

CONFIDENTIAL

**CITY OF NEWTON
LAW DEPARTMENT
OPINION**

To: Members of the Community Preservation Committee

**From: Daniel M. Funk
City Solicitor** *DMF*

Date: February 19, 2009

**Re: Exterior Restoration of Jackson Homestead
Eligibility for CPA funds**

BACKGROUND

The Community Preservation Committee (CPC) has received a proposal requesting \$136,244 in Community Preservation Act (CPA) funds toward the exterior restoration of the Jackson Homestead ("Project"), a City-owned building that currently houses the Newton History Museum. The Jackson Homestead was constructed, in part, in 1809 and served as a stop on the Underground Railroad. It is listed on the National Registry of Historic Places and has been designated a local landmark. The Jackson Homestead was given to the City of Newton in 1949 to be "... preserved as an object of local historic interest as well as for its architectural qualities..." The Jackson Homestead is unquestionably an historic resource of the City of Newton as that term is defined in the CPA.¹

The scope of the Project will include replacement of the existing roof and repair of roof eaves; replacement of chimney flashing; exterior wood repairs including deteriorated storm window sashes, sills, shutters, trim, a portion of the wood gutter, and replacement of existing bulkhead doors; exterior painting of the entire building, including

¹ The CPA defines an historic resource as:

... a building, structure, vessel [*sic*] real property, document or artifact that is listed or eligible for listing 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. G.L. c. 44B §2.

windows, trim, and porches; and miscellaneous other exterior work including new aluminum downspouts, new shutterdogs for all windows, and oiling the new and existing wood gutters. The estimated cost for the Project is \$133,224, with an additional \$3,000 budgeted for removal of the Homestead's collection located in the attic which is necessitated by the repairs. A more detailed description of the work and costs from the Project's Preservation Proposal is attached to this memorandum as Exhibit A.

The Public Buildings Department is paying the architectural fees associated with the Project (totaling \$18,900) and is using one of its "on-call" architects with experience in historical preservation.

QUESTION

Is the Project eligible for CPA funds as preservation or rehabilitation of an historic resource?

SHORT ANSWER

The majority of the Project's scope of work appears to protect the Jackson Homestead from harm or destruction, or constitutes an extraordinary repair or both, and is eligible for CPA funding pursuant to the definition of "preservation" or "rehabilitation." The CPC should review the Project's scope of work to see if there are any minor item(s) that are more fairly described as maintenance unrelated to the work that constitutes "preservation" or "rehabilitation" as those terms are discussed in this memorandum.²

DISCUSSION

The CPA allows funds to be spent for the "acquisition, preservation, rehabilitation and restoration of historic resources." See G.L. c. 44B, §5. As noted above, The Jackson Homestead is unquestionably an historic resource which is already owned by the City. Hence, the Project involves no funding for acquisition of an historic resource. The issue is whether the project constitutes preservation, rehabilitation, or restoration of this historic resource.

The term "restoration" is not defined by the CPA. Applying principals of statutory construction, this term should be given its usual and customary meaning provided that meaning is consistent with the purpose of the CPA. See *Commonwealth v. Zone Book, Inc.*, 372 Mass 366, 369 (1977). For historical resources, the term "restoration" is generally understood as returning the resource to its original or previous

² In *Seideman v. City of Newton*, 452 Mass. 472 (2008), both the Superior Court and the Supreme Judicial Court used a broad brush in analyzing the proposed work and did not consider whether some components of the proposed work might qualify for CPA funding. Applying that approach to this Project, one could argue that a broad brush approach would allow incidental work that might itself not be eligible for funding to be included, given that the Project's primary purpose is clearly eligible work.

state.³ Applying this definition, the Project does not appear to qualify as the "restoration" of an historical resource.⁴

The CPA does define "preservation" and "rehabilitation," in pertinent part, as follows:

"Preservation", protection of personal or real property from injury, harm or destruction, but not including maintenance.

