COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Appeals Court No. 2016-P-1675

GEORGE CAPLAN, et al.
Appellants

v.

TOWN OF ACTON
Appellee

Appeal from the Superior Court of Middlesex County

APPELLANTS' BRIEF

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Statement of Issues Presented for Review

1. Do the Town of Acton's two proposed grants totaling more than $100,000 to the Acton Congregational Church violate the Anti-Aid Amendment's prohibition against the "use of public money . . . for the purpose of . . . maintaining or aiding any church . . ."?

2. Did the trial court misapply the three-factor test set forth in *Helmes v. Commonwealth*, 406 Mass. 873 (1990), in determining whether the grants of public funds for the maintenance of a church comply with the Anti-Aid Amendment?

3. Did the trial court err in denying Appellants' requests for discovery into the purpose of the two proposed grants and the assistance that they would confer on the Church?

Statement of the Case

Nature of the Case

Appellants, 13 taxpaying residents of Defendant Town of Acton ("Taxpayers"),[1] appeal from an order entered by the Honorable Leila R. Kern of the Superior Court of Middlesex County denying Taxpayers' motion for a preliminary injunction to enjoin the Town's disbursement of two proposed grants under

[1] Taxpayers are: George Caplan, Jim Conboy, G. Stodel Friedman, Daniel Gilfix, Maria Greene, Jesse Levine, Dave Lunger, Allen Nitschelm, Scott Smyers, William Alstrom, Jennifer Brown, William Brown, and David Caplan.

Massachusetts's Community Preservation Act of $100,737 to Acton Congregational Church (the "Proposed Grants"). JA VIII:82-85.[2] The Town approved the use of this money to refurbish stained-glass windows with religious imagery, and to make other repairs that would improve the condition of the Church for its congregants.

The Anti-Aid Amendment to the Massachusetts Constitution prohibits the "use of public money . . . for the purpose of founding, maintaining or aiding any church . . ." Mass. Const. amend. Art. XVIII, § 2 (as amended by arts. XLVI and CIII). The Proposed Grants provide public money for maintaining the Church. Neither the Supreme Judicial Court nor this Court has ever interpreted the Anti-Aid Amendment to permit this kind of direct public funding of an active house of worship. The Superior Court elided this clear Constitutional prohibition by applying a balancing test developed by the Supreme Judicial Court for funding of private charitable and nonprofit organizations that are not houses of worship. It compounded the error by applying the test to the CPA rather than to the challenged grants made by the Town.

[2] Consistent with Massachusetts Appellate Procedure Rule 18, citations are to the multi-volume joint record appendix ("JA") containing designations agreed upon by the parties. Citations include the JA volume and page number (*e.g.*, VII:3).

If allowed to stand, this approach would mean that as long as a statute does not on its face violate the Anti-Aid Amendment but instead delegates funding decisions to state agencies or smaller units of government, public money may be used to fund religious institutions—not just in this instance, but regularly. That interpretation would strip the Anti-Aid Amendment of any real meaning or effect. This Court should reverse the Superior Court's Order to ensure that the Anti-Aid Amendment remains the bar against public support of religious activity that it was intended and the Courts of the Commonwealth have always recognized it to be.

Course of Proceedings

On July 7, 2016, Taxpayers filed *George Caplan, et al. v. Town of Acton, Massachusetts*, C.A. No. 1681CV01933, in the Superior Court of Middlesex County under the Ten Taxpayer Statute (Mass. Gen. Laws Ann. Ch. 40, § 53), seeking a declaration that the Proposed Grants violate the Anti-Aid Amendment and an injunction prohibiting the disbursements. JA I:15-18. On August 15, Taxpayers filed a motion for preliminary injunction, the Town's opposition, and Taxpayers' reply. JA I:85-176; vols. II-VII. The Town later filed a sur-reply. JA VIII:75-81.

Disposition in Court Below

After oral argument on September 14, 2016, Judge Kern issued the Order denying Taxpayers' motion, ruling that the Community Preservation Act is constitutional; the purpose of the Proposed Grants under that Act is historic preservation; and the Grants are not the kind of spending that the Anti-Aid Amendment was enacted to prevent. JA VIII:82-85 (Order), 86-156 (Tr. of oral argument).

At the oral argument, Judge Kern also granted the Town's motion for a protective order, thereby denying Taxpayers discovery from the Town and the Church regarding the purpose of the Proposed Grants and the substantial assistance that the grants would confer on the Church. The trial court's conclusions regarding the purpose and impact of the Proposed Grants were central to its denial of Taxpayers' motion for a preliminary injunction. The Order is stayed by agreement of the parties pending appellate review. *See Caplan v. Town of Acton*, Plaintiffs' Application for Direct Review in the Supreme Judicial Court (Jan. 27, 2017). Taxpayers applied for direct review in the Supreme Judicial Court on January 27, 2017. *Id.*

Statement of the Facts[3]

[3] These facts derive from the cited documents and are undisputed.

Acton Congregational Church owns and occupies a building at 12 Concord Road, which it calls "the Evangelical Church." JA VII:47. It uses the Evangelical Church for worship and religious education activities. *See, e.g.*, JA VII:34-40; *see also* JA VII:90 (Acton Historical Commission document describing both "present" and "original" use of the building as "religious"). Acton Congregational Church describes its mission as follows:

> The mission of Acton Congregational Church, which it shares with the Church Universal, is to preach and teach the good news of the salvation that was secured for us at great cost through the life, death, and resurrection of Jesus. The church encourages each individual to accept the gift of Christ and to respond to God's love by taking part in worship, ministry to one another, and the Christian nurture of people of all ages. With the guidance of the Holy Spirit, we are called as servants of Christ to live our faith in our daily lives and to reach out to people of this community and the world with love, care, and concern for both their physical and spiritual needs.

JA VII:41-43.

Taxpayers' lawsuit challenges the Town's intended grants to the Church under the Community Preservation Act (CPA).[4] Mass. Gen. Laws Ann. Ch. 44B, § 2. The CPA provides public funding to municipalities for, among

[4] The complaint also references a proposed grant of $15,000 to South Acton Congregational Church. The Town's counsel has informed Taxpayers' counsel that South Acton Congregational Church has withdrawn its application for that grant, thereby mooting that portion of the lawsuit.

other things, "the acquisition, creation and preservation of historic resources." *Id.* Towns that participate in the program must set up a Community Preservation Fund, which is funded through a combination of disbursements from a state-administered trust fund and a surcharge on local property taxes. *Id.* §§ 3, 7, 10. Each town administers its preservation funds through a Community Preservation Committee, which makes recommendations that must be approved by the town's government. *Id.* § 5.

In November 2015, Acton Congregational Church submitted two grant applications to the Acton Community Preservation Committee. In its cover letter, the Church explained that it seeks public funds to make up for declining membership and contributions that are inadequate to meet the Church's goals in serving its congregation:

> As you may know, mainstream churches have not been growing for years, and the financial strain is significant. ACC has weathered the storm better than many churches, but the reality is that we have had to cut programs and personnel. The cuts can further exacerbate the financial problem *by not offering the congregation what draws them to their church*. With that in mind, the long list of maintenance and capital improvement projects get delayed before we cut programs, but there are many things that we've had to fix.

