COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12274

GEORGE CAPLAN and others,
Plaintiffs-Appellants,

v.

TOWN OF ACTON, MASSACHUSETTS, inclusive of its instrumentalities and the Community Preservation Committee,

Defendants-Appellees.

On Direct Appellate Review of an Interlocutory Appeal from an Order of the Middlesex Superior Court

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BRIEF OF AMICI CURIAE MASSACHUSETTS MUNICIPAL LAW ASSOCIATION and COMMUNITY PRESERVATION COALITION

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STATEMENT OF THE ISSUES

The amici adopt the first of the two issues set forth in the Statement of the Issues contained in the Brief of Defendants-Appellees.

STATEMENT OF THE CASE AND FACTS

The amici adopt the Statement of the Case and Statement of Facts set forth in the Brief of Defendants-Appellees.

STATEMENT OF INTEREST

The Massachusetts Municipal Law Association (the "Association", formerly the City Solicitors & Town Counsel Association) is the municipal law bar association for Massachusetts. The Association has served Massachusetts cities and towns and has provided municipal law educational opportunities to its members and public officials since 1946. Association members consist of attorneys whose practice includes providing legal services to cities and towns or who otherwise devote a substantial portion of their practice to the advancement of municipal law. The Association advocates to strengthen home rule and to broaden local citizens' opportunity to participate in the governance of the Commonwealth's 351 cities and towns.

The Community Preservation Coalition (the "Coalition") plays a leading role in working with the Commonwealth and with local governments and key partner organizations to help preserve Massachusetts communities' unique character. The Coalition was formed in the 1990s with the goal of achieving passage of the Community Preservation Act (the "CPA"). That goal was met in 2000, when the said statewide enabling legislation was signed into law. The Coalition now helps municipalities understand, adopt and implement the CPA, and advocates for the CPA at the state level. Current members of the Coalition include The Trust for Public Land, Citizens' Housing and Planning Association, Massachusetts Affordable Housing Alliance, Massachusetts Audubon Society, The Trustees of Reservations and Preservation Massachusetts.

The Association and the Coalition submit this brief to urge that the decision of the Superior Court in this matter be affirmed. The CPA grants at issue here were made upon the recommendation of the Town of Acton's community preservation committee, board of selectmen and finance committee. They were approved by town meeting. And they are for the legitimate, public, secular purpose of historic preservation.

When the preservation work is completed and the funds are ultimately released, the town's investment will be secured in perpetuity by recorded historic preservation restrictions.

The assertion by the plaintiffs-appellants that the Anti-Aid Amendment (defined below) bars Acton from awarding CPA grants to the two churches at issue is wrong as a matter of law and would be harmful, if followed, as a matter of policy. The analysis which this Court has consistently applied under the Anti-Aid Amendment leads inexorably to the conclusion that the grants are lawful. To accept the argument by the plaintiffs-appellants that the Anti-Aid Amendment presents a bar to any appropriation that benefits a church would be to disregard this Court's case law and to wholly ignore the U.S. Supreme Court's recent decision in the Trinity Lutheran case. As a practical matter, Massachusetts communities would be severely hampered in their efforts to achieve historic preservation - and to further the other interests protected by the CPA - if CPA funds were held categorically off-limits to religious organizations.

ARGUMENT

I. MUCH OF THE PURPOSE OF THE CPA WOULD BE THWARTED IF THE COURT ADOPTED THE TAXPAYERS' EXTREME VIEW OF THE ANTI-AID AMENDMENT.

The argument advanced by the plaintiffs-appellants (the "Taxpayers") would, at a minimum, prevent municipalities from spending CPA funds for valid public purposes that incidentally benefit religious organizations and, for reasons set forth below, would more broadly apply to prevent cities and towns from using their CPA money in any way that accrued to the benefit of a private organization, no matter how small that benefit and no matter how great the public interest. This extreme view of the Anti-Aid Amendment would defeat much of the purpose of the CPA, which already contains many checks and balances to ensure the proper disposition of funds.

A. The CPA Establishes Elaborate Safeguards for the Use of Public Funds.

Cities and towns must clear significant hurdles merely to accept the CPA, ensuring that those that do have a deep commitment to the interests sought to be furthered by the CPA, which are historic preservation, open space, community housing and public recreation. G.L. c. 44B, § 5. Before CPA funds can be spent,

their specific purpose is vetted more carefully than most - or possibly any - other municipal expenditure, and the community's enduring benefit must be assured through the acquisition of legally binding restrictions.

