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COMMONWEALTH OF MASSACHUSETTS  
Supreme Judicial Court

MIDDLESEX, SS.

No. SJC-12274

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GEORGE CAPLAN and others,  
*Plaintiffs-Appellants,*

v.

TOWN OF ACTON,  
*Defendant-Appellee.*

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ON APPEAL FROM AN ORDER OF THE MIDDLESEX SUPERIOR COURT

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**BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE***

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### **QUESTION PRESENTED**

Whether grants made by the Commonwealth to preserve the exterior and structural features of important historic buildings violate the Anti-Aid Amendment of the Massachusetts Constitution when the recipients of such grants are religious organizations.

### **INTERESTS OF AMICUS CURIAE**

"The continuing presence of historic properties in Massachusetts immeasurably enhances the quality of our lives; they help to establish our sense of place and to define the very character of our communities." Secretary of the Commonwealth, The Mass. Historical Commission, <https://www.sec.state.ma.us/mhc/mhcabout.htm>. To that end, the Commonwealth has created and administers several publicly-funded grant programs to ensure the restoration and preservation of historic resources within the Commonwealth's cities and towns. These programs often require that the recipient organization convey a historic preservation restriction, G.L. c. 184, § 31, thereby guaranteeing that the resources will be available to the public for years to come.

The Commonwealth has a strong interest in the continued viability of these programs, which ensure

that future generations will continue to have access to the physical manifestations of Massachusetts' unique heritage. These grant programs would be substantially compromised if this Court were to hold, as Plaintiffs-Appellants (Taxpayers) ask in this case, that no religious organization may ever apply for or receive historic preservation grants. Many of the Commonwealth's earliest and most important historic resources are church buildings and associated exterior features. See Statement of Facts, *infra*. Many religious buildings within the Commonwealth are on the federal or state registries of historic places. Id.; see also J.A. 985-87 (affidavit of Paul Holtz, MHC staff Historical Architect and co-Director of the Grants Division). Many also possess significant architectural features, or have some association with notable historic figures. See Statement of Facts, *infra*.

These buildings and their features represent important artifacts of the Commonwealth's history, and they could be lost without public support for their restoration and preservation. The Commonwealth has a strong interest in preventing that from happening.

## STATEMENT OF THE CASE

The Commonwealth adopts the Statement of the Case in the Brief for Defendants-Appellees, at 1-3.

## STATEMENT OF FACTS

### Community Preservation Act (CPA)

In 2000, the Legislature enacted the Community Preservation Act (CPA), determining that "the acquisition, preservation, rehabilitation and restoration of historic resources" served the public interest. See G.L. c. 44B, § 5(b)(2). Under the CPA statutory scheme, a municipality may vote to adopt the CPA, which involves the creation of a local preservation fund made up of a percentage of property tax revenues, for historic preservation (among other purposes not relevant here). See Community Preservation Coalition, About the CPA, <http://communitypreservation.org/content/cpa-overview>. Municipalities that adopt the CPA also gain access to a state-wide trust fund, administered by the Department of Revenue, which provides annual distributions to municipalities that have adopted the CPA. Id. To date, 172 of the 351 cities and towns within Massachusetts have adopted the CPA. Id.

The CPA defines a "historic resource" as "a building, structure, vessel[,] real property, document or artifact that is listed on the state register of historic places or has been determined by the local historic preservation commission to be significant in the history, archeology, architecture or culture of a city or town." G.L. c. 44B, § 2. Each municipality's legislative body decides which applicants should be awarded grants. G.L. c. 44B, § 3.

Since the CPA was enacted, over 9,000 projects have been approved by local legislative bodies, including over 4,400 appropriations for historic preservation projects. See Community Preservation Coalition, About the CPA, <http://communitypreservation.org/content/cpa-overview>. Buildings of a religious character are often judged worthy of preservation as historical resources: A search of the Community Preservation Coalition's online database reveals 35 CPA-funded projects to undertake historic stained glass window repairs in churches (including one by the acclaimed artist Louis Comfort Tiffany). J.A. 732-35. These projects were approved both in buildings that are still used as active houses of worship, and others that are not.

Id. In addition, the CPA database contains 75 projects related to the repair of roofs or other structural elements of buildings that are or have been used for religious purposes, many of which are listed on national or state historic resource registries. Id. at 735-42. Among these projects are: the repair of a church steeple holding a bell forged by Paul Revere & Sons, id. at 738, the addition of a fire suppression system to a Jewish temple in Somerville, id. at 788, a structural repair to a church which was constructed with funds raised by civil rights leader and Massachusetts native W.E.B. Du Bois, id. at 736, and the restoration of church buildings that also served as town meetinghouses in colonial Massachusetts. Id. at 742.

