarily secular purpose. (slip opinion at p. 43

Grant funding to active churches and would provide aid to those churches, thus implicating the Caplan decision and the test found therein.

> Bell Tower Rehabilitation at the Watertown-Belmont United Methodist Church
> The application indicates that the funds will be used for the repair and restoration of the historic bell tower which is part of the Church building. The bell tower is a prominent landmark structure, and is an integral part of the Church building. While the application does reference the historical prominence of this structure, the primary public benefits cited are uses by community groups of the Church structure itself. Bell towers, much like steeples and spires, are associated closely with the church structures with which they are associated. It is important to note that in the case of Martin v. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 434 Mass. 141 (2001), the Court, in reviewing whether the erection of a church spire was protected by the so-called Dover Amendment which protects religious uses from zoning restrictions, determined that a church spire has aesthetic character but, as part of the structure of the church, is consistent with the religious use of that building. Steeples, or spires, pointing skywards, are central to the significance of churches as religious centers. Therefore, great care should be used to determine whether a grant of public funds for the repair of a bell tower, which has significance similar to a steeple, would constitute the use of public funds for a religious purpose.

Looking to the three-part test enumerated in the Caplan decision, it is difficult to determine that the grant of the requested funds would not be a direct benefit to the Church and result in entanglement of the government and public monies in religious institutions. It is simply not clear that the historic significance of the structure as a landmark would outweigh the risks referenced by the Caplan court as the repair and restoration of the structure would be of primary benefit to the Church itself, and any public benefit would be ancillary and primarily related to the use of the Church building itself by certain groups. The CPC, in recommending the grant, would need to make its analysis based not simply upon the use of iconography (as referenced in the Caplan case with respect to stained glass windows) but as to whether the bell tower has historical significance which clearly outweighs the religious significance of the bell tower itself. This is a factual determination which should be based upon information available to the CPC.

MEMORANDUM

TO: CPC Members

FROM: Jon Bockian

8/9/2023

Re: BWUMC Eligibility for CPA Funds

Under U.S. Supreme Court decisions, it is not constitutionally permitted to deny *all* CPA grants to preserve historic church buildings simply because the grantee is a religious institution; each grant must be judged individually using constitutionally permissible criteria which will not effectively ban all such grants. The Caplan decision[1] imposes a 3-factor test for this purpose. These factors are entirely different from CPA's eligibility criteria. Our CPA eligibility form and process are not well suited to enable the CPC to analyze the Caplan factors. We should not penalize BWUMC for that.

The first Caplan factor is whether the *grantor's* (i.e., ultimately, the City Council's) motive in making the grant[2] – *not* the applicant's motivation -- is to aid this particular church rather than to serve the purpose of historic preservation. There is no way to determine now, in the event the City were to eventually approve a grant to BWUMC, whether the City's declared or hidden motivation would be to serve the proper purpose of historic preservation or to aid this particular church.

The other two Caplan factors are (A) whether the grant will have the effect of "*substantially*" [emphasis added] assisting the church in carrying out its essential (i.e., religious, non-secular) function, and (B) whether the grant avoids the *risks* of the political and economic abuses that prompted the passage of the Massachusetts anti-aid amendment. The CPC's eligibility application form does not require — nor could it effectively require — sufficient information from religious institutions to adequately analyze these two factors. The constitutional analysis cannot be adequately done by only looking at the initial proposal. These other two Caplan factors require full analysis of the details of the project (which we have decided we do not want to do for other projects at the eligibility stage) and analysis of what the CPC would recommend (and the Council approve) as the scope of work to be CPA-funded, the limitations on the use of funding, and the preservation restriction that would be imposed. That can't be done yet.

In examining the second Caplan factor -- whether the grant would have the effect of "substantially" assisting the church in carrying out its essential function – we are prohibited by the U.S. Constitution from assuming that every grant to a religious institution fails this test. It is a

[1] Caplan v. Town of Acton, 479 Mass. 69 (2018)
[2] Whether the primary stated or hidden purpose *of the grantor* is to aid this particular church rather than to serve the purpose of historic preservation.

misreading of the second Caplan factor to say that a CPA grant is forbidden if any CPA funds would help defray planning or restoration costs that a church would otherwise have to shoulder on its own, thereby allowing the money saved to be used to support its core religious activities. Because money is fungible, every public dollar granted to a religious institution to fix a leaky roof makes a private dollar available to pay for religious functions. In addition, BWUMC is asking for 8% of their estimated total project costs. While a grant of $750,000 is by no means small, it is debatable whether focusing on a proportion of 8% (without consideration of what the funds are for) allows anyone to judge whether the grant would be substantial enough to fail this Caplan test. Therefor a detailed and careful analysis of the proposed work, and the uses to which CPA funds may be put, is required. It is inappropriate to attempt that analysis now on the basis of the eligibility submittal.

