

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCV2015-00517

DONALD A. MAUCH, MARIA C. MOLLA,
DAVID A. DEGHECCHIO, ALBERT E. GUILD, LEONA M. GUILD,
WALTER E. DIXON, MARGARET M. DIXON, IRENE VASQUEZ, PENELOPE W.
WILSON, STEPHEN MOTT, JR., and STEVEN B. GETTO,¹
Plaintiff,

v.

TOWN OF NORWELL, MASSACHUSETTS,²
Defendants.

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

This action arises out of a ten-taxpayer action, G. L. c. 40, § 53 (the “ten-taxpayer statute”), challenging the Town of Norwell’s appropriation of \$1.4 million of Community Preservation Act (“CPA”) funds for a pedestrian and bicycle pathway installation project (the “project” or “Pathwalk”) within the town. Now before the court are the parties’ cross motions for summary judgment. For the foregoing reasons, the plaintiffs’ motion is **ALLOWED**, and the defendants’ motion is **DENIED** in part and **ALLOWED** in part.

BACKGROUND

I. Facts

The material, undisputed facts as revealed by the record before the court are as follows.

Plaintiffs are eleven taxable residents of Norwell, Massachusetts who seek to prevent the expenditure of \$1.4 million of CPA funds appropriated by the May 5, 2015 Norwell Town

¹ As eleven taxable inhabitants, citizen-taxpayers of the Town of Norwell, Massachusetts.

² Inclusive of its instrumentalities the Community Preservation Committee, Board of Selectmen, Town Administrator, Advisory Board, and Annual Town Meeting (May 5, 2015).

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Meeting to construct a pedestrian and bicycle pathway along Main Street/Route 123 in Norwell. In 2002, Norwell adopted the CPA, and established its Community Preservation Committee (“CPC”) as the instrumentality which makes recommendations to Norwell’s designated legislative body, the annual Norwell Town Meeting, as to requests for CPA funds.

In the proposed Pathwalk application, Norwell’s Board of Selectmen and co-applicant Paul Foulsham (“Foulsham”), Highway Surveyor, requested \$1.5 million in CPA funding for the “[i]nstallation of a [P]athwalk on Main Street from South Street to Norwell Center” in an effort to “provide recreational opportunities for residents such as jogging and walking in a safe environment.” The co-applicants also stipulated that the Pathwalk would “provide large numbers of residents a safe and secure place to exercise on Main Street separate from vehicles.” Main Street is also known as Route 123 in Norwell, and is a state highway extending 4.93 miles from the Norwell-Hanover town line to the Norwell-Scituate town line. As proposed, the Pathwalk would install 2.6 miles of a five-and-one-half foot wide paved pedestrian-bicycle path along this highway, connecting with other existing paved paths at South Street and the town center, and ultimately forming a 5-mile loop. That loop would connect schools, recreation areas, sport fields, open space areas, a community farm, historic properties, and Norwell’s town center.

Norwell’s existing paved paths are located south of Main Street, and were previously constructed as part of a larger “Pathway” project to connect the town High School to the Middle School, the Middle School to Circuit Street, Circuit Street to Forest Street, and Forest Street to the town center. A Pathway Committee sought, and continues to seek, CPA funding for these Pathways in an effort “to develop a plan for an integrated network of pathways for recreational use within the Town of Norwell.” These paved bikepaths currently provide for safe transport, whether by walking, running, or biking, to certain facilities. While it is not a part of the Pathway

Project nor did the Pathway Committee seek CPA funding for the Pathwalk, the Pathwalk in this case would ultimately link these existing Pathways to form the larger 5-mile loop in Norwell.

