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A.L. PRIME ENERGY CONSULTANT, INC. v. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

SJC-12370

SUPREME JUDICIAL COURT OF MASSACHUSETTS

479 Mass. 419*; 95 N.E.3d 547**
2018 Mass. LEXIS 248***

January 5, 2018, Argued; May 2, 2018, Decided

Prior History: [***1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on September 6, 2016.

A motion to dismiss was heard by *Mitchell H. Kaplan*, J., and a question of law was reported by him to the Appeals Court.

The Supreme Judicial Court granted an application for direct appellate review.

A.L. Prime Energy Consultant, Inc. v. Mass. Bay Transp. Auth., 2017 Mass. Super. LEXIS 10 (Mass. Super. Ct., Mar. 3, 2017)

Case Summary

Overview

HOLDINGS: [1]-In a public contract dispute, as a state or municipal entity may terminate a procurement contract for its convenience in order to achieve cost savings, where the contractual language permits, and in the absence of contrary applicable law, the Superior Court erred in denying defendant's motion to dismiss; in light of the incompatibility between the federal standard and Massachusetts jurisprudence, it was found proper to construe the termination for convenience clause in the parties' contract according to Massachusetts law; [2]-Construing the termination clause as written did not render the contract unenforceable for lack of consideration; the contract bound defendant to provide certain valuable consideration; [3]-Under the terms of the contract, terminating to obtain a better price, alone, was not a violation of the duty of good faith and fair dealing.

Outcome

Judgment remanded.

Counsel: *Kevin P. Martin* (*Joshua J. Bone* also present) for the defendant.

Michael P. Murphy for the plaintiff.

Judges: Present: GANTS, C.J., LENK, GAZIANO, LOWY, BUDD, CYPHER, & KAFKER, JJ.

Opinion by: LENK

Opinion

[**550] **LENK**, J. This case concerns the proper construction of the termination for convenience clause in a contract between the [*420] Massachusetts Bay Transportation Authority (MBTA) and A.L. Prime Energy Consultant, Inc. (Prime), a private fuel supplier. A termination for convenience clause permits a contracting public entity, under certain circumstances, to cancel a procurement contract without exposure to liability for breach of contract. See *Maxima Corp.* v. *United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988). Termination for convenience clauses originated in Federal procurement contracts, and have given rise to a body of Federal case law defining Federal entities' termination rights. Some State and municipal procurement contracts also contain termination for [***2] convenience clauses, but the case law interpreting them is sparse. As a result, some State courts have looked to Federal precedent for guidance when construing a termination for convenience clause in a State or municipal procurement contract.

We are asked to determine first, whether, in Massachusetts, a termination for convenience clause in a State or municipal procurement contract should be construed according to Federal precedent; and second, if not, whether Massachusetts law permits a State or municipal public entity to invoke a termination for convenience provision solely to obtain a more favorable price. This dispute began when the MBTA terminated the MBTA-Prime contract (contract), in order to procure fuel more economically through an existing Statewide contract with a different vendor. Prime filed a complaint against the MBTA for breach of contract and breach of the implied covenant of good faith and fair dealing, claiming that the MBTA's termination must be evaluated according to Federal case law. Prime further argued that, under Federal precedent, a public entity may not invoke a termination for convenience clause solely to secure a lower price. A Superior Court judge agreed, [***3] and denied the MBTA's motion to dismiss Prime's complaint. The judge then granted the MBTA's motion to report the case for interlocutory review pursuant to Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 (1996), and we allowed the MBTA's motion for direct appellate review.

The Federal standard for construing a termination for convenience provision in a governmental procurement contract departs from the general rule that contracts must be enforced according to their plain meaning. We decline to import this Federal case law, which conflicts with Massachusetts precedent indicating that basic contract principles determine the proper construction of a termination for convenience clause. We conclude that a [**551] State or municipal entity may terminate a procurement contract for its [*421] convenience in order to achieve cost savings, where, as here, the contractual language permits, and in the absence of contrary applicable law. As a result, we conclude further that the Superior Court judge erred in denying the motion to dismiss on the ground that a public entity may not invoke a termination for convenience clause in a State or municipal public procurement contract in order to secure a lower price.

1. *Background*. We summarize the facts alleged [***4] in the plaintiff's complaint, *Polay* v. *McMahon*, 468 Mass. 379, 382, 10 N.E.3d 1122 (2014), as well as relevant "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint" (citation omitted). *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477, 735 N.E.2d 373 (2000).

In January, 2015, the MBTA issued an invitation for bids to supply it with ultra low sulfur diesel fuel (ULSD) for two years. The MBTA's procurement of the ULSD was supported with Federal assistance awarded by the Federal Transit Administration. See note 10, *infra*. The MBTA attached to its invitation for bids the entire contract that the successful bidder would sign with the MBTA. This contract included the following provision, entitled "Termination for Convenience":

> "*Termination for Convenience*. The [MBTA] may, in its *sole discretion*, terminate all or any portion of this Agreement or the work required hereunder, at any time *for its convenience and/or for any reason* by giving written notice to the Contractor thirty (30) calendar days prior to the effective date of termination or such other period as is mutually agreed upon in advance by the parties. If the Contractor is not in default or in breach of any material term or condition of this Agreement, the Contractor shall be paid its reasonable, proper [***5] and verifiable costs in accordance with generally accepted government contracting principles as set forth in the Federal Acquisition Regulations, including demobilization and contract closeout costs, and profit on work performed and Accepted up to the time of termination to the extent previous payments made by the [MBTA] to the Contractor have not already done so. Such payment shall be the Contractor's sole and exclusive remedy for any Termination for

> Convenience, and upon such payment by the [MBTA] to the Contractor, the [MBTA] shall have no further obligation to the Contractor. The [MBTA] shall not be responsible for the [*422] Contractor's anticipatory profits or overhead costs attributable to unperformed work." (Emphasis supplied.)

In July, 2015, the MBTA awarded the ULSD contract to Prime, and agreed that the contract would take effect in September of that year.[1] July, 2015, also saw the creation of the Fiscal and Management Control Board through legislative enactment. See St. 2015, c. 46, §§ 199-208. This body is charged with, among other things, securing the fiscal stability of the MBTA. See St. 2015, c. 46, § 200 (*f*).

Separately, in May, 2015, the Commonwealth issued a request for response (RFR) seeking [***6] bids for a Statewide supply of ULSD for executive branch agencies. Dennis Burke, Inc. (Burke), was the successful bidder, and executed a contract with the Commonwealth in June, 2015.

[**552] Almost one year later, in April, 2016, the MBTA told Prime that the MBTA could achieve cost reductions by opting into the Statewide ULSD contract with Burke. On July 12, 2016, the MBTA notified Prime in writing that it intended to terminate the contract, pursuant to the termination for convenience provision, effective August 15, 2016. Later that month, Prime demanded that the MBTA rescind its termination of the contract. The MBTA replied in August that its termination was proper, and would allow the MBTA to "utiliz[e] economies of scale available through the Commonwealth's existing blanket fuel contract," and encouraged Prime to submit a termination claim.[2]

In September, 2016, Prime filed a complaint against the MBTA in the Superior Court. The complaint asserted claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and sought "compensatory damages, costs of suit, reasonable attorney[']s fees, interest, and such further relief as the court may deem just and equitable." Although [***7] Prime's complaint suggests that the MBTA incorrectly calculated its potential cost savings, its claims rest on the premise that the MBTA terminated the contract in order to secure a lower price for ULSD through the Statewide contract.

[*423] In October, 2016, the MBTA moved to dismiss the complaint pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). In March, 2017, a Superior Court judge denied the motion. The judge's decision was based on Federal case law interpreting termination for convenience clauses in Federal procurement contracts. The judge reasoned that, under that precedent, Prime could show that the MBTA acted improperly if Prime proved that the MBTA had terminated the contract solely to obtain a better price from another contractor.

In April, 2017, the MBTA filed a motion for reconsideration or, in the alternative, to report the case for interlocutory review pursuant to Mass. R. Civ. P. 64. The judge denied the motion for reconsideration but allowed the rule 64 motion. The judge stayed all proceedings in the Superior Court pending interlocutory appeal, and reported the following question to the Appeals Court:

> "May a government agency[3] invoke a termination for convenience clause contained in a procurement contract for the purchase [***8] of goods for the sole reason that it has learned of an opportunity to purchase the same goods at a lower price from another vendor?"

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[1] The Massachusetts Bay Transportation Authority (MBTA) initially had awarded the contract to a different bidder. A.L. Prime Energy Consultant, Inc. (Prime), appealed from this decision on the ground that it was based on incorrect price calculations, and subsequently was awarded the contract.

[2] The record is silent as to whether the MBTA paid Prime the reimbursement costs required in the event of a termination for convenience, but Prime has not alleged that the MBTA failed to provide this payment.

[3] Although the MBTA is a political subdivision akin to "a county, a regional school district, or a fire, improvement, or incinerator district," see *Massachusetts Bay Transp. Auth.* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 543, 205 N.E.2d 346 (1965); G. L. c. 161A, § 2, we construe the reported question as applying to the MBTA.

We allowed the MBTA's application for direct appellate review.[4]

2. *Discussion*. We are asked to determine, as a matter of first impression, whether to construe a termination for convenience clause in a State or municipal public procurement contract according to [**553] Federal case law concerning such clauses in Federal procurement contracts. We first discuss this precedent, which provides that a court must evaluate whether a Federal government entity acted in bad faith or abused its discretion in terminating for its convenience. See, e.g., *Krygoski Constr. Co.* v. *United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996), cert. denied, 520 U.S. 1210, 117 S. Ct. 1691, 137 L. Ed. 2d 819 (1997) (*Krygoski*). We then compare the Federal standard to our own jurisprudence, which indicates that a termination for con [*424]- venience clause in a public procurement contract should be interpreted under "general contract principles." See *Morton St. LLC* v. *Sheriff of Suffolk County*, 453 Mass. 485, 490, 903 N.E.2d 194 (2009) (*Morton St.*). Because the State and Federal approaches cannot be reconciled, we conclude that Massachusetts law must determine the proper construction of a termination for convenience clause.

In this case, the contract unambiguously vests the MBTA with the discretion to terminate "for [***9] any reason," a phrase which necessarily includes the decision to cut costs. We identify nothing in Massachusetts law to indicate that this, standing alone, is an impermissible reason to terminate a contract for convenience. Nor does construing the termination for convenience provision as written render the contract illusory, because the contract required the MBTA to provide Prime with valuable consideration, and placed certain restrictions on the MBTA's termination right. As a result, we conclude that Prime has not alleged sufficient facts to demonstrate that the MBTA committed a breach of the contract or the implied covenant of good faith and fair dealing. The Superior Court judge therefore erred in denying the MBTA's motion to dismiss on the ground that Prime had not stated a viable claim upon which relief could be granted.

a. *Standard of review*. We review an order on a motion to dismiss de novo. See *Galiastro* v. *Mortgage Elec. Registration Sys., Inc.*, 467 Mass. 160, 164, 4 N.E.3d 270 (2014); *Shapiro* v. *Worcester*, 464 Mass. 261, 266, 982 N.E.2d 516 (2013). Factual allegations are sufficient to survive a motion to dismiss if they plausibly suggest that the plaintiff is entitled to relief. *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008). Resolution of this case turns on the proper construction of the contract before us; this is a question of law, which we also review de novo. See [***10] *James B. Nutter & Co.* v. *Estate of Murphy*, 478 Mass. 664, 667, 88 N.E.3d 1133 (2018).

b. *Applicable law*. We first must determine whether to construe the termination for convenience provision according to Federal precedent. Certain background is helpful in understanding Prime's argument that Federal law should guide our analysis.

In general, a termination for convenience clause permits a contracting public entity, under certain circumstances, to cancel a procurement contract without exposure to liability for breach of contract. See *Maxima Corp.*, 847 F.2d at 1552. If a public entity properly invokes a termination for convenience clause, the contractor is not entitled to common-law damages; rather, the remedy is limited to "costs incurred, profit on work done and the costs of [*425] preparing the termination settlement proposal" (citation omitted). *Id.* The concept of terminating a procurement contract for the Federal government's convenience developed during the Civil War, as a way to avoid military procurement costs following the completion of a war effort. See *Krygoski*, 94 F.3d at 1540.

[4] Although the trial judge's report takes the form of a question of law, we evaluate the propriety of the judge's decision denying the MBTA's motion to dismiss. See *Maher* v. *Retirement Bd. of Quincy*, 452 Mass. 517, 522 n.9, 895 N.E.2d 1284 (2008), cert. denied, 556 U.S. 1166, 129 S. Ct. 1909, 173 L. Ed. 2d 1058 (2009); Mass. R. Civ. P. 64, as amended, 423 Mass. 1410 (1996).

Congress subsequently enacted new legislation governing terminations for convenience after each of the World Wars. See *id.* at 1541. By the end of the Twentieth Century, the [**554] principle had been extended beyond the military context, and Federal law required [***11] that many Federal procurement contracts contain a termination for convenience clause. See *id.*; 48 C.F.R. § 49.502. Indeed, Federal regulations now provide uniform language for termination provisions that must be included in certain Federal procurement contracts, permitting termination when it is "in the Government's interest." 48 C.F.R. §§ 52.249-1 to 52.249-6.[5]

Judicial interpretation of this language has evolved along with the changes in statutory and regulatory requirements, primarily in the United States Court of Appeals for the Federal Circuit and the Court of Claims, which was the predecessor to the United States Court of Federal Claims.[6] See *Krygoski*, 94 F.3d at 1541-1544; *South Corp.* v. *United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982); *Torncello* v. *United States*, 681 F.2d 756, 763-766, 231 Ct. Cl. 20 (Ct. Cl. 1982). Following some confusion concerning the correct standard, the United States Court of Appeals for the Federal Circuit settled that a termination for convenience is proper so long as a government entity does not act in bad faith or abuse its discretion. See *Krygoski*, *supra* at 1541.

[*426] The United States Court of Appeals for the Federal Circuit's precedent as to abuse of discretion "suggest[s] that [the] court will avoid a finding of abused discretion when the facts support a reasonable inference that the contracting officer terminated for convenience in furtherance of statutory requirements for full and open competition." [***12] See *id.* at 1544, citing *Caldwell & Santmyer, Inc.* v. *Glickman*, 55 F.3d 1578, 1582 (Fed. Cir. 1995) (*Caldwell*), and *Salsbury Indus.* v. *United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), cert. denied, 498 U.S. 1024, 111 S. Ct. 671, 112 L. Ed. 2d 664 (1991); 41 U.S.C. § 3301(a)(1) (requiring full and open competition in procurement by Federal executive branch agencies). See also discussion, *infra*. With respect to the bad faith standard, in order to succeed on a claim that a termination for convenience clause was invoked in bad faith, a contractor must overcome the presumption that a contracting officer has acted in good faith, by showing "'well-nigh, irrefragable proof' that the government had a specific intent to injure it." *Caldwell*, *supra* at 1581, quoting *Torncello*, 681 F.2d at 770.[7] The Court [**555] of Federal Claims has explained that "[a] claim for breach of contract based on breach of the implied duty of good faith and fair dealing is distinct from a claim for breach of contract based on an improper termination for convenience" under Federal law. See *TigerSwan, Inc.* v. *United States*, 110 Fed. Cl. 336, 345 (2013).[8,9]

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[5] The Federal acquisition regulation provides uniform termination for convenience clauses for seven different types of procurement contracts. See 48 C.F.R. §§ 52.249-1 to 52.249-7. These clauses are distinct from one another, but all contain language permitting termination when it is "in the Government's interest," with one exception for termination clauses required in contracts for architect-engineer services when a fixed-price contract is contemplated, which provides that the government may terminate "for the Government's convenience or because of the failure of the Contractor to fulfill the contract obligations." See 48 C.F.R. § 52.249-7. The United States Court of Appeals for the Federal Circuit applied the bad faith or abuse of discretion standard in considering the "in the Government's interest" language provided by 48 C.F.R. § 52.249-2. See *Krygoski Constr. Co.* v. *United States*, 94 F.3d 1537, 1544-1545 (Fed. Cir. 1996), cert. denied, 520 U.S. 1210, 117 S. Ct. 1691, 137 L. Ed. 2d 819 (1997).

[6] The United States Court of Appeals for the Federal Circuit is a specialized court that hears appeals from the United States Court of Federal Claims, which has jurisdiction to review appeals of most decisions by Federal contracting officers. See 28 U.S.C. § 1295(a)(3); 41 U.S.C. § 7104(b)(1).

[7] The United States Court of Appeals for the Federal Circuit has concluded that the requirement for "well-nigh, irrefragable proof" approximates the "clear and convincing evidence" standard. See *Am-Pro Protective Agency, Inc.* v. *United States*, 281 F.3d 1234, 1239-1240 (Fed. Cir. 2002) (*Am-Pro Protective*).

[8] The Court of Federal Claims held in *TigerSwan, Inc.* v. *United States*, 110 Fed. Cl. 336, 345 (2013), quoting *Am-Pro Protective*, 281 F.3d at 1239-1240, that "[t]o establish a breach based on bad faith in this context, a contractor must present clear and convincing evidence that the government's termination was made with the 'intent to injure' the contractor." By contrast, under Federal common law, "[p]arties can show a breach of the implied duty of good faith and fair dealing by proving lack of diligence, negligence, or a failure to cooperate." *TigerSwan, Inc.*, *supra*. "[P]roof of 'bad faith' is not required to show a breach of the implied duty of good faith

Our own precedent concerning termination for convenience clauses in public procurement contracts is far less extensive. We [*427] have had one previous occasion to construe such a clause. See *Morton St.*, 453 Mass. at 486-487. In *Morton St.*, *supra* at 494, we held that where a sheriff lost outside funding to pay a lease, she lawfully could terminate the lease under a termination for convenience provision. We applied [***13] "general contract principles," looking to the unambiguous contractual language and the dictionary definition of "convenience." See *id.* at 490, 494. We concluded that "losing the funding for the lease is plainly an inconvenience justifying termination" because, to continue the lease, the sheriff would have been required to reduce or eliminate funding for other obligations. *Id.* at 494.

In *Morton St.*, the parties did not raise, and the court did not address, the question whether to import Federal precedent when construing a termination for convenience provision. See *id.* at 490-494. The court interpreted the termination for convenience clause according to "general contract principles." *Id.* at 490. This approach is consonant with the canon that "in general the law applicable to public contracts is the same as that applicable to private contracts." *R. Zoppo Co.* v. *Commonwealth*, 353 Mass. 401, 404, 232 N.E.2d 346 (1967).

The Federal standard, by contrast, is a gloss that has settled on the uniform language found in certain Federal termination for convenience clauses, informed partly by Federal procurement requirements that have no application to State or municipal agencies. See *Krygoski*, 94 F.3d at 1544 ("court will avoid a finding of abused discretion when the facts support a reasonable inference that the contracting officer [***14] terminated for convenience in furtherance of statutory requirements for full and open competition"); 41 U.S.C. § 3301(a)(1) ("an executive agency in conducting a procurement for property or services shall … obtain full and open competition through the use of competitive procedures in accordance with the requirements of [the Federal Procurement Policy] and the Federal Acquisition Regulation"). The Federal acquisition regulation mandates [**556] that certain Federal procurement contracts include a termination for convenience clause, and provides stock language for them. See 48 C.F.R. §§ 49.502, 52.249-1 to 52.249-6. Non-Federal entities, however — such as the MBTA — may craft their own termination for convenience clauses when drafting procurement contracts, because they are not bound by the [*428] Federal acquisition regulation. See 48 C.F.R. §§ 1.104, 2.101. As a result, for example, the contract here allows the MBTA to terminate "in its sole discretion," and "for any reason," rather than allowing termination only where the termination is "in the Government's interest."

Our precedent instructs courts to examine how a contract, by its plain language, defines the parties' rights. See *Schwanbeck* v. *Federal-Mogul Corp.*, 412 Mass. 703, 706, 592 N.E.2d 1289 (1992). The Federal standard, conversely, requires inquiry into whether a public entity has abused its [***15] discretion or acted in bad faith. Embracing the Federal approach would require Massachusetts courts, in construing termination for convenience clauses, to apply the meaning that Federal courts have assigned to language provided by Federal regulations — regardless of the specific contractual language in front of them. The Federal standard, therefore, cannot be reconciled with "general contract principles" provided by Massachusetts law, *Morton St.*, 453 Mass. at 490, including the "elementary" axiom that "an unambiguous agreement must

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and fair dealing in most cases," and "[e]vidence of government intent to harm the contractor is not ordinarily required." *Id.* at 346. But see *Austin* v. *United States*, 118 Fed. Cl. 776, 790 (2014) (rejecting claim for breach of implied duty of good faith and fair dealing against Federal government entity, based on conclusion that "the record does not reflect that any government official acted with the specific intent to injure plaintiffs").

[9] A claim that a Federal public entity has invoked a termination for convenience clause in bad faith also is distinct from a claim for breach of the implied duty of good faith and fair dealing under Massachusetts law. See discussion, *infra*.

be enforced according to its terms." *Schwanbeck, supra*.[10]

Prime's argument that, by referencing the Federal acquisition regulation, the contract incorporates Federal case law, is unavailing. The contract states that, in the event of termination for convenience, "the Contractor shall be paid its reasonable, proper and verifiable costs in accordance with generally accepted government contracting principles as set forth in the Federal Acquisition Regulations." This language does no more than provide that, once the [*429] MBTA terminates for its convenience, Prime's reimbursement is to be determined under the principles provided by the Federal acquisition regulation. See, e.g., 48 C.F.R. § 31.205-42 (cost principles [***16] in event of termination). The single reference to the Federal acquisition regulation does not incorporate the Federal standard for interpreting a termination for convenience clause, as Prime seems to suggest. "[T]he scope of a party's obligation cannot 'be delineated by isolating words and interpreting them as though they stood alone.'" [**557] *Starr* v. *Fordham*, 420 Mass. 178, 190, 648 N.E.2d 1261 (1995), quoting *Boston Elevated Ry.* v. *Metropolitan Transit Auth.*, 323 Mass. 562, 569, 83 N.E.2d 445 (1949). The MBTA's power to terminate is expressly defined by other language in the termination provision; disregarding this language would belie the "general rule of contract construction" "that contracts should be construed as a whole." See *Polaroid Corp.* v. *Rollins Envtl. Servs. (NJ), Inc.*, 416 Mass. 684, 690, 624 N.E.2d 959 (1993).

Neither Prime's additional contention that a termination for convenience clause — construed according to its plain language — would deprive a contractor of any consideration, nor the fact that certain other States have adopted the Federal standard, persuades us that we should import Federal precedent that would conflict with State law. Prime suggests that, in order to ensure that public procurement contracts provide contractors with real consideration, we must adopt the Federal standard. We recognize that Federal case law might represent "an effort to [rein] back on the government's non-negotiable, statutorily-conferred [***17] entitlement to terminate its contracts as it pleases." See *Handi-Van, Inc.* v. *Broward County*, 116 So. 3d 530, 538 (Fla. Dist. Ct. App. 2013). Public entities, however, are constrained by the general contract principle that "a promise that binds one to do nothing at all is illusory and cannot be consideration." *Graphic Arts Finishers, Inc.* v. *Boston Redev. Auth.*, 357 Mass. 40, 43, 255 N.E.2d 793 (1970). A public entity's power unilaterally to walk away from a contract, without restrictions, therefore would render the contract illusory. See *Mb Oil Ltd. Co.* v. *Albuquerque*, 2016- NMCA 090, 382 P.3d 975, 978 (N.M. Ct. App. 2016) (government's unlimited right to terminate could render contract illusory).[11] That is a situation,

[10] Although Prime does not discuss this fact, we note that the MBTA's procurement of fuel under section 6.1.1 of the contract is supported by Federal funding awarded by the Federal Transit Administration (FTA). The Federal acquisition regulation, however, does not apply to procurements conducted with Federal assistance by non-Federal entities, such as the MBTA. See 48 C.F.R. §§ 1.104, 2.101; Federal Transit Administration, Circular No. FTA C 4220.1F, at 9 (rev. Mar. 18, 2013) (FTA Circular). A different Federal regulation instructs that contracts supported by Federal funding must include a termination for convenience clause, but leaves State and municipal recipients of Federal funds free to craft their own contractual language. See 2 C.F.R. Part 200, Appendix II(B); FTA Circular, *supra* at 13. Compare 48 C.F.R. §§ 52.249-1 to 52.249-7 (requiring specific language for termination for convenience clauses in Federal procurement contracts). The MBTA's receipt of Federal funding does not alter our conclusion that Massachusetts law must govern construction of the termination for convenience clause. See *Linan-Faye Constr. Co.* v. *Housing Auth. of Camden*, 49 F.3d 915, 917, 920 (3d Cir. 1995) (State law governs termination for convenience clause in State or municipal contract drafted by Federal funding recipient, using forms provided by Federal agency, if controlling State law exists).

[11] We leave for another day the question whether a public entity may terminate a contract for its convenience in order to rebid the contract in search of a lower price. See *Petricca Constr. Co.* v. *Commonwealth*, 37 Mass. App. Ct. 392, 392-397, 640 N.E.2d 780 (1994) (G. L. c. 30, § 39M, which allows awarding authority to "reject any and all bids, if it is in the public interest to do so," did not permit State entity to reject valid bid and readvertise procurement contract in order to "recapture the benefit of a lower bid that was properly rejected"). In this case, the MBTA had the opportunity to contract with a new vendor by joining an existing Statewide

however, not confronting [*430] us in the contract at issue here.[12]

We recognize that some State courts have consulted Federal precedent in construing a termination for convenience clause in a State or municipal contract. See, e.g., *Krygoski*, 94 F.3d at 1542, 1544; *RAM Eng'g & Constr., Inc.* v. *University of Louisville*, 127 S.W.3d 579, 584, 587 (Ky. 2003) (applying now defunct Federal standard permitting termination only under changed circumstances). Nonetheless, there is no consensus concerning whether or how to apply the Federal standard. See, e.g., *Old Colony Constr., LLC* v. *Southington*, 316 Conn. 202, 204 n.1, 113 A.3d 406 (2015) ("Unlike [F]ederal contracts, no [S]tate regulations dictate the requirements and obligations attendant to termination for convenience in municipal contracts. As in the present case, such obligations [**558] generally are dictated by the terms of the contract").[13] Additionally, at least one Federal court has held that, where [***18] controlling State law exists, a State court need not look to Federal precedent construing termination for convenience clauses. See *Linan-Faye Constr. Co.* v. *Housing Auth. of Camden*, 49 F.3d 915, 917, 920 (3d Cir. 1995).

In sum, in light of the incompatibility between the Federal standard and our own jurisprudence, we are not persuaded that Federal law should supplant Massachusetts precedent in determining the proper construction of a termination for convenience clause in a State or municipal public procurement contract. Having concluded that the termination for convenience clause must be construed according to Massachusetts law, we turn to Prime's [*431] claims against the MBTA.

c. *Proper construction*. i. *Breach of contract*. Prime alleges that the MBTA's decision to terminate the contract in order to secure a better price or contract terms from another vendor "rendered the competitive bidding process meaningless" and was a breach of the contract. In order to determine whether Prime has alleged sufficient facts to show that the MBTA's termination was impermissible, we analyze the contract according to the principle that "[w]hen contract language is unambiguous, it must be construed according to its plain meaning." *Balles* v. *Babcock Power Inc.*, 476 Mass. 565, 571-572, 70 N.E.3d 905 (2017).

The language of a contract is unambiguous unless "the phraseology [***19] can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken" (citation omitted). *Bank* v. *Thermo Elemental, Inc.*, 451 Mass. 638, 648, 888 N.E.2d 897 (2008), and cases cited. The contract at issue vests the MBTA with "sole discretion" to terminate. "Sole discretion" means the "power to make decisions without anyone else's advice or consent." Black's Law Dictionary 565 (10th ed. 2014). See *Thomas* v. *Oregon Fruit Prods. Co.*, 228 F.3d 991, 994 n.3 (9th Cir. 2000) ("sole discretion" represents "unambiguous grant of discretion"). The words "sole discretion" cannot reasonably be interpreted in multiple ways. See *Bank*, *supra*. They clearly permit the MBTA to terminate the contract unilaterally.

The termination provision further provides that the MBTA may terminate the contract "for its convenience and/or for any reason." As we concluded in *Morton St.*, 453 Mass. at 494,

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contract. Under the Commonwealth's regulations for the procurement of commodities or services, which the MBTA has elected to follow, see 801 Code Mass. Regs. § 21.01(2)(a) (2003), State agencies typically must procure goods and services through a competitive process, but this requirement does not apply when an agency joins a collective purchasing agreement. See 801 Code Mass. Regs. §§ 21.05(5), 21.06 (1997).

[12] See discussion, *infra*, concerning consideration provided by the MBTA-Prime contract in the event of termination.

[13] See *Mb Oil Ltd. Co.* v. *Albuquerque*, 2016- NMCA 090, 382 P.3d 975, 978-980 (N.M. Ct. App. 2016) (discussing Federal standard and plain contractual language, and declining to state controlling standard); *Louis Food Serv. Corp.* v. *Department of Educ. of the City of New York*, 76 A.D.3d 956, 958, 908 N.Y.S.2d 235 (N.Y. 2010) (New York law permits State government agency to exercise rights under termination for convenience clause without judicial inquiry); *4N Int'l, Inc.* v. *Metropolitan Transit Auth.*, 56 S.W.3d 860, 861-862 (Tex. Ct. App. 2001) (rejecting Federal standard and applying Texas law).

quoting the American Heritage Dictionary of the English Language 411 (3d ed. 1996), "'convenience' means the 'quality of being suitable to one's comfort, purposes, or needs.'" Conserving resources meets an important need. See *Morton St.*, *supra* at 492, 494 (recognizing "concern about the public fisc" and "many challenging decisions that public officials with considerable obligations and limited resources often need to make, especially during difficult fiscal [***20] times, in order to allocate available resources more suitably").

The word "any" is defined as "one, no matter what one: every." Webster's Third New International Dictionary 97 (2002). [**559] The phrase "for any reason" thus unambiguously includes the MBTA's reason for termination: achieving cost savings. See *Insurance Brokers W. Inc.* v. *Liquid Outcome LLC.*, 874 F.3d 294, 298 (1st Cir. 2017); (phrase "for any reason" is unambiguous); *Ruiz* v. *A.B. Chance Co.*, 234 F.3d 654, 672 (Fed. Cir. 2000) (same). "There is [*432] no ambiguity here that would allow a court to search for an intent of the parties not to be held strictly to the plain terms of the contract language." *Eigerman* v. *Putnam Invs., Inc.*, 450 Mass. 281, 287, 877 N.E.2d 1258 (2007).

Prime argues that, under *Morton St.*, only a funding loss or other change of circumstances could justify invocation of a termination for convenience clause, but *Morton St*. contains no such limitation. Indeed, in that case we concluded that "challenging decisions" forced by budget constraints may motivate a public entity to terminate a contract. See *Morton St.*, 453 Mass. at 494. We did not define the full extent of the sheriff's discretion in *Morton St.*, because it clearly encompassed the sheriff's right to end the lease when she lost the financing for that lease. *Id.* The sheriff's circumstances were sufficient, but not necessary, to justify termination for convenience.

The Legislature's decision to create [***21] the Fiscal and Management Control Board in order to secure the MBTA's fiscal stability indicates that the MBTA's budget is under pressure. See St. 2015, c. 46, § 200 (*f*). Moreover, the contract language in this case contains a broader authorization of discretion than was at issue in *Morton St.*, 453 Mass. at 486-487. In that case, the termination provision provided simply that the contract could "be terminated at any time for the convenience of the" sheriff. *Id.* Accordingly, we considered whether the funding loss constituted an inconvenience. *Id.* at 494. Here, by contrast, the contract specifies that the MBTA may terminate "for any reason"; Prime does not allege that the MBTA terminated the contract for no reason at all but, rather, argues that its stated reason is improper.[14] In sum, Prime has not alleged any impermissible conduct or wrongdoing, aside from its contention that the MBTA could not terminate the contract in order to secure a lower price.[15]

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[14] As noted, although Prime's complaint asserts that the MBTA incorrectly calculated its potential cost savings, the complaint does not allege that the MBTA's stated reason for terminating the contract concealed another, illegitimate one.

[15] In its brief, Prime suggests that the MBTA's decision to terminate the contract runs afoul of Massachusetts public bidding laws that are aimed at fostering equitable competition. We observe that, as a recipient of Federal assistance, the MBTA both must comply with applicable State law and must ensure that "procurement transactions be conducted in a manner providing full and open competition." 2 C.F.R. §§ 200.318(a), 200.319(a). Prime, however, has alleged no statutory or regulatory violations that occurred during the process by which the contract at issue here, or the Statewide ULSD contract, was awarded. On the facts provided, we have no reason to conclude that these procedures did not comply with applicable law, and, accordingly, must enforce the contract as written. Contrast *Phipps Prods. Corp.* v. *Massachusetts Bay Transp. Auth.*, 387 Mass. 687, 692, 443 N.E.2d 115 (1982) (contract was unenforceable where MBTA did not comply with statutory public bidding requirements).

To the extent that Prime argues that the contract, construed according to its plain language, is unenforceable as contrary to the public policy of treating bidders fairly and equally, we reject this claim. "'Public policy' in this context refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." *Feeney* v. *Dell Inc.*, 454 Mass. 192, 200, 908 N.E.2d 753 (2009), and cases cited. Although "[w]e have repeatedly stated that the purpose of competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an open and honest procedure for competition for public contracts," *Modern Continental Constr. Co.* v. *Lowell*, 391 Mass. 829, 840, 465 N.E.2d 1173 (1984), terminating a procurement contract in order to secure a lower price does not conflict with this purpose. If a contract clearly defines the public entity's right to terminate, the bidders

[*433] [**560] Finally, construing the termination clause as written does not, as Prime argues, render the contract unenforceable for lack of consideration. The contract here bound the MBTA to provide certain valuable consideration to Prime. See *Graphic Arts Finishers, Inc.*, 357 Mass. at 43 ("The law does not concern itself with the adequacy [***22] of consideration; it is enough if it is valuable"). In addition to payment for ULSD, the contract guaranteed Prime thirty days' written notice and reimbursement for certain costs in the event of termination. See 3 R.A. Lord, Williston on Contracts § 7:13 (4th ed. 2008) (consideration exists when reservation of right to cancel requires written notice). Compare *Torncello*, 681 F.2d at 769-770 ("a route of complete escape vitiates any other consideration furnished," where no notice or additional payment was provided). The MBTA's termination does not render the contract illusory. See *Simons* v. *American Dry Ginger Ale Co.*, 335 Mass. 521, 525, 140 N.E.2d 649 (1957) (contract construed as terminable at will on reasonable notice was not illusory prior to termination). For these reasons, we conclude that Prime has not alleged sufficient facts to state a claim for breach of contract.

ii. *Breach of the implied covenant of good faith and fair dealing*. Prime's complaint also asserts that the MBTA terminated the contract "in order to undercut the [c]ontract price set through the competitive bidding process, thereby depriving Prime [*434] of the fruits of the [c]ontract," and therefore committed a breach of the implied covenant of good faith and fair dealing. The MBTA's broad latitude under the contract does not immunize it against such an [***23] allegation. See *Robert & Ardis James Found.* v. *Meyers*, 474 Mass. 181, 189, 48 N.E.3d 442 (2016) (covenant of good faith and fair dealing is implied in every contract).

"The covenant of good faith and fair dealing … provides 'that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' … 'A breach occurs when one party violates the reasonable expectations of the other'" (citations omitted) *Weiler* v. *PortfolioScope, Inc.*, 469 Mass. 75, 82, 12 N.E.3d 354 (2014). "There is no requirement that bad faith be shown; instead, the plaintiff has the burden of proving a lack of good faith… . The lack of good faith can be inferred from the totality of the circumstances." *Robert & Ardis James Found.*, 474 Mass. at 189, quoting *Weiler*, *supra*. See *Anthony's Pier Four, Inc.* v. *HBC Assocs.*, 411 Mass. 451, 473-474, 583 N.E.2d 806 (1991) (rejecting argument that, because trial judge did not find "bad faith," he erred in ruling that defendant violated implied covenant of good faith and fair dealing).

Prime has not alleged sufficient facts to show that the MBTA's decision to terminate "injured" its right to "receive the fruits of the contract," which, as discussed, [**561] included payment for ULSD delivered, as well as thirty days' written notice and reimbursement for certain costs in the event of termination. Nor do Prime's allegations state a claim that the MBTA violated its "reasonable [***24] expectations." "The plaintiff cannot have misunderstood the broad discretion on the part of" the MBTA. *Eigerman*, 450 Mass. at 289. "Any expectation otherwise on the plaintiff's part, as [a] matter of contract law, would not be reasonable." *Id.*[16]

On the facts provided, this is not a case in which one party leveraged its discretion to "recapture opportunities forgone on

are equally on notice of such a possibility. Furthermore, the Legislature has encouraged State agencies to join cooperative purchasing agreements. See G. L. c. 30B, § 23. As explained *supra*, the MBTA's termination was consistent with this court's precedent.

[16] Prime contends, in addition, that the obligation of good faith imposed by the Uniform Commercial Code (U.C.C.) is applicable here. For the reasons discussed, the MBTA has not violated this obligation. See G. L. c. 106, § 1-304; *Knapp Shoes, Inc.* v. *Sylvania Shoe Mfg. Corp.*, 72 F.3d 190, 199 & n.3 (1st Cir. 1995), cert. denied, 517 U.S. 1245, 116 S. Ct. 2500, 135 L. Ed. 2d 191 (1996) (combining common law and statutory good faith analyses); official comment to U.C.C. § 1-203, 1 U.L.A. 273 (Master ed. 2012) ("This section does not support an independent cause of action for failure to perform or enforce in good faith … [and] does not create a separate duty of fairness and reasonableness").

contracting" or "to refuse 'to pay the expected costs of perfor- [*435] mance.'" See *Anthony's Pier Four, Inc.*, 411 Mass. at 473, quoting E.A. Farnsworth, Contracts § 7.17 (a), at 329 (1990). Nor has Prime claimed that the MBTA entered into the contractual relationship without intending to continue it for the full term, compare *K.G.M. Custom Homes, Inc.* v. *Prosky*, 468 Mass. 247, 254-255, 10 N.E.3d 117 (2014) (party who had no intention of completing contract committed breach of implied covenant of good faith and fair dealing), or asserted that the MBTA's stated reason for terminating the contract concealed an illegitimate one. See *T.W. Nickerson, Inc.* v. *Fleet National Bank*, 456 Mass. 562, 571, 924 N.E.2d 696 (2010); *Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 104-105, 364 N.E.2d 1251 (1977) (employer acts in bad faith by terminating employee in order to deprive him or her of commission).

Simply put, "the implied covenant of good faith and fair dealing cannot create rights and duties that are not already present in the contractual relationship." *Eigerman*, 450 Mass. at 289. Under the terms of the contract, terminating to obtain a better price, alone, is not a violation of [***25] this duty. Prime has not alleged sufficient facts to prove that the MBTA committed a breach of the implied covenant of good faith and fair dealing.

3. *Conclusion*. We construe the reported question as asking whether the MBTA's motion to dismiss properly was denied. We conclude that the Superior Court judge erred in denying the motion on the ground that a public entity may not invoke a termination for convenience clause in a public procurement contract in order to secure a lower price. The matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

ACEVEDO V. MUSTERFIELD PLACE, LLC

SJC-12398

SUPREME JUDICIAL COURT OF MASSACHUSETTS

479 Mass. 705*; 98 N.E.3d 673**
2018 Mass. LEXIS 354***

February 8, 2018, Argued; June 8, 2018, Decided

JULIO ACEVEDO *vs.* **MUSTERFIELD PLACE**, LLC, & others.[1]

Prior History: [***1] Middlesex. CIVIL ACTION commenced in the Superior Court Department on January 26, 2015.

A motion for partial summary judgment was heard by *Maynard M. Kirpalani*, J., and the case was reported by him to the Appeals Court.

The Supreme Judicial Court granted an application for direct appellate review.

Case Summary

Overview

HOLDINGS: [1]-A property owner, a controlled affiliate of the housing authority, and the property manager were not entitled to summary judgment in a slip and fall action by a tenant of the housing development because the owner and the manager were not governmental entitles and not public employers under the Tort Claims Act, Mass. Gen. Laws Ann. ch. 258, § 2; thus, limiting the scope and amount of the owner's and the

[1] FHA Musterfield Manager, LLC; and Framingham Housing Authority. The Framingham Housing Authority is not a party to this appeal.

manager's liability would not protect public funds.

Outcome

Judgment affirmed; matter remanded.

Counsel: *John Egan* (*Laura M. Kelly* also present) for Musterfield Place, LLC, & another.

Chester L. Tennyson, Jr., for the plaintiff.

Judges: Present: GANTS, C.J., GAZIANO, BUDD, CYPHER, & KAFKER, JJ.

Opinion by: GANTS

Opinion

[**674] **GANTS**, C.J. On February 22, 2013, the plaintiff, Julio Acevedo, allegedly slipped and fell while descending stairs at his apartment in a public housing development in Framingham known as Musterfield at Concord Place (property), and suffered serious injuries. He filed a complaint in the Superior Court alleging various claims for damages against three defendants: the Framingham Housing Authority (authority); Musterfield Place, LLC, a "controlled affiliate" of the authority, which owns the property (owner);[2] and FHA Musterfield Manager, LLC, the managing agent for the owner (manager). The owner and manager moved [*706] for partial summary judgment, seeking a ruling that [***2] they should be deemed public employers under the Tort Claims Act (act), G. L. c. 258, § 2, and therefore may not be liable for damages in excess of $100,000. The judge denied the motion, concluding that the act "clearly defines the scope of a public employer," and did not include controlled affiliates within that definition. Recognizing that the issue whether controlled affiliates are deemed public employers under the act is a matter with "potentially broad impact throughout the Commonwealth" and that it has not been addressed by any other Massachusetts court, the judge reported his decision to the Appeals Court pursuant to Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1410 (1996), and stayed the action until the appeal is decided. We conclude that neither a controlled affiliate nor the manager of a controlled affiliate is a "public employer" as defined in the act, and therefore, we affirm the denial of the defendants' motion for partial summary judgment.

Background. In 2009, the authority determined that the property, a 110-unit public housing development in Framingham then owned by the authority (and previously known as the Pearl Harbor Development), was in need of substantial rehabilitation. Because the estimated costs to rehabilitate the [***3] property exceeded the funding available to the authority from the Department of Housing and Community Development (department), the authority sought financing through five sources, one of which was an equity investment by investors seeking to take advantage of low income housing tax credits made available through the Federal Low Income Housing Tax Credit (LIHTC) program.

The LIHTC program, created by the Tax Reform Act of 1986 and incorporated in the Internal Revenue Code, see 26 U.S.C. § 42 (2012), is a Federal tax subsidy program designed to promote the construction and rehabilitation of rental housing that is affordable to low and moderate income households. Under the LIHTC program as administered in Massachusetts, [**675] the Internal Revenue Service allocates Federal tax credits to the department. The department, in turn, allocates those tax credits to "qualified low-income housing projects" — that is, residential rental properties that are rent-restricted and have a certain minimum share of rental units set aside for low and moderate income households. See 26 U.S.C. § 42(g), (h)(3). See also 760 Code Mass. Regs. [*707] § 54.05(1) ("Any person or entity [of whatever type] with an ownership interest in a qualified Massachusetts project is eligible to receive [***4] an allocation of Massachusetts standard [tax credits under the LIHTC program] with

[2] As explained later in the opinion, a "controlled affiliate" of a local housing authority is defined as "[a]n entity with the power to own and manage residential real property of which and over which actual and legal control shall be in [a local housing authority]." See 760 Code Mass. Regs. §§ 4.01, 4.15 (2017).

respect to such project"). Private developers of these projects typically use the tax credits allocated to them through the LIHTC program as an incentive to attract capital from private investors to help pay for the construction, acquisition, and rehabilitation of affordable housing. These developers "sell" the tax credits to private investors, usually through a syndicator, in exchange for an equity investment in the housing project. See J. Khadduri, C. Climaco, & K. Burnett, United States Department of Housing and Urban Development, What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond? at 2 (2012).

Local housing authorities seeking to rehabilitate public housing cannot make direct use of these Federal tax credits because they are exempt from Federal tax liability and, therefore, have no Federal tax liability that they can diminish by receiving Federal tax credits under the LIHTC program. To enable local housing authorities to make use of Federal funding that would otherwise be unavailable to them, the department promulgated regulations permitting them to transfer ownership [***5] of a housing project in need of substantial rehabilitation to a "controlled affiliate" of the local housing authority, defined as "[a]n entity with the power to own and manage residential real property of which and over which actual and legal control shall be in [a local housing authority]." See 760 Code Mass. Regs. §§ 4.01, 4.15 (2017). The controlled affiliate that owns the property may claim these tax credits annually over a period of ten years, thereby offsetting the Federal tax liability of its investors, see 26 U.S.C. § 42(a), (f)(1), but must continue to comply with affordability requirements for the low and moderate income renters of the property units for a period of fifteen years to preserve those tax credits. See 26 U.S.C. § 42(c)(2), (i)(1), (j). For any LIHTC project allocated tax credits after 1989, the owner must also agree to comply with the affordability restrictions for an additional fifteen years, known as the extended use period. See 26 U.S.C. § 42(h)(6).

