COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court Department
Civil Action No. 1681CV01933

GEORGE CAPLAN, *et al.*,
thirteen taxable inhabitants, citizens-taxpayers of Acton, Massachusetts,
Plaintiffs,
v.

TOWN OF ACTON, MASSACHUSETTS,
inclusive of its instrumentalities and the Community Preservation Committee,
Defendant.

DEFENDANT TOWN OF ACTON'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Mass. R. Civ. P. 65(a), the Defendant Town of Acton (the "Town") opposes the Plaintiffs' motion for a preliminary injunction to prohibit the Town from paying three historic preservation grants appropriated by the 2016 Annual Town Meeting from the Town's Community Preservation Act ("CPA") fund. The Town appropriated CPA funds for historic preservation projects at two historic churches in historic districts in return for permanent historic preservation restrictions. The Plaintiffs have not shown any likelihood of success on their claim that these grants violate the Anti-Aid Amendment to the Massachusetts Constitution or that a preliminary injunction would be in the public interest. Their motion should be denied.

FACTS

I. The Community Preservation Act

The CPA was enacted to enable municipalities to fund projects involving open space, recreational use, historic resources and community housing. G.L. c. 44B, §§3-7; s*ee Seideman v. City of Newton*, 452 Mass. 472, 473-474 (2008). The CPA took effect in Acton "upon the

approval by the legislative body [Town Meeting] and [its] acceptance by the voters of a ballot question" pursuant to G.L. c. 44B, § 3. Affidavit of Roland Bartl ("Bartl Aff.") ¶ 2, Ex. 1. After accepting the CPA, the Town established a Community Preservation Committee ("CPC") to "study the needs, possibilities and resources of the city or town regarding community preservation." G.L. c. 44B, §§ 5(a), (b)(1); Bartl Aff. ¶ 16, Ex. 12. The CPC gathers information, consults with municipal boards, holds public informational hearings, and "make[s] recommendations to [Town Meeting] ... for [among other things] the acquisition, preservation, rehabilitation and restoration of historic resources." G.L. c. 44B, § 5(b)(2). It incorporates its overall findings in the Town's Community Preservation Plan (the "CPA Plan"). Bartl Aff. ¶ 17, Ex. 13. After receiving the CPC's recommendations, Town Meeting makes appropriations from the Community Preservation Fund and other sources as it deems appropriate. G.L. c. 44B, § 5(d).

II. The Town's Historic Districts and the Historic Resources at Issue in this Case

The buildings at issue in this case are located in the Acton Center and South Acton Historic Districts, established by the Town pursuant to G.L. c. 40C. Bartl Aff. ¶ 6.

A. The Acton Center Historic District and Acton Congregational Church

The Acton Center Historic District is listed on the National and State Registers of Historic Places. Bartl Aff. ¶ 9, Exs. 2-5; *see* 950 CMR 71.03 (definition of State Register). Beginning with the Town's creation in 1735,[1] Acton Center "has been the location of the Town Common, the training field, and the First Meeting House." Bartl Aff. Ex. 4, p. 4. In 1806, "Acton Centre began to develop as a nucleus for civic and religious activities" and became "the

[1] See Province Laws, 1735-36, 1st Sess., Chapter 10, titled "An Act for Dividing the Town of Concord, and Erecting a New Town There by the Name of Acton" (the "1735 Act"). Attachment A. The 1735 Act established that "the said north-westerly part of Concord, together with the said farms, be and hereby are set off, constituted and erected into a distinct and [separate] township, by the name of Acton" provide that "the inhabitants of the said town of Acton do, within the space of three years from the publication of this act, erect and finish a suitable house for the publick worship of God, and procure and settle a learned, orthodox minister, of good conversation, and make provision for his comfortable and honourable support." *Id.*, §§ 1, 3.

geographic center of the large sprawling town … characterized by 19th century dwellings and civic buildings lining the Main Street with an oblong Common at the cross roads of Main Street, Concord Road[.]" *Id.*

"Three mid to late 19th century institutional buildings[,] … the Congregational Church (1846) …, the Town Hall (1863) …, and the Acton Memorial Library (1889)" are situated on or around the Town Common at the heart of the Acton Center Historic District. Bartl Aff. ¶ 10, Exs. 4, pp. 4, 5. The Acton Congregational Church and its associated buildings, the Abner Hosmer House and the John Fletcher House, are located in the Acton Centre National Register Historic District and the Local Historic District, contributed to the District's listing on the National and State Registers and designation as a Local Historic District, are listed on the Massachusetts Historical Commission's ("MHC") Inventory of Historic Assets of the Commonwealth, and have been determined by the Acton Historical Commission to be significant in the history, architecture or culture of the Town. Bartl Aff. ¶¶ 8, 11-12, Exs. 2-8. The current church was built in 1846 and extensively remodeled in 1898. Bartl Aff. Ex. 6, p. 6. Its stained glass windows date from the 1898 remodeling and feature prominently in the building's inventory of historic resources. *Id.*

B. The South Acton Historic District and South Acton Congregational Church

The South Acton Village Historic District is also included on the State Register of Historic Places. Bartl Aff. ¶ 13, Exs. 3, 9, 10. The District has been determined by the Acton Historic Commission to be significant in the history, architecture and culture of the Town. Bartl Aff. ¶¶ 8, 13, Ex. 9. Portions of it are also eligible for listing on the National Register. *Id.*

South Acton Village "developed as a result of the available mill privileges on Fort Pond Brook and Mill Pond, and the coming of the railroad in 1844." Bartl Aff. Ex. 9. "Commercial and institutional architecture is located at the center of the village," with extant buildings built

specifically for non-residential use dating to the mid 19th century. *Id*. There are "two churches in South Acton, both of which are late 19th century ... and reflect architectural styles for which there are very few examples in Acton and none in South Acton." *Id*. "The 1878 Universalist Church (140 Main Street) is a Stick Style building while the 1892 Congregational Church (29 School Street) is representative of Shingle Style." *Id*. The "growth and development of the schools and religious societies [in South Acton] are important in that they reflect the growth and self-contained aspect of South Acton Village[.]" *Id*.

The 1892 South Acton Congregational Church is separately listed on MHC's Massachusetts Cultural Resource Information System ("MACRIS") Inventory (Bartl Aff. ¶ 15, Ex. 11), is centrally located on School Street in heart of the South Acton Village Historic District (Bartl Aff. ¶ 15, Ex. 10), and contributed to the creation of the South Acton Village Historic District and its listing on the State Register (Bartl Aff. ¶ 15, Ex. 9). The church has been determined by the Acton Historical Commission to be significant in the history, architecture or culture of the Town and "eligible for National Register nomination as part of the School River-Main Mill and Commercial Historic District" because of its "association with the development of the railroad community from the 1840s … [and] its representation of the one of two church properties in South Acton and the only Queen Anne institutional building in the proposed district" (Bartl Aff. ¶¶ 8, 15, Ex. 11, p. 3). Indeed, the church is "one of the best examples in Acton of the Queen Anne/Shingle Style" and "the only local example of an institutional building in the Queen Anne/Shingle Style of architecture". Bartl Ex. 11 at pp. 4, 8. Its variety of shapes and roof lines feature prominently in its inventory of historic resources. *Id.* at pp. 4-5.

III. The CPA Grants in this Case

A. The Acton Congregational Church Projects

On November 15, 2015, the Acton Congregational Church applied for two CPA grants for preservation, rehabilitation and restoration of historic resources:

1. $49,500 to fund a Master Plan for the preservation of three historic properties located at 8, 12, and 20 Concord Road to evaluate and identify critical needs and set restoration and rehabilitation priorities to preserve these historic assets for future years (Bartl Aff. ¶¶ 21-22, Ex. 14); and

2. $41,000 (later revised to $51,237) to fund the rehabilitation and restoration of eight (later revised to 11) 120±-year-old stained glass windows installed in the sanctuary building honoring members of the church (Bartl Aff. ¶¶ 21, 23 26, Ex. 16).

The master plan project covers the John Fletcher and Abner Hosmer Houses as well as the church itself, and will involve hiring an architectural consultant to "thoroughly investigate each of the 3 historic buildings to identify all the needs of each building in order to protect and preserve these historic assets for further generations." Bartl Aff. Ex. 14. For the sanctuary building, this investigation includes an evaluation of the bell tower, stained glass windows and building envelope (windows, doors, siding, and roof); for the John Fletcher and Abner Hosmer Houses, it includes evaluation of the building envelopes, insulation, wiring, heating, plumbing and fire code issues. *Id*. This project constitutes the comprehensive planning "for the preservation, rehabilitation and restoration of historic resources" to the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties. *See* G.L. c. 44B, §§ 2 and 5(b)(2).

Because of ongoing deterioration, the stained glass window project will immediately stabilize and protect the stained glass windows from further harm. Bartl Aff. Ex. 16, pp. 4, 6. Currently, the wood around the windows is rotting and not weathertight; and the existing exterior Plexiglas is installed directly into the windows' wood framing, trapping moisture and causing the

accumulation of a powdered lead substance on the windows and the deterioration of the lead strips. *Id*. The project will remove the old plastic covers, repair wood damage, replace missing or broken glass, seal the glass, scrape and paint the wood, and install new glazing/caming. *Id*. All three historic buildings and eleven stained glass windows are visible from the Concord Road public way or sidewalk, the Town Green, the publicly accessible foot path from the Church to the parking lot, or the parking lot. Bartl Aff. ¶¶ 22-23, Exs. 15, 17.

B. The South Acton Congregational Church Project

On November 19, 2015, the South Acton Congregational Church requested $15,000 to perform work on the roof "to prevent ice dam formation … to preserve an historic structure." Bartl Aff. ¶ 24, Ex. 18. Without these repairs, "ice dams will continue to form each winter resulting water backing up into the roof and leaking into the building, damaging the ceilings, walls, and eventually rotting the structure." *Id*. The "work sought to be done through CPA funds will meet the CPC's Historic Preservation Goals by protecting and preserving a historic property and helping to preserve the existing historical character of the town." *Id*. The historic building is visible from the School Street public way and sidewalk. Bartl Aff. ¶ 24, Ex. 19.

C. The CPC Process

On December 17, 2015, the CPC held a public hearing on the churches' applications and deliberated on the applications at subsequent meetings. Bartl Aff. ¶ 25-26, Ex. 20. At the CPC meetings, no Acton taxpayer opposed CPA funding for any of these three projects based on the Anti-Aid Amendment. Bartl Aff. ¶ 28. On February 25, 2016, the CPC "voted unanimously to approve for recommendation at Town Meeting the appropriations schedule." Bartl Aff. ¶¶ 26-27, Exs. 21-22. The CPC based its determination on the significance of the historic resources, the eligibility of the projects for funding under the CPA, and the availability of CPA funds, not on the identity or motives (financial or otherwise) of the applicants. Bartl Aff. ¶ 28.

On April 5, 2016, based on the favorable recommendations of the CPC, the Selectmen and the Finance Committee, Town Meeting voted to approve the CPA warrant article, including the grants for these three projects. Bartl Aff. ¶ 28-30, Ex. 23-24. The Town then issued grant award letters to each church, with standard conditions, including (Bartl Aff. ¶ 31, Exs. 25-27):[2]

- "Execution, conveyance to the Town, and recording of a historic preservation restriction for the property … [that] shall be perpetual to the extent permitted by law";
- "All CPA fund disbursements shall be made as reimbursements … after receipt by the Planning Director of [the churches'] invoices"; and
- "All invoices shall include ... [s]tatements ... certifying that all work items listed in the invoice have been completed ... consistent with the project scope presented in [the] funding application."

Upon completion, all work on the roof and the windows must be certified by the Acton Historic District Commission as meeting "the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 C.F.R. Part 68," and any unused funds must be returned to the Town. *Id.*

IV. Consistency with other Historic Preservation Grants at the Local and State Level

The CPA grants challenged in this case are entirely consistent with previous funding approvals by the Town, other towns across Massachusetts and the state.