In May 2014, the annual Town Meeting authorized an appropriation of \$3.3 million for road repair to upper Main Street (“Sidewalk Project”), including full-length sidewalk design, permitted the treasurer to borrow that amount, and authorized the Board of Selectmen to apply for and receive available grants, aid and reimbursements from the Commonwealth. In furtherance of this project, Norwell hired Environmental Partners Group, Inc. in July 2014 for “Engineering and Supplemental Services in Connection with Drainage, Sidewalk, and Intersection Improvements and Roadway Resurfacing and Restoration for Main Street (Route 123).” Selectmen Ellen Allen later stated at the May 5, 2015 Town Meeting in regard to this sidewalk project that “project timing is this summer and fall so we had to move quickly on this... we knew we couldn’t afford to do this out of our regular Town funds[-]we couldn’t fit it as another borrowing[-]so we decided to apply for [CPA] funds.” On October 1, 2014, Board of Selectmen Allen and Tammie Garner led the Board’s effort to complete an application to the CPC to seek funding for the Pathwalk along Main Street.

On October 15, 2014, the Board of Selectmen and Foulsham submitted the Pathwalk application to the CPC. Norwell’s Town Counsel and Kathleen Colleary, Chief of the Bureau of Municipal Finance Law at the Massachusetts Department of Revenue (“DOR”), advised the Selectmen that their proposed Pathwalk was likely fundable with CPA funds, provided that the CPC and a Town Meeting vote approved the appropriation for recreational purposes. On March 26, 2015, the CPC recommended its approval of the Pathwalk, and on May 5, 2015, town voters at the Annual Town Meeting voted in favor of Article 38 that would appropriate \$1.4 million “upon the recommendation of the [CPC], for open space and recreation purposes . . . to be

expended by the Highway Surveyor and Board of Selectmen for the design, permitting, and construction of or improvements to any pedestrian or bicycle pathways on Main Street in the Town of Norwell.” Additionally, town voters also voted in favor of Article 39 that would appropriate \$205,000 “upon the recommendation of the [CPC], for open space and recreation purposes . . . for the design, permitting, and construction of or improvements to any pedestrian or bicycle pathways in the Town of Norwell from Gaffield Park to Main Street in Norwell Center.”

II. Relevant Statutory Provisions

The CPA, G. L. c. 44B, promulgated the following provisions, which are applicable to this matter:

A city or town that accepts sections 3 to 7, inclusive, shall establish by ordinance or by-law a community preservation committee. § 5(a).

The community preservation committee shall make recommendations to the legislative body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use; for the acquisition, creation, preservation and support of community housing; and for the rehabilitation or restoration of open space and community housing that is acquired or created as provided in this section; provided, however, that funds expended pursuant to this chapter shall not be used for maintenance. §5 (b)(2).

After receiving such recommendations from the community preservation committee, the legislative body shall then take such action and approve such appropriations from the Community Preservation Fund as set forth in section 8, and such additional appropriations as it deems appropriate to carry out the recommendations of the community preservation committee. §5 (d).

Additionally, the CPA imposes the following applicable definitions, G. L. c. 44B, § 2:

“Maintenance,” the upkeep of real or personal property.

“Open space,” shall include, but not be limited to, land to protect existing and future well fields, aquifers and recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands, ocean, river, stream, lake and pond frontage,

beaches, dunes and other coastal lands, lands to protect scenic vistas, land for wildlife or nature preserve and land for recreational use.

“Recreational use,” active or passive recreational use including, but not limited to, the use of land for community gardens, trails, and noncommercial youth and adult sports, and the use of land as a park, playground or athletic field. “Recreational use” shall not include horse or dog racing or the use of land for a stadium, gymnasium or similar structure.

“Rehabilitation,” the remodeling, reconstruction and making of extraordinary repairs to historic resources, open spaces, lands for recreational use and community housing for the purpose of making such historic resources, open spaces, lands for recreational use and community housing functional for their intended use, including but not limited to improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes.