Here, in order to obtain Federal tax credits pursuant to the LIHTC program, the authority submitted an application to the department to transfer ownership of the property to a controlled affiliate. In the fall of 2009, after the department approved the authority's application, the authority sold the property, pursuant [*708] to [***6] 760 Code Mass. Regs. § 4.15, to its controlled affiliate, the owner, for $6.5 million. The owner has three members: RSEP Holding, LLC, the "investor," with a 99.99 per cent ownership interest; the manager, the "managing member," with a 0.009 per cent ownership interest; and Red Stone Equity Manager, LLC, the "special member," with a 0.001 per cent ownership interest.[3] [**676] The manager is comprised of only one member — the authority. Therefore, although the authority no longer owns the property, the authority (through the manager) continues to manage it.

Discussion. Under G. L. c. 258, § 2, of the act, "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of $100,000." The provisions of the act apply only to a "public employer," which is defined in G. L. c. 258, § 1, [***7] as

> "the [C]ommonwealth and any county, city, town, educational collaborative, or district, including the Massachusetts Department of Transportation, the Massachusetts Bay Transportation Authority, any duly constituted regional transit authority and the Massachusetts

[3] In keeping with its ownership interests, RSEP Holding, LLC, is entitled to receive 99.99 per cent of the tax credits, while Red Stone Equity Manager, LLC, is entitled to receive 0.001 per cent.

> Turnpike Authority and any public health district or joint district or regional health district or regional health board established pursuant to the provisions of [G. L. c. 111, § 27A or 27B], and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof including a local water and sewer commission including a municipal gas or electric plant, a municipal lighting plant or cooperative which operates a telecommunications system pursuant to [G. L. c. 164, § 47E], department, board and commission, which exercises direction and control over the public employee, but not a private contractor with any such public employer, the Massachusetts Port Authority, or any other independent body politic and corporate."

[*709] A local housing authority is an "authority" within the meaning of § 1, and, therefore, is a "public employer" within the ambit of the act. See *Commesso* v. *Hingham Hous. Auth.*, 399 Mass. 805, 807, 507 N.E.2d 247 (1987) ("The definition of 'public employer,' has clearly included a town 'authority' [***8] since the statute was amended in 1981. See St. 1981, c. 179").

The defendants here contend that because the authority, as the sole member of the manager of the controlled affiliate, retains actual and legal control over the property, and because the controlled affiliate must comply with the statutes governing local housing authorities in G. L. c. 121B, and with various department regulations "in the same manner and to the same effect as if it were [a local housing authority]," see 760 Code Mass. Regs. § 4.15(1)(a), the controlled affiliate and its managing member should be treated as a local housing authority under the act and, accordingly, be deemed public employers. We disagree. To characterize either a limited liability company that is a controlled affiliate or a limited liability company that is the managing member of that controlled affiliate as a "public employer" would be inconsistent with the language of the definition of a public employer in § 1 and with the purpose and history of the act.

The language of the definition of a public employer in § 1 does not include a controlled affiliate among the various entities that are deemed public employers. In fact, it specifically excludes "a private contractor with any such public employer." [***9] See G. L. c. 258, § 1. Consequently, if a housing authority that owned a housing development were to retain a private contractor to manage the development (including delegating to that private contractor [**677] the responsibility for maintenance and repairs in the housing development), a suit brought by a tenant of the housing development against the private contractor for injuries arising from the negligent failure to maintain or repair the premises could not be brought under the act and, accordingly, would not be subject to the limitations on liability in the act. In that scenario, the private contractor would not become a public employer even if the housing authority contractually required the private contractor to comply with the statutes and regulations governing local housing authorities in the same manner and to the same effect as if it were a housing authority. A contract that requires a private contractor to perform the maintenance and repair responsibilities of a local housing authority as if it were a local housing authority does not transform that private contractor into a public employer.

[*710] Accordingly, if a private contractor that manages property owned by a housing authority is not a public employer [***10] (even if it were contractually obligated to manage the property as if it were a housing authority), then a controlled affiliate that purchased the property from the housing authority, but is required by regulation to manage the property "in the same manner and to the same effect as if it were" a housing authority, see 760 Code Mass. Regs. § 4.15(1)(a), is also not a public employer. It would be strange indeed if the sale of the public property by the housing authority to a private entity could enable that private entity to become a public employer.

Nor would it be consistent with the purpose and history of the act to characterize a limited liability company that is a controlled affiliate or its managing member as a public employer. "One of the major purposes of [the act] clearly is to allow plaintiffs with valid causes of action to recover in negligence against governmental entities in Massachusetts. A second, and equally important, purpose is to preserve the stability and effectiveness of government by providing a mechanism which will result in payment of only those claims against governmental entities which are valid, in amounts which are reasonable and not inflated." *Vasys* v. *Metropolitan Dist. Comm'n*, 387 Mass. 51, 57, 438 N.E.2d 836 (1982). See *Hallett* v. *Wrentham*, 398 Mass. 550, 558, 499 N.E.2d 1189 (1986), quoting *Irwin* v. *Ware*, 392 Mass. 745, 772, 467 N.E.2d 1292 (1984) (act reflects "a legislative [***11] intent to be protective of … public funds" while also "ensur[ing] that a meaningful recovery will be available to victims of public employee negligence"). The controlled affiliate and its managing member in this case are not governmental entities; they are private limited liability companies that have never been thought to be entitled to sovereign immunity. See *Estate of Gavin* v. *Tewksbury State Hosp.*, 468 Mass. 123, 131, 9 N.E.3d 299 (2014), quoting *Shapiro* v. *Worcester*, 464 Mass. 261, 266, 982 N.E.2d 516 (2013) ("The act was passed in 1978 in response to 'the Legislature's desire to abolish "sovereign immunity and the crazy quilt of exceptions to sovereign immunity … which courts [had] stitched together"'"). And because the owner and the manager are not governmental entities, limiting the scope and amount of their liability would not protect public funds.

Conclusion. For the reasons stated, we affirm the denial of the defendants' motion for partial summary judgment, and remand [*711] the case to the Superior Court for further proceedings consistent with this opinion.

So ordered.

BOARD OF SELECTMEN OF WEST BRIDGEWATER V. ATTORNEY GENERAL
17-P-84

APPEALS COURT OF MASSACHUSETTS

93 Mass. App. Ct. 1109;
2018 Mass. App. Unpub. LEXIS 375*

May 4, 2018, Entered

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

Subsequent History: Appeal denied by Bd. of Selectmen of W. Bridgewater v. Ag, 2018

Mass. LEXIS 529 (Mass., July 30, 2018)

Judges: Vuono, Sullivan & Massing, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue in this case is whether the board of selectmen of West Bridgewater (board) violated the open meeting law, G. L. c. 30A, §§ 18-25, when it discussed the professional competence of nonunion municipal employees in executive sessions without first discussing those matters in open session as required under *District Attorney for the N. Dist.* v. *School Comm. of Wayland*, 455 Mass. 561, 918 N.E.2d 796 (2009) (*Wayland*). Acting on a complaint filed by a private citizen, the Attorney General concluded that the board had violated the open meeting law on three occasions. The board then commenced this action pursuant to G. L. c. 30A, § 23(*d*), seeking certiorari review under G. L. c. 249, § 4. On cross motions for judgment on the pleadings, a judge of the Superior Court dismissed the board's complaint and affirmed the decision of the Attorney General. The board has appealed from that judgment.

Background. The following facts are taken from the administrative record. The three executive session discussions that are the subject of this appeal occurred on January 14, 2015, March 4, 2015, and April 1, 2015. During each of these executive sessions, the board discussed the professional competence of nonunion municipal employees in connection with negotiating the employees' contracts. There [*2] is no dispute that the board did not conduct annual performance evaluations or otherwise discuss the employees' professional competence in open sessions prior to the three executive sessions in question.[1]

On January 14, 2015, the board met with the police chief to discuss renewing his contract. The minutes from that meeting state that the board convened an executive session "[p]ursuant to MGL Chapter 30A, Section 21(a) Exception 2 to conduct contract negotiations with non union personnel." Prior to the session, the board had sent a letter to the chief describing "actions and changes that would help improve the Police Department and that would serve as a measure of renewing" his contract. During the session, the board asked the chief to discuss his progress and the steps he had taken to improve the department. The board finalized its negotiations with the chief during two subsequent executive sessions held on March 4, 2015, and April 16, 2015.

On March 4, 2015, and April 1, 2015, the board met with various other nonunion employees during executive sessions. Like the session held on January 14, the minutes indicate that these two sessions were convened "[p]ursuant to MGL Chapter 30A, Section 21(a) Exception 2 to conduct contract negotiations with non-union personnel." [*3] On March 4, the board met with the town accountant, the elder services director, the police chief, and the forestry and parks superintendent. On April 1, the board met with the highway and vehicle maintenance superintendent, the assistant vehicle maintenance superintendent, and a police lieutenant. Each employee was asked a series of questions about their positions. The board asked the employees to describe their work schedules and the manner in which they accrue compensatory time. The employees were also asked to provide an overview of their departments and to highlight their projects, accomplishments, and challenges.[2] The board

[1] On November 19, 2014, and February 4, 2015, the board discussed whether to conduct performance evaluations for nonunion employees and, if so, how those evaluations would be used to determine salary increases. However, no performance evaluations were conducted.

[2] On March 4, 2015, the town accountant presented "documentation chronicling her accomplishments," "discussed her increase in duties," and requested a salary increase. The elder services director discussed her accomplishments and also requested a salary increase. The forestry and parks superintendent "discussed his daily meetings with his employees and his time spent working on grants and facilitating summer concert sponsorships," and requested a salary increase. Similar discussions were conducted on April 1, 2015, with the highway and vehicle maintenance superintendent, the assistant vehicle maintenance superintendent, and the police lieutenant.

then deliberated on what it describes as "contract presentations" by the employees and voted to increase their salaries. The employment contracts were executed in open session on June 17, 2015, after the annual town budget had been approved.

On August 21, 2015, a town resident filed a complaint with the Attorney General alleging that the board's discussion in executive session of nonunion employees' professional competence violated the open meeting law. The Attorney General opened an investigation and found that, in the context of the negotiations, the board [*4] solicited "contract presentations" in which it identified performance issues for certain employees and asked them to respond to those areas of concern. The Attorney General concluded that violations had occurred on January 14, 2015, March 4, 2015, and April 1, 2015. Relying on *Wayland*, the Attorney General determined that the board's characterization of the discussions as "contract presentations" "did not transform the[m] ... into something other than a performance review." The Attorney General then ordered the board to comply with the open meeting law in the future and to review a training video on executive sessions.[3]

In bringing this action, the board asserts that it properly discussed the employees' professional competence in executive session because the sessions were conducted pursuant to G. L. c. 30A, § 21(*a*)(2) (§ 21[*a*][2]), in connection with contract negotiations. Because § 21(*a*)(2) does not explicitly require that professional competence be discussed in open session, contrast G. L. c. 30A, § 21(*a*)(1) (§ 21[*a*][1]), the board argued that the Attorney General erred in determining that it had violated the open meeting law.[4] A judge of the Superior Court rejected the board's argument that professional competence must be discussed [*5] in open session only where an executive session is called pursuant to § 21(*a*)(1), and held that the board's interpretation of G. L. c. 30A, § 21(*a*), is inconsistent with the holding in *Wayland*. The judge deferred to the Attorney General's finding that the board effectively conducted performance evaluations of nonunion employees during executive sessions without first discussing professional competence in an open session, and he concluded that the Attorney General did not err.

Discussion. "Our function in reviewing an appeal of a decision in a certiorari proceeding is a limited one." *Durbin* v. *Board of Selectmen of Kingston*, 62 Mass. App. Ct. 1, 5, 814 N.E.2d 1121 (2004). We review the administrative record only to determine (1) whether the Superior Court judge correctly ruled that the Attorney General committed no error of law that adversely affected the board's legal rights, and (2) whether the Attorney General's determination that the board violated the open meeting law is supported by substantial evidence. *Id.* at 6.

As previously noted, in affirming the decision of the Attorney General, the judge concluded that the board had violated the open meeting law because it did not first discuss professional competence in an open session as required under *Wayland*. In [*6] *Wayland*, 455 Mass. at 569-570, the school committee exchanged private electronic mail messages concerning a draft performance evaluation of the superintendent. It then discussed the draft evaluation in two executive sessions. *Id.* at 566-567. The Supreme Judicial Court held that this process "violated the letter and spirit of the open meeting law." *Id.* at 570. As the Attorney General notes in her brief, the Supreme Judicial Court established a bright-line rule in *Wayland*. If a public body like the board intends to discuss an employee's professional competence — even for purposes of contract

[3] On January 6, 2016, the members of the board returned certificates of compliance showing that they had reviewed the video.

[4] In pertinent part, § 21(*a*)(1), as appearing in St. 2009, c. 28, § 18, provides that a public body may convene in an "executive session" that is closed to the public in order to "discuss the reputation, character, physical condition or mental health, *rather than professional competence*, of an individual" (emphasis supplied). Pursuant to § 21(*a*)(2), as appearing in St. 2009, c. 28, § 18, a public body may convene an executive session in order to "conduct ... contract negotiations with nonunion personnel."

negotiations under § 21(*a*)(2) — it must first conduct performance evaluations or otherwise discuss that competence in an open session. See *id.* at 568. Thereafter, the board may convene an executive session to determine how such evaluations of the employee will be used in the negotiations. *Ibid.*

Here, there is no dispute that the board failed to conduct performance evaluations or to publicly discuss the professional competence of the various employees in question. As a result, we, like the judge, conclude that the Attorney General correctly determined that the board violated the open meeting law. See G. L. c. 30A, § 23(*a*), inserted by St. 2009, c. 28, § 18 ("[T]he attorney general [*7] shall interpret and enforce the open meeting law"); G. L. c. 30A, § 25(*b*), inserted by St. 2009, c. 28, § 18 ("The attorney general shall have the authority to interpret the open meeting law and to issue written letter rulings"). See also *Boelter* v. *Board of Selectmen of Wayland*, 479 Mass. 233, 242, 93 N.E.3d 1163 (2018) (Attorney General's interpretation of open meeting law "is entitled to substantial deference, unless it is inconsistent with the plain language of the statute").

We also agree with the judge that the board's attempt to distinguish its conduct from that at issue in *Wayland* is not persuasive; the board interprets *Wayland* too narrowly. It matters not that the school committee in *Wayland* did not discuss negotiations or strategy in its executive sessions. The point the Supreme Judicial Court made in *Wayland* is that any discussion of professional competence must first take place in an open session. See *Wayland*, *supra* at 568 ("While *professional competence must first be discussed in an open session*, how that evaluation will factor into a contract or salary negotiation strategy may be suitable discussion for an executive session" [emphasis supplied]); *ibid.* ("While a school committee's *deliberation of the superintendent's professional competence must take place in an open session*, written [*8] performance evaluations, whether draft or final, are not a public record, and are not required to be made available to the public" [emphasis supplied]); *id.* at 572 n.8 ("If, however, the school committee had met *as required by law in an open meeting to discuss the superintendent's professional competence*, it then could have moved into a proper executive session to draft the evaluation" [emphasis supplied]).

The board is correct that the open meeting law was amended significantly after the Supreme Judicial Court decided *Wayland*. However, those amendments did not materially change the portions of the law upon which *Wayland* is based. To the contrary, the amendments "broadened the open meeting law's definition of 'deliberation'" and clarified the manner in which public bodies may conduct performance evaluations. *Boelter* v. *Board of Selectmen of Wayland*, *supra* at 241. Nothing in the amendments to the open meeting law changes the Supreme Judicial Court's consistent interpretation that "[t]he open meeting law was intended to ensure that the public is able to see for themselves how [decisions to award contract extensions or raises] are made," *id.* at 243, in that the Supreme Judicial Court continues to interpret the open meeting [*9] law to require that professional competence first be discussed in an open session. See *id.* at 242-243 (distribution of board members' opinions regarding town administrator's performance "to the quorum, prior to the [open] meeting, was ... a violation of the open meeting law").

Conclusion. We reject the board's argument that the Attorney General committed legal error in determining that the board violated the open meeting law, and we affirm the judgment of the Superior Court.

So ordered.

By the Court (Vuono, Sullivan & Massing, JJ.[5]),

Entered: May 4, 2018.

[5] The panelists are listed in order of seniority.

BOELTER V. BOARD OF SELECTMEN OF WAYLAND

SJC-12353

SUPREME JUDICIAL COURT OF MASSACHUSETTS

479 Mass. 233*; 93 N.E.3d 1163**
2018 Mass. LEXIS 169***

December 5, 2017, Argued; April 5, 2018, Decided

Prior History: [***1] Middlesex. CIVIL ACTION commenced in the Superior Court Department on February 11, 2014.

The case was heard by *Dennis J. Curran*, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Boelter v. Wayland Bd. of Selectmen, 2016 Mass. Super. LEXIS 83 (Mass. Super. Ct., June 29, 2016)

Case Summary

Overview

HOLDINGS: [1]-The superior court properly allowed the voters' motion for summary judgment and issued a permanent injunction because a town board of selectmen's conduct violated the open meeting law, Mass. Gen. Laws ch. 30A, §§ 18 and 20(a), where, while the e-mail message to the board, prior to a meeting, did not itself contain advocacy or invite comment, the evaluations that were attached contained board members' opinions; [2]-To the extent that the judge attempted to reverse the Attorney General's decision on the voter's administrative complaint by striking the decision, he had no authority to do so because the voter was not a member of a public body at the time that the complaint was filed and the Attorney General was authorized to interpret and enforce the open meeting law under Mass. Gen. Laws ch. 30A, § 23(a).

Outcome

Judgment affirmed, striking of attorney general's determination vacated, and matter remanded.

Counsel: *Mark J. Lanza*, Special Town Counsel, for the defendant.

David S. Mackey, Special Assistant Attorney General (*Christine M. Zaleski* also present) for Massachusetts Gaming Commission.

George H. Harris for the plaintiffs.

[*234] The following submitted briefs for amici curiae:

Maura Healey, Attorney General, *& Jonathan Sclarsic & Kevin W. Manganaro*, Assistant Attorneys General, for the Attorney General.

Robert J. Ambrogi & Peter J. Caruso for Massachusetts Newspaper Publishers Association.

Kenneth S. Leonetti, Christopher E. Hart, Michael Hoven, & Kelly Caiazzo for Hal Abrams & others.

Judges: Present: GANTS, C.J., LENK, GAZIANO, LOWY, BUDD, CYPHER, & KAFKER, JJ.

Opinion by: LENK

Opinion

[**1165] **LENK**, J. The plaintiffs, all registered voters in the town of Wayland (town), brought this action in the Superior Court to challenge the procedure by which the board of selectmen of Wayland (board) conducted the 2012 performance [***2] review of the town administrator. The chair of the board had circulated to all board members, in advance of the public meeting where the town administrator's evaluation was to take place, board members' individual written evaluations,

as well as a composite written evaluation, of the town administrator's performance. The board made public all written evaluations after the open meeting. The issue before us is whether the board violated the Massachusetts open meeting law, G. L. c. 30A, §§ 18 and 20 (*a*), which generally requires public bodies to make their meetings, including "deliberations," open to the public.

A judge of the Superior Court allowed the plaintiffs' motion for summary judgment, issued a permanent injunction, and declared "stricken" a contrary determination by the Attorney General that had issued the prior year, on essentially the same facts, in which the Attorney General had found that the board's conduct had not violated the open meeting law. The board appealed from the allowance of summary [**1166] judgment, arguing that the matter is moot, its conduct did not violate the open meeting law, and the judge erred in "striking" the Attorney General's separate administrative decision.

We conclude that the [***3] judge did not err in declining to dismiss the case on mootness grounds, because the matter is capable of repetition and yet evading review, and is of substantial public importance. See, e.g., *Seney* v. *Morhy*, 467 Mass. 58, 61, 3 N.E.3d 577 (2014). We conclude further that the procedure the board followed in conducting the town administrator's evaluation did violate the open meeting law. In making this determination, we consider, for the first time, the meaning of the open meeting law's exemption to the definition of "[d]eliberation," which became effective in July, 2010, that permits members of public bodies to distribute to [*235] each other "reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." See St. 2009, c. 28, § 18; G. L. c. 30A, § 18.

We conclude that this exemption was enacted to foster administrative efficiency, but only where such efficiency does not come at the expense of the open meeting law's overarching purpose, transparency in governmental decision-making. As the individual and composite evaluations of the town administrator by the board members contained opinions, the circulation of such documents among a quorum prior to the open meeting does not fall within the exemption and, thus, constituted a deliberation [***4] to which the public did not have access, in violation of the open meeting law. We therefore affirm the judge's decision allowing summary judgment for the plaintiffs on this ground. We agree with the board, however, that the judge erred in "striking" the Attorney General's determination, and we vacate that portion of the judge's decision.[2]

1. *Background*. The material facts are not in dispute. On January 3, 2012, the five-member board held an open meeting during which it reviewed the procedures it intended to follow in conducting the annual performance evaluation of the town administrator. The board agreed that, by the end of the month, its members would submit individual evaluations to the chair, who would compile the evaluations and draft a composite evaluation. The composite evaluation was to be distributed to all board members in advance of the scheduled March 28, 2012, open meeting at which the board planned to discuss the town administrator's performance and issue a final written evaluation. The procedure the board chose to follow was largely consistent with the Attorney General's guidance to public bodies regarding performance evaluations, which was available on the Attorney General's [***5] Web site:

> "May the individual evaluations of an employee be aggregated into a comprehensive evaluation?
>
> "Yes. Members of a public body may individually create evaluations, and then submit them to an individual to aggregate into a master evaluation document to be discussed at an open meeting. Ideally, members of the public body should submit

[2] We acknowledge the amicus briefs submitted by the Attorney General; the Massachusetts Gaming Commission; the Massachusetts Newspaper Publishers Association; and Hal Abrams, Kim Abrams, and Karen Silva.

> their evaluations for compilation to someone who is not a [*236] member of the public body, for example, an administrative assistant. If this is not a practical option, then the chair or other designated public body member may compile the evaluations. However, once the individual evaluations are submitted for aggregation there should be no deliberation among members of the public [**1167] body regarding the content of the evaluations outside of an open meeting, whether in person or over email."

In accordance with the plan developed at the open meeting, three of the board members submitted written evaluations to the chair. Two sent the evaluations by electronic mail (e-mail) message, and one hand-delivered her evaluation. The chair created a composite performance evaluation, which included the opinions of those three board members, as well as his own. The reviews were [***6] predominantly positive. The chair then sent the composite document, along with the three individual performance evaluations, to each board member, by e-mail, as part of an agenda packet for the then-upcoming open meeting.

At the meeting, the board reviewed and discussed the composite evaluation and approved it as final. The minutes of the meeting simply state that the board "praised [the town administrator] for his availability and responsiveness to the public, his work ethic, his relationship with town staff, and his accessibility to board and committee members." The composite and individual evaluations subsequently were released to the public.

Approximately two months after the March 28, 2012, open meeting, George Harris, a registered voter in Wayland, filed a complaint with the office of the Attorney General, claiming that the board's procedure for conducting the town administrator's performance evaluation violated the open meeting law. See G. L. c. 30A, §§ 18, 20 (*a*). The open meeting law requires public bodies to make their meetings open to the public, and provide advance notice of such meetings, unless the meeting is an executive session, which can be conducted only for limited reasons. See G. L. c. 30A, §§ 18, 20.

In January, [***7] 2013, the Attorney General responded with a determination letter finding that the board's conduct had not violated the open meeting law; Harris's subsequent request for reconsideration was denied. As judicial review of an Attorney General's determination in such matters is available only to an aggrieved public body or member thereof, see G. L. c. 30A, § 23 (*d*), Harris did not appeal from the decision.

[*237] In February, 2014, the five plaintiffs in this action, who are also registered voters in Wayland (and who are represented by Harris) filed a complaint against the board in the Superior Court, concerning the same facts. The complaint sought a declaratory judgment and injunctive relief prohibiting the board from commencing a "private exchange of opinions in deliberating the professional competence of an individual prior to an open meeting." The parties filed cross motions for summary judgment.[3]

The plaintiffs' motion was allowed after a hearing. The judge concluded that the board had violated the open meeting law and permanently enjoined it from "deliberating the town administrator's professional competence by private written messages before the commencement of a meeting open to the public." In his decision, [***8] although not in the judgment or amended judgment,[4] the judge also declared that "[t]he opinion from the Attorney General [d]ivision of [o]pen [g]overnment is stricken." The board appealed to the Appeals Court, and we transferred the case to this court on our own motion.

[**1168] 2. *Discussion*. a. *Standard of review*.

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[3] In civil actions to enforce the open meeting law, "the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by the open meeting law." G. L. c. 30A, § 23 (*f*).

[4] The initial judgment was amended to correct an erroneous statutory reference.

We review a decision on a motion for summary judgment de novo and, thus, "accord no deference to the decision of the motion judge" (citation omitted). *Drakopoulos* v. *U.S. Bank Nat'l Ass'n*, 465 Mass. 775, 777, 991 N.E.2d 1086 (2013). "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Boazova* v. *Safety Ins. Co.*, 462 Mass. 346, 350, 968 N.E.2d 385 (2012), citing Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

b. *Mootness*. At first blush, the plaintiffs' claims appear moot, because the evaluation of the town administrator has been completed, and the plaintiffs are no longer able to affect the procedure the board implemented in 2012 in order to ensure compliance with the open meeting law. In addition, the typical remedy for such a violation is public release of the documents at issue, which the board effectuated after the asserted violation.[5] See *District [*238] Attorney for the N. Dist.* v. *School Comm. of Wayland*, 455 Mass. 561, 572, 918 N.E.2d 796 (2009) (*School Comm. of Wayland*).

Nonetheless, dismissal for mootness may be inappropriate if the situation presented is "capable of repetition, yet evading review" [***9] (citation omitted). *Seney*, 467 Mass. at 61. See *Globe Newspaper Co.* v. *Commissioner of Educ.*, 439 Mass. 124, 127, 786 N.E.2d 328 (2003). "In such circumstances, we do not hesitate to reach the merits of cases that no longer involve a live dispute so as to further the public interest" (citation omitted). *Seney*, *supra*. Here, the board's practice is likely to recur; regardless of who is serving as the town administrator, an evaluation must take place every year. Moreover, the practice that the board followed is endorsed by the posted information on the Attorney General's Web site, meaning that other public bodies might follow suit.[6] At the same time, the issue likely would evade judicial review, because of the relatively short window involved in the annual review. See *Wolf* v. *Commissioner of Pub. Welfare*, 367 Mass. 293, 298, 327 N.E.2d 885 (1975) (matter capable of repetition and yet evading review "because the claim of any named plaintiff is likely to be mooted by the mere passage of time during the appeal process").

This matter is also of substantial public importance. By challenging the board's procedure, the plaintiffs seek to ensure that all of the town's constituents have access to the decision-making process of their local government whenever a town administrator is evaluated. See *School Comm. of Wayland*, 455 Mass. at 570 ("It is essential to a democratic form of government that the public have broad access [***10] to the decisions made by its elected officials *and to the way in which the decisions are reached*" [emphasis in original; citation omitted]). We conclude that the motion judge did not err in declining to dismiss the case for mootness.

[**1169] c. *Open meeting law*. General Laws c. 30A, § 20 (*a*), provides [*239] that, with the exception of executive sessions,[7] "all meetings of a public body shall be open to the public."[8]

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[5] The board's mootness argument focuses on the fact that the town administrator, whose performance evaluation was the subject of this action, was terminated in August, 2013. The record is silent as to the reasons for the termination or the outcome of the administrator's other performance evaluations, if any. The plaintiffs, however, are not challenging the outcome of this particular town administrator's performance evaluation, which was in fact positive. The town administrator's subsequent termination thus is irrelevant to the mootness determination.

[6] The Attorney General is authorized to interpret and enforce the open meeting law. See G. L. c. 30A, § 23 (*a*). She also may "promulgate rules and regulations to carry out enforcement of the open meeting law" and "issue written letter rulings or advisory opinions." G. L. c. 30A, § 25.

[7] General Laws c. 30A, § 21 (*a*), permits a public body to meet in an executive session in ten limited circumstances, none of which is applicable here. Notably, these circumstances include discussion of "the reputation, character, physical condition or mental health, *rather than professional competence*, of an individual" (emphasis added). See G. L. c. 30A, § 21 (*a*) (1).

[8] "Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least [forty-eight] hours prior to the meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to the meeting." G. L. c. 30A, § 20 (*b*).

The statute defines a "meeting" as "a deliberation by a public body with respect to any matter within the body's jurisdiction," subject to certain exclusions not relevant here. G. L. c. 30A, § 18. A "deliberation," in turn, is defined as "an oral or written communication through any medium, including [e-mail], between or among a quorum of a public body on any public business within its jurisdiction." *Id.*

The statute, however, provides an exemption: "'deliberation' shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, *provided that no opinion of a member is expressed*" (emphasis added). *Id.* The parties dispute whether, in circulating the individual [***11] and composite evaluations in advance of the public meeting, the board members' opinions were "expressed" within the meaning of this exemption.

To resolve this dispute, we must "effectuate the intent of the Legislature" (citation omitted). *Koshy* v. *Sachdev*, 477 Mass. 759, 765, 81 N.E.3d 722 (2017). "We begin with the canon of statutory construction that the primary source of insight into the intent of the Legislature is the language of the statute." *Id.* at 766, quoting *International Fid. Ins. Co.* v. *Wilson*, 387 Mass. 841, 853, 443 N.E.2d 1308 (1983).

As an initial matter, the open meeting law does not provide a meaning for the word "opinion." In ordinary usage, an "opinion" is "a view, judgment, or appraisal formed in the mind about a particular matter." Webster's Third New International Dictionary 1582 (1993). See *Boylston* v. *Commissioner of Revenue*, 434 Mass. 398, 405, 749 N.E.2d 684 (2001) ("We usually determine the plain and ordinary meaning of a term by its dictionary definition" [quotation omitted]). The individual and composite evaluations prepared by the board members and shared with the quorum doubtless constituted "appraisals" of the town administrator's performance and, therefore, contained [*240] board members' opinions. The question, then, is whether the circulation of the individual and composite evaluations containing board members' opinions was permissible since the opinions were not expressed in [***12] the body of the chair's e-mail message circulating the evaluations but, rather, in the attachments themselves.

The phrase "provided that no opinion of a member is expressed" specifically pertains to "reports or documents that may be discussed at a meeting." G. L. c. 30A, § 18. See *Deerskin Trading Post, Inc.* v. *Spencer Press, Inc.*, 398 Mass. 118, 123, 495 N.E.2d 303 (1986) (general rule of grammatical construction is that "a modifying clause is confined to the last antecedent" [citation omitted]). The natural reading of the statute is that two categories are carved out of the definition of "deliberation." It is not "deliberation" when the [**1170] materials distributed to the quorum fall into one of two categories: first, purely procedural or administrative materials (such as agendas) and, second, reports or documents to be discussed at a later meeting, so long as such materials do not express the opinion of a board member.

The board argues that the phrase "provided that no opinion of a member is expressed" only pertains to the distribution of reports or documents, and not to the reports or documents themselves. In other words, the board believes that the statute permits board members to share their opinions with a quorum provided that the opinions are not expressed in, for example, the body of an [***13] e-mail message or in a cover letter, but only in attachments to e-mail messages or documents referred to in a cover letter. This reading would create a loophole that would render the open meeting law toothless. See *ENGIE Gas & LNG LLC* v. *Department of Pub. Utils.*, 475 Mass. 191, 199, 56 N.E.3d 740 (2016) ("The court does not determine the plain meaning of a statute in isolation but, rather, … [considers] the surrounding text, structure, and purpose of the Massachusetts act …" [citation and quotations omitted]); *Champigny* v. *Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996)

(reading of statute that causes it to have "no practical effect" is absurd result, and we "assume the Legislature intended to act reasonably"). If we were to adopt the board's view, the board members permissibly could have conducted an extended communication on any topic without public participation, so long as they styled their opinions as separate reports or documents and delivered them without substantive comment by hand, United States mail, or e-mail messages. This plainly cannot be what the Legislature intended in adopting the exemption. See *Worcester* v. *College [*241] Hill Props., LLC*, 465 Mass. 134, 145, 987 N.E.2d 1236 (2013), quoting *North Shore Realty Trust* v. *Commonwealth*, 434 Mass. 109, 112, 747 N.E.2d 107 (2001) (statute "should not be so interpreted as to cause absurd or unreasonable results when the language is susceptible of a sensible meaning").

Our reading is consistent with the statute's history. Previously, [***14] the open meeting law defined "deliberation" as "a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction." See G. L. c. 39, § 23A, as appearing in St. 1975, c. 303, § 3. In *School Comm. of Wayland*, 455 Mass. at 570-571, this court clarified that a "private e-mail exchange in order to deliberate the superintendent's professional competence" among Wayland school committee members "violated the letter and spirit of the open meeting law," because "[g]overnmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form." We reasoned that the e-mail communications at issue were not protected, "as we must presume the substance of the written comments would have been stated orally at an open meeting in which the superintendent's professional competence was discussed." *Id.* at 571-572.

In the same year that *School Comm. of Wayland*, *supra*, was decided, the Legislature broadened the open meeting law's definition of "deliberation," and affirmed that a "deliberation" could encompass "any medium," not just verbal communication. See St. 2009, c. 28, §§ 18, 20, 106 (effective [***15] July 1, 2010). At the same time, however, the Legislature amended the open meeting law expressly to allow public bodies to distribute some materials internally in advance of open meetings without triggering the definition of "deliberation"; this change seems to have been a response to the [**1171] practical realities of local governmental service. By permitting officials to review certain administrative materials and reports in advance of an open meeting, the Legislature took steps to ensure that the work of those officials at the meetings could be focused and efficient. At the same time, in recognition that the overarching purpose of the open meeting law is to ensure transparency in governmental decision-making, the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting. See *Revere* v. *Massachusetts Gaming Comm'n*, 476 Mass. 591, 610, 71 N.E.3d 457 (2017) ("the new version of the open meeting law does not alter our belief that '[i]t is essential to a democratic form of government that the public [*242] have broad access to the decisions made by its elected officials and to the way in which the decisions are reached'" [citation omitted]). However inefficient this may prove for local bodies in certain [***16] circumstances, this is the balance that the Legislature has struck.

The board argues that the Attorney General's interpretation of the open meeting law is entitled to deference and should prevail. In the determination letter dismissing Harris's complaint, the Attorney General found that the board did not violate the open meeting law because "the [c]hair performed an administrative task exempt from the law's definition of deliberation." She explained that the chair's "email did no more than distribute a document to be discussed at the [b]oard's meeting that night. The email did not contain any advocacy by [the chair], and it did not invite comment from other [b]oard members,

nor was any comment provided." She went on to explain that "[a]lthough the document itself may have contained the opinions of [b]oard members, we find compiling evaluations to be a permissible and necessary function for public bodies to conduct ahead of meetings, so long as discussion of the evaluations occurs during an open meeting." The Attorney General conceded, however, that because e-mail communication among a quorum of public body members, "however innocent[,] creates at least the appearance of a potential open meeting law violation … our best [***17] advice continues to be that public bodies not communicate over email at all except for distributing meeting agendas, scheduling meetings and distributing documents created by non-members to be discussed at meetings, which are administrative tasks specifically sanctioned under the open meeting law."

Where, as here, the Attorney General is authorized to interpret a statute, her interpretation is entitled to substantial deference, unless it is inconsistent with the plain language of the statute. *Smith* v. *Winter Place LLC*, 447 Mass. 363, 367-368, 851 N.E.2d 417 (2006). In this case, the Attorney General's characterization is not supported by the plain meaning of the statute and, therefore, is not accorded such deference. While the Attorney General correctly notes that the e-mail message to the board to which the evaluations were attached did not itself contain advocacy or invite comment, this does not alter the fact that the evaluations themselves contained board members' opinions. The Attorney General dismisses the fact that the composite evaluation contained board members' opinions by stating that "compiling evaluations" is a "permissible and necessary function for public bodies," but the chair did not [*243] simply compile the evaluations in this case — he circulated [***18] the compiled evaluations to a quorum. We note also that the Attorney General's determination letter fails to recognize that the chair sent not only the composite evaluation, but also the three individual evaluations, to all board members.

We conclude that the board's conduct violated the open meeting law. The circulated [**1172] individual and composite evaluations expressed the opinions of the board members to a quorum in advance of the public meeting. As the plaintiffs note, the effect of the circulation of the individual and composite evaluations was that all five board members were aware of the opinions of four of the members in advance of the open meeting; thus, the circulation, in effect, constituted a deliberation, or a meeting, to which the public did not have access. Indeed, the motion judge noted that, after the circulation, and before the open meeting, "it was rather obvious that the die had been cast as to whether the town administrator should be continued in his position." The open meeting law was intended to ensure that the public is able to see for themselves how such decisions are made. See *Revere*, 476 Mass. at 610. The distribution of the individual and composite opinions to the quorum, prior to the [***19] meeting, was thus a violation of the open meeting law. See G. L. c. 30A, § 18. Compare *School Comm. of Wayland*, 455 Mass. at 570 ("Open meetings provide an opportunity for each member of the governmental body to debate the issues and disclose their personal viewpoints *before* the governmental body reaches its decision on a matter of public policy" [emphasis added]); *McCrea* v. *Flaherty*, 71 Mass. App. Ct. 637, 641, 885 N.E.2d 836 (2008) (open meeting law "provides for public access to the decision-making process when it is in a formative stage, several steps removed from the eventual result").

The result here would have been different if the board had made the individual and composite evaluations publicly available before the open meeting. For example, the board could have posted the evaluations on its Web site and made paper copies available for inspection at or about the time that the evaluations were circulated among a quorum of board members. Ordinarily, the board is required only to make the minutes of open meetings, along with "the notes, recordings or other materials used in the preparation of such minutes and all documents and exhibits used at

the session," available to the public, upon request, within ten days after an open meeting has taken place. G. L. c. 30A, § 22 (*c*), (*e*). Nothing in the open meeting law or the public [***20] records statute, however, precludes the board from prior disclosure, at least in [*244] these circumstances.[9] See G. L. c. 4, § 7; G. L. c. 30A, §§ 18-25; G. L. c. 66, §§ 1 et seq. If board members wish to circulate documents containing board member opinions among a quorum in advance of an open meeting, as here, prior and relatively contemporaneous public disclosure of those documents, where permissible, is necessary in order to comply with the open meeting law and to advance the statute's over-all goal of promoting transparency in governmental decision-making.

d. *Striking the Attorney General's decision*. The board argues that, in his decision granting the plaintiffs' motion for summary judgment, the judge erred in ruling that "[t]he opinion from the Attorney General [d]ivision of [o]pen [g]overnment is stricken."[10] We agree. The open [**1173] meeting law establishes two separate means by which a party may complain of a violation: an aggrieved party may seek administrative remedies, for which judicial review is available only to a government entity that is party to the ruling, or file a registered-voter complaint in the Superior Court, as here. See G. L. c. 30A, § 23 (*b*), (*d*), (*f*). To the extent that the judge was attempting [***21] to reverse the Attorney General's decision on Harris's administrative complaint, he had no authority to do so.[11] While Harris's administrative complaint and this action concern the same facts, Harris's complaint was not before the judge. Nor could it have been, as Harris was not a member of a public body at the time that the complaint was filed. See G. L. c. 30A, § 23 (*d*) ("A public body or any member of a body aggrieved by any order issued pursuant to this section [by the Attorney General] may, notwithstanding any general or special law to the contrary, obtain judicial review of the order only [*245] through an action in [S]uperior [C]ourt seeking relief in the nature of certiorari").

3. *Conclusion*. The judgment is affirmed. The purported "striking" of the Attorney General's determination at the administrative proceeding is vacated. The matter is remanded to the Superior Court for such further proceedings as are required.

So ordered.

[9] Under the open meeting law, only the following materials used in open meetings are "exempt from disclosure to the public as personnel information: (1) materials used in a performance evaluation of an individual bearing on his professional competence, *provided they were not created by the members of the body for the purposes of the evaluation*; and (2) materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; provided, however, that any resume submitted by an applicant shall not be exempt" (emphasis added). G. L. c. 30A, § 22 (*e*).

[10] While the judge's decision does not specify which opinion it purports to strike, in context, it can refer only to the 2013 determination letter dismissing Harris's complaint. The plaintiffs do not dispute that the decision to strike was improper.

[11] The purported striking was not necessary to ensure uniform resolution of future open meeting law challenges. The Attorney General has represented that if we affirm the judge's decision, she will amend her guidance and adjust her interpretation of the open meeting law when resolving complaints.

CAPLAN V. ACTON

SJC-12274

SUPREME JUDICIAL COURT OF MASSACHUSETTS

479 Mass. 69*; 92 N.E.3d 691**
2018 Mass. LEXIS 96***

September 7, 2017, Argued; March 9, 2018, Decided

Prior History: [***1] Middlesex. CIVIL ACTION commenced in the Superior Court Department on July 7, 2016.

A motion for a preliminary injunction was heard by *Leila R. Kern*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Case Summary

Overview

HOLDINGS: [1]-In a case regarding whether two grants of public funds to renovate an active church that had been identified as a historic resource were categorically barred under the anti-aid amendment, the Supreme Judicial Court concluded that the constitutionality of such grants must be evaluated under the three-factor test applied under Commonwealth v. School Comm. of Springfield to payments made to other private institutions; [2]-The superior court judge applied the test incorrectly in denying plaintiffs' motion for a preliminary injunction to prohibit disbursement of these grants; [3]-Plaintiffs were likely to succeed on the merits of their claim with respect to a stained glass grant; [4]-With respect to a master plan grant, further discovery was needed before a determination should be made as to whether plaintiffs were likely to succeed on the merits of their claim.

Outcome

Vacated and remanded.

Counsel: *Douglas B. Mishkin*, of the District of Columbia (*Joshua Counts Cumby & Alex Luchenitser*, of the District of Columbia, & *Russell S. Chernin* also present) for the plaintiffs.

Nina L. Pickering-Cook (*Arthur P. Kreiger* also present) for the defendant.

The following submitted briefs for amici curiae.

Daniel Mach, of the District of Columbia, *Anthony M. Doniger, Kate R. Cook, & Sarah R. Wunsch* for American Civil Liberties Union & another.

Maura Healey, Attorney General, *David C. Kravitz*, Assistant State Solicitor, *& Matthew P. Landry*, Assistant Attorney General, for the Attorney General.

Eric C. Rassbach, of the District of Columbia, *Joseph C. Davis*, of Louisiana, *Daniel D. Benson*, of Utah, *& Mark L. Rienzi* for Becket Fund for Religious Liberty.

Thomas A. Mullen for Massachusetts Municipal Law Association & another.

Thaddeus A. Heuer & Andrew London for National Trust for Historic Preservation. [***2]

Ryan P. McManus & M. Patrick Moore for Boston Preservation Alliance & others.

Judges: Present: GANTS, C.J., LENK, GAZIANO, BUDD, CYPHER, & KAFKER, JJ.

Opinion by: GANTS

Opinion

[**693] **GANTS**, C.J. Article 18 of the Amendments to the Massachusetts Constitution, as amended by arts. 46 and 103 of the Amendments, [*71] known as the "anti-aid amendment," prohibits in § 2, cl. 2, the

"grant, appropriation or use of public money … for the purpose of founding, maintaining or aiding any church, religious denomination or society." This case presents the question [**694] whether two grants of public funds to renovate an active church that has been identified as a "historic resource" under the Community Preservation Act (act), G. L. c. 44B, are categorically barred by the anti-aid amendment, or whether the constitutionality of such grants must be evaluated under the three-factor test we have applied under *Commonwealth* v. *School Comm. of Springfield*, 382 Mass. 665, 675, 417 N.E.2d 408 (1981) (*Springfield*), to payments made to other private institutions. Also presented is the follow-up question: if the three-factor test applies, do the grants satisfy its requirements?

We conclude that the constitutionality of such grants must be evaluated under our three-factor test: a judge must consider whether a motivating purpose of each grant [***3] is to aid the church, whether the grant will have the effect of substantially aiding the church, and whether the grant avoids the risks of the political and economic abuses that prompted the passage of the anti-aid amendment. We also conclude that, in light of the history of the anti-aid amendment, a grant of public funds to an active church warrants careful scrutiny. Because the judge applied this three-factor test incorrectly in denying the plaintiffs' motion for a preliminary injunction to prohibit disbursement of these grants, we vacate the order denying the motion. As to the grant to preserve the stained glass windows in the main church building, we remand the case to the Superior Court for entry of an order allowing the plaintiffs' motion for a preliminary injunction barring disbursement of the grant. As to the grant to fund a "Master Plan" to preserve all three of the buildings belonging to the church, we remand for further proceedings consistent with this opinion.[2]

Background. The Acton Congregational Church (church), an affiliate of the United Church of Christ, is an active church with [*72] a congregation of over 800 members. It describes its mission thusly:

> "The mission of Acton [***4] Congregational Church … is to preach and teach the good news of the salvation that was secured for us at great cost through the life, death, and resurrection of Jesus. The church encourages each individual to accept the gift of Christ and to respond to God's love by taking part in worship, ministry to one another, and the Christian nurture of people of all ages. With the guidance of the Holy Spirit, we are called as servants of Christ to live our faith in our daily lives and to reach out to people of this community and the world with love, care, and concern for both their physical and spiritual needs."

