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COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

No. SJC-12274

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**GEORGE CAPLAN, et al.**  
**Plaintiffs-Appellants,**

**v.**

**TOWN OF ACTON,**  
**Defendant-Appellee.**

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On Appeal from the Superior Court of Middlesex County

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**BRIEF OF AMICI CURIAE THE BOSTON PRESERVATION ALLIANCE,  
HISTORIC BOSTON INCORPORATED, HISTORIC NEW ENGLAND, NORTH  
BENNET STREET SCHOOL, and PRESERVATION MASSACHUSETTS**

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TABLE OF CONTENTS

INTERESTS OF THE AMICI ..... 1

INTRODUCTION ..... 6

BACKGROUND ..... 8

    A.    Historic Preservation Serves The Public Interest. ....8

        1.    The Commonwealth and its municipalities repeatedly recognize the value of historic preservation. ....8

        2.    Legislative determinations that historic preservation serves the public interest are well-founded. ....14

        3.    Amici’s own experience demonstrates the value of public support for historic preservation. ....17

    B.    Religious Institutions Are An Integral Part of Massachusetts’ History. ....18

        1.    Convergence of religious and civic life in the Commonwealth before 1833. ....18

        2.    The tradition of the New England meetinghouse. ....19

        3.    The living history of religious structures. ....21

        4.    The use of public funds to preserve historically important religious structures. ....23

ARGUMENT ..... 26

    I.    Acquisition of Historic Preservation Restrictions Does Not Implicate Article 46. ....26

    II.   Historic Preservation is an Important Public Purpose, Worthy of Support for its own Sake, and is Not a Pretext for Public Aid to Private Organizations. ....32

        A.    Spending to preserve historic resources does not conflict with Article 46. ....32

B. None of the three Helmes considerations give rise to constitutional concern here.....37

C. The CPA was enacted and adopted by 172 municipalities against the backdrop of this Court's precedent interpreting Article 46.....39

III. In Administering the CPA, the Town of Acton May Not Treat Religious and Secular Nonprofits Differently. ....40

CONCLUSION ..... 43

## TABLE OF AUTHORITIES

### **Cases**

<u>Attorney General v. School Committee of Essex,</u> 387 Mass. 326 (1982) .....	33, 34
<u>Benevolent &amp; Protective Order of Elks, Lodge No.</u> <u>65 v. Planning Bd. of Lawrence,</u> 403 Mass. 531 (1988) .....	27, 28, 31
<u>Bloom v. School Committee of Springfield,</u> 376 Mass. 35 (1978) .....	33, 35, 38
<u>Brooks v. City of Boston,</u> 334 Mass. 285 (1956) .....	28
<u>Commonwealth v. Maloney,</u> 447 Mass. 557 (2006) .....	37
<u>Commonwealth v. School Committee of Springfield,</u> 382 Mass. 665 (1981) .....	28, 34
<u>Fabiano v. City of Boston,</u> 49 Mass. App. Ct. 281 (2000) .....	32
<u>Helmes v. Commonwealth,</u> 406 Mass. 873 (1990) .....	passim
<u>Inhabitants of Milford v. Godfrey,</u> 18 Mass. 91 (1822) .....	19
<u>Lynch v. Donnelly,</u> 465 U.S. 668 (1984) .....	18
<u>Opinion of the Justices,</u> 333 Mass. 773 (1955) ....	9, 32, 34
<u>Opinion of the Justices,</u> 374 Mass. 843 (1978) .....	28
<u>Opinion of the Justices,</u> 401 Mass. 1201 (1987) ..	33, 35, 38
<u>School Comm. Of Greenfield v. Greenfield Educ.</u> <u>Ass'n,</u> 385 Mass. 70 (1982) .....	41
<u>Sherbert v. Verner,</u> 374 U.S. 398 (1963) .....	42
<u>Taylor v. Martha's Vineyard Land Bank Comm'n,</u> 475 Mass. 682 (2016) .....	39
<u>Trinity Lutheran Church of Columbia, Inc. v.</u> <u>Comer,</u> 582 U.S.—, 137 S.Ct. 2012 (2017) .....	8, 41, 42

**State Constitutional Provisions**

Mass. Const. Articles of Amend. art. 46, as amended by art. 103 ..... 32, 33

Mass. Const. Articles of Amend. art. 9 ..... 19

Mass. Const. Part I, art. 3, repealed by Mass. Const. Articles of Amend. art. 9 ..... 19

Mass. Const. Part I, Preamble ..... 18

Mass. Const. Part II, c. 1, § 1 ..... 9

**Statutes & Regulations**

54 U.S.C. § 300101(5), (6) ..... 9

950 Code Mass. Regs. § 73.01, et seq. .... 10

G.L. c. 184, §§ 31-33 ..... 10, 29

G.L. c. 23G, § 42 ..... 11

G.L. c. 40C ..... 12

G.L. c. 44B ..... passim

G.L. c. 5(b)(2) ..... 37

G.L. c. 62, § 6J ..... 11

G.L. c. 63, § 38R ..... 11

G.L. c. 9, § 26 ..... 9, 10

St. 1994, c. 85, § 2 ..... 10

St. 2000, c. 267 ..... 13

St. 2006, c. 123, § 21 ..... 11

St. 2018, c. 47, § 2 ..... 9, 11

**Other Authorities**

1984-85 Mass. Op. Att’y Gen. 83 ..... 38

“Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church,” 27 Op. O.L.C. 91 (2003) ..... 22

Bridenbaugh, Carl, “The New England Town: A Way of Life,” Journal of the American Antiquarian Society (Apr. 1946) ..... 20

Butler, Stuart M., Diaz, Carmen, “ ‘Third Places’ as Community Builders,” Brookings Institute (Sept. 14, 2016)..... 16

Colleary, Kathleen, Letter from Kathleen Colleary, Chief, Bureau of Municipal Finance Law, DOR to Mary Ellen Gattoni (Feb. 9, 2007) ..... 31

Colleary, Kathleen, Letter from Kathleen Colleary, Chief, Bureau of Municipal Finance Law, DOR, to Barbara A. Durand, City Auditor, Marlborough (March 10, 2006) ..... 28

Hennesey, Hon. Edward F., “The Extraordinary Massachusetts Constitution of 1780,” 14 Suffolk U. Law Rev. 873 (1980) ..... 19

Hurwitz, Eric, Massachusetts Town Greens: A History of the State’s Common Centers (2016)..... 21

Jefferson, Thomas, Letter of Thomas Jefferson to William Langborn (Jun. 15, 1786) ..... 19

Kafker, Hon. Scott, “Surveying Constitutional Territory: Book Review of Lawrence Friedman & Lynnea Thody’s The Massachusetts State Constitution,” 42 Rutgers Law J. 913 (2011) ..... 19

Knight Foundation, “Soul of the Community 2010, Why People Love Where they Live and Why it Matters” (2010) ..... 14

Logan, Tim, "Historic Boston Churches Fear Towers May Cast Them in Darkness," <u>Boston Globe</u> (Apr. 19, 2017) .....	10
Massachusetts Historical Commission, "Guidelines for Survey and Planning Applicants" (2017) .....	12
McConnell, Michael, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 <u>Wm. &amp; Mary Law R.</u> 2105 (2003) .....	18, 22
McMahon, Edward T., "The Distinctive City," <u>Urban Land Magazine</u> (Apr. 4, 2012) .....	15
Meeks, Stephanie, <u>The Past &amp; Future City</u> (2016).....	15
Preservation Massachusetts, "Historic Rehabilitation Tax Credit: Leveraging Funds to Stimulate Development and Economy" (2011) .....	11
Ryan, Andrew, "For Nearly Two Centuries, this Chapel has Endured in Boston," <u>Boston Globe</u> (May 27, 2017) .....	22
Rypkema, Donovan, "The Dependency of Place," 10 <u>Places Journal</u> 58 (1996) .....	15
Shurtleff, Nathaniel B., ed., <u>Records of the Governor and Company of the Massachusetts Bay</u> , Vol. I, 157 (1853) .....	21
Tilak, Visi, "Baystate's Public Schools, Health Care, Economy Stand Out," <u>U.S. News &amp; World Report</u> (Feb. 28, 2017) .....	16
Town of Acton Bylaws c. S, § 4.3 .....	36
Town of Acton CPC, "Community Preservation Plan 2015" (Sept. 2014) .....	35
Witte, John Jr., "How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism," 39 <u>Emory Law J.</u> 41 (1990) .....	20





## **INTERESTS OF THE AMICI**

Amici are nonprofit organizations dedicated to the preservation of historic resources in Massachusetts and New England. The historic settings of the Commonwealth are essential to its uniqueness and charm – and are critical components of the state's economic strength. In the amici's experience, the availability of state and local funding has proven an essential catalyst in countless preservation projects. Those projects have in turn proven a worthy focus of public resources.

