

PRESERVATION RESTRICTION (PR) POLICY FOR FALMOUTH CPC FUND HISTORIC PRESERVATION GRANTS				
1.	Is the historic property publicly owned (by town, state, or federal government)?	Yes	No PR required unless intended purpose (preservation of historic resource) needs to be protected in perpetuity	Long Pond Pumping Station, Falmouth Public Library, Edward Marks Building, Town Landing West Falmouth Harbor, Lawrence Academy (PR)
2.	Is the property in a Falmouth Historic District ?	Maybe	Changes require certification from Historical Commission but circumstances may suggest need for PR	Woods Hole Public Library
3.	Is the historic property a church open to all groups or an ancient burial ground or an historical museum?	Maybe	NO PR required but circumstances may suggest need for PR	Waquoit Congregational Church, West Falmouth Methodist Church, Oak Grove Cemetery, East Falmouth Burying Ground
4.	Is the historic property privately owned and to be acquired with CPA funds?	Yes	PR Required	No examples yet
5.	Is the historic property privately owned with an existing permanent PR or is otherwise protected by being in an historic district or other protected status?	Maybe	No PR Required but circumstances may suggest need for PR	Example: Bradley House (WH Historical Museum); Conant House (Museums on the Green)
6.	Is the property privately owned, with no existing protection of its historical value, and CPA funds are paying for the entire or a significant part of the restoration?	Yes	PR Required	Davis House, River Bend Silo
7.	Is the property privately owned, with no existing protection of its historical value, and CPA funds are paying for an insignificant part of the restoration?	Maybe	Consider criteria for imposing a PR	Carriage House*

CONSIDERATIONS FOR IMPOSING PR WHEN NOT REQUIRED BY LAW BUT SUGGESTED BY CIRCUMSTANCES	
<i>Preservation of Resource</i> Is there is risk of property being altered in historically inappropriate ways or of being demolished? Is there risk of property being sold or used for non-public purposes?	<i>Degree of Project Effects</i> Does funding/restoration affect 50 percent or more of the structure or property? Is percentage value of total project cost significant relative to assessed value of building (excluding land)?
<i>Visibility/Access</i> Are elevations of structure or property, or elevations affected by the project visible from a public way?	<i>Capacity for Ongoing Maintenance of Rehabilitated Historic Resource</i> Does resource owner have capacity for ongoing maintenance?

## BACKGROUND – PRESERVATION RESTRICTIONS FOR CPA-FUNDED PROJECTS

### I. Acquisition of Historic Property with CPA Funds

CPA Funds may be used for the acquisition, preservation, rehabilitation and restoration of historic resources. In the case of acquisition of an historic property, the property must be bound by a permanent restriction, recorded as a separate interest, limiting the use of the interest to the purpose for which it was acquired. The permanent restriction shall run with the land and shall be enforceable by the city or town or the commonwealth. The permanent restriction may also run to the benefit of a nonprofit organization, charitable corporation or foundation selected by the city or town with the right to enforce the restriction. The legislative body may appropriate monies from the CPA fund to pay a nonprofit organization created pursuant to Chapter 180 to hold, monitor and enforce the deed restriction on the property (MGL 44B s. 5 (a) (2) as amended by St. 2012 c. 139 s. 69-83).

### II. Preservation, Rehabilitation and Restoration of Historic Resources

#### A. Municipal or Government Buildings

In the case of preservation, rehabilitation and restoration of a municipal historic resource, the purpose and benefit are public. No preservation restriction is required to ensure public purpose, access and benefit. However, circumstances may be such that the CPC decides to impose a PR on the property to ensure that the historic features and value be preserved in perpetuity. A municipality may not hold a restriction on itself, so when a PR is placed on a municipal property, it is necessary to find a nonprofit to hold that restriction. However, the CPA does not authorize the use of CPA funds to pay a nonprofit to hold the PR on a building not acquired with CPA funds.

#### B. Privately Owned Buildings

The Anti-Aid Amendment to the Massachusetts Constitution (Art 46 s. 2 as amended by Article 103) generally prohibits the use of public monies for private projects, whether held by an individual, a corporation, or a nonprofit corporation.

However, there is a way to grant public money to private organizations for historic preservation, rehabilitation and restoration. The key concept is to understand that public funds are prohibited from being used for private purposes. Any expenditure of public funds must be used to advance a public purpose. The MA DOR pointed out in a February 2007 letter to the Town of Norfolk that the preservation of historic assets is generally understood to have legitimate public purpose. A variety of federal and state programs provide historic preservation grants to private nonprofit organizations, and typically the public purpose is served by the acquisition of a preservation restriction. Likewise, many CPA communities are now requiring permanent preservation restrictions as a condition of funding preservation projects on private properties.