The church stands in the Acton Centre Historic District (historic district), an area that has served as a center of town life since the establishment of the town of Acton (town) in 1735. The church owns and maintains three adjacent buildings in the historic district: the main church building, the John Fletcher House, and the Abner Hosmer House. The main church building was built in 1846. Today, it is used for worship services and religious educational programs; it also houses a local day care center, meeting spaces for various community [**695] groups, and a thrift shop. The two houses, also [***5] built in the mid-Nineteenth Century, originally were private residences but were later acquired by the church and are now rented to local families.

The town is one of 172 municipalities in Massachusetts that have adopted the act, which establishes a mechanism for funding projects relating to open space, historic resources, and community housing.[3] G. L. c. 44B. In 2015,

[2] We acknowledge the amicus brief submitted in support of the plaintiffs by the American Civil Liberties Union (ACLU) and ACLU of Massachusetts. We acknowledge the amicus briefs submitted in support of the town of Acton (town) by the Attorney General; the Becket Fund for Religious Liberty; the Massachusetts Municipal Law Association and Community Preservation Coalition; the National Trust for Historic Preservation; and the Boston Preservation Alliance, Historic Boston Incorporated, Historic New England, North Bennet Street School, and Preservation Massachusetts.

[3] Municipalities that adopt the Community Preservation Act

the church submitted two grant applications to the town's Community Preservation Committee (committee), which makes recommendations in accordance with the act to the town meeting regarding "the acquisition, preservation, rehabilitation and restoration of historic re- [*73] sources."[4] G. L. c. 44B, § 5 (*b*) (2). See G. L. c. 44B, § 7.

The church's first application was for a $49,500 grant to fund a "Master Plan for Historic Preservation" for all three of its buildings (the Master Plan grant). The church proposed to hire an architectural consultant to develop a plan for their renovation and preservation; the proposed work would include "a thorough assessment of the [c]hurch building envelope, including windows, doors, siding, roof, chimney, bell tower, skylights, and fire escapes." The church noted "[s]pecific areas of concern" for the building, including its bell tower and brass chandelier. [***6]

The church's second application was for a $51,237 grant to fund the restoration and preservation of the main church building's stained glass windows, which were installed in 1898 (the stained glass grant). According to the church's application, the "most prominent" of the windows depicts Jesus and a kneeling woman; another window features a cross and the hymnal phrase, "Rock of Ages Cleft for Me." The proposed work would include replacing parts of the glass, sealing the glass, and installing new glazing so that the windows — which currently have a "cloudy" exterior and "cannot be appreciated outside the church" — will be given "complete transparency."

The church explained in its applications that, due to declining membership and contributions, it lacked the funds necessary both to preserve its buildings and to fully serve the needs of its congregation without financial assistance from the town:

> "As you may know, mainstream churches have not been growing for years, and the financial strain is significant. [The church] 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 [***7] 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[s] delayed before we cut programs, but there are many things that we've had to fix."

Consistent with the requirements of the act, the committee held a public hearing on [**696] the church's applications and voted unanimously [*74] to recommend the two grants. The town approved them both at a town meeting.

The town imposed several conditions on the grants. First, it required that the church convey to the town a "historic preservation restriction" in the buildings that would be "perpetual to the extent permitted by law." Second, it specified that no funds would be disbursed to the church except as reimbursements for specific expenses incurred in connection with the projects, and only after the town could verify, based on submitted invoices, that those expenses were "consistent with the project scope presented" in the church's applications.

The plaintiffs, a group of town taxpayers, commenced this action in the Superior Court under G. L. c. 40, § 53, which permits taxpayers to act "as private attorneys general" to enforce laws designed to prevent abuse of public funds by local [***8] governments. *LeClair* v. *Norwell*, 430 Mass. 328, 332, 719 N.E.2d 464 (1999). The plaintiffs sought a declaratory judgment that the grants to the church violate the anti-aid amendment, and

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(act), G. L. c. 44B, must establish a local preservation fund, which is funded through a surcharge on local property taxes, *id.* at § 4, and through disbursements from a State-administered trust fund that is funded through a Statewide surcharge on all real estate transactions at the State's Registries of Deeds, *id.* at § 8. See Community Preservation Coalition, CPA Trust Fund, http://www.communitypreservation.org/content/trustfund [https://perma.cc/Y7XF-VQRZ].

[4] The act defines "historic resources" as "a building, structure, vessel, real property, document or artifact that is listed on the [S]tate register of historic places or has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture of a city or town." G. L. c. 44B, § 2.

requested injunctive relief to prevent their disbursement.[5]

In denying the plaintiffs' motion for a preliminary injunction, the judge relied on the three-factor test we first set forth in *Springfield*, 382 Mass. at 675. We applied the test in that case to determine whether a statute that authorized the public funding of special education placements of public school students in private schools violated the anti-aid amendment. *Id.* at 667. The three factors are "(1) whether the purpose of the challenged statute is to aid private schools; (2) whether the statute does in fact substantially aid such schools; and (3) whether the statute avoids the political and economic abuses which prompted the passage of [the anti-aid amendment]." *Id.* at 675.[6] We cautioned that these factors "are not 'precise limits to the necessary constitutional inquiry,' but are instead guidelines to a proper analysis." *Id.*, quoting *Colo* v. *Treasurer & Receiver Gen.*, 378 Mass. 550, 558, 392 N.E.2d 1195 (1979). We also recognized that each factor was "interrelated," [*75] and that any conclusion "results from a balancing" of the factors as applied to the facts of each case. *Springfield*, *supra* at 675.

The judge here [***9] determined that the plaintiffs bore a heavy burden to overcome the presumption of the act's constitutionality because, although the plaintiffs were challenging the constitutionality of the grants to the church, those grants were awarded pursuant to the act. Thus, as to the first factor, the judge determined that she must "examine the purpose of the [act]," and concluded that the purpose of the grants under the act was "to preserve historic resources, and not to aid the [c]hurch[ ]." As to the third factor, the judge found that "[t]here is no credible evidence that the grants under the [act] are economically or politically abusive or unfair," noting that "[t]he application and approval procedures for grants under the [**697] [act] operate without regard to the applicant's makeup or purpose." The judge concluded that, even if the plaintiffs were to satisfy the second factor, which she was "not convinced they can," they still had "no likelihood of success on the merits" because their failure to satisfy the first and third factors "preclud[ed] them from overcoming the presumption of constitutionality that favors the [act]."

The judge also granted the town's motion for a protective order to stay discovery until thirty days after [***10] entry of a decision on the preliminary injunction. The plaintiffs appealed from the denial of their motion for a preliminary injunction and the allowance of the protective order. We granted their application for direct appellate review.

Discussion. In a taxpayer suit such as this, the taxpayers collectively are acting as a private attorney general seeking under G. L. c. 40, § 53, "to enforce laws relating to the expenditure of tax money by the local government." *LeClair*, 430 Mass. at 332. In order to obtain a preliminary injunction, the plaintiffs must show a likelihood of success on the merits and that the requested relief would be in the public interest; they need not demonstrate irreparable harm. See *id.* at 331-332.

The plaintiffs claim that the judge made two errors of law in her decision denying their motion for a preliminary injunction. First, they argue that the judge erred by applying the three-factor test articulated in *Springfield*, contending that this test only applies where the challenged grant of public funds is to aid a private school or institution, and not where the challenged grant is to aid a church. Second, they contend that, even if the three-factor test properly applies to public aid to churches, the judge misapplied [***11] [*76] the test. To rule on these claims of error, we must look first to the history and evolution of the anti-aid amendment.

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[5] In their complaint, the plaintiffs also challenged the town's proposed $15,000 grant to South Acton Congregational Church, another active church located in Acton. South Acton Congregational Church has since withdrawn its application for that grant; on appeal, the plaintiffs challenge only the grants to the Acton Congregational Church.

[6] The judge described these as "the three factors outlined in *Helmes* v. *Commonwealth*, 406 Mass. 873, 876, 550 N.E.2d 872 (1990)"; the court in *Helmes* quoted the factors set forth in *Commonwealth* v. *School Comm. of Springfield*, 382 Mass. 665, 675, 417 N.E.2d 408 (1981) (*Springfield*).

1. *The history and evolution of the anti-aid amendment*. Our original Declaration of Rights, adopted in 1780, provided in art. 3 for the direct public support of religion, continuing the Colonial practice of using tax revenues to support the "public Protestant teachers of piety, religion and morality," see *Colo*, 378 Mass. at 556 n.10, which essentially meant support of the Congregational Church. See T.J. Curry, The First Freedoms, Church and State in America to the Passage of the First Amendment, 163-164, 174-175 (1986) (Curry); S.E. Morison, A History of the Constitution of Massachusetts 24 & n.1 (1917) (Morison).[7]

Even before it was mandated by the Declaration of Rights in 1780, the "quasi-religious establishment" of the Congregational Church had provoked heated conflict. *Id.* at 24. See generally 1 W.G. McLoughlin, New England Dissent 1630-1833, The Baptists and the Separation of Church and State 547-568 (1971) (McLoughlin). During the American Revolution, Baptists protested the religious assessments [**698] with acts of civil disobedience; in retaliation, mobs attacked them on the pretext that they were Tories. See Curry, *supra* at 163. When the Constitution [***12] was submitted to the people for ratification, forty-five towns rejected art. 3, most of them because it provided public support to the Congregational Church. See *id.* at 167-169; McLoughlin, *supra* at 626-631. After art. 3 was enacted, the Baptists challenged the religious assessments in court, and other denominations followed. See McLoughlin, *supra* at 636-659.

After decades of "lawsuits, bad feeling, and petty persecution," Morison, *supra* at 24, the Massachusetts Constitution was amended in 1833 with art. 11 of the Amendments enacted to substitute for art. 3. Article 11 guarantees the equal protection of "all religious sects and denominations" — not just the Christian [*77] denominations protected under art. 3 — and effectively ended religious assessments. The next year, the Legislature enacted a statute providing that "no citizen shall be assessed or liable to pay any tax for the support of public worship … to any parish or religious society whatever, other than to that of which he is a member." St. 1834, c. 183, § 8. See Morison, *supra* at 38-39.

But the issue of public support for religious institutions was far from resolved by art. 11. It was raised again in the Constitutional Convention of 1853, which adopted art. 18 of the Amendments to prevent the appropriation of public funds to sectarian schools. [***13] [8] See 3 Debates and Proceedings in the State Convention 1853, at 613-626 (1853) (Debates of 1853); Morison, *supra* at 59. The debates from the Convention indicate that art. 18 did not arise in response to any actual funding of sectarian schools in Massachusetts, but from fear of the sectarian conflict that would result if such funding were to occur. See Debates of 1853, *supra* at 615, 618-620.[9]

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[7] Article 3 of the Massachusetts Declaration of Rights originally provided, in relevant part, that "the [L]egislature shall … authorize and require[ ] the several towns, parishes, precincts, and other bodies politic … to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality." Because Congregationalists were the overwhelming majority of the population in Massachusetts at the time, art. 3 functioned as a de facto general assessment in favor of the Congregational Church. See T.J. Curry, The First Freedoms, Church and State in America to the Passage of the First Amendment 163-164 (1986); S.E. Morison, A History of the Constitution of Massachusetts 24 & n.1 (1917).

[8] Article 18 of the Amendments, as adopted by the 1853 Convention and ratified in 1855, provides:

> "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance exclusively of its own schools."

[9] As one opponent to art. 18 stated, "[T]here has been nothing sectarian heretofore in the division of the public moneys." 3 Debates and Proceedings in the State Convention 1853, at 614 (1853) (Debates of 1853). Another delegate added, "Nobody asserts that such is the case; but somebody imagines that such a state of things may arise in the future; that sectarian schools are going to be established; that some new sect may outvote the Protestants, and claim the school fund. … We contend that it is all right now, but we are afraid of something ahead." *Id.* at 615-616. A supporter of art. 18 acknowledged that "no efforts

The delegates worried that competing claims from various denominations would quickly deplete public funds for education. In the words of one delegate: "[I]f we take the position that a part of this fund may be given to one denomination, another may come in and claim the same privilege, and another, and another, until the fund is completely [***14] exhausted . … " *Id.* at 620. But the [*78] delegates were equally fearful of the political controversies that were bound to ensue. See *id.* at 619, 624. One delegate warned that making public funds available [**699] to religious institutions would be like throwing "a firebrand into … town meetings." *Id.* at 624. The "object" of art. 18, he explained, was "to extinguish [that] firebrand, so that it shall not be possible to rekindle it." *Id.* Having seen until 1833 how public financial support for churches could provoke such animosity between citizens, the delegates were eager to remove the controversial issue of religion from politics. See *id.* at 624-625.

In fact, religious tensions were on the rise in 1853, as Massachusetts faced a massive influx of immigrants, most of them driven here from Ireland by the famine caused by a potato blight that devastated the nation's harvest. See generally O. Handlin, Boston's Immigrants, A Study in Acculturation 25-53 (rev. ed. 1979). In 1841, about 10,000 Irish immigrants arrived in Boston; in 1846, that number had risen to more than 65,000. *Id.* at 242. By 1850, more than one-fourth of Boston residents were Irish. *Id.* at 243. Hostility toward Irish Catholics grew among those who felt threatened by the combined forces [***15] of mass immigration, urbanization, and industrialization. See Haynes, The Causes of Know-Nothing Success in Massachusetts, 3 Am. Hist. Rev. 67, 70-76 (1897) (Haynes). Rumors spread about a "papal plot" to spread Catholic influence throughout the government and in particular the public school system. See Holt, The Politics of Impatience: The Origins of Know Nothingism, 60 J. Am. Hist. 309, 323-324 (1973). These anti-Catholic sentiments were well known to the framers of art. 18. Indeed, some delegates believed (and historians today agree) that art. 18 was itself targeted specifically against Catholic schools.[10] See Debates of 1853, *supra* at 615-617; J.R. Mulkern, The Know-Nothing Party in Massachusetts, The Rise and Fall of a People's Movement 42 (1990) (Mulkern); Shapiro, The Conservative Dilemma, The Massachusetts Constitutional Convention of 1953, 33 New Eng. Q. 207, 224 (1960). See also *Wirzburger* v. *Galvin*, 412 F.3d 271, 281 (1st Cir. 2005), cert. denied, 546 U.S. 1150, 126 S. Ct. 1165, 163 L. Ed. 2d 1128 (2006).

It bears noting that art. 18, along with all the amendments adopted by the 1853 Convention, failed to be ratified by the [*79] people in 1853. Morison, *supra* at 63. However, in 1854, the Know-Nothing Party, running on an anti-foreign and in particular an anti-Catholic platform, won a surprising political victory [***16] in Massachusetts that secured both the governorship and control of the Legislature. See Haynes, *supra* at 67-68. Article 18 was revived by the Know-Nothing government, Mulkern, *supra* at 94, 105-106, and ratified by special election in 1855, Morison, *supra* at 64.

However, the adoption of art. 18 did not end the controversy over public support for religious institutions. Public dissatisfaction with art. 18 grew when, due to its "rather uncertain language," private religious schools and hospitals continued to receive public funding. *Bloom* v. *School Comm. of Springfield*, 376 Mass. 35, 39, 379 N.E.2d 578 (1978). See Loring, A Short Account of the Massachusetts Constitutional Convention 1917-1919, 6 New Eng. Q. 1, 10 (1933). In 1913, the Legislature requested this court's opinion on whether art. 18 "adequately

have been made to establish sectarian schools," but pointed out that "other States have been afflicted" with such developments and that "it would be well to consider whether, in this State, … it is not our best policy to guard against it in time." *Id.* at 619.

[10] In the words of one delegate: "Every-body knows [art. 18] appears to be aimed at one class of our citizens, one denomination of religion. Nobody has intimated any apprehension that money would be used for the benefit of Protestant sectarianism. … [Article 18 has been] discussed[ ] in relation to the support of Catholic schools … ." Debates of 1853, *supra* at 615.

prohibit[ed]" the appropriation of public funds "for maintaining or aiding any church, religious denomination or religious society, or any [**700] institution, school, society or undertaking which is wholly or in part under sectarian or ecclesiastical control." *Opinion of the Justices*, 214 Mass. 599, 599-560 (1913). The Justices were in agreement that art. 18 prohibited appropriations to primary and secondary schools under sectarian control, but not to schools of higher education. *Id.* at 601. The Justices were divided, however, on whether art. 18 allowed appropriations to a church or religious denomination; [***17] four Justices were "of opinion that such an appropriation is prohibited by the Constitution and its Amendments," while three Justices "incline[d] to the opposite conclusion." *Id.*

Faced with this uncertainty, delegates to the Constitutional Convention of 1917 sought "to tighten the prohibition of public support for religious education" and "to protect State and municipal treasuries from the growing pressure of interest groups in search of private appropriations." *Springfield*, 382 Mass. at 673. The result was art. 46 of the Amendments, a substantially revised version of art. 18 that was "sweeping in its terms." *Bloom*, 376 Mass. at 39. Article 46 broadened the prohibition on the use of public funds to encompass not only private religious schools but all private institutions, whether secular or religious, and, in the last clause of § 2, specifically prohibited the "grant, appropriation or use of public money … for the purpose of founding, maintaining or aiding any church, religious denomination or soci-[*80] ety."[11]

By its terms, the revised anti-aid amendment applied to all institutions not under public control. Its proponents recognized that, in the fight over public funds, [***19] private institutions of all kinds — whether religious or not — were equally likely to compete. See 1 Debates in the Massachusetts Constitutional Convention, 1917-1918, at 62-70, 163-168 (1919) (Debates of 1917-1918). As one of the amendment's chief supporters explained during the debates: "[I]f you let the bars down everything else will come in." *Id.* at 118. The decision to appropriate funds to one private institution would lead to "a thousand other[s]" asking for the same. *Id.* The anti-aid amendment was intended to keep those bars up, protecting public funds from religious and secular institutions alike.[12]

[**701] Still, the delegates to the Convention voiced many concerns that were specific to religious institutions, as reflected in the last clause of § 2 of the revised anti-aid amendment. As we have summarized in the past:

> "Proponents of [the anti-aid amendment] urged that liberty of [*81] 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

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[11] As amended by art. 46 of the Amendments in 1917, art. 18, § 2, provided:

> "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the [C]ommonwealth for the support of common schools shall be applied to, and expended in, no other schools than those which [***18] are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the [C]ommonwealth or any political division thereof for the purpose of founding, maintaining or aiding any other school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the [C]ommonwealth or [F]ederal authority or both, [with exceptions not relevant here]; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."

[12] Several efforts were made during the 1917 Convention to modify the wording of art. 46, to permit funding of nonsectarian private schools and secular institutions such as museums and libraries. These efforts were rejected. See R.L. Bridgman, The Massachusetts Constitutional Convention of 1917, at 26-29 (1923); Shattuck, Martin Lomasney in the Constitutional Convention of 1917-1919, 71 Proceedings of the Mass. Hist. Soc'y 299, 303 (1959).

> civic harmony the irritating question of religion should be removed from politics [***20] as far as possible, and with it the unseemly and potentially dangerous scramble of religious institutions for public funds in ever-increasing amounts."

Bloom, 376 Mass. at 39, citing Debates of 1917-1918, *supra* at 68, 74-79, 161-164.

The anti-aid amendment that emerged from the 1917 Convention is the amendment — with some revisions adopted in 1974, not relevant here[13] — that applies today. It currently provides:

> "No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the [C]ommonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the [C]ommonwealth or federal authority or both, [with exceptions not relevant here]; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."[14]

Art. 18, § 2, as amended by arts. 46 and 103.

2. *Does the three-factor test in* Springfield *apply to public aid [***21] to churches*? Section 2 of the anti-aid amendment contains two clauses: the first clause prohibits the grant of public funds "for the purpose of founding, maintaining or aiding" any institution that is not publicly owned or under exclusive public control, including [*82] schools and hospitals; the second clause prohibits the grant of public funds "for the purpose of founding, maintaining or aiding any church, religious denomination or society." Art. 18, § 2, as amended by arts. 46 and 103. The plaintiffs contend that the three-factor test in *Springfield* applies only where the challenged grant of public funds is to a private school or institution under the first clause, and should not be applied where the challenged grant is to an active house of worship under the second clause, as in this case. Rather, the plaintiffs argue that the second clause requires an "unequivocal and unqualified" ban on the grant of public funds to churches. We disagree.

[**702] This is the first time that we have been asked to consider the constitutionality of a grant of public funds to a church under the second clause of the anti-aid amendment. All of our prior decisions under the anti-aid amendment since its revision in 1917 have considered [***22] the actual or contemplated grant of public funds or assistance to private schools or institutions under the first clause. See *Helmes* v. *Commonwealth*, 406 Mass. 873, 874, 550 N.E.2d 872 (1990) (funding for repair of memorial battleship); *Attorney Gen.* v. *School Comm. of Essex*, 387 Mass. 326, 327, 439 N.E.2d 770 (1982) (*Essex*) (transportation for private school students); *Springfield*, 382 Mass. at 665, 666 (funding for special education programs in private schools); *Colo*, 378 Mass. at 551 (payment of legislative chaplains' salaries); *Bloom*, 376 Mass. at 36 (textbooks for private school students). See also *Opinion of the Justices*, 401 Mass. 1201, 1202, 514 N.E.2d 353 (1987) (tax deduction for expenditures on tuition, textbooks, and school transportation); *Opinion of the Justices*, 357 Mass. 846, 847-848, 259 N.E.2d 564 (1970) (vouchers for private school students); *Opinion of the Justices*, 357 Mass. 836, 837-838, 258 N.E.2d 779 (1970) (reimbursement of private schools for secular educational services).

In *Springfield*, 382 Mass. at 675, we declared

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[13] Article 18 was further amended by art. 103 of the Amendments in 1974 to eliminate the opening clause of the previous version and to allow grants-in-aid to private institutions of higher education and their students. See *Bloom* v. *School Comm. of Springfield*, 376 Mass. 35, 40-41, 379 N.E.2d 578 & n.11 (1978).

[14] Section 1 of art. 18, as amended by art. 46, also added during the 1917 Convention, provides that "[n]o law shall be passed prohibiting the free exercise of religion."

that "there are no simple tests or precise lines by which we can determine the constitutionality" of grants challenged under the first clause of the anti-aid amendment. Instead, we devised the three-part test as "guidelines to a proper analysis," *id.*, quoting *Colo*, 378 Mass. at 558, focusing on the purpose of the grant, the extent to which the grant aids the private institution, and whether the grant "avoids the political and economic abuses" that led to the passage of the anti-aid amendment, all of which must be carefully balanced in determining its constitutionality. *Springfield*, *supra* at 675.

This rejection of "simple tests [***23] [and] precise lines" is equally appropriate when evaluating the constitutionality of a grant of [*83] public funds under the second clause of the anti-aid amendment. *Id.* The operative language in each clause is identical: both provide that no "grant, appropriation, or use of public money … shall be made or authorized" "for the purpose of founding, maintaining or aiding" one of the enumerated private institutions. Art. 18, § 2, as amended by arts. 46 and 103. In both clauses, the specific reference to "purpose" demands an inquiry into both the making of a grant and its purpose.[15] Where the language of the two clauses is essentially the same, our interpretive framework is appropriately also the same. See, e.g., *Alliance, AFSCME/SEIU, AFL-CIO* v. *Secretary of Admin.*, 413 Mass. 377, 384, 597 N.E.2d 1012 (1992) ("Words occurring in different places in the Constitution and its amendments ordinarily should be given the same meaning unless manifestly used in different senses" [citation omitted]); *Opinion of the Justices*, 384 Mass. 820, 823, 425 N.E.2d 750 (1981) (interpreting word "items" in §§ 3 and 5 of art. 63 of Amendments to have same meaning).

Moreover, even if we did not look to our interpretation of the first clause for guidance, we could not read the second clause as an absolute ban on grants to churches, [**703] because the second clause *by its own terms* calls [***24] for a case-by-case analysis. The words of the second clause are not: "No grants shall be made to any church." Rather, the second clause prohibits only grants that are made "for the purpose of founding, maintaining or aiding any church," and we cannot know that every grant to a church will be for that purpose. The categorical prohibition urged by the plaintiffs therefore invites the danger of overbreadth — and of hubris. We do not presume that we have the wisdom or imagination to contemplate every possible grant of public funds to a "church, religious denomination or society" and be certain that all of them, regardless of purpose, effect, or historical context, would be barred by the anti-aid amendment.

A categorical prohibition also invites the risk of infringing on the free exercise of religion, a right guaranteed under the First Amendment to the United States Constitution ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"); art. 2 of the Massachusetts Dec- [*84] laration of Rights ("no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth [***25] not disturb the public peace, or obstruct others in their religious worship"); and the anti-aid amendment itself. See art. 18, § 1, as amended by art. 46 ("No law shall be passed prohibiting the free exercise of religion").

This was the risk addressed in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2017, 198 L. Ed. 2d 551 (2017) (*Trinity Lutheran*), where a church in Missouri was denied a public grant to resurface its playground. In contrast with the Massachusetts anti-aid amendment, the Missouri Constitution imposes a categorical prohibition on any grant of public funds "in aid of any church, sect[,] or

[15] The most recent revisions to the anti-aid amendment support this reading. In 1974, the opening clause of art. 18, § 2 — which contained broad language against the expenditure of public funds, unmodified by the phrase "for the purpose of" — was eliminated, suggesting that under the current amendment an investigation into purpose is required. See *Springfield*, 382 Mass. at 679.

denomination of religion."[16] *Id.* As a result, when a church preschool and day care center applied for a grant under a general government program to purchase a new playground surface made from recycled tires, the State's Department of Public Resources rejected its application, based on "a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* The Supreme Court of the United States held that the department's policy of excluding a church from a government program "solely because it is a church," *id.* at 2025, "imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' [***26] scrutiny," *id.* at 2024, quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).[17]

[**704] We do not interpret the Massachusetts anti-aid amendment to [*85] impose a categorical ban on the grant of public funds to a church "solely because it is a church." *Trinity Lutheran*, 137 S. Ct. at 2025. Rather, under our three-factor test, whether a church can receive such a grant depends on the grant's purpose, effect, and the risk that its award might trigger the risks that prompted the passage of the anti-aid amendment. Such an analysis would surely not bar the grant of public funds to a church preschool to provide a safer surface for its playground. Cf. *Essex*, 387 Mass. at 333-334 (State funding to provide transportation to students attending private schools did not violate anti-aid amendment because it was "a general program to help parents get their children, regardless of their religion, safely … to and from … schools" [citation omitted]).[18]

Therefore, we conclude that the judge did not err in declining to interpret the second clause of the anti-aid amendment as a categorical prohibition on the grant of public funds to churches.

3. *Application of the three-factor test.* The plaintiffs contend that, even if the constitutionality of the grant should be determined under the three-factor [***27] test, the judge erred as a matter of law in her application of that test. We agree, and discern two distinct errors of law.

First, in determining whether the grants at issue would violate the anti-aid amendment, the judge focused primarily on the constitutionality of the act itself rather than on the constitutionality of the award of the two grants at issue.[19] Analysis of the act's constitutionality would have been appropriate if the act itself authorized the appropriation of public funds to a church or other private institution within the scope of the anti-aid amendment. See, e.g., *Helmes*, 406 Mass. at 875, 877-878 (applying three- [*86] factor test to statute authorizing expenditure of public funds for repair of World War II battleship

[16] Article I, § 7, of the Missouri Constitution, provides: "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2017, 198 L. Ed. 2d 551 (2017) (*Trinity Lutheran*).

[17] Chief Justice Roberts sought to limit the reach of the Court's opinion by stating in a footnote: "This case involves express discrimination based on religious identity with respect to playground surfacing. We do not address religious uses of funding or other forms of discrimination." *Trinity Lutheran*, 137 S. Ct. at 2024 n.3. Because two Justices joined the opinion except as to that footnote and one Justice concurred only in the judgment, the footnote failed to command a majority of the Court. *Id.* at 2017. See *id.* at 2025 (Thomas, J., concurring in part); *id.* at 2025-2026 (Gorsuch, J., concurring in part); *id.* at 2026-2027 (Breyer, J., concurring in the judgment).

[18] Despite our refusal to interpret the anti-aid amendment as a categorical ban on grants to churches, the dissent warns that our decision raises potential issues under the religion clauses of the First Amendment. See *post* at 110-111. We disagree. "'[R]igorous' scrutiny" is required under the free exercise clause where a State policy "expressly *requires* [an applicant for public funds] to renounce its religious character in order to participate in an otherwise generally available public benefit program" (emphasis added; citation omitted). *Trinity Lutheran*, 137 S. Ct. at 2024. As we will make clear, our three-factor analysis under the anti-aid amendment imposes no such requirement. The fact that an applicant is an active church is a relevant but by no means disqualifying consideration under our anti-aid amendment.

[19] The judge stated, "This court is directed to examine the purpose of the [act], under which the challenged grants are to be conferred upon the [c]hurch[ ] . … " She found that "the purpose of the grants to the [c]hurch[ ] under the [act] is to preserve historic resources, and not to aid the [c]hurch[ ]."

under control of charitable corporation); *Springfield*, 382 Mass. at 668, 675-683 (applying three-factor test to statute authorizing school committees to contract with private schools to provide special needs education where public schools could not meet special needs).[20]

[**705] Here, however, the act simply establishes a procedure for municipalities to make discretionary grants to projects relating to open space, historic resources, and community housing. See G. L. c. 44B, §§ 5, 7. Nothing in the act itself specifically authorizes [***28] the expenditure of funds to assist churches or religious institutions.

For this reason, the constitutionality of the act itself was not challenged by the plaintiffs, and is not at issue in this case. What was challenged, and is at issue, is the constitutionality of specific discretionary grants made pursuant to the act. Therefore, "the familiar principle of statutory construction that affords a statute a presumption of constitutional validity," *Springfield*, 382 Mass. at 674, does not apply to the constitutional analysis of these grants, and the judge erred in applying that presumption. The grants themselves enjoy no such presumption of constitutionality.

Second, the judge's focus on the constitutionality of the act rather than of the grants also rendered erroneous her analysis of the first and third factors.[21] As to the first factor, the judge relied on the language of the test as it was applied to the statutes at issue in *Springfield* and *Helmes*, and therefore considered whether the legislative purpose of the act was to aid churches. The judge instead should have considered whether the primary purpose of the committee in recommending the grants was to aid this particular church rather than to serve the proper purpose [***29] of historic preservation.

Accordingly, we now apply the three-factor test to the proposed grants themselves. On this record, we conclude that the plaintiffs [*87] are likely to succeed on the merits of their claim with respect to the stained glass grant, but that further discovery is needed to evaluate their claim as to the Master Plan grant.

a. *Purpose*. The first factor to be considered is whether the proposed grants are "for the purpose of founding, maintaining or aiding [a] church." Art. 18, § 2, as amended by arts. 46 and 103. In ascertaining the purpose of a challenged grant, our cases concerning aid to private schools are instructive. In *Springfield*, 382 Mass. at 678, we upheld the constitutionality of a statute that funded special education programs in private schools for children whose needs could not adequately be met in public schools, finding that its "primary purpose" was "to benefit public schools and individual children." We saw no evidence of any "hidden legislative purpose" to aid the private schools themselves. *Id.* at 677. See *Essex*, 387 Mass. at 331 (statute authorizing provision of transportation to private school students held constitutional based on "avowed purpose" to benefit children and lack of any "hidden purpose to [***30] maintain private schools"). In contrast, in *Bloom*, 376 Mass. at 42, we declared unconstitutional a statute requiring public school committees to lend textbooks to children attending private schools because we could infer from this statutory scheme no other purpose than to aid private schools "in carrying out their essential function." We determined that it made no difference under the anti-aid amendment that the textbooks [**706] were to be lent to the students rather than to the private schools they attended. *Id.* at 47. What mattered was that the statute made use of public money or property

[20] The statute at issue in *Springfield* was G. L. c. 71B, which authorizes school committees to enter into contracts with private schools, agencies, or institutions to provide special education to children whose needs cannot be met in the public school system. *Springfield*, 382 Mass. at 668. The Commonwealth sued the Springfield school committee, seeking to compel the school committee to enter into such contracts; in response, the school committee contended that any such contracts would violate art. 18, as amended by arts. 46 and 103, thus placing the constitutionality of the statute at issue. *Springfield*, *supra* at 666.

[21] The judge did not make a finding regarding the second factor of the *Springfield* test — that is, whether the grants would "substantially aid" the church. See *Springfield*, 382 Mass. at 675.

for the purpose of "maintaining or aiding" the private schools. *Id.* at 42.

Here, historic preservation is the stated purpose of the committee in awarding these grants to the church. That stated purpose is consistent with the town's decision to make the grants contingent on a historic preservation restriction in the three buildings. Such a restriction would limit the church's ability to make changes to the buildings in the future, thereby ensuring that the historic value of those buildings is not diminished over time. Thus, the plaintiffs' burden under the first factor is to demonstrate a "hidden … purpose" to aid this particular church. [***31] *Springfield*, 382 Mass. at 677.[22]

We conclude that the record before us is insufficient to deter- [*88] mine whether such a hidden purpose existed. The plaintiffs here sought to depose a person, to be designated by the town under Mass. R. Civ. P. 30 (b) (6), as appearing in 435 Mass. 1501 (2001), to testify regarding the town's "[c]onsideration and approval of the applications for the [c]hurch [g]rants," and the communications among town officials, employees, and committee members regarding the applications, but the judge denied the plaintiffs this discovery for purposes of the motion for preliminary injunction when she granted the town's motion for a protective order. Where the anti-aid amendment itself focuses on the "purpose" of a grant to a church, and where the first factor to be considered under our test is the purpose of the grant, a plaintiff is entitled to reasonable discovery to ascertain whether there is a hidden purpose that motivated the issuance of the grant. Discovery, however, should not be any broader or any more intrusive than it needs to be. For the purpose of ascertaining the purpose of the grants, discovery should be limited to the testimony of the rule 30 (b) (6) witness and writings reflecting the oral and written communications regarding the committee's decision-making process in recommending [***32] the grants; there is no need in this case to probe the private intentions of town meeting members. We leave it to the judge in her discretion to determine more precisely the appropriate scope of discovery.

b. *Substantial aid.* The second factor to be considered is whether the effect of the grants is to substantially aid a [**707] church. Our precedents make clear that a grant of public funds does not violate the anti-aid amendment if the assistance it provides to a private institution is merely "minimal," *Essex*, 387 Mass. at 332, or "remote," *Bloom*, 376 Mass. at 47. The aid must provide "sub- [*89] stantial assistance" to the church to risk violation of the anti-aid amendment. *Springfield*, 382 Mass. at 680. In evaluating this factor, we look to both the amount of aid provided and "the degree to which the aid assists [the church] in carrying out [its] essential function." *Opinion of the Justices*, 401 Mass. at 1208.

In particular, we have focused on whether the aid that is provided contains certain "limiting features" designed to restrict its effect. *Id.* at 1207. In *Springfield*, we approved the funding of the special education programs with the important limitation that there would be no reimbursement for children whose parents had unilaterally enrolled them in private school; public funding was strictly limited to expenses [***33] that the private schools would not otherwise have incurred. See *Springfield*, 382 Mass. at 677. This limiting feature worked to

[22] We recognize that the decision to award a grant of public funds, like other kinds of decisions, can have more than one motivating purpose. See, e.g., *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 666, 729 N.E.2d 1068 (2000), overruled on another ground by *Stonehill College* v. *Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 808 N.E.2d 205 (2004) (recognizing that certain employment discrimination cases are "mixed-motive" cases where discriminatory motive is one of several factors motivating employer's decision). Although in *Springfield*, 382 Mass. at 678, we focused on "*the* primary purpose" (emphasis added) of the challenged aid, we later acknowledged, in *Opinion of the Justices*, 401 Mass. 1201, 1208, 514 N.E.2d 353 (1987), that public aid may have more than one motivating purpose (aiding private schools was "one of the primary purposes … if not [the] only purpose" of challenged statute). In such cases, the inquiry becomes whether one of those motivating purposes is impermissible under the anti-aid amendment. We stress, however, that the purpose of a challenged grant is only one factor to be considered in our three-factor test, and need not be dispositive by itself. Thus, whether an impermissible purpose is the sole motivating purpose behind the grant, or only one purpose among many, may be considered in determining the weight to accord that factor.

cabin the effect of the public funding, guaranteeing that it would not "aid the private school[s] in carrying out [their] essential function." *Id.* at 681.

We see no such guarantee here. As an initial matter, we note that the proposed grants are "neither minimal nor insignificant" in amount. *Opinion of the Justices*, 401 Mass. at 1208. The total cost of the comprehensive assessment contemplated under the Master Plan will be $55,000, to which the Master Plan grant will contribute $49,500, while the total cost of restoring the stained glass windows will be $56,930, to which the stained glass grant will contribute $51,237.

More worrisome is the extent to which these grants will assist the church in its "essential enterprise" as an active house of worship. *Bloom*, 376 Mass. at 47. The church was candid in its grant applications, explaining that — faced with declining membership and contributions — it would need the town's "help" in order to preserve its buildings while also "offering the congregation what draws them to their church." This is not a case like in *Springfield*, where it was possible to limit the public funding to a narrow, specific purpose. The reimbursement there [***34] was for expenses that the schools would not otherwise have incurred; it did nothing to "lessen[ ] the financial burden" of the schools or those who chose to attend those schools. *Springfield*, 382 Mass. at 683. Here, in contrast, the grants would help defray planning and restoration costs that the church would otherwise have to shoulder on its own, allowing the money saved to be used to support its core religious activities. As the church indicated in its grant applications, budgetary constraints have led it to make difficult choices between "capital improvement projects" on the one hand [*90] and "programs and personnel" on the other. These grants would allow the church to have both, in effect "underwrit[ing]" its essential function as an active house of worship. *Opinion of the Justices*, 401 Mass. at 1209.

On this record, we therefore conclude that the effect of these grants is to substantially aid the church.

c. *Risks*. The third and last factor that must be considered is whether the grants avoid the risks that prompted the passage of the anti-aid amendment. In evaluating the third factor, the judge erred in focusing on whether there was "credible [**708] evidence that the grants under the [act] are economically or politically abusive or unfair," and, finding no such evidence, concluding [***35] that there was "no political or economic abuse which the anti-aid amendment was enacted to prevent." Instead, the judge should have focused on whether the grants to the church avoid the *risks* of the political and economic abuses that "prompted the passage" of the anti-aid amendment. *Springfield*, 382 Mass. at 675.

We recognize that our articulation of this third factor in prior cases has provided less than clear guidance. The third factor, as first set forth in *Springfield*, focused on "whether the [grant] avoids the political and economic abuses which prompted the passage of [the anti-aid amendment]." *Id.* But in *Springfield*, we did not provide the historical background that identified these "political and economic abuses," and therefore failed to recognize, as we do here, that the amendment was proposed in 1853 not to abolish an existing practice of funding religious institutions — no one at the Convention alleged the existence of such a practice — but instead as a preemptive measure to avoid the risks associated with the public financial support of religious institutions. These risks, as we noted in *Bloom*, 376 Mass. at 39, also prompted the revision of the anti-aid amendment in 1917, and are worth repeating here: first, the risk that [***36] "liberty of conscience" would be infringed "whenever a citizen was taxed to support the religious institutions of others"; second, the risk that public funding would result in improper government entanglement with religion, undermining the "independence and dignity" of churches; and third, the risk that the public support of religious institutions would threaten "civic harmony," making the divisive "question of religion" a political question. *Id.*

In *Helmes*, 406 Mass. at 878, our most recent case applying the three-factor test, we redefined the third factor in light of the circumstances of that case to consider "whether there is any use [*91] of public money that aids a charitable undertaking in a way that is abusive or unfair, economically or politically." Because nothing in the record indicated any such abuse or unfairness, we concluded that the appropriation was constitutional; there was no evidence that any private person would benefit from it, that the funds would be distributed to a noncharitable use, or that its charitable objective — preserving a World War II battleship and educating the public — was not generally accepted. *Id.* at 877-878. We did not consider in *Helmes* whether the appropriation of funds presented any [***37] of the *risks* that the framers of the anti-aid amendment sought to avoid, perhaps because it was so clear that these risks were not presented where the challenged funding was for the repair of a memorial battleship.

Here, where the grant of public funds is for the renovation of an active house of worship, it is imperative, in considering the third factor, to focus on whether these specific grants avoid the risks of the political and economic abuses that "prompted the passage" of the anti-aid amendment, which we identified in *Bloom* and have described in this opinion. On the record before us, we conclude that these risks are significant.

First, these grants risk infringing on taxpayers' liberty of conscience — a risk that was specifically contemplated by the framers of the anti-aid amendment. As one delegate to the Convention of 1917 stated, "Religious liberty [requires] that … the State cannot compel a man to pay his good money in taxation for the support of a religion, or of the schools and institutions [**709] of a religion, in which he does not believe." Debates of 1917-1918, *supra* at 77. The self-described mission of the church here is "to preach and teach the good news of the salvation that was [***38] secured … through the life, death, and resurrection of Jesus." The proposed grants would be used to renovate the main church building, where the church conducts its worship services, and its stained glass windows, which feature explicit religious imagery and language. For town residents who do not subscribe to the church's beliefs, the grants present a risk that their liberty of conscience will be infringed, especially where their tax dollars are spent to preserve the church's worship space and its stained glass windows.

Second, these grants also present a risk of government entanglement with religion. See *Bloom*, 376 Mass. at 39, 47. To ensure that the grants are used for historic preservation, the town has imposed on the church the condition that it execute a historic [*92] preservation restriction, which — if the restrictions accompanying the town's prior grants under the act are any indication — would significantly limit the church's ability to make future alterations to its buildings, including its worship space and its stained glass windows, without the town's approval.[23] We have held in other contexts that where the State exercises control over the design features of a church, it infringes on the free exercise [***39] of religion guaranteed under the Massachusetts Constitution. In *The Society of Jesus of New England* v. *Boston Landmarks Comm'n*, 409 Mass. 38, 42, 564 N.E.2d 571 (1990) (*Society of Jesus*), we concluded that the designation of a church interior as a landmark, thereby making all renovations subject to government approval, infringed on "the right freely to design interior spaces for religious worship," in violation of art. 2 of the Massachusetts Declaration of Rights. The historic preservation restriction contemplated here presents a comparable risk of "intrusion … , reaching into the church's actual worship space." *Id.*

The town contends that these grants would

[23] The record in this case includes two historic preservation restrictions executed in relation to past grants that the town has awarded under the act. These restrictions prohibit the owners from, inter alia, making changes to the exterior of their properties "without the prior express written approval of the [t]own," which can be "withheld or conditioned in the [t]own's sole and absolute discretion."

result in no such intrusion, and are distinguishable from the landmark designation in *Society of Jesus*, because they relate only to the exterior of the church's buildings. See, e.g., G. L. c. 40C, § 7 ("The [historic district] commission shall not consider interior arrangements or architectural features not subject to public view"). In *Society of Jesus*, 409 Mass. at 39 n.2, we expressly did not decide whether a landmark designation of a church exterior would also infringe on the free exercise of religion. We need not decide that issue here because, even if we were to recognize the distinction between the interior and exterior of a church and conclude that restrictions on the renovation of a church exterior would not burden the free [***40] exercise of religion, such restrictions would still pose a risk of government entanglement in religious matters.

In *Society of Jesus*, we reasoned that "[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of … religious worship." *Society of Jesus*, 409 Mass. at 42. Since then we have recognized that the exterior features of a religious structure can also be expressive of [*93] religiou s beliefs. In *Martin* v. *The Corporation of the Presiding [**710] Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 142, 747 N.E.2d 131 (2001), we held that a church steeple should be exempted from local height restrictions as a "religious" use of land, noting that "churches have long built steeples to 'express elevation toward the infinite'" (citation omitted). *Id.* at 152. See P. Tillich, On Art and Architecture 212 (1989) ("the one great symbol of the church building is the building itself"). We warned, "It is not for judges to determine whether the inclusion of a particular architectural feature is 'necessary' for a particular religion," *Martin*, *supra* at 150, or "to determine what is or is not a matter of religious doctrine." *Id.* at 152. The Master Plan grant at issue here contemplates a comprehensive assessment of the entire church building, which would include elements both exterior and interior; it is not for judges [***41] or, for that matter, a community preservation committee to determine whether this assessment will affect elements that touch on matters of religious doctrine.

The stained glass window is illustrative of the fragility of the interior-exterior distinction, and of the extent to which historic preservation of the building is interwoven with religious doctrine. Although it is an "exterior" feature, in that it is open to public view, see G. L. c. 40C, § 5, its inclusion in a church building is as much a religious choice as an aesthetic one — especially where, as here, the windows have an expressly religious message. See V.C. Raguin, Stained Glass, From Its Origins to the Present 10-13 (2003).

