MEMORANDUM

TO: Mark Bressler

FROM: Tom Farrell

DATE: June 12, 1989

SUBJECT: Roxbury Mosque

INTRODUCTION

On April 25, 1988, the Muslim Council of Boston (a charitable, religious and education organization created to pursue the acquisition of Roxbury land for the construction of mosque), sent a letter to Mayor Raymond Flynn and BRA Director Stephen Coyle requesting the use of Roxbury land to construct a mosque. The site is jointly owned by the City of Boston and the BRA, and is comprised of approximately 70,000 sq.ft. of vacant land. On June 14, 1988, the BRA responded by letter, explaining the disposition process and encouraging the Muslim Council to pursue their plans. (See attached copies.)

DETERMINING A VIOLATION OF THE ESTABLISHMENT CLAUSE

In Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745 (1971), the Supreme Court articulated the generally applied three-part test to determine whether conduct violates the Establishment Clause. The test inquires:

(1) whether the challenged statute has a secular purpose;

(2) whether the primary effect of the statute is to advance religion; and

(3) whether the statute creates an excessive entanglement of government with religion. Id. at 29 L.Ed.2d 745, 755.

Although the Lemon court refers to a challenged statute, Lynch v. Donnelly, 465 U.S. 668, 79 L.Ed.2d 604, 607 (1984) makes it clear that the test applies to governmental conduct as well.

SUMMARY OF ANALYSIS

The first inquiry is whether the land transfer has a secular purpose. Although the land transfer might be seen as bestowing special recognition upon the muslim faith in general as well as conferring the benefit of lower cost land to this muslim group in

particular, the purpose of the BRA's general land transfer program appears to be secular in nature: to transfer land with the expectation that the development of that land will contribute to the revitalization of an area. Opponents of the BRA may argue, however, that the purpose of this transfer is not secular by nature of conduct which grants special recognition or benefits to a religious group.

The next inquiry concerns whether the land transfer would advance religion. The BRA's opponents may contend that the land grant amounts to advancement of religion because "it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Hunt v. McNair, 413 U.S. 734, 37 L.Ed.2d 923 (1973). A muslim group seeking to erect a mosque for religious worship would most likely qualify as such an "institution." Additionally, under the older "singling out" test, the BRA's action may be considered "advancement" because they may be seen as singling out the muslim organization for the land grant, Walz v. Tax Commission of the City of New York, 397 U.S. 664, 25 L.Ed.2d 697 (1970). Regarding the latter claim, the BRA may assert, however, that the very nature of a single parcel transfer of this size requires one development group with one development purpose, conferring benefits upon one group at a time.

The final inquiry regards whether the conduct would constitute excessive entanglement. Since the action is a single purpose, one-time transfer and an ongoing governmental involvement in the muslim group's affairs would not result from the transfer, it is unlikely that the conduct would be seen as constituting "excessive entanglement." Tilton v. Richardson, 403 U.S. 672, 29 L.Ed.2d 790 (1971).

Concerning the issue of standing, AUFSC would probably have difficulty establishing standing to sue in federal court because they would need to assert an identifiable and judicially redressable harm suffered as a result of the conveyance; an abstract injury due to an alleged non-observance of the Constitution would not suffice. Valley Forge Christian College v. AUFSCS, 454 U.S. 646, 70 L.Ed.2d 700, 709 (1982).

WOULD THE CONVEYANCE OF LAND TO THE MUSLIM GROUP HAVE A SECULAR PURPOSE?

The BRA's transfer may be seen as conferring special recognition and benefits upon the muslims. The central question of the first inquiry is whether the conferring of special recognition or benefits upon a religious group is, in itself, a violation of the establishment clause?

Special Recognition

The Supreme Court has held the special recognition of specific religions is not violative of the establishment clause, provided the state conduct has a secular purpose. In McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393 (1961), the Supreme Court ruled that Sunday closing laws do not violate the establishment clause, even though they grant special recognition to a day of particular significance to Christian

denominations, because the law's purpose is secular, to provide a uniform day of rest and relation. Id. at 6 L.Ed.2d 393, 410.

Similarly, in Lynch v. Donnelly, 465 U.S. 668, 79 L.Ed.2d 604 (1984), the Supreme Court ruled that governmental conduct which granted special notice of one religion was not violative of the First Amendment. The court considered that a municipality's inclusion of a Christian nativity scene in an annual Christmas display was constitutional because it supported a secular purpose; the celebration of a national holiday and the depiction of its origins. Id. at 607.

Although the BRA's potential conveyance of land to a muslim organization may be seen as providing special recognition of one religious group, the purpose of the BRA's conduct may be considered secular in light of its broader program to promote economic revitalization within the Roxbury area.