The third Caplan factor is whether the grant avoids the *risks* of the political and economic abuses that prompted the passage of the anti-aid amendment. What are these risks according to Caplan?

First, the risk that "liberty of conscience" would be infringed "whenever a citizen was taxed to support the religious institutions of others." Again, we must remember that this risk cannot be used to deny every church application. Also, keep in mind that CPA defines rehab as "capital improvements, or the making of extraordinary repairs, to historic resources... for the purpose of making such historic resources... *functional for their intended uses*…." So by definition, a grant to rehab a church property that is even partially used for worship service has some effect of making the property functional *as a church*. Therefor the required analysis must dig deeper into what the CPA-funded work would be. The Caplan court decided this risk was too great for a project to "renovate the main church building, where the church conducts its worship services, and [to preserve] its stained glass windows, which feature explicit religious imagery and language." Merely repairing a church roof for the purpose of historic preservation would probably not create a legally significant risk as to liberty of conscience. We can't know yet what limits the CPC might recommend on the uses to which CPA funds may be spent by BWUMC.

The other risk cited by Caplan is that public funding would result in improper government entanglement with religion. The Caplan court found that in approving a certain grant, the Town of Acton required preservation restrictions which "would *significantly* [emphasis added] limit the church's ability to make future alterations to its buildings, including its worship space and its stained glass windows, without the town's approval." We cannot be certain now what our restriction on BWUMC would say. But let's suppose Watertown's restriction on the BWUMC building would prevent most alteration to exterior historic features visible to the public. Is it absolutely required by the CPA that such a restriction prohibit alteration to the religious symbols or words that may now be found on the building's exterior? As far as I can tell from the eligibility submittal, the exterior of the historic building features crosses at various places on the roof line and stained glass windows, some or all of which contain religious iconography. It seems feasible that the CPC could require a restriction prohibiting any alteration to the exterior *other than* to the crosses and stained glass windows. As I read the statement of architectural significance from Imai Keller Moore Architects, the content of the windows are not part of what makes the building historically significant.[3]

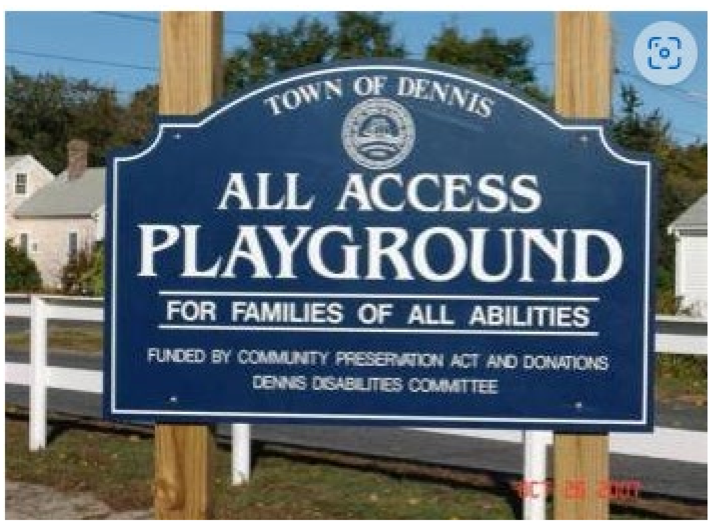
In summary, the Caplan tests apply to the actions of *the City* if it were to approve a grant to BWUMC, and, given what is so far set out in the proposal, the CPC is currently unable to know enough about what the *outcome* of deliberations on this grant request would be without pursuing the application process to a conclusion. The possibility that the application would ultimately be denied does not excuse the CPC from giving the application full, due consideration.

[3] In addition, the large stained glass windows on the east and south elevations are be removed under an “add alt” in the proposal.

Permanent Signage Examples

Plaque type

Medallion type



CPA acknowledgement incorporated into place naming signs

CPA acknowledgement incorporated into place naming sign

Decal type

Temporary Signage
Examples of Wooden and Metal Signs