Historic preservation brings tangible and immediate benefits. Longer term, historic settings are points of pride and differentiation integral to the Commonwealth's future. Here in Massachusetts – where the town meetinghouse was the center of civic and spiritual life deep into the 1800s, where town greens are framed by churches, and where one of our quintessential settings is a steeple surrounded by autumn foliage – the preservation of historic resources necessarily includes religious places.

Amici are:

**The Boston Preservation Alliance (the "Alliance")** is Boston's premier, independent historic preservation advocacy organization. Its mission is to protect places, promote vibrancy, and preserve the character of Boston by promoting

sensitive treatment of Boston's unique built environment. The Alliance focuses its efforts on education, public policy research, and advocacy, and regularly provides testimony to regulatory bodies on the local, state, and national level regarding issues impacting the historic resources of Boston.

The Alliance is an umbrella organization representing 40 nonprofit organizational members, which include neighborhood-focused groups such as the Dorchester and Jamaica Plain Historical Societies, nationally known sites such as those on the Freedom Trail, major museums such as the Museum of Fine Arts, and regional organizations such as the Chinese Historical Society of New England and the Trustees of Reservations. Nearly 100 corporations and hundreds of individuals are also members of the Alliance.

The Boston Preservation Alliance has benefited from public funding and it has received such funding for efforts specifically relating to the preservation of historically significant religious properties. In 2003, for example, the Alliance received an emergency grant from the Massachusetts Historical Commission to conduct a comprehensive, city-wide survey of buildings owned by the Roman Catholic Archdiocese of Boston, which at the time was exploring the sale of many of its properties. Boston Preservation Alliance's survey identified historic resources under the Archdiocese's

ownership and helped set priorities for the long-range preservation of those resources. Public grants for this survey and others performed by the Alliance and its affiliated organizations are essential to the continued protection and future success of historic resources in our evolving built environment.

**Historic Boston Incorporated** is a nonprofit organization that works with local partners – including the City of Boston and the Commonwealth – to identify and redevelop historically significant buildings in Boston’s neighborhoods. It was founded in 1960 to preserve the Old Corner Bookstore at the corner of School and Washington Streets, and, since then, has preserved countless structures in the City. Historic Boston emphasizes projects that revitalize at-risk historic buildings in underprivileged neighborhoods as catalysts to further development.

**Historic New England** is a nonprofit organization that is the nation’s oldest and largest regional heritage organization. Historic New England owns and operates 37 historic properties in New England, 22 of which are in Massachusetts. It also manages and oversees more than 100 properties for which it holds historic preservation restrictions.

Historic New England owns and holds interests in numerous properties that have served or continue to serve as houses of religious worship, including: the Rocky Hill Meetinghouse in Amesbury, the Charles Street Meetinghouse in Boston, the Old West Church in Boston, and All Saints' Church in Dorchester. Dozens of properties owned or overseen by Historic New England have received public funding through the Massachusetts Preservations Project Fund, the Massachusetts Cultural Facilities Fund, and the Community Preservation Act, including the Old West Church (which houses an active religious congregation).

**North Bennet Street School ("NBSS")** is a nonprofit organization that trains students for careers in traditional trades, including woodworking and preservation carpentry. It is located in Boston's North End, where it was founded in the 1880s as a trade school for immigrants. NBSS has maintained that diversity. Nearly a third of its students are from disadvantaged and underserved communities; another twenty percent are returning veterans who find new meaning (and a new career) by working with their hands. Through the school's preservation carpentry, furniture and cabinetry, and locksmithing programs, a majority of its students are actively engaged in the work of historic preservation. For example, the school's preservation carpentry program teaches

the craftsmanship necessary to stabilize endangered buildings, preserve architectural details, and recreate historical design elements. Student field work is done at historic sites owned by nonprofit organizations, the restoration of which are frequently supported by public funds. With its rich history and abundance of historical structures, the Commonwealth provides ideal field training ground. From here, NBSS graduates go on to perform historic preservation work throughout the country.

**Preservation Massachusetts** is the statewide nonprofit historic preservation organization dedicated to preserving the Commonwealth's historic and cultural heritage. It is one of the founding members of the Community Preservation Act ("CPA") Coalition that was instrumental in the enactment of the CPA. Preservation Massachusetts operates in all 351 Massachusetts municipalities, working with partners that range from individual property owners to large preservation organizations. Preservation Massachusetts is a leader in policy research on the benefits of historic preservation, and has published comprehensive studies on the economic benefits that flow to Massachusetts as a result of investment in preservation efforts.

Preservation Massachusetts has long recognized the value and importance of preserving religious properties in

Massachusetts. In 2005, together with other preservation organizations, it published a toolkit on preserving historic religious properties for congregations and community leaders. It also maintains an archive of Massachusetts' Most Endangered Historic Resources, which includes more than a dozen churches (among them First Parish Church in Plymouth, i.e., the Pilgrims' Church).

### **INTRODUCTION**

The building in which this Court sits – the John Adams Courthouse, built in 1894 and majestically restored in 2005 – is a testament to the indispensability of well-preserved historic structures. Unlike the Courthouse, though, the vast majority of historically significant spaces in the Commonwealth are privately owned, often by secular or religious nonprofit organizations. To those owners falls the responsibility of stewardship of those historic resources for the benefit of all the Commonwealth's residents.

Recognizing the importance of historical preservation, Massachusetts has made numerous policy decisions to finance or otherwise incent stewardship and preservation efforts by nonprofit organizations. Under the Community Preservation Act, 172 of the Commonwealth's municipalities likewise have prioritized investment in historic preservation.

Because the history of the Commonwealth is intertwined with religion, historic preservation necessarily encompasses the preservation of religious places. It is no surprise, then, that the state and its municipalities have incited religious organizations to undertake the work – and the continuing responsibility – of preservation.

This brief begins with a review of: (A) the various ways the Commonwealth and its municipalities have determined that historic preservation is in the public interest and why those determinations have been well-founded; and (B) the extent to which the Commonwealth's history is enmeshed with religion, such that one may not be preserved without the other.

The brief then turns to why the Anti-Aid Amendment is no impediment to public spending for the purpose of historic preservation. First, where, as here, a municipality acquires a preservation restriction in exchange for funding historic preservation, it has purchased a cognizable property interest in the historic structure such that the Anti-Aid Amendment is not implicated at all. Second, this Court expressly has held that the Anti-Aid Amendment permits the provision of public funds to a nonprofit for the purpose of the rehabilitation and preservation of a historic structure. The present case fits comfortably within the ambit of that



holding. Third, neither the plain language of the Anti-Aid Amendment nor the Supreme Court's recent decision in Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S.—, 137 S.Ct. 2012 (2017), permits a two-tier system wherein secular nonprofits may receive public funds for a particular purpose but religious nonprofits may not receive funds for that same purpose.

A holding that bars the expenditure of public funds in this case would endanger historic preservation efforts by amici and other nonprofits throughout the Commonwealth. Such a holding would be contrary to precedent, practice, and repeated legislative determinations regarding the public value of historic preservation.

## **BACKGROUND**

### **A. Historic Preservation Serves The Public Interest.**

The public benefits of historic preservation have been realized in Massachusetts to a greater extent than in perhaps any other state. The value of historic preservation is demonstrated through legislative priorities, the tangible benefits that have resulted from preservation efforts, and amici's own experiences.

#### **1. The Commonwealth and its municipalities repeatedly recognize the value of historic preservation.**

Whether spending is in the public interest is the quintessential legislative determination. E.g., Mass. Const.

Part II, c. 1, § 1. Time and again the Massachusetts Legislature has determined that historic preservation is worthy of public resources, even in the common circumstance where the structure is owned by a nonprofit organization. These legislative determinations have been constitutionally sound because such spending is for the purpose of sustaining a fundamentally public resource – our history. See Helmes v. Commonwealth, 406 Mass. 873, 877 (1990) (holding that public money appropriated to a nonprofit “to rehabilitate [a World War II] battleship, to preserve it as a memorial to citizens of the Commonwealth” served a public purpose). Cf. Opinion of the Justices, 333 Mass. 773, 780 (1955) (“There has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts.”).