Third, the challenged grants also risk threatening "civic harmony," by making the "question of religion" a political one. *Bloom*, 376 Mass. at 39. As centuries of experience have shown, government support of churches has always and inevitably been a politically divisive issue in Massachusetts. Although the act provides for a rigorous process for the allocation of funds, the decision to award a grant lies with the committee and, ultimately, with the town meeting members. Those who first proposed the anti-aid amendment in 1853 were wary of throwing [***42] "a firebrand into … town meetings." Debates of 1853, *supra* at 624. Grants for the renovation of churches — using funds that could potentially have been dedicated to open space, soccer fields, low-income housing, or other historic preservation projects, including projects for the renovation of houses of worship of other religious denominations — pose an inevitable risk of making "the irritating [*94] question of religion" a politically divisive one in a community, the more so where those grants are for the renovation of a worship space or of a stained glass window with explicit religious imagery. *Bloom*, *supra* at 39.

We do not suggest that fair consideration of the risks that prompted the passage of the anti-aid amendment means that every historic preservation grant for a church building will be unconstitutional. We only caution that any

such grant to an active church warrants careful scrutiny under the three-factor *Springfield* test. The third factor is by no means a dispositive factor, only an important one. Indeed, we can imagine various circumstances where such grants would survive careful scrutiny, including, for instance, where historical events of great significance occurred in the church, or where [***43] the grants are limited to preserving church property with a primarily secular purpose. Cf. *Shrine of Our Lady of La Salette Inc.* v. *Board of Assessors of Attleboro*, 476 Mass. 690, 700-702, 71 N.E.3d 509 (2017) (shrine property leased for battered women's shelter and used as wildlife sanctuary not subject to religious worship exemption, because "dominant [**711] purpose" not connected to religious worship and instruction). The use of public funds for such preservation efforts poses little risk of political division.[24]

[*95] In this case, having weighed and balanced the three factors, we conclude that the plaintiffs are likely to succeed on the merits of their claim with respect to the stained glass grant. Although the record before us does not allow us to ascertain whether there is a motivating purpose behind this grant other than historic preservation, its effect is to substantially aid the church in its essential function and, given the explicit religious imagery of the stained glass, it fails to avoid the very risks that the framers of the anti-aid amendment hoped to avoid. Thus, even if further discovery were to reveal that the sole motivating purpose of this grant was in fact to preserve historic resources, and not to aid this particular church, the other factors in our analysis — especially [***44] the third factor, to which we accord special weight — still compel the conclusion that the stained glass grant runs afoul of the anti-aid amendment. Because the plaintiffs are likely to succeed on the merits of their claim, and a preliminary injunction would "promote[ ] the public interest" reflected in the anti-aid amendment, *LeClair*, 430 Mass. at 332, the plaintiffs are entitled to a preliminary injunction barring the disbursement of the stained glass grant.

With respect to the Master Plan grant, we conclude that further discovery is needed before a determination should be made as to whether the plaintiffs are likely to succeed on the merits of their claim. This is in part because, unlike the stained glass grant, the Master Plan grant is far broader in its scope, including not only plans for the renovation of worship space but also plans for the renovation of the Fletcher and Hosmer Houses, which are both private residences. Accordingly, analysis of the grant under the third factor must be more fact-intensive; restoration of the main church building will implicate risks different from those arising from the [**712] restoration of the adjoining residences. And where the analysis of the third factor is more complex, [***45] and the potential judicial options more diverse,[25] the discovery that might shed light

[24] The dissent takes issue with the emphasis that we place on the third factor in cases like these, where the public grant is to an active church. The dissent contends that our analysis is inconsistent with this court's anti-aid amendment cases, relying on our statement, first made in *Bloom*, 376 Mass. at 45, that "[o]ur anti-aid amendment marks no difference between 'aids,' whether religious or secular" (citation omitted). See *post* at 109-110. But the dissent takes this statement out of context. What we meant in *Bloom* (and in the other cases the dissent cites) was that, unlike the establishment clause of the First Amendment, which requires an inquiry into whether the aid has a religious or secular purpose, see *Lemon* v. *Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), our anti-aid amendment does not make that distinction. See *Bloom*, 376 Mass. at 45 & n.20. See also *Opinion of the Justices*, 401 Mass. 1201, 1203 n.4, 514 N.E.2d 353 (1987); *Attorney Gen.* v. *School Comm. of Essex*, 387 Mass. 326, 332 n.3, 439 N.E.2d 770 (1982); *Springfield*, 382 Mass. at 674 n.14. The only purpose that is forbidden under the anti-aid amendment is "the purpose of founding, maintaining or aiding" a private institution. Art. 18, § 2, as amended by arts. 46 and 103. Thus, in *Bloom*, 376 Mass. at 45, it did not matter whether the textbooks that were lent were of a religious or secular nature; what mattered was that the purpose of the loan was to aid private schools. See *id.* at 41-42. This does not mean that we do not distinguish between different kinds of "aids" in evaluating whether that aid poses the risks that prompted the anti-aid amendment; after all, aid to support a church poses risks quite different from those arising from aid to support a World War II battleship. Cf. *Helmes*, 406 *Mass.* at 873. We reiterate that the anti-aid amendment is not a categorical ban on aid to churches. However, the fact that a grant recipient is an active church is relevant to our analysis of the potential risks under the third factor, to which we cannot (and need not) be blind.

[25] For example, the judge may deny the preliminary injunction as to the part of the Master Plan grant allocated to the renovation of the Fletcher and Hosmer Houses, and allow it as

on whether there was a hidden purpose apart from historic preservation becomes more important to the over-all decision.

We therefore remand the issue to the Superior Court for a determination whether the Master Plan grant, in full or in part, [*96] should survive the careful scrutiny required under the third factor. Such a determination should not be made until the plaintiffs have had reasonable discovery regarding the purpose of the committee in awarding this grant. We reiterate that the scope of such discovery should be limited at this time to the testimony of the rule 30 (b) (6) witness and writings reflecting the oral and written communications regarding the committee's decision-making process in recommending the grants and that there is no need to probe the private intentions of town meeting members. We leave it to the judge to determine more precisely its appropriate scope.

Conclusion. The orders denying the plaintiffs' motion for a preliminary injunction and granting the town's motion for a protective order to stay discovery are vacated. The case is remanded to the Superior Court for entry of an order allowing the [***46] plaintiffs' motion for a preliminary injunction barring disbursement of the stained glass grant and, as to the Master Plan grant, for further proceedings consistent with this opinion.

So ordered.

Concur by: KAFKER

Concur

KAFKER, J. (concurring, with whom Gaziano, J., joins). I write separately to emphasize that our analysis of the anti-aid amendment of the Massachusetts Constitution is tightly constrained by the United States Supreme Court's interpretation of the religion clauses of the First Amendment to the United States Constitution. The grants at issue here are provided pursuant to a generally available public benefit program designed to promote community conservation including the protection of the Commonwealth's historic buildings. The United States Supreme Court has warned that only a very narrow category of exclusions are allowed by the free exercise clause from such generally available public benefit programs. Because I believe the preliminary injunction against the stained glass grant is consistent with this very narrow permitted exclusion, and the Master Plan grant requires further analysis to decide both the anti-aid and First Amendment questions, I concur in the judgment of the court.

1. *The First Amendment background to this case*. Today's decision takes us into one of the most confusing [***47] and contested areas of State and Federal constitutional law. The United States Supreme Court has emphasized that there is a "tension" between the religion clauses of the United States Constitution — that is, [*97] what is prohibited by the establishment clause and what is required by the free exercise clause of the First Amendment. See *Locke* v. *Davey*, 540 U.S. 712, 718, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004). The Court has also stated that there is "play in the joints" between the dictates of the two religion provisions in the United States Constitution — allowing limited State action therein — without defining precisely how much play. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019, 198 L. Ed. 2d 551 (2017) [**713] (*Trinity Lutheran*). The Supreme Court's jurisprudence also has been continually evolving, particularly in its definition of the neutrality the two First Amendment provisions requires in regard to religion.[1]

to the part allocated to the renovation of the church's worship space.

[1] The evolution was summarized by Justice Souter in *Mitchell* v. *Helms*, 530 U.S. 793, 882-883, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000) (Souter, J., dissenting):

> "In sum, 'neutrality' originally entered this field of jurisprudence as a conclusory term, a label for the required relationship between the government and religion as a state of equipoise between government as ally and government as adversary. Reexamining *Everson* [v. *Board of Educ. of Ewing*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947),]'s paradigm cases to derive a prescriptive guideline, we first determined that 'neutral' aid was secular, nonideological, or unrelated to religious education. Our subsequent reexamination of [multiple United States Supreme Court cases] … recast [***48]

All of this is further complicated by State constitutional anti-aid provisions providing greater protections against the establishment of religion than the establishment clause of the First Amendment. These State constitutional anti-aid provisions present additional legal constraints, and State grants are permissible only if they do not run afoul of the free exercise clause of the First Amendment.

There is no clear path yet through this difficult intersection of the religion clauses of the State and Federal Constitutions. Most instructive, for our purposes, however, are the Supreme Court's more recent pronouncements in *Trinity Lutheran* and *Locke*. These two cases analyzed grants arising from generally available public benefit programs, like the one before us. See *Trinity Lutheran*, *supra* at 2017; *Locke*, *supra* at 715. Both cases involved exclusions required by anti-aid provisions in State Constitutions. See *Trinity Lutheran*, *supra* (Missouri Constitution, art. 1, § 7); *Locke*, *supra* at 722 (Washington Constitution, art. 1, § 11).

In *Trinity Lutheran*, 137 S. Ct. at 2025, the Supreme Court held [*98] that the exclusion of a church school and day care facility from a generally available public benefit program funding rubber playground surfaces "solely" on account of a church's religious identity violated the free exercise clause. The Court held that it had "repeatedly confirmed" that it will [***49] not approve such exclusions, giving as an example its 1947 decision upholding against Federal establishment clause challenges a New Jersey law allowing a local school district to pay for public, private, and parochial school transportation costs. *Id.* at 2019-2020, citing *Everson* v. *Board of Educ. of Ewing*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

In *Locke*, however, the Supreme Court held that a State anti-aid amendment exclusion of scholarships to pursue degrees in devotional theology from an otherwise inclusive student aid program did not violate the free exercise clause of the First Amendment. *Locke*, 540 U.S. at 725. In so holding, the Court stressed that it could "think of few areas in which a State's antiestablishment interests come more into play" than using "taxpayer funds to support church leaders." *Id.* at 722. "The claimant in *Locke* sought funding for an 'essentially religious endeavor … akin to a religious calling.'" *Trinity Lutheran*, 137 S. Ct. at 2023, quoting *Locke*, *supra* at 721-722. To contrast, the Court in *Trinity Lutheran* stated, "nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Trinity Lutheran*, *supra*. In his concurrence in [**714] *Trinity Lutheran*, Justice Breyer also emphasized that he would "find relevant, and would emphasize, the particular nature of the 'public benefit' … at issue." *Id.* at 2026 (Breyer, J., concurring).

Together, *Trinity Lutheran* and [***50] *Locke* define a very narrow category of exclusions from generally available public benefit programs that can be required by State anti-aid amendments without violating the free exercise clause of the First Amendment. To be excluded from a generally available public benefit program, the funding must be sought for an "essentially religious endeavor" raising important State constitutional antiestablishment concerns. *Trinity Lutheran*, 137 S. Ct. at 2023, quoting *Locke*, 540 U.S. at 721-722. With these overarching First Amendment principles in mind, I turn to the grants at issue, and art. 18 of the Amendments to the Massachusetts Constitution, as amended by arts. 46 and 103 of the Amendments, the anti-aid amendment.

2. *The Community Preservation Act grant and the anti-aid amendment*. As explained by the court, the town of Acton (town) is one of 172 municipalities in Massachusetts that have adopted [*99] the Community Preservation Act (act), which establishes processes and procedures for funding projects related to open space, historic resources, and community housing. See *ante* at 72. Here, the church's "Evangelical Church Stained Glass Window Preservation" application initially requested

neutrality as a concept of 'evenhandedness.'"

Evenhandedness in this context means an evenhanded treatment of religious and nonreligious institutions.

$41,000 from the town's Community Preservation Committee (committee) to repair the church's stained glass windows. Eventually $51,237 was awarded for the windows. The proposed repairs included [***51] a three-foot, six-inch by ten-foot, six-inch "Christ window" depicting Jesus with a woman kneeling and praying, altar windows, and a window containing a cross and the hymnal phrase "Rock of Ages Cleft for Me."[2] The church was requesting that the town pay for ninety per cent of the costs. The stained glass windows were "installed in memorial to honor prominent members of the church" in 1898.

The church also sought $49,500 to hire an architect to do a structural review and prepare a master plan for historic preservation of the church, and two neighboring buildings owned by the church, the John Fletcher House and the Abner Hosmer House. The church was again requesting that the town pay ninety per cent of the costs. The main church dates back to 1846 with a renovation in 1898. The houses were built circa 1855 and 1846. The grant was sought to "hire an architectural consultant to thoroughly investigate each of the [three] historic buildings to identify all the needs of each building in order to protect and preserve these historic assets for future generations." For the church itself, this would include "a thorough assessment of the [c]hurch building envelope, including windows, doors, siding, roof, [***52] chimney, bell tower, skylights, and fire escapes, with a focus on protecting the building from the elements." Similarly, "the rental houses will be evaluated for the building envelope, mechanical, electrical and plumbing systems, and safety systems. This work will focus on building structural integrity." The grant was requested because "each [of the [**715] buildings] shows the signs of 170+ years of wear."

In its application for both grants, the church explained that "mainstream churches have not been growing for years, and the [*100] financial strain is significant . … [We] have had to cut programs and personnel. The cuts can further exacerbate the financial problem[s] by not offering the congregation what draws them to their church."

Pursuant to the requirements of the act, the committee held a public hearing and voted unanimously to recommend the grants. The town meeting approved both grants. The annual town meeting warrant explained that the church and the other two buildings were located in the Acton Centre Historic District. The warrant explained that the "work will protect the stained glass windows, an integral part of the church's historical significance." The warrant also explained that the master [***53] plan would evaluate and identify critical needs and set restoration and rehabilitation priorities to preserve the three historic buildings. It also stated that the "preservation project must comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties codified in 36 C.F.R. Part 68." Historic preservation restrictions were imposed on the buildings with the restriction being "perpetual to the extent permitted by law." The plaintiffs, who are town taxpayers, challenged the grants, claiming they violate the anti-aid amendment.

3. *Application of the anti-aid amendment and the First Amendment to the stained glass grant*. I agree with the court that the three-factor anti-aid amendment analysis set forth in *Commonwealth* v. *School Comm. of Springfield*, 382 Mass. 665, 675, 417 N.E.2d 408 (1981) (*Springfield*), applies, including where the grant is being given to a church as well as a nonreligious private charity. I also agree that a categorical ban would violate the First Amendment right to the free exercise of religion.

In analyzing the first factor, I conclude that we must consider the purpose of both the statute

[2] The windows are described as a "treasure, yet they are in need of care. The exterior plexiglass is no longer doing its job. Not only is it cloudy, so that the beauty of the glass cannot be appreciated outside of the church, but it is no longer weathertight. … The proposed work would remove the old plastic covers, repair the existing wood damage, [and] replace missing or broken pieces … to stabilize and protect the eight primary stained glass windows."

and the grant. This is necessitated, in part, by the Supreme Court's First Amendment jurisprudence and its focus on whether the grant is authorized [***54] pursuant to a generally available public benefit program. Here, the purpose of the statute itself is unquestionably to provide generally available public benefits for the purpose of conservation, including historic preservation. There is no suggestion or argument that an "examination of the statutory scheme … [will reveal] any 'technique of circumvention'" designed to avoid the requirements of the anti-aid amendment. *Springfield*, 382 Mass. at 677, quoting *Bloom* v. *School Comm. of Springfield*, 376 Mass 35, 47, 379 N.E.2d 578 (1978). See *Bloom*, [*101] *supra* at 44 ("[W]e note, first, that the Supreme Court has been regularly unreceptive to schemes of circumvention which resemble that attempted by the present legislation"). Indeed the statute is straightforward and serves important conservation purposes as eloquently explained by the dissent. See *post* at 111-112.

The court, however, draws a distinction between the purposes of the statute and those of the grants, and emphasizes that we must probe further to discern the primary or motivating purposes of the grantors as well as any hidden purposes, and this additional inquiry requires a remand for the Master Plan grant. See *ante* at 95-96. At least for a determination whether a preliminary injunction should issue regarding the stained glass grant, I conclude that [***55] we have a sufficient record that conservation is the primary purpose of the [**716] grants. I do not detect any indicia of a scheme or technique of circumvention. The purpose, as reflected in the town warrant, appears to be described straightforwardly and factually.

In my opinion, the most complicated aspect of the purpose inquiry is not discerning the subjective intentions of the grantors but the difficulty of separating conservation from religious purposes when the grant is being given to preserve a religious component of a church building. Even if the purpose of the grantors is conservation, and not the promotion of religion, it is obvious to anyone voting on the grants that both purposes would be served. I think that is particularly true for the stained glass grant where the windows convey an express sectarian religious message.[3] Ultimately, however, the purpose inquiry is just one [*102] factor in a multifactor test and it is meant to be instructive, not dispositive. *Springfield*, 382 Mass. at 675. I find the other two factors, particularly the third, conclusive of the anti-aid amendment analysis and critical to the First Amendment interpretation as well.

The second prong of the anti-aid test analyzes whether the grants substantially assist [***56] religion. The stained glass grant is "neither minimal nor insignificant" to the church. See *Opinion of the Justices*, 401 Mass. 1201, 1208, 514 N.E.2d 353 (1987). Approximately $50,000 is being provided and the town is funding ninety per cent of the total cost.

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[3] Unlike in the stained glass grant, there are other grants to churches where the secular and religious purposes may be more easily separable. The Old North Church, located in the North End neighborhood of Boston, is a good example. Funding the repair and restoration of glass windows is at issue for both houses of worship, but any similarity ends there. In 2002, the Old North Foundation applied for, and later received, a Save America's Treasure grant to preserve, among other things, the Old North Church's historic window. See United States Department of Justice, Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 27 Opinions of the Office of Legal Counsel for 2003, at 91, 96, 99 (2013) (Old North Church opinion), https://www.justice.gov/olc/file/477026/download [https://perma.cc/XUT2-L54E]. Famously, in the Old North Church's steeple hung two lit lanterns to indicate that the British army was leaving Boston by boat to capture the stores of arms and ammunition located in Concord. See http://oldnorth.com/historic-site/the-events-of-april-18-1775/ [https://perma.cc/9AGF-KL9Z]. See also H.W. Longfellow, Paul Revere's Ride (1860) ("He said to his friend, — 'If the British march By land or sea from the town to-night, Hang a lantern aloft in the belfry-arch Of the North-Church-tower, as a signal-light, — One if by land, and two if by sea; And I on the opposite shore will be'").

For the grant to the Old North Church, the historical purpose is manifestly evident and is described by the National Park Service as "one of America's most cherished landmarks." Old North Church opinion at 97. The Old North Church windows also contained no overt religious message as do the stained glass windows in the town of Acton. Furthermore, for the Old North Church, rigorous auditing requirements were also in place to ensure that the grant funded only the historic aspects of the church and not its religious endeavors. Old North Church opinion at 103.

Without the assistance of the committee's grants, the church indicated that the financial strain and required cuts could "exacerbate the financial problem[s] by not offering the congregation what draws them to their church."[4]

[**717] Most important in my view is the third prong. Awarding public monies paid by taxes directly to a church to repair stained glass windows with an express religious message raises core concerns about separation of church and State that prompted the passage of the anti-aid amendment. I agree with the court that those concerns include (1) infringement on liberty of conscience caused by taxing citizens to support the religious beliefs and institutions of [*103] others; (2) improper government entanglement with religion, thereby diminishing the independence and integrity of both church and State; and (3) unnecessary divisiveness in the polity caused by making the funding of religious institutions a political question. See *ante* at 91-94.

All three of these risks are present here. Tax dollars are paying [***57] for the stained glass windows that have an express sectarian religious message. A historic preservation restriction of perpetual duration is being imposed on the windows and perhaps other parts of the church, thereby entwining an active church building with State government. See *The Society of Jesus of New England* v. *Boston Landmarks Comm'n*, 409 Mass. 38, 42, 564 N.E.2d 571 (1990) (designation of church interior as landmark infringed on "right freely to design interior spaces for religious worship"). See also *Martin* v. *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 434 Mass. 141, 153, 747 N.E.2d 131 (2001) ("no municipal concern was served by controlling the steeple height of churches"); Saperstein, Public Accountability and Faith-Based Organizations: A Problem Best Avoided, 116 Harv. L. Rev. 1353, 1365 (2003) ("With government money come government rules, regulations, audits, monitoring, interference, and control — all of which inherently threaten religious autonomy"). Town meeting members were being asked to vote on a grant to maintain religious aspects of the church of their neighbors and now they are suing each other. Should another house of worship in the town be denied a grant after this one has been awarded, it will likely bring about further controversy and division. No more discovery is required to know that this grant goes to core concerns of the anti-aid amendment.[5] In sum, the balancing of the three factors [***58] shows that the plaintiffs have a substantial likelihood of success in establishing that the stained glass grant violates the anti-aid amendment.

As the church and the free exercise rights of its members are also implicated, they must be considered as well. As explained above, to be excluded from a generally available public benefit program, the funding must be sought for an "essentially religious endeavor" raising important State constitutional antiestablishment concerns. See *Locke*, 540 U.S. at 721. I conclude that pay- [*104] ing for stained glass windows with an express sectarian religious message and mission fits [**718] within the very narrow exception allowed by *Locke*.

The benefits are vastly different from the

[4] The Old North Church is again a good comparison. Great efforts were made to avoid religious assistance. See National Park Service, Press Release, Old North Foundation Awarded $317,000 Grant Under Save America's Treasure Program (May 27, 2003) (Park Service Press Release), https://www.nps.gov/aboutus/news/release.htm?id=395 [https://perma.cc/9MAN-6NGV]. The Old North Foundation, a secular, nonprofit organization, was the entity approved for the grant. See Mission Statement, Old North Foundation of Boston, Inc., http://oldnorth.com/historic-site/foundation/ [https://perma.cc/B45N-79Y5]; Park Service Press Release, *supra*. Furthermore, as a matching-grant program, the Old North Foundation contributed a substantial amount to the project. See National Park Service, Matching Share Requirements, at 1, https://www.nps.gov/preservation-grants/manual/Matching_Share_Requirements.pdf [https://perma.cc/RA45-3SQF] ("The Federal grant is meant to stimulate nonfederal donations-not to pay for all the work by itself").

[5] Again, this case is unlike the Old North Church. Any risks or tensions there are substantially assuaged by the building's undeniable significance in the Commonwealth's and the country's history and because of the separability of the historic restoration work from the religious mission.

nonreligious rubberized playground services or school transportation costs, or the police and fire or other obviously nonreligious types of assistance that have been found not to raise establishment clause or anti-aid concerns. See *Trinity Lutheran*, 137 S. Ct. at 2026-2027 (Breyer, J., concurring). See also *Everson*, 330 U.S. at 17-18 (describing services "so separate and so indisputably marked off from the religious function"). Although "nothing [religious] … can be said about a program to use recycled tires to resurface playgrounds," the opposite is true for stained glass windows. See *Trinity Lutheran*, *supra* at 2023. They are an important part of the church's religious message and mission. V.C. Raguin, Stained Glass, From its Origins to the Present, 13 (2003) ("stained [***59] glass became … an intimation of God's very nature, and important as a contemplative aid"); Lupu & Tuttle, Historic Preservation Grants to House of Worship: A Case Study in The Survival of Separationism, 43 B.C. L. Rev. 1139, 1175 (2002) ("[Stained glass] windows often present religious themes … and help to shape the worship experience through the play of light and imagery"). See *Mitchell* v. *Helms*, 530 U.S. 793, 820, 120 S. Ct. 2530, 147 L. Ed. 2d 660 (2000) (opinion of Thomas, J.) (aid cannot be "impermissibly religious in nature"). Additionally, as explained above, the stained glass grant here raises core State constitutional anti-aid concerns. Like excluding State scholarships to pay for a divinity degree in *Locke*, there are "few areas in which a State's antiestablishment interests come more into play" than paying for stained glass windows with sectarian religious symbolism. *Locke*, 540 U.S. at 722.

For the religion clauses in the State and Federal Constitutions, there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible." *School Dist. of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203, 306, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring). See *Van Orden* v. *Perry*, 545 U.S. 677, 699, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (Breyer, [***60] J., concurring) ("the Court has found no single mechanical formula that can accurately draw the constitutional line in every case"). Although line drawing in this intensely contested area of constitutional law is difficult, I believe that the use of taxpayer dollars to pay for stained glass windows with a religious message crosses that line.

[*105] I therefore conclude that on this record the plaintiffs have demonstrated the necessary likelihood of success that the stained glass grant violates the State's anti-aid amendment without running afoul of the free exercise clause.

4. *Remand on the Master Plan grant*. I also agree with the court that a remand is required on the Master Plan grant, although I place less emphasis than the court does on a search for "hidden" purposes. I conclude that a fuller factual record is required on the inner workings of the grant itself before it can be determined whether the Master Plan grant violates the anti-aid amendment, and if so, whether exclusion of such a grant from a generally available public benefit program would violate the free exercise clause of the First Amendment.

It is important to emphasize up front just how narrow the exclusion is for generally available public benefit programs. See *Locke*, 540 U.S. at 725. The exclusion involves essentially [***61] religious endeavors, such as paying for ministry training or stained glass windows with sectarian [**719] symbols or messages. The Master Plan grant is to pay an architect to perform a structural review of three 170 year old buildings of historic importance to the town. Only one of those buildings is a church. The focus of the architect's work appears to be on preserving the structural integrity of the old buildings, not repairing or maintaining particular parts of the church that convey an express religious message.[6] It is unclear to me

[6] I recognize that this distinction may be subtle and even elusive as a house of worship contains many different religious symbols, but as the Supreme Court has emphasized, line drawing may be difficult but necessary in this area. See *School Dist. of Abington Twp., Pa* v. *Schempp*, 374 U.S. 203, 305-306, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J.,

how much of this work goes beyond the "building envelope." These buildings are also a part of the historic district of the town and serve important nonreligious as well as religious purposes in the town and the Commonwealth, as the dissent explains. See *post* at 111-112. Additionally it is not clear from the record what historic preservation restriction will result from this grant. Will the grant to pay for an architect to provide for a structural review of the three buildings give the town a restriction regarding construction on all of these buildings? Or would such a restriction only apply if a grant is provided for subsequent work [*106] on the buildings? A fuller factual [***62] record is necessary on this point as well as others.

5. *Conclusion*. In sum, I conclude that the stained glass grant not only violates the anti-aid amendment but also fits within the very narrow exclusion from a generally available public benefit program authorized by the Supreme Court pursuant to the First Amendment. I further conclude that on remand the legal status of the Master Plan grant under both the anti-aid amendment and the free exercise clause of the First Amendment must be determined.

Dissent by:CYPHER

Dissent

CYPHER, J. (dissenting). I respectfully dissent. Separation of church and State is a vital constitutional requirement under the Massachusetts Declaration of Rights and the United States Constitution and an enduring principle of the Commonwealth. As the court recounts, Massachusetts has an interesting and complex history in this regard. Nevertheless, I would affirm the order denying the motion for an injunction to block the use by the town of Acton (town) of the Community Preservation Act (act) to preserve the historic façade of the Acton Congregational Church, which is located in the town center.

I agree with the court that grants of public funds to active religious institutions pursuant to the act are not categorically barred by the anti-aid amendment, and that [***63] such grants are instead subject to the three-factor test this court first articulated in *Commonwealth* v. *School Comm. of Springfield*, 382 Mass. 665, 675, 417 N.E.2d 408 (1981) (*Springfield*). As the court points out, this test requires that we consider (1) whether the purpose of the challenged grant is to aid a private charity; (2) whether the grant does in fact substantially aid a private charity; and (3) whether the grant avoids the political and economic abuses that prompted the passage of the anti-aid amendment.[1] I do not think that [**720] the motion judge misapplied those three factors here.

[*107] I am also concerned with the court's admonition that grants of community preservation funds to active religious institutions warrant particularly "careful scrutiny." Such an analysis is belied by the plain text of the anti-aid amendment, as well as this court's cases interpreting the amendment, which dictate that we do not treat religious and secular entities differently under the

concurring). See also *Van Orden* v. *Perry*, 545 U.S. 677, 699, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (Breyer, J., concurring). See generally Lupu & Tuttle, Historic Preservation Grants to House of Worship: A Case Study in the Survival of Separationism, 43 B.C. L. Rev. 1139, 1174 (2002).

[1] With respect to the first factor set out in *Commonwealth* v. *School Comm. of Springfield*, 382 Mass. 665, 675, 417 N.E.2d 408 (1981) (*Springfield*), consideration of a grant's "purpose," I disagree with the court that a court's primary focus here is on whether "one" of a grantor's motivating purposes is impermissible. See *ante* at note 22. Our "purpose" inquiry is limited to the intent of the grantor, without consideration of an applicant's motives for seeking grant funds. See, e.g., *Boston Edison Co.* v. *Boston Redevelopment Auth.*, 374 Mass. 37, 62-63, 371 N.E.2d 728 (1977) (where the Legislature has provided specific standards, "the *purpose* of the applicants in proposing the project is wholly irrelevant"). And as *Springfield* and subsequent cases make clear, that inquiry requires that we consider what "the" purpose of the grant is, see, e.g., *Springfield*, 382 Mass. at 675 — not, as the court states, whether "one purpose among many" might be impermissible. In instances where there may be more than one purpose for a grant, a court must consider and balance all such purposes in order to determine what "the" predominant or "primary" purpose of the grant is. *Id.* at 678 ("The statute's purpose is, primarily, to help specified children with special needs obtain the education which is theirs by right"). I am therefore not convinced that the plaintiffs' potential discovery of some "hidden purpose" to aid the church tips the scale in their favor under this factor, where the clear predominant purpose of these grants is historic preservation.

amendment. The court's focus on a grant applicant's status as an active house of worship also implicates the most recent United States Supreme Court decision in this area, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024, 198 L. Ed. 2d 551 (2017) (*Trinity Lutheran*). *Trinity Lutheran* holds that a State cannot condition participation in a generally available [***64] public benefit program on an applicant's "renounc[ing] its religious character."[2] *Id.* Finally, I write to underscore the importance of preserving our State's historic buildings, which embody the Commonwealth's rich past and offer those in the present a number of public benefits. Historic churches and meeting houses are, like secular historic buildings, an indispensable part of our historic landscape, and warrant the same degree of preservation.

As I understand the judge's decision, she examined the purpose of the grant and found that the taxpayers did not satisfy the first *Springfield* factor in their challenge. She stated in her decision that the taxpayers "failed to demonstrate that the purpose of the grants is to aid the [c]hurch[ ]." And in the judge's discussion of this factor, she correctly stated that a court's inquiry does not depend on "the stated purpose of the recipients." *Boston Edison [*108] Co.* v. *Boston Redevelopment Auth.*, 374 Mass. 37, 62-63, 371 N.E.2d 728 (1977) (where Legislature has provided specific standards, "the *purpose* of the applicants in proposing the project is wholly irrelevant").[3] At the hearing on the request [**721] for a preliminary injunction, the parties emphasized the grant, not the act itself, and the judge noted in her decision that under *Helmes* she was to consider the purpose [***65] of the grants. *Helmes* v. *Commonwealth*, 406 Mass. 873, 877, 550 N.E.2d 872 (1990). When the judge set out the factors, she identified each one as concerning the grants, not the act.

Turning to the grants themselves, it is readily apparent that they have a public purpose of historic preservation and require a recipient to convey a preservation restriction as an express condition of the grant. G. L. c. 44B, § 12 (*a*). See G. L. c. 184, § 31 (defining preservation restriction). The public receives a real property interest in exchange for the grant. Moreover, the town enjoys "every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare." *LaPointe* v. *License Bd. of Worcester*, 389 Mass. 454, 459, 451 N.E.2d 112 (1983).[4] There is nothing in the record that suggests any irregularity in the grant process in this case. To the contrary, the town and its Community Preservation Committee (committee) complied with all of the rigorous requirements of the act for these grants. After a public hearing, the committee voted unanimously to recommend the projects to the town meeting, based in part on "the significance of the historical resource[s]" that were to be preserved. Following additional favorable recommendations by the town's board of selectmen and its finance committee, residents at the town meeting [***66] voted to approve the grants for these projects in April, 2016. These grants received full scrutiny and

[2] Were I to interpret the principles of separation of church and State without concern for our own precedent or the United States Supreme Court's decisions, I may well find myself in agreement with Justice Sotomayor's dissent in *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2041, 198 L. Ed. 2d 551 (2017) (Sotomayor, J., dissenting) ("History shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government. If this separation means anything, it means that the government cannot, or at the very least need not, tax its citizens and turn that money over to houses of worship"). See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 686-717, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002) (Souter, J., dissenting).

[3] The Community Preservation Act (act) sets forth neutral criteria for the grants and a detailed procedural process under which those grants are considered. G. L. c. 44B, §§ 3-7. Under the act, the town's Community Preservation Committee gathers information, consults with municipal boards, holds public hearings, and makes recommendations for the acquisition, preservation, rehabilitation, and restoration of historic resources.

[4] In its brief, the town represents that the grants under the act "in this case are entirely consistent with previous funding by the town, other Massachusetts municipalities and the State itself. Over time, the town has approved fourteen other similar [projects under the act] (i.e., windows, roofs, and master planning) to preserve historic resources, including six owned by the town, five owned by private nonprofits, one owned by a church, and two owned by other private recipients."

endorsement by the residents of the town at multiple levels of town government.

[*109] The judge found that the first and third prongs of the test had been satisfied by the town.[5] With regard to the second factor, the judge assumed for the purposes of the analysis that the taxpayers would be able to show that the grants in fact substantially aided the church and she then conducted the balancing test, concluding that the grants did not run afoul of the anti-aid amendment.[6] She did not ignore [**722] the second factor; rather, the judge balanced the various factors, which are "cumulative and interrelated," *Springfield*, 382 Mass. at 675, in reaching her conclusion that the town had not violated the anti-aid amendment by issuing the preservation grant.[7]

The anti-aid amendment itself makes no distinction between secular and religious recipients of public funds; rather, as the court acknowledges, "the operative language in [the amendment's two clauses] is identical." *Ante* at 83. Indeed, as this court's [*110] anti-aid amendment cases repeatedly state, the amendment "marks no difference between 'aids,' whether [***67] religious or secular." *Springfield*, 382 Mass. at 674, n.14, quoting *Bloom* v. *School Comm. of Springfield*, 376 Mass. 35, 45, 379 N.E.2d 578 (1978). See *Opinion of the Justices*, 401 Mass. 1201, 1203 n.4, 514 N.E.2d 353 (1987); *Attorney Gen.* v. *School Comm. of Essex*, 387 Mass 326, 332 n.3, 439 N.E.2d 770 (1982). In my view, we cannot treat a religious institution differently from a secular private institution if we are to respect the text of the amendment and our own precedent. Applying that principle to this case, I conclude that the application of the three-factor *Springfield* test to religious institutions should be no more rigorous than the application of the test to any other grant under the act to any other secular private or charitable organization.[8]

In addition, although this case primarily concerns the State anti-aid amendment, our decision must also be mindful of applicable Federal constitutional provisions, such as the religion clauses of the First Amendment to the United States Constitution. In *Trinity Lutheran*, decided this past June, the Supreme Court struck down a State's policy of denying public grants to religiously affiliated applicants as a violation of the free exercise clause. *Trinity Lutheran*, 137 S. Ct. at 2024. The policy at issue there was based on a State

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[5] It is worth noting that between 2003 and 2014, the Massachusetts Historical Commission approved funding for thirty-eight projects involving active religious institutions through its Massachusetts Preservation Project Fund (16.5 per cent of all approved projects), including Vilna Shul in the Beacon Hill area of Boston, Trinity Church in Boston, and Saint George Greek Orthodox Cathedral in Springfield. There has been no evidence of the risks with which the court is concerned.

[6] Although there is no question that the grants must not "substantially aid" the church, the grants do not aid the "essential function" of the church within the meaning of the anti-aid amendment. *Springfield*, 382 Mass. at 680, 681. The grants are expressly limited to reimbursement of expenses incurred by the church on the projects and cannot be used "for the purpose of founding, maintaining or aiding" the church's mission, see art. 18 of the Amendments to the Massachusetts Constitution, as amended by arts. 46 and 103 of the Amendments, or any purpose other than historical preservation. *Springfield*, *supra* (close monitoring of public funds prevents aid from becoming aid for entity's essential function). There appears to be no case that has held that a grant to a private organization necessarily constitutes "substantial aid" where the grant serves other important public purposes. See *Helmes* v. *Commonwealth*, 406 Mass. 873, 876-877, 550 N.E.2d 872 (1990); *Springfield*, *supra* at 675; *Bloom* v. *School Comm. of Springfield*, 376 Mass. 35, 47, 379 N.E.2d 578 (1978).

[7] We have recognized that an incidental benefit to an entity is inevitable. In fact, in *Helmes*, we observed that a battleship would not be able to continue as a war memorial and likely would be forfeited to the Navy. *Helmes*, 406 Mass. at 877. See *Springfield*, 382 Mass. at 679-681 (secondary and indirect benefits to private schools do not qualify as "substantial aid" under anti-aid amendment). See also *Attorney Gen.* v. *School Comm. of Essex*, 387 Mass. 326, 332, 439 N.E.2d 770 (1982) ("The fact that a [S]tate law, passed to satisfy a public need, coincides with the personal desires of individuals most directly affected is certainly an inadequate reason … to say that a legislature has erroneously appraised the public need" [citation omitted]).

[8] In addition to their argument concerning the risks posed by public support of religious institutions, the taxpayers voice other concerns that are not insubstantial. They claim that (1) the grant to the church violates their liberty of conscience if the grant is for a church they do not want to support; (2) the grant threatens the independence of religious institutions, making them "supplicants" for governmental aid that may bring intrusive governmental inquiries; and (3) the grant may be politically divisive and engender "religious biases" in grant making. Of course, taxpayers could make similar objections to grants provided to secular recipients. These are the concerns that the three-factor test in *Springfield* is designed to address.

constitutional provision requiring "[t]hat no money shall ever be taken from the public treasury, directly, or indirectly, in aid of any church." *Id.* at 2017. The court distinguishes *Trinity Lutheran* from the present [**723] case by stating that, unlike the State constitutional provision there, [***68] Massachusetts's anti-aid amendment is not a categorical ban on religious institutions applying for and receiving public grants. In my opinion, however, *Trinity Lutheran* carries broader implications.

The Supreme Court further observed that a State policy requiring an applicant for public funds "to renounce its religious character in order to participate in an otherwise generally available public benefit program is," absent "a [S]tate interest 'of the [*111] highest order,'" "odious to our Constitution" (citation omitted). *Id.* at 2024-2025. As I read the court's analysis in this case, a historic religious building with an active congregation is at a distinct disadvantage when seeking funds under the act — at least for purposes of a court's anti-aid scrutiny of that building's grant application — compared to historic religious buildings that are no longer active. The historic religious building would then be confronted with the "odious" choice of "having to disavow its religious character" in order to participate in the Commonwealth's community preservation program. *Id.* at 2022.

Finally, I write to emphasize the importance of preserving our State's historic structures, in light of the significant cultural, aesthetic, and [***69] economic benefits such preservation bestows on the Commonwealth's cities and towns. The citizens and the Legislature have determined that historic preservation is important so that future generations may appreciate the history of the Commonwealth. This determination has been expressed through the creation of a variety of historic districts and historical commissions, as well as State laws and regulations governing historic preservation.[9] We have likewise recognized this interest. See, e.g., *Helmes*, 406 Mass. at 877 (public money appropriated to nonprofit "to rehabilitate [a World War II] battleship, to preserve it as a memorial to citizens of the Commonwealth" served public purpose); *Opinion of the Justices*, 333 Mass. 773, 780, 128 N.E.2d 557 (1955) ("There has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts").

"[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all," as they "represent the lessons of the past and embody precious features of our heritage." *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 108, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Likewise, the careful craftsmanship of these buildings — too often a feature of the past — "serve[s] as [an] example[ ] of quality for today," *id.*, and improves the aesthetics of our neighborhoods. Indeed, [***70] the building that this court occupies is a testament to that, having been placed on the National Register of Historic Places in 1974, and undergoing a magnificent renovation [*112] and restoration completed in 2005. Historic preservation also offers distinct economic advantages, by increasing property values, encouraging tourism, and generating local business. See, e.g., Edwards, The Guide for Future Preservation in Historic Districts Using a Creative Approach: Charleston, South Carolina's Contextual Approach to Historic Preservation, 20 U. Fla. J.L. & Pub. Pol'y 221, 223-225 (2009).

Churches, an undeniable part of the Commonwealth's historic landscape, achieve these same cultural, aesthetic, and [**724] economic benefits,[10] and likewise warrant

[9] For example, the Massachusetts Historical Commission was created by the Legislature in 1963, see St. 1963, c. 697, § 1, to identify, evaluate, and protect important historical and archaeological assets of the Commonwealth, G. L. c. 9, §§ 26-27D, including establishing and maintaining the State Register of Historic Places, G. L. c. 9, § 26C.

[10] According to one study conducted in 1996, the average historic religious place in an urban environment generates over $1.7 million annually in economic impact. Sacred Places, The Economic Halo Effect of Historic Sacred Places, at 4, 19 (undated), http://www.sacredplaces.org/uploads/files/1687909246625106 1-economic-halo-effect-of-historic-sacred-places.pdf [

preservation. During Massachusetts's early history, civic and religious life were in many ways one in the same. The meeting house — perhaps the most iconic feature of a "quintessential New England town" — served as the center of gravity for both public administration and religious worship. See, e.g., Witte, How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism, 39 Emory Law J. 41, 57 (1990) ("Church meetinghouses and chapels were used not only to conduct religious services, but also to host [***71] town assemblies, political rallies, and public auctions … "). Colonial laws often required homes to be constructed within one mile of the meeting house. See, e.g., 1 Records of the Governor and Company of the Massachusetts Bay in New England 157 (N.B. Shurtleff ed., 1853) (reflecting 1635 order of General Court that, in certain towns, no "dwelling howse" was to be "above halfe a myle from the meeting house" without legislative permission). Especially for buildings of such historic significance — the institutional center of life in colonial Massachusetts — we should be careful not to impose undue restrictions on their access to needed preservation funds.

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DELL'ISOLA V. STATE BOARD OF RETIREMENT

No. 16-P-963

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 547*; 90 N.E.3d 784**
2017 Mass. App. LEXIS 160***

September 8, 2017, Argued; December 15, 2017, Decided

Subsequent History: Appeal denied by Dell'Isola v. State Bd. of Ret., 2018 Mass. LEXIS 225 (Mass., Mar. 29, 2018)

Prior History: [***1]Suffolk. CIVIL ACTION commenced in the Superior Court Department on December 31, 2014.

The case was heard by *Linda E. Giles*, J., on motions for judgment on the pleadings.

Case Summary

Overview

HOLDINGS: [1]-Where plaintiff, a former corrections officer, received cocaine from an inmate's cousin, his conviction of possession of cocaine required forfeiture of his retirement allowance under Mass. Gen. Laws ch. 32, § 15(4), because the means by which he came into possession of the cocaine was factually linked to his position as a correction officer, as his transaction with the cousin was a direct result of plaintiff's communications with the inmate while he was custody; [2]-The State Board of Retirement and the hearing officer properly considered plaintiff's postarrest interview transcript and the arrest report; though they were hearsay, they had sufficient indicia of reliability and established a direct link between plaintiff's position as a correction officer and the crime for which he was convicted.

Outcome

The judgment was affirmed.

Counsel: *David R. Marks*, Assistant Attorney General, for State Board of Retirement.

Nicholas Poser for the plaintiff.

Judges: Present: RUBIN, NEYMAN, & HENRY, JJ.

Opinion by: HENRY

Opinion

[**786] **HENRY**, J. Michael Dell'Isola was a correction officer when he committed the crime of possession of cocaine. The State Retirement Board (board) subsequently conducted a hearing and made factual findings that Dell'Isola came into possession of the co-[*548] caine only as a result of an arrangement with an inmate who had been in his custody and who at the time remained in the custody of the Middlesex County sheriff's office. This case thus requires us to consider whether, pursuant to G. L. c. 32, § 15(4), Dell'Isola's conviction requires forfeiture of his retirement allowance.[2] General Laws c. 32, § 15(4), inserted by St. 1987, c. 697, § 47, provides that "[i]n no event shall any member [of the State employees' retirement system] after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance." Because [***2] how Dell'Isola came into possession of the cocaine was factually linked to his position as a correction officer, we hold that his criminal offense falls within the purview of § 15(4) and he is ineligible to receive a retirement allowance.

Background. In September, 2012, a jury convicted Dell'Isola of one charge of possession of cocaine. The board later held a

[2] This case was paired for argument with *State Bd. of Retirement v. O'Hare*, 92 Mass. App. Ct. 555 (2017), 92 Mass. App. Ct. 555.

hearing regarding Dell'Isola's application for a superannuation allowance. The board made the following findings of fact based on an evidentiary hearing and largely based on a transcript of Dell'Isola's own statements during a postarrest interview with the State police.

