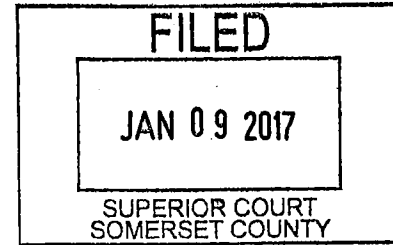


**A TRUE COPY**

**John M. Bowens, Esq.** (Atty ID 009711973)  
**SCHENCK, PRICE, SMITH & KING, LLP**  
220 Park Avenue, P.O. Box 991  
Florham Park, New Jersey 07932-0991  
*Attorneys for Defendants,*  
Morris County Board of Chosen Freeholders,  
The Morris County Preservation Trust Fund  
Review Board, and Joseph A. Kovalcik, Jr.



FREEDOM FROM RELIGION FOUNDATION, *et al.*,

Plaintiffs,

– against –

MORRIS COUNTY BOARD OF CHOSEN  
FREEHOLDERS, *et al.*,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION:  
SOMERSET COUNTY

DOCKET NO.: SOM-C-12089-15

Civil Action

**ORDER**

**THIS MATTER** having come before the Court on August 19, 2016 upon Notice of Motion by Schenck, Price, Smith & King, LLP, attorneys for defendants, The Morris County Board of Chosen Freeholders, The Morris County Preservation Trust Fund Review Board, and Joseph A. Kovalick, Jr. (in his official capacity as Morris County Treasurer) (collectively, “Defendants”), for an Order for summary judgment with prejudice in the above-captioned action, and the Court having considered the papers filed herein; and for good cause shown;

IT IS, on this 9<sup>th</sup> day of January, 2017 ~~October, 2016,~~

**ORDERED** that Defendant’s motion for summary judgment is hereby granted and Plaintiff’s Complaint is hereby dismissed with prejudice; and

**IT IS FURTHER ORDERED** that a copy of this Order be served upon all counsel of record herein within seven (7) days from the date on which the executed Order is received by

counsel for Defendants.

  
\_\_\_\_\_  
**MARGARET GOODZEIT, P.J.Ch.** J.S.C.

Papers received from movant:

- ☒ Notice of Motion
- ☐ Affidavit in Support of Motion
- ☒ Certification in Support of Motion
- ☒ Proposed Order
- ☐ Letter brief in Support of Motion
- ☐ Proof of Service
- ☒ Brief in Support of Motion for Summary Judgment

*See Attached  
Statement  
of Reasons*

Papers received from respondent:  
<sup>S</sup>  
<sub>h</sub>

- ☒ Notice of Cross-Motion
- ☐ Affidavit in Support of Cross-Motion
- ☒ Certification in Support of Cross-Motion
- ☐ Affidavit in Opposition to Motion
- ☒ Certification in Opposition to Motion
- ☒ Proposed [counter-] Order
- ☒ Brief in Support of Cross-Motion
- ☐ Brief in Opposition to Motion
- ☐ Proof of Service
- ☐

Responsive papers received:

- ☐ Reply Affidavit
- ☐ Reply Certification
- ☐ Reply Brief
- ☐ Affidavit in Opposition to Cross-Motion
- ☐ Certification in Opposition to Cross-Motion
- ☐ Brief in Opposition to Cross-Motion
- ☐ Proof of Service
- ☐ Other:

## STATEMENT OF REASONS

The Freedom From Religion Foundation and David Steketee have filed suit to enjoin Morris County from distributing funds to participating churches through their Historic Preservation Trust Fund, claiming that Morris County has violated Article I, Paragraph 3 of the New Jersey Constitution. Defendant Morris County is joined by a coalition of churches that would be affected by the imposition of said injunction. The parties agreed to a statement of stipulated facts (“Stipulation”) on which the Court relies and which is incorporated herein by reference.<sup>1</sup>

The crux of the FFRF’s argument is that the plain language of the New Jersey Constitution prohibits the government from funding the repair or construction of churches for any reason, and that higher courts have recognized the plain language interpretation. Morris County argues that the FFRF’s interpretation is too literal and confuses the letter of the law with the intended purpose of the law, as demonstrated by the holdings of several cases addressed below. Additionally, Morris County asserts that the Equal Protection Clause of the 14<sup>th</sup> Amendment and Religious Land Use and Institutionalized Persons Act require rejection of the FFRF’s position. However, given the facts and circumstances of the present case, this Court arrives at its conclusion independently of either.

The FFRF claims that “the heart of this case is the interpretation of” Art. I, Para. 3:

No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

Although the FFRF relies primarily on Art. I, Para. 3 of the New Jersey Constitution, there are other New Jersey Constitutional provisions the Court must consider. Art. I, Para. 4 guarantees that:

There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.

Art. I, Para. 5 further guarantees that:

No person shall be denied enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

---

<sup>1</sup> For ease of reference, both plaintiffs shall be referred to as “FFRF” and all defendants as “Morris County.”

Finally, the state Constitution specifically authorizes use of public funds for historic preservation and appropriates revenues for this purpose. *See* N.J. Const. Art. VIII, Sec. II, Para. 6, 7.