DISCUSSION

I. Standard of Review

The familiar standard governing summary judgment motions provides that summary judgment shall be granted where the moving party affirmatively demonstrates that there is no genuine dispute of material fact and it is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); see Flesner v. Technical Commc’ns Corp., 410 Mass. 805, 817 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715-716 (1991); Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 625 (2012). In assessing the record on a motion for summary judgment, the court draws all reasonable inferences in favor of the nonmoving party. Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 411 (2007). The court will not, however, “resolve issues of material fact, assess credibility or weigh evidence.” Kelly v. Brigham & Women’s Hosp., 51 Mass. App. Ct. 297, 299 n.4 (2001). The moving party must satisfy its burden either by submitting affirmative evidence that negates an essential element of the opposing party’s case, or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner, 410 Mass. at 817.

II. Analysis

As grounds for their suit, Plaintiffs argue that because the appropriation went to a project for improving and constructing sidewalks and bikeways alongside a highway, and because the CPA does not authorize appropriations for highway improvements, the appropriation should be restrained for being unlawful and invalid.

Section 5(b)(2) of the CPA authorizes expenditures of CPA funds for “the acquisition, creation and preservation of open space . . . [and] for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use; . . . provided, however, that funds expended pursuant to this chapter shall not be used for maintenance.” G. L. c. 44B, § 5(b)(2). The statute defines “recreational use” as including the use of land “for community gardens, trails, and noncommercial youth and adult sports, and the use of land as a park, playground or athletic field.” G. L. c. 44B, § 2. Whether the use of CPA funds for the Pathwalk is appropriate depends upon the interpretation of Section 5(b)(2), and turns on whether the paved Pathwalk qualifies as a trail under the CPA’s definition of recreational use.

Statutory interpretation is a question of law appropriate for resolution by the court at the summary judgment stage. See Annese Elec. Servs., Inc. v. City of Newton, 431 Mass. 763, 767 (2000). In its interpretation of the applicable CPA provisions, the court must give effect to the intent of the Legislature. See Seideman v. City of Newton, 452 Mass. 472, 477-478 (2008); Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539 (1996). The legislative intent must be “ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may

be effectuated.” Seideman, 452 Mass. at 477, quoting Hanlon v. Rollins, 286 Mass. 444, 447 (1934). Words appearing in a statute that are not expressly defined should be given their usual and accepted meanings, provided that those meanings align with the statutory purpose. See Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977); Kemble v. Metropolitan Dist. Comm’n, 49 Mass. App. Ct. 165, 166 (2000). “We derive the words’ usual and accepted meanings from sources presumably known to the statute’s enactors, such as their use in other legal contexts and dictionary definitions.” Zone Book, Inc., 372 Mass. at 369.

Central to the parties’ disagreement is each’s characterization of the Pathwalk proposal, and whether it is properly considered as a highway improvement, sidewalk, bikepath, pathway, pathwalk, or otherwise. Semantics aside, the Pathwalk project calls for the installation of a paved way alongside a highway for the purpose of accommodating walkers, runners, cyclists, and/or commuters alike, and that connects other existing paved ways. While the CPA does not define highway, sidewalk, bikeway, trail, or any other characterization of this paved way, this court looks to the terms’ ordinary meanings in its endeavor to ascertain the Legislature’s intent.

Black’s Law Dictionary defines a “highway” as a “free and public roadway, or street; one which every person has the right to use,” and specifies that “as generally understood, does not have a restrictive or a static meaning, but it denotes ways laid out or constructed to accommodate modes of travel and other related purposes that change as customs change and as technology develops, and . . . includes areas other than and beyond the boundaries of the paved surface of a roadway.” Black’s Law Dictionary, 5th ed. p. 656 (1979); see also Opinion of the Justices to the Senate, 370 Mass. 895, 901-903 (1976) (elaborating on definitions of highway, bikeway). In comparison, a “sidewalk” is “[t]hat part of a public street or highway designed for the use of pedestrians, being exclusively reserved for them, and constructed somewhat differently than

other portions of the street.” Black’s Law Dictionary, 5th ed. p. 1238 (1979); see Kemble v. Metropolitan Dist. Comm’n, 49 Mass. App. Ct. 165, 167 (2000) (“The word ‘sidewalk’ on its face suggests a walkway along the side of a roadway. This sense of the word is borne out by dictionary definitions which refer to a path or pavement at the side of a street for the use of pedestrians.”). Bikeways similarly are “intimately related” to highways, and the court has categorized bicycles as “a part of the legitimate vehicular traffic on our highways.” Opinion of Justices to Senate, 370 Mass. at 900.

