COMMONWEALTH OF MASSACHUSETTS

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

GEORGE CAPLAN, *et al.*,
Plaintiffs,
v.
TOWN OF ACTON, MASSACHUSETTS,
Defendant.

DEFENDANT'S SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Defendant Town of Acton (the "Town") submits this Sur-Reply in response to Plaintiffs' Reply. That Reply misstates the law and the facts in several respects.

1. Construction of Art. 46. The Plaintiffs claim that applying the SJC's "General Prohibition's test" (the three guidelines from *Helmes*, 406 Mass. at 876, and *Springfield*, 382 Mass. at 675) to the "Religious Prohibition would write the latter out of the State Constitution," which "must be construed 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" Reply at 2 (citation omitted).

The Plaintiffs' "plain text" distinction between a "General Prohibition" and a "Religious Prohibition" contravenes the case law. Identically worded clauses in the Anti-Aid Amendment should be construed consistently. *E.g.*, *Raymer v. Tax Comm'r*, 239 Mass. 410, 412 (1921) (court "must construe a constitutional amendment as an harmonious whole, giving words and phrases in different places in the amendment the same meaning unless used in manifestly different senses"); *All., AFSCME/SEIU, AFL-CIO v. Sec'y of Admin.*, 413 Mass. 377, 384 (1992) (same); *see Kain v. Dep't of Envtl. Prot.*, 474 Mass. 278, 287 (2016) (same, for statutes). Both clauses in art. 46 use the same operative terms: "no grant, appropriation or use of public money

... shall be made or authorized ... for the purpose of founding, maintaining or aiding" a recipient.[1] Under *Raymer's* "fundamental standard of construction" (*Opinion of Justices to House of Representatives*, 384 Mass. 820, 823 (1981)), the SJC's three guidelines apply equally to both clauses of art. 46 because their identical wording should be construed consistently.[2]

2. Purpose. The Plaintiffs argue that the "purpose of the grants is to enable the church to spend its own funds on" programmatic needs (Reply at 3) and, therefore, that such funds are "substantial aid" to the churches in violation of the Anti-Aid Amendment Reply at 5.

The Plaintiffs misread the SJC's conclusion as to the "anticipated functioning" (*Op. of the Justices*, 401 Mass. at 1206) or the "articulated purpose" (*Springfield*, 382 Mass. at 676) of the funding. Reply at 3. The Court must examine *the legislation* "to discern whether the Legislature has attempted to circumvent the strictures of art. 46, § 2, through the use of facially valid language." *Op. of the Justices*, 401 Mass. at 1205 (citation omitted). An examination of the CPA reveals no such pretext; rather, the express purpose of both the CPA and the grants is historic preservation, a valid public purpose. *See Seideman v. City of Newton*, 452 Mass. 472, 473-474 (2008) (citation omitted).

Moreover, the applicant's motive – the centerpiece of the Plaintiffs' argument - is irrelevant. The art. 46 inquiry focuses on the *CPA's* legislative intent and the *grantor's* purpose in distributing the grant funds. *See* Opp. at 6. And, the Town has imposed numerous conditions on the grants to ensure that they actually fund the intended purpose of historic preservation. The churches are *reimbursed* money already expended for this valid purpose alone, and only after the

[1] Art. 46's first clause "focused on the practice of granting public aid to private schools" but "reads more broadly" to cover "'any nonpublic institution not within [art. 46's] very limited exceptions.'" *Helmes*, 406 Mass. at 877. Art. 46's second clause focused on aid to "any church, religious denomination or society."

[2] If, as the Plaintiffs suggest, the "Religious Prohibition" is absolute based on its "plain text," municipalities "would not be permitted to render police or fire protection to religious groups" and "[p]olicemen who helped parishioners into their places of worship would violate the Constitution." *Colo v. Treasurer*, 378 Mass. 550, 560-561 (1979).

grant of a historic preservation restriction, presentment of invoices for completed work, and certification that the invoices reflect only work within the scope of the Town Meeting-approved historic preservation project. Opp. at 16. Unlike the decisions cited by the Plaintiffs (Reply at 5), the CPA grants cannot be used for the programmatic needs of the churches.

3. Church Interior/Religious Imagery. The Plaintiffs assert that the Town has failed to respond to the argument that "the grants would substantially aid the churches by supporting the interiors of the church buildings and religious imagery in one of those buildings." Reply at 4.

