

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss.

Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR.,)
PETER FOOTE, DONALD WIIISTON,)
JAMES FOLEY, ELIZABETH KILCOYNE,)
PATRICK J. MCNALLY, AND INGRID)
MILES AS THEY ARE THE FEOFFEEES OF)
THE GRAMMAR SCHOOL IN THE TOWN)
OF IPSWICH)
Plaintiffs,)
)
v.)
)
ATTORNEY GENERAL OF THE)
COMMONWEALTH OF MASSACHUSETTS,)
IPSWICH SCHOOL COMMITTEE, and)
RICHARD KORB, as he is Superintendent of)
Schools in the Town of Ipswich,)
Defendants.)

Affidavit of Alexander B.C. Mulholland, Jr.

I, Alexander B.C. Mulholland, Jr., being of majority, hereby depose and state as follows:

1. I am a plaintiff in this action and have been a Feoffee of the Grammar School in the Town of Ipswich since 1978. I am presently the Chairman of the Feoffees.
2. I am aware of the history of the Feoffees of the Grammar School in the Town of Ipswich dating back to the creation of the Feoffees by the Will of William Payne.
3. In the event and to the extent statements contained herein pertain to Massachusetts General Laws, I rely on my counsel and believe those statements to be true and accurate.

4. The following statements of fact are true and accurate:

10 • Little Neck represents a coastal drumlin, an oval, smoothly rounded hill of unstratified glacial drift, containing approximately 36 acres. About 28 acres are upland; the balance of the land is tidal wetland. It is accessed by land only via Little Neck Road which connects Little Neck to Great Neck. That road is a flood-prone, filled causeway between Ipswich Bay and Neck Cove, with a history of tidal overwash during major storm events. The access road parallels Pavilion Beach, so named for a pavilion that was demolished during the Blizzard of 1978.

11 • Many years ago the Feoffees began renting small portions of Little Neck to individuals and families who constructed cottages on those portions of land. Those portions of land have commonly been referred to as "lots" and that term is used herein. The term lot is not used as it is defined in G.L. c. 41, 81L, a section of the Massachusetts subdivision control law. There are no lots within the meaning of the subdivision control law at Little Neck. Little Neck is one parcel of land, one lot, within the meaning of the subdivision control law and the Ipswich Protective Zoning By-Law. The use of Little Neck as one lot improved with one hundred sixty-seven cottages¹ is, in zoning terminology, a lawful pre-existing non-conforming use and each cottage is a lawful pre-existing non-conforming structure. See G.L. c. 40A, §6.

12 • The Ipswich assessor has divided Little Neck into 210 lots, each separately assessed for tax purposes. Among those 210 lots are 167 lots improved with cottages. In each instance, the cottage is owned by someone other than the Feoffees.

13 • Historically, the cottage owners were tenants at will of the Feoffees and each paid to the Feoffees both rent and an amount equal to the taxes assessed by the Town on both the

¹ There are also a community building and an MIS building owned by the Feoffees.

cottage and the lot on which the cottage was located. The rent and taxes were paid every six months.

14 • The Feoffees raised the rent from time to time and the tenants paid the increased rent.

15 • Most of the cottages were used seasonally. Twenty-four cottage owners had permission from the Feoffees to occupy their cottages on a year-round basis; the remaining owners did not have such permission. The limit of twenty-four year-round cottages was based on wastewater discharge concerns at Little Neck.

16 • While the Feoffees were increasing the rent, the wastewater discharge problems at Little Neck increased.

22 • Due to a lack of support from Great Neck land owners for extension of the municipal sewer, sewer was not extended to Great Neck and Little Neck.

24 • The Feoffees engaged Lombardo Associates, Inc. ("Lombardo") as their engineer to deal with the DEP and investigate alternatives to the installation of individual tight tanks and drip irrigation systems for the 167 cottages.

25 • Lombardo investigated a variety of options and ultimately recommended to the Feoffees, and the Feoffees adopted, an on-site sewage collection system consisting of four 30,000-gallon holding tanks installed beneath the ball field, a 2000-gallon spill containment tank, an MIS emergency power building and a 75kw emergency generator and fuel tank. The stated design capacity of the collection system was capped at 50,000 gallons per day based on the aggregate bedroom count of 462 bedrooms (110 gallons per bedroom per day according to then current Title 5 regulations).

27 • The DEP insisted on the Feoffees' commencing construction prior to the Feoffees petitioning this Court for permission to borrow the funds needed to construct the collection system. I loaned to the Feoffees nearly one million dollars, without interest, to commence construction and avoid enforcement action and penalties imposed by the DEP.

30 • The present note payable to the Institution for Savings and Vicinity ("IFS") has a variable interest rate. The current annual interest rate is 7.61 percent. The present monthly principal and interest payment is \$53,117.52.

31 • At or about the same time the Feoffees sought instructions for borrowing, the Feoffees began discussions with the tenants' legal representative about the terms of a lease. Discussions failed to bring agreement. In 2006, the Feoffees offered a lease to each cottage owner at an annual rental of \$9,700 for a seasonal use cottage and \$10,800 for a year-round use cottage.

32 • A minority of tenants signed the lease. The Feoffees sent a notice to quit to those tenants who did not sign leases.

33 • At present, the Feoffees have 33 lessees, 7 of whom have year-round use cottages and 26 of whom have seasonal-use cottages, paying annual rent of \$9,700 and \$10,800 respectively. Those rent amounts have been in place since July 1, 2006.