#### **Massachusetts Historical Commission (MHC) Grants**

The Massachusetts Historical Commission (MHC) operates similar historic preservation programs. See G.L. c. 9, § 26. The Legislature created the MHC in 1963 to "to identify, evaluate, and protect important historical and archaeological assets of the Commonwealth." See Secretary of the Commonwealth, About the MHC, <https://www.sec.state.ma.us/mhc/mhcabout.htm>. Among its many responsibilities, MHC

administers the Massachusetts Preservation Project Fund, which provides state and federal funds to a variety of nonprofit organizations "for restoration, rehabilitation, and research of properties listed in the State Register [of Historic Places]." See Secretary of the Commonwealth, Grants Division, <http://www.sec.state.ma.us/mhc/mhchpp/grdhpp.htm>. The Massachusetts Preservation Project Fund grant criteria requires that the property for which assistance is sought "must be listed in the State Register of Historic Places." Secretary of the Commonwealth, Massachusetts Preservation Projects Fund Application Instructions (2017), <https://www.sec.state.ma.us/mhc/mhcpdf/MPPF/MPPF-Round-23-Instructions.pdf>. And "[p]rojects involving buildings actively used for religious purposes are strictly limited in scope to the building exterior." J.A. 986 (affidavit of Paul Holtz, MHC historical architect and co-director of MHC grant programs).

Between 2003 and 2014, MHC awarded 230 grants under the Preservation Projects Fund. J.A. 986-87. Of these, several grants were awarded to recipients that operated active houses of religious worship, such as the Vilna Shul historic synagogue and Jewish

cultural center in the Beacon Hill neighborhood of Boston. J.A. 987.

**Public Benefits**

The public benefits from these and similar grants in several respects. First, it receives the benefit of a preserved historic building or a notable architectural or artistic feature. Second, in cases involving the preservation of real property, the grant recipient is typically required to convey to the government (either the Commonwealth or the municipality) a historic preservation restriction, which is recorded in the Registry of Deeds and runs with the land in perpetuity. See G.L. c. 44B, § 12(a) ("a real property interest that is acquired with monies from the Community Preservation Fund shall be bound by a permanent restriction, recorded as a separate instrument, that meets the requirements of section 31 to 33, inclusive, of chapter 184 limiting the use of the interest to the purpose for which it was acquired. The permanent restriction shall run with the land and shall be enforceable by the city or town or the commonwealth."); 950 C.M.R. § 73.03 (MHC regulations stating that a preservation restriction under chapter 184 "must be recorded . . . before any

funds will be released to a recipient"). Thus, if a CPA or MHC grant relates to a building that is owned by a religious institution or is still used as a house of worship, the restriction which is conveyed by the grantee survives indefinitely and binds successive owners, whether religiously affiliated or not.

#### **SUMMARY OF ARGUMENT**

I. The categorical prohibition, proposed by Taxpayers, of any religious institution receiving a public historic preservation grant is not required by the Anti-Aid Amendment to the Massachusetts Constitution, art. 46 § 2. Rather, when assessing the propriety of public programs or grants involving private recipients, this Court should look to its existing Anti-Aid Amendment cases, which set forth a three-part test for conducting this analysis. See Helmes v. Commonwealth, 406 Mass. 873 (1990); Commonwealth v. Sch. Committee of Springfield, 382 Mass. 665, 675 (1981). The Commonwealth agrees with the Defendant-Appellee (Town of Acton) that the Helmes test is the appropriate vehicle under which this Court should resolve the case at bar. This Court should apply Helmes to cases under the Anti-Aid Amendment's second clause covering religious recipients, just as

it always has in cases under the first clause covering secular, private recipients. Pages 10-11.

II. Historic preservation grants, such as those at issue in this case, do not necessarily violate the Anti-Aid Amendment simply because the grant recipient is a religious organization. The Commonwealth's historic preservation grant programs have the public purpose of preserving important historic artifacts and resources for future generations. The public receives tangible benefits from these grants, including acquiring a recorded preservation restriction that binds any successive secular or religious owners of the preserved property. The Helmes test is well-suited to ensure that any particular grant does not depart from this legitimate public purpose. Helmes also ensures that the separation of church and state is respected by insisting that any given grant not substantially aid religious activities or implicate the political abuses and divisiveness that originally led to the enactment of the Anti-Aid Amendment. Pages 12-19.