By statute, historic preservation is “an essential governmental function of the State.” N.J.S.A. 13:1B-15.111. Since 1966, the Department of Environmental Protection has been charged with establishing comprehensive State-wide policies for historic preservation, N.J.S.A. 13:1B-15.105(a), and in 1967, the Legislature created the New Jersey Historic Trust to fund historic preservation projects. N.J.S.A. 13:1B-15.111. The New Jersey Register of Historic Places, created in 1970, provides criteria for identifying historic structures, and these criteria establish eligibility thresholds for other funding and preservation programs. *See* N.J.S.A. 13:1B-15.128 *et seq.*

By their express terms embracing “all historic sites within the State[.]” N.J.S.A. 13:1B-15.105(a), New Jersey’s historic preservation programs provide no basis for excluding a historic structure because it is also a house of worship. The State Register has, at least since 1972, included active houses of worship.<sup>2</sup> One of the earliest grants listed on the New Jersey Historic Trust website is a 1990 grant to the 1850 Solomon Wesley Church, an active house of worship originally built to serve as a community of freed slaves.<sup>3</sup> Since then the New Jersey Historic Trust has made grants to various other active houses of worship.

On the local level, the Municipal Land Use Law (MLUL) provides for historic preservation as part of a municipal Master Plan, N.J.S.A. 40:55D-28, and authorizes municipalities to designate and protect historic sites in addition to those on the State or National Register of Historic Places. *See* N.J.S.A. 40:55D-107-112. Complementing State and local efforts, in 1997, the Legislature authorized counties to seek, by referendum, authority to impose a levy for “historic preservation of historic properties, structures, facilities, sites, areas, or objects, and the acquisition of such properties, structures, facilities, sites, areas, or objects for historic preservation purposes.” N.J.S.A. 40:12-15.2(a)(1)(e).

In 2002, Morris County, by referendum under N.J.S.A. 40:12-15.1, adopted a dedicated tax to fund historic preservation and instituted a competitive grant program administered by its Board of Chosen Freeholders through its Historic Preservation Trust. The program requires detailed submissions establishing the historic significance of the subject, including proof of the eligibility for inclusion on the National or State Registers. Historical properties that are “owned by religious institutions or used for religious purposes” are eligible for the New Jersey Register of Historic places if they meet the criteria

---

<sup>2</sup> *See* New Jersey and National Registers of Historic Places – Essex County, [http://www.nj.gov/dep/hpo/identify/nr\\_sr\\_lists/Essex.pdf](http://www.nj.gov/dep/hpo/identify/nr_sr_lists/Essex.pdf)

<sup>3</sup> [http://www.njht.org/dca/njht/funded/sitedetails/solomon\\_wesley\\_church.html](http://www.njht.org/dca/njht/funded/sitedetails/solomon_wesley_church.html).

listed in N.J.A.C. 7:4-2.3(a)(2). In addition to satisfying these criteria, there are other strict conditions to be met by religious properties to be considered eligible for the Morris County program, some of which are discussed later in this decision.

The grant applications must also establish how the specific work for which the grant is sought would enhance the historical value of the structure at issue. Recipients are required to fund 20% of the cost of any approved construction project. The County and the New Jersey Historic Preservation Office have a memorandum of understanding under which the County employs a qualified consultant to ensure that the program applies the Standards for the Treatment of Historical Properties promulgated by the U.S. Dept. of the Interior,<sup>4</sup> which have been adopted by the New Jersey Preservation Office for its oversight of preservation activity in the State.

The County Grants are of four basic types: (1) grants to document the historic nature of a structure; (2) grants to develop written preservation plans; (3) grants to prepare construction documents; and (4) grants to help fund actual preservation work. For religious properties, such as the churches in question, the construction grants are limited to preservation of exterior building elements and the building's structural, mechanical, electrical, and plumbing systems.<sup>5</sup> The program draws upon the County's general authority to acquire easements for the benefit of the County residents, *see* N.J. Const. Art. IV, Sec. VI, pursuant to N.J.S.A. 13:8B-3, which allows local governments to acquire such easements for historic preservation purposes. Any recipient's grant agreement requires execution of an easement agreement stipulating public access to the property and prohibiting inappropriate alteration of the property for 30 years.<sup>6</sup> Through this process, from 2012 to 2015, the County made one or more grants to 55 religious and nonreligious recipients.<sup>7</sup>

In response to these grants, the FFRF has filed suit. It contends that Art. I, Para. 3 of the New Jersey State Constitution prohibits use of government funds to advance a public purpose if those funds would be paid to any church, places of worship or ministry. Complaint ¶ 51. The FFRF further states in its complaint that because "this constitutional language is unambiguous" and because "courts have not interpreted this constitutional provision . . . [t]he Court should begin by considering the provision's plain language." Complaint at 3-4, FFRF and Steketee v. Morris County Board of Chosen Freeholders, et al., NJ Super. Ct. Ch. Div., Dec. 1, 2016.

---

<sup>4</sup> See Stipulation, ¶ 82, Ex. N.