JA VII:33 (emphasis added).

The "Master Plan" Application

Acton Congregational Church's first application was for $49,500 for a "Master Plan for Historic Preservation of the Evangelical Church, John Fletcher House and Abner Hosmer House." JA VII:44-106. None of these buildings are listed on the national or state historic registers; the Town describes them as "contributors" to historic districts. JA II:6. The application explains that the Evangelical Church "shows the signs of 170+ years of wear":

> In the sanctuary building, this is evident in the bell tower, stained glass windows, and the exterior building envelope (windows, doors, siding, and roof). Insufficient building insulation and leaky roofs and walls have caused extensive ceiling and wall damage over a number of years. These conditions will continue to threaten extensive damage to the interior of the building until they are corrected.

JA VII:49.

"As part of the effort to restore and protect" the Evangelical Church building and two rental properties owned by the Church, the Church "propose[d] to hire 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 future generations." JA VII:46.

In its cover letter, the Church said that "[t]he Master Plan will be used not only for further CPC applications, but also to apply for other local, state

and federal funding." JA VII:32. In other words, the Master Plan is intended to be a publicly funded first step toward obtaining more public funding for repairs, refurbishment, and improvements to the Church. The total cost of the Master Plan is $55,000; Acton Congregational Church requested $49,500 of that amount from the Town. JA VII:46.

The Stained-Glass-Window Application

Acton Congregational Church's second application was for a $41,000 grant to pay for "Evangelical Church Stained Glass Window Preservation." JA VII:107-44. The funds would be spent on improvements to the eight "major stained glass windows of the [Church's] sanctuary building." JA VII:110, 111. According to the application, the stained-glass windows are "an integral part" of the Evangelical Church. JA VII:114. The improvements would include "replac[ing] missing or broken pieces of glass" and providing new sealing and glazing for the glass. JA VII:109.

The windows are currently covered by "cloudy" exterior plexiglass, so "the beauty of the glass cannot be appreciated outside of the church." *Id.* The new sealing and glazing would provide "complete transparency to the beauty of the stained glass." JA VII:114. The application explains that CPA "funding of the stabilization of the stained glass windows of" the

Evangelical Church "also helps ACC continue to be a prominent and positive part of Acton here in the center of Town." JA VII:114-15.

According to the Church, "[t]he most prominent stained glass window, which is visible from Concord Road . . . is a double window which depicts Jesus and a kneeling woman." JA VII:108, 110. Another stained-glass window includes a cross and the hymnal phrase "Rock of Ages Cleft for Me." JA VII:121. Two stained-glass windows are described in the application as "Altar Windows." JA VII:120. The desired improvements would thus enhance and make more visible the religious messages of the windows, both within and outside the Church.

The Church requested $41,000 of the $45,600 projected total cost of the work. JA VII:109.

Town Approval of the Church's Two Applications

On February 11, 2016, the Town's Community Preservation Committee recommended the Church's two applications for CPA funding. At the April 4 Annual Town Meeting, voters approved appropriations to the Church of $100,737.[5] JA VII:157.[6]

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[5] The Town approved $49,500 as requested for the Master Plan project and $51,237 (almost 25% more than the $41,000 requested) for the stained-glass project.

[6] The Town Warrant incorrectly stated that the three buildings of the Acton Congregational Church are listed on the National Register of Historic Places. JA VII:162.

Standard of Review

The trial court's "conclusions of law are subject to broad review and will be reversed if incorrect." *Packaging Indus. Group, Inc. v. Cheney*, 308 Mass. 609, 616 (1980).

Argument

The Superior Court approved something that neither the Supreme Judicial Court nor this Court has ever sanctioned: the grant of public funds to an active house of worship.

The Anti-Aid Amendment prohibits the "use of public money . . . for the purpose of . . . maintaining or aiding any church," full stop. The trial court should have enjoined the Proposed Grants based on this clear constitutional mandate not to aid or maintain churches using public funds. Instead, the court applied a balancing test developed by the Supreme Judicial Court under entirely different circumstances than direct aid to a church. *Helmes v. Commonwealth*, 406 Mass. 873 (1990) (money to repair battleship); *Commonwealth v. Sch. Comm. of Springfield*, 382 Mass. 665 (1981) (funds to educate special needs students).

Even if the *Helmes* guidelines should apply to direct aid to houses of worship, the trial court still erred in how it applied them. First, it applied the guidelines to the State's Community Preservation Act,

rather than to the Proposed Grants. Second, if the guidelines are applied to the Proposed Grants, the result is inescapable that they violate the Anti-Aid Amendment because (1) a primary purpose is to aid the Church; (2) the $100,000 in Proposed Grants would "substantially aid" the Church; and (3) direct aid to a church is the kind of sectarian spending that the Anti-Aid Amendment was enacted to prevent.

Finally, the trial court denied Taxpayers' requests for discovery into Acton's improper purpose in granting funds to the Church and the resulting substantial aid to the Church.

I. THE ANTI-AID AMENDMENT EXPRESSLY PROHIBITS PUBLIC FUNDING OF CHURCHES

A. The Plain Language of the Anti-Aid Amendment Prohibits the Proposed Grants

The Anti-Aid Amendment provides in pertinent part:

> No grant, appropriation or use of public money . . . 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 . . . and no such grant, appropriation or use of public money . . . shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

Mass. Const. amend. art. XVIII, § 2 (as amended by arts. XLVI and CIII).

The original version of the Amendment, passed in 1855, focused solely on public support for private religious schools. *Bloom v. Sch. Comm. of Springfield*, 376 Mass. 35, 39 (1978). In 1918, the Amendment was substantially modified to include, among other things, this express prohibition: "no . . . grant, appropriation or use of public money . . . shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society." *Id.* at 40 n.10.

Neither the Supreme Judicial Court nor this Court has ever before considered whether this prohibition applies to public funds paid to a house of worship—perhaps because the prohibition is so obvious. The Proposed Grants would indisputably "maintain[] or aid[]" Acton Congregational Church by taxing Taxpayers "to support the religious institutions of others." *Id.* at 40. The Master-Plan grant would support the Church as a whole, funding a comprehensive study of "all the needs of [the] building" and a comprehensive plan to make the needed improvements. JA VII:46, 49, 57. The Stained-Glass-Window grant would improve the stained-glass windows in the Church's sanctuary—not just maintaining "an integral part" of the Evangelical Church's

sanctuary, *see* JA VII:114, but also making the windows' expressly religious imagery, including a depiction of Jesus, much more visible to passersby, *see* JA VII: 108-10, 114, 119, 121.