The Legislature has codified in numerous ways its determination that supporting historic resources is worthwhile. It has created and funded a state Historical Commission to preserve the “historical and archeological assets of the Commonwealth.” G.L. c. 9, § 26; see St. 2018, c. 47, § 2, ln. 0526-0100.<sup>1</sup> The Historical Commission

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<sup>1</sup> Likewise, it is the express policy of the federal government to “contribute to the preservation of nonfederally owned historic property.” 54 U.S.C. § 300101(5), (6).

maintains a state register of historic places and districts. See G.L. c. 9, § 26C. It is also charged with reviewing certain development projects that may impact historic places and exploring ways to “eliminate, minimize or mitigate the adverse effects.” Id., § 27C. This review process follows regardless whether the historic place is secular or religious. Id.<sup>2</sup>

The Historical Commission provides direct financial support for historic preservation. It administers the Massachusetts Preservation Projects Fund (“MPPF”), which is a grant program that supports the preservation of properties listed in the state register of historic places. See St. 1994, c. 85, § 2; 950 Code Mass. Regs. § 73.01, et seq. The 2016 round of grant awards totaled more than \$800,000 and leveraged significant private funding. As noted in the record of this appeal, since 2003, the Historical Commission has made grants well over 100 nonprofit organizations, including 38 churches. JA 986-87.<sup>3</sup>

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<sup>2</sup> See, e.g., Tim Logan, “Historic Boston Churches Fear Towers May Cast Them in Darkness,” Boston Globe (Apr. 19, 2017) (“Those concerns prompted the Massachusetts Historical Commission to weigh in ... warn[ing] of an ‘adverse effect’ on both historic churches ...”).

<sup>3</sup> Any recipient of a Historical Commission grant must enter into and record a preservation restriction, enforceable by the Commission. See G.L. c. 184, §§ 31-33; 950 Code Mass. Regs. § 73.03; see also infra, § I (discussing preservation restrictions).

In addition, the Historical Commission determines eligibility for the state historic rehabilitation tax credit, which provides a considerable incentive for the rehabilitation of "qualified historic structure[s]," i.e., those that are "listed on the National Register of Historic places individually or as a contributing building to a district." See generally G.L. c. 62, § 6J; G.L. c. 63, § 38R. The purpose of such credits is to incent preservation by private parties.<sup>4</sup>

The Commonwealth also has established the Massachusetts Cultural Facilities Fund, declaring that it is "in the best interest of the commonwealth to ... enhance cultural activities ... by partially financing the renovation and repair of our cultural facilities [a term defined so as to include historical sites]." St. 2006, c. 123, § 21, codified at G.L. c. 23G, § 42. And the Legislature directs discrete line items to particular preservation projects each year. See, e.g., St. 2018, c. 47, § 2, ln. 0511-0200.

The Legislature also has empowered the Commonwealth's municipalities to "promote the educational, cultural,

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<sup>4</sup> See Preservation Massachusetts, "Historic Rehabilitation Tax Credit: Leveraging Funds to Stimulate Development and Economy" (2011), available at [http://docs.wixstatic.com/ugd/ba2a96\\_b88adef6e13c4a9a9a32cd448a0730d8.pdf](http://docs.wixstatic.com/ugd/ba2a96_b88adef6e13c4a9a9a32cd448a0730d8.pdf).

economic, and general welfare of the public through the preservation and protection of the distinctive characteristics of buildings and places significant in the history of the commonwealth and its cities and towns or their architecture.” G.L. c. 40C, § 2. In broad strokes, pursuant to the Historic Districts Act, a municipality may adopt an ordinance or bylaw to establish a historic district. G.L. c. 40C, § 4. Within a municipal historic district, most proposed construction or structural alteration is subject to review by a local historic district commission. See generally G.L. c. 40C, § 6, 10.

More than 100 Massachusetts municipalities have created local historic districts – representing local determinations that historic preservation is worth the commitment of municipal resources necessary to support a local historic district commission (and justifies the burden imposed on landowners within the district). In addition, the Secretary of the Commonwealth administers a federally funded “matching grant program to support historic preservation planning activities in communities throughout the state.”<sup>5</sup>

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<sup>5</sup> See Massachusetts Historical Commission, “Guidelines for Survey and Planning Applicants” (2017), available at [https://www.sec.state.ma.us/mhc/mhcpdf/2017\\_Survey\\_and\\_Planning\\_Grant\\_Program\\_Guidelines.pdf](https://www.sec.state.ma.us/mhc/mhcpdf/2017_Survey_and_Planning_Grant_Program_Guidelines.pdf).

Municipalities are also free to direct their own resources to historic preservation. Many do.

In 2000, the General Court enacted a program to establish a particularized revenue source for municipalities interested in spending on this issue (and several others, i.e., open space conservation, affordable housing, and recreation). St. 2000, c. 267, codified at G.L. c. 44B. The Community Preservation Act (the "CPA") permits voters in a municipality to adopt a property tax surcharge, the revenue from which is placed in a community preservation fund. G.L. c. 44B, § 3, 7. In addition, certain fees collected by the Commonwealth are earmarked for disbursement to municipalities that have imposed the property tax surcharge (so as to provide a state incentive for its adoption). Id., § 8, 10. The expenditure of that revenue is restricted to historic preservation, conservation of open space, affordable housing, and recreation. Id., § 10.

A municipality that has adopted the CPA must establish a community preservation committee ("CPC"), to study the "needs, possibilities and resources" of the municipality "regarding community preservation," and to make recommendations for the "preservation, rehabilitation and restoration of historic resources." Id., § 5(b). In undertaking those responsibilities, the CPC must consult

with the municipal historical commission and hold public hearings. Id. No appropriation of community preservation fund revenues is made without the approval of the municipal legislative body. Id., § 5(b), (c).<sup>6</sup> Each CPA expenditure is documented and part of the public record. Id., § 13.

Where CPA funds are used to facilitate historic preservation, municipalities are expressly empowered to obtain a preservation restriction (owned by the municipality and managed, should the municipality so desire, by its historical commission). G.L. c. 44B, § 12.

**2. Legislative determinations that historic preservation serves the public interest are well-founded.**

Ensuring that individuals are attracted – and, once attracted, attached – to a place is a crucial component of the socioeconomic health of a community.<sup>7</sup>

Over the past several decades, civic planners and policymakers seeking to bolster development increasingly

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<sup>6</sup> Each year, a municipality must “spend, or set aside for later spending ... not less than 10 per cent of the annual revenues for historic resources.” G.L. c. 44B, § 6.

<sup>7</sup> A prominent 2010 study by the Knight Foundation and Gallup, Inc. – involving the survey of nearly 43,000 individuals – concluded that “communities with the highest level of attachment [i.e., emotional bonds between people and their community] also had the highest rates of gross domestic product growth.” See Knight Foundation, “Soul of the Community 2010, Why People Love Where they Live and Why it Matters” (2010), available at <https://knightfoundation.org/sotc/>.

have focused on the goal of establishing a "sense of place."<sup>8</sup>

The theory of placemaking suggests that the settings within a municipality – its structures, streetscapes and landscapes – both reflect and affect its economic and cultural vibrancy. Rypkema, supra note 8, at 58-60. Amici have borne witness to these phenomena repeatedly (despite the difficulty of measuring them). As prominent urban planner Donovan Rypkema explains:

If in the long run we want to attract capital, to attract investment to our [municipalities], we must differentiate them from anywhere else. It is our built environment that expresses, perhaps better than anything else, our diversity, our identity, our individuality, or differentiation ...

Id. at 62; see generally Stephanie Meeks, The Past & Future City (2016). This, Rypkema observes, is the "major reason why preservationists struggle to maintain their city's historic resources[:] to maintain the city's distinct identity." Rypkema, supra note 8, at 62.

Moreover, recent development theory has emphasized the "critical role the 'third places' can play in strengthening our sense of community" – a term that "refers to places

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<sup>8</sup> See Donovan Rypkema, "The Dependency of Place," 10 Places Journal 58 (1996), available at <http://escholarship.org/uc/item/3d23r369>; Edward T. McMahon, "The Distinctive City," Urban Land Magazine (Apr. 4, 2012), available at <https://urbanland.uli.org/development-business/the-distinctive-city/>



where people spend time between home ('first' place) and work ('second' place)." Stuart M. Butler, Carmen Diaz, "'Third Places' as Community Builders," Brookings Institute (Sept. 14, 2016). In Massachusetts, these are our town greens (a setting typically framed by at least one religious structure) and our distinct and historic gathering places (e.g., Copley Square, home to the historic Trinity Church).