In this case, all of the historic preservation work centers on the exterior of the buildings, and most of the restoration involves objects incorporating no religious imagery at all. The SACC's roof restoration is wholly exterior and incorporates no religious imagery. Bartl Aff. Exs. 18, 19. The ACC's Master Plan application covers three historic buildings, two of which are houses with no religious imagery. The focus is on "building envelope issues" for the houses and on "the exterior building envelope (windows, doors, siding, and roof)" and the bell tower. *Id*., Exs. 14, 15. ACC's historic windows will be separately restored under the grant to address damage caused by the elements exterior to the building. *Id.*, Exs. 16-17.[3] The Plaintiffs complain that the grant for window restoration supports religious imagery. Reply at 4. However, most of the windows are either plain glass or secular stained glass,[4] and the other windows (which some may view as containing religious images or words) date from the 1890s, were donated by prominent Acton residents, and are integral to the structure and the history of the building. The CPA grant will restore these historic resources, and the benefits will inure to

[3] The fact that windows have an exterior face and an interior face is irrelevant. The cause of the damage, the need for the restoration, and the public benefit are all exterior to the building. Bartl Aff. Exs. 17, 19.

[4] The Plaintiffs imply that *any* stained glass windows in a church convey a religious message, asserting that "churches have historically used stained-glass windows – such as those funded by one of the grants here – to convey theological messages." Reply at 4-5. That implication is no longer true, if it ever was. *See, e.g.*, http://stainedglass.org/?page_id=169 (Stained Glass Society of America).

the public viewing the exterior of the building from public ways and publicly accessible sidewalks and paths within the National Register Historic District. *Id.*, Exs. 17, 19. The historic preservation restriction will ensure that public benefit in perpetuity.[5]

4. DOR Guidance. The Plaintiffs assert that the DOR opinion is inapposite and not entitled to deference. Reply at 3-4. Both arguments are wrong. The DOR Opinion is relevant guidance in this case where DOR is the regulatory agency responsible for CPA oversight and this case concerns whether a CPA grant for historic preservation violates art. 46. While the constitutional question is ultimately for the Court, an agency's determination on such a question can be properly considered by the Court. *See Bd. of Selectmen of Framingham v. Civil Service Comm'n*, 366 Mass. 547, 554 (1974).

5. Inapposite Federal Cases. The Plaintiffs' reliance on the First Amendment cases *Religious Liberty v. Nyquist*, 413 U.S. 756, 763 (1973) and *Tilton v. Richardson*, 403 U.S. 672 (1971) (Reply at 7) is misplaced. Neither arose under the Anti-Aid Amendment and both are distinguishable. *See Nyquist* (NY statute funding the operational expenses of non-public, sectarian schools was unconstitutional); *Tilton* (upholding, exception for one provision, the Higher Education Facilities Act of 1963 even though "Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body"). The DOJ's Memorandum of Opinion (Bartl Aff. Ex. 30) specifically explains why *Nyquist* and *Tilton* do not bar historic preservation grants like those at issue here. *See also Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 760-761 (1976) (upholding state financial aid to private colleges and

[5] Contrary to the Plaintiffs' assertion that the historic preservation restrictions cannot "be assigned values equal to the amount of the grants – if they can be valued at all," (Reply at 5), the SJC has established principles for valuing damage to "special purpose property" (such as churches) where "there will not generally be an active market from which the diminution in market value may be determined." *Trinity Church in City of Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 49 (1987). For such property, the measure of damages is "[r]eplacement or restoration costs," that is, "the reasonable costs of restoring the church to the condition it was in" before the damage. *Id.* at 49-50. That rule quantifies the value of the CPA grants subject to the historic preservation restrictions here.

universities, including religious ones, because there was a statutory prohibition against sectarian use of the funds).

6. Programs at Risk. The Plaintiffs downplay the impact of their claim, asserting that they are not challenging CPA funding of nonreligious institutions or even former churches and that this case does not concern whether funding for historic preservation may be awarded to churches if it is limited to exterior facades and nonreligious imagery. Reply at 9.

But the Anti-Aid Amendment "marks no difference between 'aids,' whether religious or secular," so the Plaintiffs *are* effectively challenging CPA funding of religious and nonreligious institutions alike. *See Bloom v. School Comm.*, 376 Mass. 35, 39 (1978). And this case *does* directly raise whether historic preservation funding may be awarded to churches for exterior work not involving religious imagery, because all of the work on the SACC and most of the work on the ACC would be on precisely those elements. Thus, despite their denial, a decision for the Plaintiffs would undercut both the CPA and other historic preservations grant programs.

By its attorneys,

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Dated: September 12, 2016

CERTIFICATE OF SERVICE

I certify that I served this document on counsel for plaintiffs by email on this 12th day of September, 2016.

Nina Pickering-Cook