COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, SS GEORGE CAPLAN, ET AL., Plaintiffs, v. TOWN OF ACTON, MASSACHUSETTS, Defendant.	SUPERIOR COURT C.A. NO. 1681CV01933 **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

The plain text of the Anti-Aid Amendment's prohibition against "aiding any church" bars the proposed grants. Cases interpreting the Amendment's more general prohibition against aid to a "religious undertaking" also foreclose the grants, because the grants would fund restoration of core facilities and religious imagery of active houses of worship. Unable to refute these decisive points, the Town relies on authorities that did not involve aid to churches or do not bind this Court. Plaintiffs' motion should be granted.

I. Plaintiffs are Likely to Prevail on the Merits.

A. The plain text of the Anti-Aid Amendment prohibits tax aid to "any church."

The Anti-Aid Amendment contains a General Prohibition — which bars tax aid to, among other institutions, schools and "religious undertakings" that are not under public control. It also contains a Religious Prohibition — which prohibits "aiding any church, religious denomination or society." The Town argues that the same three-part test should apply under both Prohibitions. Opp'n 11. In doing so, it cites no cases involving aid to churches, but instead relies on cases involving aid for the restoration of a battleship (*Helmes v. Commonwealth*, 406 Mass. 873 (1990)) and aid to private schools (*Commonwealth v. Sch. Comm. of Springfield*, 382 Mass. 665 (1981)).

Applying the General Prohibition's test to the Religious Prohibition would write the latter out of the State Constitution. The Constitution must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Carney v. Attorney Gen.*, 451 Mass. 803, 821 n.15 (2008) (citation omitted). "It is to be interpreted in the sense most obvious to the common intelligence . . . according to the familiar and approved usage of the language." *Finch v. Health Ins. Connector Auth.*, 459 Mass. 655, 665 (2011) (citation omitted).

The framers of the Anti-Aid Amendment must have intended that aid to churches be more strictly prohibited than aid to other kinds of institutions. Otherwise they would not have generally restricted aid to private institutions through a clause with exceptions, while specifically forbidding aid to churches through a separate clause with none.

The Religious Prohibition's language is unambiguous. It prohibits public "grants" "aiding any church." Such grants are exactly what is before the Court. The Court can decide the case on this ground alone.

B. The proposed grants also violate the General Prohibition.

If this Court applies the three-part test used to construe the General Prohibition, Plaintiffs still would prevail. The challenged grants serve religious purposes, substantially aid the two churches, and are politically divisive and financially wasteful.

1. A principal purpose of the grants is to aid the churches.

The Town argues that the purpose component of the three-part test looks at the purpose of the relevant statute, not the specific grant. Opp'n 12 n.6. But that is so only when a plaintiff challenges a statute. *See, e.g.*, *Springfield*, 382 Mass. at 676. When a plaintiff challenges a particular grant, the court examines the purpose of the grant. *See Helmes*, 406 Mass. at 877. Here, Plaintiffs challenge three specific grants, not the Community Preservation Act.

The Town argues that the purpose of the grants is historic preservation. Though that may be *a* purpose of the grants, the purpose inquiry recognizes that aid may have multiple purposes, and considers whether "one" of the "primary purposes" of the aid is impermissible. *See Op. of the Justices*, 401 Mass. 1201, 1208 (1987).[1] What is more, the purpose analysis looks beyond the "articulated purpose" of the funding (*Springfield*, 383 Mass. at 676) and considers its "anticipated functioning" (*Op. of the Justices*, 401 Mass. at 1206).

Here, Acton Congregational Church's grant application makes clear that a purpose of the grants is to enable the church to spend its own funds on "programs and personnel" that "offer[] the congregation what draws them to their church" (Ex. A at 2[2]) and to "help[] ACC continue to be a prominent and positive part of Acton here in the center of Town" (Ex. G at 6–7). The anticipated functioning of the grants likewise points to a religious purpose — the grants would support core facilities and religious imagery of the churches.