<sup>5</sup> See Historic Preservation – Morris County Homepage, <http://morriscountynj.gov/planning/divisions/pretrust/historic>.

<sup>6</sup> See Stipulation, ¶ 18, Ex. A (Program R. 5.16).

<sup>7</sup> Funded Sites, Historic Preservation, Morris County, <http://morriscountynj.gov/planning/divisions/pretrust/historic/fundedsites>.

The FFRF relies on two New Jersey cases as binding precedent for their argument that their interpretation of the state Constitutional provision is correct. The first is Resnick v. East Brunswick Township Board of Education, 77 N.J. 88 (1978) and the second is ACLU v. Hendricks, 445 N.J. Super. 452 (App. Div. 2016). In its analysis of both cases, however, this Court finds that Hendricks is fact-specific and distinct from the present case, whereas Resnick is actually helpful to Morris County. In addition to these cases, the Court has examined Everson v. Bd. Of Educ. Of Ewing Tp., 133 N.J.L. 350 (E & A 1945), aff'd, 330 U.S. 1 (1947) and a markedly similar case in 6<sup>th</sup> Circuit, Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278 (6th Cir. 2009).

In Resnick, New Jersey Supreme Court held that religious groups who fully reimbursed school boards for related out-of-pocket expenses could use school facilities on a temporary basis for religious education. Resnick, 77 N.J. at 102. While the religious groups were required to reimburse the school boards, the Supreme Court approved the use of a public school for the purpose of religious education by a religious group. Resnick did not exclude religious groups from the use of public property, but provided for “rentals to religious groups which would fully cover extra utility, heating, administrative and janitorial costs which result from the leasing by these groups.” Id. at 103. In other words, the costs of use by the religious groups were to be fully satisfied by the users.

Additionally, contrary to the FFRF’s claim that Art. I, Para. 3 has not been previously interpreted, Resnick did interpret Article I, Paragraph 3. The New Jersey Supreme Court wrote that it was “a provision which, fairly read, specifically prohibits the use of tax revenues for the maintenance or support of a religious group.” Id. at 102. The New Jersey Supreme Court then tempered that statement, however, and noted that “[t]his constitutional position is not carried to an extreme.” Id. at 103. That, “[n]o one suggests that the State must withhold such general services as police or fire protection,” even though the tax-exempt nature of some of these religious organizations means that they are exempt from funding these services. Id.

Furthermore, the New Jersey Supreme Court explained that:

Contrary to the literal approach to the Establishment Clause advocated by plaintiff, in total disregard of historical reality, the Supreme Court has never required that government adopt a posture of total indifference towards religion. In fact, a more accurate assessment of the requirements of the First Amendment is that the preferred governmental stance is one of benevolent neutrality.

77 N.J. 88, 118-19 (1978).

Accordingly, this Court is bound by the language of Resnick to at least consider the facts of this case, and how they might differ or resemble past cases dealing with the same issue within New Jersey, instead of simply taking the language of Art. I, Para. 3, at face value as the FFRF suggests.

Morris County's historic preservation grant program limits grants to specified and clearly defined historic elements of the structures. More importantly, the funds are not released until architects certify the specific work has been performed. Thus, any diversion of grant funds to support sectarian activities is impossible. Accordingly, while FFRF suggests that the historic preservation grants serve to support religion, it is clear that there is no direct provision of funds which would support religious purposes. As to indirect support of religion, to the extent that the reimbursement of 80% of the funds previously expended for specific, limited, and approved construction expenses may ultimately lighten a religious institution's construction budget and thus leave it with greater funds to spend for other purposes, including religious purposes, such claims of indirect support of religion have been addressed and rejected by our Supreme Court.

Indeed, in Resnick, permitting religious groups to rent – at cost – space in public schools essentially enabled those religious groups to avoid paying market rent (or mortgage costs) for maintenance of their own buildings, thus freeing up funds for other purposes, including religious purposes. Yet this was not found to be problematic. The Resnick Court seems to suggest a spectrum of governmental financial involvement with religious institutions, marked by the impermissible state sponsored establishment of a church at one extreme, and, at the other extreme, the permitted provision of general services such as police and fire protection to churches. See, 77 N.J. 88 at 103; Clayton v. Kervick, 56 N.J. 523, 529 (1970), *as modified*, 59 N.J. 583 (1971). Within this range, the Resnick Court found that the rental activities earlier described are permissible. A tax exemption for churches also falls on the permitted end of the spectrum, *id.*, as does using public funds to transport children to sectarian schools. Everson, 133 N.J.L. 350, 356 (E. & A. 1945) (See discussion below). On the other hand, distributing bibles to public schools falls on the prohibited side. Tudor v. Board of Ed. Of Borough of Rutherford, 14 N.J. 31 (1953). Similarly, the funding of a yeshiva and a seminary with no purpose besides religious education falls is also prohibited. ACLU v. Hendricks, 445 N.J. Super. 452 (App. Div. 2016).