A recent news event accentuates the point. In 2017, to much fanfare, Massachusetts was named the best state in which to live by U.S. News & World Report. Visi Tilak, "Baystate's Public Schools, Health Care, Economy Stand Out," U.S. News & World Report (Feb. 28, 2017). The opening paragraph of the article references no fewer than five historic structures, two owned by the state and three owned by nonprofits, one of which is a church:

A sunset cruise along Boston's Charles River unravels the story and strengths of this state which opened the first public park, the first colonial college and the first American subway. The spire of Harvard Memorial Church rises majestically near the columns of the Massachusetts Institute of Technology on the Cambridge side of the river. On the other side, Boston's skyline encompasses the old and the new, the state Capitol's golden dome and the high-rise Prudential and John Hancock towers.

Id.

**3. Amici's own experience demonstrates the value of public support for historic preservation.**

Amici have borne witness to and participated in countless projects that were made possible through direct public support and that have resulted in immeasurable benefits to the Commonwealth's economy, culture, and global reputation. Historic New England was an original proponent in the 1960s for the rehabilitation of Quincy Market in Boston. With the assistance of funding from the City, the project revitalized an entire neighborhood, becoming a popular tourist destination and a national model for the rehabilitation of festival marketplaces.

In a more recent example, in 2015 Historic Boston (together with Roslindale Village Main Street and the (former) Boston Redevelopment Authority) rehabilitated the long-vacant Roslindale Substation in the heart of Roslindale Square. The building, constructed in 1911, was a power station for the former Boston Elevated Railway Company, and had been unused since the 1970s. Within months, it will be home to a large, destination restaurant. The development, financed in material part with state historic tax credits, catalyzed the construction of 43 residential units on a neighboring lot, an archetype of the transit-oriented development the Commonwealth recently has encouraged.

**B. Religious Institutions Are An Integral Part of Massachusetts' History.**

The work of historic preservation necessarily includes the preservation of religious structures, because religion is an essential element of the history of the Commonwealth (as thousands of pages authored about American history instruct). Our government was framed against that backdrop. Cf. Lynch v. Donnelly, 465 U.S. 668, 674 (1984) ("There is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.").

**1. Convergence of religious and civic life in the Commonwealth before 1833.**

Though now separate, and properly so, the civic and religious life of the Commonwealth once were enmeshed. The state's predecessor entities – the Massachusetts Bay Colony and the Plymouth Bay Colony – were expressly founded as religious societies. Michael McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 Wm. & Mary Law Rev. 2105, 2121 (2003). The Commonwealth's constitution was framed with express acknowledgement of the "goodness of the great Legislator of the universe." See Mass. Const. Part I, Preamble.

As originally adopted, the Commonwealth's constitution contained a different type of establishment clause – one that directed municipalities to establish an official religion and empowered them to collect taxes for its support. See Mass. Const. Part I, art. 3, repealed by Mass. Const. Articles of Amend. art. 9; Hon. Edward F. Hennesey, "The Extraordinary Massachusetts Constitution of 1780," 14 Suffolk U. Law Rev. 873, 881-82 (1980); see also Hon. Scott Kafker, "Surveying Constitutional Territory: Book Review of Lawrence Friedman & Lynnea Thody's The Massachusetts State Constitution," 42 Rutgers Law J. 913, 917 (2011). That constitutional provision remained in effect until 1833. See Mass. Const. Articles of Amend. art. 9. Until then, cities and towns were "both of a municipal and parochial character." Inhabitants of Milford v. Godfrey, 18 Mass. 91, 99 (1822).

## **2. The tradition of the New England meetinghouse.**

The intertwinement of the civic and religious history of Massachusetts is perhaps best embodied in one quintessentially New England structure: the meetinghouse. As described by Thomas Jefferson, "[t]he meetinghouse and schoolhouse and training field are the scenes where New England ... [was] formed." Letter of Thomas Jefferson to William Langborn (Jun. 15, 1786), available at

<https://founders.archives.gov/documents/Jefferson/01-09-02-0539>. “[T]he New England meeting house served both as a town hall and house of worship.” Carl Bridenbaugh, “The New England Town: A Way of Life,” Journal of the American Antiquarian Society, 21 (Apr. 1946); Cf. John Witte, Jr., “How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism,” 39 Emory Law J. 41, 56 (1990) (“Church meetinghouses and chapels were used not only to conduct religious services, but also to host town assemblies, political rallies and public auctions ...”).

The meeting house was the sine qua non of municipal life in the Commonwealth. The designation of a meetinghouse was a prerequisite for establishing many Massachusetts towns, including Acton. See JA 124-25 (a copy of the Province Laws of 1735-36, c. 10, providing that Acton must “within the space of three years from the publication of this act, erect and finish a suitable house for the public worship of God”).

Historically, the meetinghouse not only was the institutional center of Massachusetts cities and towns, it also was the geographic center. In an antecedent to our current focus on transit oriented development, colonial laws often required homes to be constructed within one mile of the meetinghouse. E.g., Nathaniel B. Shurtleff, ed., Records

of the Governor and Company of the Massachusetts Bay, Vol. I, 157 (1853) (reflecting a 1635 order of the General Court that, in certain towns, no "dwelling howse" was to be "a[bove] halfe a myle from the meeting house" without legislative permission). The creation of Acton likewise reflected concern with proximity to the meetinghouse. In the colonial act chartering the town, the Governor, Council and General Court noted that the "inhabitants and proprietors of the north-westerly part of Concord ... have represented ... that they labor under great difficulties by reason of their remoteness from the place of public worship and therefore desired that they ... may be set off as a distinct and sep[arate] township." JA 124 (a copy of the Province Laws of 1735-36, c. 10).

It is no surprise, then, that religious structures are central components of historic districts throughout the Commonwealth. Churches (often more than one) have from the beginning been focal structures bordering the town greens of countless Massachusetts municipalities. See generally Eric Hurwitz, Massachusetts Town Greens: A History of the State's Common Centers (2016).

### **3. The living history of religious structures.**

In many circumstances, preserved religious structures are living illustrations of the Commonwealth's history. The

Freedom Trail includes stops at four churches, including the Park Street Church and King's Chapel, each mere blocks from this Court.<sup>9</sup> Swansea's First Baptist Church marks the country's first majority Baptist community. McConnell, supra, at 2123. The history of Boston is marked, in significant part, by the religious cultures of successive waves of immigrants. Their respective places of worship, preserved today, tell that story.<sup>10</sup>

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<sup>9</sup> At least one religious structure on the Freedom Trail, the Old North Church, has received federal funding for the purpose of historic preservation. The decision of the National Parks Service to grant funds to the Old North Church was specifically reviewed, and approved, by the Office of Legal Counsel of the United States Department of Justice. "Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church," 27 Op. O.L.C. 91 (2003).

<sup>10</sup> Next year, one such structure celebrates its two-hundredth anniversary:

It was there that Boston's small but resilient flock of Catholics had paid \$680 for a rocky patch of land where, on December 21, 1818, they could finally bury their dead. The consecration of a Catholic cemetery represented a remarkable step toward tolerance in a land where not long before, priests could be imprisoned or executed ... In that bucolic cemetery in what is now South Boston, the congregation built a compact, brick chapel. They called it St. Augustine, and it has endured for nearly two centuries.

Andrew Ryan, "For Nearly Two Centuries, this Chapel has Endured in Boston," Boston Globe (May 27, 2017).

**4. The use of public funds to preserve historically important religious structures.**

Reflecting their historical importance, on numerous occasions state funds have been expended to support the preservation of religious structures. The following examples are from amici's own experiences:

**The Steeples Project.** From 1993 to 2012, Historic Boston awarded matching grants to active congregations throughout Boston to allow them to undertake comprehensive building assessments and major capital repairs. On the basis of assessments funded by the Steeples Project, many churches sought and received public funds through the MPPF to preserve, rehabilitate, and illuminate their historically distinct features. Those churches include Roxbury Presbyterian Church, Eliot Congregational Church, Emmanuel Church, the First Church of Jamaica Plain, and St. John's Episcopal Church. In many cases, prominently including the restoration of First Parish Church in Dorchester, the work was performed by students from NBSS.

**Rocky Hill Meetinghouse.** Historic New England's Rocky Hill Meetinghouse in Amesbury is one of the best-preserved examples of a traditional New England meetinghouse. It was completed in 1785, and the original pulpit and pews still



remain. The Rocky Hill Meetinghouse has benefited from a grant from the MPPF.

