Supreme Judicial Court for the Commonwealth DAR: DAR-25035 Filed: 1/27/2017 3:46:29 PM

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Appeals Court No. 2016-P-1675

GEORGE CAPLAN, et al.
Plaintiffs-Appellants

v.

TOWN OF ACTON
Defendant-Appellee

PLAINTIFFS' APPLICATION FOR DIRECT REVIEW IN THE SUPREME JUDICIAL COURT

(1) Request for Direct Appellate Review

Plaintiffs, 13 taxpaying residents of the Defendant Town of Acton,[1] request direct review by the Supreme Judicial Court of an order entered by the Honorable Leila R. Kern of the Superior Court of Middlesex County denying Plaintiffs' motion for a preliminary injunction to enjoin the Town's disbursement of two proposed grants of $100,737 to Acton Congregational Church, pursuant to Massachusetts's Community Preservation Act. Addendum 1 (Ref. 9);[2]

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

[2] Consistent with Massachusetts Appellate Procedure Rule 11(b), a certified copy of the docket entries in the trial court is appended to this application as Addendum 1 and specific docket entries are cited by reference number.

Addendum 2 (Order). 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. This Court has never 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 this Court for funding of private charitable and non-profit 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.

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, state money may be used to fund religious institutions, not just in this this instance, but regularly. That interpretation would strip the Anti-

Aid Amendment of any real meaning or effect, contrary to this Court's jurisprudence. This cannot be so. This Court should directly review 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 to be.

(2) Statement of Prior Proceedings

On July 7, 2016, Plaintiffs 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. Addendum 1 (Ref. 1). On August 15, Plaintiffs filed a motion for preliminary injunction, Defendant's opposition, and Plaintiffs' reply. Addendum 1 (Ref. 6). After oral argument on September 14 Judge Kern issued the Order denying Plaintiff's motion. Addendum 1 (Ref. 9); Addendum 2.

At the oral argument, Judge Kern also granted the Town's motion for protective order, thereby denying Plaintiffs 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 Plaintiffs' motion for a preliminary injunction. The Order is stayed by agreement of the parties pending appellate resolution.

(3) Statement of Facts

This case involves the Town's proposed grants to the Church under the Community Preservation Act (CPA).[3] Mass. Gen. Laws Ann. Ch. 44B, § 2. The CPA provides public funding to municipalities for, among 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

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

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.

Pls.' Mem. in Supp. of Mot. for Prelim. Inj. Ex. A ("Cover Letter") (Refs. 6.1, 6.12) at 2 (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." None of these buildings are listed on the national or state historic registers; the Town describes them as "contributors" to historic districts.[4]

The application explains that the Evangelical Church building dates back to 1846 and "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

[4] Town's Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. Bartl Aff. (Ref. 6.3) at ¶ 11.

> 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.

Pls.' Mem. in Supp. of Mot. for Prelim. Inj. Ex. F ("Master Plan Application") (Refs. 6.1, 6.12) at 4.

"As part of the effort to restore and protect" the Evangelical Church building and two rental properties owned by the Church, the Church "proposes 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." *Id.* at 1.

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." Cover Letter at 1. 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. Master Plan Application at 1.

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." Pls.' Mem. in Supp.

of Mot. for Prelim. Inj. Ex. G ("Stained-Glass Window Application") (Refs. 6.1, 6.12). The funds would be spent on improvements to the eight "major stained glass windows of the [Church's] sanctuary building." *Id.* at 2, 3. According to the application, the stained-glass windows are "an integral part" of the Evangelical Church. *Id.* at 6. The improvements would include "replac[ing] missing or broken pieces of glass" and providing new sealing and glazing for the glass. *Id.* at 1.

According to the Church, 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." *Id.* at 6. 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." *Id.* at 6-7.

Stained-glass windows that would be restored have expressly religious imagery. "The most prominent stained glass window, which is visible from Concord Road . . . is a double window which depicts Jesus and a kneeling woman." *Id.* at cover page, 2. Another stained-glass window includes a cross and the hymnal phrase "Rock of

Ages Cleft for Me." *Id.* at 13. Two stained-glass windows are described in the application as "Altar Windows." *Id.* at 12. 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. *Id.* at 1.