In Hendricks, the Appellate Division held that Art. I, Para. 3 barred grants under the GO Bond Act and the Higher Education Technology Infrastructure (“HETI”) Fund to Beth Medrash Govoha Yeshiva and Princeton Theological Seminary because both institutions would ultimately use the grants to support religious instruction. 445 N.J. Super. 452 (App. Div. 2016). To the Yeshiva, two grants totaling \$10,635,747 were awarded to fund the construction of libraries, faculty offices, classrooms, and other academic buildings. *Id.* at 459. The Seminary was awarded three grants totaling \$645,323 for the

purposes of upgrading IT infrastructure for the purposes of theological research, on-site and distance training for students and staff, and online education. Id.

Because “the constitutional analysis under Article I, Paragraph 3 is controlled by the New Jersey Supreme Court's opinion in Resnick,” the Appellate Division relied on Resnick as precedent. Id. at 454-55. The Court in Hendricks noted that despite the fact that “the intended meaning of Article I, Paragraph 3 of the Constitution — a provision included in our State's first Constitution in 1776 and readopted in the 1844 and 1947 Constitutions — is not entirely clear,” Resnick has not been overruled or called into question. Id. Therefore, though acknowledging the debatable historic lineage of Art. I, Para. 3, the Hendricks Court found that as it was a case dealing with funds being directed to religious education, it was bound by Resnick, which applied to religious institutions using public schools for religious education. See, supra.

The case at bar, however, concerns historic preservation of structures, not funding of religious education, as does Hendricks. The Hendricks Court did not need to harmonize Art. I, Para. 3 with Art. VIII, Sec. II, Para. 6 and 7, and the State's long history of making historic preservation grants to active houses of worship. Hendricks also did not address a religious entity's rights under Art. I, Para. 5. Above all, Hendricks did not deal with the circumstances of a County, under Art. IV, Sec. VI, acquiring discrete property rights for the benefit of the public in return for the grant.

Finally, Hendricks dealt with the direct funding of two private institutions devoted to religious education. The primary purpose of the HETI Fund was to improve technology infrastructure at higher education institutions, and because of that purpose, it inevitably advanced religious education at both the Yeshiva and the Seminary. In contrast, the primary purpose of Morris County's historic preservation grants is to preserve historic structures for the sake of the citizens of Morris County. This purpose can be achieved without directly furthering the goals and ideology of churches.

This contrast results in a clear distinction between giving a religious school funding to build new classrooms and libraries or to enable them to better conduct distance learning and giving a church with historical value a reimbursement to ensure that its historical properties remain preserved. The general public does not benefit from the grants awarded to either the Yeshiva or Seminary, whereas the historic preservation grants allow the churches to continue to contribute to the character of their communities and to the heritage tourism industry.<sup>8</sup>

---

<sup>8</sup> See: <http://www.njht.org/dca/njht/touring/NJHT%20-%20TE@20Oxford%20report%2007-12-2013.pdf>



Until the Hendricks decision was handed down, “[n]o reported New Jersey cases since Resnick had interpreted the ‘religious aid’ prohibition of Article I, Paragraph 3.” Hendricks, 445 N.J. Super. at 473. However, prior to the Resnick decision, Everson v. Bd. Of Educ. Of Ewing Twp., 133 N.J.L. 350 (E. & A. 1945) addressed the issues that arose when Ewing Township’s board of education, acting under a New Jersey statute, reimbursed the parents of children attending parochial schools for the money they expended for bus transportation. The Court of Errors and Appeals, at the time the highest court in New Jersey, found that, of Art. I, Para. 3 and other provisions of the state Constitution of 1844, “neither their language, meaning, intent, nor effect are violated by the statute, supra, or the resolution challenged in this proceeding.” 133 N.J.L. at 351. As set forth earlier, Art. I, Para. 3 of the 1844 New Jersey Constitution, relied upon by the Court of Errors and Appeals in Everson, was not altered upon the adoption of the 1947 Constitution.

The US Supreme Court’s affirmance of the Court of Errors and Appeals’ Everson decision relied upon a discussion of the First Amendment - the federal Constitution’s analogue to Art. I, Para. 3. 330 U.S. 1 (1947). New Jersey courts historically have compared Art. I, Para. 3 of the New Jersey Constitution with the Federal Establishment Clause. As the New Jersey Supreme Court has noted:

In our judgment, the letter and spirit of these New Jersey constitutional provisions, taken together, are substantially of the same purpose, intent and effect as the religious guaranties of the First Amendment and have probably always been regarded as such in this State.

Schaad v. Ocean Grove Camp Meeting Ass’n of United Methodist Church, 72 N.J. 237, 266-67 (1977), *overruled in part on other grounds*.

Accordingly, New Jersey courts may look to how these issues are resolved under the federal Constitution. See, E.g., Ran Dav’s Country Kosher, Inc. v. State, 129 N.J. 141, 151 (1992) (noting that the “interpretation of the state constitutional standard is informed by an understanding of federal constitutional doctrine concerning the establishment of religion”).

It was in the Everson affirmance that Justice Hugo Black used Thomas Jefferson’s metaphor of “a wall of separation between church and state” 330 U.S. at 16. Justice Black’s wall was one of words:

“Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.”

Everson, 330 U.S. at 15-16 (emphasis added).