The Church's cover letter to its grant applications is a candid plea for public financial support for its efforts to recruit and serve congregants. The letter explains that because of "financial strain," the Church has "had to cut programs and personnel," and those "cuts can further exacerbate the financial problem by not offering the congregation what draws them to *their church*." JA VII:33. The letter adds: "With that in mind, the long list of maintenance and capital improvement projects get delayed before we cut programs, but there are many things that we've had to fix." *Id.*

Acton Congregational Church, like most active houses of worship, faces difficult choices: Should it spend its limited dollars on worship services, educational activities, programs, clergy and other staff, or physical facilities? Instead of making these choices, the Church has turned to the Town for aid.

The Town's agreement to provide that aid is precisely what the Anti-Aid Amendment prohibits. Proponents of the 1918 modifications to the Amendment, which this Court has called "sweeping in its terms":

> urged that liberty of conscience was infringed whenever a citizen was taxed to support the

> religious institutions of others; that the churches would benefit in independence and dignity by not relying on governmental support; and, more generally or colloquially, that to promote civic harmony the irritating question of religion should be removed from politics as far as possible, and with it the unseemly and potentially dangerous scramble of religious institutions for public funds in ever-increasing amounts.

Bloom, 376 Mass. at 39 (citing 1 *Debates in the Massachusetts Constitutional Convention, 1917-1918*, at 68, 74-79, 161-164 (1919)). As explained below, the Proposed Grants violate all three of the principles that the Anti-Aid Amendment protects.

B. The Proposed Grants Violate Taxpayers' Liberty of Conscience

Taxpayers have the right not to have their tax dollars spent in support of a church not of their choosing. Such compulsion would violate the "liberty of conscience" that the Anti-Aid Amendment was enacted to protect. Every member of the public may choose to support the Church, or any other house or worship, through personal contributions of money or other resources. Under the Anti-Aid Amendment, these Taxpayers are entitled to choose not to. These Proposed Grants violate that right.

C. The Proposed Grants Threaten the Independence of Churches

The framers of the Anti-Aid Amendment believed that "churches would benefit in independence and dignity by

not relying on governmental support." *Bloom*, 376 Mass. at 39. Public support comes with public oversight. Churches that receive public money not only may become dependent on public funding for their survival, but also may become subject to intrusive governmental inquiries about how they spend their funds. No church should have to respond to inquiries from government officials about how it spends its money. Such inquiries, in turn, may embroil governmental officials in improper judgments about religious matters, such as whether the refurbishments elected by the Church truly serve the public objectives of the CPA, or instead solely benefit congregants' worship experience.

The independence of churches from government funding protects against erosion of another important value: "Reliance on government funding threatens a particular far-reaching religious task via the temptation to mute the prophetic obligation to call the government to account." David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 HARV. L. REV. 1353, 1368 (2003).

> Important strands in both Jewish and Christian thought see this prophetic mission as requiring that religious communities "speak truth to power"—that is, confront political and economic powers when those power engage in unjust actions and promote unjust policies . . . . The ability of institutions to speak truth to power depends

> on the autonomy and independence that funding threatens.

Id. The plain language of the Amendment forbids funding of active houses of worship by the "powers" that their religious traditions encourage them to "speak truth" to.

D. The Proposed Grants Encourage Churches to Compete for Public Funds

The Anti-Aid Amendment was intended also to prevent "politically divisive" governmental spending. The Amendment's framers believed that "to promote civic harmony the irritating question of religion should be removed from politics as far as possible, and with it the unseemly and potentially dangerous scramble of religious institutions for public funds in ever-increasing amounts." *Bloom*, 376 Mass. at 39.

In Acton, that scramble is on. Before the 2016 grants to Acton Congregational Church, in 2013 and 2014, the Town funded four grants totaling $130,063 to West Acton Baptist Church in 2013 and 2014. JA VII:175, 187. So today, the houses of worship and faith communities are in competition with each other for shares of state largess—an unconstitutional and unseemly race to convince Town officials and residents about which church is most worthy of state support.

Moreover, the criteria purportedly applied by the Town are so vague and discretionary, *see* JA III:51, that they invite the intrusion of religious biases into the

decision, even more so because town officials' recommendations must ultimately be approved by a vote of the citizenry, *see* JA VII:162-63. In *Taylor v. Town of Cabot*, a Vermont court concluded that a similar award process warranted striking down a historic-preservation grant to a church, explaining: "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." JA I:172. Here, the Church's reference in its cover letter to the financial strain on "mainstream" churches is a faint but troubling implication that the Church's self-description as a "mainstream" church—whatever that means—entitles it to better consideration than a "non-mainstream" church.

The Amendment helps to remove "the irritating question of religion . . . from politics" by avoiding another possible source of conflict among religious groups. Permitting churches to compete for historic preservation funding under the CPA unavoidably creates a deep divide among religious groups based on how long they have been around. Some groups inhabit the historic buildings of their congregational ancestors. Others are newly established and inhabit newer and perhaps less grand facilities. On the trial court's view, public funds would be available to some religious groups, especially established faiths and churches, but not to

newer churches and denominations—leading to inevitable community friction.

E. Applying *Helmes* To Churches Strips This Plain Language Prohibition of Any Meaning or Effect

Rather than enforce the plain language prohibition, the trial court was "guided by the three factors outlined in *Helmes v. Commonwealth*, 406 Mass. 873, 876 (1990)." JA VIII:83. *Helmes* involved the State's funding through a charitable corporation of the rehabilitation of a battleship for educational purposes and as a memorial to veterans who fought in World War I. The Court used a three-factor balancing test to determine that this *indirect* funding of a *public, nonreligious* project did not violate the Anti-Aid Amendment's prohibition against aid to charities.

The *Helmes* balancing test was developed to assess the constitutionality of state aid for the type of entity identified in the first part of the Amendment—an "infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking"—that may provide nonreligious services to the public. That is entirely different from aid to the purely religious entities separately named later in the Amendment—"churches, religious denominations, and societies"—which necessarily have a religious mission as their primary purpose. Applying a balancing test to a clause

of the Amendment that admits no qualifications regarding religious entities makes that clause meaningless. *Carney v. Attorney Gen.*, 451 Mass. 803, 821 n.15 (2008) (citation omitted) (Constitution must be construed "so that effect is given to all its provisions, so that no part will be inoperative or superfluous.")

Until now, *Helmes* has never been applied to government funding of an active house of worship. To do so invites doctrinal confusion, and resulting constitutional violations, by subjecting a clear, unambiguous Constitutional prohibition to a multifactor balancing test that is neither necessary nor appropriate. The drafters of the 1918 modifications to the Anti-Aid Amendment allowed no exception or qualification in the clause strictly prohibiting aid to churches. This Court should not either.

II. THE PROPOSED GRANTS FAIL THE *HELMES* TEST

Were this Court to extend the *Helmes* test to direct aid to houses of worship, it should still reverse the Superior Court because it misapplied *Helmes* in two respects: first by evaluating the constitutionality of the Community Preservation Act rather than the Proposed Grants, and then by failing to recognize that a principal purpose of the Proposed Grants is to aid the Church, thus providing "substantial assistance" to the Church of

just the sort that the Anti-Aid Amendment is designed to prevent.