**Old West Church.** Old West Church on Cambridge Street in Boston was built in 1806 and still houses an active congregation. The congregation played a significant role in the American Revolution, as pastor Jonathan Mayhew is believed to have coined the phrase "no taxation without representation" during a sermon in the original church, which was largely destroyed by British soldiers during the war. Historic New England holds a preservation restriction on the current structure. Old West Church has received multiple grants from the MPPF to help preserve its masonry, slate roof, windows, trim, and clock tower.

Beyond these projects, the continued preservation of some of the most notable religious landmarks in the Commonwealth has been made possible through the use public funds, including:

**Vilna Shul in Beacon Hill,** was built in 1919 as a synagogue and is the oldest Jewish structure in Downtown Boston. It currently houses a Jewish cultural center and is still used for occasional religious services. Vilna Shul has received multiple MPPF grants.

**Old Ship Church in Hingham**, built in 1681, is the oldest surviving 17th-century meetinghouse in America. It has received CPA funds on two occasions.

**First Baptist Church in New Bedford**, built in 1829, is the birthplace of Robert's Rules of Order. It has benefited from a grant from the Massachusetts Cultural Council Facilities Fund.

**First Parish Church in Plymouth** was founded by the Pilgrims and is the oldest church congregation in continuous operation in the country. The current building, constructed in 1899, received CPA funds to restore its stained glass windows.

\* \* \*

The preservation of these state treasures and countless others would not be possible without public funding. The importance of such preservation extends far beyond the benefits of keeping historic building upright. It also spurs economic development and growth. It knits neighborhoods together. It provides students and craftsmen like those at NBSS with opportunities to learn, apply, and maintain their unique skills, and in many cases to enjoy productive and fulfilling careers. This case thus carries significant consequences for the future of historic preservation in Massachusetts and the public benefits it delivers.

## **ARGUMENT**

The Commonwealth values, and has made numerous policy decisions to further, the preservation of its historic resources. The Town of Acton likewise has prioritized historic preservation. Indeed, the Town has acquired property interests, in the form of preservation restrictions, requiring continued preservation of certain historic structures. Because the Town intends to acquire a preservation restriction in exchange for the funds at issue here, Article 46 is not implicated at all. Even if the Court analyzes the transaction under its Article 46 framework – i.e., the three factors set forth in Helmes v. Commonwealth, 406 Mass. 873 (1990) – there is no constitutional impediment. The purpose of the funds is to support the preservation of historic resources; any benefit to a nonprofit religious institution is ancillary to that purpose.

### **I. Acquisition of Historic Preservation Restrictions Does Not Implicate Article 46.**

Although the Superior Court's analysis of the Helmes factors was sound, amici believe that it is unnecessary for this Court to even reach those factors to decide this case. The record demonstrates that the Town of Acton will acquire something of real and substantial value in exchange for the funds at issue – namely, a preservation restriction on the

Acton Congregational Church ("ACC"). Article 46 has never been understood or construed to apply to the use of public funds to purchase something of value, be it goods, services, or - as relevant here - an interest in real estate. Accordingly, this Court can and should affirm the decision below without reaching the Helmes factors.

As consistently interpreted by this Court, Article 46 is not implicated by transactions between the Commonwealth or a municipality and a nonpublic entity. The use of public funds to purchase goods or services is simply not the type of "aid" to nonpublic entities that the Article 46 was intended to avoid. See Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence, 403 Mass. 531, 553-54 (1988) (sale of land to Emerson College was not "aid" requiring analysis under Article 46). If it were, the Commonwealth and its municipalities would be unduly inhibited in any commercial activity.

As the Department of Revenue ("DOR") has recognized, Article 46 "does not mean that [a] city is precluded from purchasing services from non-profit organizations in the same way it purchases services from for-profit entities. As a party to a contract, the city would be compensating the organization for services rendered to the city, instead of giving it a gift or grant." Letter from Kathleen Colleary,

Chief, Bureau of Municipal Finance Law, DOR, to Barbara A. Durand, City Auditor, Marlborough (March 10, 2006), available at <http://www.mass.gov/dor/docs/dls/mflb/opinions/2006-75.pdf>.

This Court similarly has recognized that transactions between a public and nonpublic entity involving an exchange of value do not implicate Article 46. In Benevolent Protective Order of Elks, the Court explicitly held that the City of Lawrence's sale of land to Emerson College did not amount to "public aid." 403 Mass. at 553 ("No public aid can be involved where a private institution pays fair market value for public property."). Moreover, because the sale meant that "public funds were not being used to aid Emerson College," the Court further determined that it "need not analyze the proposed transaction in terms of the three criteria enunciated in Commonwealth v. School Comm. of Springfield," i.e., the three criteria now commonly referred to as the Helmes factors. Id. at 554; see also Opinion of the Justices, 374 Mass. 843, 856-57 (1978) (sale of land to Boston University did not violate Article 46); Brooks v. City of Boston, 334 Mass. 285, 286-87 (1956) (sale of park to Hebrew Home for Aged did not violate Article 46).

In this case, the Town of Acton will receive something of real and substantial value in exchange for providing

funds to the ACC. The receipt of the funds is expressly conditioned on the church executing and conveying to the Town a perpetual historic preservation restriction.

By statute, a historic preservation restriction means:

a right ... 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.

G.L. c. 184, § 31; see also G.L. c. 44B, § 12 (empowering municipalities to acquire preservation easements with CPA funds). Significantly, preservation restrictions "are interests in land." G.L. c. 184, § 32. They "may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land ... to assure compliance." Id. Preservation restrictions "may be released, in whole or in part, by the holder for consideration ... in the same manner as the holder may dispose of land or other interests in land," subject certain governmental approvals. Id.

Importantly, a historic preservation restriction also ensures the continued preservation of an architecturally or historically significant church even if the building ceases

to be owned by a religious congregation. Historic New England, for example, holds a preservation restriction on the Charles Street Meetinghouse in Boston. The church continued to be operated by active religious congregations after the preservation restriction was acquired, but was later sold to a private owner. Even though the building is no longer used for religious purposes, Historic New England's preservation restriction ensures the ongoing protection of this historically significant structure.

Well before the ACC sought CPA funds from the Town, the Town had made a determination that the church and its affiliated structures were integral components in the Town's history and streetscape. JA 228-232. By acquiring a perpetual preservation restriction in the ACC, the Town has ensured that the ACC will protect its historic buildings – which will remain unaltered for generations of the Town's residents to enjoy. The Town will have the right to enter the property to police its interests and if necessary enforce the preservation restriction by seeking injunctive relief. And, if it so chooses and obtains the requisite approvals, the Town can release the preservation restriction in the future in exchange for consideration.

On these facts, Acton's use of public funds to acquire a valuable<sup>11</sup> preservation restriction in the ACC simply does not amount to public "aid" triggering scrutiny under Article 46. See Benevolent Protective Order of Elks, 403 Mass. at 553; see also Letter from Kathleen Colleary, Chief, Bureau of Municipal Finance Law, DOR, to Mary Ellen Gattoni (Feb. 9, 2007) (reproduced at JA 552) (observing that "acquiring an historic preservation restriction ... ensure[s] that the grant is for public rather than private purposes"). As a result, this Court "need not analyze the proposed transaction[s] in terms of the three criteria enunciated in Commonwealth v. School Comm. of Springfield" and Helmes. See Benevolent Protective Order of Elks, 403 Mass. at 553. The decision below should be affirmed on this basis alone.

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<sup>11</sup> Plaintiffs' complaint fails to even acknowledge that Acton is acquiring a historic preservation restriction in exchange for the CPA funds at issue, much less allege (or present evidence in support of its request for a preliminary injunction) that the funds to be provided are disproportionate to the value of the preservation restriction or that the acquisition of the preservation restriction is a mere pretext for providing "aid" to a nonpublic entity. JA 9-22; see Helmes, 406 Mass. at 878 (finding "no abuse or unfairness, political or economic" where no private person would benefit specially from expenditure for preservation).