Over the years, Acton Town Meeting has approved CPA projects for 14 historic resources similar to those here, as summarized in the following table (Bartl Aff. ¶ 37):

Historic Building/ Resource	Historic District	Ownership	Windows	Roof	Master Planning
Town Hall	Center	Town	X	X	
Memorial Library	Center	Town	X		
West Acton Citizens' Library	West	Town	X		
Windsor Avenue Antique Fire House	West	Town	X	X	
468 Main Street	Center	Town	X		

[2] To the extent that acceptance of the grant award letters already obligates the Town to provide the CPA funding at issue, Bartl Exs. 26-27, the accepted grants may be beyond the reach of a 10 taxpayer suit under G.L. c. 40, § 53, which applies only if the Town is "*about to* raise or expend money or *incur obligations purporting to bind said town*" (emphasis added).

Historic Building/ Resource	Historic District	Ownership	Windows	Roof	Master Planning
Morrison Farm	N/A	Town			X
Jonathan & Simon Hosmer House	N/A	Nonprofit	X		
Jonathan & Simon Hosmer House complex (Jenks Library and Mowry Storage Shed)	N/A	Nonprofit		X	
Jones Tavern	South	Nonprofit		X	
Theatre III (former church)	West	Nonprofit	X	X	X
Acton Women's Club	Center	Nonprofit			Other
West Acton Baptist Church	West	Religious		X	X
John Robbins House	N/A	Private		X	
Exchange Hall	South	Private	X	X	

Acton is one of 161 cities and towns in Massachusetts that has voted to accept the CPA and utilize its funding mechanism for eligible projects. Of the 8,459 approved CPA projects, approximately 4,134 of those involve historic resources. Fowler Aff. ¶ 4. CPA funding is not limited to public sector recipients; private entities have received a significant portion of CPA funding for historic preservation and other projects across the state. Saginor Aff. ¶ 7-8. In fact, Massachusetts municipalities have approved at least 307 CPA projects involving religious institutions, including 35 for stained glass windows, 77 for roofs and associated structures, and 4 for master planning for historic preservation. Fowler Aff. ¶ 5.

In addition, MHC administers a variety of federal and state grant programs for historic preservation of publicly and privately owned resources. Holtz Aff. ¶ 4. In recent years, MHC has approved funding for 38 projects (16.5% of the projects) involving preservation of historic resources of active religious institutions through its Massachusetts Preservation Projects Fund, including Vilna Shul in Beacon Hill, Trinity Church in Boston, and St. George Greek Orthodox Cathedral in Springfield. *Id.* at ¶ 7. These numbers reflect the importance of religious buildings to preserving the history of the Commonwealth. *See* Saginor Aff. ¶¶ 9-10; Holtz Aff. ¶ 4.

V. This Suit and Preliminary Injunction Motion

On July 7, 2016, 13 Acton taxpayers filed the Complaint under G.L. c. 40, § 53.[3] Their only claim is that payment of public funds for these projects would violate art. 18, as amended by arts. 46 and 103, of the Amendments to the Constitution of the Commonwealth (the "Anti-Aid Amendment" or "Art. 46"). Complaint ¶¶ 8, 68. On July 8, they served their Motion for Preliminary Injunction, seeking to prohibit the Town "from paying three grants to Acton Congregational Church and South Acton Congregational Church[.]" Pl. Motion at 1.

ARGUMENT

I. The Standard for a Preliminary Injunction in a Ten-Taxpayer Suit

To obtain a preliminary injunction in a 10-taxpayer suit under G.L. c. 40, § 53, the plaintiffs "must show a likelihood of success on the merits and that the requested relief would be in the public interest"; irreparable harm is not required. *Fordyce v. Town of Hanover*, 457 Mass. 248, 255 n. 10 (2010). The Plaintiffs fail both prongs of that test.[4] This is particularly so since the Town is afforded "every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare." *LaPointe* v. *License Board of Worcester*, 389 Mass. 454, 459 (1983).

[3] The Town accepts the Plaintiffs' allegations of their addresses and taxpayers status for purposes of this motion only, *see* Complaint, Exhibit N, but reserves its rights on that issue.

According to a pre-suit letter from counsel at Venable, LLP (Complaint Exhibit K), the moving force behind this suit is Americans United for Separation of Church and State, a 501(c)(3) nonprofit organization based in Washington, D.C. Because Americans United does not itself satisfy the jurisdictional requirement to sue under G.L. c. 40, § 53, *see Litton Bus. Sys., Inc. v. Comm'r of Revenue*, 383 Mass. 619, 621-622 (1981), it solicited the plaintiffs in this case. Indeed, according to its press release, "Americans United … has filed a lawsuit to stop the town of Acton, Mass., from spending taxpayer funds to support two local churches." *See* https://www.au.org/media/press-releases/mass-town-should-not-use-public-funds-to-support-its-churches-americans-united.

[4] Except for Complaint Ex. N (one-page affidavits on the Plaintiffs' status), the Plaintiffs have neither verified the Complaint nor submitted any affidavits in support of their motion as required by Mass. R. Civ. P. 65(a). The motion should be denied for that reason alone. *See Eaton v. Federal Nat. Mortgage Assoc*., 462 Mass. 569, 590 (2012).

II. The Plaintiffs Cannot Show a Likelihood of Success on the Merits

The plaintiffs challenge the constitutionality of historic preservation grants under the CPA solely because the owners of the buildings are active religious congregations. They cannot show a likelihood of success where nothing in the Anti-Aid Amendment prohibits "preservation, restoration or rehabilitation of historic structures of active churches" (Complaint ¶67) through the neutral criteria of the CPA and neutral implementation by the Town.

The Amendment provides (emphasis added):

> **No grant, appropriation or use of public money or property or loan of credit shall be made or authorized** by the Commonwealth or any political subdivision thereof **for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned** and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both [except for the Soldiers' Home in Massachusetts, public libraries, and existing legal obligations]; and **no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society**.

"In an art. 46 inquiry, as in any constitutional adjudication, [the court] must begin with the familiar principle of statutory construction that affords a statute a presumption of constitutional validity." *Commonwealth v. School Comm. of Springfield*, 382 Mass. 665, 674-675 (1981) (citation omitted). "Unless the specific constitutional provision requires a heightened standard of scrutiny, one attacking a statute upon a constitutional ground bears the heavy burden of proving the absence of any conceivable basis upon which the statute may be supported." *Id.*[5]

The Supreme Judicial Court has "listed three guidelines to analysis in deciding whether a particular expenditure of public funds would violate art. 46":

[5] Although couched as a challenge to three particular grants, the plaintiffs are in essence arguing that the CPA, insofar as it funds churches and other non-public entities, violates the Anti-Aid Amendment. Such constitutional challenges require notice to the Attorney General's Office under Mass. R. Civ. P. 24(d). The plaintiffs do not claim that they have provided any such notice.

> (1) whether the purpose of the challenged statute is to aid [a private charity]; (2) whether the statute does in fact substantially aid [a private charity]; and (3) whether the statute avoids the political and economic abuses which prompted the passage of art. 46.

Helmes v. Commonwealth, 406 Mass. 873, 876 (1990); *Springfield*, 382 Mass. at 675 (noting that the factors are "cumulative and interrelated, and that [its] conclusion results from a balancing of the various interests at stake").

These guidelines apply under both clauses of the Amendment. The plaintiffs attempt to bifurcate the Amendment into what they call a "General Prohibition" and a more specific "Religious Prohibition," claiming that these CPA grants violate both. Pl. Memo. at 9-16. They admit that the guidelines apply to the "General Prohibition" (Pl. Memo. at 13) but contend that the guidelines do not apply to the "Religious Prohibition" (*id*. at 10-12). However, neither the plain language of the Amendment nor the case law supports such a distinction. The two clauses apply to the same funds (a "grant, appropriation or use of public money or property or loan of credit") and for the same purposes ("founding, maintaining or aiding") whether to various private entities or a "church, religious denomination or society." *See Bloom v. School Comm.*, 376 Mass. 35, 39 (1978) (the "anti-aid amendment marks no difference between 'aids,' whether religious or secular)," cited in Pl. Memo at 13. The plaintiffs' attempt to evade the SJC's guidelines for an action under the Amendment fails.

The SJC's decisions under the Anti-Aid Amendment compel the conclusion that Acton's CPA grants fully comply with the Amendment. In *Helmes*, 24 taxpayers sued the state under G.L. c. 29, § 63 (the state analog of a 10-taxpayer suit under G.L. c. 40, § 53) to enjoin the state from appropriating $6 million dollars to a private charitable corporation to rehabilitate the USS Massachusetts. Applying the guidelines, the SJC concluded that the payment was lawful and upheld the denial of a preliminary injunction because the taxpayers had not demonstrated a

likelihood of success on the merits of their claim. 406 Mass. at 876-877. It found that there was "no evidence of a purpose to aid the [private entity] as such" simply because the state was appropriating funds to it for a dedicated public purpose. *Id.*

In *Springfield*, the Commonwealth sued the school committee to require compliance with G.L. c. 71B, including payment of the special education expenses of certain public school students at private schools (subject to receipt of some state and federal aid). 382 Mass. at 667. The school committee argued that the statutory requirement violated art. 46. *Id.* at 667. Despite the article's "clear and peremptory" language, the SJC rejected that argument based on the three guidelines. *Id*. at 673, 683 (citations omitted). *See also Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 335 (1982) ("G.L. c. 76, § 1, guaranteeing that those attending private schools in fulfillment of the compulsory attendance requirements shall be entitled to transportation to the same extent as public school students, does not violate art. 46.").

A. The CPA's Purpose Has Nothing to Do with Funding Religious Activities.

The plaintiffs assert that the "principal purpose of the grant is to aid the churches." Pl. Memo at 14. That argument fails.[6]

The CPA authorizes municipalities to award grants for "the acquisition, preservation, rehabilitation and restoration of historic resources." G.L. c. 44B, § 5(b)(2). Acton's CPA Plan specifically recognizes that the "rural, agricultural, and historic character of Acton is currently threatened by the rapid rise of local land values" and adopts a series of "Historic Preservation Goals," the primary one being to "[p]rotect, preserve, and/or restore historic properties and sites throughout Acton, which are of historical, architectural, archeological, and cultural significance." Bartl Aff. ¶ 17, Ex. 13 (19-20). Nothing in the CPA suggests that its purpose is to found,

[6] The Plaintiffs misstate the issue under the first *Helmes* guideline; it focuses on the purpose of the statute, not the specific grant. In any event, nothing suggests that the purpose of these grants is for anything other than the historic preservation described above.

maintain or aid religious activities. *See Springfield*, 382 Mass. at 677 (nothing in the statutory scheme suggests a purpose to aid private schools in violation of Art. 46). Nor do the Plaintiffs even argue that.