A. The Superior Court Erred By Evaluating the Constitutionality of the CPA Statute Rather Than the Challenged Grants

In *Helmes*, the Supreme Judicial Court provided guidelines for determining whether a particular expenditure of public funds violates the Anti-Aid Amendment: (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" the Amendment. *Helmes*, 406 Mass. at 876. The Superior Court applied these guidelines to the CPA *statute* itself, rather than the Proposed Grants. JA VIII:83-85. In so doing, the court missed a critical distinction between *Helmes* and this case, because Taxpayers do not challenge the constitutionality of the CPA.

In *Helmes*, the Court focused on the statute because the statute itself effected one-time funding of a charitable corporation; to challenge the funding, the appellants necessarily challenged the statute. But the CPA, like many funding statutes, operates in perpetuity, with numerous appropriation decisions to numerous recipients being made by local governmental entities every year. Nothing in *Helmes* or the Anti-Aid Amendment

limits the application of its three factors to an authorizing statute rather than to the actual allocations of public money made under an authorizing statute.

This case involves not a facial challenge to the entire CPA, but an as-applied challenge to the Town of Acton's exercise of its decision-making authority under the Act. If retail funding decisions are shielded from judicial review, as the trial court has effectively held, a town's decision to refurbish a temple arc holding religious scrolls, to restore a baptismal font or to replace a crucifix atop a church steeple through a CPA grant would also be immune from scrutiny merely because the General Assembly had secular goals when it passed a general statute appropriating funds to municipalities, without a thought for the specific payments that a town might someday make to a church over the explicit bar of the Anti-Aid Amendment. Even a town's decision to issue grants solely to houses of worship for a single denomination—a clear case of unlawful religious discrimination—would entirely evade review because the CPA did not specifically proscribe that sort of grant, notwithstanding that the Massachusetts Constitution, which always controls, already forbids it.

B. The Superior Court Misapplied the Three *Helmes* Factors

1. A Principal Purpose of the Grants Is to Aid the Church.

Though historic preservation may be one purpose of the Proposed Grants, the "purpose" inquiry recognizes that aid may have multiple purposes and considers whether "one" of the "primary purposes" is impermissible. *See Op. of the Justices*, 401 Mass. 1201, 1208 (1987).[7] If so, the aid is impermissible. *Id.* The "purpose" analysis looks beyond the "articulated purpose" of the funding, *Springfield*, 382 Mass. at 676, and considers its "anticipated functioning," *Op. of the Justices*, 401 Mass. at 1206.

The cover letter to the grant application here forthrightly explains that the Church seeks public money for work needed on all aspects of its buildings so that the Church can spend its own money on "programs and personnel" that "offer[] the congregation what draws them to their church." JA VII:33. This candid acknowledgement confirms that "one of the primary purposes of [the Proposed Grants], if not [the] only purpose," *see Op. of the Justices*, 401 Mass. at 1208, is

[7] The Supreme Judicial 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*, 376 Mass. at 43.

to aid the Church's religious functions. The particular uses to which the money will be put—to maintain the Church's physical structure and refurbishing and improving the visibility of stained-glass windows with expressly religious imagery—further underscores the problem. The Town's interest in historic preservation does not cure this unconstitutionality.

2. The Proposed Grants Would Provide "Substantial Assistance" to the Church.

The trial court essentially ignored the "substantial-assistance" element of the *Helmes* guidelines, JA VIII:84, by determining that the CPA itself is constitutional, JA VIII:85. Even more so than the "purpose factor," the assessment of "substantial assistance" must specifically address the identity of the recipient of government aid and the use to which the aid is put.

"Substantial assistance" occurs when state aid supports the institution in carrying out its "essential enterprise." *Op. of the Justices*, 401 Mass. at 1209; *accord Springfield*, 382 Mass. at 681; *see also Bloom*, 376 Mass. at 42. The aid need not "comprise 'a major portion of the total expense'" of the institution. *Op. of the Justices,* 401 Mass. at 1208 ($50 tax deductions constituted substantial assistant to private schools) (quoting *Springfield,* 382 Mass. at 679).

Improving a church sanctuary undeniably serves the church's religious mission—its "essential enterprise." "The 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); JA I:169 ("repairs on any internal portions of the church . . . would directly and palpably support worship at the [church]"). The Proposed Grants would substantially aid the Church's religious functions; that is precisely why the Church requested the grants. The trial court simply did not consider this factor, thereby nullifying it.

3. The Proposed Grants Are the Type of Spending That the Anti-Aid Amendment Was Intended to Prohibit.

The third *Helmes* factor is whether the challenged spending is contrary to "the history and purpose of the anti-aid Amendment." *Op. of the Justices*, 401 Mass. at 1209. The Supreme Judicial Court has recognized that the principal purpose of the Amendment was to prevent "aid to sectarian institutions." *Springfield*, 382 Mass. at 683. A Church is the quintessentially "sectarian institution." Absent an injunction, Taxpayers will suffer the very infringement on their "liberty of conscience" that the Amendment most concretely and determinedly prohibits. *Supra* at I.B.

III. TAXPAYERS ARE ENTITLED TO A PRELIMINARY INJUNCTION

Once a "Ten Taxpayer" plaintiff demonstrates likelihood of success on the merits, the plaintiff is entitled to a preliminary injunction if the injunction would promote or not adversely affect the public interest. *LeClair v. Town of Norwell*, 430 Mass. 328, 331–32 (1999). A preliminary injunction here would advance the public interest by preserving the objectives of the Anti-Aid Amendment. *See Commonwealth v. CRINC*, 392 Mass. 79, 94 (1984). At a minimum, a preliminary injunction would not adversely affect the public interest. The improvements to be financed by the Proposed Grants could be paid for with private funds. If the Town ultimately prevails, the improvements could still be financed with public money. A mere delay in funding will not harm the public.[8]

IV. TAXPAYERS ARE ENTITLED TO DISCOVERY

If this Court determines—as it should—that *by definition* this direct aid to the Church violates the Anti-Aid Amendment, no discovery is needed. The same holds true if the *Helmes* factors are deemed satisfied simply by recourse to the Church's letter and applications describing the reasons for the Proposed

[8] The trial court properly noted that in a taxpayer suit, neither irreparable harm to Taxpayers nor harm to the governmental body are factors in determining whether to issue an injunction. JA VIII:83.

Grants and the benefits that they confer on the Church. Otherwise, to present their claims and allow the Superior Court properly to apply the *Helmes* factors to the Proposed Grants, Taxpayers are entitled to discovery regarding the purpose and impact of the Proposed Grants.

Conclusion

For the foregoing reasons, Taxpayers request that:

- the order entered by the Honorable Leila R. Kern of the Superior Court of Middlesex County denying Taxpayers' motion for a preliminary injunction to enjoin the Town's disbursement of two proposed grants of $100,737 to Acton Congregational Church be reversed;
- a preliminary injunction be entered preventing disbursement of the two grants challenged during the litigation of this action; and
- the trial court's denial of Taxpayers' requests for discovery also be reversed.

