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July 2, 2007

Sanford Matathia  
Steven Davis  
Rackemann, Sawyer and Brewster  
1 Financial Center  
Boston, MA 02111

Re: Request for Advisory Opinion  
Build-out of Concord-Carlisle High School Campus - Concord

Dear Mr. Matathia and Mr. Davis:

I am writing in response to your letter of May 17, 2007, in which you requested an advisory opinion as to whether review under the Massachusetts Environmental Policy Act (MEPA) is required for the project referenced above.

In your letter, you seek a determination that activities undertaken or planned by the Town of Concord ("the Town") and the Concord-Carlisle Regional School District ("the School District") constitute one project and would be subject to review under MEPA, based on the project's receipt of state funding. Specifically, you contend that the proposed construction of two new athletic fields on approximately nine acres of the 94-acre high school campus by the Town is subject to MEPA jurisdiction because it will receive \$1.5 million in Community Preservation Act (CPA) funds, half of which is a state match.

Because the requirement for a state Agency Action - in the form of Financial Assistance, Permit(s), or a Land Transfer - is necessary in order to establish MEPA jurisdiction, I shall address this issue first. I have reviewed the information which you have submitted, including your recent submission dated June 29, 2007, as well as responses from the Town and the School District, and must conclude that the disbursement of matching funds from the Massachusetts

Community Preservation Trust Fund by the Department of Revenue (DOR) to municipalities does not constitute Financial Assistance.

DOR disburses CPA funds based on a statutorily established percentage basis formula to cities and towns who have accepted the provisions of the CPA. DOR's disbursement does not authorize any particular project, nor are the funds allocated to any individual project. Moreover, the municipalities which utilize CPA funds have the sole discretionary authority as to how these funds are to be used, with no requirement for state approval of the projects selected by the municipalities. The very purpose of MEPA review is to provide state agencies with information concerning the environmental impacts of a project prior to taking any Agency Action such as providing Financial Assistance to a project. *See, e.g., Capolupo v. Division of Fisheries and Wildlife*, 67 Mass.App.Ct. 1109 ("The overall purpose of a MEPA review is to provide for a more thorough consideration of the potential environmental impact of certain projects during the early planning stages and before final agency action is taken on those projects."); *Enos v. Secretary of Env. Affairs*, 432 Mass. 132, 136-38 (describing purpose of MEPA review). Thus, because projects undertaken by municipalities with CPA monies do not require approval or evaluation by state agencies prior to disbursement of the funds, subjecting projects funded with CPA funds to MEPA review would not advance the underlying purposes of MEPA.

In light of the foregoing, I am persuaded that CPA funds should be considered local rather than state Financial Assistance as it defined in the MEPA regulations at 301 CMR 11.02(2). I note that the proposed construction of the athletic fields has been approved by the Concord Town Meeting, as well as numerous local boards and commissions. Therefore, MEPA jurisdiction cannot be established for the proposed athletic fields based on state Financial Assistance.

Having determined that the proposed athletic fields would not be subject to MEPA jurisdiction based on state Financial Assistance, I now turn to the question of whether this project would require other state Agency Actions. I will defer to the Massachusetts Highway Department (MassHighway) regarding the question of whether any of the projects on the high school campus would require a State Highway Access Permit for indirect access to Route 2. There appears to be some disagreement as to approximately how many new vehicle trips the athletic fields would independently generate on an average weekday. However, MEPA review would be required only if MassHighway determines that a permit is required and if it can be demonstrated that the traffic that would be generated by the athletic fields would exceed MEPA review thresholds. In that case, MEPA review would be limited to the subject matter of the required permit, specifically the project's transportation and traffic impacts. Notwithstanding the question of whether a State Highway Access Permit would be required, it does not appear likely that the athletic fields, by themselves, would generate new vehicle trips in excess of MEPA transportation thresholds.

As to whether the entire 94-acre high school campus is subject to Article 97 of the Amendment to the Massachusetts Constitution, it is clear that the Town acquired the land in 1955 for school purposes, and then conveyed it to the School District in 1958. At no time does it appear that the high school campus was open space protected in perpetuity pursuant to Article 97.

Given that it is not probable that MEPA review would be required for the construction of the proposed athletic fields alone, the question of whether the various activities undertaken or proposed on the high school campus constitute a single project may be irrelevant, or at the very least premature. Although the School District may ultimately use Massachusetts State Building Authority (MSBA) funds for planning and/or construction, the proposed replacement of the Concord-Carlisle High School is in the early planning stages and the disbursement of any such funding to the School District is not imminent. It would be premature to determine the scope of any eventual MEPA review for a project that has not yet been defined. Moreover, the School District has indicated its willingness to undergo MEPA review of the high school replacement project if that project is slated to receive state Financial Assistance – or if other state Agency Actions are required - and if MEPA review thresholds would be exceeded. So, while all of the activities previously undertaken or currently proposed on the high school campus may or may not constitute a common plan or undertaking, I am deferring a determination of this question until a project demonstrated to require MEPA review is before this office.

In conclusion, I find that the use of CPA funds for the proposed athletic fields does not entail state Financial Assistance for the purpose of establishing MEPA jurisdiction. On that basis, the question of whether the athletic fields would exceed MEPA review thresholds is irrelevant, except as it pertains to a discussion of the project's traffic impacts if a State Highway Access Permit is required. Therefore, I find that no MEPA review is required for the proposed athletic fields unless it can be established that the project would require MEPA review based on traffic impacts.

Please contact Richard Bourré, Assistant Director of the MEPA Office, at (617) 626-1130 if you have any questions concerning this matter.

Sincerely,



Deerin Babb-Brott  
Assistant Secretary

Cc: Margaret Briggs, Concord Board of Selectmen  
Brenda Finn, Concord Superintendent of Schools  
Michael Fitzgerald, Concord-Carlisle Regional School District  
Christopher Whelan, Concord Town Manager  
William Lahey, Concord Town Counsel  
State Representative Cory Atkins  
Mary Marshall, Ropes and Gray  
Lionel Lucien, Massachusetts Executive Office of Transportation  
Brona Simon, Massachusetts Historical Commission

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