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BY FACSIMILE - (413) 259-2405

Mr. Laurence Shaffer
Town Manager
Amherst Town Hall
4 Boltwood Avenue
Amherst, MA 01002

Re: Plum Brook Project – Use of CPA Funds

Dear Mr. Shaffer:

You have requested an opinion as to whether the Town may use funds under the Community Preservation Act, G.L. c. 44B (the "CPA"), to pay for improvements to a 12-acre parcel of Town-owned land known as the "Plum Brook Athletic Fields" (the "Property"). In 2005, when the Town borrowed $550,000 under the CPA and appropriated $107,500 in other funds for the improvement project (the "Plum Brook Project"), portions of the Property were already used for recreational activities, such as soccer, softball, and horseback riding, while other portions were unusable because of the uneven grade of the land and/or the presence of wetlands. The Town used the CPA funds to level the ground and create new athletic fields, improve the existing fields, install irrigation systems, and pave a parking area, among other improvements. I understand that the Town now appropriates funds annually to pay the debt service owed on the 10-year bond issued by the Town. I have been informed that the Plum Brook Project is substantially complete, with a balance of approximately $11,000 to be paid to the contractor. You have asked whether the continued use of CPA funds for the Plum Brook Project is lawful in light of the Supreme Judicial Court's recent decision in Seideman v. Newton, 452 Mass. 472 (2008). That decision clarified whether CPA funds may be used to improve and restore recreational land that was not originally acquired or created using CPA funds.

In my opinion, it is likely that a court would find that a major part of the Plum Brook Project could not be funded under the CPA. The finding would be based on the fact that the Property was not acquired or created using CPA funds, and the Plum Brook Project's primary purpose was to improve and rehabilitate existing recreational facilities. However, it is my opinion that it is too late for anyone to bring suit challenging past CPA expenditures or future CPA appropriations to pay for the Plum Brook Project. Were a lawsuit brought to restrain the Town from annually raising funds to pay debt service, it is my opinion that a court would reject such a suit because the Town has incurred the obligation to pay for the Plum Brook Project, and any such suit would be barred by latches.

A. Seideman v. Newton - Use of CPA Funds

On May 15, 2006, the City of Newton appropriated $765,825 in CPA funds to improve two City-owned parks that had been used for recreational purposes prior to the enactment of the CPA in 2000 (the "City Project"). The City Project was designed to "'improve the parks' overall appearance by reorganizing existing park facilities, grouping the playground structures together, building a new tennis court...and reconfiguring and relocating the basketball courts, improving curb appeal through landscaping and [the] addition of new fencing, creating new paths, installing water fountains, constructing bleachers, installing additional lighting, interpretive signage and picnic tables, and preserving the ball fields." Seideman, at 475.

Ten taxpayers filed a suit under G.L. c. 40, § 53 on May 25, 2006, challenging Newton's appropriation of CPA funds for the City Project. The taxpayers argued that the City could not use CPA funds for the City Project because the parks were not originally acquired or created using CPA funds. Newton, on the other hand, argued that the term "creation," which is not defined in the CPA, should be "construed broadly to include not only the creation of physical land for a park, but also the creation of new recreational uses within existing parks that would make the areas open and accessible to new groups of users, including those who are disabled." Alternatively, Newton argued that since the City Project would "prevent significant destruction of green spaces, through improved drainage, fencing, and curbing," Newton was preserving, rather than rehabilitating, the parks. Id. at 477.

The Supreme Judicial Court ("SJC") rejected Newton's arguments that the City was "creating" recreational land by creating new recreational uses. According to the SJC, "the appropriation of CPA funds pursuant to G. L. c. 44B, § 5(b)(2), is for the creation of *land* for recreational use, not the creation of new recreational *uses* on existing land already devoted to that purpose" (emphasis added). Id. Since there was no question that the parks were used for recreational purposes prior to the enactment of the CPA, Newton was not, the Court held, creating new recreational land. The Court stated that "land for recreational use is not being created where a municipality chooses simply to enhance that which already exists as such." Id. at 478.

The SJC also found that Newton was not "preserving" the parks, but, rather, was "rehabilitating" them. While the City Project included improved drainage, fencing and curbing, the Court concluded that the City Project's primary purpose was not to preserve the parks from decay and destruction, but rather to "improve substantially the parks' over-all quality, attractiveness, and usage," uses that are consistent with the meaning of the term "rehabilitation." Id. at 479. The SJC thus held that Newton was prohibited from using CPA funds to rehabilitate parks that were not acquired or created using CPA funds.

It appears that a significant part of the Town's Plum Brook Project was designed to improve the existing recreational facilities on the Property. It is my understanding that while the recreational fields and other facilities on the Property may have been inadequate, they were not in danger of being damaged or destroyed. Thus, the Town may not be able to claim that the Plum Brook Project was designed to preserve the recreational land (which, as mentioned above, is a permissible use under the CPA regardless of whether CPA funds were used to acquire the Property). To the extent that a portion of the Plum Brook Project involved expanding recreational facilities into portions of the Property that hitherto had never been used for recreational purposes, the Town could argue that it properly used CPA funds because it resulted in the "creation" of new recreational land. Since the SJC was unwilling in Seideman to parse through the details of City Project to determine if certain activities could be characterized as preservation rather than rehabilitation, it is my opinion that a court may be similarly disinclined to find that the Town created recreational land when the primary purpose of the Plum Brook Project was to improve the Property.