Date: February 14, 2017

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CERTIFICATE OF SERVICE

I, Patricia A. DeJuneas, do hereby certify that I electronically filed and served a copy of the foregoing via the Odyssey e-filing system on this 14th day of February, 2017:

/s/ Patricia DeJuneas
Patricia A. DeJuneas
(BBO #652997)

CERTIFICATE OF COMPLIANCE

I, Patricia A. DeJuneas, do hereby certify that this brief complies with the rules of court that pertain to the filing of briefs.

Date: February 14, 2017

/s/ Patricia DeJuneas
Patricia A. DeJuneas
(BBO #652997)

ADDENDUM

To Appellants' Brief

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-01933

GEORGE CAPLAN & others[1]

vs.

TOWN OF ACTON, MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This is a taxpayer suit under G.L. c. 40, § 53 against the Town of Acton, Massachusetts ("Town" or "Acton") for a declaratory judgment, alleging that three grants of public funds by the Town to the Acton Congregational Church and the South Acton Congregational Church (collectively "Churches") under the Community Preservation Act ("CPA"), G.L. c. 44B, §§ 1-17, violate Article XVIII, Section 2 of the Massachusetts Constitution, as amended by articles XLVI and CIII, known as the Anti-Aid Amendment. Plaintiffs have moved for a preliminary injunction to enjoin the Town from distributing these funds. For the following reasons, Plaintiffs' Motion for Preliminary Injunction is **DENIED**.[2]

DISCUSSION

I. Standard

To obtain a preliminary injunction in a taxpayer suit, Plaintiffs must demonstrate:

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[1] Jim Conboy, G. Stodel Friedman, Daniel Gilfix, Maria Greene, Jesse Levine, Dave Lunger, Allen Nitschelm, Scott Smyers, William Alstrom, Jennifer Brown, William Brown, and David Caplan, as taxable inhabitants, citizen-taxpayers of Acton, Massachusetts.

[2] In their Stipulation of Schedule for Responding to Complaint and Briefing on Plaintiffs' Motion for Preliminary Injunction No. 4, the parties have stipulated that the funds will not be disbursed to the Churches until at least thirty (30) days after entry of this Order.

(1) a likelihood of success on the merits; and (2) that "the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public." LeClair v. Norwell, 430 Mass. 328, 331-32 (1999), quoting Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984). In taxpayer suits under G.L. c. 40, § 53, the taxpayers "act as private attorneys general, enforcing laws designed to protect the public interest." Edwards v. Boston, 408 Mass. 643, 646 (1990). Accordingly, neither irreparable harm to the plaintiffs nor harm to the governmental body are considered in determining whether to issue an injunction. *Id.* at 646-47.

II. Success on the Merits

To determine whether the Town's grants to the Churches under the CPA would violate the Anti-Aid Amendment, this court is guided by the three factors outlined in Helmes v. Commonwealth, 406 Mass. 873, 876 (1990). This court considers whether: (1) the purpose of the grants is to aid the Churches; (2) the grants in fact substantially aid the Churches; and (3) the grants avoid the political and economic abuses which prompted the Anti-Aid Amendment to be enacted. See *id.* The third factor, stated more precisely, requires this court to examine whether there is any use of public funds that aids the Churches "in a way that is abusive or unfair, economically or politically." *Id.* at 878. Though each factor is considered separately, they are "cumulative and interrelated," compelling a conclusion that balances the distinct components. Commonwealth v. School Comm. of Springfield, 382 Mass. 665, 675 (1981). A presumption of constitutionality favors the CPA, which Plaintiffs bear the heavy burden to overcome. See *id.*

Applying the three Helmes factors to the present case, this court concludes there is no likelihood that Plaintiffs will succeed on the merits of their claim that grants to the Churches under the CPA would violate the Anti-Aid Amendment. Under the first prong, Plaintiffs have

failed to demonstrate that the purpose of the grants is to aid the Churches. This court is directed to examine the purpose of the CPA, under which the challenged grants are to be conferred upon the Churches, rather than the stated purpose of the recipients, as Plaintiffs urge. Helmes, 406 Mass. at 877; Attorney Gen. v. School Comm. of Essex, 387 Mass. 326, 330-31 (1982). Grants of public funds to private institutions under the CPA are for "the acquisition, preservation, rehabilitation and restoration of historic resources[.]" G.L. c. 44B, § 5(b)(2). The Churches at issue in this case are historic churches located in historic districts of Acton. Affidavit of Roland Bartl ¶¶ 6-9. Thus, this court finds the purpose of the grants to the Churches under the CPA is to preserve historic resources, and not to aid the Churches.

Similarly, this court finds the Plaintiffs have failed to satisfy the third prong of the Helmes test. There is no credible evidence that the grants under the CPA are economically or politically abusive or unfair. The application and approval procedures for grants under the CPA operate without regard to the applicant's makeup or purpose. Approval thereunder is determined based on the Town's assessment of how best to use public funds to effectuate a legitimate public purpose. Therefore, this court finds no political or economic abuse which the Anti-Aid Amendment was enacted to prevent. Helmes, 406 Mass. at 877.

Assuming arguendo Plaintiffs can satisfy the second prong of the Helmes test, which this court is not convinced they can, there remains no likelihood of success on the merits. It is well established that "[t]he fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason . . . to say that a legislature has erroneously appraised the public need." Essex, 387 Mass. at 332, quoting Everson v. Board of Educ., 330 U.S. 1, 6 (1947). As noted above, the factors are

"cumulative and interrelated," and must be balanced as a whole. Springfield, 382 Mass. at 675. Plaintiffs have failed to satisfy the first and third prongs of the Helmes test, precluding them from overcoming the presumption of constitutionality that favors the CPA. *Id.* For these reasons, this court finds that Plaintiffs are unlikely to succeed on the merits of their contention that grants to the Churches under the CPA would violate the Anti-Aid Amendment.

ORDER

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction is **DENIED**.

Leila R. Kern
Justice of the Superior Court

Dated: September 16, 2016

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 40 POWERS AND DUTIES OF CITIES AND TOWNS

Section 53 RESTRAINT OF ILLEGAL APPROPRIATIONS; TEN TAXPAYER ACTIONS

Section 53. If a town, regional school district, or a district as defined in section one A, or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town, regional school district, or district for any purpose or object or in any manner other than that for and in which such town, regional school district, or district has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town, or not less than ten taxable inhabitants of any town in the regional school district, or not less than ten taxable inhabitants of that portion of a town which is in the district, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 44B COMMUNITY PRESERVATION

Section 2 DEFINITIONS

Section 2. As used in this chapter, the following words shall, unless the context clearly indicates a different meaning, have the following meanings:?

"Acquire", obtain by gift, purchase, devise, grant, rental, rental purchase, lease or otherwise. "Acquire" shall not include a taking by eminent domain, except as provided in this chapter.