## ARGUMENT

**I. This Court Should Apply the Helmes Test to Challenges Brought Under Either Clause of the Anti-Aid Amendment, Art. 46, § 2, In Order to Protect Grants That Advance Important Public Purposes.**

The Anti-Aid Amendment, art. 46, § 2, should not be read to categorically prohibit the Commonwealth or its municipalities from preserving historic resources that happen to be owned by a religious institution. Such a rule would have the effect of disabling the Commonwealth from acting to preserve aspects of its own heritage, to the extent that they may happen to be affiliated with religious institutions. Instead of adopting such a harsh and unprecedented rule, as proposed by Taxpayers, the Commonwealth agrees with the Town of Acton that this Court should resolve this case by looking to its existing Anti-Aid Amendment jurisprudence, specifically, the three-factor test espoused in Helmes v. Commonwealth, 406 Mass. 873 (1990) and Commonwealth v. Sch. Committee of Springfield, 382 Mass. 665, 675 (1981). The so-called "Helmes test" appropriately considers whether a given grant or program advances important public purposes under the Anti-Aid Amendment's first clause, while not "substantially aid[ing]" private entities. See

Helmes, 406 Mass. at 876; Springfield, 382 Mass. at 679. It can, and should, do the same under the second.

As this Court has observed, "our anti-aid amendment . . . marks no difference between 'aids,' whether religious or secular". Bloom v. Sch. Committee of Springfield, 376 Mass. 35, 45 (1978). In their reply brief, Taxpayers attempt to minimize the import of this passage from Bloom by arguing that "[i]n Bloom, the Court was explaining that the Anti-Aid Amendment 'marks no difference between' the form of the aid, not the recipient." Taxpayer Reply at 4 (emphasis in original). But this argument makes little sense on its own terms, because most forms of state aid -- whether financial or otherwise -- are not inherently "religious" or "secular." Furthermore, Taxpayers' reading is difficult to square with this Court's own subsequent invocations of the quoted passage, all of which make clear that Bloom did indeed state that the inquiry under the Anti-Aid Amendment does not vary depending on whether the recipient of the aid is a religious or secular private entity. See, e.g., Opinion of the Justices, 401 Mass. 1201, 1203 n.4 (1987); Attorney General v. Sch. Comm. of

Essex, 387 Mass. 326, 332 n.3 (1982); Springfield, 382 Mass. at 674 n.14.

Accordingly, the Commonwealth concurs with Part I-B of the argument as set forth in the Brief of Defendants-Appellees, at 18-27.<sup>1</sup>

**II. The Public Purposes Underlying The Commonwealth's Historic Preservation Grant Programs Justify State Aid In Appropriate Cases, Including Where The Recipient Is A Religious Institution.**

The Commonwealth urges this Court to recognize that publicly-funded historic preservation grants, such as the ones operated by the Massachusetts Historical Commission (MHC) and the 172 Community Preservation Act (CPA) cities and towns, do not necessarily fail the Helmes test and violate the Anti-Aid Amendment simply because the recipient is a religious institution. These grant programs serve important public purposes, and the mere fact that the

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<sup>1</sup> In addition, a complete prohibition on religious institutions competing for or receiving these grants may potentially implicate the First Amendment of the United States Constitution. In a recent case, the United States Supreme Court held that prohibiting a church from competing for a publicly-available playground resurfacing grant, pursuant to Missouri's Anti-Aid Amendment, violates the First Amendment's Free Exercise Clause. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. \_\_\_\_ (2017). Taxpayers' proposed reading of the Anti-Aid Amendment would arguably lead to the same result as that disapproved in Trinity Lutheran.

recipients are religiously affiliated does not necessarily imply that the grants substantially aid the essential mission of any religious institution, nor implicate the political and economic abuses that led to the enactment of the Anti-Aid Amendment.

As described above, the undisputed purpose of the Commonwealth's historic preservation grant programs is to preserve important historic artifacts and resources for future generations. See *Interests of Amicus*, supra. The Legislature created the CPA to support "the acquisition, creation and preservation of historic resources," G.L. c. 44B, § 2. Likewise, the MHC-administered Massachusetts Preservation Projects Fund considers "projects with state and national significance" involving "historic properties . . . listed or eligible to be listed in the State Register of Historic Places." 950 C.M.R. § 73.01, 73.06(a). Programs like these advance "the public interest in the preservation of historic buildings, places, and districts." Opinion of the Justices to the Senate, 333 Mass. 773, 780 (1955).

This Court has recognized that, when motivated primarily by a legitimate public purpose, state aid to private organizations does not violate the Anti-Aid

Amendment. For example, in Springfield, this Court upheld state payments to private schools that supplied special education where public schools could not do so, because they "[were] not made 'for the purpose of founding, maintaining or aiding' such schools," but rather "to help specified children with special needs obtain the education which is theirs by right." Id. at 674, 678. Likewise, in Helmes, this Court held that public funds paid to a non-profit organization dedicated to preserving and displaying the former U.S.S. Massachusetts as a war memorial served a public purpose, namely, "to rehabilitate the battleship, to preserve it as a memorial to citizens of the Commonwealth who fought and died in World War II and to educate the public, particularly school children." Helmes, 406 Mass. at 877.