Conferred Benefits

The Supreme Court does not invalidate all governmental conduct that confers benefits to religion in general or to one faith in particular. Id. In Tilton v. Richardson, 403 U.S. 672, 29 L.Ed.2d 790 (1971), the Supreme Court held that direct benefits granted to church-related colleges and universities did not violate the establishment clause because they had a secular purpose. These benefits were in the form of federal construction grants and passed the secular purpose criterion because the facilities were to be used for secular educational purposes and the grants were part of a larger program providing construction grants to all "institutions of higher education." Id. at 29 L.Ed.2d 790, 797.

Also, the conferring of state benefits upon religiously affiliated colleges have bene held not violative of the establishment clause. Roemer v. Public Works of Maryland, 426 U.S. 736, 49 L.Ed.2d 179 (1976). The Supreme Court decided that state grants to religiously affiliated colleges were constitutional because the state statute required the funds to be used for secular purposes, the institution was required to award not only seminarian and theological degrees, and the grants were part of a larger program under which all private colleges in the state were eligible. Id. at 182. In short, the grants were seen to have a secular purpose, "supporting higher education generally, as an alternative to a wholly public system." Id.

Thus, as long as the special recognition or benefits conferred by the government entities were supported by a secular purpose, the acts were not violative of the first prog of the Lemon test. Similarly, provided the BRA's transfer is seen in light of its broader program to promote economic revitalization within the Roxbury area, it may not be considered violative of the first prong of the Lemon test.

WOULD THE PRIMARY EFFECT OF THE TRANSFER BE TO ADVANCE RELIGION?

Hunt Test

The "advancement of religion" prong of the Lemon test has been refined by the case of Hunt v. McNair, 413 U.S. 734, 37 L.Ed.2d 923 (1973). According to Hunt:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. Id. at 931.

The Hunt case involved declaratory and injunctive relief sought by a South Carolina taxpayer to enjoin state issuance of revenue bonds for the benefit of the Baptist College at Charleston. The issuance was authorized by the South Carolina Educational Facilities Act. Under the arrangement, the bond proceeds would be used to finance a project which the college would convey to the state-created Educational Facilitels Authority and which the Authority would lease back to the college for conveyance to the college upon full repayment of the bonds.

In this case, the Supreme Court held that there was no basis for concluding that the college's operations were significantly oriented towards sectarian rather than secular education because there were no religious qualifications for faculty membership or student admission, and only 60% of the student body was Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. Id. The court held that the conduct would not violate the "advancement" prong because a substantial portion of the college's functions were not subsumed in the religious mission.

Under Hunt, the BRA's transfer would probably be considered an advancement of religion because "it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." Id. The muslim organization is interested in erecting a mosque for religious worship, not a school with secular facilities, and thus would most likely qualify as such an institution; the muslim group has minimal, if any, secular objectives. There may be a question, however, whether the land transfer qualifies as "aid" under Hunt, or whether a full payment or partial payment conveyance would qualify as "aid". Id.

Walz Test

Walz v. Tax Commission of the City of New York, 397 U.S. 664, 25 L.Ed.2d 697 (1970) elucidated another, older advancement inquiry: whether governmental conduct sponsored religion. In this case, the Supreme Court held that the granting of property tax exemptions to religious organizations for religious property used solely for religious

worship was constitutional because "the government [did] not transfer part of its revenue to churches but simply [abstained] from demanding that the church support the state." Id. at 703. Additionally, the state statute did not single out one particular church or religious group or even religious groups as such, but granted exemptions to all houses of worship within a broad class of property owned by nonprofit organizations.

The BRA's possible conveyance of land to a muslim organization may appear to sponsor religion because it involves the transfer of public property, which may be considered analogous to the transfer of public revenue referred to in Walz. Id. at 703. Additionally, even though the potential land transfer is part of a larger redevelopment program to promote economic revitalization of the Roxbury area, the transfer may be considered a "singling out of one religious group" because the property would be transferred solely to a muslim group. Regarding the latter point, the BRA may argue that the nature of a single parcel transfer requires the singling out of a group. Id.

Under either approach the BRA would probably be considered "advancing" religion because of the religious nature and purpose of the muslim organization and the involvement of both public property and a religious group in the transaction.

WOULD THE TRANSFER CREATE AN EXCESSIVE ENTANGLEMENT OF GOVERNMENT WITH RELIGION?

Lemon v. Kurtzman notes several factors relevant to determining whether governmental conduct involves excessive entanglement. The court inquires about:

(a) the character and purposes of the institutions that is benefitted;

(b) the nature of the aid that the state provides; and

(c) the resulting relationship between the government and the religious authority. Lemon at 757.