Justice Black's language reveals the error the FFRF makes in focusing on a literal interpretation of the latter third of Art. I, Para. 3. Because despite the stringent language of Justice Black's directive, his decision in Everson held that the First Amendment did not invalidate a N.J. program to reimburse parents of parochial school students for school bus fares using tax-raised funds because such a program was made a public purpose. 330 U.S. at 8. Justice Black informs us that such a narrow reading of the constitutional provision ignores the fact that "other language of the [First] amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion" and that it cannot exclude persons "from receiving the benefits of public welfare legislation" simply on account "of their faith, or lack of it." Id. at 16. In attempting to protect New Jersey from "state-established churches," the Court must be wary of "inadvertently prohibit[ing] New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief." Id.

The FFRF suggests that the ultimate result of receiving these funds will further sectarian causes, such as religious activities conducted by the church. It is obvious "that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way." Roemer v. Bd. of Pub. Works, 426 U.S. 736, 747 96 S. Ct. 2337 (1976).

Furthermore, Everson indicates that providing a general rebate to the parents of parochial school students does not constitute support. This is in spite of the fact that Justice Black acknowledges that "it is undoubtedly true that children are helped to get to church schools" and that if not for the State's aid, "some of those children might not be sent to church schools." Everson, 330 U.S. at 17. General services that are extended to all do not constitute favoritism or sponsorship because a recipient of such a service is a religious entity. Id. at 17-18 (noting that religious buildings are permitted to have sewer lines extended to them).

A case tried in the 6th Circuit is remarkably similar, both factually and legally, to the case at bar. Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278 (6th Cir. 2009), dealt with similar grants aimed at revitalizing the a "discrete section of downtown Detroit but reached out to all property in that area, including property owned by religious organizations." Id. at 281. Just as Morris County's program is not limited to historic structures belonging to a specific group of people, but all historic structures in Morris County, the Detroit program rather was available to all structures in a part of Detroit.

For reference, Michigan's Constitutional provisions read similarly to New Jersey's: "[n]o person shall be compelled . . . to contribute to the erection or support of any place of religious worship" and "[n]o money shall be appropriated or drawn from the treasury for the benefit of any religious sect." Id. at 301 (citing Mich. Const. Art. I, § 4). Similarly, as New Jersey courts have done, Michigan courts have "construed the state and federal guarantees in the same way." Id. Despite the seemingly strict language of the Michigan provision, the 6th Circuit Court held that the Detroit city agency allocating exterior repair grants on a neutral basis, without regard to the religious, non-religious or areligious nature of the entity, did not violate the Establishment Clause or the Michigan Constitution. After all, "a brick, gutter or bush (unless burning) cannot be coopted to convey a religious message." Id. at 293.

The 6th Circuit did not overrule the ability of a local government to provide funding for the historic preservation of religious buildings when a non-religious goal existed. Am. Atheists notes that "cosmetic repairs to walls, doors, awnings and parking lots, as well as limited landscaping" have secular uses that cannot be "diverted" to religious ones. Id. The "the mechanics of the [Detroit] program ensured that the aid would go just to the approved uses." Id. at 296. Some mechanics referenced are the "the neutrality of the program, the breadth of beneficiaries and the secular nature of the aid provided." Id. Additionally, as with the Morris County program, the City of Detroit was not footing 100% of the bill. Id.

In addition, Am. Atheists recognized what both our Court of Errors and Appeals and the United States Supreme Court saw in Everson: that the extension of a general service to religious groups did not constitute sponsorship. 567 F.3d at 291. While tax exemptions, by their very nature, are different from historic preservation reimbursements, the end effect of allowing the religious groups to free up funds to use for sectarian purposes is the same. See Walz v. Tax Com. of New York, 397 U.S. 664, 680 (1970) (holding that the grant of a tax exemption was not sponsorship of religious organizations). Accordingly, that "cash reimbursements" were used in lieu of the city sending uniformed workers (analogous to police officers and firemen), "does not invalidate the program." Am. Atheists, 567 F.3d at 296-97. Ultimately, "what matters is not the form of the reimbursement takes but the benefit it represents." Id. at 297; See Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657 (1980).

Am. Atheists points out that it is nonsensical that "a city may save the exterior of a church from a fire," but "it cannot help that same church with peeling paint or tuckpointing--at least when it provides the same benefit to all downtown buildings on the same terms." Id. at 292. The 6th Circuit explicitly states what both Resnick and Hendricks have suggested, but did not directly address due to the limited scope of either case – extending the idea of a "general service" to the very same types of grants Morris County has awarded. The 6th Circuit's rationale for doing so is based on the fact that the Detroit churches, like Morris County's, are registered on registries of historical buildings. Id. at 300. Furthermore, the

churches are subject to the same “public health regulations” applicable to their exteriors for public safety. Id. In a situation like this, “[i]t would be strange to read the Religion Clauses to say that churches may be subjected to neutral and generally applicable laws, but may not receive neutral and generally applicable benefits.” Id.