In 2011, Dell'Isola was a sergeant and a senior correction officer with the Middlesex County sheriff's office, having served in the office since 1982. An inmate under Dell'Isola's supervision at the Middlesex County jail in Cambridge, identified only as "George," offered Dell'Isola "a large amount of cash" and told Dell'Isola to contact George's mother.[3] Dell'Isola met with George's mother at a Dunkin' Donuts and received $1,000 from her. George was later transferred to the Billerica house of correction, another facility overseen by the Middlesex [***3] County sheriff's office. While Dell'Isola was speaking by telephone with a fellow officer at that Billerica facility, George, who was with that [*549] officer,[4] shouted that Dell'Isola should call George's mother. Dell'Isola subsequently called George's mother, who told Dell'Isola that she first needed to speak with George. [**787] George's mother later told Dell'Isola he needed to speak with George's "cousin," who later called Dell'Isola.[5] The cousin told Dell'Isola that he heard that Dell'Isola was "looking," and asked if he wanted "some" and if he wanted it "flake" or "solid." Dell'Isola responded that he would take half "flake" and half "solid." They agreed for the cousin to give Dell'Isola an ounce of cocaine as well as $2,500 in cash.

In May, 2011, Dell'Isola, while off duty, met George's cousin at a Starbucks in Woburn. Dell'Isola received from the cousin the expected money, which he concedes he and George had previously agreed would occur, and one ounce of cocaine. After Dell'Isola left the Starbucks he was immediately arrested. The cousin was revealed to be an undercover State police trooper.

Dell'Isola was arrested on a charge of trafficking in over twenty-eight grams of cocaine, in violation [***4] of G. L. c. 94C, § 31(*a*)(4); he was convicted of the lesser included offense of possession of cocaine. He was not charged related to the receipt of money from George, either via George's mother or his "cousin."

The board determined that, given the facts and circumstances of the conviction, in particular Dell'Isola's relationship and arrangements with the inmate George, Dell'Isola forfeited his retirement allowance under § 15(4). A judge of the Boston Municipal Court affirmed the board's decision. Dell'Isola filed for certiorari review by the Superior Court, which reversed the judgment issued from the Boston Municipal Court, and vacated the decision.[6] The board then appealed to this court.

Discussion. a. *The record*. As a preliminary matter, we acknowledge the procedural posture of this case. In the vast majority of pension forfeiture cases, the member of the State employees' retirement system pleads guilty to one or more criminal [*550] charges, and the facts at the forfeiture hearing are not disputed. See, e.g., *State Bd. of Retirement* v. *Finneran*, 476 Mass. 714, 716 n.3, 71 N.E.3d 1190 (2017). In contrast, Dell'Isola's hearing followed a criminal jury trial, and the jury did not need to consider the connection between Dell'Isola's job and his possession of cocaine. The question is to what extent [***5] the board may consider evidence beyond the record established at Dell'Isola's criminal trial.

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[3] The board did not make findings as to why George offered this money. The board did find that Dell'Isola acknowledged that he had a conversation with George regarding drug dealing, and that he acknowledged considering to act as an intermediary with George and the dealers he already knew. While the board noted that the record "strongly suggests that the agreement with George included an agreement regarding cocaine," the board did not make a finding on this question and the point was not critical to the decision.

[4] The identify of that officer was not confirmed.

[5] The record is not clear if Dell'Isola was on or off duty when speaking with the inmate's mother and cousin.

[6] The Boston Municipal Court and Suffolk Superior Court decisions were entered prior to the release and without the benefit of both *State Bd. of Retirement* v. *Finneran*, 476 Mass. 714, 71 N.E.3d 1190 (2017), and *Essex Regional Retirement Bd.* v. *Justices of the Salem Div. of the Dist. Ct. Dept. of the Trial Ct.*, 91 Mass. App. Ct. 755, 79 N.E.3d 1090 (2017).

In determining the applicability of G. L. c. 32, § 15(4), the board is authorized to make factual findings and may admit and give probative weight to "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G. L. c. 30A, § 11(2), inserted by St. 1954, c. 681, § 1. The hearing officer may assign probative value to evidence "only if it bears the requisite 'indicia of reliability.'" *Scully* v. *Retirement Bd. of Beverly*, 80 Mass. App. Ct. 538, 545 n.9, 954 N.E.2d 541 (2011), quoting from *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 140, 680 N.E.2d 45 (1997).

Here, Dell'Isola argues that the board improperly admitted copies of his postarrest interview transcript and the arrest report, because both were hearsay and neither was certified as a copy of an exhibit admitted at the criminal trial, so [**788] they cannot be assumed to be facts that the jury considered in convicting him. See *Retirement Bd. of Somerville* v. *Buonomo*, 467 Mass. 662, 666 n.9, 6 N.E.3d 1069 (2014). An assistant district attorney handling Dell'Isola's criminal case sent both documents to counsel for the board, who offered both documents in evidence at the hearing. At oral argument, Dell'Isola conceded both that the board may make factual findings based on properly admitted evidence and that the transcript was "probably" properly before the court.

Although the exhibits [***6] were hearsay, that alone does not undercut their admissibility and reliability. See *Embers of Salisbury, Inc.* v. *Alcoholic Bev. Control Commn.*, 401 Mass. 526, 530-531, 517 N.E.2d 830 (1988) (agency decision based on hearsay evidence, including trial transcript and stipulation as to anticipated testimony of witnesses); *Commonwealth* v. *Durling*, 407 Mass. 108, 120-122, 551 N.E.2d 1193 (1990) (revocation of probation based on two police reports read in court and accepted in evidence); *Costa* v. *Fall River Housing Authy.*, 453 Mass. 614, 627, 903 N.E.2d 1098 (2009) (hearsay evidence may form basis of administrative decision). The hearing officer and the board found that both documents had the requisite indicia of reliability. The transcript bore a signature and certification from an approved court transcriber. Dell'Isola himself had offered the state- [*551] ments in the interview after he had been advised of his right to remain silent, and the statements were consistent with the narrative of events presented in other documents. As to the police report, there was no suggestion that the trooper who filed the report had a personal interest in the case. The report contained observations and actions from that trooper, and the narrative was consistent with other evidence presented. The hearing officer also noted areas in both exhibits that were assigned decreased probative weight, including inaudible sections of the interview, and statements in the arrest report [***7] that were relayed from other officers. We discern no error in the admission of either document.

Dell'Isola further contends that, even if the documents were admissible, they do not establish the facts underlying his conviction. He asserts that the board can consider only evidence that the jury considered at his criminal trial, relying on *Scully*, 80 Mass. App. Ct. at 543, where we held that a direct link could not be established from facts underlying charges that had been dismissed or nol prossed in connection with a plea bargain. Dell'Isola, however, overreads *Scully*. While forfeiture cannot be based on criminal conduct that did not result in a conviction, nothing in *Scully* prevents the board from considering the facts related to how Dell'Isola came into possession of the cocaine. In *Scully*, we questioned the reliability of a statement provided by a minor to police, but assumed for the sake of argument that it was reliable. *Id.* at 545 & n.9. Even with that assumption, the record did not support forfeiture because there was no direct link between the crime Scully committed and his position at his workplace. We did not, however, restrict the board from considering the police report or like documents. In this case, the exhibits present [***8] a sufficient indicia of reliability, and we similarly do not restrict the board from making findings from the facts that they present. The question, therefore, is not whether the board could draw

facts from these documents but whether those facts establish a direct link between Dell'Isola's position as a correction officer and the crime for which he was convicted.

b. *Forfeiture pursuant to G. L. c. 32, § 15(4)*. Judicial review pursuant to G. L. c. 249, § 4, is in the nature of [**789] certiorari and is limited, "allow[ing] a court to 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the [member]. … In its review, the court may rectify only those errors of law which have resulted in manifest injustice to the [member] or which have adversely affected the real interests of the [*552] general public.'" *State Bd. of Retirement* v. *Bulger*, 446 Mass. 169, 173, 843 N.E.2d 603 (2006), quoting from *Massachusetts Bay Transp. Authy.* v. *Auditor of the Commonwealth*, 430 Mass. 783, 790, 724 N.E.2d 288 (2000).

As the purpose and operation of § 15(4) has been recently and thoroughly reviewed in *Finneran, supra*, we proceed directly to the question whether there was a direct factual or legal link between Dell'Isola's conviction and his position. A factual link exists only "where there is a direct factual connection between the public employee's crime and position." *Finneran*, 476 Mass. at 720. "The nexus required [***9] by G. L. c. 32, § 15(4), is not that the crime was committed while the member was working, or in a place of work, but only that the criminal behavior be connected with the member's position." *Durkin* v. *Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 119, 981 N.E.2d 763 (2013).

Dell'Isola asserts that his position as a correction officer and his conviction of possession of cocaine are not factually connected. He argues that the inmate was no longer under his supervision and that no evidence establishes that the inmate arranged for Dell'Isola to receive cocaine. Instead, he frames the transaction as one between Dell'Isola and the cousin alone, where the cousin contacted Dell'Isola and initiated a conversation about cocaine, prompting their meeting to conduct a separate transaction while Dell'Isola was off duty and away from his place of employment. He contends that this was a transaction that occurred without use of office resources and without any connection to the inmate. See *Scully*, 80 Mass. App. Ct. at 543; *Retirement Bd. of Maynard* v. *Tyler*, 83 Mass. App. Ct. 109, 112-113, 981 N.E.2d 740 (2013). While he concedes that an agreement for money existed, this was uncharged conduct.

We have previously held that no factual connection existed when a fire fighter sexually abused young boys, where the crimes occurred outside of the fire house while the member was off duty, and "there was no [***10] evidence that [the member] used his position, uniform, or equipment for the purposes of his indecent acts." *Ibid.*

Likewise, we found no factual connection when a library employee pleaded guilty to possession of child pornography, where the member neither stored nor accessed the images on library computers, and where he did not use his position at the library to facilitate that crime. See *Scully, supra*. The board could not rely on conduct that did not result in a conviction to establish a direct link. *Id.* at 544.

In contrast, a direct factual connection existed when the superintendent of the municipal water and sewer department stole [*553] money from the town, and when a city employee broke into city hall and stole documents from his own personnel file to improve his chances of being reappointed to his position. See *Gaffney* v. *Contributory Retirement Appeal Bd.*, 423 Mass. 1, 4-5, 665 N.E.2d 998 (1996); *Maher* v. *Justices of Quincy Div. of Dist. Ct. Dept.*, 67 Mass. App. Ct. 612, 616-617, 855 N.E.2d 1106 (2006), *S.C.*, 452 Mass. 517, 895 N.E.2d 1284 (2008), cert. denied, 556 U.S. 1166, 129 S. Ct. 1909, 173 L. Ed. 2d 1058 (2009).

[**790] Most recently, in *Finneran*, 476 Mass. at 721-722, the Supreme Judicial Court held that a direct factual link existed, requiring forfeiture, where the former Speaker of the House pleaded guilty to obstruction of justice related to false testimony he had given about a

redistricting plan. The link existed where the false testimony directly related to his position as Speaker of the House and his work on the redistricting [***11] act, and where his admitted motivation in providing false testimony was to "vindicate his conduct" as Speaker. As the Supreme Judicial Court concluded:

> "While [his] offense itself does not directly implicate his duties as Speaker of the House, it is nonetheless inextricably intertwined with his position. Simply put, it is only because he had been Speaker of the House at the relevant time that he was in a position to testify as to the genesis of the redistricting plan and to do so falsely."

Id. at 722.

The decision in *Finneran* compels the outcome here, where "[Dell'Isola's] crime directly concerns actions that he had carried out when he served … in his role . … " *Id.* at 721-722. Here, Dell'Isola's actions were "inextricably intertwined" with his position as a correction officer. Although the transaction with the cousin occurred while Dell'Isola was off duty and off location, it followed only as a direct result of Dell'Isola's communications with, and on behalf of, an inmate who continued to be in custody, albeit in a different facility. Dell'Isola came to know and communicate with the inmate as a result of his work as a correction officer, and used those continued communications while the inmate [***12] remained in custody, to obtain cocaine.

Furthermore, the board determined that Dell'Isola believed that he would be meeting someone acting on the inmate's behalf, based on the previous transaction where the inmate offered money through his mother. By Dell'Isola's own admission during the postarrest interview, he expected to receive both money and co-[*554] caine during the transaction with the cousin. Unlike in *Scully*, 80 Mass. App. Ct. at 543, where it was insufficient that "some work-related conduct spark[ed] an investigation," the factual link is not based on the uncharged receipt of money. Rather, that conduct simply illuminates the manner in which Dell'Isola and the inmate conducted transactions. The cousin may have been the first to mention cocaine on the telephone, but Dell'Isola's own retelling of that conversation indicated that there were prior conversations about cocaine, based on the cousin already having heard that Dell'Isola was "looking." Dell'Isola's use of his position is not diminished because he came into possession of the cocaine through a series of communications facilitated by the inmate and not through a direct transaction with him.

We therefore conclude that the board's decision was supported by substantial [***13] evidence, and that G. L. c. 32, § 15(4), and the case law interpreting it mandate forfeiture where Dell'Isola was convicted of possession of cocaine under the facts of this case.[7]

[**791] *Conclusion*. As there was a direct factual link between Dell'Isola's position as a public employee and his criminal conviction of the possession of cocaine, the judgment of the Superior Court is reversed. The matter is remanded for consideration of Dell'Isola's claim under the Eighth Amendment to the United States Constitution claim that pension forfeiture would be an excessive fine.

So ordered.

[7] Because we conclude that a direct factual link exists, we do not address the question whether there is a direct legal link. A legal link exists "when a public employee commits a crime directly implicating a statute that is specifically applicable to the employee's position. … The requisite direct legal link is shown where the crime committed is 'contrary to a central function of the position as articulated in applicable laws.'" *Finneran*, *supra* at 721, quoting from *Garney* v. *Massachusetts Teachers' Retirement Sys.*, 469 Mass. 384, 391, 14 N.E.3d 922 (2014).

KENNEDY V. COMMONWEALTH

No. 16-P-1464

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 644*; 92 N.E.3d 122**
2018 Mass. App. LEXIS 7***

September 19, 2017, Argued; January 18, 2018, Decided

Subsequent History: Appeal denied by Town of Huntington v. Commonwealth, 2018 Mass. LEXIS 291 (Mass., May 4, 2018)

Prior History: [***1] Hampshire. CIVIL ACTION commenced in the Superior Court Department on October 31, 2014.

Motions to dismiss were heard by *Bertha D. Josephson*, J.

Disposition: Judgment affirmed.

Case Summary

Overview

HOLDINGS: [1]-The citizens lacked standing to challenge "An Act Relative to the Withdrawal of the Town of Worthington (T1) From the Gateway Regional School District (school district) (act)," 2014 Mass. Acts 97; [2]-The school district and town two (T2) did not have standing under Mass. Gen. Laws ch. 71, § 16 to challenge the constitutionality of the act; [3]-T2 had standing to raise a home rule amendment, Mass. Const. amend. LXXXIX, § 6, challenge to the act; [4]-The act did not violate the home rule amendment as it set out the rights and duties of all 7 member towns before and after the withdrawal of T1 and did not affect only T1; [5]-The act did not permit T1 to breach the agreement and the implied covenant of good faith and fair dealing; [6]-The additional costs T2 alleged under Mass. Gen. Laws ch. 29, § 27C(a) were indirect and speculative.

Outcome

Judgment affirmed.

Counsel: *James B. Lampke* (*Russell J. Dupere* also present) for the plaintiffs.

Layla G. Taylor for town of Worthington.

Kerry David Strayer, Assistant Attorney General (*Juliana deHaan Rice*, Assistant Attorney General, also present) for the Commonwealth & another.

Judges: Present: VUONO, BLAKE, & SINGH, JJ.

Opinion by: VUONO

Opinion

[**1227] **VUONO**, J. This appeal arises from the town of Worthington's (Worthington's) withdrawal from the Gateway regional school district (school district) pursuant to special legislation. The school district was established in 1957 and consisted of seven member towns in Hampden and Hampshire Counties until May 7, 2014, when the Legislature adopted "An Act relative to the withdrawal of the town of Worthington from the Gateway regional school district." St. 2014, c. 97 (act). The act enabled Worthington to withdraw from the school district without the consent of the other member towns. The school district, the town of Huntington (Huntington), [***2] Ruth Kennedy (a resident of the member town of Russell), and Derrick Mason (a resident of the member town of Russell), brought an action in Superior Court against Worthington, the Commonwealth, the Department of Elementary and Secondary Education (department), and the town of Russell, challenging the act. The defendants filed motions to dismiss pursuant to Mass.R.Civ.P. 12(b)(1) and (6), 365 Mass. 754 (1974), which a judge allowed. Primarily for the reasons set forth in the judge's well-reasoned

memorandum of decision, we affirm.

Background. Between 1957 and 1968, the towns of Russell, Worthington, Huntington, Middlefield, Montgomery, Chester, and Blandford entered into an agreement for the creation and the operation of the school district. See G. L. c. 71, §§ 14-14B, 15. Among other things, the agreement provides for the location of schools, the apportionment and payment of costs by member [*646] towns, and the employment of teachers. The agreement also outlines the procedures through which a town may enter and withdraw from the school district. Withdrawal of a member town must be done by amendment to the agreement, and the withdrawal takes effect after each [**1228] town in the school district accepts the amendment by obtaining a majority vote from [***3] its residents during a town meeting. The agreement requires unanimous approval by the remaining towns before a town may withdraw. Any town allowed to withdraw from the school district remains liable under the agreement for its share of unpaid operating costs and indebtedness for capital expenses incurred while the withdrawing town was a member.

In early 2013, Worthington advised the school district that it wished to withdraw, and then attempted to do so. However, Worthington failed to obtain the approval of the other member towns and, as a result, the residents of Worthington voted to file a home rule petition with the Legislature seeking legislation that would permit Worthington to withdraw from the school district. See art. 89, § 6, of the Amendments to the Massachusetts Constitution (home rule amendment).[3]

On July 8, 2013, a home rule petition was filed on behalf of Worthington. See 2013 House Doc. No. 3574. The plaintiffs state that the proposed legislation was changed to "a non-home rule bill," though they dispute that it was changed to a special law.[4] On April 28, 2014, the Legislature approved the act, and it was signed by the Governor on May 7, 2014. The act states in relevant part:

> "Notwithstanding chapter 71 of the General Laws or any other [***4] general or special law or agreement to the contrary, the town of Worthington may unilaterally withdraw as a member of the Gateway Regional School District."

[*647] St. 2014, c. 97, § 1. The act required Worthington to pay the school district (1) any amounts that it would have been obligated to pay under the agreement for operating and capital costs, and (2) any amounts owed under the agreement to the Massachusetts School Building Authority. St. 2014, c. 97, § 2. The act also directed the department to convene a "reorganization needs conference," to assess, among other things, (1) the impact of Worthington's withdrawal, (2) its effect on current and future enrollments in the school district, (3) an inventory of the educational facilities in the school district, and (4) Worthington's continued obligations for capital indebtedness.

In their amended complaint, the plaintiffs sought damages and declaratory relief, contending that adoption of the act and any related actions taken by the defendants constitutes an unconstitutional impairment of contract, a violation of the home rule amendment, interference with contractual relations (the plaintiffs subsequently withdrew this claim), and a violation [***5] of the so-called "local mandates" law, see G. L. c. 29, § 27C. The plaintiffs also claim that Worthington breached the agreement and the implied covenant of good faith and fair dealing, requiring promissory estoppel due to the plaintiffs' detrimental reliance.

In allowing the defendants' motions to dismiss, the judge reasoned that the two [**1229]

[3] Pursuant to the home rule amendment, the Legislature has the power to act in relation to all cities, all towns, all cities and towns, or to a class of cities and towns of not fewer than two; the Legislature also has the power to act when the legislation only affects one city or town, by way of a special law, if the municipality has met certain requirements. See *Opinion of the Justices*, 429 Mass. 1201, 1204, 712 N.E.2d 83 (1999).

[4] The defendants allege that the legislation was changed to a special law. There is no explanation in the record regarding whether the bill was indeed changed to a bill for a special law, aside from disputing statements of the parties. As explained *infra*, the act was not improper however it is viewed.

individual plaintiffs, i.e., Kennedy and Mason, did not have standing to raise any claim regarding the act because their harm was too speculative. The judge also determined that the school district and Huntington did not have standing to claim that the act violated the contracts clause of the United States Constitution because only "citizens" have the right to challenge the constitutionality of the act. She further held that the school district did not have standing to claim that the act violated the home rule amendment because the school district was not a municipality. Furthermore, she held that the act did not violate the home rule amendment as the act did not apply solely to Worthington, i.e., it related to all of the towns in the school district.

The remaining contract and promissory estoppel claims were similarly dismissed. The judge held that Worthington acted [***6] in good faith in its attempt to withdraw from the agreement, through the method provided in the agreement; it was only when the parties "reached a stalemate" that Worthington sought action from the Legislature. Regarding the estoppel claim, she found no [*648] allegation of concealment or a misrepresentation by Worthington, and therefore there could not have been any reliance by the plaintiffs. The judge also held that the act did not violate the local mandates law, and that the plaintiffs were not entitled to a declaratory judgment as there was no actual controversy. The complaint was dismissed and judgment entered. The plaintiffs appealed.

Discussion. 1. *Standing*. "A defendant may properly challenge a plaintiff's standing to raise a claim by bringing a motion to dismiss under Mass.R.Civ.P. 12(b)(1) or (6)." *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 322, 693 N.E.2d 153 (1998). "'While a complaint attacked by a … motion to dismiss does not need detailed factual allegations … a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions … . Factual allegations must be enough to raise a right to relief above the speculative level … [based] on the assumption that all the allegations in the complaint are true (even if doubtful [***7] in fact) … .' [*Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)]. What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008), quoting from *Bell Atl. Corp., supra* at 557. On appeal, we "accept the factual allegations" in a plaintiff's complaint, "as well as any favorable inferences reasonably drawn from them, as true." *Ginther*, 427 Mass. at 322.

Here, the defendants claim that the individual plaintiffs, Kennedy and Mason, do not have standing to challenge the act because they have not suffered any harm. The defendants also assert that Huntington and the school district lack standing to raise claims for impairment of contract under the contracts clause of the United States Constitution and pursuant to the home rule amendment.

a. *Plaintiffs Kennedy and Mason*. We agree with the judge's conclusion that Kennedy and Mason lack standing because they have failed to allege facts beyond mere speculation that they will incur damages as a result of the act or Worthington's withdrawal from the school district. Kennedy and Mason allege that they "will have to pay more in taxes and other municipal fees in order to make up for the loss of the financial obligations" owed by Worthington [***8] under the agreement, and that Worthington's withdrawal is "causing serious and irreparable damage, financial [**1230] and otherwise and disruption to the orderly and effective administration of the [school district] to the detriment of" the plaintiffs.

[*649] These assertions are merely conclusions and are not supported by allegations of specific injury; therefore, they do not rise above speculation and are not sufficient to confer standing. See *Tax Equity Alliance for Mass.* v. *Commissioner of Rev.*, 423 Mass. 708, 715-716, 672 N.E.2d 504 (1996) ("[O]nly persons who have themselves suffered, or who are in danger of suffering, legal harm can compel the

courts to assume the difficult and delicate duty of passing upon the validity of the acts of a coordinate branch of the government" [citation omitted]). See also *Ginther, supra* at 323 (plaintiffs who have not alleged facts that "place them within the area of concern of the statute" do not have standing as they have not alleged substantial injury).

b. *Remaining plaintiffs*. Next, the defendants assert that the school district and Huntington are governmental entities and therefore are not entitled to raise any constitutional claims. We agree. The school district, created pursuant to G. L. c. 71, is "a body politic and corporate" that has the power "[t]o sue and be sued, [***9] but only to the same extent and upon the same conditions that a town may sue or be sued." G. L. c. 71, § 16, inserted by St. 1949, c. 638, § 1. As "political subdivision[s] of the Commonwealth," *Dartmouth* v. *Greater New Bedford Regional Vocational Technical High Sch. Dist.*, 461 Mass. 366, 379, 961 N.E.2d 83 (2012), towns "are not 'persons' for purposes of challenging the constitutionality" of State statutes. *Id.* at 380. See *Spence* v. *Boston Edison Co.*, 390 Mass. 604, 609, 459 N.E.2d 80 (1983). Thus, neither the school district nor Huntington has standing to challenge the constitutionality of the act. *Id.* at 608-610 (city cannot invoke constitutional protections against State). Accordingly, the plaintiffs' constitutional claims properly were dismissed.[5]

c. *Pursuant to home rule amendment*. Section 8 of the home rule amendment states that the Legislature "shall have the power to act in relation to cities and towns, but only by [G]eneral [L]aws which apply alike to all cities or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws." The plaintiffs argue that the act is not a special law and yet it applies to only one town, i.e., Worthington, thus violating the home rule amendment. "A municipality has standing to assert this [type of] claim." *Clean Harbors of Braintree, Inc.* v. *Board of [*650] Health of Braintree*, 415 Mass. 876, 881, 616 N.E.2d 78 (1993) (*Clean Harbors*). For the purpose of this appeal we assume without deciding that the school district has standing as well.

We conclude, as did the judge, that even [***10] though the act permitted only Worthington to withdraw from the school district and, as a result, had the appearance of a special law, the act was appropriate legislation under the home rule amendment. Contrast *Opinion of the Justices*, 374 Mass. 843, 850-851, 371 N.E.2d 1349 (1978). In effect, as the judge ruled, the act sets out the rights and duties of all seven member towns of the school district prior to and after the withdrawal of Worthington. St. 2014, c. 97, § 4. The home rule amendment preserves the Legislature's rights with respect to "State, regional, and [**1231] general matters." *Clean Harbors, supra*. Because the act did not affect only Worthington, Huntington's (and the school district's) challenge to the act fails.[6] See *id.* at 881-882, and cases cited.[7]

2. *Contract claims*. The school district and Huntington further claim that the act effectively permits Worthington to breach the agreement and the implied covenant of good faith and fair dealing; the plaintiffs also seek promissory estoppel based on their detrimental reliance on the agreement.[8] The flaw in this argument is that Worthington sought to withdraw from the school district according to the terms of the agreement. When Worthington's effort to withdraw pursuant to

[5] The school district and Huntington invite us to "exercise [our] broad authority and adopt a limited and specific exception to the standing rules for governmental entities to challenge certain [S]tate laws." We decline the invitation.

[6] If the act is viewed as the defendants prefer, i.e., as a special law affecting only one municipality, it still was proper because it was a petition based on a vote by the town meeting of Worthington.

[7] The plaintiffs sought to amend their complaint to allege that the act violates art. 30 of the Massachusetts Constitution. In light of the foregoing discussion, the judge did not abuse her discretion by failing to allow the motion to amend.

[8] The plaintiffs also seek specific performance of the contract. Specific performance requires findings that money damages are not an adequate remedy under the contract. See Perillo, Corbin on Contracts §§ 63.1, 63.4, and 63.5 (2012). The judge did not reach the issue of specific performance of the agreement as it is not appropriate for resolution on a motion to dismiss. Moreover, she disposed of the contract claims as a matter of law.

the agreement failed, Worthington sought legislative [***11] action as an alternative means for withdrawal from the school district. The act, see St. 2014, c. 97, §§ 2-4, sets out the specific means whereby Worthington could withdraw from the school district. Section 4 of the act required, among other things, the commissioner of the department to evaluate:

> "a long range education plan to determine: (i) the impacts of the withdrawal; (ii) the impacts of the withdrawal on current [*651] and future enrollment in the district; (iii) an inventory of all educational facilities under the jurisdiction of the remaining communities in the district; (iv) plans for the reimbursement of the [C]ommonwealth's capital expenditures for facilities located in the town of Worthington; (v) the requirements for continued assessments to the town of Worthington for district facilities previously paid by the town of Worthington; (vi) the administrative structure of the new district; (vii) the long-term fiscal impacts of the withdrawal of the town of Worthington, including detailed analyses of transportation, special education, vocational education and personnel costs; and (viii) fiscal recommendations to hold harmless the remaining communities."[9]

This is not a situation where Worthington withdrew from the school district [***12] unilaterally and ceased paying the required amounts incurred by the school district while enjoying the benefits of the services rendered by the school district. As the judge noted, the amended complaint does not establish any affirmative detrimental consequences, but instead provides a brief and unspecified accusation regarding additional costs. There is nothing in the amended complaint that rises above the speculative level as to factual allegations of bad faith or a representation by Worthington on which the plaintiffs relied.

3. *Remaining claims*. a. *Local mandates law*. General Laws c. 29, § 27C(*a*), inserted by St. 2012, c. 165, § 112, [**1232] provides in pertinent part: "Any law … imposing any direct service or cost obligation upon any city or town shall be effective … only if such law is accepted by vote … in the case of a town by a town meeting … ." The amended complaint does not plead any facts that support Huntington's or the school district's position that either is likely to incur direct cost obligations other than a possible increase in what the remaining towns may be required to pay to support the school district. These alleged costs are indirect and in any event are speculative; therefore, they [***13] are not sufficient under § 27C(*a*) to support the plaintiffs' claim.

b. *Declaratory judgment*. Finally, as the judge correctly observed, because all of the plaintiffs' claims could not survive the motion to dismiss, there was no actual controversy at stake and [*652] declaratory relief therefore is not available. See *Gay & Lesbian Advocates & Defenders* v. *Attorney Gen.*, 436 Mass. 132, 134, 763 N.E.2d 38 (2002).

Judgment affirmed.

[9] The plaintiffs argue that the indirect personnel costs, especially retirement benefits and health care costs, are sufficient to establish standing. However, § 4 of the act addresses these costs.

TOWN CLERK OF TOWNSEND

SJC-12509

SUPREME JUDICIAL COURT OF MASSACHUSETTS

480 Mass. 7*;
2018 Mass. LEXIS 363**

April 6, 2018, Argued; June 22, 2018, Decided

Prior History: [**1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on March 24, 2017.

A motion for a preliminary injunction was heard by *John T. Lu*, J.

A proceeding for interlocutory review was heard in the Appeals Court by *Mark V. Green*, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

King v. Shank, 92 Mass. App. Ct. 837, 2018 Mass. App. LEXIS 25, 96 N.E.3d 181 (Mar. 2, 2018)

Case Summary

Overview

HOLDINGS: [1]-A town was properly enjoined from holding a recall election under the Townsend Recall Act (Act), 1995 Mass. Acts 27, to remove plaintiff from office since the Act allowed for a recall election only under one or more of four enumerated circumstances, each of which were specifically defined; [2]-Section § 1 of the Act stated that one could be recalled solely upon the grounds set forth in § 2, and to interpret the descriptions after each of the four categories of prohibited behavior as only examples would render "solely" meaningless; [3]-The phrase, "which shall include but not be limited to" in § 2 did not modify the categories of qualifying conduct; [4]-The recall petition did not allege misfeasance or neglect of duty as defined in § 1.

Outcome

Order of single justice of appellate court affirmed.

Counsel: *John M. Dombrowski* for the plaintiff.

Ira H. Zaleznik (*Benjamin W. O'Grady & John E. Page* also present) for Joseph Z. Shank & others.

Lauren F. Goldberg, for town clerk of Townsend & another, was present but did not argue.

Judges: Present: GANTS, C.J., GAZIANO, LOWY, BUDD, & KAFKER, JJ.

Opinion by: BUDD

Opinion

BUDD, J. Ten registered voters (petitioners)[2] residing in the town of Townsend (town) petitioned the town to hold a recall election to remove the plaintiff, Cindy King, a member of the town's board [*8] of selectmen (board),[3] from office pursuant to St. 1995, c. 27, the town's recall act (act). On April 9, 2018, we issued an order affirming the order of a single justice of the Appeals Court preliminarily enjoining the town from holding a recall election to remove the plaintiff from office, and we indicated then that [**2] an opinion would follow. This opinion states the reasons for that order. Because the act provides for a

[2] The petitioners included those who initiated the recall petition and certain town officials who acted upon it. When we refer to the petitioners, we mean the former group.

[3] Initially a number of the petitioners sought to recall board member Gordon Clark as well, and he filed a separate lawsuit that eventually was consolidated with the plaintiff's appeal before the Appeals Court. See *King* v. *Shank*, 92 Mass. App. Ct. 837, 96 N.E.3d 181 (2018). However, by the time this matter came before us, Clark had fewer than six months remaining in his term, and therefore, pursuant to the act, he is not subject to recall. See St. 1995, c. 27, § 1.

recall vote to take place only on grounds not alleged here, the recall election sought in this instance may not proceed.

Background. In 2017, the petitioners submitted to the town clerk a petition that sought to recall the plaintiff. See St. 1995, c. 27, § 2.[4] The affidavit that accompanied the petition cited misfeasance and neglect of duty as grounds for the recall, alleging that, in the plaintiff's role as a member of the board, she

> "neglected her duty to adequately represent the people of [the town] by refusing to argue in the affirmative for the public to be allowed a time for public communication at [board] meetings when no other board before this has refused to hear public comments or concerns and
>
> "impeded our Police Chief's ability to do the job he was hired to do by using her position of authority and by imposing her views on day-to-day management of the Police Department and
>
> "neglected to support prior agreements made by the town with our Police Lieutenant and
>
> "neglected to speak for obtaining an official and full background check on an applicant for a senior [**3] position with the [town] prior to signing the employment contract."

In response, the plaintiff commenced an action in the Superior Court to enjoin the recall election, and on the same day, she filed [*9] a motion for a preliminary injunction. She contended that the allegations made against her were legally insufficient to initiate a recall under the act. A Superior Court judge denied her motion for a preliminary injunction, and the plaintiff appealed to a single justice of the Appeals Court, who ordered that a preliminary injunction issue. After a single justice of the Supreme Judicial Court denied the petitioners' subsequent petition for relief, the Appeals Court reversed the order of the single justice of the Appeals Court and dissolved the injunction. See *King* v. *Shank*, 92 Mass. App. Ct. 837, 847, 96 N.E.3d 181 (2018). We granted the plaintiff's application for further appellate review, and as mentioned, we issued an order affirming the order of the single justice of the Appeals Court.

Discussion. We review a grant or denial of a preliminary injunction for error of law or abuse of discretion. *Eaton* v. *Federal Nat'l Mtge. Ass'n*, 462 Mass. 569, 574, 969 N.E.2d 1118 (2012). Here, where there is a question of statutory interpretation, we review the matter de novo. *Commonwealth* v. *Escobar*, 479 Mass. 225, 227, 93 N.E.3d 1156 (2018).

1. *Interpreting the act*. Section 1 of the act provides:

> "Any person who [**4] holds an elected office in the town … and who has held that office for four months and has more than six months remaining in the term of such office on the date of filing of the affidavit, referred to in [§ 2], may be recalled from office solely upon the grounds set forth in said [§ 2] by the registered voters of said town."

St. 1995, c. 27, § 1.

Pursuant to the act, a recall election may be initiated by way of a petition signed by a certain number of registered voters, accompanied by an affidavit identifying the officer whom the voters seek to recall and "a statement of the grounds upon which the petition is based as set forth herein:

> "*Lack of fitness*, insobriety while performing official functions, involuntary commitment to a mental health facility, being placed under guardianship or conservatorship by a probate court;
>
> "*Corruption*, conviction of a felony involving moral turpitude, conviction of bribery, or extortion;
>
> "*Neglect of duties*, repeated absences from meetings without [*10] just cause, which shall include but not be limited to illness or

[4] Municipalities are authorized to exercise certain legal powers pursuant to the Home Rule Amendment. See art. 89, § 1, of the Amendments to the Massachusetts Constitution. Under the Home Rule Amendment, a city or town may petition the Legislature to pass a recall statute specific to it alone. See art. 89, § 8, of the Amendments.

regular vacation periods; and

"*Misfeasance*, performance of official acts in an unlawful manner, or a willful violation of the open meeting law."

St. 1995, c. [**5] 27, § 2.

The parties contest the significance of the short description following each of the four categories in § 2. The plaintiff argues that the words following each category are definitions of the grounds listed, excluding conduct not explicitly specified; the petitioners contend that the descriptions are nonexhaustive examples of the type of conduct that could lead to a recall election. For the reasons that follow, we agree with the plaintiff.

First, § 1 of the act states that one may be recalled "*solely* upon the grounds set forth in said [§ 2]" (emphasis added). If the descriptions after each of the four categories of prohibited behavior were intended to be only examples, the grounds would be nearly boundless, because one could easily allege conduct that could fit within the scope of one of the four listed categories. This interpretation would render the term "solely" meaningless. See *Commonwealth* v. *Disler*, 451 Mass. 216, 227, 884 N.E.2d 500 (2008) (court should read statutes so that no word is meaningless).

Second, we note that although § 2 of the act employs the phrase, "which shall include but not be limited to," indicating nonexhaustive examples, the phrase does not modify any of the four categories of qualifying conduct. The phrase is found in the "Neglect [**6] of duties" category: "*Neglect of duties*, repeated absences from meetings without just cause, *which shall include but not be limited to* illness or regular vacation periods" (emphasis added). The phrase modifies the words "just cause"; it does not modify "Neglect of duties," nor does it modify "repeated absences." In effect, the phrase expands not the types of conduct that might be considered neglect of duties but instead *exceptions* to such conduct.

The drafters of the act clearly knew how to indicate a nonexhaustive list. As they did not do so in any of the four categories of qualifying conduct, we must assume that the failure to do so was purposeful. See *Commonwealth* v. *Gagnon*, 439 Mass. 826, 833, 792 N.E.2d 119 (2003) ("[W]here the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded" [citation omitted]). Thus, we conclude that the four categories are intentionally narrowly circumscribed.

[*11] Third, if we interpreted the descriptions to be nonexhaustive examples rather than defining the scope of the categories, they would serve as a source of confusion rather than clarity. For instance, if "conviction of a felony involving moral turpitude, conviction of bribery, or extortion" were a mere [**7] illustration of the category "corruption" rather than a definition, it would be unclear whether a procedural posture short of conviction would also qualify as corruption, including allegations, an arrest, or a verdict in a civil case in connection with such activity. In contrast, as a definition, the act makes clear that only a "*conviction* of a felony involving moral turpitude, [or a] *conviction* of bribery, or extortion" could subject an elected official to a recall vote (emphasis added). We decline to adopt an interpretation that renders the act ambiguous. See *Albernaz* v. *United States*, 450 U.S. 333, 342, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981), quoting *Bifulco* v. *United States*, 447 U.S. 381, 387, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980) ("we may not manufacture ambiguity").

The petitioners claim that construing the descriptions of each ground as definitions, rather than as nonexhaustive examples, is nonsensical because the plain meaning of each of the terms is clearly broader than that which is presented in the act. This argument fails. Providing definitions of the terms used in a statute is a way to narrow or expand the reach of that statute. Statutes often provide specific definitions of their terms. See, e.g., G. L. c. 25, § 3 (defining regulated industry company); G. L. c. 89, § 4C (defining heavy commercial vehicles); G. L. c. 111, § 71 (defining responsibility and suitability for license to [**8] operate nursing home).

The Legislature has empowered each municipality to determine whether to have a recall statute and, if so, how wide-ranging or narrow it should be. *Commonwealth* v. *Lammi*, 386 Mass. 299, 300, 435 N.E.2d 360 (1982), and authorities cited. Here, the description of each ground gives notice to the citizens of the town, and to its elected officials alike, of the conduct for which a recall election might be initiated. Whether it is wiser to have a broad or a narrow recall statute is not a question for this court.[5] See *id.*

As we conclude that the act allows for a recall election only under one or more of four enumerated circumstances, each of which is specifically defined, we turn to the petitioners' recall [*12] petition to determine whether it alleges facts that allow for a recall election in this instance.

2. *The recall petition*. The affidavit that accompanies the petition in this case alleges that the plaintiff failed to represent adequately the people of the town by (1) failing to support public communication at board meetings, (2) impeding the police chief's work by imposing her views on day-to-day management of the police department, (3) failing to support prior agreements made between the town and a police lieutenant, and (4) failing [**9] to advocate for a background check on an applicant to a town position. Although the petitioners claim that the plaintiff's actions or omissions amount to misfeasance and neglect of duty, the affidavit does not allege "performance of official acts in an unlawful manner, or a willful violation of the open meeting law," the definition of misfeasance under the act; nor does it allege "repeated absences from meetings without just cause," the act's definition of neglect of duty.[6] See St. 1995, c. 27, § 2.

Relying on *Donahue* v. *Selectmen of Saugus*, 343 Mass. 93, 95, 176 N.E.2d 34 (1961), and *Mieczkowski* v. *Registrars of Hadley*, 53 Mass. App. Ct. 62, 65, 756 N.E.2d 1190 (2001), the petitioners contend that the purpose of the affidavit is simply to commence the recall procedure, and to give notice to the voters of the general reasons for the petition; it is not meant to provide an opportunity to litigate the merits of the recall. They further argue that it is for the citizens of the town, not the courts, to determine whether the stated grounds are sufficient. Although this argument may have merit in some circumstances, it cannot succeed here, where the board drafted the act to restrict the grounds for recall to those it enumerated. Applied here, the petitioners' argument would mean ignoring the limitations of the act.

In *Donahue*, 343 Mass. at 94, we reviewed the Saugus recall [**10] act, which simply required "grounds," i.e., any reason at all, to initiate a recall. See St. 1947, c. 17, § 43. There we held that the recall effort was proper because the Saugus act did not restrict the meaning of "grounds" to require "serious impropriety."[7] *Donahue*, *supra* at 95. In *Mieczkowski*, the Appeals Court interpreted [*13] Hadley's recall act, which allowed for a recall election based upon "lack of fitness, incompetence, neglect of duties, corruption, malfeasance, misfeasance, or violation of oath." *Mieczkowski*, 53 Mass. App. Ct. at 62-63, quoting St. 1987, c. 384, § 1. There were no definitions or other descriptors to accompany the grounds. The Appeals Court concluded that the affidavit, which tracked the statute but did not set forth any supporting factual assertions, satisfied the Hadley act.[8] *Mieczkowski*, *supra*, at 63, 65.

Both the Saugus and Hadley recall statutes are

[5] The petitioners also take the position that if the descriptive words following each of the grounds were definitions, then the terms themselves would be superfluous. This argument also fails, as it would make any definition redundant in relation to the term it defines.

[6] The allegations also fail to qualify as grounds for corruption or lack of fitness as defined by the act. See St. 1995, c. 27, § 2.

[7] The petitioners filed an affidavit seeking a recall based on the official having "[v]ot[ed] to award an all-alcoholic beverage goods license detrimental to the best interests of the town and its citizens and in direct opposition to the expressed desires of the people living in the area where said license was granted." *Donahue* v. *Saugus*, 343 Mass. 93, 95, 176 N.E.2d 34 (1961).

[8] The petitioners' affidavit stated only that the petitioners sought a recall simply "for reason of lack of fitness, incompetence, neglect of duties, or misfeasance." *Mieczkowski* v. *Registrars of Hadley*, 53 Mass. App. Ct. 62, 63, 756 N.E.2d 1190 (2001).

broader than the act, which, as discussed *supra*, allows for a recall election only under one or more of four enumerated circumstances, each of which are specifically defined. Although we agree that a prompt process is important in recall elections, see *Donahue*, 343 Mass. at 95, we cannot abandon our responsibility to interpret and apply the statute before us.

As the allegations in the affidavit supporting the petition [**11] for recall do not fall within the act's enumerated grounds, the recall election may not proceed.

Conclusion. For the foregoing reasons, on April 9, 2018, we affirmed the order of the single justice of the Appeals Court preliminarily enjoining the town from holding a recall election to remove the plaintiff from office.

MUI V. MASSACHUSETTS PORT AUTHORITY

SJC-12296

SUPREME JUDICIAL COURT OF MASSACHUSETTS

478 Mass. 710*; 89 N.E.3d 460**
2018 Mass. LEXIS 16***

November 6, 2017, Argued; January 29, 2018, Decided

Prior History: [***1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on October 17, 2014.

The case was heard by *Robert B. Gordon*, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Mui v. Mass. Port Auth., 2015 Mass. Super. LEXIS 38 (Mass. Super. Ct., Mar. 30, 2015)

Case Summary

Overview

HOLDINGS: [1]-The superior court erred in allowing a former employee's motion for judgment on the pleadings against his former employer because payment for accrued, unused sick time did not count as "wages" under the Wage Act, Mass. Gen. Laws ch. 149, §§ 148 and 150, and even if sick pay were a wage under the Wage Act, the employer would not have been able to compensate the employee for sick time within the required Wage Act time frame since the employee separated from his employment during the pendency of disciplinary proceedings that ultimately ended in the employer seeking to terminate his employment and the issue was not resolved until well after the Wage Act deadline had passed.

Outcome

Judgment vacated and matter remanded.

Counsel: *Laurie F. Rubin* for the defendant.

Kevin C. Merritt for the plaintiff.

David J. Fried, for Massachusetts Employment Lawyers Association, amicus curiae, submitted a brief.

Judges: Present: GANTS, C.J., GAZIANO, BUDD, & CYPHER, JJ.