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] Pls.' Mem. in Supp. of Mot. for Prelim. Inj. Ex. J ("Town Warrant") (Refs. 6.1, 6.12) at 72.[6]

(4) Statement of Issues of Law

1. Do the Proposed Grants 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

[5] The Town approved $49,500 as requested for the Master Plan Glass project and $51,237 (rather 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. Town Warrant at 77.

(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 Plaintiffs' requests for discovery into the purpose of the Proposed Grants and the assistance they would confer upon the Church?

(5) Argument

The Superior Court approved something that this Court has never 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 the balancing test developed by this 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 *did* apply to direct aid to houses of worship, the trial court misapplied them to the State's Community Preservation Act, rather than to the Proposed Grants. If the *Helmes* guidelines are applied, instead, to the Town's decisions, then the conclusion still is that the Proposed Grants violate the Anti-Aid Amendment.

Finally, the trial court denied Plaintiffs' 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'S PLAIN LANGUAGE PROHIBITS THESE GRANTS

In 1918, this express prohibition was added to the Amendment: "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. Proponents of this prohibition

> 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.

Id. at 39 (citing 1 *Debates in the Massachusetts Constitutional Convention*, *1917–1918*, at 68, 74–79, 161–164 (1919)).

This Court has never before considered whether the Anti-Aid Amendment 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 Plaintiffs "to support the religious institutions of others" by supporting the Church as a whole, funding

a comprehensive study of "all the needs of [the] building." Master Plan Application at 1, 4, 12. And 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, Stained-Glass Window Application at 6, but also making the windows' expressly religious imagery, including a depiction of Jesus, much more visible to passersby, *id.* at cover page, 1, 2, 6, 11, 13.

Acton Congregational Church's cover letter to its grant applications is a candid plea for public financial support for its religious mission. 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*." Cover Letter at 2 (emphasis added).

Rather than enforce this prohibition, the trial court was "guided by the three factors outlined in *Helmes v. Commonwealth*, 406 Mass. 873, 876 (1990)." Addendum 2 at 2. *Helmes* involved the State's funding of the rehabilitation of a battleship for educational purposes and as a memorial to Commonwealth veterans. 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 effectively recognizes that there are circumstances in which an "infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking" may provide non-religious services to the public. That is entirely different from aid to "churches, religious denominations, and societies" named separately in the Amendment, which necessarily have a religious mission as their primary purpose.

Before this case, *Helmes* has never been applied to permit government funding of an active house of worship. To do so subjects a clear, unambiguous Constitutional mandate to a multi-factored balancing test that is neither necessary nor appropriate.

II. THE PROPOSED GRANTS FAIL THE *HELMES* TEST

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

Even if the *Helmes* balancing test is extended to direct aid to churches, the Superior Court misapplied that test so as to effectively abrogate the Anti-Aid Amendment.

In *Helmes*, this Court asked: (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 Anti-Aid Amendment]." *Helmes*, 406 Mass. at 876. The Superior Court misapplied these guidelines to the CPA *statute* itself, rather than the Proposed Grants. In so doing, the Court missed a critical distinction between *Helmes* and this case, because Plaintiffs do not challenge the constitutionality of the CPA. *See* Addendum 2 at 2-4.

In *Helmes*, the statute itself effected one-time funding of a charitable corporation. But the CPA, like many funding statutes, operates in perpetuity, with numerous appropriation decisions made by local governmental entities every year. Nothing in *Helmes* limits the application of its three factors to an authorizing statute rather than to allocations of money made pursuant to the authorizing statute.

If such "retail" funding decisions are shielded from judicial review, as the trial court has effectively suggested, a town's decision to refurbish a temple arc holding religious scrolls or a baptismal font 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 already did, and must always be controlling.

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

If one of the "primary purposes" of aid is impermissible, 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. 1201, 1206 (1987).

The Church's cover letter explained that it seeks public money for work needed on all aspects of its buildings so that the Church can spend its own money on "offering the congregation what draws them to their church." Cover Letter at 2. This candid acknowledgement confirms that "one of the primary purposes of [the Proposed Grants], if not [their] only purpose," *see Op. of the Justices*, 401 Mass. at 1208, is to aid the Church's religious functions. The Town's interest in historic preservation does not cure this unconstitutionality.