This case is thus unlike *Helmes*, in which the only purpose of the grant was to rehabilitate a historic battleship owned by a nonreligious, nonprofit institution whose sole mission was preserving the battleship. 406 Mass. at 877. The Department of Revenue opinion that the Town cites is similarly inapposite, for the grant there was also to a nonreligious institution. Bartl Aff., Ex. 28 at 14. In any event, agency interpretations of the Constitution are not entitled to court deference. *See Doe v. Sex Offender Registry Bd.*, 459 Mass. 603, 628–29 (2011); *see also Weld*

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[1] Although the Town is correct that Opinions of the Justices are not binding on the Supreme Judicial Court (Opp'n 15 n.7), the Court generally follows them when they are consistent with fully litigated decisions. *See Mayor v. Dist. Court*, 317 Mass. 106, 115–18 (1944). Indeed, the Court's opinions in fully litigated cases concerning the Anti-Aid Amendment have substantially relied on Opinions of the Justices interpreting the Amendment. *See Helmes*, 406 Mass. at 877; *Springfield*, 382 Mass. at 673–80; *Bloom v. Sch. Comm.*, 376 Mass. 35, 43 (1978).

[2] The Town apparently suggests that Plaintiffs should have submitted an affidavit describing the nature and sources of their exhibits. Opp'n 9 n.4. Plaintiffs do so now. *See* Weaver Aff.

for Governor v. Director, 407 Mass. 761, 770 (1990).

2. The challenged grants would substantially aid the churches.

Plaintiffs explained in their opening brief that the grants would substantially aid the churches by supporting the interiors of the church buildings and religious imagery in one of those buildings. Mem. 15. The Town fails to respond to this point, other than asking for authority to support this commonsense proposition. Opp'n 14.

There is plenty of such authority. A Vermont court recently enjoined a historic-preservation grant to a church, explaining that "repairs on any internal portions of the church . . . would directly and palpably support worship at the [church]." *Taylor v. Town of Cabot*, No. 329-6-16, at 14 (Vt. Super. Ct. July 1, 2016) (Opp'n, Att. C).[3] The Massachusetts Supreme Judicial Court has recognized that "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the [church's] religious worship." *Soc'y of Jesus v. Boston Landmarks Comm'n*, 409 Mass. 38, 42 (1990). Likewise, the United Church of Christ — with which both grantee churches are affiliated (Ex. E at 1; Ex. H) — attributes religious significance to all of a church's interior:

> We generally think of only the sanctuary as sacred space, but in fact the whole church — the children's rooms, the offices, even the hallways — tell[s] the story of the congregation. You can read architecture. It's a different "read" than a book, but if you take time to really look at and experience a place, you can read a building — and learn the story of the congregation, what they believe about God, themselves, other people.

Staff Reports, *Sacred Space: Looking at the world differently*, United Church of Christ (Oct. 31, 2001), http://bit.ly/2b4zgt4. And churches have historically used stained-glass windows — such as those funded by one of the grants here — to convey theological messages. *See, e.g.*, Jeffrey

[3] Plaintiffs learned of this decision after serving their opening brief but notified the Town of it before the Town served its opposition.

Wigelsworth, *Science and Technology in Medieval European Life* 39 (2006).

Plaintiffs also pointed out in their opening brief that the grants would free the churches' own funds for religious programming. Mem. 15. The Town contends that this is speculative (Opp'n 15), but one of the churches' own grant applications gave the need to preserve the church's own money for "programs and personnel" as a reason for seeking taxpayer assistance for building work. Ex. A at 2.

The Town contends that the churches are not receiving substantial aid because the Town is receiving historic-preservation restrictions in return. Opp'n 13. But the receipt of value by the government does not render public aid insubstantial: The Supreme Judicial Court has repeatedly struck down state programs substantially aiding private schools even though the state would have in return received valuable educational services, lessening the burden on the public schools. *See Op. of the Justices*, 357 Mass. 836, 845 (1970) (educational "emergency" did not render aid constitutional); *see also Op. of the Justices*, 401 Mass. at 1209; *Bloom v. Sch. Comm.*, 376 Mass. 35, 49–50 (1978); *Op. of the Justices*, 357 Mass. 846, 850 (1970). In any event, the Town presents no evidence that the historic-preservation restrictions can somehow be assigned values equal to the amount of the grants — if they can be valued at all.

Unable to refute what is plain — that funding substantial renovations to churches' buildings is substantial aid to those churches — the Town turns to a series of inapposite or nonbinding authorities. Opp'n 15–17. *Springfield* is quite different from this case because the funding there "d[id] not aid the private school in carrying out its essential function" and "d[id] not, in any way, support the on-going maintenance of private schools by lessening the financial burden of those who have elected a private school education." 382 Mass. at 681, 683. Rather, public schools were merely reimbursing private schools for providing special-education services

to public-school students that were not available at the public schools but were designed and closely monitored by public-school officials. *Id.* at 667–69. Here, the grants would aid the churches' performance of their essential religious functions, while lessening the financial burdens on church members.