The grant programs at issue here also have a public purpose. Historic preservation grants benefit the public by ensuring continued availability to the public of artistically, architecturally, and/or historically significant buildings and other artifacts.<sup>2</sup> Furthermore, both the CPA and the MHC

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<sup>2</sup> The record indicates that MHC grants to "buildings actively used for religious purposes are strictly limited in scope to the building exterior." J.A. 986.

grant programs require the recipient to convey a preservation restriction (see G.L. c. 184, § 31) as an express condition of receiving the grant. See G.L. c. 44B, § 12(a) ("a real property interest that is acquired with monies from the Community Preservation Fund shall be bound by a permanent restriction, recorded as a separate instrument, that meets the requirements of sections 31 to 33, inclusive, of chapter 184 limiting the use of the interest to the purpose for which it was acquired. The permanent restriction shall run with the land and shall be enforceable by the city or town or the commonwealth."); 950 C.M.R. § 73.03 (MHC regulations stating that a preservation restriction under chapter 184 "must be recorded . . . before any funds will be released to a recipient"). The public thus receives a real property interest in exchange for making that grant. That property interest is perpetual and runs with the land. To illustrate: If a religious institution received a historic preservation grant to preserve an artifact deemed historic by the government, it is required by statute and regulation to convey a preservation restriction back to the grantor. See G.L. c. 44B, § 12(a); 950 C.M.R. §

73.03. Furthermore, these restrictions apply to the present and any future owners of the property. If a religious institution sold a historic resource to a secular private organization -- or the converse, if a religious institution purchased a historic resource from a secular private organization -- the preservation restriction would bind the owner under each circumstance. This is an important, tangible benefit received by the public in exchange for its committing funds to preserve important historic resources.

Similarly, under the second Helmes factor, historic preservation grants do not necessarily "substantially aid" a religious organization's mission, for the same reason that state aid to a private organization does not necessarily constitute impermissible aid to it. Individual grants may of course be subject to case-by-case evaluation, as Helmes requires.<sup>3</sup> But this Court has never imposed a blanket rule under which grants to private organizations necessarily constitute "substantial aid" where the grants serve other important public

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<sup>3</sup> Such fact-intensive, record-based analysis of the particular circumstances presented is beyond the scope of this brief.

purposes. See, e.g., Helmes, 406 Mass. at 876; Springfield, 382 Mass. at 675; Bloom, 376 Mass. at 47 (insubstantial benefits resulting from public benefit programs are not "substantial aid" to private schools but instead constitute aid which is "quite remote"). The same reasoning applies where the recipient is religiously affiliated; in that setting, as with other private entities, the Helmes test can differentiate cases in which public funds would impermissibly "substantially aid" the entity's mission from those in which they would not.<sup>4</sup> In the context of religious entities, the careful, case-by-case analysis that Helmes demands, and Helmes's insistence that grants must not "substantially aid" the recipient, ensures that the importance of the separation of church and

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<sup>4</sup> This Court's holding that insubstantial benefits do not constitute prohibited "substantial aid" resembles the cases of other jurisdictions interpreting their similarly-worded Anti-Aid Amendments. See Scalise v. Boy Scouts of Am., 265 Mich. App. 1, 14, 692 N.W.2d 858 (2005) ("Incidental, indirect, or remote benefits to religion do not alone render a particular activity unconstitutional."); Kotterman v. Killian, 193 Ariz. 273, 287, 972 P.2d 606 (1999) (incidental benefits to religion were "sufficiently attenuated" to avoid Anti-Aid Amendment violation); Jackson v. Benson, 218 Wis. 2d 835, 878, 578 N.W.2d 602 (1998) ("some shadow of incidental benefit to a church-related institution [does not] brings a state grant or contract to purchase within the prohibition of the [Anti-Aid Amendment]").

state, reflected in "the fundamental place held by the Establishment Clause in our constitutional scheme," Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (citation omitted), will be respected.