"Annual income", a family's or person's gross annual income less such reasonable allowances for dependents, other than a spouse, and for medical expenses as the housing authority or, in the event that there is no housing authority, the department of housing and community development, determines.

"Capital improvement", reconstruction or alteration of real property that: (1) materially adds to the value of the real property or appreciably prolongs the useful life of the real property; (2) becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (3) is intended to become a permanent installation or is intended to remain there for an indefinite period of time.

"Community housing", low and moderate income housing for individuals and families, including low or moderate income senior housing.

"Community preservation", the acquisition, creation and preservation of open space, the acquisition, creation and preservation of historic resources and the creation and preservation of community housing.

"Community preservation committee", the committee established by the legislative body of a city or town to make recommendations for community preservation, as provided in section 5.

"Community Preservation Fund", the municipal fund established under section 7.

"CP", community preservation.

"Historic resources", a building, structure, vessel real property, document or artifact that is listed on the state register of historic places or has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture of a city or town.

"Legislative body", the agency of municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled as a city council, board of aldermen, town council, town meeting or by any other title.

"Low income housing", housing for those persons and families whose annual income is less than 80 per cent of the areawide median income. The areawide median income shall be the areawide median income as determined by the United States Department of Housing and Urban Development.

"Low or moderate income senior housing", housing for those persons having reached the age of 60 or over who would qualify for low or moderate income housing.

"Maintenance", incidental repairs which neither materially add to the value of the property nor appreciably prolong the property's life, but keep the property in a condition of fitness, efficiency or readiness.

"Moderate income housing", housing for those persons and families whose annual income is less than 100 per cent of the areawide median income. The areawide median income shall be the areawide median income as determined by the United States Department of Housing and Urban Development.

"Open space", shall include, but not be limited to, land to protect existing and future well fields, aquifers and recharge areas, watershed land, agricultural land, grasslands, fields, forest land, fresh and salt water marshes and other wetlands, ocean, river, stream, lake and pond frontage, beaches, dunes and other coastal lands, lands to protect scenic vistas, land for wildlife or nature preserve and land for recreational use.

"Preservation", protection of personal or real property from injury, harm or destruction.

"Real property", land, buildings, appurtenant structures and fixtures attached to buildings or land, including, where applicable, real property interests.

"Real property interest", a present or future legal or equitable interest in or to real property, including easements and restrictions, and any beneficial interest therein, including the interest of a beneficiary in a trust which holds a legal or equitable interest in real property, but shall not include an interest which is limited to the following: an estate at will or at sufferance and any estate for years having a term of less than 30 years; the reversionary right,

condition or right of entry for condition broken; the interest of a mortgagee or other secured party in a mortgage or security agreement.

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

"Rehabilitation", capital improvements, or the making of extraordinary repairs, to historic resources, open spaces, lands for recreational use and community housing for the purpose of making such historic resources, open spaces, lands for recreational use and community housing functional for their intended uses including, but not limited to, improvements to comply with the Americans with Disabilities Act and other federal, state or local building or access codes; provided, that with respect to historic resources, "rehabilitation" shall comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties codified in 36 C.P.R. Part 68; and provided further, that with respect to land for recreational use, "rehabilitation" shall include the replacement of playground equipment and other capital improvements to the land or the facilities thereon which make the land or the related facilities more functional for the intended recreational use.

"Support of community housing", shall include, but not be limited to, programs that provide grants, loans, rental assistance, security deposits, interest-rate write downs or other forms of assistance directly to individuals and families who are eligible for community housing or to an entity that owns, operates or manages such housing, for the purpose of making housing affordable.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 44B COMMUNITY PRESERVATION

Section 3 ACCEPTANCE OF SECS. 3 TO 7

Section 3. (a) Sections 3 to 7, inclusive, shall take effect in any city or town upon the approval by the legislative body and their acceptance by the voters of a ballot question as set forth in this section.

(b) Notwithstanding the provisions of chapter 59 or any other general or special law to the contrary, the legislative body may vote to accept sections 3 to 7, inclusive, by approving a surcharge on real property of not more than 3 per cent of the real estate tax levy against real property, as determined annually by the board of assessors. The amount of the surcharge shall not be included in a calculation of total taxes assessed for purposes of section 21C of said chapter 59.

(b 1/2) Notwithstanding chapter 59 or any other general or special law to the contrary, as an alternative to subsection (b), the legislative body may vote to accept sections 3 to 7, inclusive, by approving a surcharge on real property of not less than 1 per cent of the real estate tax levy against real property and making an additional commitment of funds by dedicating revenue not greater than 2 per cent of the real estate tax levy against real property; provided, however, that additional funds so committed shall come from other sources of municipal revenue including, but not limited to, hotel excises pursuant to chapter 64G, linkage fees and inclusionary zoning payments, however authorized, the sale of municipal property pursuant to section 3 of chapter 40, parking fines and surcharges pursuant to sections 20, 20A and 20A 1/2 of chapter 90, existing dedicated housing, open space and historic preservation funds, however authorized, and gifts received from private sources for community preservation purposes; and provided further, that additional funds so committed shall not include any federal or state funds. The total funds committed to purposes authorized under this chapter by means of this subsection shall not exceed 3 per cent of the real estate tax levy against real property, less exemptions, adopted. In the event that the municipality shall no longer dedicate all or part of the additional funds to community preservation, the surcharge of not less than 1 per cent shall remain in effect, but may be reduced pursuant to section 16.

(c) All exemptions and abatements of real property authorized by said chapter 59 or any other law for which a taxpayer qualifies as eligible shall not be affected by this chapter. The surcharge to be paid by a taxpayer receiving an exemption or abatement of real property authorized by said chapter 59 or any other law shall be reduced in proportion to the amount of such exemption or abatement.

(d) Any amount of the surcharge not paid by the due date shall bear interest at the rate per annum provided in section 57 of said chapter 59.

(e) The legislative body may also vote to accept one or more of the following exemptions:

(1) for property owned and occupied as a domicile by a person who would qualify for low income housing or low or moderate income senior housing in the city or town;

(2) for class three, commercial, and class four, industrial, properties as defined in section 2A of said chapter 59, in cities or towns with classified tax rates;

(3) for $100,000 of the value of each taxable parcel of residential real property; or

(4) for $100,000 of the value of each taxable parcel of class three, commercial property, and class four, industrial property as defined in section 2A of said chapter 59.

[Paragraph added in subsection (e) by 2016, 218, Sec. 100

effective November 7, 2016.]

A person claiming an exemption provided under this subsection may apply to the board of assessors, in writing, on a form approved by the commissioner of revenue, on or before the deadline for an application for exemption under section 59 of chapter 59. Any person aggrieved by the decision of the assessors, or by their failure to act, upon such application, may appeal as provided in sections 64 to 65B, inclusive, of chapter 59. Applications for exemption under this chapter shall be open for inspection only as provided in section 60 of chapter 59.