"Rehabilitation", the remodeling, reconstruction and making of extraordinary repairs to historic resources, ... With respect to historic resources, rehabilitation shall have the additional meaning of work to comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's *Standards for the Treatment of Historic Properties* codified in 36 C.F.R. Part 68.

See G.L. c. 44B, §2 Definitions.

It should be said at the onset that neither definition is particularly helpful in determining whether a specific item of work qualifies as "preservation" or "rehabilitation." For example, both "preservation" and "rehabilitation" may involve repairs to an historic resource, but whether a repair qualifies as "preservation" or "rehabilitation" isn't readily apparent from the definitions themselves. One area of overlap between these two terms comes from the inclusion of "extraordinary repairs" in the definition of "rehabilitation." Work to protect an historic resource from destruction or harm may well involve a repair to that asset. If the repair constitutes an extraordinary repair,⁵ that work could qualify for funding as both "preservation" and "rehabilitation."

Repairing a leaking roof as proposed in the Project and protecting the Jackson Homestead from the water damage it is currently experiencing may be a case in point. This roof repair qualifies as "preservation" work. If, however, the extent of the roof

³ Cf. This term is defined in the federal *Standards for Treatment of Historic Properties*, 36 C.F.R. Part 68 as follows:

... the process of accurately depicting the form, features and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction of missing features from the restoration period.

⁴ Perhaps the title of the Project should be changed from "Exterior Restoration of Jackson Homestead," given that the work involved clearly isn't "restoration" of the Jackson Homestead for purposes of CPA funding.

⁵ The term "extraordinary repairs" is not defined in the CPA. A usual and customary definition of "extraordinary" is "going beyond what is usual, regular, or customary." A usual and customary definition of "repair" includes "to restore by replacing a part or putting together what is torn or broken; fix." See *Webster's Seventh New Collegiate Dictionary*. Cf. In the context of a lease, *Black's Law Dictionary Eighth Edition* defines an "extraordinary repair" as a "repair that is beyond the usual, customary, or regular kind."

repair constitutes an "extraordinary repair", such work is also eligible for funding under the CPA as "rehabilitation" of an historic resource. The same might be said for any repair work proposed in the Project that both protects the structure from damage and constitutes an extraordinary repair.

Presumably, preserving an historic resource from harm does not always involve an extraordinary repair. As stated, CPA funds can be used for "preservation" activities which protect the historic resource from damage or harm provided such work doesn't constitute "maintenance." The CPA defines "maintenance" as "the upkeep of real or personal property."⁶ Yet a common understanding of "maintenance" includes the notion that maintaining property can involve work, including repairs, that contribute toward protection of the property against "injury, harm or destruction."⁷ Query, what work did the drafters of the CPA intend to exclude from "preservation" funding as "maintenance"?

Unfortunately, "upkeep of real or personal property" isn't a term of art, and using this phrase as the definition of "maintenance" in the CPA draws no bright line distinction between "maintenance" and "preservation" work. Perhaps a helpful way to understand what the drafters of the CPA may have had in mind is to consider work done on historic resources, including repairs, as a continuum. The line of work would run from "maintenance" at the most modest and routine end of the continuum to the extraordinary repairs as part of "rehabilitation" at the other end of the continuum. In between those two extremes lies "preservation" covering work needed to protect the asset from harm or damage. Exactly where on this continuum "maintenance" turns into "preservation" and "preservation" turns into extraordinary repairs and "rehabilitation" involves practical considerations of the exact type of work involved and why the work is needed.

If that approach is used, by way of analogy, a helpful definition of "maintenance" appears in the section of the General Laws which deals with the Commonwealth's Capital Facilities. There "maintenance" is defined as "day-to-day, routine, normally recurring repairs and upkeep." See G.L. c. 7, §39(m). Using this approach to understanding what constitutes "maintenance" which cannot be funded as "preservation" with CPA dollars is also consistent with the discussion of "preservation" that appears in the Department of Revenue's Bulletin 2002-12B on the CPA which states in pertinent part:

⁶ A building or structure is a fixture to real property and would be included within the term "real property" when that term appears in the definition of "preservation" and "maintenance."