Helmes's third factor requires a reviewing court to consider "whether the statute avoids the political and economic abuses which prompted the passage of art. 46." Helmes, 406 Mass. at 876; Springfield, 382 Mass. at 675. As to the overall purpose of historic preservation grants, see Interests of Amicus, supra, there is no doubt that the CPA and MHC statutes easily pass this test; Taxpayers do not argue otherwise, see Taxpayer Br. 26 (contesting only the "application" of the CPA statute to particular facts under Helmes's third prong). Again, individual grants may be subject to case-by-case analysis under Helmes, but the CPA and MHC grant programs writ large have nothing in common with "the political and economic abuses which prompted the passage of art. 46." Helmes, 406 Mass. at 876. The lengthy history of awarding grants to preserve qualified historic buildings, including religious institutions, suggests that such grants have not been "politically divisive." See Springfield, 382 Mass. at 683; accord, Essex, 387 Mass. at 776. See also

Statement of Facts, supra (noting that, of over 4,400 grants for historic preservation projects since CPA took effect, several dozen have been to religious institutions). And Taxpayers and their amicus do not suggest that funding historic preservation projects is an imprudent use of the public fisc. See Springfield, 382 Mass. at 683 (contracts with private schools to educate special-needs public students was not "financially wasteful"); accord, Essex, 387 Mass. at 776. Cf. Helmes, 406 Mass. at 878 ("no abuse or unfairness, political or economic, in using public funds to preserve an historic memorial to war dead in circumstances in which no private person appears likely to benefit").

In sum, the legitimate public purpose of preserving historic resources is not automatically transformed into an impermissible purpose of "founding, maintaining, or aiding" a grant recipient simply because the recipient is covered by the Anti-Aid Amendment's second sentence, any more than it is where the recipient is covered by the first. The Helmes test can, and should be allowed to, distinguish permissible from impermissible uses in both contexts.

CONCLUSION

For the foregoing reasons, the Commonwealth asks that this Court employ the Helmes test in cases arising under either of the Anti-Aid Amendment's two clauses, in recognition of the legitimate public purpose served by the Commonwealth's historic preservation grant programs.

Respectfully submitted,

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Date: August 21, 2017

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all of rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Mass. R. A. P. 16 and 20.



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Matthew P. Landry  
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Date: August 21, 2017

CERTIFICATE OF SERVICE

I certify that on August 21, 2017, I caused two (2) true and accurate copies of the foregoing brief to be served on counsel for all parties, via first-class mail, postage prepaid, to:

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**ADDENDUM**

**Constitutional Provisions**

Article 46, § 2 of the Amendments to the  
Massachusetts Constitution.....1

**Statutes**

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**MASSACHUSETTS CONSTITUTION**

**ARTICLE 46  
AS AMENDED BY ARTICLE 103**

Section 2. 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 institutions or to students or parents or guardians of students attending such institutions.

**MASSACHUSETTS GENERAL LAWS**

**CHAPTER 9 DEPARTMENT OF THE STATE SECRETARY**

**SECTION 26 MASSACHUSETTS HISTORICAL COMMISSION;  
ESTABLISHMENT**

There shall be in the department of the secretary of state a Massachusetts historical commission, hereinafter and in sections twenty-six A to twenty-seven D, inclusive, called the commission. Said commission shall consist of the state secretary, or an officer or employee from his department designated by him, who shall be the chairman; the commissioner of environmental management; the commissioner of commerce; two persons to be appointed by the governor; and 11 persons to be appointed by the state secretary of whom one shall be selected from a list of three

nominees submitted by the Massachusetts Historical Society, one from a list of three nominees submitted by the Society for the Preservation of New England Antiquities, one from a list of three nominees submitted by The American Antiquarian Society, one from a list of three nominees submitted by The Trustees of Reservations, one from a list of three nominees submitted by the New England Historic Genealogical Society, and one from a list of three nominees submitted by The Massachusetts Archeological Society, Incorporated, one from a list of three nominees submitted by the Boston Society of Architects chapter of the American Institute of Architects, one from a list of three nominees submitted by the New England Chapter of the Society of Architectural Historians, one from a list of three nominees submitted by Old Sturbridge Village, one from a list of three nominees submitted by The Museum of Afro-American History and one from a list of three nominees submitted by the Home Builders Association of Massachusetts; and the director of housing and community development. Upon the expiration of the term of an appointive member his successor shall be appointed in like manner for a term of three years. The chairman shall appoint a state archeologist who shall be responsible for the preservation and protection of the archeological resources of the commonwealth as the commission may direct, and in accordance with the provisions of sections twenty-six A to twenty-seven C, inclusive, and who shall not be subject to chapter thirty-one or section nine A of chapter thirty. The commission, the state archeologist and the board of underwater archeological resources established pursuant to section one hundred and seventy-nine of chapter six shall advise the state secretary on matters relating to the historical and archeological assets of the commonwealth and assist him in compiling and maintaining an inventory of such assets. The commission shall encourage all governmental bodies and persons considering action which may affect a historical or archeological asset of the commonwealth to consult with the commission to avoid any adverse effect to such asset. The state secretary may on behalf of the commonwealth for the purposes of this section and section twenty-seven accept gifts of real and personal property, including papers, documents and moneys, and he may provide technical and other assistance, and publish, furnish

and disseminate information of an historic nature. All moneys received hereunder shall be transmitted forthwith to the state treasurer, who shall administer the same as a trust fund in the manner provided by section sixteen of chapter ten. The members of the commission shall serve without compensation but shall be reimbursed for actual expenses incurred by them in the performance of their duties as such members.