(f) Upon approval by the legislative body, the actions of the body shall be submitted for acceptance to the voters of a city or town at the next regular municipal or state election. The city or town clerk or the state secretary shall place it on the ballot in the form of the following question:

"Shall this (city or town) accept sections 3 to 7, inclusive of chapter 44B of the General Laws, as approved by its legislative body, a summary of which appears below"

(Set forth here a fair, concise summary and purpose of the law to be acted upon, as determined by the city solicitor or town counsel, including in said summary the percentage of the surcharge to be imposed.)

If a majority of the voters voting on said question vote in the affirmative, then its provisions shall take effect in the city or town, but not otherwise.

(g) The final date for notifying or filing a petition with the city or town clerk or the state secretary to place such a question on the ballot shall be 35 days before the city or town election or 60 days before the state election.

(h) If the legislative body does not vote to accept sections 3 to 7, inclusive, at least 90 days before a regular city or town election or 120 days before a state election, then a question seeking said acceptance through approval of a particular surcharge rate with exemption or exemptions, may be so placed on the ballot when a petition signed by at least 5 per cent of the registered voters of the city or town requesting such action is filed with the registrars, who shall have seven days after receipt of such petition to certify its signatures. Upon certification of the signatures, the city or town clerk or the state secretary shall cause the question to be placed on the ballot at the next regular city or town election held more than 35 days after such certification or at the next regular state election held more than 60 days after such certification.

(i) With respect to real property owned by a cooperative corporation, as defined in section 4 of chapter 157B, that portion which is occupied by a member under a proprietary lease as the member's domicile shall be considered real property owned by that member for the purposes of exemptions provided under this section. The member's portion of the real estate shall be represented by the member's share or shares of stock in the cooperative corporation, and the percentage of that portion to the whole shall be determined by the percentage of the member's

shares to the total outstanding stock of the corporation, including shares owned by the corporation. This portion of the real property shall be eligible for any exemption provided in this section if the member meets all requirements for the exemption. Any exemption so provided shall reduce the taxable valuation of the real property owned by the cooperative corporation, and the reduction in taxes realized by this exemption shall be credited by the cooperative corporation against the amount of the taxes otherwise payable by or chargeable to the member. Nothing in this subsection shall be construed to affect the tax status of any manufactured home or mobile home under this chapter, but this subsection shall apply to the land on which the manufactured home or mobile home is located if all other requirements of this clause are met. This subsection shall take effect in a city or town upon its acceptance by the city or town.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 44B COMMUNITY PRESERVATION

Section 5 COMMUNITY PRESERVATION COMMITTEE; MEMBERS; RECOMMENDATIONS

Section 5. (a) A city or town that accepts sections 3 to 7, inclusive, shall establish by ordinance or by-law a community preservation committee. The committee shall consist of not less than five nor more than nine members. The ordinance or by-law shall determine the composition of the committee, the length of its term and the method of selecting its members, whether by election or appointment or by a combination thereof. The committee shall include, but not be limited to, one member of the conservation commission established under section 8C of chapter 40 as designated by the commission, one member of the historical commission established under section 8D of said chapter 40 as designated by the commission, one member of the planning board established under section 81A of chapter 41 as designated by the

board, one member of the board of park commissioners established under section 2 of chapter 45 as designated by the board and one member of the housing authority established under section 3 of chapter 121B as designated by the authority, or persons, as determined by the ordinance or by-law, acting in the capacity of or performing like duties of the commissions, board or authority if they have not been established in the city or town. If there are no persons acting in the capacity of or performing like duties of any such commission, board or authority, the ordinance or by-law shall designate those persons.

(b)(1) The community preservation committee shall study the needs, possibilities and resources of the city or town regarding community preservation, including the consideration of regional projects for community preservation. The committee shall consult with existing municipal boards, including the conservation commission, the historical commission, the planning board, the board of park commissioners and the housing authority, or persons acting in those capacities or performing like duties, in conducting such studies. As part of its study, the committee shall hold one or more public informational hearings on the needs, possibilities and resources of the city or town regarding community preservation possibilities and resources, notice of which shall be posted publicly and published for each of two weeks preceding a hearing in a newspaper of general circulation in the city or town.

(2) The community preservation committee shall make recommendations to the legislative body for the acquisition, creation and preservation of open space; for the acquisition, preservation, rehabilitation and restoration of historic resources; for the acquisition, creation, preservation, rehabilitation and restoration of land for recreational use; for the acquisition, creation, preservation and support of community housing; and for the rehabilitation or restoration of open space and community housing that is acquired or created as provided in this section; provided, however, that funds expended pursuant to this chapter shall not be used for maintenance. With respect to community housing, the community preservation committee shall recommend, whenever possible, the reuse of existing buildings or construction of new buildings on previously developed sites. With respect to recreational use, the acquisition of artificial turf for athletic fields shall be prohibited; provided, however, that any project approved by a municipality for the acquisition of artificial turf for athletic fields prior to July 1, 2012 shall be a permitted use of community preservation funding.

(3) The community preservation committee may include in its recommendation to the legislative body a recommendation to set aside for later spending funds for specific purposes that are consistent with community preservation but for which sufficient revenues are not then available in the Community Preservation

Fund to accomplish that specific purpose or to set aside for later spending funds for general purposes that are consistent with community preservation.

(c) The community preservation committee shall not meet or conduct business without the presence of a quorum. A majority of the members of the community preservation committee shall constitute a quorum. The community preservation committee shall approve its actions by majority vote. Recommendations to the legislative body shall include their anticipated costs.

(d) After receiving recommendations from the community preservation committee, the legislative body shall take such action and approve such appropriations from the Community Preservation Fund as set forth in section 7, and such additional non-Community Preservation Fund appropriations as it deems appropriate to carry out the recommendations of the community preservation committee. In the case of a city, the ordinance shall provide for the mechanisms under which the legislative body may approve or veto appropriations made pursuant to this chapter, in accordance with the city charter.

(e) For the purposes of community preservation and upon the recommendation of the community preservation committee, a city or town may take by eminent domain under chapter 79, the fee or any lesser interest in real property or waters located in such city or town if such taking has first been approved by a two-thirds vote of the legislative body. Upon a like recommendation and vote, a city

or town may expend monies in the Community Preservation Fund, if any, for the purpose of paying, in whole or in part, any damages for which a city or town may be liable by reason of a taking for the purposes of community preservation.

(f) Section 16 of chapter 30B shall not apply to the acquisition by a city or town, of real property or an interest therein, as authorized by this chapter for the purposes of community preservation and upon recommendation of the community preservation committee and, notwithstanding section 14 of chapter 40, for purposes of this chapter, no such real property, or interest therein, shall be acquired by any city or town for a price exceeding the value of the property as determined by such city or town through procedures customarily accepted by the appraising profession as valid.