In summary, CPA funds may fund a project on private property if the project is advancing a public purpose. A CPC can protect the public purpose by imposing a preservation restriction, ensuring the public has access where there was none before, or ensuring some other benefit. If a preservation restriction is the means of ensuring public benefit, the municipality should hold the restriction. It is the municipality's holding of the restriction that ensures public benefit. In most towns the Historical Commission holds preservation restrictions on privately-owned historic properties.

### III. CPA Coalition and MA DOR Comments about PRs

- *(Kathleen Roth (CPA Coalition) Email to VWC 2-24-2016)*  
We've recommended to CPCs that they consult with Town Counsel when they are considering recommending that a grant of CPA funds be made to a private entity, so as to ensure that a public benefit exists. MA DOR defers to the local municipal authority when CPA funds are awarded for historical preservation work on a privately held resource if it can be shown that the CPC, in consultation with town counsel, identified adequate public benefit. Of course the receipt of a preservation restriction is always desirable, and is considered best practice, but there may be cases in which that isn't possible. So again, we feel it's best to explore all the options with Town Counsel
- *(Kathleen Roth (CPA Coalition) Email to VWC 2-24-2016)*  
In the case of a church, the fact that churches are open to everyone and open for public meetings of other organizations such as Alcoholics Anonymous and the Boy and Girl Scouts has been adequate for most towns to allow CPA fund support for preservation/ rehabilitation/restoration work (Email from Kathleen Roth to VWC 2-24-2016). [This is also true of ancient burial grounds (more than 100 years in use) according to MGL 114, s. 17.]  
Is this intended to suggest that PRs are not needed for churches?
- *(Kathleen Colleary, Chief, Bureau of Municipal Finance Law, Division of Local Services, Massachusetts Department of Revenue, to Stuart Saginor (CPA Coalition) 9-15-2006)*  
What usually happens in CPA grants to organizations owning private structures of historical significance is that the town acquires an historic preservation interest and the organization uses the funds to finance in whole or in part the rehabilitation. In other words, the town is receiving an interest in the property to ensure that its investment of public funds benefits the public through the preservation of a piece of the town's history. There is usually a grant agreement as well.

### IV. Who Should Hold PRs for CPA-funded Historical Preservation Projects?

- MGL 40 s. 8D provides that a municipal Historical Commission may "acquire in the name of the city or town by gift, purchase, grant, bequest, devise, lease or otherwise the fee or lesser interest in real or personal property of significant historical value and may manage the same."

A preservation restriction is an interest in real property intended for the preservation of a site or structure historically significant for its architecture, archaeology or associations. Preservation restrictions normally operate by prohibiting certain activity such as a) exterior or interior alterations, b) changes in appearance, c) inappropriate uses, and d) other acts detrimental to the preservation of the site or structure. See also MGL 184 s. 31 for the complete definition. A preservation restriction may be in the form of a deed, easement, covenant or other instrument executed by or on behalf of the owner of the land.

- *(Frank Duffy Memo to Jessica Erickson on PRs 12-4-2007)*

It appears to me that the Historical Commission has one authority to accept, hold and manage preservation restrictions on private property on behalf of the Community Preservation Committee as a grant condition. If the Historical Commission is willing to accept this responsibility, this office can work

with the CPC and the Commission to prepare appropriate documents and develop a plan for the Commission to hold and manage their restrictions.

- In the case of PRs being placed on municipal properties, the Falmouth Historical Commission cannot hold the PR. It must be held by some other, non-municipal entity, such as the Falmouth Historical Society and the Falmouth Preservation Alliance.
- When a PR is to be held by a non-municipal entity, the CPC may add to the amount to be recommended to Town Meeting for the project an amount of money to cover the cost of monitoring the property and managing the PR.

V. “CPC Application Process and Preservation Restrictions” (Draft Preservation Deed Restriction Program for the Falmouth Historical Commission prepared by Preservation Consultant Eric Dray in March 2010, revised May 2016)

*Step 1: Application Submission*

Applicant submits request to the Falmouth CPC, pursuant to requirements found in the Application for Community Preservation Funding and the Guidelines for Project Submission.

[Once a project funding application has been reviewed and the property found to be eligible for historic preservation funding, the CPC determines if the CPC should and will require a preservation restriction (PR) to be placed on the property. If the CPC decides to impose a PR on the resource, it should obtain assent from the grant applicant before proceeding with the application review and evaluation process. – added by CPC]

*Step 2: Review of Application*

The Falmouth CPC conducts hearings to review applications according to the Falmouth Community Preservation Plan criteria. The CPC review process typically occurs over 3 months and includes legal and technical research, consultation with Town Departments/Committees, requests for additional proposal information, public input, and CPC deliberation.