## **CHAPTER 44B      COMMUNITY PRESERVATION**

### **SECTION 2          DEFINITIONS**

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

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

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

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

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

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

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

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

"CP", community preservation.

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

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

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

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

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

"Moderate income housing", housing for those persons and families whose annual income is less than 100 per cent of the areawide median income. The areawide median income shall be the areawide median income as

determined by the United States Department of Housing and Urban Development.

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

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

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

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

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

"Rehabilitation", capital improvements, or the making of extraordinary repairs, to historic resources, open spaces, lands for recreational use and community housing for the purpose of making such historic resources, open spaces, lands for recreational use and community housing functional for their intended uses including, but not limited to, improvements to comply

with the Americans with Disabilities Act and other federal, state or local building or access codes; provided, that with respect to historic resources, "rehabilitation" shall comply with the Standards for Rehabilitation stated in the United States Secretary of the Interior's Standards for the Treatment of Historic Properties codified in 36 C.P.R. Part 68; and provided further, that with respect to land for recreational use, "rehabilitation" shall include the replacement of playground equipment and other capital improvements to the land or the facilities thereon which make the land or the related facilities more functional for the intended recreational use.

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

### **SECTION 3                    ACCEPTANCE OF SECS. 3 TO 7**

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

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

(b ½ ) Notwithstanding chapter 59 or any other general or special law to the contrary, as an alternative to subsection (b), the legislative body may vote to accept sections 3 to 7, inclusive, by approving a surcharge on real property of not less than 1 per cent of the real estate tax levy against real property and making an additional commitment of funds by dedicating

revenue not greater than 2 per cent of the real estate tax levy against real property; provided, however, that additional funds so committed shall come from other sources of municipal revenue including, but not limited to, hotel excises pursuant to chapter 64G, linkage fees and inclusionary zoning payments, however authorized, the sale of municipal property pursuant to section 3 of chapter 40, parking fines and surcharges pursuant to sections 20, 20A and 20A ½ of chapter 90, existing dedicated housing, open space and historic preservation funds, however authorized, and gifts received from private sources for community preservation purposes; and provided further, that additional funds so committed shall not include any federal or state funds. The total funds committed to purposes authorized under this chapter by means of this subsection shall not exceed 3 per cent of the real estate tax levy against real property, less exemptions, adopted. In the event that the municipality shall no longer dedicate all or part of the additional funds to community preservation, the surcharge of not less than 1 per cent shall remain in effect, but may be reduced pursuant to section 16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) With respect to real property owned by a cooperative corporation, as defined in section 4 of chapter 157B, that portion which is occupied by a member under a proprietary lease as the member's domicile shall be considered real property owned by that member for the purposes of exemptions provided under this section. The member's portion of the real estate shall be represented by the member's share or shares of stock in the cooperative corporation, and the percentage of that portion to the whole shall be determined by the percentage of the member's shares to the total outstanding stock of the corporation, including shares owned by the corporation. This portion of the real property shall be eligible for any exemption provided in this section if the member meets all requirements for the exemption. Any exemption so provided shall reduce the taxable valuation of the real property owned by the cooperative corporation, and the reduction in taxes realized by this exemption shall be credited by the cooperative corporation against the amount of the taxes otherwise payable by or chargeable to the member. Nothing in this subsection shall be construed to affect the tax status of any manufactured home or mobile home under this chapter, but this subsection shall apply to the land on which the manufactured home or mobile home is located if all other requirements of this clause are met. This subsection shall take effect in a city or town upon its acceptance by the city or town.

**SECTION 5                    COMMUNITY PRESERVATION COMMITTEE;  
MEMBERS; RECOMMENDATIONS**

(a) A city or town that accepts sections 3 to 7, inclusive, shall establish by ordinance or by-law a community preservation committee. The committee shall consist of not less than five nor more than nine members. The ordinance or by-law shall determine the composition of the committee, the length of its term and the method of selecting its members, whether by election or appointment or by a combination thereof. The committee shall include, but not be limited to, one member of the conservation commission established under section 8C of chapter 40 as designated by the commission, one member of the historical commission established under section 8D of said chapter 40 as designated by the commission, one member of the planning board established under section 81A of chapter 41 as designated by the board, one member of the board of park commissioners established under section 2 of chapter 45 as designated by the board and one member of the housing authority established under section 3 of chapter 121B as designated by the authority, or persons, as determined by the ordinance or by-law, acting in the capacity of or performing like duties of the commissions, board or authority if they have not been established in the city or town. If there are no persons acting in the capacity of or performing like duties of any such commission, board or authority, the ordinance or by-law shall designate those persons.