The Massachusetts Department of Revenue ("DOR") has confirmed that appropriating CPA funds to a private, non-profit organization for the rehabilitation or restoration of historic properties is an allowable purpose under the Anti-Aid Amendment. Bartl Aff. ¶ 34, Ex. 28. "There is nothing in the CPA that prohibits the use of funds for this project simply because the property is privately owned," and while under the Anti-Aid Amendment any expenditure of public funds "must be to advance a public purpose," the "preservation of historic assets is generally understood to have legitimate public purposes." *Id.* Both the federal and state governments "have various historic grant programs, which include grants to non-profit organizations" that typically "result in the public acquiring an historic preservation restriction or receiving some other benefit to ensure that the grant is for public rather than private purposes." *Id.* Where a town "will acquire an historic preservation restriction and the organization must use the funds received in exchange to finance the rehabilitation … 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." *Id.*

Under this guideline, the plaintiffs rely solely on *City of Springfield v. Dreison Investments, Inc.*, 2000 WL 782971 (Hampden Super. Ct. Feb. 25, 2000), Pl. Memo at 14, but that reliance is misplaced. In *Dreison*, the court invalidated eminent domain takings for the purpose of leasing the property to a private entity to attract a minor league baseball team. *Id.* Addressing the Anti-Aid Amendment in two paragraphs at the end of a 50-page decision, the court identified two major distinctions between the permissible funding in *Helmes* and the taking

in that case. First, it found that the primary purpose of the taking, to grant "a leasehold estate to a private entity so that entity can build a stadium for its baseball team," lacked any public purpose, contrasted with the sole purpose of the funding and the nonprofit entity in *Helmes* was to preserve a historic relic for the public. *Id.* at *50. It did not (and as a lower court could not), as the plaintiffs argue (Pl. Memo at 14), announce a new standard under which funding of private entities is permissible under the Anti-Aid Amendment "only if the charity serves solely public purposes." Second, the recipient's "bad faith" and "misrepresentations" were a major factor in finding the Anti-Aid Amendment violation. 2000 WL 782971, at *50. There is no suggestion of any such improprieties by the churches here. *Dreison* does not support the plaintiffs' claim.

B. The Effect of the CPA and These Grants is to Promote Historic Preservation.

The CPA grants in this case do not substantially aid the churches within the meaning of the Anti-Aid Amendment. Rather, the two historic districts, four historic buildings, and 11 stained glass windows all constitute significant historic resources significant to the Town. The Town has appropriated CPA funds to preserve those resources and will acquire historic preservation restrictions, consistent with the CPA, G.L. c. 44B, § 12(a), and DOR's opinion, and subject to MHC's oversight under G.L. c. 184, §§ 31-32. The CPA funds do not "found, maintain or aid" either church's mission; they are expressly limited solely to reimburse expenses actually incurred in the historic preservation projects. Bartl Aff. ¶ 31, Exs. 25-27 (award letters requiring invoices, receipts and certifications of the work). With the historic preservation restrictions, the public will have the benefit of the intact historic resource for generations, regardless of who owns the buildings.

The plaintiffs argue that by "[improving] a church building," the CPA funding "undeniably serves a church's religious mission." Pl. Memo at 15. They cite no legal support for this bald assertion. Instead, they highlight one sentence from the Acton Congregational

Church's application describing the financial strain on the church and the need for public assistance in preserving the property. *Id*. According to the plaintiffs, this sentence proves a prohibited connection between the funding of these projects and the programmatic needs of the church, namely, that the funding frees up other church funds for religious use. *Id.* at 11, 15.

This argument fails.[7] Providing public funding to a private organization may or may not free up some of that organization's funds for other uses (the recipient may lack funds for its other needs even with the funding or, even without the funding, the recipient may decide that its other needs are paramount and forego the preservation work). In any event, whether and how the recipient spends other money is entirely up to it; the Town does not take into account such consideration in awarding CPA funds. Bartl Aff. ¶ 28. The recipient's decision cannot be a basis for invalidating a CPA grant under the Amendment. Even if the funding were to provide some incidental or secondary benefit to the churches, that does not render it contrary to Art. 46. *See Springfield*, 382 Mass. at 680-681 (the secondary and indirect benefits to private schools does not qualify as "substantial aid" under the Anti-Aid Amendment).

Not surprisingly, the plaintiffs' attenuated funding argument has been squarely rejected. DOR has specifically declined the request of Americans United to issue a rule or regulation under G.L. c. 44B, § 17, "to clarify that government funds may not be used to renovate buildings

[7] The plaintiffs rely on *Opinion of the Justices*, 357 Mass. 836, 844 (1970) (the "*1970 Opinion*") and *Opinion of the Justices to the Senate*, 401 Mass. 1201 (1987) (the "*1987 Opinion*"). Those Opinions have no precedential value, *Tobias v. Secretary of Commonwealth*, 419 Mass. 665, 675 (1995), and the SJC "most sedulously guard[s] against any influence" such opinions might have, *Perkins v. Inhabitants of Town of Westwood*, 226 Mass. 268, 272 (1917). In any event, the Opinions are readily distinguishable because the proposed funding lacked any public benefits. The *1970 Opinion* involved a proposed statutory program to use public monies to fund the operational budgets of private schools, which could be used for supplying a wide array of school services. Thus, the funding directly aided the schools' mission and daily functions without providing a benefit to members of the public who did not attend the schools. Similarly, the *1987 Opinion* involved a proposed bill for tax deductions for education-related expenditures like tuition, textbooks, and transportation incurred in attending public or nonprofit schools, as well as for certain tutoring and related expenses. Because public school students "receive their education, including textbooks, from municipalities in the Commonwealth free of charge," the benefits of these proposed tax deductions "would flow exclusively to those taxpayers whose dependents attend private schools and, as a result, to the private schools themselves." *Id.* at 1209 (citations omitted).

used for religious worship." Bartl Aff. ¶ 35, Ex. 29. It observed that Americans United did "not cite any state or federal case expressly holding that providing historic preservation grants to rehabilitate historically significant church buildings is unconstitutional either under the United States or the Massachusetts Constitutions." *Id.* To the contrary, DOR cited with approval the Opinion from the Office of Legal Counsel of the U.S. Department of Justice (Bartl Aff. ¶ 36, Ex. 30) approving grants to religious institutions, including the Old North Church in Boston.[8]

In *Hughes v. Town of Oak Bluffs*, Duke's County Super. Ct. C.A. No. 1374CV00042, the plaintiffs made the same argument – with the CPA grant funds to preserve stained glass windows in a historic church building, the recipient "will be able to dedicate other church revenue for religious worship activities that otherwise would have been used for the restoration and maintenance of the church building." Plaintiff's Response (Docket #11, filed November 14, 2013). The court rejected that argument and denied a preliminary injunction. Attachment B. As long as the public funds are used for the designated purpose, the funding is permissible. *See Helmes*, 406 Mass. at 877 (where the appropriation imposes a requirement that the public funds be used only for the designated public purpose of rehabbing the historic vessel, there is "no evidence of a purpose to aid the [private entity] as such"). Even more stringent funding restrictions are in place here. Bartl Aff. Exs. 25-27 (reimbursement with proof of expenditures, grant of historic preservation restriction, and certification that funds were used as proposed).

[8] The Town's historic preservation grants to the churches are consistent with these criteria. They are awarded for the secular purpose of historic preservation, including the acquisition of a perpetual historic preservation restriction. They were available to a broad class of potential recipients (religious and secular), as evidenced by the Town's CPA grants for similar historic preservation projects regardless of ownership – including six Town-owned projects, five non-profit-owned projects (including Theatre III in the former building of the West Acton Universalist Church and the Acton Women's Club in the former building of the Acton Congregational Church), one religious-owned project and two privately-owned projects. Bartl Aff. ¶¶ 37-40. And they are administered neutrally, neither advancing nor inhibiting religion, as evidenced by the grant conditions in the CPA grant award letters. Bartl Aff. ¶ 31, Exs. 25-27.

Even courts addressing First Amendment challenges have determined that government funding of the preservation of historic churches does not have "primary effect of advancing religion."[9] For example, in *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F. 3d 278 (6th Cir. 2009), the plaintiff challenged under the Establishment Clause and its state analog the public funding of a church through a downtown revitalization program. *Id.* at 284 (the work included exterior façade improvements, including stained glass repair and parking lot improvements). The court upheld the funding because the revitalization program made "grants available to a wide spectrum of religious, nonreligious and areligious groups alike and employs neutral, secular criteria to determine an applicant's eligibility[.]" *Id.* at 289-291. *Accord*, *Taunton Eastern Little League v. City of Taunton*, 389 Mass. 719, 726 (1983) ("allowing religious use of State facilities or benefits as part of a neutral policy does not result in the impermissible State sponsorship of religion[.] The fundamental requirement is that the government must treat religious and nonreligious groups equally.").[10]

Where the primary (and, indeed, only) effect of the CPA and these grants is to further historic preservation, not the churches' religious programs, they are valid under this second *Helmes* guideline.

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[9] "[T]he 'hermetic separation' of church and State is an impossibility which the Constitution has never required." *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 560 (1979) (citation omitted) (denying taxpayers' request for an injunction, declaring that paying public monies for the salaries of legislative chaplains and the statute authorizing such payment are constitutional). The SJC cited the Supreme Court's reasoning in *Zorach v. Clauson*, 343 U.S. 306, 312-313 (1952), that the First Amendment "does not say that in every and all respects there shall be a separation of Church and State." Otherwise, municipalities "would not be permitted to render police or fire protection to religious groups." *Colo*, 378 Mass. at 560-561.

[10] *Taylor v. Town of Cabot*, Vt. Super Ct. No. 329-6-16 (July 1, 2016) (Attachment C), also supports the Town. The court granted a preliminary injunction against funding of interior improvements to a church. However, it "accepts that the 'mere fact that public funds are expended to an institution operated by a religious enterprise does not establish the fact that the proceeds are used to support the religion professed by the recipient." *Id.* at 12 (citations omitted). Besides addressing interior renovations under a different constitutional and statutory scheme, the court identified the key problem with the funding in that case: it was not administered pursuant to a program with neutral and objective funding criteria. *Id.* at 15-16. Such criteria are precisely what the CPA provides.

C. The CPA Avoids the Abuses that Prompted the Anti-Aid Amendment.

The third *Helmes* guideline is "the avoidance of the political and economic abuses that prompted adoption of art. 46." 406 Mass. at 877. The SJC found "no abuse or unfairness, political or economic, in using public funds to preserve an historic memorial to war dead in circumstances in which no private person appears likely to benefit specially from the expenditure." *Id.*

Similarly, the plaintiffs have not pointed and cannot point to any such abuse or unfairness in this case. The historic preservation restrictions ensure that the public, not any private person, will benefit from the funding. The CPA funding is not dependent on the user or the use of the buildings; and the restrictions will run with the land and preserve the historic resources for the benefit of the public regardless of who own them. The plaintiffs' contention that the funding of churches could be "politically divisive" (Pl. Memo. at 16) misses the mark. Where the CPA applies to non-public entities and does not exclude churches, the Legislature saw no such risk. The plaintiffs offer nothing but sheer speculation of religious favoritism by Acton. That speculation is disproved by the 14 other approved CPA projects in the Town. Page 8, *supra*.

In fact, the only potential for abuse comes from the plaintiffs' position. They claim that the grants are "financially wasteful" because the churches have not shown a financial need. Pl. Memo at 16. Yet, neither the CPA nor the Town requires applicants to prove need. Such a requirement would deter applicants and frustrate the purpose of the CPA to promote preservation of historic community assets. Either the plaintiffs are arguing for a means test to apply *only* to active religious applicants (which would violate constitutional principles of neutrality and require the Town to analyze the motives and religious beliefs of CPA applicants in determining

eligibility)[11] or they are suggesting that the Town means test all applicants (which is wholly unsupported by the CPA and antithetical to the Legislature's intent in funding CPA projects).

III. A Preliminary Injunction Would Contravene, not Serve, the Public Interest.

By any rational test, these historic resources are significant and worth preserving. In fact, the plaintiffs never question these buildings' historic significance. Yet they would have the Court forbid the use of CPA funds to protect any of these resources merely because the buildings are owned by religious institutions. The Anti-Aid Amendment compels no such result. The CPA's focus is on preserving historic resources, not on who happens to be the custodian of those resources at any particular time. Put another way, the CPA is agnostic: whether a significant historic resource is owned by the Town, a religious institution, a nonprofit or a private party, the ravages of time are equally destructive, the need for protection is equally compelling, and the irreplaceable loss caused by failure to do so is equally unforgiving. Strong and well-established public interest supports the CPA grants in this case. A preliminary injunction would be inimical to that public interest.