⁷ Indeed, the federal *Standards for Treatment of Historic Properties* acknowledges as much in its definition of "preservation" which states in pertinent part:

Preservation means the act or process of applying measures necessary to sustain the existing form, integrity and materials of an historic property. Work, including preliminary measures to protect and stabilize the property, generally focuses upon the ongoing maintenance and repair of historic materials and features rather than extensive replacement and new construction.

See 36 C.F.R. Part 68

Preservation means improvements made to protect the asset from injury, harm or destruction. *This could include such projects as the repair or replacement of a roof to protect a structure from damage from the elements or installation of a sprinkler system to protect it from fire damage.* It would not include *ordinary maintenance or upkeep* of the property, nor any of the more substantial or extensive improvements that would come within the definition of rehabilitation.[*Emphasis added*]

The focus of the inquiry in determining whether work is "preservation" or "maintenance" is essentially fact-based. It involves answering the following question: is the proposed work primarily needed to protect the historic resource from injury, harm or destruction and is not the sort of work needed on a day-to-day basis or as routine upkeep of the historic resource. If the answer to that question is yes, the work is eligible for funding as "preservation" or possibly "rehabilitation" if an extraordinary repair is needed. In many instances, the answer may be readily apparent. For example, work needed to make a structure weather proof or to stop water or rot damage (repairing and re-flashing a roof and repainting an entire building) is pretty clearly work that preserves a wooden structure from damage here in the Northeast and isn't done on a day-to-day or even year to year basis.

If, however, the proposed work doesn't protect the structure from injury, destruction or harm, or if it does, such work is more fairly characterized as ordinary "maintenance" or upkeep and not part of the "preservation" or "rehabilitation" activities, then the work is not eligible for CPA funding. For example, replacing a broken glass window can protect an historic building from water damage, but this sort of work seems to qualify as ordinary maintenance or upkeep, not "preservation."

CONCLUSION

The Project does appear to meet the eligibility criteria for funding under the provisions of §5(b)(2) of the CPA, as either "preservation" or "rehabilitation" or both, of an historic resource. The CPC should consider, however, if there are any items within the Project's scope of work that are more commonly considered ordinary maintenance unrelated to the "preservation" or "rehabilitation" work and therefore ineligible for CPA funding.⁸

⁸ But See comments in footnote 2.

EXHIBIT A



David B. Cohen
Mayor

Newton, Massachusetts Fy09 COMMUNITY PRESERVATION PROPOSAL

Date received:



Submit by 4 pm, 5 December 2008 to:
Alice E. Ingerson, Community Preservation Program Manager
Newton Planning and Development Department
1000 Commonwealth Ave., Newton, MA 02459
aingerson@newtonma.gov 617.796.1144

Proposals must follow instructions in the current Community Preservation Handbook, available upon request and online at www.ci.newton.ma.gov/cpa. You may adjust spaces, but use NO MORE THAN 1 PAGE to answer all questions on this page.

Project CONTACTS	<i>Name & title / affiliation, mailing address, email, daytime phone, & any other way we should contact you (fax, mobile phone, ...) Star (*) name of the project manager, who will track budget & submit updates.</i>				
Ms. Cynthia Stone Director, Newton History Museum 527 Washington St., Newton MA 02458 cstone@newtonma.gov 617.796.1451	* Mr. Nicholas Parnell City of Newton, Commissioner of Public Buildings 52 Elliot St, Newton Upper Falls MA 02464 nparnell@newtonma.gov 617.796.1600				
Project TITLE	Exterior Restoration of Jackson Homestead				
LOCATION	<i>Full street address (with zip code) or other precise location.</i> 527 Washington Street Newton, MA 02458				
FUNDING CATEGORIES	<i>CHECK ALL THAT APPLY.</i>	COMMUNITY HOUSING	X	HISTORIC RESOURCES	OPEN SPACE
BUDGET	<i>CP FUNDS REQUESTED:</i> \$136,244		<i>OTHER FUNDS TO BE USED:</i> \$18,900		<i>TOTAL PROJECT COST:</i> \$155,144
SUMMARY	<i>Summarize goals & benefits in NO MORE THAN 300 WORDS (staff will edit longer summaries to fit that limit).</i>				

