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December 3, 2018

Southborough Community Preservation Committee
c/o Frederica Gillespe, Chairperson
Town of Southborough
Town Hall
17 Common Street
Southborough, MA 01772

Re: Legal Opinion Request, Utilization of CPA Funds for Historical Preservation of St. Mark's Clock Tower, TCO No. 18-3077

Dear Madam Chairperson and Committee Members,

We acknowledge receipt of the opinion request above-referenced and have reviewed all furnished documents, plans, correspondence and legal cases cited.

Summarily, the opinion request indicates that St. Mark's Episcopal Church has made application for CPA funding for historical preservation of a bell and clock tower which was added to the principal church structure in 1891.

Your Committee has voted to seek this office's opinion as to the ability to recommend the project to Town Meeting for funding in view of the March 2018 Supreme Judicial Court (SJC) case of Caplan v. Town of Acton.

The Caplan case was a challenge to the use of tax generated CPA funds in the Town of Acton for a grant to restore stained glass windows with religious imagery. The SJC, in restating the prior established three part test in the use of public funds to determine if such use violated the Anti-Aid Amendment to the State Constitution enacted in 1917, concluded that the use of CPA funds, for historical preservation of such windows, fail the test.

In its Decision, the Court noted that it could "...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 grants are limited to preserving church property with a primary secular purpose*" (emphasis added).

We cite this Court commentary, in view of the fact revealed from the historical records and the current application before the CPC that the clock bell tower added in 1891 and without religious

symbols or imagery, was significantly more of a landmark in the historical downtown of Southborough than a religious symbol. Any religious imagery appears to be principally confined to the original church, meeting house structure of 1863 as depicted in the restoration project summary furnished with this opinion request.

It is also revealing, to this office, in the careful scrutiny that needs to occur in the use of public funds for a religious structure, the significant detail of historical and public purpose which the overall gothic, Old-English structure indicates.

The project description states that the bell tower restoration “benefits the entire community of Southborough due to its significance within the Downtown Historic District as well as the ties to the Burnett family of Southborough”.

In this regard, based upon our own historical research, the contiguous proximity of the bell tower facility to Southborough’s Town House shows a near historic integration between the Town where the congregation of the Town of Southborough petitioned for a new Township status in 1727. The general grant was for a meeting house, burial ground and muster field for the King’s militia to train. This was adjacent to the St. Mark’s church structure which appears clearly integrated in the Town’s historical character.

The application goes on to state that the St. Mark’s bell tower location within the downtown and its gothic revival design contributes to Southborough’s longstanding master plan goal of maintaining “the feel of a small New England town”.

In fact, the application is replete with sound historical reasons for the grant with no reference to significant religious purposes.

Furthermore, the application outlines the community services allowed in what the application calls a *community gathering place* evidencing non-denominational and non-religious community purposes, similar to what was intended for meeting houses in towns in the 1600s and 1700s.

Your Committee goes on to cite an accurate summary the compelling three part test for use of public funds so as not to violate the anti-aid amendment of the state constitution.

1. Whether the historical preservation grant is for the purpose of maintaining or aiding a religious organization. Unlike the Acton stained glass window grant with religious imagery, we suggest the Bell Tower Restoration Grant meets this prong of the test.
2. Whether the effect of the historical preservation grant is to substantially aid the religious organization. Although the restoration of the bell tower attached to the historical church would most probably benefit the Episcopal Church, the greater and more substantial benefit would be to the Town’s downtown character in the historical area of the 1727 King’s grant of establishment of the Town away from the Town of Marlborough previously established in 1660. We further suggest that the grant application meets this prong of the test.

3. Whether the risks to be avoided by the 1917 anti-aid amendment to the Constitution are implicated in the grant. Respectfully, we see no risk that liberty of conscience would be infringed or that the grant would result in an entanglement with religion or that the public support of a religious institution threatening civic harmony would occur.

Based upon the facts of the Acton case, if St. Mark's sought this grant to substantially enhance the principal church structure with all of its Episcopal Church and religious imagery well defined throughout, then it may well fail the test. But, this grant's purpose is truly for historical preservation of a landmark in the Downtown with the centrally located bell and clock tower in direct proximity to other historical structures and locations.

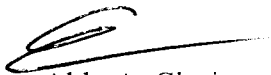
However, the ultimate analysis, in this regard, is vested with your Committee which must carefully scrutinize the application and CPA purpose related to historical preservation. That being said, the grant, if awarded, appears, to this office, to be fully defensible.

As to the final inquiry on whether the Mass. Historical Commission Preservation Restriction contains sufficient protections of historical preservation, we note that the type of restriction to the state is under the same historical preservation statute utilized by cities and towns for public restrictions i.e. M.G.L. c.184, Section 32.

A single modified restriction is being investigated by this office together with the other alternative of a separate restriction that integrates and otherwise does not conflict with the State grant and historical restriction in overall purpose.

We acknowledge that this is a complicated issue for any community preservation committee. We stand ready to assist further if additional explanation is needed.

Very truly yours,



Aldo A. Cipriano, Esq.
Town Counsel

AAC/fc

Cc: Mark Purple, *Town Administrator*