The FFRF implies that Morris County knows that the churches’ primary function is to promote their type of worship, based on their grant applications, and therefore, Morris County is effectively promoting religion and violating the Constitution. In doing so, the FFRF does not distinguish between the motivations of the churches in question and the motivations of Morris County. While it is certainly true that the applicant churches have filled their applications(see Stipulation) with language indicating religious motivations, those motivations cannot be attributed Morris County. It is only reasonable that a church’s congregation is interested in worshipping in their church. It clearly would be unreasonable and unconstitutional if Morris County dispensed said funds for this reason alone. According to Mitchell v. Helms, “presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause.” 530 U.S. 793, 858 (2000) (O’Connor, J. concurring in the judgment). While the present case does not involve school aid, the Court agrees with Justice O’Connor that a presumption of religious indoctrination is unfair. “To establish a First Amendment violation, plaintiffs must prove that the aid actually is, or has been, used for religious purposes.” Id. at 857. The FFRF has failed to do so.

In addressing the FFRF’s concerns, the Court also considers the implication that even though Morris County’s historical preservation grants have no ulterior motives or hidden agenda, it may still have the *primary effect* of advancing religion, and therefore, is in violation of Art. I, Para. 3. A four-factor test was used by the 6th Circuit Court in Am. Atheists to determine whether a program has a primary effect of advancing religion:<sup>9</sup>

- 1) [A] program may have the primary effect of advancing religion if it employs skewed selection criteria that stack the deck in favor of groups that engage in religious indoctrination, encouraging potential recipients to take part in religious activity by rewarding them for doing so.
- 2) [A] program may have the primary effect of advancing religion if it leads to "religious indoctrination" that "could reasonably be attributed to governmental action."
- 3) [A] program may have the primary effect of advancing religion if the benefit itself has an inherently religious content.

---

<sup>9</sup> This four-factor test was developed from the “Lemon test” as utilized by the Supreme Court in Agostini v. Felton, 521 U.S. 203 (1997), further defined by Justice O’Connor’s concurrence in Mitchell v. Helms, 530 U.S. 793 (2000). See, Lemon v. Kurtzman, 403 U.S. 602 (1971).

4) [A] program may have the primary effect of advancing religion if the recipient "divert[s]" secular aid to further its religious mission.

Am. Atheists, 567 F.3d at 291-93, *internal citations omitted*.

In her analysis of Mitchell v. Helms, Justice O'Connor notes that the factors are not necessarily based on constitutional requirements, but "are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion." 530 U.S. 793, 867 (2000) (O'Connor, J., concurring in the judgment).

An examination of the record before the Court reveals that Morris County has not violated any of the factors listed above. In addition, as referenced in Part 5 of The Morris County Open Space, Farmland, Floodplain Protection and Historic Preservation Trust Fund, the Morris County program has safeguards, including but not limited to, strict application criteria and rigorous inspection and reimbursement conditions, in place to prevent the possibility of misuse.<sup>10</sup> Specifically, Part 5 outlines required conditions for the receiving grants in §16, including an easement limiting changes and preventing demolition, the requirement of public access, review by the New Jersey Historic Preservation Office, adherence to a two year timetable, listing on both the National and New Jersey Register of Historical places, and accountability of funds dedicated to the preservation project. Furthermore, the use of any grant funds appropriated to religious institutions is limited to Historic Structure Reports, Preservation Plans, Assessment Reports, construction and construction documents for exterior building elements, and the building's structural and mechanical, electrical, and plumbing systems by §8, Para. 7. A review board made up of a diverse group of representatives from Morris County and professionals with expertise in various aspects of historic preservation review the applications based on criteria listed under §5, Para. 13.

Morris County desires to sustain historic landmarks, not just historic churches. Just because the religious groups have put Morris County on notice that they intend to use their churches for worship does not mean that Morris County is somehow inextricably entangled with religion. The issue in the present case is whether Morris County has a legitimate purpose for awarding historical preservation grants besides the furtherance or sponsorship of religion. The Court should not enjoin Morris County because its laws coincides with the desires of those benefitted by the law. As Justice Black wrote in Everson, "[t]he fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." 330 U.S. at 6.

---

<sup>10</sup> See Stipulation, Exhibit A, Part 5, Historic Preservation.

The New Jersey Constitution should not be read “with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as part of a harmonious framework.” State v. Muhammad, 145 N.J. 23, 44 (1996) (internal citation omitted). It is a “living charter – designed to serve the ages.” Vreeland v. Byrne, 72 N.J. 292, 328 (1977). The relief sought by the FFRF seeks to nullify the will of the people, expressed through their duly elected representatives. Further, the Court must be ever mindful of the strong presumption that a legislative enactment is valid and “will not be ruled void unless its repugnancy to the Constitution is clear beyond a reasonable doubt.” Muhammad, 145 N.J. at 41. Given that Morris County’s program has met the stringent requirements referenced above and that the legislative body of Morris County has chosen to spend their funds in such a manner, the Court believes it should defer to the lawmakers’ choice as to the means devised to serve the public purpose. Roe v. Kervick, 42 N.J. 191, 229 (1964).