Opinion by: BUDD

Opinion

[**461] BUDD, J. The plaintiff, Tze-Kit Mui, sued his former employer, Massachusetts Port Authority (Massport or agency), alleging that Massport failed to timely compensate him for his accrued, unused sick time under the Wage Act, G. L. c. 149, §§ 148, 150 (Wage Act or act). A Superior Court judge allowed Mui's motion for judgment on the pleadings.

Massport appealed, and we transferred the case here on our own initiative. Because we conclude that payment for accrued, unused sick time (sick pay) does not count as "wages" under the act, we vacate the judgment and remand the matter to the Superior Court.[1]

Background. In 2013, Massport initiated disciplinary proceed- [*711] ings against [***2] Mui, a longtime employee.[2] One week later, he applied for retirement. Massport's employees' retirement system set Mui's retirement date retroactively, despite the fact that the disciplinary proceedings had not been resolved. Several weeks later, Massport discharged Mui for cause.[3] The termination was subsequently overturned pursuant to a grievance procedure.[4]

Under Massport's sick pay policy, eligible employees receive payment for a percentage of the value of their accrued, unused sick time upon separation from the agency.[5] Employees who are discharged for cause are not eligible for sick pay.

Prior to the completion of the grievance process, Massport's position was that because the agency initiated disciplinary proceedings against Mui by suspending him prior to his application for retirement, and then terminated him (an action that was later reversed), he was not entitled to any sick pay. Once the arbitrator ruled that Massport could not terminate Mui because he had already retired, the agency paid the value of Mui's accrued sick time pursuant to its policy. Because of the grievance proceedings, however, the payment was made over one year later than Mui's effective retirement date.[6]

Mui brought [***3] suit against Massport, claiming that the agency violated the Wage Act by failing to compensate him for his accrued, unused sick time within the time frame mandated by the act. The Superior Court judge agreed and allowed Mui's motion for judgment on the pleadings. This appeal followed.

[**462] *Discussion*. Originally enacted in 1879, the purpose of the Wage Act is "to protect employees and their right to wages." *Electronic Data Sys. Corp.* v. *Attorney Gen.*, 454 Mass. 63, 70, 907 N.E.2d 635 (2009). Among other things, the Wage Act requires the payment [*712] of wages on a weekly or biweekly basis. The act provides that "any employee leaving his [or her] employment shall be paid in full on the following regular pay day," and that "any employee discharged from … employment shall be paid in full on the day of his discharge … the wages or salary earned by him." G. L. c. 149, § 148. Violations of the act result in strict liability and treble damages in the civil context, as well as potential criminal liability. G. L. c. 149, §§ 27C, 148, 150. Mui argues that because his sick pay, as wages under the act, was not paid to him until well after he separated from Massport, the agency violated the act (and, thus, owes him treble damages).

Whether the Wage Act encompasses sick pay is a question of statutory interpretation requiring de [***4] novo review. *Commonwealth* v. *Martin*, 476 Mass. 72, 75, 63 N.E.3d 1107 (2016). Our analysis begins with the plain language of the statute, which is the "principal source of insight into legislative intent." *Water Dep't of Fairhaven* v. *Department of Envtl. Protection*, 455 Mass. 740, 744, 920 N.E.2d 33 (2010), quoting *Providence & Worcester R.R.* v. *Energy*

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[1] We acknowledge the amicus brief submitted by the Massachusetts Employment Lawyers Association.

[2] The disciplinary proceedings were in connection with Tze-Kit Mui having been charged with arson and several counts of attempted murder as a result of actions he took during a suicide attempt.

[3] Mui later pleaded nolo contendere to the lesser charges of wanton destruction of property over $250 and threat to commit a crime.

[4] The arbitrator determined that, notwithstanding the reason for the termination, it was not possible to discharge an employee who had already retired.

[5] The percentage an employee receives depends upon when the employee began at the agency and the length of his or her tenure there. Under the policy, employees who remain with Massachusetts Port Authority (Massport) until retirement or death, and employees who accrued sick time prior to 2007, receive higher rates of compensation.

[6] At the time of his retirement, Mui had accrued 2,232 hours of sick time, for which Massport paid him $46,755.41.

Facilities Siting Bd., 453 Mass. 135, 142, 899 N.E.2d 829 (2009).

The act does not define "wages" per se, but does state that "'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." G. L. c. 149, § 148. Additionally, the term encompasses "commissions when the amount of such commissions … has been definitely determined and has become due and payable to [the] employee." *Id.*

Notably, the act does not mention sick pay. Certainly, the absence of an explicit reference to sick pay in the statute does not end our inquiry. "The word 'include' in a statute generally signals that entities not specifically enumerated are not [necessarily] excluded." 2A N.J. Singer & S. Singer, Statutes and Statutory Construction § 47:25 (7th ed. rev. 2014). See *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 769 F.2d 13, 17 (1985), judgment aff'd, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) (noting use of word "include" means list is not exclusive).

However, ordinarily we will not add language to a statute where the Legislature itself has not done so. See *Dartt* v. *Browning-Ferris Indus., Inc. (Mass.)*, 427 Mass. 1, 9, 691 N.E.2d 526 (1998) (court will not add language to statute that Legislature could have, but did not, include). Further, we have previously declined to expand the meaning of [***5] "wages" under the act to other types of compensation not expressly mentioned in the statute. See, e.g., *Weems* v. *Citigroup, Inc.*, 453 Mass. 147, 155-156, 900 N.E.2d 89 (2009) (discretionary [*713] bonuses not considered wages); *Boston Police Patrolmen's Ass'n, Inc.* v. *Boston*, 435 Mass. 718, 720-721, 761 N.E.2d 479 (2002) (tax-exempt deferred compensation not considered wages). See also *Prozinski* v. *Northeast Real Estate Servs., LLC*, 59 Mass. App. Ct. 599, 603-605, 797 N.E.2d 415 (2003) (severance pay not considered to be wages where payment was contingent upon circumstances of separation). Upon review, we discern no reason to conclude that the Legislature intended to include sick pay as "wages" under the Wage Act.

Like vacation time, sick time is often accrued as one works for an employer. However, unlike vacation time, which can be used for time away from work for any reason, sick time is to be used only when [**463] the employee or a family member is ill. See G. L. c. 149, § 148C (*a*) (defining sick time). Thus, because its usage is conditional, i.e., employees do not have an absolute right to spend down their sick time, employees are not typically compensated for accrued, unused sick time. G. L. c. 149, § 148C (*d*) (7) (employers not required to compensate for unused sick time). And although an employee may use accrued sick time under appropriate conditions, such time may be considered "lost" if not used. Such "use it or lose it" sick time policies are common. R.J. Nobile, Guide to Employee Handbooks: [***6] A Model for Management with Commentary § 7:113 (2017). Because accrued, unused sick time is not compensable under a "use it or lose it" sick time policy, such time clearly is not a wage under the act.

However, under Massport's sick time policy, rather than requiring employees to forfeit any accrued, unused sick time when they separate from the agency, Massport pays departing employees a certain percentage of that sick time. This compensation is payable under two conditions: the employee must have worked at Massport for at least two years, and he or she must not have been terminated for cause. It is, essentially, a contingent bonus paid to separating employees for not having used all of their accrued sick time and not engaging in conduct warranting termination for cause.

The only contingent compensation recognized expressly in the act is commissions, which are considered wages when they "ha[ve] been definitely determined and due and ha[ve] become payable to [the] employee." G. L. c. 149, § 148. We have not broadly construed the term "wages" for the purposes of the act to encompass any other type of contingent compensation. See, e.g., *Weems*, 453 Mass. at 153-156.

In *Weems*, we evaluated a bonus program through which the employer offered bonuses in the [***7] form of restricted stock options. [*714] *Id.* at 148-149. The stock options were transferred to the employee contingent upon the employee remaining with the company for the time it took the stock to vest. *Id.* at 149. We held that the forfeiture provision of the program did not violate the Wage Act, concluding that the bonuses did not constitute wages under the act because they were contingent upon employment with the company at the time the options vested. *Id.* at 153-154. We see little difference between the bonus stock options in *Weems*, which were only transferable to the employee if he or she is employed at the time the options vest, and the sick pay at issue here, which is only available to departing Massport employees meeting certain criteria.[7]

Furthermore, the designation of sick pay as wages in these circumstances would put Massport in the position of being unable to comply with the Wage Act. Mui separated from Massport during the pendency of disciplinary proceedings that ultimately ended in the agency seeking to terminate his employment. Thus, the question whether the agency owed Mui any sick pay at all was in dispute at the time of Mui's separation; the issue was not resolved until well after the Wage Act deadline [***8] had passed.

[**464] In fact, if sick pay were a wage under the Wage Act, Massport would not have been able to comply with the act even without the then-pending grievance procedure. The retirement board set a retroactive retirement date, but did not do so until after payment of all "wages" would have been due, assuming at most a biweekly pay period. G. L. c. 149, § 148.

Because Massport would not have been able to compensate Mui for sick time within the required Wage Act time frame, construing sick time compensation as wages under the Act would put Massport in an impossible position. "[W]herever possible … we read [statutes] in a commonsense way to … avoid absurd results" (citations omitted). *Commonwealth* v. *Morgan*, 476 Mass. 768, 778, 73 N.E.3d 762 (2017). See *Commonwealth* v. *Traylor*, 472 Mass. 260, 269, 34 N.E.3d 276 (2015) (penal statutes are to be construed strictly).

Conclusion. For all of the foregoing reasons, the judgment is vacated and the case is remanded to the Superior Court for entry [*715] of an order allowing Massport's motion for judgment on the pleadings.

So ordered.

[7] In *Weems* v. *Citigroup, Inc.*, 453 Mass. 147, 154, 900 N.E.2d 89 (2009), we noted that the stock option bonus program was also discretionary. However, because the discretion to award the bonuses had already been exercised in the plaintiffs' favor, the plaintiffs in *Weems* were in the same position as Mui in that they were both promised bonus compensation under particular conditions.

NINETY SIX, LLC V. WAREHAM FIRE DISTRICT

No. 16-P-1111

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 750*; 94 N.E.3d 397**
2018 Mass. App. LEXIS 18 ***

September 12, 2017, Argued; February 14, 2018, Decided

Subsequent History: Appeal denied by Ninety Six v. Wareham Fire Dist., 479 Mass. 1104, 2018 Mass. LEXIS 186 (Mass., Mar. 29, 2018)

Prior History: [***1] Plymouth. CIVIL ACTION commenced in the Superior Court Department on June 22, 2010.

The case was heard by *Robert C. Cosgrove*, J.

Disposition: Judgment affirmed.

Case Summary

Overview

HOLDINGS: [1]-Because failure to exhaust remedies and untimeliness under Mass. Gen. Laws Ann. ch. 80, §§ 5, 7, 10A were neither argued nor shown to be nonwaivable jurisdictional defenses, reaching the merits of a dispute about water betterment assessments was appropriate even though the record did not contain timely filed petitions for abatement; [2]-In requiring water betterment assessments to be based on development potential, Mass. Gen. Laws Ann. ch. 40, § 42K did not restrict a district to considering zoning in effect on the date of assessment but also allowed consideration of rules and regulations adopted under the subdivision control law, Mass. Gen. Laws Ann. ch. 41, §§ 81K to 81GG, and thus a district's inclusion of subdivision lots was permissible; [3]-Mass. Gen. Laws Ann. ch. 40, § 42G did not limit betterment assessments to land abutting a road where a water pipe was installed.

Outcome

Judgment affirmed.

Counsel: *David T. Gay* for the plaintiff.

John Allen Markey, Jr., for the defendant.

Judges: Present: MILKEY, HANLON, & SHIN, JJ.

Opinion by:SHIN

Opinion

[**398] SHIN, J. This appeal concerns the validity of water betterment assessments imposed by the Wareham fire district (district) on several large parcels of undeveloped land owned by the plaintiff. The district determined the amount of the assessments pursuant to G. L. c. 40, § 42K, which provides for a method of calculation based on "the total number of existing and potential water units to be served" by the new water mains, with "[p]otential water units … calculated on the basis of zoning in effect at the date of assessment." Construing this language to allow consideration of the full development potential of the land, the district assessed the plaintiff's property based on the maximum number of lots that could be created from each parcel, including the potential subdivision lots that each parcel could yield under the town of Wareham's [**399] subdivision [***2] rules and regulations (subdivision rules).

The plaintiff filed suit in Superior Court seeking, among other forms of relief, a declaratory judgment that the district misapplied G. L. c. 40, § 42K, by including potential subdivision lots in its calculation, rather than limiting the assessments to "approval not required" (ANR) lots.[1] After the

[1] See our discussion of G. L. c. 41, § 81L, *infra*.

parties submitted the matter for decision on a case stated basis, the judge found and declared that the "[d]istrict[ ] followed an appropriate method of calculating betterment assessments under G. L. c. 40, § 42K."[2] The plaintiff appeals, raising three arguments: (1) that § 42K prohibited the district from assessing betterments on subdivision lots because the subdivision rules were adopted pursuant to the subdivision control law, G. L. c. 41, §§ 81K to 81GG, and not the Zoning Act, G. L. c. 40A; (2) that the enabling statute, G. L. c. 40, § 42G, prohibited the district from assessing betterments on land that has [*752] no frontage on the ways in which the new water mains will be installed; and (3) that the assessments were unreasonable and disproportionate. As we conclude that the district's betterment assessment policy is consistent with the statutory scheme and purpose, and that the plaintiff failed to meet its burden of proving that the assessments were unreasonable [***3] or disproportionate, we affirm.

Background. 1. *Statutory framework*. General Laws c. 40, § 42G, inserted by St. 1955, c. 332, authorizes a municipality "having a water supply or water distributing system" to "provide by ordinance, by-law or vote for the levy of special assessments to meet the whole or part of the cost thereafter incurred of laying pipes in public and private ways for the conveyance or distribution of water to its inhabitants." The special assessment may be charged, in "proportionate part," to any "owner of land which receives benefit from the laying of water pipes in public and private ways upon which his land abuts or which by more remote means receives benefit through the supply of water to his land or buildings." *Ibid.*

The Legislature originally provided for betterment assessments to be calculated by applying a "fixed uniform rate," based on the estimated cost of laying the water pipes, according to (1) the frontage of the benefited land on the way in which the water pipe will be laid, (2) the land area within a fixed depth from the way, (3) the valuation of the land, or (4) any combination of these measures. G. L. c. 40, § 42H, inserted by St. 1955, c. 332. Since 1994, a municipality that accepts the provisions [***4] of § 42K may as an alternative use a "uniform unit method." G. L. c. 40, § 42K, inserted by St. 1994, c. 60, § 66. This method is based on the number of water units, including "potential" units, to be served by the water mains, without regard to the frontage of the land on the way:

> "[T]he water commissioners may assess betterments … for the construction and connection of water mains and services by a uniform unit method which shall be based upon the common main construction costs divided among the total number of existing and potential water units [**400] to be served . … Each water unit shall be equal to a single family residence. Potential water units shall be calculated on the basis of zoning in effect at the date of assessment."

G. L. c. 40, § 42K.

[*753] Also relevant to this dispute is the subdivision control law, G. L. c. 41, §§ 81K to 81GG. In a city or town that has accepted the provisions of the law, a person may not "make a subdivision of any land … unless he has first submitted to the planning board of such city or town for its approval a plan of such proposed subdivision, showing the lots into which such land is to be divided and the ways already existing or which are to be provided by him for furnishing access to such lots." G. L. c. 41, § 81O, inserted by St. 1953, [***5] c. 674, § 7. "Subdivision control … has as a major purpose ensuring that the subdivision provides adequate drainage, sewerage, and water facilities, without harmful effect to adjoining land and to the lots in the subdivision." *Meyer* v. *Planning Bd. of Westport*, 29 Mass. App. Ct. 167, 170, 558 N.E.2d 994 (1990). "A planning

[2] The judge still ruled partially in the plaintiff's favor with respect to two of the assessments (as to lots 1000 and 1018) after the district conceded that it had overestimated the development potential of those parcels. The district does not appeal from those rulings. In keeping with its theory as to ANR lots, the plaintiff argues there should have been a greater reduction for lot 1000, but brings no appeal as to the further reduction it had requested for lot 1018.

board's rules and regulations, adopted under the requirements of G. L. c. 41, § 81Q, address these general purposes by establishing definite standards for streets and utilities." *Beale* v. *Planning Bd. of Rockland*, 423 Mass. 690, 696, 671 N.E.2d 1233 (1996).

The statute defines "subdivision" as "the division of a tract of land into two or more lots," but with certain exemptions. G. L. c. 41, § 81L, as appearing in St. 1956, c. 282. The exemptions apply "if, at the time [the division of land] is made, every lot within the tract so divided has frontage on

> "(*a*) a public way or a way which the clerk of the city or town certifies is maintained and used as a public way, or
>
> "(*b*) a way shown on a plan theretofore approved and endorsed in accordance with the subdivision control law, or
>
> "(*c*) a way in existence when the subdivision control law became effective in the city or town in which the land lies, having, in the opinion of the planning board, sufficient width, suitable grades and adequate construction to provide for the needs of vehicular traffic in relation to the [***6] proposed use of the land abutting thereon or served thereby, and for the installation of municipal services to serve such land and the buildings erected or to be erected thereon."

G. L. c. 41, § 81L, as amended through St. 1965, c. 61.

If an applicant's plan meets one of these exemptions, the planning board must endorse the plan as one not requiring approval under the subdivision control law. See G. L. c. 41, § 81P. This is known as an "approval not required" or ANR endorsement. See *Palitz* v. *Zoning Bd. of Appeals of Tisbury*, 470 Mass. [*754] 795, 797, 26 N.E.3d 175 (2015).

2. *Factual background*.[3] The district is a municipal fire and water district vested with authority to lay water pipes and necessary appurtenances in public or private ways and to recover the costs thereof by assessing betterments on the owners of benefited lands.[4] Until the late 1990s, the [**401] district employed a street-frontage method of calculating water betterment assessments. In 1999, after concerns were raised that the frontage method was not equitable in some circumstances, the voters of the district voted to adopt the provisions of G. L. c. 40, § 42K.

Subsequently, the district implemented a policy governing assessments of large tracts of land that could be subject to multiple betterments. According to the policy, which is documented in an internal memorandum, [***7] the district considers a water unit to be "a single lot which may be served by a single water service line, receive fire protection, or otherwise benefit[ ] from the water main project." Large lots are evaluated "for potential future subdivision," and agricultural and vacant land is evaluated "for potential future maximum build out potential according [to] the Wareham Zoning Ordinance." When determining a parcel's development potential, the district follows a series of steps, which include gathering information on the parcel, such as topographic maps, wetlands data, and aerial photographs; notifying the property owner and requesting further information; "[w]ork[ing] with [the] property owner to establish maximum build out potential"; and "[i]dentify[ing] possible restrictions to maximum build out using available and supplied information."

On various dates in 2006 and 2007, the district gave notice of its intent to construct new water mains in ways abutting or near six undeveloped parcels of land owned by the plaintiff. Only three are at issue on appeal: lots 1000, 1004, and 1009. As to each, the district

[3] We summarize the facts from the parties' joint trial stipulation and, where appropriate, draw factual inferences from the joint trial exhibits. See *Hickey* v. *Pathways Assn., Inc.*, 472 Mass. 735, 743, 37 N.E.3d 1003 (2015) (where judge issues decision on case stated basis, appellate court may draw own inferences of fact). We reserve some details for later discussion.

[4] Yhe board of water commissioners is the governing body of the district and oversees the actions of the district with respect to establishing a water supply, including the assessment of betterments. We refer to the board and the district collectively as the "district."

sent the plaintiff letters explaining that it intended to assess betterments based on the buildout [***8] potential of the land and requesting an immediate response if the plaintiff had information [*755] that the land was not developable. The district also explained that the plaintiff could avoid a given assessment by restricting the parcel from development or merging it with an adjacent one. The plaintiff did not respond to the letters with any documentation, such as wetlands plans or merger deeds, identifying development restrictions on the land.

In March of 2007, the district recorded an order of assessment of betterment with the Plymouth County registry of deeds. The assessments reflected the maximum number of subdivision lots that could be created from the plaintiff's property under the subdivision rules. In particular, the three disputed assessments were as follows:

Lot 1000, which comprises approximately forty-four acres, was assessed as twenty-five units, for a total of $209,816.75.[5] On the date of assessment, it could have been divided into four ANR lots.

Lot 1004, which comprises approximately nineteen acres, was assessed as eleven units, for a total of $92,319.37. On the date of assessment, it was not buildable because it had no street frontage.

Lot 1009, which comprises approximately [***9] thirty-eight acres, was assessed as twenty-one units, for a total of $176,204.07. On the date of assessment, it could have been divided into no fewer than nine ANR lots and as many as twelve.

Discussion. 1. *Exhaustion of administrative remedies*. We begin by noting that the plaintiff does not appear to have followed [**402] the appropriate procedure for obtaining review of its claims. Although both the judge and the parties have treated this case as one for declaratory judgment, the proper avenue for relief lies in G. L. c. 80, which "sets out a comprehensive and uniform statutory scheme of administrative appeals and judicial review regarding assessments for … betterments." *Gudanowski* v. *Northbridge*, 17 Mass. App. Ct. 414, 421, 458 N.E.2d 1207 (1984). See G. L. c. 40, § 42I, inserted by St. 1955, c. 332 ("The provisions of chapter eighty relative to the apportionment, division, reassessment, abatement and collection of assessments, and to interest, shall apply to assessments under this chapter"). Under G. L. c. 80, § 7, "[a] person who is aggrieved by the refusal of [a local] board to abate an assessment … may within thirty days after notice of the[ ] decision appeal therefrom … in the superior court." Here, [*756] the record contains conflicting evidence whether the plaintiff ever filed a petition for abatement [***10] (as opposed to one for extension, which is a different form of relief).[6]

Even were we to assume, as alleged in the complaint, that the plaintiff requested abatement but the district failed to act on its petitions, this action, filed in June of 2010, appears to be untimely. An abatement petition must be filed within six months of the notice of assessment, see G. L. c. 80, § 5, and, "[i]f the [local] board … fails to act upon said petition within four months … , the petition shall be deemed to be denied, and the petitioner shall have the right within sixty days after the expiration of said four months to appeal." G. L. c. 80, § 10A. Thus, since the only petitions contained in the record are dated mid-November of 2007, it appears that this case should have been brought no later than mid-May of 2008. Nonetheless, because the district has not argued failure to exhaust or untimeliness, or shown that these are nonwaivable jurisdictional defenses, we will

[5] The judge ordered the district to recalculate this assessment after the district conceded that the parcel could yield a maximum of twenty, rather than twenty-five, subdivision lots.

[6] Extensions of payment are governed by G. L. c. 40, § 42I, which provides that "[t]he water commissioners or other officers in charge of the supply and distribution of water … shall, if the order for assessment is upon land not built upon, extend the time of payment of the assessment and interest thereon at the rate of four per cent until it is built upon or for a fixed time; and the assessment and interest shall be paid within three months after such land is built upon or at the expiration of such fixed period."

reach the merits.

2. *Standard of review*. "Because the judge issued [his] decision on a case stated basis, we review it de novo, drawing our own inferences of fact and reaching our own conclusions of law." *Hickey* v. *Pathways Assn., Inc.*, 472 Mass. 735, 743, 37 N.E.3d 1003 (2015). Although the parties appear to agree on this point, neither brief addresses [***11] the question what deference we owe to the district's interpretation of the statute. We answer the question, which was raised and discussed at oral argument, by turning to settled principles in the case law.

"Local regulations are presumed valid, unless they exceed the authority conferred by the enabling statute or the Home Rule Amendment (art. 89 of the Amendments to the Massachusetts Constitution)." *Springfield Preservation Trust, Inc.* v. *Springfield Library & Museums Assn., Inc.*, 447 Mass. 408, 418, 852 N.E.2d 83 (2006). In determining whether a local regulation is inconsistent with a statute, we give "considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions" before we hold the regulation invalid. *Grace* v. *Brookline*, 379 Mass. 43, [*757] 53-54, 399 N.E.2d 1038 (1979), quoting from *Bloom* v. *Worcester*, 363 Mass. 136, 154, 293 N.E.2d 268 (1973). "That sharp conflict appears when either the legislative intent to preclude local action [**403] is clear, or, absent plain expression of such intent, the purpose of the statute cannot be achieved in the face of the local by-law." *Grace*, 379 Mass. at 54. Thus, our inquiry here is whether the plaintiff has met its "heavy" burden of proving the existence of such a conflict between the district's policy and the water betterment assessment statute. *Springfield Preservation Trust, Inc.*, 447 Mass. at 418. See *W.R. Grace & Co.-Conn.* v. *Acton*, 62 Mass. App. Ct. 462, 465, 817 N.E.2d 806 (2004) (town by-law adopted under sewer betterment assessment statute was facially valid because it was "not arbitrary or irrational").

We owe even more deference to the district's application of its policy [***12] to the plaintiff's property. It is plain that the district has substantial discretion in this respect. See *Exeter Realty Corp.* v. *Bedford*, 356 Mass. 399, 404, 252 N.E.2d 885 (1969) (in assessing betterments, town permitted to make "approximations" of owner's proportional part of costs); *Henry B. Byors & Sons, Inc.* v. *Board of Water Commrs. of Northborough*, 358 Mass. 354, 358, 264 N.E.2d 657 (1970) (water commissioners have "considerable discretion in determining the methods of fixing prices or rates related to the use of water"); *Morton* v. *Hanover*, 43 Mass. App. Ct. 197, 205, 682 N.E.2d 889 (1997) (there need only be "reasonable basis for surcharging the plaintiffs for water service benefits [that] are particularized to them"). We will therefore uphold the assessments unless the plaintiff can show that they are "unreasonable" or impermissibly "discriminatory." *Henry B. Byors & Sons, Inc.*, 358 Mass. at 359. See *Seiler* v. *Board of Sewer Commrs. of Hingham*, 353 Mass. 452, 457, 233 N.E.2d 306 (1968); *Exeter Realty Corp.* , 356 Mass. at 404; *Morton*, 43 Mass. App. Ct. at 205.

3. *G. L. c. 40, § 42K*. The parties' dispute centers on the meaning of the provision in G. L. c. 40, § 42K, that "[p]otential water units shall be calculated on the basis of zoning in effect at the date of assessment." Under the plaintiff's interpretation, this provision requires that the district consider only the town of Wareham's zoning by-laws when calculating potential water units. As a result, the plaintiff argues, the only lots that can be considered potential units are those resulting from divisions of land that qualify for ANR endorsements under the subdivision rules. The district counters that the Legislature [***13] used "zoning" in a broader manner, allowing for consideration of potential development under the subdivision rules.

[*758] We accept the underlying premise of the plaintiff's argument that the subdivision rules are not zoning enactments. Generally, "zoning does not include regulations that a municipality duly adopts under independent statutory authority." See Healy, Massachusetts

Zoning Manual § 2.1, at 2-2 (4th ed. 2007). See also *Lovequist* v. *Conservation Commn. of Dennis*, 379 Mass. 7, 12, 393 N.E.2d 858 (1979) ("We do not consider all ordinances or by-laws that regulate land use to be zoning laws … "). Moreover, our cases have specifically discussed the differences between zoning and subdivision control, explaining that subdivision control "does not dictate in the same direct fashion [as zoning] how land will be used but, rather, compels the construction of ways which, among other things, are safe and convenient for travel and make provision for utilities." *Meyer*, 29 Mass. App. Ct. at 170. Accord *Collings* v. *Planning Bd. of Stow*, 79 Mass. App. Ct. 447, 454, 947 N.E.2d 78 (2011).

Nevertheless, we do not read the language "on the basis of zoning in effect [**404] at the date of assessment" to require the district to base its calculations solely on the zoning by-laws, as the plaintiff argues. Rather, we construe the provision as accomplishing two purposes: it prohibits a municipality from assessing [***14] a lot as a potential water unit if zoning restrictions would render the lot not buildable, and it defines the operative restrictions as the ones in effect at the time of the assessment. So construed, the provision requires consideration of zoning laws in effect at the time of assessment but does not preclude consideration of other laws relevant to the development potential of the land. Thus, if the land can be subdivided, and residences can be built on the resulting lots, we see no bar — and certainly, no "clear" bar, *Grace*, 379 Mass. at 54 — to including those residences as "potential water units" under G. L. c. 40, § 42K.

This result is consistent with the statutory scheme and purpose. When the Legislature enacted § 42K in 1994, it plainly intended to provide an alternative to the fixed uniform rate method of § 42H, which has been in place since 1955. This must mean that the uniform unit method of § 42K encompasses factors beyond those already set out in § 42H (frontage of the land on the way in which the water main is to be laid, the land area within a fixed depth from the way, and valuation). Cf. *W.R. Grace & Co.-Conn.*, 62 Mass. App. Ct. at 463 (uniform unit method under G. L. c. 83, § 15, allows municipalities to consider "existing and potential sewer units to be served," "[r]ather than making assessments based [***15] upon frontage and area as required by the fixed uniform [*759] rate").[7]

In contrast to § 42H, § 42K expressly authorizes the costs of construction to be assessed on "potential" water units that will be served by the new water mains. This indicates a legislative intent to allow municipalities to consider the development potential of the benefited land when determining how to divide the costs among the affected property owners. See *W.R. Grace & Co.-Conn.*, 62 Mass. App. Ct. at 464, quoting from *Mullen* v. *Board of Sewer Commrs. of Milton*, 280 Mass. 531, 533, 182 N.E. 641 (1932) (uniform unit method is exercise of legislative authority "to make an apportionment of the cost of improvements upon … estates receiving peculiar advantages above those accruing in general"). Although the division of costs must be proportional, see *ibid.*, we disagree with the plaintiff's contention that the inclusion of subdivision lots violates that principle. A subdivision lot will receive a particularized benefit from the availability of a nearby public water supply, even if the developer will have to pay to extend the water lines. See *Seiler*, 353 Mass. at 457 ("It having been determined that the petitioners derive special benefits from … [the new sewer system], they are liable to assessment for a proportional share of the general cost. There is nothing to compel the respondent [***16] to allocate funds so as to put the general burden exclusively on abutters other than on the petitioners"). Furthermore, if only frontage is considered, this can lead to overestimating the proportional benefits conferred to small lots, while underestimating the benefits to large or unusually shaped lots that have little frontage but high development potential. The district's inclusion of subdivision lots is thus consistent with the

[7] The statutory methods of calculating sewer betterment assessments are substantially similar to the methods set out in G. L. c. 40, §§ 42H and 42K. See G. L. c. 83, § 15.

statutory purpose of distributing costs based on the approximate proportional benefit conferred to each property owner. See *ibid.* ("In view of the difficulty of [**405] attempting to estimate benefits to the estates individually, it is necessary only that the principle by which the expenditures are apportioned provide for reasonable and proportional assessments, not substantially in excess of the benefits received"). Accord *Exeter Realty Corp.*, 356 Mass. at 404; *Morton*, 43 Mass. App. Ct. at 205.

The plaintiff further contends that it is unfair to assess betterments on hypothetical subdivision lots because planning boards have broad discretion to approve or disapprove subdivision plans; [*760] as a result, it says, a developer cannot estimate with any degree of certainty how many subdivision lots might ultimately be created out of a parcel. [***17] A planning board's discretion is more circumscribed, however. In particular, "[a] planning board has no discretion to disapprove a subdivision plan which has been approved by the board of health and is in conformance with the reasonable rules and regulations of the planning board." *MP Corp.* v. *Planning Bd. of Leominster*, 27 Mass. App. Ct. 812, 819-820, 545 N.E.2d 44 (1989), quoting from *Patelle* v. *Planning Bd. of Woburn*, 6 Mass. App. Ct. 951, 951, 383 N.E.2d 94 (1978). To reject a proposed subdivision, the planning board must "point to particular board regulations" that render the plan out of compliance. *Id.* at 821. The applicant can then appeal any disapproval to the Superior Court or the Land Court. See G. L. c. 41, § 81BB, as amended through St. 2002, c. 393, § 6.

We note also that there are procedural protections built into the district's assessment policy itself. The policy provides for dialogue between the district and the property owner prior to the district's final determination of the assessment. Property owners can submit evidence that their land cannot be developed, or they can place a deed restriction on the land. In the event of disagreement, they can petition for abatement and challenge any adverse decision in Superior Court. See G. L. c. 80, § 7. Together, these protections guard against the risk that assessments made under the district's policy will not be reasonable and proportional. [***18]

The plaintiff does not explain how its contrary reading of § 42K, which would strictly confine the district to considering only zoning laws, comports with the statute and legislative intent. "The Zoning Act and the subdivision control law share a similar purpose: to regulate the use of land to ensure the safety, convenience, and welfare of the inhabitants of municipalities." *McElderry* v. *Planning Bd. of Nantucket*, 431 Mass. 722, 726, 729 N.E.2d 1090 (2000). Both laws bear on the rights of property owners to develop their land. Indeed, the town of Wareham's zoning by-laws incorporate the subdivision rules in several places — for instance, by allowing a developer to submit a combined application for site plan review and subdivision approval, and obtain a combined public hearing, if the application meets the requirements for both approvals. See Town of Wareham Zoning By-laws § 1550 (2016). Given the interrelationship and shared purposes of the two regulatory regimes, we think it unlikely that the Legislature meant for land development potential to be determined [*761] under § 42K based on zoning laws alone. Certainly, nothing in § 42K compels that interpretation.

Furthermore, the plaintiff's reading would create the anomaly of allowing water betterments to be assessed on land that is restricted [***19] from development by nonzoning regulations, such as those governing earth removal and floodplain and wetlands protection. While "often the subject of zoning regulations, these matters have also been adopted and upheld by the Supreme Judicial Court as independent, [**406] nonzoning land use controls." Healy, Massachusetts Zoning Manual § 2.1, at 2-2 to 2-3. See *Byrne* v. *Middleborough*, 364 Mass. 331, 334, 304 N.E.2d 194 (1973); *Lovequist*, 379 Mass. at 12-14. The implication of the plaintiff's position would be that municipalities would be free to ignore such restrictions even if they would render the land undevelopable, an

outcome that the Legislature is not likely to have intended.

The plaintiff's interpretation suffers from the additional flaw that it would create substantial overlap between § 42H and § 42K. The only alternative method of calculation proffered by the plaintiff — limiting potential water units to ANR lots — is, in essence, a frontage-based method because whether a lot qualifies for an ANR endorsement depends on frontage, either on a public way or a way endorsed by the planning board as meeting the requirements of the subdivision control law. See G. L. c. 41, § 81L.[8] But the fixed uniform rate method has provided for frontage-based assessments since the original enactment of the water betterment assessment [***20] statute in 1955. See G. L. c. 40, § 42H. The plaintiff does not explain what then would have been the Legislature's intent in enacting § 42K if it too is based on frontage. See *Doherty* v. *Planning Bd. of Scituate*, 467 Mass. 560, 569, 5 N.E.3d 1231 (2014) (statute should be construed so that no part is inoperative or superfluous).

For these reasons we conclude that § 42K should be read to allow water betterment assessments to be based on the development potential of the land, which must be determined by considering "zoning in effect at the date of assessment" and may be determined by considering rules and regulations adopted under the subdivision control law. The district's policy comports with this reading and thus does not conflict with § 42K.

4. *G. L. c. 40, § 42G*. Turning to the plaintiff's next argument, we have little trouble concluding that G. L. c. 40, § 42G, poses no bar to the district's method of calculation. The plaintiff construes § 42G as authorizing water betterments to be assessed only as to "land that is actually given access to a water line, generally by having frontage on the road where the line is installed." But this interpretation disregards the plain statutory language, which specifies that betterments may be assessed against a property owner whose land "receives benefit from the laying of water pipes in public [***21] and private ways upon which his land abuts *or which by more remote means receives benefit* through the supply of water to his land or buildings" (emphasis supplied). G. L. c. 40, § 42G. If, as the plaintiff argues, the statute applies only to land abutting the way, the words "which by more remote means receives benefit" would have no meaning. We decline to adopt such a construction. See *Doherty*, 467 Mass. at 569.

5. *Fairness of the assessments*. Finally, the plaintiff has failed to demonstrate that the three assessments at issue were unreasonable or disproportionate. The plaintiff declined multiple opportunities, prior to the district's recording of the assessments, to submit evidence that the [**407] parcels are not developable. As a result, we lack any meaningful record on which to consider its claims that the district's policy is unfair as applied to the parcels.

If anything, what is in the record undermines the plaintiff's claims of unfairness. As reflected in a stipulation between the parties, the plaintiff has subdivided some of the parcels already and has reserved its rights to make further subdivisions while this lawsuit is pending. In contrast, other property owners responded to the district's letters with documentation that their [***22] land was not developable because of wetlands regulations, conservation restrictions, or other enforceable limitations on the use of the property.[9] In those cases the district responded by reducing the

[8] We note that, although an ANR endorsement takes a plan outside the regime of the subdivision control law, it "serves merely to permit the plan to be recorded … and is not an attestation of compliance with zoning requirements." *Palitz*, 470 Mass. at 807, quoting from *Cornell* v. *Board of Appeals of Dracut*, 453 Mass. 888, 892, 906 N.E.2d 334 (2009). See *Gates* v. *Planning Bd. of Dighton*, 48 Mass. App. Ct. 394, 397, 722 N.E.2d 477 (2000) (whether lot "conform[s] with zoning requirements [is] not an appropriate consideration in granting or withholding an ANR endorsement").

[9] We do not preclude the possibility that, in a different case, a landowner could successfully challenge an assessment of subdivision lots on these or other grounds. In any appeal from a denial of abatement, the court would have the power to overturn an assessment that is "unreasonable or unreasonably discriminatory." *Morton*, 43 Mass. App. Ct. at 205. See *Henry B. Byors & Sons, Inc.*, 358 Mass. at 359. No such showing has been made in this case, however.

assessments. Thus, on the evidence before us, there is nothing to [*763] indicate that the assessments at issue were unreasonable or substantially in excess of the benefits conferred on the plaintiff. See *Morton*, 43 Mass. App. Ct. at 205.

Judgment affirmed.

PARRIS V. SHERIFF OF SUFFOLK COUNTY

Appeals Court of Massachusetts

No. 17-P-189.

2018 Mass. App. LEXIS 118 *

January 16, 2018, Argued; September 5, 2018, Decided

EDWIN PARRIS & others[1] *vs*. **SHERIFF OF SUFFOLK COUNTY**.

Prior History: [*1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on June 10, 2014.

The case was heard by *Paul D. Wilson*, J., on motions for summary judgment, and a motion for reconsideration was considered by him.

Counsel: *Dennis M. Coyne* for the plaintiffs.

Janna Hansen, Assistant Attorney General, for the defendant.

Judges: Present: GREEN, C.J., TRAINOR, VUONO, MASSING, & SINGH, JJ.[2]

Opinion by: MASSING

MASSING, J. The Wage Act, G. L. c. 149, §§ 148 and 150, generally requires that all public and private employers in the Commonwealth pay their employees' wages no more than seven days after the end of the pay period in which the wages were earned. Employees whose wages are detained longer than the Wage Act permits are entitled, after filing a complaint with the Attorney General, to initiate civil actions for injunctive relief, damages including lost wages, mandatory treble damages, and attorney's fees. The defendant sheriff of Suffolk County (sheriff), as a State employer, is required to make payments in accordance with the Wage Act to "every mechanic, workman and laborer" he employs and [*2] to "every person employed in any other capacity by [him] in any penal or charitable institution … *unless such mechanic, workman, laborer or employee requests in writing to be paid in a different manner*" (emphasis supplied). G. L. c. 149, § 148, as appearing in St. 1960, c. 416.

In this case we must determine whether a provision in the collective bargaining agreements (CBAs) between the sheriff and the unions representing his employees amounts to a valid "request[ ] in writing" by the employees "to be paid in a different manner." *Ibid.* In addition, we must determine whether the CBAs in question effectively waived the employees' rights to judicial enforcement of claims of late payment. We conclude that the unions had the authority, through collective bargaining, to exercise the employees' election to request that payment of overtime wages be made under a different schedule than the Wage Act provides, but that the CBAs here were not effective to waive the employees' rights to

[1] Shane Bouyer, Augusta Akukwe, Christopher Popov, and Jail Officers and Employees Association of Suffolk County. The four lead plaintiffs seek to represent a class of 194 similarly situated individuals.

[2] This case was initially heard by a panel comprised of Justices Trainor, Massing, and Singh. After circulation of a majority and dissenting opinions to the other Justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Vuono. See *Sciaba Constr. Corp.* v. *Boston*, 35 Mass. App. Ct. 181, 181 n.2, 617 N.E.2d 1023 (1993).

enforcement in court of the altered Wage Act schedule.

Background. The facts, as presented in the parties' cross motions for summary judgment, are not in dispute. The individual plaintiffs all work or worked for the sheriff at the [*3] Nashua Street jail between January, 2010, and July 25, 2015.[3] All of the employees are members of State collective bargaining units. Plaintiff Jail Officers and Employees Association of Suffolk County (union) is the exclusive bargaining representative for most of the employees; two other unions represent the remaining employees. The sheriff recognized these unions as the exclusive representatives of their members for the purpose of collective bargaining. See G. L. c. 150E, § 4.

The sheriff and the unions entered into a series of CBAs relevant to this litigation.[4] These CBAs contained an identical provision (art. X, § 7) reflecting the parties' agreement concerning the timing of overtime payments: "Employees shall be paid for overtime service within twenty-five (25) working days following the month in which such service is performed." At all relevant times the sheriff paid the employees their overtime wages under the CBA twenty-five-day provision rather than under the Wage Act's seven-day period. In some instances the sheriff detained overtime wages beyond the twenty-five-day time frame permitted in the CBAs.[5]

After obtaining authorization from the Attorney General,[6] the lead plaintiffs commenced this action [*4] on behalf of themselves and other similarly situated employees. They alleged that the sheriff violated the Wage Act by, among other actions, failing to pay overtime wages within seven days.[7] Acting on cross motions for summary judgment, a judge of the Superior Court held that the employees, "having approved a written request in the CBA that they be paid in a different manner, have waived their right to enforce the schedule set out in the Wage Act." On the plaintiffs' timely motion for reconsideration, the judge further concluded that to the extent the sheriff exceeded the twenty-five-day time limit, the plaintiffs were required to exhaust the CBA's grievance procedures. Judgment entered for the sheriff, the plaintiff's complaint was dismissed, and this appeal ensued.

Discussion. 1. *Request to deviate from Wage Act payment schedule*. "The purpose of G. L. c. 149, § 148, is to prevent the evil of the 'unreasonable detention of wages [by employers].'" *Newton* v. *Commissioner of the Dept. of Youth Servs.*, 62 Mass. App. Ct. 343, 345, 816 N.E.2d 993 (2004), quoting from *Boston Police Patrolmen's Assoc., Inc.* v. *Boston*, 435 Mass. 718, 720, 761 N.E.2d 479 (2002). See *American Mut. Liab. Ins. Co.* v. *Commissioner of Labor & Indus.*, 340 Mass. 144, 147, 163 N.E.2d 19 (1959) (Wage Act was adopted "primarily to prevent unreasonable *detention* of wages"). "We have

[3] The plaintiffs became State employees when the Legislature transferred the sheriff's department to the Commonwealth on January 1, 2010. See St. 2009, c. 61, §§ 3, 4, 26; *Sheriff of Suffolk County* v. *Jail Officers & Employees of Suffolk County*, 465 Mass. 584, 595, 990 N.E.2d 1042 (2013). As State employees working at a penal institution, the employees — irrespective of their various job classifications — were covered by the Wage Act. Contrast *Newton* v. *Commissioner of the Dept. of Youth Servs.*, 62 Mass. App. Ct. 343, 348-349, 816 N.E.2d 993 (2004).

[4] The record includes copies of the CBAs between the sheriff and the three unions for the periods July 1, 2009, to June 30, 3012; July 1, 2012, to June 30, 2014; and July 1, 2014, to June 30, 2017. In the agreements for 2009 through 2012, the employer was Suffolk County, "acting by and through the Sheriff of Suffolk County, hereinafter called 'the Municipal Employer.'" In the later CBAs, the employer was changed to the Commonwealth, reflecting the transfer of the sheriff's department to the Commonwealth. Nonetheless, the CBAs continued to refer to the sheriff as the "Municipal Employer."

[5] The plaintiffs allege that overtime payments were made "from one to eight months or more after the regular bi-weekly pay period ended." The sheriff admits "that there were a de minimus number of payments, representing a mere fraction of all of the payments in this case, that eclipsed the 25 day payment term."

[6] Under G. L. c. 149, § 150, the Attorney General may institute civil or criminal actions to enforce § 148. In addition, individual employees aggrieved by Wage Act violations may file civil suits on their own behalf ninety days after filing a complaint with the Attorney General or sooner if the Attorney General gives her written assent.

[7] The plaintiffs have voluntarily dismissed all claims except their claim for untimely payment of overtime wages.

consistently held that the legislative purpose behind the Wage Act … is to provide strong statutory protection for employees and their right to [*5] wages." *Crocker* v. *Townsend Oil Co.*, 464 Mass. 1, 13, 979 N.E.2d 1077 (2012). Accordingly, waiver of Wage Act protections is strongly disfavored. See, e.g., *Melia* v. *Zenhire, Inc.*, 462 Mass. 164, 170, 967 N.E.2d 580 (2012), quoting from *Camara* v. *Attorney Gen.*, 458 Mass. 756, 760-761, 941 N.E.2d 1118 (2011) ("An agreement to circumvent the Wage Act is illegal even when 'the arrangement is voluntary and assented to'").