In order to adopt the CPA, the legislative body of the municipality (in the case of Acton, the town meeting) must vote to accept the statute and to approve a surcharge on real property of up to 3% of the real estate tax levy outside the constraints of Proposition 2½. G.L. c. 44B, § 3 (a-b). The question whether to adopt the CPA and to pay the surcharge must then go before the voters in a referendum at the polls. G.L. c. 44B, § 3(f).[1]

In a city or town that so votes to adopt the CPA, the legislative body must adopt an ordinance or bylaw to create a community preservation committee. G.L. c. 44B, § 5. The committee consists of 5-9 members including representatives of the conservation commission, historical commission, planning board, park commissioners and housing authority. Id.

[1] If the legislative body does not vote to accept the CPA at least 90 days before a municipal election or 120 days before a state election, the question may be placed on the ballot upon the written petition of not less than 5% of the registered voters of the community. G.L. c. 44B, § 3(h).

Expenditures that advance the interests protected by the CPA and that have been approved by the committee may be considered by the legislative body for funding with CPA money. G.L. c. 44B, § 5(d). This vetting is in addition to any other requirements that may apply to appropriations, such as review by the board of selectmen and finance committee (both of which approved Acton's expenditures). JA179-180 (¶¶ 28-39); JA 513-529.

Real property interests acquired with CPA funds must be bound by permanent restrictions complying with the requirements of G.L. c. 184, §§ 31-33. G.L. c. 44B, § 12(a). Such interests become the property of the municipality. G.L. c. 44B, § 12(b). In Acton's case, the grant award letters specifically required the grantees to convey to the town and record in the registry of deeds historic preservation restrictions that would perpetually protect the historic facades which it was the purpose of the town to preserve. JA180 (¶ 31); JA533-548.

B. The CPA Is Flourishing, Not Least in the Field of Historic Preservation, Which All-But-Inevitably Involves Incidental Benefit to Religious and Other Private Institutions.

Despite the hurdles, 172 cities and towns in Massachusetts have adopted the CPA - 49% of all communities, accounting for almost 60% of the population of the Commonwealth. Community Preservation Coalition website, http://communitypreservation.org. Statewide, in excess of $1.75 billion has been raised to fund CPA projects, over 9,000 of which have been approved by local legislative bodies. Id. More than 26,000 acres of open space have been preserved; more than 1,700 recreation projects have been commenced; more than 4,200 affordable housing units have been created; and more than 4,400 appropriations have been made for historic preservation. Id.

The record in this case discloses that at the time of the Superior Court hearing, almost 49% of all CPA projects involved the preservation of historic resources. JA731-732 (¶ 4). Inevitably, in a state rich in religious history, where some of the oldest structures in many towns are often churches still in active use, a significant number of the historic preservation projects (more than 300) have involved religious institutions, including the preservation of such historic resources as stained glass windows,

steeples and the like. JA732 (¶ 5). Numerous other private organizations have also benefited as cities and towns have invested CPA funds to preserve historic facades. JA983 (¶¶ 7-8). As required by G.L. c. 44B, § 12, municipalities secure their investment in privately-owned buildings with recorded preservation restrictions.

C. Cities and Towns Would Be Hobbled in Their Use of CPA Funds If the Taxpayers' Extreme View of the Anti-Aid Amendment Were Adopted.

The Taxpayers urge this Court to accept an extraordinary re-interpretation of the Anti-Aid Amendment that would greatly limit the ability of municipalities to use their CPA money for its proper, statutory purposes. It is not just historic preservation, but other interests as well that would be put at risk. If cities and towns may not use CPA funds to purchase the perpetual preservation of historic facades because the buildings to which they are attached happen to be owned by religious organizations, it follows that such money could not be used to acquire open space restrictions with respect to land owned by such organizations, or to obtain affordable housing restrictions in projects organized by religiously-affiliated developers. In light of the

Supreme Court's Trinity Lutheran decision, discussed below, it is unlikely that the prohibition sought by the Taxpayers could be limited to religious organizations, but would instead bar municipalities from using CPA funds in any way that even incidentally benefited a private owner. The Court should not accept the Taxpayers' invitation but should instead affirm the Superior Court's decision, and Acton's proposed use of its CPA money, as both are consistent with this Court's case law concerning the Anti-Aid Amendment.

II. THE CPA GRANTS AT ISSUE IN THIS CASE DO NOT VIOLATE THE ANTI-AID AMENDMENT.

The Anti-Aid Amendment to the Commonwealth's Constitution provides as follows:

> No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the Commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the Commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be

> made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society. Nothing herein contained shall be construed to prevent the Commonwealth from making grants-in-aid to private higher educational institution or to students or parents or guardians of students attending such institutions.