In fact, the disservice to the CPA and the public interest from an injunction would extend well beyond Acton and these particular resources. The plaintiffs' argument would jeopardize CPA funding for all nonprofit, charitable and other private entities. Where the prohibitions against funding of private entities and churches in the Anti-Aid Amendment are enunciated identically, there would be no basis to limit the effect of an injunction to religious recipients. Such a ruling would undercut a significant portion of the CPA program, severely limiting the

[11] Doing so would push municipalities into the very forbidden territory the plaintiffs assert must be avoided. *Cf. Martin v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 150 (2001) ("It is not for judges to determine whether the inclusion of a particular architectural feature is "necessary" for a particular religion."). *See also* Pl. Memo. at 11 (warning against "intrusive governmental inquiries about how they spend their funds").

impact of this important legislation. Saginor Aff. ¶ 9.[12] It would also jeopardize analogous state funding of historic preservation projects of nonprofit organizations (including religious institutions) throughout the state. *See* Holtz Aff. ¶¶ 4-7. A greater impairment of the public interest in historic preservation across Massachusetts can hardly be imagined.

CONCLUSION

For the foregoing reasons, the plaintiff's motion for temporary or preliminary injunctive relief should be denied.

If the Court nevertheless grants injunctive relief, it should require the plaintiffs to post a bond in the amount of the Town's anticipated damages. Mass. R. Civ. P. 65(c). Those damages would be at least $250,000. *See Financial Acceptance Corp. v. Garvey*, 9 Mass. App. Ct. 94, 96-97 (1980) (the Town will be entitled to the legal fees incurred as a result of the preliminary injunction, which would include any fees to appeal or dissolve the injunction, if it wins at trial).

By its attorneys,

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Dated: July 29, 2016

CERTIFICATE OF SERVICE

I certify that I served this document on counsel for plaintiffs by email and Federal Express on this 29th day of July, 2016.

Nina Pickering-Cook

[12] Of the thousands of CPA historic preservation projects across the state, public projects represent only a fraction. The rest are projects involving historic resources owned by non-profit, religious and other private entities. In Acton, for example, of the 14 historic preservation projects approved prior to the current projects, there were 6 town-owned, 5 nonprofit-owned, 2 privately-owned, and 1 church-owned. Bartl Aff. ¶ 37. Statewide, non-public entities, such as non-profits, museums, and religious institutions, have received a significant portion of the over 4,000 historic preservation grants included in the state database. Saginor Aff. ¶ 7-8. Of these, over 300 projects involving historic preservation of historic resources owned by religious institutions. Fowler Aff. ¶ 5.

Attachment A

lands, as the mortgager himself had or ought to have; and an acknowledgement of satisfaction in the margin of the record of such mortgages, by the mortgagee or his heirs, shall be as sufficient a discharge thereof, to the creditor who hath redeemed or shall hereafter redeem the same, or to his heirs, as it would have been to the mortgager himself, or his heirs: *provided*, that if the said right shall, by apprizement in due form of law, happen to exceed the sum to be levied, with the necessary charges, the overplus shall be paid by the creditor to the debtor within three months after levying the execution, or publication of this act.

Overplus to be returned and paid to the debtor.

Provided, also,—

And be it further enacted by the authority aforesaid,

[Sect. 2.] That all executions that shall hereafter be levied on lands or tenements, and the proceedings thereon, shall, at the charge of the creditor, within three months after such levying, be entred in the office of the register of deeds for the county where such lands l[*i*][*y*]e.

Executions hereon to be entered in the registry of deeds.
15 Mass., 201.
3 Pick., 334.

And it is further provided and enacted,

[Sect. 3.] That the debtor, whose right in equity as aforesaid is taken by execution as aforesaid, shall have liberty, for the space of one year next after levying such execution, of redeeming such his right, by paying the full sum levied by execution on such right, with lawful[l] interest, and all charges arising thereon, and such other sum or sums as the creditor, at whose suit the execution was levied, shall have paid to the person or persons to whom it was before mortgaged, or to the mortgager himself.

Debtor allowed a year to redeem his right.

And it is further enacted,

[Sect. 4.] That such person or persons, at whose suit such lands or right by equity of redeeming any mortgaged lands, have been, are, or shall be taken by execution as aforesaid, shall be as legally and fully entitled to the said lands, or right of redeeming the mortgage or mortgages thereof, as the original mortgager, at the time of levying the execution, was; and the said lands, or right of redeeming the same, shall be and remain to the said creditor, and his heirs and assigns, forever, unless redeemed by the mortgager within one year, as aforesaid. [*Passed and published July* 3.

Creditor to have a good title to the land.

CHAPTER 10.

AN ACT FOR DIVIDING THE TOWN OF CONCORD, AND ERECTING A NEW TOWN THERE BY THE NAME OF ACTON.

Whereas the inhabitants and proprietors of the north-westerly part of Concord, in the county of Middlesex, called "The Village," or "New Grant," have represented to this court that they labour under great difficulties by reason of their remoteness from the place of publick worship, and therefore desired that they and their estates, together with the farms called Willard's Farms, may be set off a distinct and sep[*a*][*e*]rate township, for which they have also obtained the consent of the town of Concord,—

Preamble.

Be it therefore enacted by His Excellency the Governor, Council and Representatives in General Court assembled, and by the authority of the same,

[Sect. 1.] That the said north-westerly part of Concord, together with the said farms, be and hereby are set off, constituted and erected into a distinct and sep[*a*][*e*]rate township, by the name of Acton, and agre[*e*]able to the following boundaries; namely, beginning at the south-west corner of Concord old bounds, then, south-westerly, on Sudbury

A new town constituted, by the name of Acton.

Bounds of said town described.

and Stow lines, till it comes to the south-west corner of Concord village; then, north-westerly, by Stow line, till it comes to Littleton line; then bounded, northerly, by Littleton, Westford and Chelmsford; then, easterly, by Billerica line, till it comes to the north-east corner of Concord old bounds; then, easterly, by Concord old bounds.

[SECT. 2.] And that the inhabitants of the lands before described and bounded, be and hereby are vested with all the powers, privileges and immunities that the inhabitants of the other towns within this province are or by law ought to be vested with.

Provided,

Proviso. [SECT. 3.] That the inhabitants of the said town of Acton do, within the space of three years from the publication of this act, erect and finish a suitable house for the publick worship of God, and procure and settle a learned, orthodox minister, of good conversation, and make provision for his comfortable and honourable support.

Provided, also,—

And be it further enacted,

Proviso. [SECT. 4.] That the inhabitants of the said town of Acton shall be liable and subject, notwithstanding their being set[t] off and constituted a township as aforesaid, to pay their proportion of all province and county rates, for this present year, in the town of Concord, and shall be accordingly assessed in the same manner they would have been if this act had never been made. [*Passed and published July* 3.

CHAPTER 11.

AN ACT FOR DIVIDING THE TOWNS OF MENDON, SUTTON, UXBRIDGE AND HOPKINTON, AND ERECTING A NEW TOWN IN THE COUNTY OF WORCESTER, BY THE NAME OF UPTON.

Preamble. WHEREAS the out-lands of the several towns of Mendon, Sutton, Uxbridge and Hopkinton are competently filled with inhabitants, who labour under difficulties by reason of their remoteness from the places of publick worship in the said towns, and have thereupon addressed this court that they may be set off a distinct and sep[*a*][e]rate township, and vested with all the powers and privile[d]ges that other towns in this province are vested with,—

Be it therefore enacted by His Excellency the Governour, Council and Representatives in General Court assembled, and by the authority of the same,

The bounds of a new town described. [SECT. 1.] That all the out-lands of the aforesaid towns of Mendon, Sutton, Uxbridge and Hopkinton, comprised within the following bounds, containing in the whole, twelve thousand nine hundred and forty-three acres, together with one hundred and fifty-one acres, taken off [*from*] Mr. John Rockwood's farm, bounded as follows; vizt., beginning at a pine tree, being the south-east corner of Grafton, and from thence, extending north, bounding west on Grafton, till it comes to the north-east corner thereof; and from thence, bounding by Westborough line till it meets with Hopkinton line; from thence, extending southerly, two hundred and twelve perch in the bounds between Sutton and Hopkinton; from thence, south, nine degrees east, four hundred and ninety perch, to a stake and heap of stones; from thence, south, thirty-one degrees and thirty minutes east, one hundred and forty perch; from thence, south, sixty-one degrees and thirty minutes east, two hundred perch, to a heap of stones at Haven-Meadow; from thence, easterly, one hundred [*and*] thirty-four perch, to the north end of a pond called

Attachment B

Filed 11/6/13

(16)

COMMONWEALTH OF MASSACHUSETTS

DUKES COUNTY, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. DUCV2013-00042

BRIAN P. HUGHES,

Plaintiff,

vs.

TOWN OF OAK BLUFFS, and OAK BLUFFS COMMUNITY PRESERVATION COMMITTEE,

Defendants.

OPPOSITION OF THE MUNICIPAL DEFENDANTS TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

A. Introduction.

The Town of Oak Bluffs, and the Oak Bluffs Community Preservation Committee (hereinafter, the "Town"), oppose the motion of the plaintiffs, allegedly ten Oak Bluffs taxpayers, for a preliminary injunction. The request must be denied, for several reasons:

1. Although entitled "Verified Complaint," neither the complaint itself nor any of the supporting documentation is, in fact, verified or supported by sworn affidavits; and

2. The Town's appropriation of Community Preservation Act ("CPA") monies under G. L. c. 44B, § 5(b)(2) to restore the exterior windows of the Trinity Methodist Church (the "Church"), which is located within the "Campgrounds," which is named on the State Register of Historic Places does not violate the laws of

the Commonwealth, the Anti-aid Amendment to the Massachusetts Constitution, or the Establishment Clause of the First Amendment to the United States Constitution.

Under governing precedents, the approved expenditure for restoration of the windows is permissible because it: a.) will be utilized to rehabilitate a state registered historic asset to which the public has access to view and therefore advances a public purpose; b.) will not aid, in any way, the Church's religious mission; and c.) is drawn from a pool of funds which can appropriated for a host of historic renovation projects, under a governing state statute (the CPA), including public, private, secular, and sectarian. Since the Town will obtain a Historic Preservation Restriction in return for the funding, the Town is securing a commitment that the renovated windows will remain in place on a long term basis.

Similar funding measures have been approved throughout the state. The Massachusetts Historical Commission ("MHC"), a state agency, has funded, for example, at least twelve (12) rehabilitation and restoration projects of historic churches since 2002. The Town refers the Court to the Justice Department's Memorandum entitled "Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church," dated April 30, 2003, attached to the affidavit of Joan Hughes as Exhibit

"C", which approved the use of federal funds to renovate the windows, among other features, of the Old North Church in Boston, an active house of worship.

The plaintiffs cannot show a likelihood of success on the merits. Further, given the need for the extraordinary repairs, delaying the Town Meeting's decision to fund the restoration project will not advance the public interest. The motion should be denied.

B. Applicable Standards.

(i). Legal Standards for issuance of a preliminary injunction.

The standard for a court considering a motion for a preliminary injunction is well established. See Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-17 (1980). With litigation involving private parties, the court must consider certain factors when deciding a motion for preliminary injunction. These include: (1) plaintiff's likelihood of success on the merits; (2) the risk of irreparable harm to the plaintiff if the motion is denied; and (3) the irreparable harm to the defendant if the motion is allowed. Id. When a party seeks to enjoin governmental action, a judge is "required to determine that the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely

affect the public.". Commonwealth v. Mass. CRINC, 392 Mass. 79, 89, (1984).[1]

(ii) Factual Requirements under Rule 65.