C. The Proposed Grants Would Provide Substantial Assistance to the Church.

The trial court essentially ignored the "substantial-assistance" element of the *Helmes* guidelines, Addendum 2 at 3, by determining that the CPA itself is constitutional, *id.* at 4. 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 v. Sch. Comm. of Springfield*, 376 Mass. 35, 42 (1978). "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); *see also Taylor v. Town of Cabot*, No. 329-6-16, at 14 (Vt. Super. Ct. July 1, 2016) ("repairs on any internal portions of the church . . . would directly and palpably support worship at the [church]") (attached as Addendum 3). 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.

D. 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 [A]nti-[A]id Amendment." *Op. of the Justices*, 401 Mass. at 1209. The principal purpose of the Amendment was to prevent "aid to sectarian institutions." *Springfield*, 382 Mass. at 683. The Church is a quintessentially "sectarian institution." Modifications to the Anti-Aid Amendment were urged in 1917 because the proponents of the amendment believed that "liberty of conscience [is] infringed whenever a citizen [i]s taxed to support the religious institutions of others." *Id.* at 673. Absent an injunction, that is what will happen to these Plaintiffs.

Furthermore, the Anti-Aid Amendment was intended to prevent "politically divisive" governmental spending. *Id.* at 683. 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.[7]

Moreover, the criteria purportedly applied by the Town are so vague and discretionary, *see* Town's Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. Bartl Aff. (Ref. 6.3) Ex. 13 at 27, 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 Town citizens, *see* Town Warrant at 77–78. In *Taylor v. Town of Cabot*, a Vermont court struck 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." Addendum 3 at 17. So too here.

III. PLAINTIFFS 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,

[7] Before the 2016 grants to Acton Congregational Church and South Acton Congregational Church, in 2013 and 2014 the Town funded four grants totaling $130,063 to West Acton Baptist Church. Pls.' Mem. in Supp. of Mot. for Prelim. Inj. Exs. L at 62, M at 48 (Refs. 6.1, 6.12).

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. PLAINTIFFS 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 Grants and the benefits they confer on the Church. Otherwise, to apply the *Helmes* factors to the Proposed Grants, the Plaintiffs are entitled to discovery regarding the purpose and impact of the Proposed Grants.

(6) Statement of Reasons Why Direct Appellate Review Is Appropriate

[8] The trial court properly noted that in a taxpayer suit, neither irreparable harm to the plaintiffs nor harm to the governmental body are factors in determining whether to issue an injunction. Addendum 2 at 2.

The questions presented by this appeal satisfy all three criteria of Appellate Rule 11. Specifically:

App. R. 11(a)(1): The issues of law raised in this appeal are "questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court." There are no reported decisions applying the Anti-Aid Amendment to a proposed grant of public funds to an active house of worship. None of the cases upon which the Town relies, and which the trial court cited in denying the preliminary injunction, involved a church or any other active house of worship.

App. R. 11(a)(2): These questions of law "concern[] the Constitution of the Commonwealth." They also concern the tests that this Court applies when citizens of the Commonwealth bring a substantial constitutional challenge to government action affecting their fundamental rights of religious freedom.

App. R. 11(a)(3): These questions are "of such public interest that justice requires a final determination by the full Supreme Judicial Court." According to the Town, Acton is one of 161 cities and towns in Massachusetts that has accepted the CPA and uses its funding mechanism, private entities receive a significant portion of CPA funding for historic preservation, and at least 307 approved CPA projects involved "religious institutions,"

including 35 for stained glass windows. Town's Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. (Ref. 6.2) at 8. Although Plaintiffs challenge only the two proposed grants to the Church, the fundamental question of the applicability of the Anti-Aid Amendment to the widespread use of CPA funds for religious institutions makes this case of broad public interest warranting a determination by this Court.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant direct review of this appeal.

Date: January 27, 2017 /s/ Patricia DeJuneas

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*Appearing *pro hac vice*.