Massachusetts Constitution, Amend. Art. 18, § 2. The Taxpayers argue that the Anti-Aid Amendment erects an absolute bar to public expenditures when religious organizations are involved as even incidental beneficiaries. But this Court has never so held, and has in fact stated that "[o]ur anti-aid amendment marks no difference between 'aids,' whether religious or secular." Bloom v. School Committee of Springfield, 376 Mass. 35, 45 (1978). The courts of the Commonwealth have applied the same test in determining whether appropriations comport with the Anti-Aid Amendment regardless of whether the private parties involved are religious in nature.

A. The CPA Grants Do Not Violate the Anti-Aid Amendment Under the Analysis Consistently Applied by This Court.

This Court has long applied a three-part test in determining whether challenged appropriations violate the Anti-Aid Amendment. Discussing a statute that appropriated money for a disputed purpose, the Court

phrased the test as follows: "(1) whether the purpose of the challenged statute is to aid [a private charity]; (2) whether the statute does in fact substantially aid [a private charity]; and (3) whether the statute avoids the political and economic abuses which prompted the passage" of the Anti-Aid Amendment. Helmes v. Commonwealth, 406 Mass. 873, 876 (1990) (brackets in original), quoting Commonwealth v. School Committee of Springfield, 382 Mass. 665, 675 (1981). That test has been set forth in essentially the same form in several cases, regardless whether the private party involved is religious in nature. See, e.g., Helmes v. Commonwealth, supra (appropriation to private, non-religious committee upheld to support rehabilitation of a battleship to be used as a memorial and for educational purposes); Commonwealth v. School Committee of Springfield, supra (use of public funds upheld to pay for special needs education of public school students who are placed in private schools because the public schools cannot accommodate their disabilities); Attorney General v. School Committee of Essex, 387 Mass. 326, 330-335 (1982) (school committee held to be required to provide transportation to private school students); Opinion of

the Justices, 401 Mass. 1201, 1204-1210 (1987) (proposed tax deductions for educational expenses incurred in attending private schools held to violate Anti-Aid Amendment).

Acton's CPA grants easily pass the "purpose" prong of the test. Nothing in G.L. c. 44B or the text of the grants suggests an intent to benefit a private organization, secular or religious. In this the grants differ from the proposed statute at issue in Opinion of the Justices, supra, where a purpose to aid private schools was manifest on the face of the legislation. Id., 401 Mass. at 1206. Like the provision of transportation for private school students that was at issue in Attorney General v. School Committee of Essex, supra, the self-evident public rationale (safety in that case, historic preservation in this) admits of no "hidden purpose." Id., 387 Mass. at 331. The Court found no illegitimate purpose in Chapter 766, the statute authorizing payment of tuition for special needs students placed in private schools, because that legislation provided generally for the education of such students and did "not deal exclusively with private school placements." Commonwealth v. School

Committee of Springfield, supra, 382 Mass. at 677. Similarly in this case, G.L. c. 44B does not deal exclusively with churches or other privately owned properties, but generally with the full range of historically significant structures that communities deem worthy of preservation. In Helmes, supra, the Court found a public purpose in the rehabilitation of a battleship by a private group because the "available public funds must be used for the designated public purpose, and, once repaired, the ship must be used to further public purposes." Id., 406 Mass. at 877. Much the same may be said here: the CPA funds can only be used for the designated public purpose of historic preservation, and, once that work is done, the public's interest in the structures so preserved will be protected in perpetuity by a recorded restriction under G.L. c. 184, §§ 31-32.

The test for whether aid is "substantial" has both a quantitative and a qualitative dimension. Quantitatively, this Court has held that aid "must be more than minimal; it must amount to 'substantial assistance' to be violative of the anti-aid amendment." Attorney General v. School Committee of Essex, supra, 387 Mass. at 332, quoting Commonwealth

v. School Committee of Springfield, supra, 382 Mass. at 680. More important, though, in order to run afoul of the amendment, the aid in question would have to be shown to support the private mission of the benefited entity, as opposed to the public purpose claimed by the appropriating authority. Thus in Helmes, supra, the Court observed that the challenged state aid was "substantial in the sense that, without public funds, the battleship presumably could not continue as a war memorial and likely would be forfeited to the United States Navy." Id. at 877. But the appropriation was not invalidated on that basis because "[n]o public funds ... [would] benefit the committee beyond permitting it to carry out" this public purpose. Id. On the other hand, since virtually all of the public money at stake in Opinion of the Justices, supra, would have paid for private school tuition and textbooks, in effect subsidizing the core mission of private schools, and would not have been "limited to benefits that are remote from the essential function of the schools ... such as transportation, police and fire protection, and the provision of sewers and public ways," the proposed legislation was held to fail the substantial aid test. Id., 401 Mass. at

1208-1209. Where transportation was furnished for all students, public and private, in the same way that "sewers, public ways, and fire and police protection ... benefit school buildings equally with all buildings," Attorney General v. School Committee of Essex, supra, 387 Mass. at 333, this Court "conclude[d] that the benefits which busing brings to the schools are not substantial aid to the schools but constitute aid which is 'quite remote.'" Id. at 334, quoting Bloom v. School Committee of Springfield, 376 Mass. 35, 47 (1978) (forbidding the loaning of textbooks by municipalities to private schools).