A city or town may appropriate money in any year from the Community Preservation Fund to an affordable housing trust fund.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 44B COMMUNITY PRESERVATION

Section 7 COMMUNITY PRESERVATION FUND

Section 7. Notwithstanding the provisions of section 53 of chapter 44 or any other general or special law to the contrary, a city or town that accepts sections 3 to 7, inclusive, shall establish a separate account to be known as the Community Preservation Fund of which the municipal treasurer shall be the custodian. The authority to approve expenditures from the fund shall be limited to the legislative body and the municipal treasurer shall pay such expenses in accordance with chapter 41.

The following monies shall be deposited in the fund: (i) all funds collected from the real property surcharge or bond proceeds in anticipation of revenue pursuant to sections 4 and 11; (ii) additional funds appropriated or dedicated from allowable municipal sources pursuant to subsection (b1/2) of section 3, if applicable; (iii) all funds received from the commonwealth or any

other source for such purposes; and (iv) proceeds from the disposal of real property acquired with funds from the Community Preservation Fund. The treasurer may deposit or invest the proceeds of the fund in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation or national banks, or may invest the proceeds in paid up shares and accounts of and in co-operative banks or in shares of savings and loan associations or in shares of federal savings and loan associations doing business in the commonwealth or in the manner authorized by section 54 of chapter 44, and any income therefrom shall be credited to the fund. The expenditure of revenues from the fund shall be limited to implementing the recommendations of the community preservation committee and providing administrative and operating expenses to the committee.

Part I ADMINISTRATION OF THE GOVERNMENT

Title VII CITIES, TOWNS AND DISTRICTS

Chapter 44B COMMUNITY PRESERVATION

Section 10 ANNUAL DISTRIBUTIONS OF MONIES IN TRUST FUND

Section 10. (a) The commissioner of revenue shall annually on or before November 15 disburse monies from the fund established in section 9 to a city or town that has accepted sections 3 to 7, inclusive, and notified the commissioner of its acceptance. The community shall notify the commissioner of the date and terms on which the voters accepted said sections 3 to 7, inclusive. The municipal tax collecting authority shall certify to the commissioner the amount the city or town has raised through June 30 by imposing a surcharge on its real property levy and shall certify the percentage of the surcharge applied. In the event a city or town accepts said sections 3 to 7, inclusive, pursuant to subsection (b1/2) of section 3 the municipal tax collecting authority shall certify to the commissioner by October 30, the maximum additional funds the city or town intends to transfer to

the Community Preservation Fund from allowable municipal sources for the following fiscal year. Once certified, the city or town may choose to transfer less than the certified amount during the following fiscal year.

(b) The commissioner shall multiply the amount remaining in the fund after any disbursements for operating and administrative expenses pursuant to subsection (c) of section 9 by 80 per cent. This amount distributed in the first round distribution shall be known as the match distribution. The first round total shall be distributed to each city or town accepting said sections 3 to 7, inclusive, in an amount not less than 5 per cent but not greater than 100 per cent of the total amount raised by the additional surcharge on real property by each city or town and, if applicable, the additional funds committed from allowable municipal sources pursuant to subsection (b1/2) of section 3. The percentage shall be the same for each city and town and shall be determined by the commissioner annually in a manner that distributes the maximum amount available to each participating city or town.

(c) The commissioner shall further divide the remaining 20 per cent of the fund in a second round distribution, known as the equity distribution. The commissioner shall determine the equity distribution in several steps. The first step shall be to divide the remaining 20 per cent of the fund by the number of cities and towns that have accepted said sections 3 to 7, inclusive. This dividend shall be known as the base figure for equity distribution.

This base figure shall be determined solely for purposes of performing the calculation for equity distribution and shall not be added to the amount received by a participant.

(d) Each city and town in the commonwealth shall be assigned a community preservation rank for purposes of the equity distribution. The commissioner shall determine each community's rank by first determining the city or town's equalized property valuation per capita ranking, ranking cities and towns from highest to lowest valuation. The commissioner shall also determine the population of each city or town and rank each from largest to smallest in population. The commissioner shall add each equalized property valuation rank and population rank, and divide the sum by 2. The dividend shall be the community preservation raw score for that city or town.

(e) The commissioner shall then order each city or town by community preservation raw score, from the lowest raw score to the highest raw score. This order shall be the community preservation rank for each city or town. If more than 1 city or town has the same community preservation raw score, the city or town with the higher equalized valuation rank shall receive the higher community preservation rank.

(f) After determining the community preservation rank for each city and town, the commissioner shall divide all cities or towns into deciles according to their community preservation ranking, with approximately the same number of cities and towns in each

decile, and the cities or towns with the highest community preservation rank shall be placed in the lowest decile category, starting with decile 10. Percentages shall be assigned to each decile as follows:

After assigning each city and town to a decile according to their community preservation rank, the commissioner shall multiply the percentage assigned to that decile by the base figure to determine the second round equity distribution for each participant.

(g) Notwithstanding any other provision of this section, the total state contribution for each city and town shall not exceed the actual amount raised by the city or town's surcharge on its real property levy and, if applicable, additional funds committed from allowable municipal sources pursuant to subsection (b1/2) of section 3.

(h) When there are monies remaining in the Massachusetts Community Preservation Trust Fund after the first and second round distributions and any necessary administrative expenses have been paid in accordance with section 9, the commissioner may conduct a third round surplus distribution. Any remaining surplus in the fund may be distributed by dividing the amount of the surplus by the number of cities and towns that have accepted sections 3 to 7, inclusive. The resulting dividend shall be the

surplus base figure. The commissioner shall then use the decile categories and percentages as defined in this section to determine a surplus equity distribution for each participant.

(i) The commissioner shall determine each participant's total state grant by adding the amount received in the first round distribution with the amounts received in any later round of distributions, with the exception of a city or town that has already received a grant equal to 100 per cent of the amount the community raised by its surcharge on its real property levy.

(1) Only those cities and towns that adopt the maximum surcharge pursuant to subsection (b) of section 3 and those cities and towns that adopt the maximum surcharge and additional funds committed from allowable municipal sources such that the total funds are the equivalent of 3 per cent of the real estate tax levy against real property pursuant to subsection (b1/2) of said section 3 shall be eligible to receive additional state monies through the equity and surplus distributions.

(2) If less than 10 per cent of the cities and towns have accepted sections 3 to 7, inclusive, and imposed and collected a surcharge on their real property levy, the commissioner may calculate the state grant with only 1 round of distributions or in any other equitable manner.

(j) After distributing the Massachusetts Community Preservation Trust Fund in accordance with this section, the commissioner shall keep any remaining funds in the trust for distribution in the following year.

Article XLVI.

(In place of article XVIII of the articles of amendment of the constitution ratified and adopted April 9, 1821, the following article of amendment, submitted by the constitutional convention, was ratified and adopted November 6, 1917.)

Article XVIII.
Section 1. No law shall be passed prohibiting the free exercise of religion.

Section 2. All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the commonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; 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.]

Section 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

Section 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.

Section 5. This amendment shall not take effect until the October first next succeeding its ratification and adoption by the people. [See Amendments, Arts. XLVIII, The Initiative, Sec. 2., LXII, XCV, section 1 and CIII.]