The fundamental public policy against forfeiture of Wage Act protections is rooted in the "special contract" provision of the statute, originally inserted in 1896, *Melia*, *supra*, which states, "No person shall by a special contract with an employee or by any other means exempt himself from this section or from [G. L. c. 149, § 150]." G. L. c. 149, § 148, as appearing in St. 1956, c. 259. Public employees, however, have long been explicitly granted the ability to make written requests to alter the manner of their payments. The ability to make this election predates the special contract provision. Indeed, as early at 1887, city employees were entitled to payment of wages every seven days, "unless such employee shall request in writing to be paid in some different manner." St. 1887, c. 399, § 1.

While the Wage Act has consistently given the individual public employee the ability to make a written request for a different manner of payment, the statute does not expressly permit an employee's collective bargaining representative [*6] to make such a written request on the employee's behalf. The first question we must decide, therefore, is whether a collective bargaining representative has the authority to exercise the individual employees' election through collective bargaining.

An interpretation of the Wage Act requiring individual employees personally to make this election would create a conflict with the public employee labor relations law, G. L. c. 150E. Under c. 150E, the relevant unions are the employees' "exclusive representative of all the employees … for the purpose of collective bargaining," G. L. c. 150E, § 4, inserted by St. 1973, c. 1078, § 2, and are empowered to act on the employees' behalf "with respect to wages, hours, standards or productivity and performance, and any other terms and conditions of employment," G. L. c. 150E, § 6, inserted by St. 1973, c. 1078, § 2. The employees' status as union members limits the sheriff's ability to deal directly with them. Rather, the unions possess the right to speak exclusively for all the employees on mandatory subjects of collective bargaining. See *Service Employees Intl. Union, AFL-CIO, Local 509* v. *Labor Relations Commn.*, 431 Mass. 710, 714, 729 N.E.2d 1100 (2000). Direct communications between the sheriff and the employees regarding changes to the statutory payment schedule would have been [*7] a prohibited practice. See *id.* at 715; *Service Employees Intl. Union, Local 509* v. *Department of Mental Health*, 469 Mass. 323, 333, 14 N.E.3d 216 & n.10 (2014).

Public employee collective bargaining was first authorized by statute long after the Wage Act was in place. See *Somerville* v. *Commonwealth Employment Relations Bd.*, 470 Mass. 563, 568-569, 24 N.E.3d 552 (2015) (discussing Commonwealth's recognition in 1958 of right of public employees to organize and to bargain collectively). "We assume that the Legislature was aware of existing statutes when enacting subsequent ones." *Green* v. *Wyman-Gordon Co.*, 422 Mass. 551, 554, 664 N.E.2d 808 (1996). See *Everett* v. *Revere*, 344 Mass. 585, 589, 183 N.E.2d 716 (1962), quoting from *Walsh* v. *Commissioners of Civil Serv.*, 300 Mass. 244, 246, 15 N.E.2d 218 (1938) ("A statute is to be interpreted with reference to the preëxisting law… . If reasonably practicable, it is to be explained in conjunction with other statutes to the end that there may be an harmonious and consistent body of law"); *Fall River* v. *AFSCME Council 93, Local 3177, AFL-CIO*, 61 Mass. App. Ct. 404, 406 (2004), quoting from *Dedham* v. *Labor Relations Commn.*, 365 Mass. 392, 402, 312 N.E.2d 548 (1974) ("When possible, we attempt to read [statutes] and the collective

bargaining law, as well as the agreements that flow from the collective bargaining law, as a 'harmonious whole'").

To harmonize the Wage Act with c. 150E, we hold that the unions may act on behalf of their members to exercise the employees' election under the Wage Act to alter the timing of the overtime payments. We emphasize that the provision of the CBAs at issue here did not represent a *waiver* of individual rights under the Wage Act. Rather, the provision represents a negotiated version of a different [*8] time period for payment, elected by the employees as permitted by the terms of the Wage Act, through their collective bargaining representatives. Accordingly, to the extent that the sheriff paid the employees' overtime wages within twenty-five days of the end of the month in which they were earned, the sheriff was in compliance with what the unions, on behalf of the employees, agreed was timely payment under the Wage Act.

2. *Judicial remedies*. Having held that the parties validly negotiated for the employees to be paid according to a different schedule than the Wage Act provides, we must determine whether the CBAs preclude the employees from judicial enforcement of their right to prompt payment under the negotiated Wage Act schedule. We conclude that they do not. "[T]he prompt payment of wages statute creates an independent statutory right that can be enforced judicially even when a collective bargaining agreement addresses the subject matter of compensation." *Newton*, 62 Mass. App. Ct. at 347.

Unlike the exercise of the Wage Act election to be paid in a different manner, we deal here with the purported waiver of an individual statutory right. "Although a union has the power to waive statutory rights related to collective [*9] activity, rights … which are of a personal, and not merely economic, nature are beyond the union's ability to bargain away." *Blanchette* v. *School Comm. of Westwood*, 427 Mass. 176, 183, 692 N.E.2d 21 (1998) (protections of antidiscrimination law, G. L. c. 151B, not waivable through collective bargaining). The Wage Act rights at issue here fall into this category: "The statutory right to the timely payment of wages does not involve the collective rights of employees but, rather, is designed to insure that each individual is paid promptly the wages due him or her." *Newton*, *supra* at 346.[8]

No Massachusetts appellate decision has ever upheld the waiver of individual statutory rights through a CBA. In *Newton*, even though the CBA included provisions concerning overtime, call-back, stand-by pay, and a grievance procedure "relating to the interpretation and application of the terms of the agreement," we held that the agreement did not waive the plaintiffs' "right to the timely payment of wages" under the Wage Act. *Ibid.* "While an individual may waive the requirements of the statute by a writing, the record does not disclose that the plaintiffs did so. Nor does their collective bargaining agreement include any reference to G. L. c. 149, § 148, or to the time when wages must be paid." *Id.* at 345.

The United States Supreme [*10] Court, in *Barrentine* v. *Arkansas-Best Freight Sys.*, 450 U.S. 728, 745, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), similarly held that the grievance procedures of a CBA could not waive an individual employee's right to bring an action in Federal court alleging a violation of the minimum wage provision of the Fair Labor Standards Act (FLSA). The Court stated that employees' rights under the FLSA "devolve on petitioners as individual workers, not as members of a collective organization. They are not waivable." *Ibid.*

More recently, in a sharply divided decision, the United States Supreme Court held for the

[8] Because claims under the Wage Act, like claims under the antidiscrimination law, concern individual rather than collective rights and are protected by a strong, statutorily expressed public policy, the case law concerning waiver of antidiscrimination claims is uniquely applicable here. These statutory rights are "unlike … the right to receive a financial reward beyond his base salary for advancing his education and job training," at issue in *Rooney* v. *Yarmouth*, 410 Mass. 485, 492, 573 N.E.2d 969 (1991) (contrasting Rooney's rights under Quinn Bill with "right to minimum wage and overtime pay" under the Fair Labor Standards Act and "right to equal employment opportunities").

first time that Federal law permits enforcement of a provision in a CBA that compels arbitration of individual employees' statutory age discrimination claims, but only by way of "a provision … that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 251, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009). The Court distinguished *Barrentine* on the ground that "the arbitration provision under review in *Barrentine* did not expressly reference the statutory claim at issue." *Id.* at 263.

We need not determine whether Massachusetts law permits a union to waive represented employees' rights and remedies under the Wage Act[9] because we conclude that the CBAs before us do not [*11] include such a waiver. The Commonwealth's fundamental public policy "to provide strong statutory protection for employees and their right to wages," *Crocker*, 464 Mass. at 13, would require, at the minimum, a clear and unmistakable waiver. The CBAs here do not meet this high standard.

The case of *Warfield* v. *Beth Israel Deaconess Med. Center, Inc.*, 454 Mass. 390, 910 N.E.2d 317 (2009), like the case before us, considered the specificity necessary to waive judicial enforcement of an important public policy protection. The question in *Warfield* was whether a clause in an individual's employment agreement providing for arbitration of "[a]ny claim, controversy or dispute arising out of or in connection with" the contract applied to an employment discrimination claim under G. L. c. 151B. *Warfield*, *supra* at 392. Both the Federal Arbitration Act (FAA) and the Massachusetts Arbitration Act explicitly permit written agreements to submit to arbitration any controversy between the parties. *Id.* at 394-395. Moreover, Federal law allows for arbitration of Federal employment discrimination disputes, and the court assumed without deciding that Massachusetts law likewise would permit arbitration of employment discrimination claims under G. L. c. 151B. *Warfield*, *supra* at 395. In addition, both Federal and State law and policy favor arbitration, creating [*12] a rebuttable presumption of arbitrability. *Id.* at 396.

Nonetheless, relying on the Commonwealth's "overriding governmental policy proscribing various types of discrimination, set forth in G. L. c. 151B," *Warfield*, *supra* at 398, quoting from *Massachusetts Bay Transp. Authy.* v. *Boston Carmen's Union, Local 589*, 454 Mass. 19, 26, 29, 907 N.E.2d 200 (2009), the court held that "an employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by G. L. c. 151B is enforceable only if such an agreement is stated in clear and unmistakable terms." *Warfield*, *supra*.[10]

Similarly in *Blanchette*, 427 Mass. at 183, after determining that the plaintiff's individual judicial remedies could not be waived by her union's collective bargaining agreement, the court considered whether she had waived those remedies by her own actions. The court assumed that the plaintiff "may have been able explicitly and voluntarily to waive her right to pursue her statutory civil rights claim in a judicial forum," but held that "there is no evidence that [she] made such an explicit and voluntary waiver." *Id.* at 184.

Finally, in *Crocker*, 464 Mass. at 12, the court considered whether a general release agreement made in settlement of an

[9] In *Warfield* v. *Beth Israel Deaconess Med. Center, Inc.*, 454 Mass. 390, 401 n.17, 910 N.E.2d 317 (2009), the court noted the sharp disagreement among the justices in *14 Penn Plaza LLC* regarding whether "a collective bargaining agreement could waive an individual's right to court access for individually based statutory claims."

[10] To the extent our dissenting colleagues assert that the presumption of arbitrability overrides the need for a clear and unmistakable waiver, the Supreme Judicial Court considered that issue at length, see *Warfield*, *supra* at 397-401, and concluded that "[t]he interpretive rule we state here is not inconsistent with the presumption of arbitrability embedded in the FAA." *Id.* at 399. *Post* at ___. The court emphasized that the case concerned "an 'overriding' statutorily expressed, public policy," calling for "distinct treatment," *Warfield*, *supra* at 400 n.16 (citation omitted) — as does the case before us. It was in this context that the court further observed that an employment contract need not "specifically list every possible statutory claim that might arise." *Ibid.*

employment dispute could insulate an employer from Wage Act liability. Resolving the tension between the Wage Act, [*13] which generally prohibits any agreement to circumvent its protections, and "the contravening public policy favoring the enforceability of general releases," *id.* at 14, the *Crocker* court created a limited exception to the "special contract" prohibition. *Melia*, 462 Mass. at 170 (citation omitted). To protect against the possibility "that the strong protections afforded by the Wage Act could be unknowingly frittered away under the cover of a general release in an employer-employee termination agreement," the court held that such an agreement "will be enforceable as to the statutorily provided rights and remedies conferred by the Wage Act only if [it] is stated in clear and unmistakable terms." *Crocker*, *supra*. "In other words, the release must be plainly worded and understandable to the average individual, and it must specifically refer to the rights and claims under the Wage Act that the employee is waiving." *Ibid.*

Thus, even if Massachusetts were to allow a provision of a CBA to waive represented employees' individual rights and remedies under the Wage Act, the fundamental public policy to prevent employees' unwitting waiver of their individual rights would require "establishing a relatively narrow channel through which [*14] waiver of Wage Act claims can be accomplished," *id.* at 15 — that is, a clear and unmistakable statement. The CBAs here do not meet this high standard.

With respect to the grievance procedure, the CBAs state in art. VII, "Only matters involving the question whether the [sheriff] is complying with the written provisions of this Agreement shall constitute grievances under this Article." This provision does not even mention, let alone clearly and unmistakably state, that the employees have waived their rights to judicial enforcement of Wage Act violations. See *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 80, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) (general arbitration clause, providing for arbitration of "[m]atters under dispute," effective as to contractual, but not statutory, claims; "a union negotiated waiver of employees' statutory right to a judicial forum" must be "clear and unmistakable").

Even though the unions agreed to an extended period for the timely payment of wages under the Wage Act, the unions did not waive the employees' Wage Act remedies with respect to payments withheld longer than the negotiated standard permits. The twenty-five-day payment window is both a provision of the CBAs and a requirement that the sheriff must meet to comply with the Wage Act.[11] "[I]t is … [*15] well-established that there are certain personal, statutory rights that can be enforced judicially even though they are incorporated into a collective bargaining agreement. The mere fact that those rights may be *Post* at ___. To the contrary, it represents a "request[ ] in writing," made under the provisions of the Wage Act, "to be paid in a different manner." G. L. c. 149, § 148, as appearing in St. 1960, c. 416. created both by contract and by statute and may be violated by the same factual occurrence does not vitiate their distinct and separate nature." *Newton*, 62 Mass. App. Ct. at 346 (citations omitted). "[W]e agree with the plaintiffs that the right to timely payment of wages is a distinct, independent statutory right that can be enforced judicially even though the subject matter of overtime … is incorporated in the plaintiffs' collective agreement." *Ibid.*

The cases of *Machado* v. *System4 LLC*, 471 Mass. 204, 28 N.E.3d 401 (2015), and *Dixon* v. *Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271, 914 N.E.2d 97 (2009), two decisions that enforced individually negotiated agreements to submit Wage Act claims to arbitration without requiring explicit reference to the Wage Act in the arbitration clause,[12] are not to the contrary. Neither of those cases concerned a purported

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[11] Our dissenting colleagues erroneously contend that the twenty-five-day provision is solely a creature of the CBAs.

[12] In *Dixon*, *supra* at 277 n.8, we rejected the employee's argument that she did not waive her right to litigate her claim because her waiver was not made "explicitly and voluntarily," citing *Blanchette*, 427 Mass. at 184. In *Machado*, *supra* at 216-217, the court declined to extend the rule in *Crocker* "and hold that the arbitration clause does not apply to [the plaintiffs'] Wage Act claims given that it makes no explicit mention of such claims."

waiver of individual rights in a CBA, a distinction explicitly relied upon in *Dixon [*16]*. See *Dixon*, *supra* at 277 & n.8.

Moreover, both cases reasoned that the arbitration provisions at issue did not implicate the employees' substantive rights under the Wage Act or "exempt" the employer from the Wage Act's operation, "but solely dictate[d] the forum in which the plaintiffs' right to recovery will be determined." *Machado*, *supra* at 217-218. See *Dixon*, *supra* at 275 & n.5. Here, however, not all of the statutory remedies available to the employees in court would be available to them under the CBAs. The grievance procedure under the CBAs is limited "[o]nly [to] matters involving the question whether the [sheriff] is complying with the written provisions of [the CBA]." The CBAs do not provide contractual remedies of treble damages or attorney's fees, which are purely Wage Act terms. Indeed, the sheriff asserts in his brief that "any alleged violation with respect to the timing of overtime pay would be a violation of that CBA provision, and not the Wage Act," and that the plaintiffs "are not entitled to damages, treble or otherwise, since there is no Wage Act violation."[13] Even if the CBAs were considered ambiguous as to the availability of Wage Act remedies, that ambiguity alone would demonstrate why an [*17] express reference to Wage Act rights is essential. The CBAs here do not include sufficiently clear and unmistakable language to waive the employees' individual judicial remedies contained in G. L. c. 149, § 150.

Conclusion. The plaintiff employees' election, through the CBAs and authorized by the Wage Act, that payment of overtime wages would be considered timely if made "within twenty-five (25) working days following the month in which such service is performed" is effective to supplant the Wage Act's seven-day requirement. The plaintiffs did not waive their Wage Act remedies for payment of wages beyond the twenty-five-day period. Accordingly, we vacate the judgment dismissing the plaintiffs' complaint. The plaintiffs may proceed to enforce their claims for late payment in the Superior Court under G. L. c. 149, § 150.

So ordered.

Dissent by: SINGH; TRAINOR

SINGH, J. (dissenting, with whom Trainor, J., joins). I agree with the majority that the provision of the collective bargaining agreement (CBA) setting forth a twenty-five-day time limit for the payment of overtime wages, rather than a seven-day time limit as set forth in the Wage Act, is enforceable as a "request[ ] in writing to be paid in a different manner," exercised by the [*18] unions on behalf of the employees. G. L. c. 149, § 148, as appearing in St. 1960, c. 416. It follows therefore that any dispute arising out of this provision of the CBA must first be pursued within the grievance procedure provided for in the CBA. See *Azzi* v. *Western Elec. Co.*, 19 Mass. App. Ct. 406, 408, 474 N.E.2d 1166 (1985) (before bringing action against employer for violation of CBA, employee required to exhaust grievance procedure), citing *Vaca* v. *Sipes*, 386 U.S. 171, 184, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). To the extent that the majority allows employees to elect a judicial remedy in the first instance, bypassing the contractual remedies provided for in the CBA, I dissent.

The CBA provides that "matters involving the question whether the [sheriff of Suffolk County (sheriff)] is complying with the written provisions of this Agreement shall constitute grievances" and sets out a detailed grievance procedure to be followed, ultimately concluding in binding arbitration. The employees' claim to have not been paid

[13] Justice Singh, in her dissent, asserts that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," quoting from *Mitsubishi Motors Corp*. v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). *Post* at ___. While this statement may be true, it presupposes both an agreement to arbitrate and an arbitration provision that incorporates the full range of statutory remedies. See *Barrentine*, 450 U.S. at 745 ("Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. 29 U.S.C. § 216[b]. An arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement").

overtime wages within twenty-five days as required by the CBA unquestionably falls within the definition of a grievance. The employees were therefore required to pursue and to exhaust their contractual remedies through the grievance procedure; election of a judicial remedy in the first instance was not permissible. See *Malden Police Patrolman's Assn.* v. *Malden*, 92 Mass. App. Ct. 53, 59, 82 N.E.3d 1055 (2017) ("Employees [*19] may not simply disregard the grievance procedures set out in a collective labor contract and go direct[ly] to court for redress against the employer"), quoting from *Balsavich* v. *Local Union 170 of the Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 371 Mass. 283, 286, 356 N.E.2d 1217 (1976).

Relying primarily on cases involving claims of employment discrimination,[1] the majority contends that the CBA must state in "clear and unmistakable" terms that employees waive the right to bring a Wage Act claim in court for claims arising out of the CBA provision requiring overtime wages to be paid within twenty-five days. *Ante* at ___. Yet, there is a presumption of arbitrability in contracts containing arbitration clauses. See *Drywall Sys., Inc.* v. *ZVI Constr. Co.*, 435 Mass. 664, 666, 761 N.E.2d 482 (2002) (arbitration of particular claim "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage"). Thus, there is no need for the CBA to "list every possible statutory claim that might arise." *Warfield* v. *Beth Israel Deaconess Med. Center, Inc.*, 454 Mass. 390, 400 n.16, 910 N.E.2d 317 (2009).

In the employment discrimination cases, the courts were concerned that individual statutory rights to be free from discrimination may be unwittingly waived through general arbitration clauses in agreements making no mention of discrimination. See *id.* at 402 (statutory [*20] gender discrimination claim could be pursued in court, despite arbitration clause in employment contract, where there was "no contractual term dealing with discrimination"). That concern is not present here where the claim arises out of an explicit term of the CBA concerning the time period within which overtime wages must be paid.

Additionally, the rationale for not applying the presumption of arbitrability in employment discrimination cases has no applicability here. See *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 78-79, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) (noting that presumption of arbitrability is rooted in rationale that arbitrators are in better position than courts to interpret terms of CBAs, court explained that presumption does not have force in employment discrimination context where arbitrator would be called upon to interpret discrimination statutes). The claim in this case does not require arbitrators to interpret the Wage Act but, rather, to interpret the CBA as negotiated by the parties.

Moreover, the clear and unmistakable standard has never been required to permit Wage Act claims to be submitted to arbitration. To the contrary, in *Machado* v. *System4 LLC*, 471 Mass. 204, 216-217, 28 N.E.3d 401 (2015), the court considered a broad arbitration clause that required any claim arising out of the parties' [*21] franchise relationship to be submitted to arbitration.[2] Relying on *Crocker* v. *Townsend Oil Co.*, 464 Mass. 1, 979 N.E.2d 1077 (2012), as the majority does here, the plaintiffs argued that their Wage Act claims were not arbitrable because the arbitration clause made no mention

[1] See *Blanchette* v. *School Comm. of Westwood*, 427 Mass. 176, 692 N.E.2d 21 (1998) (retaliation based on sexual harassment claim); *Massachusetts Bay Transp. Authy.* v. *Boston Carmen's Union, Local 589*, 454 Mass. 19, 907 N.E.2d 200 (2009) (handicap discrimination); *Warfield* v. *Beth Israel Deaconess Med. Center, Inc.*, 454 Mass. 390, 910 N.E.2d 317 (2009) (gender discrimination); *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) (disability discrimination); *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009) (age discrimination).

[2] Although the arbitration clause in *Machado* was contained within individual franchise agreements, as opposed to a CBA, "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC* v. *Pyett*, *supra* at 258.

of the Wage Act. *Machado, supra*. Rejecting this argument, the court explained that an arbitration agreement "does not permit an employer to thwart or exempt itself from Wage Act obligations, but solely dictates the forum in which the plaintiffs' right to recovery will be determined."[3] *Id.* at 217-218. Thus, despite the absence of clear and unmistakable language indicating waiver of a judicial forum for Wage Act claims, the plaintiffs were required to submit their claims to arbitration as provided in the CBA. See *Dixon* v. *Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271, 275-276, 914 N.E.2d 97 (2009) (Wage Act claim required to be submitted to arbitration pursuant to general arbitration clause with no reference to Wage Act).

Given that the provision of the CBA setting forth a twenty-five-day time limit for the payment of overtime wages is enforceable, any claim that the sheriff violated this provision must be resolved, in the first instance, through the mechanism provided for in the CBA. I would affirm the judgment in its entirety.

Trainor, J. (dissenting). [*22] I, like my dissenting colleague, also agree with the majority that the twenty-five-day time limit for the payment of overtime wages is enforceable as a "request[ ] in writing to be paid in a different manner" than the seven-day payment requirement contained in the Wage Act. See G. L. c. 149, § 148, as appearing in St. 1960, c. 416. However, I do not believe it was necessary to "harmonize the Wage Act with c. 150E" as the majority holds. *Ante* at ___. Collective bargaining agreements (CBAs) are not the kind of contracts from which the Wage Act was attempting to protect workers.[1,2] See *Rooney* v. *Yarmouth*, 410 Mass. 485, 492-494, 573 N.E.2d 969 (1991); *Crocker* v. *Townsend Oil Co.*, 464 Mass. 1, 13-15, 979 N.E.2d 1077 (2012).

I dissent, however, from the majority holding that employees subject to the CBA may elect to enforce its provision for the payment of overtime wages by employing the judicial remedy contained in the Wage Act. *Ante* at ___. The appropriate forum for the remedy is arbitration, as stated in the CBA.

In 1974, the town of Yarmouth (town) voted to accept the provisions of G. L. c. 41, § 108L (the Quinn Bill).[3] *Rooney*, *supra* at 487. Sometime after the town's acceptance, the town and the union representing police officers adopted § 108L as a provision of their CBA, including "[a]mendments passed by the State legislature, now and in the future." *Rooney*,

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[3] "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985).

[1] "During the period preceding World War I, in which [the Illinois version of the Wage Act] was originally enacted, many State legislatures outlawed and forbade certain and various kinds of individual contracts between the employer and individual employees in the belief that 'employers had an unfair economic advantage over individual wage earners because of their superior economic power, including the present control over the means of livelihood in an industrial system and took advantage of such wage earners' absolute necessity to make a living on any terms available." *Pullman Co.* v. *Cummins*, 10 Ill. 2d 454, 467-468, 140 N.E.2d 713 (1957) (citation omitted).

[2] "The national policy favoring collective bargaining and industrial self-government was first expressed in the National Labor Relations Act of 1935, 29 U.S.C. § 151 et seq. (the Wagner Act). It received further expression and definition in the Labor Management Relations Act, 1947, 29 U.S.C. § 141 et seq. (the Taft-Hartley Act). Predicated on the assumption that individual workers have little, if any, bargaining power, and that 'by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions,' … these statutes reflect Congress' determination that to improve the economic well-being of workers, and thus to promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers… . The rights established through this system of majority rule are thus 'protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151.'" *Barrentine* v. *Arkansas-Best Freight Sys.*, 450 U.S. 728, 735, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981).

[3] Section 108L established a career incentive pay program for police officers in the form of salary increases for officers who further their education. *Rooney*, *supra* at 487. Municipalities that accepted the provisions of § 108L would be entitled to reimbursement from the Commonwealth of one-half of the costs of the incentive benefits. *Ibid.*

supra at 487 n.2.[4] The *Rooney* court determined [*23] that the parties intended to make § 108L part of, and subject to, the CBA. *Id.* at 491. When a dispute arose concerning the payment of certain salary increases, an employee police officer claimed that he was not required to arbitrate the dispute because G. L. c. 41, § 108L (i.e., statutory rights) and constitutional rights regarding property rights through 42 U.S.C. § 1983 were involved. *Rooney*, *supra* at 490. The employee police officer insisted that he was entitled to a judicial remedy and that even if the dispute were arbitrable under the CBA, arbitration would not be an exclusive remedy. *Ibid.* His failure to pursue arbitration would thus not justify a dismissal of the action. *Ibid.* The *Rooney* court held:

> "[Section] 108L does not vest in [the employee] a personal, substantive, nonwaivable statutory guarantee that he is free to enforce judicially notwithstanding the incorporation of § 108L into the [CBA]… . [The employee] plainly does not have in § 108L an independent statutory right that is unencompassed by the [CBA]… . We conclude that, by agreeing to the incorporation of § 108L into the [CBA], the union effectively waived any right [the employee] may have had to judicial relief based on § 108L. [The employee's] exclusive remedy … was through the grievance process [*24] provided in the agreement."

Id. at 492, 494.[5] Here, as the majority would agree, there was no attempted waiver by the CBA of the statutory right to timely payment of overtime wages. The CBA merely, as specifically allowed by the Wage Act, determined what the period of time would be for the prompt payment of overtime wages for the employees covered by the CBA.

The cases cited by the majority to support the proposition that this case represents a situation of a nonwaivable right are inapposite. See *Blanchette* v. *School Comm. of Westford*, 427 Mass. 176, 183, 692 N.E.2d 21 (1998) (protections of G. L. c. 151B [anti-discrimination law] cannot be waived through CBA); *Warfield* v. *Beth Israel Deaconess Med. Center, Inc.*, 454 Mass. 390, 398, 910 N.E.2d 317 (2009) (applied arbitration requirement to employment discrimination claim under G. L. c. 151B; "an agreement by the employee to limit or waive any of the rights or remedies conferred by G. L. c. 151B is enforceable if such an agreement is stated in clear and unmistakable terms"); *Crocker*, 464 Mass. at 14 (arbitration, pursuant to agreement, "will be enforceable as to the statutorily provided rights and remedies conferred by the Wage Act only if such an agreement is stated in clear and unmistakable terms"); *Barrentine* v. *Arkansas-Best Freight Sys.*, 450 U.S. 728, 737-744, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981) (right to minimum wage and overtime pay cannot be waived through a CBA); *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) ("union negotiated waiver [*25] of employees' statutory right to a judicial forum" in general arbitration clause must be "clear and unmistakable").

And, finally, the majority misunderstands the holding in *Newton* v. *Commissioner of the Dept. of Youth Servs.*, 62 Mass. App. Ct. 343, 816 N.E.2d 993 (2004). In *Newton*, employees of a Department of Youth Services (DYS) forestry camp brought an action against DYS under the Wage Act for failure to pay overtime and for other extra pay. *Id.* at 344. Unlike our case, while the DYS employees were subject to

[4] The CBA also incorporated a binding arbitration clause for all disputes arising out of the agreement. *Rooney*, *supra* at 486.

[5] Significantly, both for the *Rooney* decision and our case here, a nonwaivable statutory right would include, for example, the right to the statutory minimum wage, the right to overtime pay (regardless of the timing of payment), or the right to equal employment opportunities. See, e.g., *School Comm. of Brockton* v. *Massachusetts Commn. Against Discrimination*, 377 Mass. 392, 399, 386 N.E.2d 1240 (1979); *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36, 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974); *Barrentine* v. *Arkansas-Best Freight Sys.*, *supra* at 739-746. Also, the union in *Rooney* incorporated the entire statute into the CBA, including future amendments. Here, the union created a new payment period that existed only within the CBA.

a CBA and its arbitration clause, the CBA made no mention of the Wage Act or of any of its specific requirements. *Id.* at 345. The court held that, "[w]hile an individual may waive the requirements of the statute by a writing, the record does not disclose that the plaintiffs did so. Nor does their collective bargaining agreement include any reference to G. L. c. 149, § 148, *or to the time when wages must be paid*" (emphasis supplied). *Newton*, *supra*.

The Wage Act allowed the inclusion of the provision of the CBA at issue here, and the majority agrees with this. *Ante* at ___. The twenty-five-day payment requirement contained in the CBA exists only in the CBA and not in the Wage Act. The CBA does not and cannot amend the Wage Act. The twenty-five-day payment requirement created by, and existing only in, the CBA can [*26] be enforced only within the forum (i.e., arbitration) provided in the CBA.

PLYMOUTH RETIREMENT BOARD V. CONTRIBUTORY RETIREMENT APPEAL BOARD

17-P-23

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 1128
2018 Mass. App. Unpub. LEXIS 158 *;

February 16, 2018, Entered

Disposition: Judgment affirmed.

Judges: Rubin, Lemire & Shin, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Plymouth Retirement Board (board) appeals from a Superior Court judgment affirming a decision of the Contributory Retirement Appeal Board (CRAB). CRAB concluded that the board was entitled to recover retirement benefits paid to defendant Michael Daley (Daley). In this appeal, the board seeks a narrow reversal of the CRAB order, asserting that it erred in not making exact findings as to Daley's excess earnings for the years 2007 to 2010 pursuant to G. L. c. 32, § 91(*b*), instead relying on an adverse inference as a result of a discovery sanction.[2]

[2] The Superior Court properly dismissed Daley's claims as untimely pursuant to G. L. c. 30A, § 14(1). Where Daley or the

We affirm.

Background. We briefly summarize the relevant factual and procedural background. This case began as a decision of the board against Daley ordering recovery of Daley's earnings in excess of G. L. c. 32, § 91(*b*), postretirement limitations. Daley appealed to the Department of Administrative Law Appeals (DALA). DALA found in favor of the board after Daley refused to comply with discovery. Daley then appealed to CRAB. CRAB upheld DALA's decision in full including an adverse inference sanction against Daley pursuant to 801 Code Mass. Regs. § 1.01(8)(i) (1998) because Daley failed to comply with an administrative discovery order. As a result [*2] of this inference, CRAB ordered recovery to the board limited to the retirement benefits paid to Daley from 2007 to 2010. In its decision, CRAB did not make specific findings as to the amount of Daley's excess earnings under G. L. c. 32, § 91(*b*), and rejected the board's requested recovery amount of $350,927.03. The board sought limited judicial review in Superior Court on only the issue of whether remand back to CRAB was required to supplement its decision to more accurately determine Daley's excess earnings in accordance with G. L. c. 30A, § 11(8). The board was the only party to seek judicial review of CRAB's decision in Superior Court within the statutory time period. Upholding CRAB's decision, the Superior Court found no abuse of discretion in CRAB's sanction and found no error in CRAB's award of recovery. The board subsequently appealed to this court.

Standard of review. Judicial review of a CRAB decision pursuant to G. L. c. 30A, § 14, is narrow and we only set aside a decision where it is legally erroneous or unsupported by substantial evidence. See G. L. c. 30A, § 14(7). See also *Retirement Bd. of Salem* v. *Contributory Retirement Appeal Bd.*, 453 Mass. 286, 288-289, 901 N.E.2d 131 (2009). "Under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different [*3] inferences from the facts found by the [agency]." *Medi-Cab of Massachusetts Bay, Inc. v. Rate Setting Commn.*, 401 Mass. 357, 369, 517 N.E.2d 122 (1987). Rather, our review "must give due weight to the experience, technical competence, and specialized knowledge of CRAB." *Murphy* v. *Contributory Retirement Appeal Bd.*, 463 Mass. 333, 344, 974 N.E.2d 46 (2012). Thus, a valid discovery sanction in an administrative hearing, carefully weighing the issue on a subject within their expertise, satisfies the substantial evidence test. See *Automobile Insurers Bureau* v. *Commissioner of Ins.*, 430 Mass. 285, 291, 718 N.E.2d 830 (1999).

Discussion. CRAB's decision allowing the board to recover retirement benefits paid to Daley from 2007 to 2010, arose from Daley's repeated noncompliance with administrative discovery orders, and the consequent adverse inference pursuant to 801 Code Mass. Regs. § 1.01(8)(i)(1). The board argues that CRAB erred because CRAB rejected evidence of Daley's excess income submitted by the board which would have increased the amount of recovery to $350,927.03. While CRAB acknowledged that Daley's compliance with discovery may have resulted in a different outcome, CRAB correctly explained why the amount suggested by the board would have resulted in an excessive sanction.

Like other adjudicatory bodies, CRAB is charged with determining what the just and appropriate relief is for sanctionable conduct

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Public Employment Retirement Administration Commission (PERAC) failed to file complaints within the thirty-day period, the CRAB decision became final against them, and the Superior Court had no jurisdiction to consider judicial review. See *Friedman* v. *Board of Registration in Med.*, 414 Mass. 663, 665-666, 609 N.E.2d 1223 (1993). "With extremely rare exceptions not relevant here, failure to timely file is thus typically an absolute bar to a plaintiff's ability to obtain judicial review of a final agency action." *Herrick* v. *Essex Regional Retirement Bd.*, 68 Mass. App. Ct. 187, 189-190, 861 N.E.2d 32 (2007). See G. L. c. 260, § 36 (allowing party to "relate back" to original complaint for counterclaims not cross claims). See *Doyle* v. *Department of Indus. Accidents*, 50 Mass. App. Ct. 42, 47 n.6, 734 N.E.2d 1187 (2000) ("[A]n action for declaratory relief cannot be used to avoid the time bar consequences of failure to pursue the appropriate form of judicial review or appeal). Accordingly, we need not reach Daley's or PERAC's remaining arguments and expressly do not decide those issues.

and need not apply the harshest sanction even when a party acts in bad faith. See 801 Code Mass. Regs. § 1.01(8)(i). See also [*4] *Anderson* v. *Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir.), cert. denied, 498 U.S. 891, 111 S. Ct. 233, 112 L. Ed. 2d 193 (1990) (judges should "take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms"). Accordingly, we review administrative discovery sanctions not under the strictest standard, but only for abuse of discretion. *Augis Corp. v. Massachusetts Commn. Against Discrimination*, 75 Mass. App. Ct. 398, 404-405, 914 N.E.2d 916 (2009) ("regulation of the administrative discovery process lies within the sound exercise of the hearing officer's discretion, just as regulation of the discovery process in judicial proceedings lies within the sound exercise of judicial discretion"). Here, the sanctions limiting recovery to the benefits paid to Daley for the years that he received excess earnings under G. L. c. 32, § 91(*b*), appropriately balanced the parties' positions to reach a fair outcome. We find no abuse of discretion in CRAB's conclusion that these considerable sanctions sufficed.

Conversely, an examination into the board's calculation of Daley's excess earnings shows it clearly "exceed[ed] the bounds of reasonableness." See *Henshaw* v. *Travelers Inc.*, 377 Mass. 910, 911, 386 N.E.2d 1029 (1979). The board's calculation does not purport to be the amount of excess income earned by Daley, but instead the gross payments made to Daley's consulting company by Massachusetts towns. The board incorrectly contends that his gross amount can be substituted [*5] for Daley's individual earnings. However, such calculation ignores ubiquitous business expenses including, but not limited to, employee wages, taxes, benefits, insurance, location costs, and maintenance costs. Accordingly, the board's suggestion that Daley personally earned every penny his company grossed is clearly erroneous. See *Plasko* v. *Orser*, 373 Mass. 40, 43-44, 364 N.E.2d 1220 (1977). See also *Wiedmann* v. *Bradford Group, Inc.*, 444 Mass. 698, 706, 831 N.E.2d 304 (2005). Remand is therefore unnecessary because CRAB's calculation of recovery limited to the benefits paid to Daley from 2007 to 2010 as a result of sanctions did not preclude meaningful judicial review and satisfied the substantial evidence test.

Judgment affirmed.

By the Court (Rubin, Lemire & Shin, JJ.[3]),

Entered: February 16, 2018.

[3] The panelists are listed in order of seniority.

SALIBA V. WORCESTER

No. 16-P-591

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 408*; 87 N.E.3d 100**
2017 Mass. App. LEXIS 143***

February 14, 2017, Argued; October 27, 2017, Decided

Prior History: [***1] Worcester. CIVIL ACTION commenced in the Superior Court Department on March 27, 2015.

A motion to dismiss was heard by *James R. Lemire,* J.

Case Summary

Overview

HOLDINGS: [1]-The trial court did not err in granting defendant city's motion to dismiss plaintiff's suit alleging it violated Mass. Gen. Laws ch. 149, § 19B by using information from his polygraph examination with the state police to bypass him for employment with the fire department; because the city did not condition his eligibility for employment on his undergoing a lie detector test, it did not violate § 19B; [2]-Plaintiff was not entitled to relief under the Employee Polygraph Protection Act (EPPA), 29 U.S.C.S. § 2001 et seq.; although the EPPA prohibited employers from using or inquiring about the results of any lie detector test of any employee or prospective employee, it applied only to nongovernmental employers.

Outcome

The judgment was affirmed.

Counsel: *Allyson H. Cohen* for the plaintiff.

William R. Bagley, Jr., Assistant City Solicitor, for the defendant.

Judges: Present: GREEN, MEADE, & AGNES, JJ.

Opinion by: AGNES

Opinion

[**102] AGNES, J. Massachusetts law prohibits employers, public as well as private, from subjecting applicants for employment, as well as employees, to a "lie detector test," whether the test is administered in this State or elsewhere. G. L. c. 149, § 19B.[1] The statute includes safeguards for employees who assert their rights, provides criminal penalties for those who violate the statute, and permits persons aggrieved by a statutory violation to bring a civil [*409] action against the violator for injunctive relief and damages.[2] This appeal requires us to address a question of first impression, namely, whether § 19B(2) prohibits a Massachusetts employer from considering the results of a lie detector test

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[1] The statute defines the phrase "lie detector test" as

> "any test utilizing a polygraph or any other device, mechanism, instrument or written examination, which is operated, or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual."

G. L. c. 149, § 19B(1), as appearing in St. 1985, c. 587, § 1.

[2] General Laws c. 149, § 19B(2), as appearing in St. 1985, c. 587, § 1, reads as follows:

> "It shall be unlawful for any employer or his agent, with respect to any of his employees, or any person applying to him for employment, including any person applying for employment as a police officer, to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations.
>
> "(*a*) The fact that such lie detector test was to be, or was, administered outside the commonwealth for employment within the commonwealth shall [***3] not be a valid defense to an action brought under the provisions of subsection (3) or (4)."

administered lawfully by an out-of-State employer in connection with an individual's earlier application for employment in another State.[3] For the reasons [**103] that follow, we conclude that § 19B(2) does not apply in the circumstances [***2] of this case, and accordingly, we affirm the judgment dismissing the plaintiff's complaint.

The plaintiff, Philip Saliba, alleges that the defendant, the city of Worcester (city), violated G. L. c. 149, § 19B(2), by obtaining and referring to a copy of the plaintiff's lie detector (polygraph) test results from his application for a job with the Connecticut State police (CSP). The judge below allowed the defendant's motion to dismiss under Mass.R.Civ.P. 12(b)(6), 365 Mass. 747 (1974), and judgment entered accordingly. The plaintiff filed a timely appeal.

Background. 1. *2007 CSP and Worcester police department applications*. The plaintiff's claim is based on the following series of events, which are summarized in his complaint. In 2007, the plaintiff, an honorably discharged United States Marine Corps veteran, was working full time as a plumber. He applied for a job with the CSP. As part of the hiring process, the plaintiff volun-[*410] tarily underwent a polygraph examination.[4] On January 18, 2008, the plaintiff was informed that the reason he was not hired by the CSP was his past use of anabolic steroids.[5] The plaintiff also applied for a job with the Worcester police department (WPD) around the same time. On or about January 23, 2008, the WPD requested from [***4] the CSP a copy of the plaintiff's employment application, the CSP findings, and the results of the polygraph examination administered by CSP. The polygraph test results were sent to the WPD the following day. After the WPD completed its own investigation of the plaintiff, which included a personal interview, the chief of police forwarded to the city manager a recommendation that the plaintiff be bypassed[6] for the job based at least in part on the results of the CSP polygraph test.[7]

2. *2011 Worcester fire department application*. In October, 2011, the plaintiff applied for a job with the Worcester fire department (WFD). On March 30, 2012, the plaintiff was bypassed for a position based at least in part on the results of the CSP polygraph test.[8] The plaintiff appealed

[3] We are not called upon and do not express any opinion about the scientific validity of various instruments and technologies that may be used to detect whether a subject is telling the truth. In *Commonwealth* v. *Mendes*, 406 Mass. 201, 212, 547 N.E.2d 35 (1989), the Supreme Judicial Court ruled "that polygraphic evidence … is inadmissible in criminal trials in this Commonwealth either for substantive purposes or for corroboration or impeachment of testimony."

[4] The report on the results of that polygraph examination are included in the record before us as an attachment to the plaintiff's opposition to the city's motion to dismiss. The CSP report is also referred to in the decision by the Civil Service Commission discussed *infra*.

[5] Other than the polygraph report, none of the materials from CSP hiring process are included in the record appendix.

[6] We do not use the term "bypass" in reference to passing over the candidate whose name appears highest on a certification for a civil service position. See G. L. c. 31, § 27; *Bielawski* v. *Personnel Administrator of the Div. of Personnel Admin.*, 422 Mass. 459, 459-460, 663 N.E.2d 821 (1996). We simply use the term, as the parties have in their briefs and record appendix, to mean that the city determined not to make an offer of employment to the plaintiff.

[7] The WPD's employment investigation report noted that during his interview, the plaintiff several times gave answers contradictory to answers he gave during his employment process with the CSP. The report also noted that when confronted with the conflicting information, the plaintiff would change his responses. Based on this, the report concluded that "[n]ot only can [the plaintiff's] *honesty* and *integrity* be questioned at times, the *consistency* to his answers leave doubt."

[8] Contrary to the plaintiff's claims, nothing in the record shows that he was considered by the WFD to be "number 2" on the list of potential candidates. Early on in his interview for a position with the WFD, the plaintiff disclosed his application for a job with the CSP, including that he had undergone a polygraph examination. He stated that he had been bypassed for that job due to his disclosure that he had taken anabolic steroids in the past. At the end of the interview, the plaintiff mentioned his application for employment with the WPD. As a result, the interviewer contacted the WPD and obtained information about the WPD's investigation of the plaintiff. The record indicates that the WFD's investigation concluded that the plaintiff should be bypassed for a job due to his "issues with anger and alcohol coupled with his selective memory about which issues in his past to bring forward." Subsequently, a letter from the city's director of human resources to the city manager listed the plaintiff under the heading "Bypassed Candidates," and stated that the plaintiff was bypassed due to his negative history, including criminal and domestic violence incidents and issues with alcohol, as well as his prior unsuccessful attempts to obtain employment with the CSP and the WPD.

[**104] this bypass to the [*411] Civil Service Commission, but later withdrew his appeal.

3. *2013 WFD application.* The plaintiff again applied for a job with the WFD in July, 2013. The plaintiff was interviewed a second time. In connection with the plaintiff's 2013 application, the WFD obtained summaries of the investigations conducted in connection with the plaintiff's 2008 application to the WPD and his 2011 [***5] application to the WFD. Of the applicants for the 2013 position, the plaintiff was the only person who had polygraph test results in his file. The plaintiff was again bypassed, based at least in part on the results of the polygraph test administered by the CSP.[9]

The plaintiff also appealed this bypass to the Civil Service Commission (commission).[10] After three days of hearings, the commission issued its decision. The commission concluded that the city "did not require [the plaintiff] to undergo [a polygraph] exam." The city learned about the test taken by the plaintiff when it became aware that the plaintiff had previously applied for employment with the CSP and requested a copy of the plaintiff's file including any polygraph test results. The commission ruled that this did not violate G. L. c. 149, § 19B.[11]

During the pendency of the plaintiff's appeal to the commission, he filed the present complaint in Superior Court alleging that the city violated G. L. c. 149, § 19B, by using information from [*412] his polygraph examination with the CSP to bypass him for employment with the WFD in 2011 and 2013.[12] The judge allowed the city's motion to dismiss the plaintiff's complaint "for essentially the reasons stated in [its] motion."