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 27th day of January, 2017:

/s/ Patricia DeJuneas

ADDENDUM 1

To Plaintiffs' Application for Direct Review in the Supreme Judicial Court

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

1681CV01933
Caplan, George et al vs. Town Of Acton,inclusive of its instrumentalities and the Community Preservation Committee

CASE TYPE:	Administrative Civil Actions	**FILE DATE:**	07/07/2016
ACTION CODE:	E03	**CASE TRACK:**	X - Accelerated
DESCRIPTION:	Certiorari Action, G. L. c. 249 § 4		
CASE DISPOSITION DATE		**CASE STATUS:**	Open
CASE DISPOSITION:	Pending	**STATUS DATE:**	07/07/2016
CASE JUDGE:		**CASE SESSION:**	Civil D Rm 620

LINKED CASE

PARTIES

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Plaintiff Brown, Jennifer Acton, MA 01720	
Plaintiff Caplan, David Acton, MA 01720	
Plaintiff Caplan, George Acton, MA 01720	**082050** Russell S Chernin The Slater Building The Slater Building 390 Main Street Suite 659 Worcester, MA 01608 Work Phone (508) 753-8118 Added Date: 07/07/2016
Plaintiff Conboy, Jim Acton, MA 01720	**082050** Russell S Chernin The Slater Building The Slater Building 390 Main Street Suite 659 Worcester, MA 01608 Work Phone (508) 753-8118 Added Date: 07/07/2016

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

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Plaintiff
Lunger, Dave

Acton, MA 01720

Plaintiff
Nitschelm, Allen

Acton, MA 01720

Plaintiff
Smyers, Scott

Acton, MA 01720

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

Defendant
Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee

Acton, MA 01720

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COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

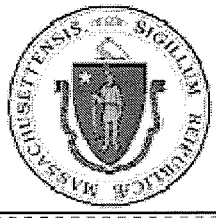
FINANCIAL DETAILS

Date	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
07/07/2016	Civil Filing Fee (per Plaintiff)	240.00	240.00	0.00	0.00
07/07/2016	Civil Security Fee (G.L. c. 262, § 4A)	20.00	20.00	0.00	0.00
07/07/2016	Civil Surcharge (G.L. c. 262, § 4C)	15.00	15.00	0.00	0.00
07/07/2016	Fee for Blank Summons or Writ (except Writ of Habeas Corpus) MGL 262 sec 4b	5.00	5.00	0.00	0.00
	Total	**280.00**	**280.00**	**0.00**	**0.00**

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX COUNTY
Public Docket Report

INFORMATIONAL DOCKET ENTRIES			
Date	**Ref**	**Description**	**Judge**
07/07/2016		Attorney appearance On this date Russell S Chernin, Esq. added for Plaintiff George Caplan	
07/07/2016		Attorney appearance On this date Russell S Chernin, Esq. added for Plaintiff Jim Conboy	
07/07/2016		Attorney appearance On this date Russell S Chernin, Esq. added for Plaintiff G. Stodel Friedman	
07/07/2016		Case assigned to: DCM Track X - Accelerated was added on 07/07/2016	
07/07/2016	1	Original civil complaint filed.	
07/07/2016	2	Civil action cover sheet filed.	
07/15/2016	3	Party(s) file Stipulation of Schedule for Responding to Complaint and Briefing on Plaintiffs' Motion for Preliminary Injunction Applies To: Caplan, George (Plaintiff); Conboy, Jim (Plaintiff); Friedman, G. S (Plaintiff); Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	
07/15/2016		Attorney appearance On this date Arthur Paul Kreiger, Esq. added as Private Counsel for Defendant Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee	
07/15/2016		Attorney appearance On this date Nina L Pickering-Cook, Esq. added as Private Counsel for Defendant Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee	
08/09/2016		General correspondence regarding Requirement for filing Pro Hac Vice. Original signature The Motion must not be signed by the attorneys who are not part of the Massachusetts Bar Affidavits from both attorneys who are to be admitted pro hac vice Payment statement from the Board of Bar Overseers	
08/10/2016	4	Summons, returned SERVED Accepted Service by Email on July 7,2016 Applies To: Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	
08/10/2016	5	Russell S Chernin, Esq.'s MOTION to admit counsel pro hac vice: Douglas B. Mishkin, Joshua Counts Cumby, Richard B. Katskee and Alex J. Luchenitser as Co-Counsels for Plaintiffs	
08/10/2016	5.1	Opposition to Plaintiffs' MOTION to admit counsel pro hac vice: Douglas B. Mishkin, Joshua Counts Cumby, Richard B. Katskee and Alex J. Luchenitser as Co-Counsels for Plaintiffs filed by Applies To: Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	