Nevertheless, the Legislature chose to define recreational use by incorporating the term “trail,” which retains a different connotation in its usual definition than sidewalk, bikeway, or highway. Merriam-Webster defines a trail as “a track made by passage especially through a wilderness[;] a marked or established path or route especially through a forest or mountainous region[;] a course followed or to be followed.” A scan of Massachusetts case law also reinforces this connotation, as the bulk of cases dealing with “trails” involve issues related to ski slopes, hiking trails, and other conservation or large, dedicated recreation areas. See, e.g., Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 770 (2010) (“Trail networks shall be laid out allowing public access to permanently protected open space and connecting to abutting conservation areas and Lake Attitash”); Sierra Club v. Commissioner of the Dep’t of Env’tl. Mgmt., 439 Mass. 738 (2003) (ski trails); Gould v. Greylock Reservation Comm’n, 350 Mass. 410 (1966) (ski and foot trails in forest area).

The DOR’s written advice to the Town reinforces this distinction. Specifically, the DOR explained its understanding that the use of “trail,” in light of the rest of the “recreational use” definition, implies trails “in the nature of non-paved paths for walking within open space or outdoor recreational areas.” However, the DOR qualified this recommendation by stating that

there may be specific CPA projects to “install or restore suitable walkways within a playground, beach or other public recreational area,” or “to install or restore a bike path,”³ and cautioned that “ordinary municipal sidewalks alongside a street, rather than within a recreational area or dedicated to a specific recreational use, are not the types of capital improvements contemplated by the legislature. . . .”⁴

The parties do not dispute that Main Street is a heavily traveled state highway that, in addition to being designated as an alternate truck route, operates as a main route to the towns of Scituate, Marshfield, and Cohasset. The parties also do not dispute that Main Street supports an increased number of vehicles and trucks that render its use by walkers, runners, cyclists or rollerbladers all the more dangerous, and that, even as reconstructed, it is unlikely that such active individuals would use Main Street for their activities. Additionally, the parties agree that it can be “pretty dangerous” for middle and high-school aged children to walk on Main Street while trying to walk or bicycle to school and other areas located off of Main Street. For all intents and purposes, the Pathwalk is a sidewalk and part of the highway; the fact that it connects to the existing Pathway is insufficient to transform its character and endow it with a true recreational purpose consistent with the legislative intent underlying the CPA.

Nothing in the record suggests that the proposed Pathwalk is set back from Main Street or meaningfully segregated from the bustle of the highway to indicate that it would be more of a recreational trail than a functional sidewalk. While this court recognizes that there is some open

³ In the latter case, the use would qualify for CPA funding under the “creation or rehabilitation of land for recreational use” provision. G. L. c. 44B, § 5(b)(2).

⁴ In support of their motion, defendants argue that the pathwalk qualifies as either creating or rehabilitating land for recreational use because the present character of Main Street is not conducive to safe recreational use by walkers, joggers, and cyclists. The court, for the foregoing reasons, does not reach this argument because it is dependent on the Pathwalk qualifying as a recreational use.

space⁵ bordering Main Street in the form of school recreation areas, sport fields, and a community farm, merely naming this paved way as a Pathwalk does not demonstrate the type of “acquisition, creation, preservation, rehabilitation [or] restoration of land for recreational use” contemplated under the CPA. To piggyback the Pathwalk on the existing schools and their sport fields, and a community farm, without evidence of a larger recreational area plan—such as one like the Pathway project—indicates an after-the-fact attempt to take advantage of the spirit of Section 5(b)(2).⁶ Considered in light of the \$3.3 million sidewalk project that predated the Pathwalk appropriation and authorized the installation of sidewalks along the same stretch of Main Street, this court rules that, as a matter of law, the Pathwalk does not qualify as a recreational use under the CPA. Accordingly, the appropriation of the \$1.4 million in CPA funds was inappropriate and the plaintiffs are entitled to summary judgment.

