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August 14, 2020

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Community Preservation Committee  
c/o Lara Kritzer, Community Preservation Program Manager  
City of Newton Planning & Development Department  
1000 Commonwealth Avenue  
Newton, MA 02459

Re: Grace Episcopal Church Application

Dear Members of the Community Preservation Committee:

We are outside counsel to Grace Episcopal Church (“Grace”). We write to address Grace’s application (the “Application”) for Community Preservation Act (“CPA”) funds to make emergency repairs to Grace’s historic bell tower. In particular, we write to explain why, in our view, Grace’s Application and the use of CPA funds to restore the tower are consistent with state and federal law, including the so-called “anti-aid amendment” to the Massachusetts Constitution and the Supreme Judicial Court’s decision in Caplan v. Town of Acton, 479 Mass. 69 (2018).

As described in greater detail in the Application, Grace, and the tower in particular, have been recognized repeatedly as a significant historic resource. Grace is listed in the State Register of Historic Places as a contributing property to the Farlow and Kenrick Parks National Register Historic District. The Newton Historic Commission lists Grace among the sites on its historic walking tour of Newton Corner, and notes that Grace’s “corner tower” in particular “serves as an important local landmark.” And Newton’s 2010 Heritage and Landscape Report recognized that “Churches, synagogues and other places of worship help to define Newton’s villages and neighborhoods. Many are prominently located landmarks with attractive surroundings, have distinctive architectural styles and serve as community gathering places. Some also provide important public functions by housing various social services.” Despite that recognition, to our knowledge Newton has never provided CPA funding to a historic church, synagogue, or other property owned by a religious organization.

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We recognize the competing concerns that arise when public grants potentially benefit (or have the appearance of benefiting) religious organizations. The U.S. Supreme Court has repeatedly held, however, that the “Establishment Clause [of the U.S. Constitution] is not offended when religious observers and organizations benefit from neutral government programs.” Espinoza v. Mont. Dep’t of Revenue, 140 S. Ct. 2246, 2254 (June 30, 2020). On the other hand, disqualifying religious organizations from participating in such government programs simply because of their religious affiliation raises serious constitutional concerns. As the Supreme Court just recently reaffirmed, the Free Exercise Clause of the U.S. Constitution prohibits “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character.’” Id. (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017)).

Here in Massachusetts, the Supreme Judicial Court (“SJC”) has recognized that religious organizations cannot be excluded categorically from receiving CPA funds without raising serious constitutional concerns. Caplan, 479 Mass. at 83–84. The SJC has interpreted the Massachusetts Constitution’s anti-aid amendment to impose no such categorical bar, and to instead require each grant to be scrutinized on an individual basis. In the Caplan case, the SJC endorsed a three-factor framework: whether a grant of public funds to a church is permissible under the anti-aid amendment depends on (1) whether the motivating purpose for the grant was to aid the church, (2) whether the grant will have the effect of substantially aiding the church, and (3) whether the grant avoids the risks that prompted the passage of the anti-aid amendment in the first place (namely, infringement on liberty of conscience, entanglement of church and state, and the disruption of civic harmony). 479 Mass. at 71.

Viewed through the lens of this three-factor framework, the grant requested in Grace’s Application would not run afoul of the anti-aid amendment or the SJC’s holding in Caplan.

First, the motivating purpose behind a grant of CPA funds to Grace would be historic preservation, not aiding Grace’s religious mission. See Caplan, 479 Mass. at 87 (recognizing historic preservation as a permissible purpose, provided there is no “hidden purpose” of aiding a church). Designed by renowned architect Alexander Rice Esty, the Gothic-style stone tower at Grace bears a number of historically and architecturally significant features, including an open belfry trimmed with Gothic arches, tracery, and colonnettes. A grant of CPA funds to make emergency repairs necessary to preserve the tower would be consistent with Newton’s recognition that historic churches and synagogues contribute significantly to the character of the City’s neighborhoods. It would also be consistent with the Newton Historical Commission’s characterization of the tower as a “local landmark.”

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In addition, no part of the tower is used for religious worship services or other activities integral to advancing Grace’s religious mission. Nor would any part of a CPA grant be spent restoring religious imagery or iconography. In these circumstances, it is clear that the motivating purpose for a grant of CPA funds would be historic preservation, and not aiding the religious mission of Grace.