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

a hearing in a newspaper of general circulation in the city or town.

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

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

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

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

(e) For the purposes of community preservation and upon the recommendation of the community preservation committee, a city or town may take by eminent domain under chapter 79, the fee or any lesser interest in real property or waters located in such city or town if such taking has first been approved by a two-thirds vote of the legislative body. Upon a like recommendation and vote, a city or town may expend monies in the Community Preservation Fund, if any, for the purpose of paying, in whole or in part, any damages for which a city or town may be liable by reason of a taking for the purposes of community preservation.

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

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

**SECTION 12 REAL PROPERTY INTEREST; PERMANENT RESTRICTION; MANAGEMENT**

(a) A real property interest that is acquired with monies from the Community Preservation Fund shall be bound by a permanent restriction, recorded as a separate instrument, that meets the requirements of sections 31 to 33, inclusive, of chapter 184 limiting the use of the interest to the purpose for which it was acquired. The permanent restriction shall run with the land and shall be enforceable by the city or town or the commonwealth. The permanent restriction may also run to the benefit of a nonprofit organization, charitable corporation or foundation selected by the city or town with the right to enforce the restriction. The legislative body may appropriate monies from the Community Preservation Fund to pay a nonprofit organization created pursuant to chapter 180 to hold, monitor and enforce the deed restriction on the property.

(b) Real property interests acquired under this chapter shall be owned and managed by the city or town, but the legislative body may delegate management of such property to the conservation commission, the historical commission, the board of park commissioners or the housing authority, or, in the case of interests to acquire sites for future wellhead development by a water district, a water supply district or a fire district. The legislative body may also delegate management of such property to a nonprofit organization created under chapter 180 or chapter 203.

**CHAPTER 184 GENERAL PROVISIONS RELATIVE TO REAL PROPERTY**

**SECTION 31 RESTRICTIONS, DEFINED**

A conservation restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid or limit any or all (a) construction

or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

A preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to preservation of a structure or site historically significant for its architecture, archeology or associations, to forbid or limit any or all (a) alterations in exterior or interior features of the structure, (b) changes in appearance or condition of the site, (c) uses not historically appropriate, (d) field investigation, as defined in section twenty-six A of chapter nine, without a permit as provided by section twenty-seven C of said chapter, or (e) other acts or uses detrimental to appropriate preservation of the structure or site.

An agricultural preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any or all (a) construction or placing of buildings except for those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to

adversely affect the land's overall future agricultural potential; and (c) other acts or uses detrimental to such retention of the land for agricultural use. Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices.

A watershed preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land predominantly in such condition to protect the water supply or potential water supply of the commonwealth, to forbid or limit any or all (a) construction or placing of buildings; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance except as needed to maintain the land and (c) other acts or uses detrimental to such watershed. Such watershed preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner, including the right to privacy.

An affordable housing restriction means a right, either in perpetuity or for a specified number of years, whether or not stated in the form of a restriction, easement, covenant or condition in any deed, mortgage, will, agreement, or other instrument executed by or on behalf of the owner of the land appropriate to (a) limiting the use of all or part of the land to occupancy by persons, or families of low or moderate income in either rental housing or other housing or (b) restricting the resale price of all or part of the property in order to assure its affordability by future low and moderate income purchasers or (c) in any way limiting or restricting the use or enjoyment of all or any portion of the land for the purpose of encouraging or assuring creation or retention of rental and other housing for occupancy by low and moderate income persons and families. Without in any way limiting the scope of the foregoing definition, any restriction, easement, covenant or condition placed in any deed, mortgage, will,

agreement or other instrument pursuant to the requirements of the Rental Housing Development Action Loan program or the Housing Innovations Fund program established pursuant to section three of chapter two hundred and twenty-six of the acts of nineteen hundred and eighty-seven or pursuant to the requirements of any program established by the Massachusetts housing partnership fund board established pursuant to chapter four hundred and five of the acts of nineteen hundred and eighty-five, including without limitation the Homeownership Opportunity Program, or pursuant to the requirements of sections twenty-five to twenty-seven, inclusive, of chapter twenty-three B, or pursuant to the requirements of any regulations or guidelines promulgated pursuant to any of the foregoing, shall be deemed to be an affordable housing restriction within the meaning of this paragraph.