B. Ten-Taxpayer Lawsuits

You have asked whether the Town's past or future use of CPA funds for the Plum Brook Project could be challenged. Any such complaint would be filed as a ten taxpayer lawsuit under G.L. c. 40, § 53. Section 53 governs taxpayer suits that are brought to prevent the expenditure of municipal funds for an illegal purpose and to prohibit the raising of money by taxation in any manner not authorized by law. Section 53 states, in relevant part, that "[i]f a town . . . 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, . . . determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power."

As quoted above, a lawsuit under G.L. c. 40, § 53 must be brought before a municipality raises funds, expends funds, or incurs a binding obligation. In Kapinos v. Chicopee, 334 Mass. 196, 198 (1956), the SJC held that suits under G.L. c. 40, § 53 must be brought only "if a town or any of its officers or agents *are about to incur obligations*. This plainly implies that a taxpayers' petition will lie only before such obligations are incurred and not afterwards" (emphasis in original). Similarly, according to the SJC in Howard v. Chicopee, 299 Mass. 115, 120 (1937), G.L. c. 40, § 53 "is solely preventive. It does not authorize the correction of wrongs wholly executed and completed. It does not include in its words redress of an evil which is past." In Seideman, Newton appropriated CPA funds on May 15, 2006, and the taxpayer suit was brought on May 25, 2008, before Newton entered into an agreement with a contractor to perform the work. The SJC, in upholding the taxpayer's suit, enjoined Newton before it incurred any obligation or raised or expended the CPA funds.

In my opinion, the Seideman Court suggests that a ten-taxpayer suit under G.L. c. 40, § 53 may not apply to a CPA-funded project after the municipality has already borrowed and expended the funds, even though the municipality must annually appropriate funds to pay the debt service, as is the case here. Significantly, the SJC notes in Seideman that "an action by ten taxpayers under G.L. c. 40, § 53, is subject to latches, see Zeitler v. Hinsdale, 5 Mass.App.Ct. 778 (1977), and must be brought before obligations are incurred by a municipality." Seideman, fn. 13. In Zeitler, the Appeals Court rejected a ten-taxpayer suit brought to invalidate a vote of the Hinsdale town meeting to appropriate and borrow funds for a sewer project (alleging certain procedural errors in the passage of the vote). Since the suit was brought three years after the town meeting vote, the Appeals Court summarily barred the lawsuit because the taxpayers were "guilty of latches." Zeitler, at 778.

Here, the Town borrowed the funds in 2005, entered into a construction contract shortly thereafter, and has expended almost all of the funds. The Town must appropriate funds for several more years to pay the debt service owed on the bond. The success of a ten-taxpayer suit under G.L. c. 40, § 53 questioning the Plum Brook Project depends, in my opinion, on the specific Town action that is the subject of the suit. If a suit challenges the construction contract and demands the contractor to repay the funds or prohibits the Town from paying the contractor the remaining $11,000 owed, it is my opinion that a court would find that the taxpayers have no standing because the Plum Brook Project has been substantially completed and the funds expended; G.L. c. 40, § 53 "does not authorize the correction of wrongs wholly executed and completed." Howard, at 120.

The critical question, therefore, is whether taxpayers could successfully prohibit the Town from appropriating funds annually to pay the debt service. The taxpayers may argue that G.L. c. 40, § 53 is phrased in the disjunctive, and allows suits to be brought not only before the Town expends the funds, but also before the Town appropriates or raises funds for debt service. In my opinion, such an argument ignores the requirement in G.L. c. 40, § 53 that suits must be brought before the Town incurs an obligation. "A taxpayer's petition will lie only before such obligations are incurred and not afterwards." Kapinos, at 198. It is my opinion that the Town may validly argue that taxpayers cannot prohibit the Town from paying for the Plum Brook Project because it incurred the obligation to repay the debt when it issued the bond.

In Cape Ann Citizens Association v. Gloucester, taxpayers brought suit to enjoin Gloucester from assessing betterment assessments to pay for a sewer extension project that had been designed and built in violation of the city charter. The taxpayers claimed that "while the sewer is complete and the obligation incurred, the City is 'about to raise' money to pay for the sewer via betterment assessment. 6 Mass.L.Rptr. 219 (1996). Although the Cape Ann decision is not binding precedent, the Court rejected the taxpayers' argument, and held that "to permit the plaintiffs to now attack the violation of the city charter in constructing the sewer by way of enjoining payment for the sewers would undercut the reason why ten taxpayers suits must be filed before the city incurs the obligation. After all, the obligation now exists. . . . Rather, the plaintiffs seek the proverbial second bite at the apple by first attacking the sewer project and then attacking the payment for the sewer project. To

permit such a lawsuit would create an exception that would swallow the holding of Kapinos" that taxpayers may file suit only before the municipality incurs an obligation. Id.

Moreover, it is my opinion that a taxpayers suit under G.L. c. 40, § 53 would be barred by latches. Town Meeting first appropriated the CPA funds in 2002; a vote to rescind the 2002 appropriation was challenged and defeated at a referendum in 2005, more than three years ago. As the SCJ held in Fuller v. Trustees of Deerfield Academy and Dickinson High School, 252 Mass. 258, 264 (1925), "the acts of which complaint here is made must have been open and thoroughly known to everyone, because they are . . . the result of votes or action taken...in the most public of all governmental assemblies, the town meeting of a New England town." Since Amherst taxpayers have had ample time to challenge the use of CPA funds for the Plum Brook Project, it is my opinion that the Town may validly argue that the taxpayers are now too late.

Please contact me if you have any questions.

Very truly yours,

Joel Bard (SE)

Joel B. Bard

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