The goal of this project is to restore the exterior of the Jackson Homestead so it may continue to serve as Newton's History Museum and a link to important early residents of Newton and the Underground Railroad. The major physical needs of the Homestead have not been addressed since the late 1990's. Peeling paint and an intermittently leaky roof, is putting the structure of Newton's preeminent historic house at risk. In 2009 we are celebrating the 200th anniversary of the Homestead's construction----what better way to celebrate it than to restore it prime condition!

The work includes:

- Wood Repair:** of deteriorating storm window sashes, sills, shutters and trim and creation of new bulkhead doors
 - Exterior Painting:** of siding, brick, chimneys, gutters, downspouts, trim, shutters, windows, storm doors, entries, decks, porches, etc.
 - Roof:** removal of asphalt shingle roof and installation of new synthetic roof shingles, underlayment, flashing and accessories
 - Other:** removal and replacement of chimney flashing, recaulking of windows and replacement of glass where necessary, limited gutter replacement and oiling of wood gutters.
- (For more detail see Project Manual attached to this proposal.)

In addition, this project will require dust control and other work necessary for the Homestead to stay open during the 3 months that this project will require. In preparation for this project, the Museum will need to move collection items out of its attic so that they do not get damaged as the roof is repaired.

This project will allow the Jackson Homestead to continue serving the people of Newton through its exhibitions, programs, and collections as it preserve this historic building and collections.

City of Newton
Jackson Homestead

Exterior Painting and Roof Replacement

Construction estimate
8/27/08

Division 2 - Site Work and Demolition

Remove shutters, shutter holdbacks, storm windows for repainting	\$	2,000.00	
Scaffolding/Staging	\$	10,000.00	
Remove and Dispose of roof shingles and underlayment -30 sq	\$	4,500.00	
Division 2 - Sub Total:			\$ 16,500.00

Division 6 Wood and Plastic

Provide new custom bulkhead door	\$	2,000.00	
Replace 20' length of wood gutter	\$	1,500.00	
Roof eave repair	\$	5,000.00	
Provide new ridge vents	\$	3,500.00	
Wood repair	\$	4,000.00	
Division 6 - Sub Total:			\$ 16,000.00

Division 7 - Thermal and Moisture Protection

Provide new lead coated copper and copper flashings at chimneys	\$	8,000.00	
Provide new aluminum downspouts and accessories	\$	2,000.00	
Provide new asphalt roof shingles and underlayment-30 sq	\$	10,500.00	
Division 7 - Sub Total:			\$ 20,500.00

Division 8 - Doors and Windows Not Used

Division 9 - FINISHES

Treat existing and new gutters with preservative	\$	1,000.00	
Paint exterior including trim, decks, shutters, windows	\$	30,000.00	
Division 9 - Sub Total:			\$ 31,000.00

Division 10 - Specialties

Provide new shutterdogs at all windows	\$	7,500.00	
Division 10 - Sub Total:			\$ 7,500.00

Division 16 - Electrical - Not Used

Construction Budget Subtotal:	\$	91,500.00	
General Bonds and Insurance (2%):	\$	1,830.00	
General Conditions (10%):	\$	9,150.00	
Sub Total:	\$	102,480.00	
G.C. Overhead and Profit (15%):	\$	15,372.00	
Construction Contingency- 15%	\$	15,372.00	

TOTAL DESIGN DEVELOPMENT BUDGET: **\$ 133,224.00**