Rule 65(a) explicitly requires affidavits or a verified complaint to support a motion for a temporary restraining order, and, "[a]s a general rule, an allegation that is supported on 'information and belief' does not supply an adequate factual basis for the granting of a preliminary injunction. See Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 493-494 (1986), and cases cited (noting that although preliminary injunction may be based on affidavits and verified complaint, allegations based only on information and belief would be insufficient to support preliminary injunction)." Eaton v. Federal Nat. Mortgage Assoc., 462 Mass. 569, 590 (2012).[2] The absence of supporting materials containing facts,

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[1] When a group of citizens brings an action "acting as private attorney generals to enforce a statute of a declared policy of the Legislature, a showing of irreparable harm is not required." Fordyce v. Town of Hanover, 457 Mass. 248, 255 n.10 (2010). However, the plaintiffs must meet the other factors, most notable a likelihood of success on the merits and a determination that a delay with not affect the public interest, which they cannot do.

[2] We also note that the original plaintiff, Brian Hughes, first sought an injunction as the sole plaintiff, which Judge Moriarty denied on October 31, 2013, presumably for lack of standing under G. L. c. 40, § 53. The Amended Complaint added nine (9) other plaintiffs, but did not contain an appearance of

supported by sworn statements, should preclude the Court from addressing the plaintiffs' request for relief at this juncture.

C. The plaintiffs cannot show a likelihood of Success on the Merits: The Proposed Spending Complies With The Anti-Aid Amendment and the Establishment Clause.

(i) The CPA and the Anti-Aid Amendment.

Section 5(b)(2) of G. L. c. 44B, the Community Preservation Act ("CPA"), provides in part that:

> "[t]he Community Preservation Committee shall make recommendations to the legislative body . . . for the acquisition, preservation, rehabilitation and restoration of historic resources . . ."

Under § 2 of the CPA, "historic resources" include "a building . . . real property that is listed on the state register of historic places . . . ." While restoration is not a defined statutory term, "rehabilitation" means "capital improvements or the making of extraordinary repairs to historic resources for the purpose of making such historic resources . . . functional for their intended uses . . . ." Id. As set forth in the Affidavit of Joan Hughes, the Campground area, which encompasses the Church, is a named place on the State Register of Historic Places. Accordingly, the spending meets the terms of the CPA.

The plaintiffs claim that the use of public funds to renovate the stained glass windows on the Church violates art. 18, as amended by arts. 46 and 103 of the Amendments of the

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counsel. Mr. Hughes is not a member of the bar, and cannot "represent" the other plaintiffs in this action.

Constitution of the Commonwealth, the so-called Anti-aid Amendment. The Anti-aid Amendment provides, in pertinent, part as follows:

> "No grant, appropriation or use of public money or property, shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any . . . charitable or religious undertaking which is not publicly owned, under the exclusive control, order and supervision of public officers or public agents . . . and no such grant, appropriate or use of public money . . . shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious domination or society."

The provision does not bar public spending which advances a public purpose. In Helmes v. Commonwealth, 406 Mass. 873, 873 (1990), the Supreme Judicial Court ("SJC") took up the question of whether the use of public monies to aid a charitable corporation formed to oversee "the alteration and the remodeling and repair of the battleship the U.S.S. Massachusetts" violated the Anti-aid Amendment. The Superior Court denied the plaintiffs' (24 taxpayers) motion for a preliminary injunction, and the SJC affirmed, concluding as follows:

> "The payment of public funds to the committee to meet the committee's expenses in rehabilitating the battleship does not violate the anti-aid amendment. . . .
>
> The public purpose of the expenditures is to rehabilitate the battleship, to preserve it as a memorial to the citizens of the Commonwealth who fought and died in World War II, and to educate the public, particularly school children. We see no evidence of a purpose to aid the committee as such. The available funds must be used for the designated public purpose, and, once repaired, the ship must be used to further public purposes."

Id. at 877.

The situation here is no different. The Church is a historic asset, is located within a state registered historic resource, and the Town has voted a modicum of funds to support the restoration and rehabilitation of its stained glass windows. The funds do not directly aid the Church's mission, but rather are earmarked solely to assist with the restoring the deteriorated and failing windows -- a facet of the building available for viewing by the public at large. The Town and the public have unfettered access to view the Church's exterior. Their right to enjoy this architectural feature and to consider its role in the history of the Campground and the community is, without a doubt, a public purpose.[3]

Section 17 of the CPA provides that the Department of Revenue ("DOR") "shall have the authority to promulgate rules and regulations to effect the purposes of this chapter." The DOR has opined that use of CPA funds to maintain the exterior of privately owned historic resources is a permissible expenditure.

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[3] Further support for the Town's position can be found in Colo v. Treasurer & Receiver General, 378 Mass. 550 (1979), discussed infra (rejecting challenge to funding of Legislative chaplains) and Commonwealth v. School Committee of Springfield, 382 Mass. 665, 667 (1981), where the Court held that "the disbursement of public funds to educate school-age children in private schools or institutions, when no public school program is available to meet the children's special needs . . . does not violate the anti-aid amendment . . . ."

In DOR File No. 206230, attached hereto, the DOR ruled as follows:

> "The second appropriation is for the restoration of an historic building owned by the Norfolk Grange, which is a private, non-profit organization. Rehabilitation or restoration of historic properties is an allowable purpose. There is nothing in the CPA that prohibits the use of funds for this project simply because the property is privately owned. However, under the anti-aid amendment to the Massachusetts Constitution, public funds cannot be given or loaned to private individuals or organizations for their private purposes. Mass. Const. Amend. Article 46 §2, as amended by Article 103. Any expenditure must be to advance a public purpose. The preservation of historic assets is generally understood to have legitimate public purposes. Both the federal and state governments, for example, have various historic grant programs, which include grants to non-profit organizations. . . . In the case of the Grange property, we understand the town will acquire an historic preservation restriction and the organization must use the funds received in exchange to finance the rehabilitation."

(Emphasis supplied.)

The Preservation Restriction that the Town has secured here requires the Church to use the funds only for the windows and ensures that the windows must be retained in their restored form and if the building is changed. Given that the Town is receiving a preservation property "right" in exchange for the funds, the appropriation does not violate the Anti-aid Amendment.

(ii) The appropriation does not violate the Establishment Clause.

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law respecting

an establishment of religion, or prohibiting the free exercise thereof . . . ." In Colo v. Treasurer & Receiver General, 378 Mass. 550 (1979), a group of taxpayers sought to restrain the State Treasurer from using public monies to pay the chaplains of the House of Representatives, claiming a violation of the Establishment Clause, among other provisions. The SJC rejected that challenge, ruling that the "complete obliteration of all vestiges of the religious tradition from our public life is unnecessary to carry out the goals of nonestablishment and religious freedom set forth in our State and Federal Constitutions." Id. at 561.

The SJC in Colo summarized the criteria or "tests" employed by the Supreme Court for assessing claims under the First Amendment. The tests are:

> "(1) is there a secular purpose, (2) does the primary effect of the challenged practice neither advance nor inhibit religion, and (3) is there an avoidance of excessive government entanglement with religion?"

Id. at 558. None of these criteria remotely suggest that the appropriation for the Church's window repair and renovation project run afoul of the First Amendment, the Anti-aid Amendment, or any other constitutional provision.

The funding is for secular purpose. As noted, the Church is in an historic area, is accessible to the public, and has historic importance. The windows are in disrepair. Municipal

assistance to fix the degraded windows has a public purpose that has nothing to do with the Church's religious mission.

The second and third inquiries are also satisfied. The Town's decision has no direct impact on the Church's services or the beliefs of its congregation, and compels no "entanglement" between the two entities; the sole interaction called for is neutral and secular accounting. The beliefs of the Church fathers or its membership play no role whatsoever in the renovation project: the Letter Agreement and the Preservation Restriction provide that the church must replicate the existing windows. The SJC in Colo observed:

> "[T]he hermetic separation of church and State is an impossibility which the Constitution has never required. . . . Otherwise, the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. . . .:

378 Mass. at 560-61.

There are no Massachusetts cases dealing directly with municipal grants to religious groups for the renovation of historically significant churches. However, as noted at the outset, the MHC has issued state historic preservation grants to at least 12 churches throughout the state since 2002 for rehabilitation and restoration of their physical facilities. See Exhibit "C" to the Affidavit of Joan Hughes. Moreover, in a

Memorandum Opinion for the Solicitor Department of the Interior entitled "Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church," dated April 30, 2003 (the "OLC Opinion"), the Office of Legal Counsel for the U.S. Department of Justice ("OLC") opined that the "Establishment Clause does not bar the award of historic preservation grants to the Old North Church[4] or other active houses of worship that qualify for such assistance, and that the section of the National Historic Preservation Act[5] that authorizes historic preservation assistance to religious properties is constitutional." Id. at page 1.

The OLC Opinion providing advice to the Department of Interior was, in fact, prompted by the funding request to restore the Old North Church in Boston, including its deteriorated windows. The Old North Church is an active

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[4] The Old North Church is in the North End of Boston, where lanterns were hung on the eve of the Revolutionary War - "One if by land, and two, if by sea" - signaling to Paul Revere whether the British were approaching by land or water.

[5] The National Historic Preservation Act, § 470(a)(e)(3) of 16 USC, extends to grants "for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant."

Episcopal Church. The OLC concluded, as noted, that the request was legal and consistent with the Establishment Clause because:

> "*First*, the federal government has an obvious and powerful interest in preserving all sites of historic significance to the nation, without regard to their religious or secular character. The context in which this issue arises distinguishes the Program from programs of aid targeted to education, which have been subjected to especially rigorous scrutiny by the Supreme Court. *Second*, eligibility for historic preservation grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions. All sorts of historic structures - - from private homes to government buildings - - are eligible for preservation grants. *Third*, although the criteria for funding require a measure of subjective judgment, those criteria are amenable to neutral application, and there is no basis to conclude that those who administer the Program will do so in a manner that favors religious institutions. Thus, we believe that the provision of historic preservation grants to religious structures such as the Old North Church cannot be materially distinguished from the provision of disaster assistance to religious schools, which we have already approved, or from other aid programs that are constitutional under longstanding precedents establishing that religious institutions are fully entitled to receive widely available government benefits and services. For similar reasons, no reasonable observer would view the Park Service's provision of a Save America's Treasures grant to an otherwise eligible religious structure as an endorsement of religion."

(Emphasis added.)

The OLC undertook an extensive review of Establishment Clause cases, including several which we assume the plaintiffs will suggest should control here. See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971); Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973). In Tilton, the Supreme Court invalidated a section of a federal statute that provided

construction grants to religious colleges buildings devoted to science, art, and music. The provision that violated the Establishment Clause returned the new building to the exclusive control of the owner after twenty years with no restrictions. Since the "primary effect [of that funding ultimately] advances religion", 403 U.S. at 679, the provision could not stand.

In Nyquist, the Court held unconstitutional a New York state program of maintenance and repair grants for the upkeep of religious schools and equipment. The grants were only available to private, nonpublic schools in low income areas, "all or practically all of which were Catholic." 413 U.S. at 768. The Supreme Court held that the maintenance and repair provision violated the Establishment Clause because its effect, ultimately, was to subsidize and advance the grant recipient's religious mission. See id. at 775.

Tilton and Nyquist do not control the Town's CPA grant to repair the Church windows. The programs at issue those cases benefited and furthered the missions of the religious grant recipients, aided in fulfilling their religious missions, and provided minimal secular benefit.[6]

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[6] The federal construction aid program at issue in Tilton also discriminated against religious educational institutions of higher learning because the restrictive grant agreements required by the governing statute provided that, after twenty years, "secular institutions were free to use government aid to foster their philosophical outlooks; religious institutions were

The central distinction between the Town's appropriation here and the grants at issue in Tilton and Nyquist is that that CPA funding provides has a direct secular benefit to the public at large. The CPA funds may only be used to restore the exterior of a building which has independent historical importance and to which the public has access. The same cannot be said of the grants at the Supreme Court found unconstitutional in Tilton and Nyquist, because they primarily furthered a religious mission without a direct corresponding public benefit.