The Court recognizes the FFRF’s mission and its endeavor to promote a healthy separation of church and state. Without organizations like the FFRF, one check that keeps the balance even disappears. However, in the case at bar, precedent clearly indicates that to adhere strictly to the literal interpretation of Article I, Paragraph 3 of the New Jersey Constitution, as advocated by FFRF, would be a mistake.

Resnick, Hendricks, and Everson indicate that the only thing that is clear about Art. I, Para. 3’s intended meaning is that it is not meant to be read literally. Therefore, to correctly interpret the intended meaning of Art. I, Para. 3 in this particular instance, given these particular facts, the Court must read it in conjunction with the State’s longstanding tradition of neutrality in church-state relations which has been manifested in judicial decisions such as Everson and the adoption of pro-neutrality provisions of the State Constitution, such as Art. I, Para. 4 and 5. It must also be harmonized with the grant to counties of the power to protect public health, safety and welfare by acquiring easements and other interests in real property for the benefit of county residents. N.J. Const. Art. IV, Section 6, Para. 3. Finally, it must be harmonized with the fact that Art. VIII, Sec. II, Para. 6 and Para. 7 of the New Jersey Constitution allow for the funding of historic preservation.

Given the facts and legal precedent before the Court, it finds that in this instance “the preferred governmental stance is one of benevolent neutrality.” Resnick, 77 N.J. at 118-19. When a “government endorses everything, it endorses nothing,” as Morris County has done here. Am. Atheists, 567 F.3d at 294. Excluding historical churches from receipt of reimbursements available to all historical buildings would be tantamount to impermissibly withholding of general benefits to certain citizens on the basis of their religion, Everson, 330 U.S. at 16, and would be inconsistent with the spirit of our state and federal Constitutions, as reflected in the decisions discussed above.

For the foregoing reasons, the FFRF's motion for summary judgment seeking a declaration that Morris County's grants of historic preservation funds to houses of worship violate Art. I, Para. 3 of the New Jersey Constitution is denied, and Morris County's motion for summary judgment dismissing the FFRF's complaint with prejudice is granted.

This matter comes before the Court on a Motion for Summary Judgment by Defendant Preservation Grant Recipients. The Court,



having considered the Motion and any opposition or reply thereto, will GRANT the Motion.

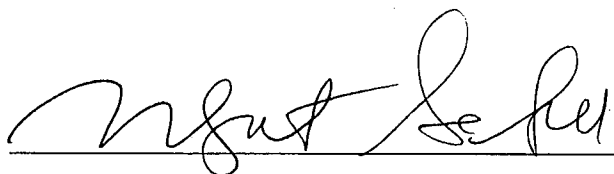
WHEREFORE, it is this 9<sup>th</sup> day of January, 2017 hereby:

ORDERED, that the Motion shall be, and hereby is, **GRANTED**; and it is further

ORDERED, that summary judgment is entered in favor of Defendant Preservation Grant Recipients as to each and every count of Plaintiffs' Complaint; and it is further

ORDERED, that each and every count of Plaintiffs' Complaint is **DISMISSED** with prejudice.

A copy of this Order shall be served on all interested parties within 7 days of receipt.  
SO ORDERED.



Hon. Margaret Goodzeit, P.J. Ch.

See Statement of Reasons  
attached to Order at  
even date on Schenck Price  
letterhead.

**A TRUE COPY**

**PAUL S. GROSSWALD**  
NJ Attorney ID #: 040312001  
13 Irving Place, Ste. 1  
Summit, NJ 07901  
(917) 753-7007  
Fax: (212) 671-1321  
pgrosswald@hotmail.com  
Attorney for Plaintiffs,  
**FFRF & David Steketee**

**ANDREW L. SEIDEL** (*pro hac vice*)  
**RYAN D. JAYNE** (*pro hac vice*)  
**FREEDOM FROM RELIGION FOUNDATION**  
P.O. Box 750  
Madison, WI 53701  
(608) 256-8900  
aseidel@ffrf.org / rjayne@ffrf.org  
Attorneys for Plaintiffs,  
**FFRF & David Steketee**

FREEDOM FROM RELIGION FOUNDATION, *et al.*,

Plaintiffs,

– against –

MORRIS COUNTY BOARD OF CHOSEN  
FREEHOLDERS, *et al.*,

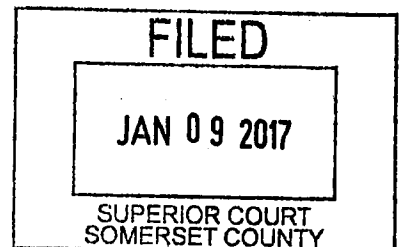
Defendants.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION:  
SOMERSET COUNTY

DOCKET NO.: SOM-C-12089-15

Civil Action

**ORDER**



This matter having been presented to the Court by:

1. a Motion for Summary Judgment brought by John M. Bowens, of the law firm Schenck, Price, Smith & King, LLP, attorneys for Morris County Board of Chosen Freeholders; The Morris County Historic Preservation Trust Fund Review Board; and Joseph A. Kovalcik, in his official capacity as Morris County Treasurer (hereinafter "the Morris County Defendants");
2. a Motion for Summary Judgment brought by Kenneth J. Wilbur, of the law firm Drinker Biddle & Reath LLP, attorneys for The Presbyterian Church in Morristown; First Presbyterian Church of New Vernon; St. Peter's Episcopal Church; First Reformed Church of Pompton Plains; Church of the Redeemer; Community of St. John Baptist; Stanhope United Methodist Church; Church of the Assumption of the Blessed Virgin Mary; First Presbyterian Church of Boonton; St. Peter's Episcopal Church in Mountain Lakes; Ledgewood Baptist Church; and Community Church of Mountain Lakes (hereinafter "the Grant Recipient Defendants"); and
3. a Cross-Motion for Summary Judgment brought by Paul S. Grosswald, a solo practitioner; Andrew L. Seidel, in-house counsel to Freedom From Religion Foundation, admitted to this Court *pro hac vice*; and Ryan D. Jayne, in-house counsel to Freedom From Religion Foundation, admitted to this Court *pro hac*

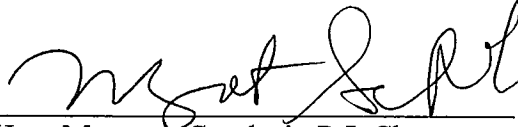
vice; attorneys for Freedom From Religion Foundation and David Steketee (hereinafter "the Plaintiffs"); and

the Court having considered all of the papers and arguments submitted in support of and in opposition to each of the Motions and Cross-Motions described above, including an oral argument held on October 13, 2016, and for good cause shown;

It is on this 9<sup>th</sup> day of January, 2016, ORDERED as follows:

1. The Morris County Defendants' Motion for Summary Judgment is ~~DENIED~~ GRANTED
2. The Grant Recipient Defendants' Motion for Summary Judgment is ~~DENIED~~ GRANTED
3. Plaintiffs' Cross-Motion for Summary Judgment is ~~GRANTED~~ DENIED
4. This Court hereby DECLARES that the Morris County Historic Preservation Trust Fund program, as applied to the building or repairing of any church or churches, place or places of worship, or for the maintenance of any minister or ministry, violates Article I, ¶ 3 of the New Jersey Constitution.
5. This Court hereby DECLARES that the grants issued to the Grant Recipient Defendants from 2012 through 2015 pursuant to the Morris County Historic Preservation Trust Fund program violated Article I, ¶ 3 of the New Jersey Constitution.
6. This Court hereby DECLARES that the unconstitutional activity described herein has caused a deprivation of rights to Plaintiff David Steketee, a Morris County taxpayer who objects to his tax money being used to build or repair any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right and has deliberately and voluntarily engaged to perform.
7. This Court hereby DECLARES that the unconstitutional activity described herein has caused a deprivation of rights to Plaintiff Freedom From Religion Foundation, as an organizational representative of Morris County taxpayers who object to having their tax money being used to build or repair any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what they believe to be right and have deliberately and voluntarily engaged to perform.
8. This Court hereby DECLARES that the deprivations of rights described herein violate the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c).
9. In order to prevent further violations of Article I, ¶ 3 of the New Jersey Constitution and the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c), the Morris County Defendants are hereby PERMANENTLY ENJOINED from issuing any further grants pursuant to the Morris County Historic Preservation Trust Fund program to any church or churches, place or places of worship, or minister or ministry.

10. The Morris County Defendants are hereby ORDERED to pay Plaintiff David Steketee an award of actual damages in the amount of \$40.
11. The Morris County Defendants are hereby ORDERED to pay Plaintiff David Steketee an award of nominal damages, as defined by N.J.S.A. 2A:15-5.10, in the amount of \$499.99.
12. The Morris County Defendants are hereby ORDERED to pay the Plaintiffs' reasonable attorney's fees and costs, pursuant to N.J.S.A. 10:6-2(f). The Plaintiffs shall submit an application for attorney's fees and costs, with supporting documentation, within \_\_\_\_\_ days of the date of this Order. The Morris County Defendants shall file any objections to same within \_\_\_\_\_ days of the date on which the Plaintiffs file their application. The Plaintiffs shall file any reply to any such objections within \_\_\_\_\_ days of the date on which the Morris County Defendants file their objections. Oral argument with respect to the Plaintiffs' application for attorney's fees and costs will be heard on \_\_\_\_\_.
13. The Grant Recipient Defendants are hereby ORDERED to refund to Morris County all grant money they received from 2012 through 2015 pursuant to the Morris County Historic Preservation Trust Fund program, within \_\_\_\_\_ days.
14. A copy of this Order shall be served by Plaintiffs' counsel upon all counsel of record, within 7 days of its entry. *receipt*

  
Hon. Margaret Goodzeit, P.J. Ch.

The Morris County Defendants' Motion for Summary judgment was opposed by the Plaintiffs.

The Grant Recipient Defendants' Motion for Summary judgment was opposed by the Plaintiffs.

The Plaintiffs' Cross-Motion for Summary judgment was opposed by the Morris County Defendants and the Grant Recipient Defendants.

*See Statement  
of Reasons attached to  
Order of even date on  
Schenck Price letterhead*