**CODE OF MASSACHUSETTS REGULATIONS**

**TITLE 950                   OFFICE OF THE SECRETARY OF THE  
COMMONWEALTH**

**CHAPTER 73               STANDARDS FOR THE AWARDING OF A  
MATCHING GRANT PURSUANT TO THE  
MASSACHUSETTS PRESERVATION PROJECTS  
FUND**

**SECTION 73.03   DEFINITIONS**

Allowable Costs shall mean the applicant's costs associated with pre-development, construction, and acquisition activities, where historic fabric is directly involved. The computation of these costs will be the basis of the grant request.

Application shall be the form provided by the Massachusetts Historical Commission, from which final selections are made for finding. The application sets forth the scope of the proposed project, as well as conditions of funding, and will provide details of the project and its implementation. The Massachusetts Historical Commission will provide the applicant with published guidelines and instructions relative to the completion and evaluation of an application.

Eligible Applicants shall include any non-profit organization and municipality which owns or has an

interest in property, a landscape or a site and which is listed or eligible to be listed as further defined in application guidelines in the State Register of Historic Places.

Eligible Projects shall consist of pre-development, which may include the conducting of studies necessary to enable future development or protection of a State Register property, such as historic structures report, feasibility studies and certain archaeological investigations; development, which may include preservation, stabilization, protection, rehabilitation and restoration of endangered historic properties; and, acquisition which encompasses a request to acquire State Register properties that are imminently threatened with inappropriate treatment, alteration or destruction.

Endowment Option is available for development projects only. The applicant may request that 75% of the total project cost be funded by a Massachusetts Preservation Projects Fund grant. The recipient agrees to set aside an additional amount equivalent to 25% of the total project cost in an endowment fund, the interest from which would be limited to use for maintenance of the grant assisted property. Endowment funds must be established with new cash only.

Grant shall include matching share and endowment option monies awarded by vote of the MHC to eligible applicants in accordance with procedures described herein. This shall not include emergency funds, which are to be distributed solely by the Secretary.

Ineligible Costs shall mean that projects consisting primarily of routine maintenance, replacement of mechanical systems, renovation of non-historic spaces, or construction of additions, will generally not be considered. Architectural/engineering fees are not eligible for funding.

MHC shall mean, unless the context otherwise requires, the Massachusetts Historical Commission, a division within the Office of the Secretary of the Commonwealth, and its staff, as established pursuant to M.G. L. c. 9, § 26. Notices of MHC meetings are posted as required by M.G. L. c. 30A, § 11A1/2 and are open to the public.

MPPF shall mean the Massachusetts Preservation Projects Fund established and funded pursuant to St. 1994, c. 85, § 2.

Matching Share unless otherwise defined, shall mean that each applicant must provide a 50% dollar to dollar match to the amount of the grant. Other state funds may not be used as part of the matching share.

Preservation Restriction shall mean the instrument executed by or on behalf of the owner of the property which mandates maintenance of the property and disallows or limits acts or uses detrimental to appropriate preservation of the structure or site as described in M.G.L. c. 184, § 31. Said preservation restriction, which will be defined by the MHC, must be recorded at the appropriate Registry of Deeds before any funds will be released to a recipient. In the case of emergency funds, preservation restrictions must be filed with the appropriate Registry of Deeds and recorded within year, before the release of funds.

Secretary shall mean the Secretary of the Commonwealth, who, pursuant to M.G.L. c. 9, § 26 is the designated chairman of the MHC.

Secretary of the Interior's Standards shall mean the United States Secretary of the Interior's Standards for Historic Preservation Projects, as set forth in 36 C.F.R. Part 68. This reference is available for inspection and copying at the offices of the MHC.

State Register shall mean the State Register of Historic Places which is maintained pursuant to M.G.L. c. 9, § 26C. The State Register shall contain the following properties:

(a) all districts, sites, buildings, or objects determined eligible for listing or listed in the National Register of Historic Places. These include properties listed in the National Register under provisions outlined in 36 C.F.R. Part 60, or properties formally determined eligible for listing in the National Register by the Secretary of the Interior under provisions outlined in 36 C.F.R. Part 63;

(b) all local historic districts established pursuant to M.G.L. c. 40C, or special legislation;

(c) all landmarks designated under local ordinances or by-laws;

(d) all structures and sites subject to preservation easements approved or held by the MHC pursuant to M.G.L. c. 184, §§ 31 and 32;

(e) all historical or archaeological landmarks certified pursuant to M.G.L. c. 9, § 27; and,

(f) all properties listed by the MHC pursuant to M.G.L. c. 9, § 26D.