COMMONWEALTH OF MASSACHUSETTS
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08/10/2016	5.2	Brief filed: Reply Plaintiffs' Reply in support of Motion to Admission Pro Hac Vice with copy of Statement for the Board of Bar Overseers attached Applies To: Caplan, George (Plaintiff); Conboy, Jim (Plaintiff); Friedman, G. S (Plaintiff)	
08/15/2016		Endorsement on Motion for Admission Pro Hac Vice (#5.0): ALLOWED After review, ALLOWED. The fact that four lawyers are being admitted pro hac vice says nothing about whether any or all are necessary, will add value, or will be entitled to fees if plaintiffs prevail. (Peter B. Krupp, Justice) Dated 8/12/16 and copies mailed 8/15/16	Krupp
08/15/2016	7	Party(s) file Stipulation "Stipulation of schedule for responding to complaint and briefing on Plaintiffs' motion for preliminary injunction" Applies To: Caplan, George (Plaintiff); Conboy, Jim (Plaintiff); Friedman, G. S (Plaintiff); Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	
08/15/2016	6	Plaintiff George Caplan's Motion for Preliminary Injunction, Hearing Requested	
08/15/2016	6.1	George Caplan's Memorandum in support of Motion for Preliminary Injunction, Hearing Requested	
08/15/2016	6.2	Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee's Memorandum in opposition to Plaintiffs' Motion for Preliminary Injunction	
08/15/2016	6.3	Affidavit of Roland Bartl	
08/15/2016	6.4	Affidavit of Andrew W. Fowler	
08/15/2016	6.5	Affidavit of Stauart Saginor	
08/15/2016	6.6	Affidavit of Paul Holtz	
08/15/2016	6.7	Affidavit of Kathleen Colleary	
08/15/2016	6.8	Plaintiff George Caplan's Request for Leave To File A 10-Page Reply In Support Of Motion For Preliminary Injunction	
08/15/2016	6.9	Brief filed: Reply In Support Of Motion For Preliminary Injunction Applies To: Caplan, George (Plaintiff)	
08/15/2016	6.11	Affidavit of Thomasina Weaver	
08/15/2016	6.12	List of exhibits A Through N Applies To: Caplan, George (Plaintiff)	
09/01/2016	8	Defendant Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee's Motion for Protective Order to Stay Discovery	

09/01/2016	8.1	Opposition to Defendant's Motion for Protective Order to Stay Discovery filed by George Caplan, Jim Conboy, G. S Friedman, Daniel Gilfix, Maria Greene, Jesse Levine, Dave Lunger, Allen Nitschelm, Scott Smyers, William Alstrom, Jennifer Brown, David Caplan	
09/01/2016	8.2	Affidavit of Roland Bartl Planning Director for the Town of Acton Applies To: Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	
09/01/2016	8.4	Affidavit of compliance with Superior Court Rule 9A Applies To: Pickering-Cook, Esq., Nina L (Attorney) on behalf of Town Of Acton,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	
09/02/2016	8.3	Response to to Plaintiff's Opposition to the Town's Motion for Protective order to Stay Discovery filed by Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee Applies To: Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	
09/14/2016		Event Result: The following event: Hearing on Preliminary Injunction scheduled for 09/14/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	Kern
09/20/2016		Endorsement on Motion for protective order to stay discovery (#8.0): ALLOWED for the reasons stated herein and in defendant's reply. Dated 9/14/16. Notices mailed 9/20/16.	Kern
09/20/2016	9	MEMORANDUM & ORDER: MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (See scanned image - 4 pages): ORDER: For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is DENIED. Dated 9/16/16. Copies mailed 9/20/16.	Kern
10/20/2016	10	Plaintiffs Notice of Appeal from the Court's September 16, 2016, Order denying their motion for a preliminary injunction and the court's allowance of the Town's motion for a protective order staying discovery. The Order denying plaintiffs' motion for a preliminary injunction was entered on the docket on September 20, 2016.	
10/20/2016	11	Certification/Copy of Letter of transcript ordered from Court Reporter 09/14/2016 02:00 PM Hearing on Preliminary Injunction	
10/20/2016		Copy of Notice of Appeal mailed to all counsel of record. Applies To: Mishkin, Esquire, Douglas B. (Other interested party); Counts Cumby, Esquire, Joshua (Other interested party); Luchenitser, Esquire, Alex J. (Other interested party); Katskee, Esquire, Richard B. (Other interested party); Kreiger, Esq., Arthur Paul (Attorney) on behalf of Town Of Acton,inclusive of its instrumentalities and the Community Preservation Committee (Defendant); Chernin, Esq., Russell S (Attorney) on behalf of Caplan, George (Plaintiff); Pickering-Cook, Esq., Nina L (Attorney) on behalf of Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)	