*Discussion [***6]*. 1. *Standard of review.* In reviewing a decision allowing a motion to dismiss under Mass.R.Civ.P. 12(b)(6), "the allegations of the complaint, as well as such inferences as may be [**105] drawn therefrom in the plaintiff's favor," are taken as true. *Golchin* v. *Liberty Mut. Ins. Co.*, 460 Mass. 222, 223, 950 N.E.2d 853 (2011), *S.C.*, 466 Mass. 156, 993 N.E.2d 684 (2013), quoting from *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45, 809 N.E.2d 1017 (2004). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief. … " *Golchin*, *supra*, quoting from *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008). "We review the allowance of a motion to dismiss de novo." *Goodwin* v. *Lee Pub. Schs.*, 475 Mass. 280, 284, 56 N.E.3d 777 (2016).

2. *Section 19B.* Under G. L. c. 149, § 19B(2), as appearing in St. 1985, c. 587, § 1, it is

> "unlawful for any employer … , with respect to any of his employees, or any person applying to him for employment, including any person applying for employment as a police officer, to subject such person to, or request such person to take a lie detector test within or without the commonwealth, or to discharge, not hire, demote or otherwise discriminate against such person for the assertion of rights arising hereunder. This section shall not apply to lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations."

Section 19B(2)(*a*) provides that "[t]he fact that such lie detector test was to be, or was,

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[9]The record contains a 2014 letter from the city's director of human resources to the city manager stating the reasons for the bypass. The director stated that the plaintiff "had a poor interview," and that he "admitted he would have lied to the investigators about his history of drug use and almost anything if they did not have the information already on file." The director concluded that the plaintiff's "admission to purposely omitting information relative to his background demonstrates his intent to mislead the investigators, a total disregard for the law, a pattern of irresponsibility and dishonesty."

[10] See *Beverly* v. *Civil Serv. Commn.*, 78 Mass. App. Ct. 182, 187-188, 936 N.E.2d 7 (2010) (describing commission appeal procedure).

[11] In addition, the commission addressed some of the matters contained in the CSP's polygraph examination report that the WFD had referred to in its decision to bypass the plaintiff.

[12] The plaintiff did not include the WPD's bypass of his 2007 application in his complaint, as it was barred by the statute of limitations. His appeal here only concerns his 2011 and 2013 applications to the WFD.

administered outside the [***7] commonwealth for employment within the commonwealth shall not be a valid defense" to an action brought under the statute. Further, § 19B(2)(*b*) requires that

> "[a]ll applications for employment within the commonwealth shall contain the following notice which shall be in clearly legible print:
>
> [*413] "'It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability.'"

Initial violations of G. L. c. 149, § 19B, are punishable by a fine. Subsequent violations are further subject to a fine or imprisonment for not more than ninety days, or both. See G. L. c. 149, § 19B(3). Anyone aggrieved by a violation of § 19B(2) may initiate a civil action for injunctive relief and damages, including treble damages for any loss of wages or other benefits, as well as costs of litigation and attorney's fees. See G. L. c. 149, § 19B(4).

The plaintiff argues that the Legislature enacted G. L. c. 149, § 19B, to protect applicants for employment both from being required to take a lie detector test and from a potential employer's use of test results in the hiring decision, regardless of when and by whom such a test is administered. In response, the city argues that [***8] § 19B only prohibits an employer from "subjecting" an applicant "to, or request[ing] such person to take a lie detector test"; § 19B(2) does not specifically prohibit an employer from using preexisting results from tests not requested or administered by the employer. Because the city did not "subject" the plaintiff to a lie detector test or condition his employment on his agreeing to take such test, the city maintains that its alleged use of the CPS polygraph test results did not violate § 19B.

"[T]he primary source of insight into the intent of the Legislature is the language of the statute." *International Fid. Ins. Co.* v. *Wilson*, 387 Mass. 841, 853, 443 N.E.2d 1308 (1983). "A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the [**106] aim of the Legislature unless to do so would achieve an illogical result." *Sullivan* v. *Brookline*, 435 Mass. 353, 360, 758 N.E.2d 110 (2001). See G. L. c. 4, § 6, Third. Here, the language of G. L. c. 149, § 19B, is unambiguous. The statute states that an employer may not "subject" a person applying for employment to, or "request" that such person take, a lie detector test. The city did not do so in this case. Instead, upon learning of the plaintiff's prior application to the CSP, which he voluntarily disclosed, the city requested the plaintiff's employment application and [***9] the CSP's findings, which included a written report concerning the results of his polygraph examination. An appointing authority, here the city, may use any information it has obtained through an impartial and reasonably thorough [*414] independent review as a basis for bypass. See *Beverly* v. *Civil Serv. Commn.*, 78 Mass. App. Ct. 182, 189, 936 N.E.2d 7 (2010). "In the task of selecting public employees of skill and integrity, appointing authorities are invested with broad discretion." *Cambridge* v. *Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 304-305, 682 N.E.2d 923 (1997). Therefore, because the city did not condition the plaintiff's eligibility for employment on his undergoing a lie detector test, it did not violate the express terms of § 19B.[13]

The plaintiff argues in the alternative that even if G. L. c. 149, § 19B, by its express terms does not prohibit the use of lie detector test results, the statute establishes a public policy against the use of such results. The plaintiff points to the Legislature's most recent amendment of § 19B in 1985, which extended subsection (2) of the statute to prohibit an employer from requiring an applicant for

[13] Similarly, the plaintiff's argument that G. L. c. 149, § 19B, prohibits the use of the *results* of a lie detector test and prohibits such tests even if they are conducted outside the Commonwealth, see G. L. c. 149, § 19B(1)(*a*), (2), falls short. As with § 19B(2), those actions are only prohibited when done as a requirement of or prerequisite to employment. That is not the case here.

employment to take a lie detector test "within or without the Commonwealth." G. L. c. 149, § 19B(2), as appearing in St. 1985, c. 587, § 1. For two reasons, the plaintiff's argument is unavailing. First, if the Legislature intended to extend the prohibitions of § 19B to all *uses [***10]* of lie detector tests or their results, as opposed to a prohibition against requiring an applicant for employment to take a lie detector test in Massachusetts or in another State, it had the opportunity to do so in the 1985 amendment. The language of that 1985 amendment, however, modifies only the prohibition against subjecting a job applicant to, or requesting that such person take, such a test, and does not address the use of lie detector test results. See *Jancey* v. *School Comm. of Everett*, 421 Mass. 482, 495, 658 N.E.2d 162 (1995). Additionally, there is language in the statute that strongly suggests that the Legislature's intent was to limit the statute's reach only to lie detector tests administered in relation to employment in Massachusetts. See G. L. c. 149, § 19B(2)(*a*) ("The fact that such lie detector test was to be, or was, administered outside the commonwealth *for employment within the commonwealth* shall not be a valid defense to an action brought under the provisions of subsection [3] or [4]" [emphasis supplied]).

Second, cases decided since the original enactment of G. L. c. 149, § 19B, see St. 1959, c. 255, make clear that the use of lie [*415] detector tests is not contrary to the public policy of the Commonwealth. For example, in *Baker* v. *Lawrence*, 379 Mass. 322, 326-327, 409 N.E.2d 710 (1979), the Supreme Judicial Court recognized that notwithstanding the fact that § 19B [***11] [**107] prohibits all employers, public or private, from requiring or even requesting that an applicant for employment (including an applicant for a position as a police officer) submit to a lie detector test, by its express terms the statute exempts "lie detector tests administered by law enforcement agencies as may be otherwise permitted in criminal investigations."[14] In *Baker*, the court recognized that the employer police department could require its officers to submit to a lie detector test as part of the department's investigation into a crime alleged to have been committed by one or more of its police officers. *Id.* at 327. "Such requests, followed by administration of tests where the subjects agree, are common incidents of criminal investigations, and are permitted." *Ibid.* (quotation omitted). See *Patch* v. *Mayor of Revere*, 397 Mass. 454, 456-457, 492 N.E.2d 77 (1986) (compelling police officers suspected of crime to submit to lie detector test or face discharge does not violate due process); *Local 346, Intl. Bhd. of Police Officers* v. *Labor Relations Commn.*, 391 Mass. 429, 440, 462 N.E.2d 96 (1984) (use of lie detector tests in criminal investigations in which police officer is suspect is not contingent on collective bargaining process).[15,16]

3. *Federal law*. The plaintiff also relies on Federal law, in particular, the Employee Polygraph Protection Act (EPPA), 29 [*416] U.S.C. §§ 2001 et seq. (2012), as support for his argument. The EPPA, which was adopted in 1988, bars an employer from requiring or requesting that a prospective employees submit to a lie detector test. However, unlike G. L. c. 149, § 19B, the EPPA also makes it "unlawful"

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[14] "The Legislature, although generally averse to tests forced by employers upon their employees, here recognized an evident interest of the employer in applying some pressure to assist an investigation leading to exoneration of the employee or the opposite." *Baker* v. *Lawrence*, 379 Mass. at 327.

[15] Of course, whether a police officer who refuses a lawful order to submit to a lie detector test can be disciplined or discharged is a separate question. "A public employer has authority to compel an employee, under threat of discharge for noncooperation, to answer questions reasonably related to the employee's ability and fitness to perform his official duties." *Patch* v. *Mayor of Revere*, 397 Mass. at 455. In *Carney* v. *Springfield*, 403 Mass. 604, 611, 532 N.E.2d 631 (1988), the Supreme Judicial Court explained that a grant of transactional immunity is necessary to overcome a public employee's privilege against self-incrimination under art. 12 of the Massachusetts Declaration of Rights so as to compel the public employee to answer questions relating to a criminal investigation. See *Furtado* v. *Plymouth*, 451 Mass. 529, 530-532, 888 N.E.2d 357 (2008).

[16] A private employer also may require an employee who is suspected of a crime during an ongoing criminal investigation to submit to a police-administered lie detector test or face discharge from employment. See *Bellin* v. *Kelley*, 435 Mass. 261, 271-272, 755 N.E.2d 1274 & n.14 (2001).

for an employer to "use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee." 29 U.S.C. § 2002(2) (2012). The plaintiff argues that "[b]ecause the [EPPA's] meaning … is clear and unambiguous, its pla[i]n language controls our analysis." We disagree.

General Laws c. 149, § 19B, was initially enacted by the Legislature in 1959, and last amended in 1985. The EPPA, on the other hand, was adopted in 1988. See Pub. L. No. 100-347, §§ 2 et seq., 102 Stat. 646 (1988). The EPPA [***12] expressly limits its reach to nongovernmental employers: "This chapter shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government." 29 U.S.C. § 2006(a) (2012). [**108] Federal law, therefore, provides no support for the plaintiff in this case.

Conclusion. For the above reasons, the judgment dismissing the complaint is affirmed.

So ordered.

STATE BOARD OF RETIREMENT V. O'HARE

No. 16-P-965

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 555; 91 N.E.3d 677***
*2017 Mass. App. LEXIS 161****

September 8, 2017, Argued; December 15, 2017, Decided

STATE BOARD OF RETIREMENT *vs*. **BRIAN O'HARE** & others.[1]

Notice: Supplemented April 16, 2018. Further appellate review granted, 479 Mass. 1103 (2018).

Subsequent History: Appeal granted by State Bd. of Ret. v. O'Hare, 2018 Mass. LEXIS 227 (Mass., Mar. 29, 2018)

Prior History: [***1] Suffolk. CIVIL ACTION commenced in the Superior Court Department on January 29, 2015.

The case was heard by *Peter M. Lauriat*, J., on motions for judgment on the pleadings.

Case Summary

Overview

HOLDINGS: [1]-A State police sergeant's pension was properly forfeited under Mass. Gen. Laws ch. 32, § 15(4) after he pled guilty to using the Internet to attempt to coerce and entice a child under 18 to engage in unlawful sexual activity under 18 U.S.C.S. § 2422(b) as there was a legal link between his position and the crime; [2]-An invitation to find that the laws applicable to the office or position of State trooper included the rules and regulations of a code of conduct was rejected; [3]-The sergeant's crime involved intentional action that would have caused significant harm to a child in violation of his role as a trooper to protect children, and violated the public's trust and the integrity of the State police; [5]-The sergeant's claim that as he was the patrol supervisor and shift commander, he was not responsible for policing crimes against children was rejected.

Outcome

Judgment reversed. New judgment to enter in

[1] Justices of the Cambridge District Court Department (as nominal parties).

the trial court for board.

Counsel: *David R. Marks*, Assistant Attorney General, for State Board of Retirement.

Eric B. Tennen for Brian O'Hare.

Judges: Present: RUBIN, NEYMAN, & HENRY, JJ.

Opinion by: HENRY

Opinion

[**678] **HENRY**, J. Brian O'Hare was a sergeant with the State police when he committed the Federal crime of using the Internet [**679] to entice a person under eighteen to engage in unlawful sexual activity, a charge to which he subsequently pleaded guilty. This case presents the question whether the State Board of Retirement (board) correctly ordered forfeiture of O'Hare's retirement allow- [*556] ance under G. L. c. 32, § 15(4).[2] General Laws c. 32, § 15(4), inserted by St. 1987, c. 697, § 47, provides that "[i]n no event shall any member [of the State employees' retirement system] after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance." Because we hold that O'Hare's actions had a direct legal link to his position with the State police, we conclude that O'Hare's conviction [***2] required forfeiture pursuant to § 15(4).

Background. Brian O'Hare served with the State police for twenty years and, in 2006, held the rank of sergeant and was a patrol supervisor and shift commander. Between August, 2005, and February, 2006, O'Hare communicated online with an individual whom he believed to be a fourteen year old boy. O'Hare used a family computer while off duty to communicate with the "youth." The youth was later revealed to be an undercover Federal Bureau of Investigation (FBI) agent.

In February, 2006, O'Hare was arrested by the FBI after arriving at a prearranged meeting place to meet the youth for sexual purposes. In October, 2006, O'Hare resigned from the State police while under Federal indictment. In February, 2007, O'Hare pleaded guilty to one charge of using the Internet to attempt to coerce and entice a child under the age of eighteen to engage in unlawful sexual activity, in violation of 18 U.S.C. § 2422(b).

After O'Hare's conviction, the board held a hearing and denied O'Hare a retirement allowance under G. L. c. 32, § 15(4).[3] O'Hare filed a timely complaint for judicial review in the District Court, where a judge of that court reversed the board's decision on the ground that O'Hare's offense [***3] did not involve a violation of law applicable to his position with the State police. The board filed for certiorari review by the Superior Court, where a judge upheld the District Court's decision. The board then appealed to this court.

[*557] *Discussion*. Judicial review pursuant to G. L. c. 249, § 4, is in the nature of certiorari and is limited, "allow[ing] a court to 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the [member]. … In its review, the court may rectify only those errors of law which have resulted in manifest injustice to the [member] or which have adversely affected the real interests of the general public.'" *State Bd. of Retirement* v. *Bulger*, 446 Mass. 169, 173, 843 N.E.2d 603 (2006), quoting from *Massachusetts Bay Transp. Authy.* v. *Auditor of the Commonwealth*, 430 Mass. 783, 790, 724 N.E.2d 288 (2000).

As the purpose and operation of § 15(4) has been recently and thoroughly reviewed in *State Bd. of Retirement* v. *Finneran*, 476 Mass. 714, 71 N.E.3d 1190 (2017), we proceed directly to the question whether there was a direct factual or legal link [**680] between O'Hare's criminal conviction and his position. Given that there was no evidence that O'Hare used

[2] This case was paired for argument with *Dell'Isola* v. *State Bd. of Retirement*, 92 Mass. App Ct. 547 (2017).

[3] After the hearing officer entered recommended findings and a decision, O'Hare filed a motion for reconsideration after this court issued decisions in *Retirement Bd. of Maynard* v. *Tyler*, 83 Mass. App. Ct. 109, 112-113, 981 N.E.2d 740 (2013), and *Durkin* v. *Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 981 N.E.2d 763 (2013). The hearing officer denied the motion. The board then accepted the recommended findings and decision.

the resources of his position to commit the crime, the board focuses on the existence of a legal link.

A legal link exists "when a public employee commits a crime directly implicating a statute that is specifically applicable to the employee's position. [***4] … The requisite direct legal link is shown where the crime committed is 'contrary to a central function of the position as articulated in applicable laws.'" *Finneran*, 476 Mass. at 721, quoting from *Garney* v. *Massachusetts Teachers' Retirement Sys.*, 469 Mass. 384, 391, 14 N.E.3d 922 (2014). Thus, for example, the Supreme Judicial Court held that a member forfeited his pension as a city alderman when he, in his subsequent position as register of probate, embezzled funds from that office in violation of the Code of Professional Responsibility for Clerks of Courts. See *Retirement Bd. of Somerville* v. *Buonomo*, 467 Mass. 662, 664-666, 6 N.E.3d 1069 (2014).

Similarly, in *Bulger*, *supra*, forfeiture was warranted when a clerk-magistrate committed perjury and obstruction of justice in an arguably personal matter. When he committed those crimes "he violated the fundamental tenets of the code and of his oath of office" — at the heart of which "is the unwavering obligation to tell the truth, to ensure that others do the same through giving of oaths to complainants, and to promote the administration of justice." *Id* at 179. "[T]he nature of [his] particular crimes cannot be separated from the nature of his particular office when what is at stake is the integrity of our judicial system," and forfeiture was required. *Id.* at 180.

Recently, in *Essex Regional Retirement Bd.* v. *Justices of the Salem Div. of the Dist. Ct. Dept. of the Trial Court*, 91 Mass. App. [*558] Ct. 755, 756-757, 79 N.E.3d 1090 (2017), this court found that forfeiture was required where a police officer, while [***5] off duty, used a personal firearm to threaten his wife's life and, after she left the home, fired into a door. Such action "directly violated the public's trust and was a repudiation of his official duties." *Id.* at 760.

Here, the board invites us to conclude that the laws applicable to the office or position of State trooper include the rules and regulations of a code of conduct. These regulations require, among other things, that troopers avoid conduct "which brings the Massachusetts State [p]olice into disrepute or reflects discredit upon the person as a member of the Massachusetts State [p]olice." The regulations also require State troopers to obey all of the laws of the United States and of the local jurisdiction in which the trooper is present.[4] Because this would have the effect of making any violation of law mandate forfeiture, which the Supreme Judicial Court has already held is not permissible, see *Bulger*, 446 Mass. at 178-179, we decline the invitation.

Nonetheless, in evaluating forfeiture cases involving law enforcement personnel, we have acknowledged the special position of law enforcement officers:

> "Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that [***6] brings honor and respect for rather than public distrust of law enforcement personnel. … In accepting employment by the public, they implicitly agree that they will not engage in [**681] conduct which calls into question their ability and fitness to perform their official responsibilities."

Attorney Gen. v. *McHatton*, 428 Mass. 790, 793-794, 705 N.E.2d 252 (1999), quoting from *Police Commr. of Boston* v. *Civil Serv. Commn.*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27 (1986). "This applies to off-duty as well as on-duty officers." *Falmouth* v. *Civil Serv. Commn.*, 61 Mass. App. Ct. 796, 801, 814 N.E.2d 735 (2004).

O'Hare's position as a law enforcement officer distinguishes this case from other cases in

[4] Pursuant to G .L. c. 22C, §§ 3 and 10, the Colonel of the State police has promulgated rules and regulations that function as a code of conduct.

which a member was convicted of a crime involving children, but the Supreme Judicial Court and this court in those cases held that the criminal offense did not fall within the purview of § 15(4). In *Garney*, 469 Mass. at 394-395, the Supreme Judicial Court held that pension forfeiture was not [*559] warranted where a teacher possessed child pornography, a crime that endangers children generally, but did not use his status as a teacher or involve the students he taught, or even involve the district for which he worked. Similarly, in *Tyler*, 83 Mass. App. Ct. 109, 113, 981 N.E.2d 740 (2013), this court held that the narrow scope of § 15(4) precluded pension forfeiture for a fire fighter who had sexually abused young boys. His essential duty as a fire fighter was to extinguish fires and to [***7] protect life and property. In *Tyler*, *Garney*, and *Essex Regional Retirement Bd.*, the fundamental nature of each position was key in determining pension forfeiture.

As in *Essex Regional Retirement Bd.*, 91 Mass. App. Ct. at 760, we face the difficulty of considering the fact that not all violations of law necessarily mandate forfeiture, see *Bulger*, 446 Mass. at 178-179, and the fact that "police officers voluntarily undertake to adhere to a higher standard of conduct . … than ordinary citizens." *Essex Regional Retirement Bd.*, 91 Mass. App. Ct. at 761.

When pressed to determine the line, the board at oral argument ventured that a conviction of trespassing or perhaps operating a motor vehicle while under the influence might not warrant pension forfeiture. This may have been an effort to delineate a moral or mens rea line in various crimes. We need not speculate on the full reach of § 15(4) for crimes committed by State troopers, however, because O'Hare's crime involved intentional action that would cause significant harm to a child.[5] O'Hare's egregious actions are in violation of the fundamental tenets of his role as a State police officer, where the protection of the vulnerable, including children, is at the heart of a police officer's role, and this repudiation of his official duties violated the public's trust and the integrity [***8] of the State police. See *Bulger*, 446 Mass. 180.[6] See also *Durkin* v. *Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 119, 981 N.E.2d 763 (2013) ("[A]t the heart of a police officer's role is the unwavering [*560] obligation to protect life").[7] O'Hare's argument that his position [**682] of patrol supervisor and shift commander at the time of the offense meant that he was not responsible for policing crimes against children is not persuasive, because it relies on the happenstance of a particular job assignment at the time of the crime and parses too fine a line for the central tenets of a law enforcement officer's position.

The judgment is reversed, and a new judgment shall enter in the Superior Court in favor of the board.

So ordered.

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[5] Similarly, because the member here was a State trooper, we need not confront what could be a difficult question of determining who is a law enforcement officer. For example, the Attorney General is "the chief lawyer and law enforcement officer of the Commonwealth of Massachusetts," and therefore, arguably at least, some assistant attorneys general are law enforcement officers. See https://www.mass.gov/orgs/office-of-attorney-general-maura-healey [https://perma.cc/9WMH-S3TC].

[6] We reiterate that not every criminal conviction, and not even every conviction involving a law enforcement officer, necessitates forfeiture. See *Durkin*, 83 Mass. App. Ct. at 119 n.5.

[7] In *Durkin*, 83 Mass. App. Ct. at 119, forfeiture was similarly required when a police officer shot a fellow officer using a department-issued firearm. Although the court discussed the fundamental nature of the police officer's position, forfeiture in *Durkin* was based on a factual link, not a legal link.

TOWN OF HULL V. HUGHES

17-P-226

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 1120
*2017 Mass. App. Unpub. LEXIS 1127**

December 28, 2017, Entered

TOWN OF HULL vs. TERRANCE L. HUGHES, trustee.[1]

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792, (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

Disposition: Order denying motion to vacate affirmed.

Judges: Milkey, Henry & Wendlandt, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Don Perry, the apparent successor in interest to the named defendant, appeals from an order of the Land Court denying his motion to vacate a judgment barring the right of redemption over a tax taking on a property.[2] We affirm.

Background. In 1979, the town of Hull (town) assessed a tax taking for unpaid real estate taxes on a property, and recorded that taking at the Plymouth County registry of deeds. In 2001, Terrance Hughes,[3] the trustee of the Hughes Realty Trust, acquired the property and recorded the deed. In 2012, the town filed a complaint in the Land Court against Hughes to foreclose the tax lien. A court-appointed title examiner filed a report in the case, identifying Hughes as the interested party entitled to notice. In 2014, Hughes was served with a court-issued citation indicating that a complaint had been filed and instructing Hughes of the opportunity to file a written appearance and an answer with the court. In 2015, Hughes filed an answer and claimed the right to redeem the tax taking. The town later filed a motion requesting that the court enter a finding allowing redemption, and the court entered a finding [*2] allowing Hughes to redeem the taking on or before September 3, 2015, by paying the town the sum of $107,792.87, with interest plus court costs and legal fees. Hughes failed to pay the amount

[1] Of the Hughes Realty Trust.

[2] As an initial matter, the town contends that Perry did not have standing to bring a motion to vacate the judgment because he did not allege or prove he was a party having a legal interest in the property. The Land Court did not address the issue, and we assume without deciding that Perry did have standing to make the motion and to appeal.

[3] After the formation of the trust and the conveyance of the property to the trust, trustee Terrance Hughes changed his surname to Surles. We refer to him as Hughes only for continuity and clarity.

and, on September 8, 2015, the town filed a motion requesting a final judgment. A final judgment barring all rights of redemption entered on November 2, 2015.

On October 17, 2016, Perry, asserting that he owned the property, filed a motion to vacate the final judgment in the Land Court. That motion was denied, and Perry appealed.

Discussion. Petitions to vacate judgments of foreclosure "'are extraordinary in nature and ought to be granted only after careful consideration and in instances where they are required to accomplish justice.' *Lynch* v. *Boston*, 313 Mass. 478, 480, 48 N.E.2d 26 (1943)... . Allowance of a petition rests 'largely but not entirely in the discretion of the [Land Court].' *Lynch* v. *Boston*, *supra*, quoting from *Bucher* v. *Randolph*, 307 Mass. 391, 393, 30 N.E.2d 234 (1940). Consequently we review the denial of the petition for abuse of discretion and error of law." *Worchester* v. *AME Realty Corp.*, 77 Mass. App. Ct. 64, 67, 928 N.E.2d 656 (2010).

The Land Court docket entry denying the Perry's motion states that:

> "Perry has not demonstrated a willingness or ability to pay the tax indebtedness. The court will not exercise its discretion to Vacate Judgment without full payment as Don [*3] Perry or his predecessors have not availed themselves of reducing the amount of indebtedness through the abatement process."

Perry challenges this ruling on two grounds. First, Perry argues that the Land Court erred in denying the motion because the town improperly declared the property unbuildable while assessing it at a higher value, resulting in an unconstitutional taking of the defendant's property. Second, Perry argues that the judgment should have been vacated while litigation in another suit concerning the same property is ongoing. However, when Hughes responded to the town's complaint, he sought only the right to redeem the tax taking and did not challenge the validity of the taking itself. "If a person claiming an interest desires to raise any question concerning the validity of such a title, he shall do so by answer filed in the proceeding on or before the return day, or within such further time as may on motion be allowed by the court, or else be forever barred from contesting or raising the question in any other proceeding." G. L. c. 60, § 70, as appearing in St. 1935, § 5. Perry's claims regarding the validity of the title were therefore waived.

Furthermore, Perry seeks a remedy that must be [*4] sought through an application for abatement. See *Lynch* v. *Boston*, *supra* at 479-480 ("The exclusive remedy for overassessment is by application for abatement"). We therefore conclude that there was no abuse of discretion in denying the motion to vacate the judgment, where neither Perry nor his predecessors first sought relief through the abatement process.[4]

Order denying motion to vacate affirmed.

By the Court (Milkey, Henry & Wendlandt, JJ.[5]),

Entered: December 28, 2017.

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[4] To the extent that we do not address the appellant's other contentions, they "have not been overlooked. We find nothing in them that requires discussion." *Commonwealth* v. *Domanski*, 332 Mass. 66, 78, 123 N.E.2d 368 (1954).

[5] The panelists are listed in order of seniority.

WORCESTER REGIONAL RETIREMENT BOARD V. CONTRIBUTORY RETIREMENT APPEAL BOARD

No. 17-P-66

APPEALS COURT OF MASSACHUSETTS

92 Mass. App. Ct. 497; 88 N.E.3d 1169***
*2017 Mass. App. LEXIS 153****

October 11, 2017, Argued; November 29, 2017, Decided

WORCESTER REGIONAL RETIREMENT BOARD *vs.* **CONTRIBUTORY RETIREMENT APPEAL BOARD** & others.[1]

Prior History: [***1] Worcester. CIVIL ACTION commenced in the Superior Court Department on September 15, 2015.

The case was heard by *Shannon Frison*, J., on motions for judgment on the pleadings.

Disposition: Judgment affirmed.

Case Summary

Overview

HOLDINGS: [1]-Plaintiff retirement board (board) had to let a former member buy more creditable service, under Mass. Gen. Laws ch. 32, § 20(5)(c)(1) and (2), because it did not enroll him on the day he was eligible for membership, and he had no affirmative duty to ensure his enrollment on that date; [2]-This decision did not violate Mass. Gen. Laws ch. 32, § 3(3) because the statute did not apply, as the member neither failed to become nor elected not to become a member, so this was not a case of "late entry"; [3]-It was no error to order the board to reimburse a retirement system for benefits based on the member's first nine months of service, under Mass. Gen. Laws ch. 32, § 3(8)(c), when the board had no benefit of contributions for his membership for that time, because this was due to the board's failure to enroll him, and his uncredited service "pertained" to the retirement system.

Outcome

Judgment affirmed.

Counsel: *Michael Sacco* for the plaintiff.

Thomas F. Gibson for Middlesex County Retirement Board.

Judges: Present: MILKEY, MASSING, & DITKOFF, JJ.

Opinion by: MASSING

Opinion

[**1170] **MASSING**, J. The Worcester Regional Retirement Board (WRRB) appeals from a judgment of the Superior Court, which affirmed a decision of the Contributory Retirement Appeal Board (CRAB) requiring the WRRB to permit a former member to purchase nine additional months of creditable service.[2] At issue is whether the WRRB is responsible for not having enrolled the employee, Brian Pierce, as of the day he became eligible for membership, or whether Pierce had an affirmative obligation to ensure that he had been enrolled as of his start date. CRAB determined that the responsibility lay with the WRRB, not the employee; that the retirement system records should be corrected [*498] to reflect Pierce's nine months of uncredited membership; and that Pierce should be permitted to buy back the [***2] time of which he had erroneously been deprived. Discerning no legal error or abuse of discretion on CRAB's part, we affirm.

[1] Middlesex County Retirement Board; Brian Pierce.

[2] Neither CRAB nor Pierce has participated in this appeal. Their interests have been represented by the Middlesex County Retirement Board, the pension system of which Pierce was a member when he retired.

Background. Pierce began permanent, full-time employment as a third-class lineman for the Princeton Municipal Light Department, which is a member unit of the Worcester Regional Retirement System (WRRS), on December 6, 1982. On October 24, 1983, Pierce completed a new entrant enrollment form "[i]n order that [he] may be properly enrolled" in the WRRS.[3] [**1171] The WRRB stamped the form as received on November 18, 1983. The form correctly indicated that Pierce's full-time permanent employment had begun on December 6, 1982. The WRRB enrolled Pierce as a member as of September 1, 1983, crediting him with service prior to its receipt of his enrollment form, but not for the first nine months of his employment starting on December 6, 1982.

Pierce's service with the town of Princeton ended on May 1, 1986, when he took a similar position with the Middleborough Light Department. At that time, Pierce became a member of the Plymouth County Retirement System, and his funds in the WRRS, representing two years and eight months of service (September 1, 1983, to May 1, 1986) were transferred [***3] to the Plymouth system. After ten years and one month of service in Middleborough, Pierce went to work for the Littleton Light Department, and his funds within the Plymouth system were transferred to the Middlesex County Retirement System (MCRS). On June 30, 2008, after eleven years and nine months of service in Littleton, Pierce retired from service with superannuation retirement benefits through the MCRS.[4]

Shortly before his retirement, Pierce initiated a request to purchase from the WRRS the nine months of full-time service for which he had not received credit.[5] Following a series of communications among Pierce, the town of Princeton, the WRRB, and [*499] the MCRS, the WRRB declined to accept Pierce's request and denied liability for his noncontributing service period.

Pierce, joined by the MCRS, timely appealed from the WRRB's decision to the Division of Administrative Law Appeals (DALA). A DALA magistrate concluded that because Pierce correctly indicated his start date when he applied for membership, "the WRRB had notice of [his] membership status and eligibility to purchase that service as of the date he became a member." The magistrate further stated, "There was no additional onus on [Pierce] [***4] to be proactive and request to purchase said service at that time. [Pierce] was entitled to retroactive membership from the moment the WRRB accepted the enrollment form. The omission was an error of the board." Accordingly, the magistrate concluded that "the omission of [Pierce] from the system from his date of hire through September 16 [*sic*], 1983 was an error of the WRRB which must be corrected pursuant to G. L. c. 32, § 20(5)(*c*)(1)."

The WRRB appealed from the DALA magistrate's decision to CRAB. CRAB adopted the magistrate's findings and conclusions, adding, "Pierce's application for membership listed his date of hire and should have resulted in his enrollment [**1172] commencing on that date, with any makeup payments necessary. Under these circumstances he was not required to make a specific request to purchase those nine months of credible service."

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[3] Pierce dated the form October 24, *1982*. As the Princeton treasurer verified the form on October 24, 1983, and the form referenced a start date of December 6, 1982, it is most likely that Pierce misdated his signature.

[4] As of May 14, 2009, the Public Employee Retirement Administration Commission calculated that the WRRS was responsible for 10.84761 percent of Pierce's total service time, based on the two years and eight months between September 1, 1983, and May 1, 1986, and directed the WRRB to reimburse the MCRS $2,630.06 yearly toward Pierce's retirement allowance.

[5] A Division of Administrative Law Appeals magistrate decided the case on memoranda and documents without an evidentiary hearing. She enumerated "stipulations of fact" from those materials. She set forth that Pierce made the request to purchase his service in October, 2009. The CRAB incorporated the magistrate's "findings of fact" but further found that "Pierce's request to provide make-up payments for this time was made on or before May 12, 2008, prior to his retirement." The CRAB's finding in this regard is supported by documentary evidence in the record.

The WRRB sought judicial review of CRAB's decision under G. L. c. 30A, § 14, and a Superior Court judge affirmed CRAB's decision. This matter is before us on the WRRB's appeal from the Superior Court judgment.

Discussion. The standard of review of a CRAB decision in these circumstances is well established. "Appellate review under G. L. c. 30A, § 14, is limited to determining whether the agency's decision [***5] was unsupported by substantial evidence, arbitrary and capricious, or otherwise based on an error of law." *Arlington Contributory Retirement Bd*. v. *Contributory Retirement Appeal Bd.*, 75 Mass. App. Ct. 437, 441, 914 N.E.2d 957 (2009). We defer to CRAB's expertise, even when conducting de novo review of legal questions, see *ibid.*; *Haverhill Retirement Sys*. v. *Contributory Retirement Appeal Bd.*, 82 Mass. App. Ct. 129, 131, 971 N.E.2d 330 (2012), but "we are not bound by what we believe is an agency's erroneous interpretation of its statutory authority." *Bristol County Retirement Bd*. v. *Contributory Retirement Appeal Bd.*, 65 Mass. App. Ct. 443, 451, 841 N.E.2d 274 (2006).

CRAB concluded that the WRRB's failure to enroll Pierce as of his start date was an error subject to correction under G. L. c. 32, § 20(5)(*c*)(2). This section applies "[w]hen an error exists in the records maintained by the system or an error is made in computing a benefit and, as a result, a member or beneficiary receives from the system more or less than the member or beneficiary would have been entitled to receive had the records been correct or had the error not been made." G. L. c. 32, § 20(5)(*c*)(2), as appearing in St. 2000, c. 159, § 91. In such cases, "the records or error shall be corrected," the member shall make up any underpayment or be reimbursed for any overpayment, and future benefit payments are to be recalculated. *Ibid.* "This section effectively acknowledges that the retirement law is a complicated combination of various legislative efforts occurring at different times and for different purposes, that [***6] it is difficult to administer, and that it is inevitable that mistakes in implementation will be made." *Bristol County Retirement Bd.*, 65 Mass. App. Ct. at 449. The plain language of this section covers the situation here, where an error exists in the WRRB's records such that Pierce is receiving lower benefits than he is entitled to receive.

The WRRB raises a number or arguments why § 20(5)(*c*)(2) should not apply, none of them availing. First, the WRRB asserts that the CRAB decision is contrary to G. L. c. 32, § 3(3), as appearing in St. 1960, c. 535, "Late Entry into Membership," which permits employees who "failed to become or elected not to become" a member of a retirement system to "apply for and be admitted to membership" retroactively under certain conditions. The WRRB argues that because this provision is permissive — members are not required to buy back service — it puts the onus on employees to take affirmative steps to purchase creditable service. Under the circumstances of this case, we do not agree that § 3(3) applies.

Rather, we agree with the Superior Court judge that "Pierce neither failed to become nor elected not to become a member of WRRB. He ultimately became a member of the WRRS when he submitted his Enrollment Form, and his efforts were only frustrated [***7] due to WRRB's error." [**1173] Simply put, this appeal does not present a case of "late entry."

The WRRB also argues that it cannot be ordered to reimburse the MCRS for benefits attributable to Pierce's first nine months of service because those nine months did not "pertain" to the WRRB within the meaning of G. L. c. 32, § 3(8)(*c*). The WRRB relies in part on *Haverhill Retirement Sys.*, 82 Mass. App. Ct. at 133-134, where we held that an employee's service in a retirement system in which he was erroneously enrolled nonetheless "pertained" to that system because it accepted and had the use of contributions made on behalf of the employee. The WRRB's reliance on *Haverhill Retirement Sys*. is misplaced: although it did not have the benefit of contributions associated with Pierce's

membership for the first nine months of his service in Princeton, this was only because the WRRB had failed to enroll him for those nine months, during which he was eligible for membership.

The WRRB further claims that employment does not "pertain" to a particular system unless the employee is a member of that system. In support of this claim, the WRRB cites prior DALA decisions stating that "where a member of a retirement system seeks to buy back prior service in a different retirement system, [***8] the 'different' system is not required to accept liability for that service, where the former employee was *not entitled to membership in that system* when rendering that 'prior' service" (emphasis supplied by the WRRB). Here, although Pierce was not a member of the WRRS, he was entitled to membership at the relevant time. His uncredited service "pertains" to the WRRS.

Finally, the WRRB argues that CRAB's decision is invalid because it did not make a liability determination under G. L. c. 32, § 3(8)(*c*). In fact, the DALA magistrate stated, "A review of the record in this case renders the interpretation that the system with the liability for [the nine-month period] is the WRRS." Nonetheless, the magistrate also noted that the issues of the parties' precise liability was not before her, but was for "PERAC, the actuary" to determine. See G. L. c. 32, § 1, as amended by St. 1996, c. 306, § 6 (defining "actuary" in relevant part as "a member of the staff of the public employee retirement administration commission"); G. L. c. 32, § 3(8)(*c*) (reimbursements between retirement systems to be computed by the actuary). We discern no error.

Judgment affirmed.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2016-1050

STURBRIDGE HILLS CONDOMINIUM TRUST

vs.

BOARD OF SELECTMEN OF SURBRIDGE[1] & another[2]

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Sturbridge Hills Condominium Trust (the "plaintiff" or the "Trust"). brought this certiorari action pursuant to G. L. c. 249, § 4 seeking review of a decision by the defendant, the Board of Selectmen of Sturbridge (the "Board"). The Board, in a decision dated May 23, 2016, voted to uphold its continued assessment of sewer usage charges against the Trust, despite the fact that the Trust's meters are not tied into the Town of Sturbridge's sewer system.

The parties have filed cross-motions for judgment on the pleadings. For the reasons that follow, the Board's motion is **DENIED**, and the Trust's motion for judgment on the pleadings is **ALLOWED**.

BACKGROUND

The Sturbridge Hills Condominium (the "Condominium") is a residential condominium consisting of 120 townhouse style units in Sturbridge (the "Town"). The Trust is the organization of unit owners and is a separate legal entity pursuant to G. L. c. 183A, § 10. The

[1] In its capacity as Water and Sewer Commissioners

[2] Board of Selectmen of Sturbridge

Trust is responsible for maintaining the common areas of the Condominium, including the lawn of the property. In order to maintain the lawn and landscaping, the Trust owns and utilizes an automatic sprinkler system which is served by twenty-one water meters. These meters are not connected to the Town's sewer system.

These twenty-one meters owned by the Trust are distinct from the water meters that are connected to the individual condominium units. In contrast to the meters utilized by the Trust, the individual unit owners' meters are connected to the Town's sewer system. Unit owners are charged individually for their respective water and sewage usage.

It is the sewer usage charges which are at issue in this suit. Where a Town water customer is connected to the Town's sewer system, the Town assesses a sewer usage charge based upon the customer's metered water usage. The twenty-one meters owned by the Trust are not tied into the Town's sewer system, yet the Trust is assessed both a water and sewer usage charge. The sewer charges are significant, accounting for approximately 60% of the Trust's water bills. Other water customers in the Town who are not tied into the sewer system are assessed only for their water usage and not for a corresponding sewer usage charge.

On February 24, 2016, the Trust submitted a letter to the Board requesting that the Trust be treated as a water only customer and not be assessed a sewer usage rate. The Board held discussions on the Trust's application for modification to its water sewer assessments at its April 19, 2016 and May 23, 2016 meetings. On May 23, 2016, the Board issued a decision denying the Trust's request.

The Trust filed this certiorari action on July 15, 2016. The parties filed their cross-motions for judgment on the pleadings on April 7, 2017. The court heard oral argument from the parties on June 20, 2017.

DISCUSSION

Massachusetts General Laws c. 249, § 4 provides in pertinent part: "[a] civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court . . . ." Review pursuant to G. L. c. 249, § 4 "serves to correct errors in administrative proceedings by means of judicial review where such oversight is not otherwise available by statute." Yerardi's Moody Street Restaurant and Lounge, Inc. v. Board of Selectmen of Randolph, 19 Mass. App. Ct. 296, 300 (1985). The court is limited to correcting only substantial errors of law, evidenced by the record, that adversely affect material rights. Gloucester v. Civil Service Commission, 408 Mass. 292 (1980).

Massachusetts General Laws c. 83, § 16, titled "Assessment for Use of Sewers," provides:

> "The aldermen of any city or the sewer commissioners, selectmen or road commissioners of a town, may from time to time establish *just and equitable* annual charges for the use of common sewers and main drains and related stormwater facilities, which shall be paid by every *person* who enters his particular sewer therein."

G. L. c. 83, § 16 (emphasis added). "Although the sewer charge 'must be proportioned to the benefit [of the sewer] and not in excess of it,' the city may adopt any 'reasonable way of estimating the extent of the benefit received.'" Merrimac Paper Co. v. City of Lawrence, 1995 Mass. Super. LEXIS 448 at *24 (Mass. Super. 1995), quoting Carson v. Brockton, 175 Mass. 242, 244 (1900).

The Trust contends that it is a legally distinct entity, separate and apart from the unit owners. Thus, according to the Trust, it is a separate water customer. Because the Trust's meters are not tied in to the Town's sewer system, it should accordingly not be assessed a sewer usage fee, regardless of the fact that the individual unit owners' meters are tied in to the Town's

sewer system. The Trust further argues that the Town's sewer charges are not assessed in a "fair and equitable" manner pursuant to the language of G. L. c. 83, § 16.

In contrast, the Town argues for a property-based approach. The Town contends that the condominium *property* – as opposed to the Trust's meters in particular – is connected to the Town's sewer system, and thus all meters on the property, including the Trust's, are tied into the sewer system and assessed sewer charges accordingly. Relying on Merrimac Paper Co., the Town further argues that, "as long as there is evidence that the rates indicate a reasonable attempt to balance the myriad concerns and costs of sewage treatment and a rational effort to roughly estimate the benefit received, the rate must be upheld." 1995 Mass. Super. LEXIS 448, at *26. The Town argues their assessment of fees is reasonable here, and thus, judgment should enter in their favor. The court disagrees.

The Trust correctly argues that it is a distinct legal entity from the individual unit owners. See G. L. c. 183A. Thus, the Trust is correct that it is a distinct water customer. Furthermore, the Town's contention that its assessment of sewer fees against the Trust should be upheld because "the Town has decided to apply a uniform sewer rate based on actual metered use of water for all *properties* that are also provided sewer services" is misplaced. Nothing in the record, relevant regulations, statute, or case law supports the Town's position that simply because a property is connected to the Town's sewer system, all meters on that property can appropriately be assessed a sewer fee. In fact, G. L. c. 83, § 16 suggests that the opposite is true, stating in relevant part that a town may assess "just and equitable" charges to "be paid by every *person* who enter his particular sewer therein." (emphasis added).

Moreover, the court disagrees with the Town's position that its decision here to assess sewer usage charges against the Trust constitutes "a reasonable attempt to balance the myriad

concerns and costs of sewage treatment and a rational effort to roughly *estimate the benefit received.*" See Merrimac Paper Co., 1995 Mass. Super. LEXIS 448 at *26 (emphasis added). Here, where the Trust's twenty-one meters are not tied in to the sewer system, there is no "benefit received." See id.

The Trust's twenty-one water meters are not tied in to the Town's sewer system. As a distinct water customer, separate and apart from the condominium unit owners, the Town's decision to uphold the continued assessment of sewer usage fees against the Trust was in error.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiff Sturbridge Hills Condominium Trust's motion for judgment on the pleadings be **ALLOWED**.

Daniel M. Wrenn
Justice of the Superior Court

July 10, 2017