Second, the requested funds would not have the effect of substantially aiding Grace as a church. As noted, the tower is not used for any religious worship services, and while many parishioners (like other citizens of Newton) appreciate the tower for its historic and architectural significance, a majority of parishioners recently expressed that they do not view the tower as integral to Grace’s mission or religious identity. Additionally, it is worth stressing that the choice for Grace is not between securing a CPA grant or diverting funds from its other programs; the choice is whether the tower can be preserved or not. If Grace is not able to secure a CPA grant to defray some of the cost of preserving the tower, the project simply will not be undertaken. The effect of a CPA grant is therefore to benefit all citizens of Newton who value historic preservation and appreciate the Grace tower’s historic significance. It will not have the effect of substantially benefiting Grace as a church.

Third, a grant of CPA funds for the preservation of the Grace tower will not give rise to the concerns that prompted the passage of the anti-aid amendment. In the Caplan decision, the SJC identified those concerns as: the risk that “liberty of conscience” will be infringed by using taxpayer money to support the religious institutions of others, the risk of improper government entanglement with religion, and the risk of threatening “civic harmony” with divisive questions of religion. 479 Mass. at 90. It is worth noting, however, that the U.S. Supreme Court and the SJC have also acknowledged the more “checkered” and “shameful pedigree” of so-called “anti-aid” and “Blaine Amendments” to state constitutions – namely, that they were largely born of bigotry and hostility towards Catholics, particularly Irish-Catholic immigrants. Espinoza, 140 S. Ct. at 2259; Caplan, 479 Mass. at 78–79. Needless to say, to the extent those concerns motivated the initial passage of the anti-aid amendment, they are not entitled any consideration.

The grant requested in Grace’s Application does not present any substantial risk of infringing liberty of conscience, entangling the City in church affairs, or threatening civic harmony. As noted above, the requested funds will not be used to support Grace’s religious mission, nor will they be used to preserve or restore any religious imagery. The risk to liberty of conscience is therefore no greater than when a religious organization benefits from any generally available, taxpayer-funded City services. Nor will a grant entangle the City in Grace’s religious affairs. The funds will only be used for the preservation of the tower, a place where no religious worship

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or other activities are conducted, and which is already subject to a historic preservation restriction between Grace and the Massachusetts Historical Commission. Finally, Grace's Application has been carefully and narrowly tailored to seek support for an essentially non-religious – and yet historically significant – portion of its property. There is therefore little risk to civic harmony.

Grace's Application to preserve its historic tower is readily distinguishable from the use of CPA funds to restore stained glass windows containing religious imagery, which the SCJ found problematic in Caplan. Most obviously, the grant under consideration here would provide no funds for restoring religious imagery. Additionally, Grace's Application is not seeking any funds for the restoration or maintenance of the portion of its property where religious worship occurs. That was not the case in Caplan, and was repeatedly emphasized by the SJC as a concern. 479 Mass. at 91 (finding a risk to liberty of conscience because "the proposed grants would be used to renovate the main church building, where the church conducts its worship services"); *id.* at 92 (finding that the preservation restriction upon which the grants were conditioned risked entanglement of church and state because it could limit the church's ability to make future alterations to its worship space); *id.* 93–94 (noting the risk of political divisiveness is heightened "where those grants are for the renovation of a worship space or of a stained glass window with explicit religious imagery"). Finally, the grant at issue here would not allow money to be saved "to be used to support [the church's] core religious activities." 479 Mass. at 89. Grace is not seeking CPA funds in order to avoid diverting funds from its other programs and services. In the absence of CPA funding, preservation of the tower will simply not be accomplished.

For all of these reasons, a faithful application of the three-factor analysis endorsed by the SJC in Caplan leads to the unavoidable conclusion that the grant sought by Grace's Application would not violate the anti-aid amendment. In fact, since the Caplan decision, CPA grants have been made by many communities to active houses of religious worship like Grace, including a grant by the City of Boston to the Emmanuel Episcopal Church (also designed by Alexander Rice Esty) to restore its doors and entrances. Upon review of Grace's Application, we trust that the Committee will reach the same conclusion.



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If we can be of any further assistance Committee, please let us know.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Ryan P. McManus", written in a cursive style.

Ryan P. McManus