COMMONWEALTH OF MASSACHUSETTS
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10/28/2016	12	CD of Transcript of 09/14/2016 02:00 PM Hearing on Preliminary Injunction received from Rosemary Matchak.
10/31/2016	13	Court received Letter from Atty. Joshua Cumby, counsel for plaintiffs, related to appeal Consistent with the Notice of Appeal filed received on October 25, 2016, and Appellate Rule 8(b)(1), Plaintiffs write to inform you that they have ordered and original transcript of the September 14, 2016, hearing on their motion for preliminary injunction. The transcript was mailed by the court reporter from Seal Harbor, Maine, on October 20, 2016, via First Class Mail. One you receive the transcript, Plaintiffs will request that you assemble the record for appeal The transcript of the September 14 hearing is the only transcript that will be included in the record on appeal.
11/18/2016	14	Court received Letter from Att. Joshua Cumby, counsel for plaintiffs, related to appeal Consistent with the Notice of Appeal filed received on October 25, 2016, and appellate rule 8(b)(1), plaintiffs write to inform you that the U.S. Postal Service delivered an original transcript of the September 14, 2016, hearing on plaintiffs' motion for a preliminary injunction to the Superior Court on Friday, October 28, 2016 (File Ref Nbr. 12). Plaintiffs now request that you assemble the record for appeal and transmit the record to the Appeals Court. The transcript of the September 14 hearing is the only transcript that will be included in the record on appeal. Consistent with Appellate Rule 18, the parties are conferring on the contents of the appendix.
11/21/2016	15	Affidavit of Kathleen Colleary
12/06/2016	16	Appeal: notice of assembly of record sent to Counsel Applies To: Mishkin, Esquire, Douglas B. (Other interested party); Counts Cumby, Esquire, Joshua (Other interested party); Luchenitser, Esquire, Alex J. (Other interested party); Katskee, Esquire, Richard B. (Other interested party); Kreiger, Esq., Arthur Paul (Attorney) on behalf of Town Of Acton,inclusive of its instrumentalities and the Community Preservation Committee (Defendant); Chernin, Esq., Russell S (Attorney) on behalf of Caplan, George (Plaintiff); Pickering-Cook, Esq., Nina L (Attorney) on behalf of Town Of Acton ,inclusive of its instrumentalities and the Community Preservation Committee (Defendant)
12/06/2016	17	Notice to Clerk of the Appeals Court of Assembly of Record
12/19/2016	18	Appeal entered in Appeals Court on 12/14/2016 docket number A.C. 2016-P-1675.

MIDDLESEX, SS. ***Commonwealth of Massachusetts***
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

In testimony that the foregoing is a true copy on file and of record made by photographic process, I hereunto set my hand and affix the seal of said Superior Court this Seventeenth day of January, 2017.

Ellen M. DiPace
Deputy Assistant Clerk

ADDENDUM 2

To Plaintiffs' Application for Direct Review in the Supreme Judicial Court

9

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

ADDENDUM 3

To Plaintiffs' Application for Direct Review in the Supreme Judicial Court

VERMONT SUPERIOR COURT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 329-6-16 Wncv

Grant Taylor and Richard Scheiber,
Plaintiffs,

v.

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

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

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

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

I. Factual Background

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

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

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

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

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

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

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

II. Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Preliminary Injunction

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

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

A. Likelihood of Success

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

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

In full, Article 3 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This factor weighs in favor of injunctive relief.

B. Irreparable Harm

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

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

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

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

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

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

This factor weighs in favor of injunctive relief.

C. <u>The Potential Harm to Other Parties and the Public Interest</u>

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

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

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

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

These factors weigh in favor of injunctive relief.

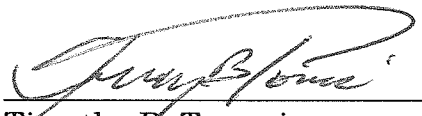
IV. Conclusion

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

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

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

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



Timothy B. Tomasi,
Superior Judge