ORDER

For the foregoing reasons, this court **ORDERS** that the Plaintiffs’ motion for summary judgment is **ALLOWED**, as to the Town of Norwell, as the town is the true party of interest. It is therefore **AJUDGED** and **DECLARED** that:

- 1) The use of CPA funds for the Pathwalk project is not permitted by the CPA;
- 2) The Town of Norwell violated the CPA when it appropriated \$1.4 million from the Community Preservation Fund at the Annual Town Meeting on May 5, 2015 for the purpose of the Pathwalk project;
- 3) The vote of the Annual Town Meeting on May 5, 2015 with respect to Article 38 is declared null and void;

⁵ Neither would the pathwalk qualify under the “open space” clause of Section 5(b)(2) in light of the express definition of open space in Section 2.

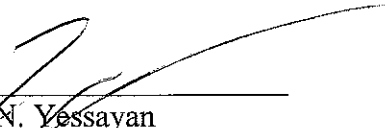
⁶ This court also appreciates the difference between the proposed Pathwalk and the existing Norwell Pathway. While the Pathway does consist of paved paths, it does not solely track a highway, instead involving an integrated network of bikepaths that evoke the type of recreational use contemplated by the CPA. The Pathway Committee was not involved with the Ppathwalk proposal.

- 4) The Town of Norwell is ordered to pay back to the Community Preservation Fund any of the monies that the Town may have used from the Article 38 appropriation;
- 5) The plaintiffs are also entitled to statutory costs from the town;

For the reasons previously stated, the Defendants' cross-motion for summary judgment is **DENIED** as set forth above as to the Town of Norwell, and **ALLOWED** as to all other parties.

By the court,

Dated: December 18, 2015



Raffi N. Yessayan
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT DEPT.
CIVIL ACTION NO. 1583CV0517

DONALD A. MAUCH, MARIA C. MOLLA,
DAVID A. DEGNETTO, ALBERT E. GUILD,
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PENELOPE W. WILSON, STEPHEN MOTT, JR.,
and STEVEN B. GETTO,

Plaintiffs,

vs.

TOWN OF NORWELL, MASSACHUSETTS, inclusive
of its instrumentalities the Community Preservation Committee,
Board of Selectmen, Town Administrator, Advisory Board, and
Annual Town Meeting,

Defendants.

SUMMARY JUDGMENT

This action came before the Court, Raffi N. Yessayan, presiding, upon cross-motions of the parties for summary judgment pursuant to Mass. R. Civ. P. 56, and the Court, after hearing and upon consideration of the pleadings and submissions, finds that there is no genuine issue of material fact and that the plaintiffs are entitled to judgment as a matter of law, therefore,

It is DECLARED, ORDERED and ADJUDGED:

- I. The use of Community Preservation Act Funds for the Pathwalk Project is not permitted by the Community Preservation Act;
- II. The Town of Norwell violated the Community Preservation Act when it appropriated \$1.4 million from the Community Preservation Act Fund at the Annual Town Meeting on May 5, 2015 for the purpose of the Pathway Project;
- III. The vote of the Annual Town Meeting on May, 2015 with respect to Article 38 is declared null and void;
- IV. The Town of Norwell is Ordered to pay back to the Community Preservation Act Fund any of the monies that the Town may have used from the Article 38 appropriation;

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- V. That the plaintiffs shall recover their statutory costs from the Town of Norwell;
- VI. That the defendants Community Preservation Committee, Board of Selectmen, Town Administrator, Advisory Board and Annual Town Meeting be and hereby are dismissed.

Dated at Plymouth, this 21st day of December 2015.

By the Court (Yessayan, J.)



Assistant Clerk