Applying these principles, it is clear that Acton's CPA grants do not constitute "substantial aid" in violation of the Anti-Aid Amendment because they exclusively support the valid, public purpose of historic preservation and not any impermissible, private purpose, such as would be the case if they funded the conduct of church services, the purchase of hymnals, or the minister's salary. Because the grants are available on an equal basis to all owners of historically significant structures in Acton, in the same way that the town makes public safety services and public works infrastructure available to all, the

aid at issue cannot be called anything more than "remote."

Further, in ruling that Chapter 766 payments to private schools for special needs placements did not constitute "substantial aid," the Court in Commonwealth v. School Committee of Springfield, supra, noted that "various safeguards ensure that any public money spent for private placements is in direct return for services actually rendered." Id. at 681. The same is certainly true here. As stated above, the CPA appropriations in Acton were approved by the community preservation committee, selectmen, finance committee and town meeting. If the CPA grants are allowed by this Court to be issued, they will be subject to the restrictions in the grant award letters, implementing the municipal finance laws of the Commonwealth, which require, among other things, payment "only after an examination to determine that the charges are correct and that the goods, materials or services charged for were ordered and that such goods and materials were delivered and that the services were actually rendered." G.L. c. 41, § 56. Here, as in Commonwealth v. School Committee of Springfield, supra, ample procedural safeguards exist

to ensure that no part of the challenged payments are applied to anything but the legitimate, public purpose of the appropriation.

Finally, the requirement that a public expenditure avoid the political and economic abuses which prompted passage of the Anti-Aid Amendment is readily met here. The Helmes Court observed that the amendment "was focused on the practice of granting public aid to private schools," and that accordingly most "[o]pinions involving the anti-aid amendment have generally concerned the use or proposed use of public funds with respect to private schools." Helmes, supra, 406 Mass. at 877. Where, as in that case and this one, the challenged appropriation does not implicate private education, the third "criterion must be redefined to present the question whether there is any use of public money that aids a charitable undertaking in a way that is abusive or unfair, economically or politically." Id. at 878. The Court found nothing of the kind "in using public funds to preserve an historic memorial to war dead in circumstances in which no private person appears likely to benefit specially from the expenditure." Id. The Court noted in support of its conclusion that

there was "no indication that, on dissolution of the committee, its assets would be distributable to other than a public charitable use." Id. In the same way here, the rigorous, even-handed and transparent process used to award the CPA grants leaves no room to argue that Acton is guilty of any economic or political abuse or unfairness. Being limited to the highly specific historic preservation work proposed by the grantees and approved through that public process, the grants cannot inure to the benefit of any private person. The requirement of recording an historic preservation restriction ensures that no matter what happens to the church buildings in the future, the public's investment in the preservation of their historic features will be protected.[2]

B. In Light of the U.S. Supreme Court's Trinity Lutheran Decision, This Court Must Decline the Taxpayers' Request to Expand the Anti-Aid Amendment to an Absolute Bar Against

[2] Applying the same three-part analysis, the Attorney General determined that the Anti-Aid Amendment posed no bar to expanding a proposed state program for the removal of asbestos from schools so that private as well as public schools would benefit. Op. Att'y Gen., October 12, 1984. The purpose, the Attorney General stated, was "to protect and benefit school children," and "there appear[ed] to be no reason to suspect a hidden, contrary purpose to maintain or aid private schools." Id. The "proposed aid would be 'quite remote' from the educational functions of the schools." Id. As a "law of general application directed to a serious public health issue," the proposal was not "of the character which the Anti-aid Amendment was designed to prevent." Id.

Appropriations That Benefit Religious Institutions.

The Taxpayers ask this Court to rule that when the proposed recipient of public funds is a religious institution, the three-part test described above has no application, and in its stead the Anti-Aid Amendment mandates a Biblical "thou shalt not." Their extreme position is unsupported by this Court's decisions and contrary to the statement in Bloom, supra, that "[o]ur anti-aid amendment marks no difference between 'aids,' whether religious or secular." Id., 376 Mass. at 45. To whatever extent the Taxpayers' absolutism may ever have held any appeal, it did not survive the U.S. Supreme Court's decision in Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___, 137 S. Ct. 2012 (2017).