The aid in *Attorney General v. Essex* — provision of busing to private-school students — was "a public safety measure . . . not entirely dissimilar from the provision for sewers, public ways, and fire and police protection," and hence "'quite remote'" from supporting any religious function. 387 Mass. 326, 333–34 (1982) (quoting *Bloom*, 376 Mass. at 47). *Hughes v. Town of Oak Bluffs* is a non-precedential superior-court decision, with no written opinion, concerning restoration work on a church that — unlike the substantial aid to building interiors and expressly religious items here — was limited to exterior windows that had no religious imagery. No. DUCV2013-00042, at 1 (Dukes Cty. Super. Ct. Nov. 19, 2013) (Opp'n, Att. B). And the DOR letter cited by the Town did not even take a position on whether historic-preservation grants to churches violate the Anti-Aid Amendment. *See* Bartl Aff., Ex. 29.[4]

The Town goes yet further afield by citing federal authorities that interpret the federal First Amendment's Establishment Clause. The Anti-Aid Amendment is "more stringent" (*Essex,* 387 Mass. at 332) and "'much more specific'" than the Establishment Clause — "[i]ts prohibition is 'emphatic and comprehensive'" (*Op. of the Justices*, 401 Mass. at 1203 n.4 (quoting *Op. of the Justices*, 357 Mass. at 841–42)). The Town's federal authorities also addressed facts drastically different from those here. In *American Atheists v. Detroit Downtown*

[4] *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550 (1979), approved public funding of legislative chaplains, consistently with the General Prohibition's exception for funding of a "religious undertaking" under public control. The case did not involve funding of any private religious institution.

Development Authority, for example, the aid was available to all buildings within a city section, was limited to building exteriors, did not pay for religious imagery, and was not "diver[ted]" "to further" any church's "religious mission." 567 F.3d 278, 281–82, 292–93 (6th Cir. 2009).

The historic-preservation funding to the Old North Church approved by a U.S. Department of Justice opinion went to a nonreligious nonprofit organization separate from the church's congregation; the church building was "one of America's most cherished landmarks" because of its pivotal role in the Revolutionary War; the building principally served as a living historical museum for the public; and the nonprofit managed the building's historical programs and preservation. Bartl Aff., Ex. 30 at 97–99. Here, the grants would go directly to churches, not secular nonprofits. And while the churches here do have some historic significance, they are not listed on the national or state historic registers, but are merely contributors to historic districts identified on the Massachusetts Historical Commission's Massachusetts Cultural Resource Information System Inventory. *See* Bartl Aff., ¶¶ 9–15, Exs. 2–11.[5]

Finally, even if federal authorities were to be considered, the grants at issue would not meet federal constitutional requirements. The U.S. Supreme Court has held that it is unconstitutional for governments to subsidize construction or maintenance of a religious institution's buildings if the buildings are used for religious activities. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774–80 (1973); *Tilton v. Richardson*, 403 U.S. 672, 683–84 (1971); *accord Cmty. House v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007).

3. The grants are the type of spending that the Anti-Aid Amendment was intended to prohibit.

The Town has no solid answer to Plaintiffs' point that public funding of these churches

[5] *Taunton Eastern Little League v. City of Taunton*, 389 Mass. 719 (1983) — a case about Beano licensing, not funding of a church — also interpreted only the federal Establishment Clause.

would contravene the purposes of the Anti-Aid Amendment. Plaintiffs explained in their opening brief that the Amendment's principal purpose was to prevent "aid to sectarian institutions" (*Springfield*, 382 Mass. at 683), yet the Town leads its arguments on this issue with *Helmes*, 406 Mass. 873, a case involving funding of a nonreligious nonprofit. Opp'n 18.

Plaintiffs also explained that the Anti-Aid Amendment was intended to prevent "politically divisive" spending. *Springfield*, 382 Mass. at 683. The Town argues that Community Preservation grant awards are guided by neutral criteria (Opp'n 16 n.18), but the criteria are vague and discretionary (*see* Bartl Aff., Ex. 13 at 27), and the grants must ultimately be approved by elected officials and a vote of Town citizens (*see* Ex. J at 77–78). The Vermont court in *Taylor* concluded that a similar award process (Opp'n, Att. C, at 2–4) supported striking down a historic-preservation grant to a church: "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" (*id.* at 17). The funding process here is quite different from the one in *Springfield*, where "a detailed [administrative] review and appeal process" ensured that "professional and personal checks and balances, not political pressures, determine how the public money will be allocated." 382 Mass. at 683. It is even further afield from *Essex*, where a statute required that private-school students receive the same transportation services as public-school students, leaving no room for discretionary decisions at all. 387 Mass. at 329, 335.