As part of this review process, the CPC will work with a preservation consultant, as needed, to generate a list of character-defining features for the historic resource. This list could include exterior features of buildings or structures, including ornamental details, massing, roof shapes, materials, and color schemes; interior features such as staircases, window surrounds and ornamental trim; and landscape features such as fences, walls, mature trees, open spaces and view sheds. This list would also be included as a documentation requirement if a Preservation Restriction is required (see B.2.a.ii below).

*Step 3: Review of Need for a Preservation Restriction*

1. If the application is for historic preservation funds and includes the purchase of real property interest, the CPC must require a preservation restriction.

2. If the application is for historic preservation funds other than for purchase of real property interest, including rehabilitation, additions, and planning documents, and the CPC has determined that they will recommend the project for approval, the CPC may require a preservation restriction.
3. If the application is for affordable housing funds and includes the acquisition or rehabilitation of an historic resource, the CPC may require a preservation restriction.
4. If the application is for open space funds and includes purchase of a real property interest that includes one or more historic resources, the CPC may require a preservation restriction in addition to a conservation restriction.

In determining whether a preservation restriction should be included in a recommendation, the CPC should weigh the following factors:

1. Significance of the historic resource,
2. Amount requested from the CPC,
3. Total cost of the proposed project,
4. Percentage of the historic resource effected by the proposed project, and
5. Degree to which character-defining features of the historic resource are effected by the project.

#### *Step 4: Grant Recommendation to Town Meeting*

The Falmouth CPC makes recommendations to Town Meeting for historic preservation, open space, affordable housing, and recreation projects. If the CPC determines that a preservation restriction will be required in the grant recommendation, the scope and extent of the restriction should be included in the recommendation. In determining the scope of a preservation restriction, the CPC will consult with the Historical Commission. Preservation restrictions, at a minimum, typically protect building exteriors, but can be drafted to protect some or all of the following additional elements of an historic resource in exceptional circumstances:

1. Building interiors,
2. Built and natural landscape features, and
3. View sheds or open spaces.

#### *Step 5: Town Meeting Vote*

Each application recommended by the Falmouth CPC is brought to Town Meeting for authorization.

#### *Step 6: Grant Agreement*

The CPC enters into a formal Grant Agreement with those applicants who receive recommended funding authorized by Town Meeting. The agreement will outline the terms and conditions of any authorized project or purchase, including preservation restrictions where required as outlined in the recommendation. The Grant Agreement should include the scope and content of the restriction and a requirement that until the restriction is recorded, the CPC, by and through its preservation consultant, must review and approve all work of the authorized project to ensure compliance with the Grant Agreement. Upon completion of the authorized project, The CPC may withhold up to 40 percent of the grant until the preservation consultant confirms that the completed project complied with the Grant Agreement and the Preservation Restriction has been executed.

#### *Step 7: Drafting of Preservation Restriction*

If a preservation restriction is required, then the owners of the subject property, the Historical Commission, the CPC, and Town Counsel should be involved in drafting and approving a preservation restriction. The CPC may use the services of a preservation consultant to draft the preservation restriction and provide necessary documentation.

To pay for the preparation of the preservation restriction, the CPC may pay from its Administration Fund, or it may add to the amount to be recommended to Town Meeting for the project an amount of money to cover the cost of monitoring the property and managing the PR.

#### *Step 8: Review of Draft Preservation Restriction*

After the preservation consultant has prepared a draft of the preservation restriction, the draft will be submitted to the CPC and then to Town Counsel for review. The draft may also be submitted to the grant recipient (property owner) in order for them to confirm that the terms of the Grant Agreement are accurately incorporated into the restriction. The CPC will then conduct a final review and approval of the preservation restriction.

Once the CPC has approved the draft restriction, it must be sent to the MHC, which is required to review the restriction to ensure it conforms with M.G.L. Chapter 184 and determine if it adequately protects the features that make the historic resource significant. Town Counsel generally accept any revisions proposed by the MHC.

#### *Step 9: Adoption of Preservation Restriction*

Once given preliminary approved by the MHC or revised to meet its requirements, the preservation restriction must be signed by the grant recipient (property owner), the Falmouth Historical Commission (or the holder of the preservation restriction in the case of a town resource), the CPC and the Board of Selectmen. The Board of Selectmen require a letter or memo from Town Counsel approving the document as to form before signing. It is then sent back to the MHC for its signature. Once fully executed, recording in the Barnstable County Registry of Deeds can be done by grantor (property owner), at its expense, or by the CPC

#### *Step 10: Notice of Adoption to all Parties*

Once the preservation restriction is recorded in the Barnstable County Registry of Deeds, copies of the recorded restriction should be sent to the property owner, Historical Commission (or holder of the restriction in the case of a town resource) and Town Clerk. A copy should also be kept in the CPC project file. The Historical Commission or other holder of the preservation restriction should also contact the Inspectional Services Department and Board of Assessors to put a “red flag” on properties with a preservation restriction, and ask the town to notify the Historical Commission any time a development permit is sought for one of these properties.