In ruling that the grant to the Old North Church is constitutional, the OLC also relied on a "more recent line of cases holding that the Free Speech Clause does not permit the government to deny religious groups access to the *government's own property,* even where such groups seek to use the property 'for religious worship or religious teaching.'" Id. (quoting Widmar v. Vincent, 454 U.S. 263, 265 (1981)). The Supreme Court has affirmed this rule "[e]ven [though] the provision of a [governmental] meeting room [for religious purposes] . . . involve[s] governmental expenditure." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 842-43 (1981).

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not." OLC Opinion at 17. "The same can be said of the program at issue in Nyquist" because there "secular schools were free to use grants 'given largely without restriction on usage' to advance their missions, but religious institutions were not." Id.

Finally, the OLC advised that evolving Establishment Clause jurisprudence does not support the "pervasively sectarian" doctrine, which "held that there are certain religious institutions in which religion is so pervasive that *no* government aid may be provided to them, because their performance of even secular tasks will be infused with a religious purpose." Id. at 18. See, e.g., Helms v. Mitchell, 530 U.S. 793 (2000), where the Supreme Court held that the Elementary and Secondary Education Act of 1965, under which the federal government distributes funds to state and local government agencies - which in turn lend educational materials and equipment to public and private schools - does not violate the Establishment Clause. Accordingly, the OLC opined that Nyquist and Tilton did not bar the historic preservation grant to fix the windows of the Old North Church.

Community Preservation Act appropriations are similar to grants under the National Historic Preservation Act. The Town, like the U.S. Park Service for national historic sites, has an interest in the "preservation of *all* sites of historic significance to the [Town], without regard to their religious or secular character." Id. 8. Community Preservation Act funds may be expended by the Town to restore a wide spectrum of historic assets - not just churches. This factor "distinguishes the grants here from programs of aid targeted to education,

which the Supreme Court has subjected to far more rigorous scrutiny than aid to other sorts of religious institutions." Id. "[E]ligibility for historic preservation [CPA] grants extends to a broad class of beneficiaries, defined without reference to religion and including both public and private institutions." Id. at 9; see G. L. c. 44B, § 2 (defining historic resources neutrally and to include a host of physical assets).

Community Preservation Act aid for historic resources "is analogous to aid that qualifies as 'general government services'". Id. at 9. If "buses can be provided to carry police and fire protection to protect church school pupils, we fail to see how a broader range of police and fire protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the Religion Clauses." Walz v. Tax Comm., 397 U.S. 664, 671 (1970). "Thus, just as a broad category of beneficiary institutions was sufficient to sustain the inclusion of religious institutions in the tax benefit in Walz - which, after all, substantially benefitted churches' *property* - we believe the breadth of eligibility for the Program here weighs heavily in favor of the constitutionality of a Save America's Treasures grant to the Old North Church." OLC Opinion, at 10-11.

Simply stated, the CPA expenditure here is drawn from source which is available to fund acquisition, preservation, rehabilitation, and restoration of a wide array of historically significant assets - both public and private - and with both religious and secular import and missions.[7] The grants do not aid the mission of any particular recipient, but rather are aimed at rehabilitation of the historical physical resources themselves. Community preservation expenditures are thus similar to and in the nature of a general governmental service, such as police and fire protection, trash pickup, road maintenance, or delivery of the mail, all of which, if carried to their extremes, could be claimed to "aid" a sectarian group. Given that the plaintiffs can cite to no directly governing authority that supports their unsworn allegations that the funding here aids the Trinity Church as a matter of law, they have failed to demonstrate a likelihood of success on the merits.

D. The Public Interest does not favor delaying the expenditure.

The voters who convened at the 2013 Annual Town Meeting supported the CPC's recommendation to appropriate funds for the

[7] Community Preservation Act funds are raised from the municipal tax base and supplemented by state funds. The DOR, which administers the program through its statutorily authorized role to promulgate regulations, has never taken the position that CPA funds cannot be used for exterior renovations of historically significant churches, as that term is defined in the statute. The funds are used to rehabilitate the historic asset - not a religious institution.

Church window renovation, acting on representations that they were in significant disrepair. The funds are available and ready to be used once the Church executes the Letter Agreement and the Preservation Restriction. Even though Town Meeting appropriated the funds in April, the plaintiffs waited until now to file suit. The public interest favors the timely restoration of the Church windows, as approved by the voters.

E. Conclusion

For all the reasons set out in this memorandum, the motion for a preliminary injunction should be denied.

TOWN OF OAK BLUFFS and
OAK BLUFFS COMMUNITY PRESERVATION COMMITTEE

By their attorneys,

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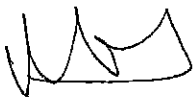
Dated: November 6, 2013

5308-002/Second Oppo to Pls Mot PI.doc

CERTIFICATE OF SERVICE

I, Michael A. Goldsmith, hereby certify that I will hand-deliver a copy of the within Opposition Of The Municipal Defendants To Plaintiff's Motion For A Preliminary Injunction at the hearing to be conducted on Wednesday, November 6, 2013, at the Bristol Superior Court, New Bedford, MA, to any plaintiffs who appear, none provided mailing addresses with the short order of notice, which was delivered to my office on Monday, November 4, 2013:



Michael A. Goldsmith

Massachusetts Department of Revenue *Division of Local Services*
Alan LeBovidge, Commissioner Gerard D. Perry, Deputy Commissioner

February 9, 2007

[redacted]

Re: Community Preservation Act
Our File No. 2006-230

Dear [redacted]

This is in reply to your letter questioning certain appropriations from the Community Preservation Fund that were voted by the Town of Norfolk at its 2006 annual meeting. You question whether Community Preservation Act (CPA) monies may be used to fund these projects. G.L. c. 44B. We apologize for the delay in responding.

The CPA is relatively new and as is usually the case, there are many issues regarding its interpretation and application with respect to particular projects. Many of the questions are very fact specific so we generally defer to municipal counsel to advise about the appropriateness of any given expenditures. The reason is that under the law, all CPA spending decisions are made locally and we do not have the power to invalidate any municipal appropriations from CPA fund monies (or any other municipal financing source). From the general information presented, however, the projects in question would appear to come within the purposes of the statute.

Monies in the Community Preservation Fund may be used "for the acquisition, creation and preservation of open space; for the acquisition, preservation, **rehabilitation and restoration** of historic resources; for the acquisition, **creation** and **preservation** of land for recreational use; for the **acquisition, creation**, preservation and **support** of community housing; and for the rehabilitation or restoration of open space, land for recreational use and community housing that is acquired or created" under the act. (Emphasis added). G.L. c. 44B, §5(b)(2).

The first appropriation you question is to assist town residents and employees make a down payment on a home within the town. We understand there are various programs that provide such financial support to low and moderate-income persons seeking to own a home and in exchange, the municipality acquires an affordable housing restriction on the unit. As a result, the home becomes part of the community's affordable housing stock. This type of program would appear to be eligible for CPA funding since acquisition of property interests for affordable housing – in this case an affordable housing restriction – is clearly an allowable

purpose. Even if a restriction is not being acquired under this program, the statute allows monies to be used in support of affordable housing. Support is not defined in the statute, but it could include a broad range of programs to provide affordable housing. We think the statute contemplates that these programs result in additional affordable housing units in the community, but some have interpreted it to allow support or assistance to individuals needing affordable housing as well.

The second appropriation is for the restoration of an historic building owned by the Norfolk Grange, which is a private, non-profit organization. Rehabilitation or restoration of historic properties is an allowable purpose. There is nothing in the CPA that prohibits the use of funds for this project simply because the property is privately owned. However, under the Anti-aid Amendment to the Massachusetts Constitution, public funds cannot be given or loaned to private individuals or organizations for their private purposes. Mass. Const. Amend. Article 46 §2, as amended by Article 103. Any expenditure must be to advance a public purpose. The preservation of historic assets is generally understood to have legitimate public purposes. Both the federal and state governments, for example, have various historic grant programs, which include grants to non-profit organizations. www.sec.state.ma.us/mhc/mhcidx.htm. Typically, these programs result in the public acquiring an historic preservation restriction or receiving some other benefit to ensure that the grant is for public rather than private purposes. For example, in an anti-aid case involving state monies given to a non-profit group to rehabilitate the U.S.S. Massachusetts for use as a memorial and museum, the Supreme Judicial Court found the expenditure was for a public purpose because the property would be open to the public as a place to contemplate and honor those who died in the service of their country and to educate school children, who were admitted free of charge, about history. *Helmes v. Commonwealth*, 406 Mass. 873. In the case of the Grange property, we understand the town will acquire an historic preservation restriction and the organization must use the funds received in exchange to finance the rehabilitation. In other words, it appears 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.

The last appropriation was to create and preserve recreational facilities at a town owned pond. From information provided, the Community Preservation Committee and Recreation Department sought the monies to restore the pond and beach area and to make it suitable for recreational purposes, such as swimming, picnicking and boating. Apparently, the pond was once used for swimming and fishing, but it was closed many years ago due to contamination from poor drainage in the area. You claim that the monies will actually be used to build a water treatment plant near the pond. We are obviously not in a position to evaluate that claim, although the $85,000 appropriated would not seem sufficient to build such a facility. In any event, given that the site is not currently used for recreational purposes, any expenditure to restore the pond and beach area would probably qualify as creation of a recreational asset.

Creation is not defined in the act, but its ordinary and generally understood meaning is bringing into being, causing to exist or production. American Heritage Dictionary 338 (2nd New College Edition 1985); Black's Law Dictionary 440 (4th ed. 1968). Creation could include a number of activities, such as a wholly new use, conversion from one use to another, or restriction of future use, that effectively cause property not used for recreational purposes to become a recreational asset. Even if the appropriation were for some sort of treatment facility or other improvement designed to prevent further contamination of the pond, it might possibly qualify as preservation, which the act defines as protection of property from injury, harm, or destruction.

If ten taxpayers believe particular expenditures are unlawful, they can bring suit to enjoin the municipality from spending those funds. G.L. c. 40, §53. Ultimately, the voters may consider whether they believe local officials are acting appropriately with respect to implementing the CPA, or carrying out any municipal responsibility.

I hope this information is helpful.

Very truly yours,

Kathleen Colleary, Chief
Bureau of Municipal Finance Law

KC

Attachment C

VERMONT SUPERIOR COURT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 329-6-16 Wncv

2016 JUL -1 P 4:43

Grant Taylor and Richard Scheiber,
Plaintiffs,

v.

Town of Cabot, The Cabot Community Association, Inc., and United Church of Cabot, Inc.,
Defendants.

Opinion and Order on Motion for Preliminary Injunction and Motion to Dismiss

Plaintiffs Grant Taylor and Richard Scheiber are residents, property owners, and taxpayers in the Town of Cabot. They seek an injunction preventing the Town from disbursing $10,000 of what they see as municipal funds to the United Church of Cabot, Inc. (UCC), which was approved by the voters at Town Meeting. The UCC owns and operates a historic church in Cabot Village, and the voters authorized the monies to make repairs to the church. Plaintiffs claim that the payment violates the Compelled Support Clause of the Vermont Constitution, Vt. Const. ch. I art. 3, and specifically do not rely on the federal Establishment Clause of the First Amendment. With the Complaint, they filed a motion for preliminary injunction seeking to maintain the status quo until this matter can be finally resolved. The Town argues that the claims should be dismissed because Plaintiffs lack standing in this case and that Plaintiffs are not entitled to preliminary injunctive relief.

On June 27, 2016, the Court held a hearing on the request for an injunction. Plaintiffs were present and were represented by Robert Gensburg, Esq. The Town was present and was represented by Daniel Richardson, Esq. The representatives of the remaining Defendants were also present. Neither party presented testimony at the hearing, but each offered documentary exhibits and stipulated to a number of facts. Based on the existing record, the Court makes the following determinations.

