

COMMUNITY PRESERVATION ACT – UPDATE ON PATHWAYS

Prepared for the 2016 Massachusetts Municipal Association Annual Meeting

We continue to receive questions about use of Community Preservation Act (“CPA”) funds for the creation of pathways. The issue has received additional attention as a result of the Plymouth Superior Court’s recent decision in Mauch et al. v. Norwell. Although a superior court decision is not binding precedent, the Norwell decision provides further guidance on the permissible use of CPA funds for projects involving land for recreational use.

CPA funds may be used for the acquisition, preservation, rehabilitation, and restoration of land for recreational use. The term “recreational use” is defined as “active or passive recreational use including, but not limited to, the use of land for community gardens, trails, and noncommercial youth and adult sports...” As you may recall, in Seideman v. Newton, 452 Mass. 472 (2008), the Supreme Judicial Court interpreted the CPA strictly, finding that CPA funds could not be used for a significant park project, as the project did not constitute “creation” of land for recreational use where the land was already used by the City for park purposes. As a result of this strict reading of the law, the legislature amended the statute to expressly permit rehabilitation of land already used by a municipality for recreational purposes.

In Norwell, the Superior Court took a similar approach to the CPA, interpreting its provisions narrowly. The Town appropriated \$1.4 million in CPA funds at its May 2015 Annual Town Meeting to construct a single paved pedestrian and bicycle pathway along Main Street, which, the Court notes, is a highway. According to the Town, the project constituted creation of land for recreational use. The pathway would connect to other existing paths, ultimately forming a 5-mile loop, and providing “recreational opportunities for residents, such as jogging and walking in a safe environment.” The Town argued further that the project would connect schools, recreation areas, sport fields, open space areas, a community farm, historic properties and the Town center.

The Superior Court held that the Town could not use CPA funds for the project because the pathway was not intended or designed for recreational use, but was instead an ordinary roadway improvement incidentally connecting recreational areas. Significantly, in 2014, the Town borrowed \$3.3 million to make highway improvements, including the construction of sidewalks along the same stretch of Main Street. In addition, the Court observed that the pathway, which was to be constructed along a busy state highway that also served as an alternate truck route; was not set back from the highway or otherwise segregated to avoid traffic; and, was unlikely, by the Town’s own admission in light of dangerous traffic conditions, to be used by children or active adults for walking, running, or bicycling. Further, the pathway project was not part of an overall recreation plan and did not involve a Town committee that actively participated in creating an extensive network of recreational trails in the Town. The Court held

that, “[c]onsidered in light of the \$3.3 million sidewalk project that predated the pathway appropriation and authorized the installation of sidewalks along the same stretch of Main Street,” the pathway was a highway project ineligible for CPA funding. In summary, the Court found that Norwell could not use CPA monies to construct what was otherwise an ordinary municipal sidewalk merely because of its tangential recreational use.

Norwell does not stand for the proposition that CPA monies may never be used for the construction of paved pathways. Rather, the decision highlights that a municipality seeking to use CPA funds for a pathway project must be able to demonstrate that the pathway is part of an overall or recreation planning process and will directly further a recreational purpose, rather than simply an adjunct to a highway project. Such evidence might include: location of the pathway as shown in a master plan or recreational master plan; design elements intended to foster recreational use of the pathway including but not limited to: location of pathway on road; width of pathway; access elements for persons with disabilities; recreational elements on or along the pathway such as a bike lane, exercise features, green space or scenic vistas; and appointment of a committee for the purpose of vetting the recreational nature of the pathway. In other words, it will be important to demonstrate that the municipality considered and planned for the recreational elements/purposes of the pathway project. The Norwell decision has no impact, of course, on the use of CPA funds to construct walkways within a park, playground, beach or other public recreational area, or for bicycle path or recreational trail purposes.

Should you have any questions concerning the Norwell case or the CPA, please contact Attorney Lauren Goldberg or Attorney Shirin Everett by e-mail at lgoldberg@k-plaw.com or severett@k-plaw.com or by phone at 617.556.0007.

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