**II. Historic Preservation is an Important Public Purpose, Worthy of Support for its own Sake, and is Not a Pretext for Public Aid to Private Organizations.**

Even if this Court applies its Helmes framework to address plaintiffs' claim, Article 46 is no impediment to the Town of Acton's use of CPA funds to support the "acquisition, preservation, rehabilitation and restoration of historic resources." That spending is specifically authorized by state law, G.L. c. 44B, § 5(b)(1), and a long line of cases – including one in the Anti-Aid context – establishes that expenditures to support historic preservation serve a legitimate public interest. See Helmes, 406 Mass. at 877; see also Opinion of the Justices, 333 Mass. 773, 780 (1955) ("There has been substantial recognition by the courts of the public interest in the preservation of historic buildings, places, and districts."); Fabiano v. City of Boston, 49 Mass. App. Ct. 281 (2000) (a municipality may "preserve within reason the historic ... character" of its streetscape).

**A. Spending to preserve historic resources does not conflict with Article 46.**

The plain language of Article 46 indicates that the purpose of spending by the public entity is the key inquiry. Mass. Const. Articles of Amend. art. 46, § 2, as amended by art. 103. Where the purpose of public spending to support a

bona fide (i.e., non-pretextual) public interest, it is permitted. See id.; Attorney General v. School Committee of Essex, 387 Mass. 326, 333-34 (1982). By contrast, where the purpose of public spending is to maintain or aid a private nonprofit organization, it is not permitted. See Opinion of the Justices, 401 Mass. 1201, 1206 (1987); Bloom v. School Committee of Springfield, 376 Mass. 35, 42-45 (1978). As the Amendment provides:

[N]o grant, appropriation, or use of public money ... shall be made or authorized by the Commonwealth or any political division thereof for the purpose of founding or maintaining or aiding ... any ... hospital, institution, or educational, charitable or religious undertaking which is not publicly owned..

Mass. Const. Articles of Amend. art. 46, § 2, as amended by art. 103 (emphasis added).<sup>12</sup> The emphasized language is the foundation of this Court's Article 46 jurisprudence.

Without a focus on the purpose of the spending, the Anti-Aid Amendment would be a significant constraint on the legislative power to appropriate – perhaps the most significant constraint found in the Commonwealth's constitution. Take, for example, the significant subsidies

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<sup>12</sup> Plaintiffs emphasize the second clause of Article 46, § 2, but the operative language is identical: "no such grant or appropriation or use of public money ... shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society." (Emphasis added).

directed by the state to nonprofit hospitals that disproportionately care for low-income patients.<sup>13</sup> Because that spending is for the purpose of public health and welfare, it is permissible, even though the ancillary benefit to nonprofit hospitals is considerable.

Here, the legitimate purpose is historic preservation. See Helmes, 406 Mass. at 877; Opinion of the Justices, 333 Mass. at 780. Where spending achieves a legitimate public purpose, this Court's precedent instructs that the Anti-Aid Amendment intercedes only where the purpose is pretextual and the spending, by any objective measure, is meant to aid private nonprofit organizations.<sup>14</sup> Both the structure of the CPA and the record refute any suggestion of pretext.

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<sup>13</sup> The fiscal year 2018 budget includes supplemental payments to safety net hospitals – aid to them that is distinct from the payment for services expressly allowed by Section 3 of Article 46. See Massachusetts Budget and Policy Center, "Analyzing the State Budget for FY 2018" (July 21, 2017), available at [http://www.massbudget.org/report\\_window.php?loc=Analyzing-the-State-Budget-for-FY-2018.html](http://www.massbudget.org/report_window.php?loc=Analyzing-the-State-Budget-for-FY-2018.html).

<sup>14</sup> Compare School Committee of Essex, 387 Mass. at 333–34 (law providing subsidized transportation to private school students to the extent it is available to public school students permissible because it established a "general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools" and challengers "demonstrated no hidden purpose to maintain private schools") (internal citation and quotation marks omitted), and Commonwealth v. School Committee of Springfield, 382 Mass. 665, 678–80 (1981) (program that pays private school tuition for students in need of specialized services not available in the public

Under the CPA, before a dollar is expended for the "acquisition, preservation, rehabilitation and restoration of historic resources," the Acton CPC must study the Town's needs and determine where historic preservation fits within them. G.L. c. 44B, § 5(b). The CPC has done just that, issuing a lengthy Community Preservation Plan in September 2014, which emphasized the importance of "[p]rotect[ing], preserv[ing], and/or restor[ing] historic properties and sites throughout Acton," particularly those reflecting the "rural/historic character of the town" including is "historic land and streetscapes." Town of Acton CPC, "Community Preservation Plan 2015" (Sept. 2014), available at <http://www.acton-ma.gov/DocumentCenter/View/3028>. Where the CPC determines that a particular expenditure will meet the Town's needs, it must make a recommendation to the Town Meeting, which has complete discretion to accept or reject

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school setting permissible because the law's purpose was to help "specified children with special needs obtain the education which is theirs by right"), with Opinion of the Justices, 401 Mass. at 1206 (legislation providing tax deduction for primary and secondary school tuition and related expenses impermissible because "the benefits of these proposed tax deductions would flow exclusively to those taxpayers whose dependents attend private schools and, as a result, to the private schools themselves"), and Bloom, 376 Mass. at 43 (striking down a textbook loan program that benefited private schools exclusively).

the recommendation. G.L. c. 44B, § 5(c); see Town of Acton Bylaws c. S, § 4.3.

There is no dispute that the property to be preserved with the funding at issue here is located in a historic district and contributed to the listing of that district on the state register. See Appellants' Br. at 5-7; JA 113, 196-222, 252-271. The ACC and its component buildings border the town green (and have for over 150 years). JA 213-14, 281-82, 285. The historic significance of the structures is not in dispute. And they plainly fit within the CPA's definition of a historic resource. See G.L. c. 44B, § 2.

Of course, where any provision of public money is made to a nonprofit organization for historic preservation, that organization receives a benefit. Accordingly, the CPA is set up to ensure that any private benefit is ancillary to the public purpose of preservation: (i) only certain structures are eligible as determined by a benchmark (historical listing or designation by the local historical commission) unrelated to religious or nonprofit status; (ii) the CPC must make and explain its recommendation to the town legislative body; which then (iii) must approve the expenditure as consistent with the CPA.<sup>15</sup>

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<sup>15</sup> Moreover, the Act specifically prohibits grants for the purpose of maintenance (rather than preservation or

**B. None of the three Helmes considerations give rise to constitutional concern here.**

This Court has adopted a three-factor test, most clearly enunciated in Helmes, for determining whether the disbursement of public funds to a private nonprofit is permissible. Specifically: (i) whether the purpose of the challenged action is to aid a private charity; (ii) whether the action does in fact substantially aid a private charity; and (iii) whether the action avoids the political and economic abuses which prompted the passage of Article 46. Helmes, 406 Mass. at 876. The Helmes Court also phrased the third factor as “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.

Amici advocate the adoption of the Town’s Helmes analysis, Appellee’s Br. at 29-40, and supplement the Town’s argument in two respects.

First, while the funding decision (rather than the CPA writ large) may be the proper subject of the Helmes analysis, the structure of the CPA must be considered in

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rehabilitation), G.L. c. 44B, § 5(b)(2), in recognition of the limitations imposed by Article 46. Cf. Commonwealth v. Maloney, 447 Mass. 557, 589 (2006) (internal citations and quotations omitted) (the Court “presume[s] that the Legislature is aware of the prior state of the law as explicated by the decisions of this Court” in construing and interpreting state law).

applying the first and third factors. The breadth of the CPA, the types of funding it allows, and the political safeguards against the misuse of CPA funds are central to the analysis of the purpose of a CPA grant and whether it is "abusive or unfair." Here, the CPA is a considered, state and local partnership to incent and finance the preservation of the unique attributes of the Commonwealth's communities in a multitude of ways. See G.L. c. 44B, § 1, et seq. It is not a subsidy directed exclusively at a particular type of private nonprofit, i.e., the only uses of public funds that have run afoul of Article 46. See Opinion of the Justices, 401 Mass. at 1206; Bloom, 376 Mass. at 43. Absent some indication that the Town has improperly administered the CPA, plaintiffs have no Article 46 claim.

Second, the Attorney General's Office has evaluated a state program to finance construction at private and parochial schools, and concluded there were no Article 46 concerns under the Helmes factors. See 1984-85 Mass. Op. Att'y Gen. 83. The grants envisioned by that program were for the purpose of removing asbestos from school buildings. Even though the grants significantly benefited schools (by allowing them to remain open and "attract or retain students"), the "thrust of the legislation was to advance" a legitimate public health initiative. Id. Here, the same

analysis applies: that the ACC receives an ancillary benefit from the funds it receives is undeniable, but the purpose of the funding decision is historic preservation. Notably, the Attorney General's opinion mirrors that of DOR (which is charged with oversight of the CPA, G.L. c. 44B, § 17) in the context of historic preservation. JA 146-47.