I. Factual Background

In 1986–1987, the United States Department of Housing and Urban Development (HUD) awarded the Town a $2,000,000 Urban Development Action Grant, a so-called "UDAG Grant." The Grant funded a loan to the Cabot Farmers' Co-Op to construct a warehouse. By 2003, the loan had been paid back to the Town. Pursuant to a Closeout Agreement with HUD, the Town retained the funds for uses consistent with HUD regulations and relevant provisions of the Housing and Community Development Act of 1974. The Town has kept these funds isolated from other municipal funds in what it used to call its UDAG Plan and now calls the Community Investment Fund of Cabot (CIFC). The CIFC consists exclusively of funds remaining from the original HUD grant. It includes no funds raised directly by the Town from local taxes.

The CIFC permits "local individuals and groups" to seek grants and other financial assistance from CIFC funds that are intended to correspond to broadly stated goals: to "[p]rotect and enhance the quality of life and character of the town;" to "[p]romote commercial development that is consistent with the scale and

character of the community;" to "[p]romote education; to ["i]mprove community infrastructure, facilities and services;" to "[e]nhance the local tax base by supporting projects and activities that serve to improve existing businesses and attract new ones:" and to "[p]reserve the fund so as to be able to continue to meet the needs of the community for many years to come."

Those who may apply for CIFC grants include "community groups, non-profits, civic organizations, fraternal organizations, . . . as well as such other committees, agencies, organizations or commissions that are created by the Town of Cabot, Village of Cabot or the Cabot School District. Eligible applicants include the Recreation Committee, the Conservation Committee, the Cemetery Commission, the Library Trustees, the Cabot Historical Society, et[] al." An applicant submits a grant proposal to a Committee appointed by the Selectboard. The Committee determines whether the proposal meets the CIFC's broadly stated goals. If approved, the question of whether to fund the grant is put to the voters to "be voted on by Australian ballot on Town Meeting Day." The CIFC specifically provides: "The submission of the grant proposal to the voters does not constitute an endorsement of any grant proposal by the Committee. Each voter must decide if a particular grant proposal is a worthwhile use of [CIFC] funds, and cast their vote accordingly."

In 2014, the UCC had a consultant prepare a "Conditions Assessment" report that revealed that the church was in substantial need of repair. By the following year, it had spent significantly on those repairs but was in need of more funds. It

eventually applied for a $10,000 CIFC grant. The Committee approved the request. The 2016 ballot at Town Meeting included this as Article 17: "Shall the voters of the Town of Cabot approve the sum of ten thousand dollars ($10,000) from UDAG funds in 2016 for the Cabot Community Association (CCA) for the purpose of repairing the steeple, stairwell and other interior sections in urgent need of repair at the United Church of Cabot."[1] This item was approved by the voters. The Defendants agreed at the hearing that the $10,000 amounted to a small portion of the total funds needed to repair the church.

The UCC is a place of worship. In its grant application it described its mission as follows: "*We seek to live as Christian disciples of Christ in the life of the Church and in the world and through inviting others into Christian discipleship in our community and in the world.*" The church has regular worship services and runs a Sunday School. It also makes its premises available for many nonsectarian community events and gatherings. Additionally, it is an important and historic building in the Town.

II. Standing

The Town acknowledges that municipal taxpayer standing is available in Vermont, but argues that it does not apply in this case. Plaintiffs do not assert standing on any other basis. In short, the Town argues as follows. Taxpayer

[1] The Town stipulated at the hearing on the motion that the CCA's exclusive function in this funding scheme is to receive the grant funds from the Town and deliver them to the UCC and that its function as such has no effect on the issues in this case.

standing is predicated on the municipality's expenditure of municipal tax revenues. The CIFC originated with funds that did not come from municipal tax revenues and has never been augmented with such revenues. Therefore, there is no basis for municipal taxpayer standing. Neither the parties nor the Court have found any authority addressing the issue of municipal taxpayer standing when the funds expended came from a source other than municipal tax revenues but are, nonetheless, controlled by the Town.

"Standing doctrine is fundamentally rooted in respect for the separation of powers of the independent branches of government." *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341 (1997) (noting at 340–41 that "[o]ne of the 'passive virtues' of the standing doctrine is to promote judicial restraint by limiting the occasions for judicial intervention into the political process"); *accord Parker v. Town of Milton*, 169 Vt. 74, 77 (1998).

The contemporary federal doctrine was described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560–61 (citations omitted). These are the constitutional limits on federal courts' jurisdiction. These federal standing requirements have been adopted in

Vermont. *Parker*, 169 Vt. at 77–78 (explaining that in *Hinesburg Sand & Gravel*, the Vermont Supreme Court adopted the standing test articulated in *Lujan*).

Generally, there is no federal taxpayer standing. In other words, a taxpayer does not suffer a cognizable injury for federal (and state) standing purposes because some portion of that taxpayer's taxes were expended (or future taxes will be increased) due to allegedly illegal or unconstitutional legislation. As the United States Supreme Court explained long ago:

> [The federal taxpayer's] interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained.

Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

The same rule has not been applied to the municipal taxpayer, however. *Id.* at 486 ("The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not

inappropriate. It is upheld by a large number of state cases and is the rule of this court.").

Municipal taxpayer standing is recognized in Vermont. *See, e.g., Cent. Vermont Pub. Serv. Corp. v. Town of Springfield*, 135 Vt. 436, 438 (1977) ("The basis of actions of this sort is not that any direct loss has been caused to the plaintiff, but that municipal assets have been improperly wasted. In Vermont, taxpayer's suits have long been recognized as appropriate vehicles for seeking relief from official action." (citation omitted)); *see also Baird v. City of Burlington*, 2016 VT 6, ¶ 21 ("Although taxpayer suits in Vermont are generally 'recognized as appropriate vehicles for seeking relief from official action,' to have standing a plaintiff must still demonstrate that she has either sustained some 'direct loss' or that municipal assets have been 'improperly wasted.'")

The Court is not persuaded by the Town's argument that there cannot be taxpayer standing in this case because the original source of CIFC funds did not come from municipal tax revenue. Regardless of where the funds came from initially, they cannot reasonably be characterized now as anything other than public, municipal funds. The grants are intended to be distributed, at least in part, to improve community infrastructure and to assist municipal governmental entities that, one can presume, otherwise might be seeking appropriations originating from tax revenues. For example, the music department of the Town school might seek a grant for a new piano that would otherwise be paid for directly through the school budget. Or, the Town's public works department could seek a grant, rather than a

budget increase, to buy a new snow plow to better maintain the roads. The grants are also intended to be distributed in manners that promote commercial development, improve current businesses, and attract new ones. These are, according to the CIFC, expressly intended to "enhance" the local tax base.

In the Court's view, there is no meaningful way to divorce CIFC funds from effects on municipal taxation and, consequently, the municipal taxpayer. Plaintiffs, as Cabot taxpayers, have an adequate interest in CIFC funds to support a cognizable injury for standing purposes when alleging their misuse.

There is a complementary reason that the Court believes that Plaintiffs have standing in this case. They are asserting a violation of the Compelled Support Clause of the Vermont Constitution, Vt. Const. ch. I art. 3. The analogous provision of the United States Constitution is the Establishment Clause of the First Amendment. Despite the otherwise "impenetrable barrier" against federal taxpayer standing, the United States Supreme Court specifically permits it in cases raising Establishment Clause challenges. *Flast v. Cohen*, 392 U.S. 83, 85 (1968). It is unnecessary to recite here the analysis that arrived at that result in *Flast*. The "*Flast* exception" has been heavily criticized for its deviation from traditional standing principles and was limited to exclude challenges to discretionary executive expenditures in *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 603, 608 (2007). Nevertheless, the *Flast* exception continues to permit federal taxpayer standing in Establishment Clause cases.

As the *Flast* Court itself noted: "Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Flast,* 392 U.S. at 103. A prominent treatise has explained this aspect of *Flast* as follows:

> The injury redressed by the *Flast* decision is not really the injury of tax payments. Instead, it is the sense of wrong that arises from unconstitutional acts of government. Only a theory that some constitutional rights deserve greater judicial solicitude than others can account for the *Flast* ruling that unconstitutional spending is an injury sufficient to confer standing with respect to some constitutional trespasses but not others. *The result is not taxpayer standing, but simply Establishment Clause standing.*

13B Charles Wright, *et al., Fed. Prac. & Proc. Juris.* § 3531.10.1 (3d ed.) (emphasis added). Justice Kennedy echoed this sentiment in his concurrence in *Hein*:

> The Court's decision in [*Flast*], and in later cases applying it, must be interpreted as respecting separation-of-powers principles but acknowledging as well that these principles, in some cases, must accommodate the First Amendment's Establishment Clause. The Clause expresses the Constitution's special concern that freedom of conscience not be compromised by government taxing and spending in support of religion. In my view the result reached in *Flast* is correct and should not be called into question.

Hein, 551 U.S. at 615–16 (Kennedy, J., concurring). Challenges under the Establishment Clause are unique for purposes of standing analysis.

Given the state of federal standing law, which would find standing in a case like this if a federal legislative expenditure were at issue, it would be remarkably discordant if the traditionally far more liberal municipal taxpayer standing were interpreted to arrive at the opposite result. The Court declines to so rule.

Accordingly, Plaintiffs have standing, and the Court may consider their claim for equitable relief.

III. Preliminary Injunction

Plaintiffs' motion for injunctive relief faces a high hurdle. "An injunction is an extraordinary remedy, the right to which must be clear." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000). Plaintiffs' request for preliminary injunctive relief requires the Court to consider: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." *In re J.G.*, 160 Vt. 250, 255 n.2 (1993). To establish irreparable harm, a party "must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (internal quotations omitted). In addition, the purported irreparable harm "must be shown to be actual and imminent, not remote or speculative." *Id.*

After considering the existing record and the arguments of both sides in light of those standards, the Court makes the following determinations.

A. Likelihood of Success

Plaintiffs claim that the appropriation to the UCC violates the Compelled Support Clause contained in Article 3 of the Vermont Constitution. Plaintiffs assert, and Defendants do not dispute, that they have sincerely held beliefs against the use of public funds to support religion and that the $10,000 appropriation to the

UCC offends their principles. Defendants counter that the simple fact that public monies are flowing to a church is not determinative of an Article 3 violation. Here, they contend, the funds are not being used to support religion but to repair an important building in the town that has multiple uses, only one of which is as a house of worship.

In full, Article 3 provides:

> That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, or of right can be *compelled to attend any religious worship, or erect or support any place of worship*, or maintain any minister, *contrary to the dictates of conscience*, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. Nevertheless, every sect or denomination of christians ought to observe the sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.

Vt. Const. ch. I, art. 3 (emphasis added.)

The seminal case construing Article 3 is *Chittenden Town School Dist. v. Dep't of Educ.*, 163 Vt. 310 (1999) [hereinafter *Chittenden*]. There, the Court engaged in a lengthy historical and textual analysis of Article 3 both in relation to the Establishment Clause of the United States Constitution and similarly worded constitutions in place in other states. In the end, the Court chose to develop its own jurisprudence regarding the Compelled Support Clause of the Vermont Constitution independent of that under the Establishment Clause. *See id.* at 323 (noting, *inter*

alia, that the First Amendment prohibits the establishment of religion while Article 3 guards against compelled support of religion).

Chittenden analyzed the constitutionality of a state program that provided tuition reimbursement for parents who chose to send their children to parochial schools in towns where there were no public schools. The Court ultimately concluded that the scheme did not pass constitutional muster because the monies provided to the sectarian schools would be used, in part, for religious instruction. *Id.* at 342-43.