II. The Public Interest Supports a Preliminary Injunction.

The Town contends that a preliminary injunction would harm the public interest by allegedly jeopardizing all Community Preservation funding to private entities. Opp'n 19–20. But the public-interest analysis only considers the impact of a *preliminary* injunction (*see, e.g.*, *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 94 (1984)), and whatever impact this case may

have on other funding will be determined by its ultimate resolution.

In any event, Plaintiffs are challenging only the three specific grants here. Plaintiffs are not challenging Community Preservation funding of nonreligious institutions, and explain that the Anti-Aid Amendment limits aid to churches more strictly than aid to secular institutions (*see supra* § I(A)). Nor are Plaintiffs asking the Court to hold that a historic church building that is no longer used for religious activities cannot be restored with public funds. And this case does not present the question whether historic-preservation funding may be awarded to churches if its use is limited to exterior facades and nonreligious imagery.

In addition, if the grants are unconstitutional, then enjoining them is in the public interest, for there is a "strong public interest in protecting constitutional rights." *Jaykay-Boston, Inc. v. City of Boston*, 9 Mass. L. Rptr. 551, 1999 WL 65655, at *4 (Mass. Super. Feb. 3, 1999). What is more, Acton has not asserted that merely delaying the restoration work on the churches would harm the public interest. *See id.* (public interest not harmed where preliminary injunction would merely delay goals desired by defendant until and unless defendant prevails on merits).

III. The Court Should Not Require an Injunction Bond, Much Less a $250,000 One.

The Court should waive the requirement of an injunction bond. A court has discretion to do so (*Am. Circular Loom Co. v. Wilson*, 198 Mass. 182, 211 (1908); *Herman v. Home Depot, Inc.*, 2001 Mass. App. Div. 132, 2001 WL 705725, at *5 (Dist. Ct. 2001)) and should where, as here, plaintiffs are seeking to enforce constitutional rights (*see I.P. Lund Trading ApS v. Kohler Co.*, 11 F. Supp. 2d 127, 135 n.12 (D. Mass.), *vacated in part on other grounds*, 163 F.3d 27 (1st Cir. 1998); *Ward v. New York*, 291 F. Supp. 2d 188, 211 (W.D.N.Y. 2003)).

But if the Court does require a bond, it should reject the Town's request for a $250,000 security, which is based on the attorney's fees the Town anticipates incurring in attempting to

overturn an injunction. Opp'n 20. The items recoverable out of an injunction bond "usually [do] not includ[e] attorneys' fees." *O'Day v. Theran*, 7 Mass. App. Ct. 622, 625 (1979); *see also Lawyers' Mortg. Inv. Corp. v. Paramount Laundries*, 287 Mass. 357, 362 (1934) ("denial of counsel fees as damages for breach of the injunction bond" was proper). Allowing the Town to recover attorney's fees through an injunction bond would circumvent the Massachusetts Civil Rights Act, which permits plaintiffs but not defendants to recover attorney's fees in suits alleging constitutional violations (*Bailey v. Shriberg*, 31 Mass. App. Ct. 277, 281 (1991); Mass. Gen. Laws Ann. ch. 12, § 11I), as well as the general rule that each litigant should bear their own fees except in limited circumstances, such as statutory or contractual authorization (*e.g.*, *Fuss v. Fuss*, 372 Mass. 64, 70 (1977)). In *Financial Acceptance Corp. v. Garvey*, 9 Mass. App. Ct. 94, 97 (1980), cited by the Town, the payment of attorney's fees out of a bond appeared to be based on an underlying contractual agreement, but there is no such contract here.

As the Town has not argued that it would suffer any damages other than attorney's fees as a result of an injunction, if a bond is required, it should be nominal.[6]

Conclusion

For the foregoing reasons, the Court should preliminarily enjoin the grants.

Date: August 12, 2016

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[6] Acton's footnoted suggestion (Opp'n 7 n.2) that Plaintiffs may lack standing "[t]o the extent that" the Town may have already become obligated to pay the grants is refuted by *Andrews v. City of Springfield*, 75 Mass. App. Ct. 678, 681–82 (2009), which holds that taxpayers have standing under the Ten Taxpayer Statute when the defendant municipality has not yet "expended" the "money" at issue, even if the municipality has already "incurred an obligation" to spend the money.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served on August 12, 2016 upon the attorneys of record for defendant Town of Acton by email:

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