In Lemon, the Supreme Court ruled that subsidies to teachers in church-related schools involve excessive entanglement of church and state and, thus, violate the First Amendment. Lemon v. Kurtzman, 403 U.S. 602, 29 L.Ed.2d 745 (1971). Under the applicable statue, these private school teachers, use only texts and materials found in public schools and not teach any course in religion. Id. at 759.

The court used the three-part inquiry previously mentioned to determine whether excessive entanglement existed. (a) The court determined that the character and purposes of the parochial schools were substantially religious because the school's objective was to inculcate the Catholic faith, which was enhanced by the impressionable age of the elementary school students. Id. at 757. (b) Regarding the nature of the aid, the court considered aid to teachers considerably different from aid in the form of secular textbooks because "a textbook's content is ascertainable, but a

teacher's handling of a subject matter is not," and a danger exists of the teacher involving some aspect of faith or morals in secular subjects. Id. at 758.
(c) Concerning the resulting relationship between the government and the religious authority, a "comprehensive, discriminating and continuing state surveillance [would] inevitably be required to ensure that [the statutory] restrictions [were] obeyed." Id. at 759. The resulting relationship was considered an excessive entanglement because it involved continuous state supervision of church-related affairs. Id.

On the other hand, the Supreme Court has ruled that federal construction grants, to church-related colleges and universities are constitutional, provided the facilities constructed are used for secular educational purposes. Tilton. (a) The court noted that religious indoctrination was not a substantial purpose of these church-related colleges and universities. Tilton at 804. (b) Also, the aid was directed to the construciton of religiously neutral facilitels. Id. (c) In holding that these grants did not involve excessive entanglement, the court emphasized the one-time, single purpose nature of the grant; the court indicated that there would be "no continuing financial relationships or dependencies, no annual audits, and no governmental analysis of an institution's expenditures on secular activities." Id. Additionally, since religious indoctrination was not a substantial purpose of these institutions and since the government was providing religiously neutral facilities, there was less of a need for government scrutiny of the institution's activities than the unconstitutional aid to teachers in religiously affiliated elementary and secondary schools. Id.

AUFSCS MAY HAVE DIFFICULTY ESTABLISHING STANDING IN FEDERAL COURT

The minimum standing requirement under Article III is "actual injury redressable by the Court." Valley Forge Christian College v. AUFSCS, 454 U.S. 464, 70 L.Ed.2d 700, 709 (1982). In Valley Forge, AUFSCS did not have standing to challenge, as violative of the establishment clause, a no-cost transfer of surplus United States property to a religious educational institution devoted to the training of men and women for Christian services. AUFSCS failed to assert an identifiable harm to their members resulting from the transfer. Id. The standing requirements were not met by an alleged "abstract injury in nonobservance of the Constitution." Id. at 716.

Additionally, AUFSCS members did not have standing to sue as taxpayers because the source of their complaint was not congressional action and the property transfer was not an exercise of authority under the axing and spending clause (Art. I, sec. 8) but the property clause (Art. IV, sec. 3, cl. 2).

To quality for standing in federal court, potential litigants to the BRA transfer would need to allege a judicially redressable injury resulting from the transaction. Valley Forge at 709.

STATE STANDING

Generally, an opponent to a BRA action may gain standing in one of two ways in state court. If the action is governed by a statute with a specific standing requirement, than the litigant is required to meet the specific standing requirement of that particular statute. Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37, #71 N.E.2d 728, 737 (1977). If, however, the statute which governs the action does not have a specific standing requirement, then general standing principles apply.

The general standing principle applicable to constitutional challenges to government action is that litigants are required to be "persons whose interests are affected." Boston Licensing Board v. Alcoholic Beverage Commission, 326 N.E.2d 848, 367 Mass. 788 (1975); Commonwealth v. Brunelle, 381 Mass. 6, 10-11 (1972). Although the cases do not define the scope of the phrase "interests affected," developers who submitted competing bids for the development of the site would probably qualify as "persons whose interest are affected" because they have an economic interest in being chosen as the developer of the parcel. Since this parcel development is part of a larger urban renewal project (Campus High Urban Renewal Area) and is thus subject to M.G.L. C. 121B which has no standing provision, general standing principles would be applied.

Potential litigants may seek standing on grounds other than a constitutional challenge to the transaction. Property owners within the urban renewal area that encompasses the parcel (Campus High Urban Renewal Area) may have standing to challenge the transfer of the land because their economic interests may be adversely affected if a place of worship rather than housing or businesses were located on the site. Schlager v. BRA, Land Court, Case No. 112416 (1986). Under Schlager v. BRA, property owners of parcels in the Government Center Urban Renewal Are had standing to challenge a zoning redesignation of a parcel in the same urban renewal area because their business operations could have bene adversely affected by the zoning change.