In this case, each side takes comfort from different portions of the *Chittenden* ruling. Defendants point to the portion of the opinion finding that "Article 3 is not offended by mere compelled support for a place of worship unless the compelled support is for the 'worship' itself." *Id.* at 325. They assert that the appropriation for repairs does not support worship. Plaintiffs note the Court's analysis of the colonial-era Ministerial Act, and its conclusion that "tax support for houses of public worship" was consistently deemed by the Council of Censors to be inconsistent with Article 3. *Id.* at 330-31. They also argue that the monies here will be used to support worship by maintaining the infrastructure of a church.

The Court accepts that the "mere fact that public funds are expended to an institution operated by a religious enterprise does not establish the fact that the proceeds are used to support the religion professed by the recipient." *Vt. Educ. Buildings Financing Agency v. Mann*, 127 Vt. 262, 270-71 (1968) (internal quotations and citations omitted). For present purposes, it also accepts Defendants'

view that the same principle applies with regard to governmental payments made to a place of worship. *Chittenden*, 169 Vt. at 325.[2] Nonetheless, the Court concludes that the payments in this case run afoul of Article 3 for similar reasons as the program in *Chittenden*.

Even assuming that a town could create a program whereby public funds could be made available to repair portions of important community buildings – religious and non-religious alike – and that the program would have neutral and objective criteria to ensure that funds are not simply made available to the house of worship favored by a majority of the voters, to meet the demands of Article 3, no part of the allocation of money could be used to support religious "worship." *Chittenden*, 169 Vt. at 342-43. The payment in this case cannot meet that standard.

That conclusion is inescapable in light of the language of the Warning that was approved by the voters at Town meeting. There, the voters approved the payment of $10,000 to the UCC "for the purpose of repairing the steeple, stairwell and *other interior sections.*" (Emphasis added.). Assuming, *arguendo*, that

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[2] The *Mann, Swart v. S. Burlington Town Sch. Dist.*, 122 Vt. 177 (1961) and *Chittenden* decisions all involved educational institutions run by groups affiliated with religious entities. None involved an actual church. With no analysis, *Chittenden* suggested that the quoted doctrine from *Mann* would apply as well to payments made to a "house of worship." 169 Vt. at 325. While the *Chittenden* Court rejected the plaintiffs' attempt to attain lesser scrutiny for religious schools because it believed religious instruction and religious worship amounted to the same thing, *id.* at 343, it did not specifically analyze whether payments to a church might be viewed differently from payments to a school for Article 3 purposes. As this motion can be resolved even if governmental payments to a church and to a religious school implicate the same constitutional concerns, the Court has no occasion to analyze whether there may be a difference in kind between payments made directly to churches as opposed to those made to sectarian schools.

provision of funds for steeple and stairway repairs might be permitted under Article 3, the remaining catch-all provision of the Warning is fatally problematic. As a result of the open-ended nature of the Warning, the UCC would be able to use the funds to make repairs on any internal portions of the church, including the alter, the pulpit and similarly religious areas. Such work would directly and palpably service and support worship at the UCC and those who choose to worship at that church. Similar to the situation in *Chittenden*, the Warning has "no restrictions that prevent the use of public money to fund religious [worship]." *Id.* In the absence of such provisions, the apportionment of $10,000 to the UCC is simply not consistent with Article 3. *Cf. Mann*, 127 Vt. at 271 (upholding public bond program where there was "no suggestion that the cause of religion will be served or obstructed by the facilities to be constructed and financed").

The Complaint does not cite to and Plaintiffs expressly eschew reliance on the First Amendment's Establishment Clause of the United States Constitution. Nonetheless, the Town argues that Establishment Clause jurisprudence provides a useful gloss that should be applied to *Chittenden* in these circumstances. In briefing, the Town cited (without substantial analysis) *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009), as "affirming the use of public funds for historic preservation of churches under the First Amendment." The Town's Motion to Dismiss and Opposition to Preliminary Injunction 5 (filed June 24, 2016). At oral argument, the Town relied heavily on *American Atheists*, asserting that its analysis should guide the outcome of this case.

The thrust of the Town's argument is that *American Atheists* supports the proposition that spending public funds to assist a place of worship with historic preservation efforts does not violate the Establishment Clause and that is all the Town is doing here.

American Atheists is more complicated. There, the City of Detroit had undertaken a downtown revitalization program by which the City would contribute funds toward improvements to the exteriors (only) of buildings and their parking lots in a fixed, pre-defined zone. Any building in that zone, whether a place of worship or not, could be the subject of an application for funding. Funds would be awarded based on "neutral, secular criteria" that had nothing to do with whether the building was a church. *American Atheists*, 567 F.3d at 290. "That the program includes, rather than excludes, several churches among its many other recipients helps 'ensure neutrality, not threaten it.'" *Id.* Additionally, the program's facial neutrality did not mask any intent to advance "one religion or all religions generally" and that was not its primary effect. *Id.* at 290–91. On this basis, the Court found no violation of the Establishment Clause.

The key to *American Atheists* has nothing whatsoever to do with historic preservation or similar interests *per se*. The *ratio decidendi* is that a fully neutral and "carefully regulated," *id.* at 296, program that is open to everyone, operates with completely neutral criteria, and does not, in effect, advance or promote religion is not required by the Establishment Clause to exclude religious organizations from its benefits. *See id.* at 292 ("If a city may save the exterior of a church from a fire, it

is hard to understand why it cannot help that same church with peeling paint or tuckpointing—*at least when it provides the same benefit to all downtown buildings on the same terms*." (emphasis added); *see generally Ark Encounter, LLC v. Parkinson*, No. CV 15-13-GFVT, 2016 WL 310429 (E.D. Ky. Jan. 25, 2016) (using *American Atheists* to rationalize public funding of a religious amusement park based on Noah's Ark that includes religious instruction).

Indeed, in the absence of that type of regimented and neutral program, direct grants to religious institutions for construction or maintenance would plainly run afoul of Supreme Court precedent. *See, e.g., Comm. For Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 776-77 (1973) ("If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (plurality) (finding that public grant to religious school for construction of building to be put to non-sectarian uses and that allowed government to obtain return of funds if building was used for religious purposes within 20 years of grant violated Establishment Clause by placing a time limit on the return of such monies).

The Court need not decide whether *American Atheists* was rightly decided under the Establishment Clause, nor need it decide whether the sort of neutrally operated program that was at issue in *American Atheists* would survive review under the Compelled Support Clause, because that sort of program is not presented in this case. The CIFC is not predicated on neutral selection criteria. It is based on

very broad, aspirational "goals" that easily could encompass proposals with religious motivations. No evidence suggests that the Town's vetting committee is guided by any more neutral selection criteria. Then, regardless of how a grant proposal may become approved, the matter is simply placed on the ballot at Town Meeting where it is wholly subject to the whims of the voters. While the voters may be presumed to cast their votes in the best of good faith, they are completely unrestricted from exercising that good faith with religious motivations. The CIFC process is simply not analogous to the Detroit downtown revitalization program at issue in *American Atheists* and the coincidence of the Town's interest in historic preservation and Detroit's interests in aesthetics and revitalization is irrelevant. As a result, *Chittenden* obtains no additional sheen from *American Atheists*, at least in this case.

This factor weighs in favor of injunctive relief.

B. Irreparable Harm

Under federal law, violations of constitutional rights—especially those housed in the First Amendment—typically provide a sufficient showing of irreparable harm to justify injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the a*lleged* violation of a constitutional right that triggers a finding of irreparable harm") (emphasis in original); *Tolbert v. Koenigsmann*, No. 913CV1577LEKDEP, 2016 WL 3349317, at *3 (N.D.N.Y. June 15, 2016) ("The

alleged violation of a constitutional right generally satisfies a plaintiff's burden to demonstrate irreparable harm."); *Bloom v. O'Brien*, 841 F. Supp. 277 (D. Minn. 1993) (similar); see also 11A Charles Wright, Arthur Miller & Mary Kane, *Fed. Prac. & Proc. Civ.* § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary."). The Court sees no reason to view a violation of Article 3 of the Vermont Constitution with any less import.

Against this Defendants argue that this case is about a discrete sum of money, $10,000. They point out that, should Plaintiffs prevail, that money can be returned to the Town, and Plaintiffs will receive their legal remedy without need of an injunction. Of course, Defendants are correct that the availability of a certain damages remedy generally precludes the award of injunctive relief.[3] *See Sampson v. Murray*, 415 U.S. 61, 90–91 (1974). They are incorrect, however, in cabining the alleged harm in this case to the $10,000 figure.

Here, the Plaintiffs seek to limit governmental funding of a religious institution because it violates their principles. The Court has concluded that such support, in this instance, likely violates the Vermont Constitution. The parties

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[3] Additionally, irreparable harm can be established if the plaintiff's ability to collect a judgment is compromised because the defendant is insolvent or judgment proof. *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir.1994) ("[A] district court has authority to issue a preliminary injunction where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant. . . ."). There is no such evidence in this case.

have agreed that the payment to UCC would violate the sincerely held beliefs and conscience of the Plaintiffs. Allowing the UCC to benefit from governmental dollars during the pendency of this action would amount to an ongoing violation of our Constitution and an ongoing affront to the values held by Plaintiffs. Even if the $10,000 ultimately is returned to the Town, that sum would be inadequate to compensate Plaintiffs for their intangible constitutional injuries. *Accord Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 432 (D. Conn. 1982) ("monetary damages would be inadequate compensation for the additional legal injury from the underlying violation of the Establishment Clause"); *Libin v. Town of Greenwich*, 625 F. Supp. 393, 395 (D. Conn. 1985) (ongoing violation of Establishment Clause "cannot be remedied by an award of monetary damages"). In short, the case is about more than money, and the Court rejects Defendants' cramped view of the constitutional interests at stake.

This factor weighs in favor of injunctive relief.

C. The Potential Harm to Other Parties and the Public Interest

Defendants admitted a number of exhibits at the hearing but offered no testimony. The Court can discern from the exhibits that the UCC building is an important community gathering space and that it is in need of repairs. At hearing, counsel for the defense acknowledged that the $10,000 from the Town amounted to only a small portion of the funds needed to complete those repairs. Given the limited record, the Court cannot make any particular findings as to the actual

impact the withdrawal of the $10,000 may have on the repair project or on the continuing availability of the building for public use.

The Court can presume that those who voted for or support the use of the Town money for this purpose will be adversely impacted if there is a delay in providing the funds to the UCC. On the other hand, the Court can also presume that those who did not vote for or who do not support allocating funds to the UCC would be adversely affected if the Court allowed the monies to be disbursed.

More importantly, "injunctions protecting First Amendment freedoms are always in the public interest." *Texans for Free Enter. v. Texas Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)); *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *see also K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) ("enforcement of an unconstitutional law vindicates no public interest"). The Court believes the same is true with regard to the freedoms guaranteed by the Declaration of Rights set out in the Vermont Constitution.

These factors weigh in favor of injunctive relief.

IV. Conclusion

Plaintiffs do not contend and likely few would contest that the UCC is a vital and valued resource to the Town. It affords a holy space for worship and Sunday School. To its great credit, it also provides space for countless community events

and gatherings that benefit many. It also contributes mightily to the Town's historic architecture and character. Nothing in this opinion is meant to diminish those worthwhile contributions. Nonetheless, the Court must adhere to the tenets of Article 3, and, as drafted, the instant provision of public monies to the UCC lacks sufficient safeguards to ensure that those funds are used only for constitutional purposes.

Accordingly, in light of the foregoing, Plaintiffs' request for preliminary injunctive relief is granted. The Town of Cabot is hereby enjoined from providing the $10,000 payment to the UCC until further order of the Court. Defendants' motion to dismiss is denied.

Dated this 1st day of July, 2016, at Montpelier, Vermont.

Timothy B. Tomasi,
Superior Judge