The facts in Trinity Lutheran are much like those here. The state constitution in Missouri contains language akin to the Anti-Aid Amendment, providing 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." Missouri State Constitution, Article I,

Section 7. The state sought to achieve valid public purposes (reducing the number of used tires in landfills and improving children's playgrounds) by offering competitive grants to nonprofit organizations to purchase playground surfaces made from recycled tires. Trinity Lutheran, supra, 137 S. Ct. at 2017. A pre-school and daycare center that identified itself as "a ministry of Trinity Lutheran Church" applied for such a grant, and under the state's ranking system would have received one but for its religious affiliation. Id. at 2017-2018. Applying the kind of absolute bar for which the Taxpayers contend here, Missouri denied the grant for the sole reason that the applicant was operated by a church. Id. at 2018.

That, the Supreme Court held, violated the Free Exercise Clause of the First Amendment. The state's "policy expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." Trinity Lutheran, supra, 137 S. Ct. at 2021.[3] In effect, the state was putting Trinity

[3] It made no difference that the policy was based on the state constitution. In the same way, the fact that the Anti-Aid Amendment is part of the Massachusetts Constitution does not privilege any prohibition that may be applied in its name.

Lutheran "to a choice: It may participate in an otherwise available benefit program or remain a religious institution." Id. at 2021-2022. Citing McDaniel v. Paty, 435 U.S. 618 (1978), a case in which the Court had annulled a state statute that disqualified ministers from serving as delegates to a constitutional convention, Justice Roberts wrote that "To condition the availability of benefits ... upon [a recipient's] willingness to ... surrender[] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties." Trinity Lutheran, supra, 137 S. Ct. at 2022, quoting McDaniel, supra, 435 U.S. at 626.

The majority opinion took pains to identify what was not at issue in Trinity Lutheran, distinguishing Locke v. Davey, 540 U.S. 712 (2004), where a state was permitted to disqualify an applicant from a publicly-funded scholarship because he proposed to use the money to become a minister.

> Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do - use the funds to prepare for the ministry. Here there was no question that Trinity Lutheran was denied a grant simply because of what it is - a church.

Trinity Lutheran, supra, 137 S. Ct. at 2023 (emphasis in original).

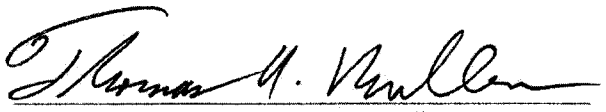
The significance of Trinity Lutheran for this case is clear. Acton did the right thing: it offered a benefit program (the CPA grants) on the same basis to all interested entities, regardless of whether they had a religious affiliation. The grants steered well away from the church-state entanglement forbidden in Locke v. Davey, supra, as they did not support any religious conduct such as the education of ministers, but rather applied narrowly to the legitimate, public, secular purpose of historic preservation. The churches in this case were allowed to compete on an equal footing with the owners of other historically significant structures, neither suffering nor benefiting as a result of who they were. Had the town done as the Taxpayers urge, disqualifying the churches from the outset, it would have been guilty of forcing them to choose between participating in an otherwise available benefit program or remaining religious institutions - precisely the compelled election that the Supreme Court condemned as violative of the Free Exercise Clause in Trinity Lutheran.

Conclusion

For the reasons set forth above, the amici urge this Court to affirm the decision of the Superior Court in this matter.

MASSACHUSETTS MUNICIPAL LAW ASSOCIATION and the COMMUNITY PRESERVATION COALITION,

By their attorney,



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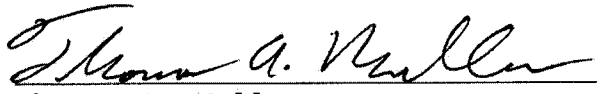
Dated: August 22, 2017

RULE 16(k) CERTIFICATION

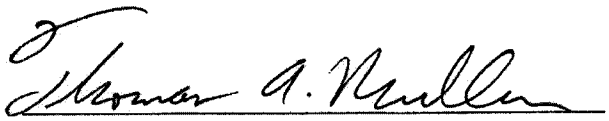
Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of appellate briefs.



Thomas A. Mullen

CERTIFICATE OF SERVICE

Pursuant to Rule 13(d) of the Massachusetts Rules of Appellate Procedure, I hereby certify that on August 22, 2017 I caused a true and correct copy of the foregoing document to be served by first class mail, postage prepaid, on counsel of record in this matter.



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