**C. The CPA was enacted and adopted by 172 municipalities against the backdrop of this Court's precedent interpreting Article 46.**

As noted above, this Court's precedent establishes that the provision of funds to a nonprofit organization for the purpose of historic preservation is permissible. In enacting the CPA, the General Court legislated against that backdrop, as the statute plainly contemplates that preservation and conservation grants will be made to nonprofit organizations. See, e.g., G.L. c. 44B, § 5(b), 12 (provisions allowing municipalities to obtain preservation and conservation easements makes sense only in the context of funding for private entities). And 172 municipalities have voted to adopt the CPA, with the understanding that such grants would be permitted. In light of that extensive legislative and municipal reliance, continued adherence to Helmes is particularly important. Cf. Taylor v. Martha's Vineyard Land Bank Comm'n, 475 Mass. 682, 688 (2016) (considerations



favoring stare decisis particularly acute where actions taken in reliance on prior decision).

**III. In Administering the CPA, the Town of Acton May Not Treat Religious and Secular Nonprofits Differently.**

If the funds at issue in this case had been provided by the Town of Acton to a secular nonprofit organization (e.g., the Acton Historical Society ("AHS")) for the preservation of a historic structure (e.g., the AHS's Hosmer House, listed on the National Register of Historic Places), any Article 46 claim would plainly fail under Helmes (supra, § II).

Consequently, plaintiffs stress that this case is different because it involves a religious nonprofit.<sup>16</sup> But that distinction finds no support in the text of Article 46, which treats secular and religious nonprofits identically. See supra n. 12; Appellee's Br. at 20-24. Accordingly, were the Court to find an Article 46 problem here, the Commonwealth's extensive public support for historic preservation efforts by nonprofits would be placed into question.

Not only is Plaintiffs' attempted distinction inconsistent with the plain language of Article 46, it also

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<sup>16</sup> E.g., Appellants' Br. at 19-20; Appellants' Reply Br. at 3.

is constitutionally problematic under the United States Supreme Court's recent decision in Trinity Lutheran Church of Columbia v. Comer, 538 U.S.—, 137 S. Ct. 2012 (2017).<sup>17</sup> There, the Supreme Court concluded that the Free Exercise Clause of the First Amendment does not permit a state to exclude religious organizations from a grant program open to other nonprofits (specifically, a program to resurface playgrounds with recycled rubber). See id. at 2022 (a church "is a member of the community too, and the State's decision to exclude it for purposes of this public program [cannot] withstand the strictest of scrutiny").

Identical logic applies here. The Town of Acton makes CPA grant funding available to organizations that own and preserve historically significant buildings. See generally G.L. c. 44B, § 5(b); Town of Acton Bylaw c. S, § 3.2; Appellee's Br. at 4-12. The ACC may not be excluded as a recipient of that funding simply because it is a religious organization. Per the Supreme Court, "the exclusion of [a church] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution ... and cannot stand." Id. at 2025.

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<sup>17</sup> Cf. School Comm. Of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 79 (1982) (where, as here, "reasonable principles of interpretation permit," Massachusetts law will be construed so as to "avoid such constitutional difficulties").

Faced with the clear direction of Trinity Lutheran, in their recent filing plaintiffs instead question the legitimacy of the public interest in preserving a historic building that is used for religious purposes. Appellants' Memorandum of Law at 4-6. But that approach ignores the historic reality, which demonstrates that religious structures are a fundamental part of the Commonwealth's living history. See infra Background § B. It is likewise inconsistent with the Commonwealth's longstanding approach to historic preservation, which includes, among many other things, the cataloguing of religious structures on the state register. If – as the Legislature has determined time and again, with this Court's approval – the historic resources of the Commonwealth are worth preserving, the preservation effort would be markedly incomplete were it to exclude religious structures.

Moreover, it is doubtful that an historic preservation program that excludes religious structures otherwise eligible for funding under objective criteria (i.e., listing on the state register or designation by the local historical commission, the benchmark for CPA eligibility, G.L. c. 44B, § 2) could be reconciled with the Supreme Court's holding in Trinity Lutheran. See 137 S. Ct. at 2022 (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)) (vindicating Trinity

Lutheran's "right to participate in a government benefit program without having to disavow its religious character" because "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit.'").

**CONCLUSION**

For the foregoing reasons, amici respectfully request that the Court affirm the decision below.

Respectfully Submitted,

BOSTON PRESERVATION  
ALLIANCE,  
HISTORIC BOSTON, INC.,  
HISTORIC NEW ENGLAND,  
NORTH BENNET STREET SCHOOL,  
and PRESERVATION  
MASSACHUSETTS,

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Dated: August 22, 2017

**CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)**

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief complies with all applicable appellate rules.



M. Patrick Moore Jr.

**CERTIFICATE OF SERVICE**

I certify under the penalties of perjury that on August 22, 2017, I caused a true and correct copy of the foregoing document to be served by electronic mail on counsel of record in this matter, with paper copies to follow.



M. Patrick Moore Jr.

# **ADDENDUM**



**Massachusetts Constitution Articles of Amendment art. 46, §§ 1–2, as amended by art. 103**

§ 1. No law shall be passed prohibiting the free exercise of religion.

§ 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.

§ 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

§ 4. Nothing herein contained shall be construed to deprive any inmate of a publicly controlled reformatory, penal or charitable institution of the opportunity of religious exercises therein of his own faith; but no inmate of such institution shall be compelled to attend religious services or receive religious instruction against his will, or, if a minor, without the consent of his parent or guardian.



**G.L. c. 44B, § 3, 5-8, 12**

**G.L. c. 44B, § 3**

(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.

**G.L. c. 44B, § 5**

(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.

**G.L. c. 44B, § 6**

In each fiscal year and upon the recommendation of the community preservation committee, the legislative body shall spend, or set aside for later spending, not less than 10 per cent of the annual revenues in the Community Preservation Fund for open space, not less than 10 per cent of the annual revenues for historic resources and not less than 10 per cent of the annual revenues for community housing. In each fiscal year, the legislative body shall make appropriations from the Community Preservation Fund as it deems necessary for the administrative and operating expenses of the community preservation committee and such appropriations shall not exceed 5 per cent of the annual revenues in the Community Preservation Fund. The legislative body may also make appropriations from the Community Preservation Fund as it deems necessary for costs associated with tax billing software and outside vendors necessary to integrate such software for the first year that a city or town implements the this chapter; provided, however, that the total of any administrative and operating expenses of the community preservation committee and the first year implementation expenses shall not exceed 5 per cent of the annual revenues in the Community Preservation Fund.

Funds that are set aside shall be held in the Community Preservation Fund and spent in that year or later years; provided, however, that funds set aside for a specific purpose shall be spent only for the specific purpose. Any funds set aside may be expended in any city or town. The community preservation funds shall not replace existing operating funds, only augment them.

**G.L. c. 44B, § 7**

Notwithstanding the provisions of section 53 of chapter 44 or any other general or special law to the contrary, a city or town that accepts sections 3 to 7, inclusive, shall establish a separate account to be known as the Community Preservation Fund of which the municipal treasurer shall be the custodian. The authority to approve expenditures from the fund shall be limited to the legislative body and the municipal treasurer shall pay such expenses in accordance with chapter 41.

The following monies shall be deposited in the fund: (i) all funds collected from the real property surcharge or bond proceeds in anticipation of revenue pursuant to sections 4 and 11; (ii) additional funds appropriated or dedicated from allowable municipal sources pursuant to subsection (b ½ ) of section 3, if applicable; (iii) all funds received from the commonwealth or any other source for such purposes; and (iv) proceeds from the disposal of real property acquired with funds from the Community Preservation Fund. The treasurer may deposit or invest the proceeds of the fund in savings banks, trust companies incorporated under the laws of the commonwealth, banking companies incorporated under the laws of the commonwealth which are members of the Federal Deposit Insurance Corporation or national banks, or may invest the proceeds in paid up shares and accounts of and in co-operative banks or in shares of savings and loan associations or in shares of federal savings and loan associations doing business in the commonwealth or in the manner authorized by section 54 of chapter 44, and any income therefrom shall be credited to the fund. The expenditure of revenues from the fund shall be limited to implementing the recommendations of the community preservation committee and providing administrative and operating expenses to the committee.

**G.L. c. 44B, § 8**

(a) Except as otherwise provided, the fees of the registers of deeds to be paid when a document or instrument is recorded shall be subject to a surcharge of \$20; provided, however, that if the document or instrument to be filed includes multiple references to a document or instrument intending or attempting to assign, discharge, release, partially release, subordinate or notice any other document or instrument, each reference shall be separately indexed and separately assessed an additional \$20 surcharge. The fee for recording a municipal lien certificate shall be subject to a surcharge of \$10; provided, however, that if the certificate includes multiple references to a document or instrument intending or attempting to assign, discharge, release, partially release, subordinate or notice any other document or instrument, each reference shall be separately indexed and separately assessed an additional \$10 surcharge. The surcharges imposed shall be used for community preservation purposes. No surcharge shall apply to a declaration of homestead under chapter 188. No surcharge shall apply to the fees charged for additional pages, photostatic copies, abstract cards or additional square feet for the recording of plans.

(b) The fees of the assistant recorder, except as otherwise provided, to be paid when the instrument is left for registering, filing or entering with respect to registered land shall be subject to a surcharge of \$20. The fees for so registering, filing or entering a municipal lien certificate shall be subject to a surcharge of \$10. The surcharges shall be imposed for the purposes of community preservation. No surcharge shall apply to a declaration of homestead of chapter 188. No surcharge shall apply to the fees charged for additional lots shown on plans, for indexing instruments recorded while a petition for registering is pending, for additional certificates of sewer assessments, for old age assistance liens, for duplicates and for photocopies.

(c) All surcharges on fees collected pursuant to this section shall be forwarded to the Massachusetts Community Preservation Trust Fund, established in section 9.

**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. 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.

G.L. c. 184, §§ 31–33

**G.L. c. 184, § 31**

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.

#### **G.L. c. 184, § 32**

No conservation restriction, agricultural preservation or watershed preservation restriction as defined in section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas or of a particular such area, and no preservation restriction, as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include preservation of buildings or sites of historical significance or of a particular such building or site, and no affordable housing restriction as defined in said section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include creating or retaining or assisting in the creation or retention of affordable rental or other housing for occupancy by persons or families of low or moderate income shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes, or on account of the governmental body the charitable corporation or trust having received the right to enforce the restriction by assignment, provided (a) in case of a restriction held by a city or town or a commission, authority or other instrumentality thereof it is approved by the secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district



commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction, and (b) in case of a restriction held by a charitable corporation or trust it is approved by the mayor, or in cities having a city manager the city manager, and the city council of the city, or selectmen or town meeting of the town, in which the land is situated, and the secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction.

Such conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions are interests in land and may be acquired by any governmental body or such charitable corporation or trust which has power to acquire interest in the land, in the same manner as it may acquire other interests in land. The restriction may be enforced by injunction or other proceeding, and shall entitle representatives of the holder to enter the land in a reasonable manner and at reasonable times to assure compliance. If the court in any judicial enforcement proceeding, or the decision maker in any arbitration or other alternative dispute resolution enforcement proceeding, finds there has been a violation of the restriction or of any other restriction described in clause (c) of section 26 then, in addition to any other relief ordered, the petitioner bringing the action or proceeding may be awarded reasonable attorneys' fees and costs incurred in the action proceeding. The restriction may be released, in whole or in part, by the holder for consideration, if any, as the holder may determine, in the same manner as the holder may dispose of land or other interests in land, but only after a public hearing upon reasonable public notice, by the governmental body holding the restriction or if held by a charitable corporation or trust, by the mayor, or in cities having a city manager the city manager, the city council of the city or the selectmen of the town, whose approval shall be required, and in case of a restriction requiring approval by the secretary of environmental affairs, the Massachusetts historical commission, the director of the division of water supply protection of the department of conservation and recreation, the commissioner of food and agriculture, or the director of housing and community development, only with like approval of the release.

No restriction that has been purchased with state funds or which has been granted in consideration of a loan or grant made with state funds shall be released unless it is repurchased by the land owner at its then current fair market value. Funds so received shall revert to the fund sources from which the original purchase, loan, or grant was made, or, lacking such source, shall be made available to acquire similar interests in other land. Agricultural preservation restrictions shall be released by the holder only if the land is no longer deemed suitable for agricultural or horticultural purposes or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good. Watershed preservation restrictions shall be released by the holder only if the land is deemed by the commissioner of the metropolitan district commission and the secretary of environmental affairs to no longer be of any importance to the water supply or potential water supply of the commonwealth or unless two-thirds of both branches of the general court, by a vote taken by yeas and nays, vote that the restrictions shall be released for the public good.

Approvals of restrictions and releases shall be evidenced by certificates of the secretary of environmental affairs or the chairman, clerk or secretary of the Massachusetts historical commission, or the commissioner of food and agriculture, or the director of housing and community development or the city council, or selectmen of the town, as applicable duly recorded or registered.

In determining whether the restriction or its continuance is in the public interest, the governmental body acquiring, releasing or approving shall take into consideration the public interest in such conservation, preservation, watershed preservation, agricultural preservation or affordable housing and any national, state, regional and local program in furtherance thereof, and also any public state, regional or local comprehensive land use or development plan affecting the land, and any known proposal by a governmental body for use of the land.

This section shall not be construed to imply that any restriction, easement, covenant or condition which does not have the benefit of this section shall, on account of any provisions hereof, be unenforceable. Nothing in this section or section thirty-one and section thirty-three shall diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain or otherwise to use land for public purposes.

Nothing in this section shall prohibit the department of public utilities or the department of telecommunications and cable from authorizing the taking of easements for the purpose of utility services provided that (a) said department shall require the minimum practicable interference with farming operations with respect to width of easement, pole locations and other pertinent matters, (b) the applicant has received all necessary licenses, permits, approvals and other authorizations from the appropriate state agencies, (c) the applicant shall compensate the owner of the property in the same manner and the same fair market value as if the land were not under restriction.

### **G.L. c. 184, § 33**

Any city or town may file with the register of deeds for the county or district in which it is situated a map or set of maps of the city or town, to be known as the public restriction tract index, on which may be indexed conservation, preservation, agricultural preservation, watershed preservation and affordable housing restrictions and restrictions held by any governmental body. Such indexing shall indicate sufficiently for identification (a) the land subject to the restriction, (b) the name of the holder of the restriction, and (c) the place of record in the public records of the instrument imposing the restriction. Maps used by assessors to identify parcels taxed, and approximate boundaries without distances, shall be sufficient, and, where maps by parcels are not available, addition to other maps of approximate boundaries of restricted land shall be sufficient. If the names of the holders and the instrument references cannot be conveniently shown directly on the maps, they may be indicated by appropriate reference to accompanying lists. Such maps may also indicate similarly, so far as practicable, (a) any order or license issued by a governmental body entitled to be recorded or registered, (b) the approximate boundaries of any historic or architectural control district established under chapter forty C or any special act, ordinance or by-law where a certificate of appropriateness may be required for exterior changes, (c) any landmark certified by the Massachusetts historical commission pursuant to section twenty-seven of chapter nine, (d) any other land which any governmental body may own in fee,

or in which it may hold any other interest, and (e) such additional data as the filing governmental body may deem appropriate.

Whenever any instrument of acquisition of a restriction or order or other appropriate evidence entitled to be indexed in a public restriction tract index is at the option of the holder of the right to enforce it submitted for such indexing, the register shall make, or require the holder of the right to enforce the restriction or order or interest to make, appropriate additions to the tract index.

The maps shall be in such form that they can be readily added to, changed, and reproduced, and shall be a public record, appropriately available for public inspection. If any governmental body, other than a city or town in which the land affected lies, holds a right to enforce a restriction or order or an interest entitled to be indexed in a public restriction tract index for any city or town which has not filed such an index, or if the secretary of environmental affairs or the Massachusetts historical commission or the commissioner of food and agriculture or the director of housing and community development approves a conservation or preservation restriction or agricultural or watershed preservation restriction or affordable housing restriction held by a charitable corporation or trust so entitled, and the city or town does not within one year after written request to the mayor or selectmen file a sufficient map or set of maps for the purpose, the holding governmental body or approving secretary, director or commission may do so.

The registers of deeds, or a majority of them, may from time to time make and amend rules and regulations for administration of public restriction tract indexes, and the provisions of section thirteen A of chapter thirty-six shall not apply thereto. No such rule, regulation or any amendment thereof shall take effect until after it has been approved by the attorney general. New tract indexes may be filed, from time to time, upon compliance with such rules and regulations as may be necessary to assure against omission of prior additions and references still effective.