34 • At present, the Feoffees have 134 cottage owners who are paying annual use and occupancy charges of \$5,520 for seasonal use (117 seasonal users) and \$6,000 for annual use (17 annual users). Those charges are in accordance with a stipulation filed in the Essex Superior Court action brought by certain cottage owners against the Feoffees.

36 • All cottage owners pay, in addition to rent or use and occupancy, real estate taxes on their cottages and the lots on which their cottages are located. The average real estate taxes paid per cottage owner in fiscal 2010 was just under \$4,000.

37 • Each cottage owner also pays significant costs for the collection and removal of the effluent from Little Neck; each cottage owner is charged .095 cents for every gallon of water used by the cottage owner. Based on the DEP's figure of 110 gallons per bedroom per day, an owner of a three-bedroom cottage would incur a charge of nearly \$950 for wastewater removal for a month when the cottage was occupied.

40 • Discovery in the Superior Court action has been extensive, but is not complete. The costs of litigation have been substantial. The parties engaged in extensive settlement discussions, aided for nearly one year by the mediation efforts of a former Superior Court judge. Those settlement discussions focused on arriving at a mutually acceptable lease. Efforts at reaching such a lease ended unsuccessfully in 2008, the parties thousands of dollars apart on what constituted a fair annual rent.

41 • Settlement discussions then turned in a new direction: the possible sale of Little Neck to the cottage owners.

42 • On October 8, 2008, the Little Neck Legal Action Committee ("LNLAC"), acting in behalf of the non-lessees, and the Feoffees reached tentative agreement on a sale price of \$26,500,000 for all of Little Neck in its AS IS condition.

43 • The Feoffees met with the Ipswich School Committee on November 20, 2008 and the Committee voted to authorize the Feoffees to enter into an agreement with the cottage owners to sell Little Neck for a price of \$26,500,000, all subject to Probate Court approval.

41. The Feoffees and LNLAC jointly announced the tentative agreement to the public on December 9, 2008.

45. The Feoffees and LNLAC began negotiations for a mutually acceptable purchase and sale agreement. Those negotiations came to a halt when in March, 2009, LNLAC advised the Feoffees that, due to the general downturn in the economy and the scarcity of credit for the proposed purchase, LNLAC was unable to obtain financing for the purchase.

46. The Feoffees and LNLAC discussed the possibility of structuring the sale of Little Neck differently: the Feoffees recording a so-called approval not required (ANR) plan, see G.L. c. 41, §§ 81L and 81P, dividing Little Neck into 168 lots, 167 lots improved with cottages and a 168th lot containing the remaining land, and offering for sale individual lots to cottage owners who, collectively, would acquire the 168th lot. Such an ANR plan is permitted by reason of the 167 cottages having pre-existed the adoption of the subdivision control law by the Town of Ipswich.

47. On May 7, 2009, the Feoffees met in executive session with the Ipswich School Committee and presented the ANR sale methodology. The Committee voted to approve such a sale.

48. The Feoffees and LNLAC awaited a decision in the Appeals Court case of Branagan v. Zoning Board of Appeal of Falmouth in which the issue of the status of houses on lots so created was to be determined. The Branagan court held on October 16, 2009 that such houses did not enjoy the benefit of being prior non-conforming structures, the new ANR plan having changed that status.

49. The Branagan decision doomed the ANR sale methodology.

§ 10 • The Feoffees and LNLAC then discussed the only other available, practicable approach to sale: the creation of a condominium pursuant to the Massachusetts Condominium Law, G.L. c. 183A, §§ 1 et seq.

§ 11 • G.L. c. 183A, §§ 1 et seq. require that a condominium consist of land and buildings; the statute does not permit a so-called dirt (land only) condominium.

§ 12 • The condominium approach to sale required either that the Feoffees convey the land to the cottage owners who would then create the condominium or that the cottage owners convey their cottages to the Feoffees who would then create the condominium.

§ 13 • Months of negotiations between the Feoffees and LNLAC, neither side wanting to give up control of its property to the other, resulted in the execution of a Settlement Agreement and Release ("Settlement Agreement") as of December 24, 2009. The final negotiated sale price was \$29,150,000.

§ 14 • On January 4, 2010, the Feoffees met with their lessees and their counsel and explained the Settlement Agreement. The lessees were invited to participate in the purchase; indeed, their support of the purchase was critical to the sale of Little Neck.

§ 15 • On January 10, 2010, the Feoffees and LNLAC appeared before the Ipswich School Committee in an open session held in the Ipswich High School auditorium and presented the terms of the Settlement Agreement.

§ 16 • The Ipswich School Committee created an Ad Hoc Committee consisting of local businessmen Mitch Feldman, Mark Leff, and Clark Ziegler to study the feasibility of the proposed condominium creation and sale. The Ad Hoc Committee prepared a report dated May 20, 2010 concluding that the proposed condominium and sale were feasible.

63 • James E. Monahan of LandVest, Inc. has consulted with the Feoffees since 1997 concerning valuation of Little Neck and fair rental values of lots.

67 • Daniel Clasby is the certified public accountant of the Feoffees. He has prepared financial statements for the Feoffees and their filings with the Division of Public Charities of the Massachusetts Office of the Attorney General.

70 • The 2006 distribution of \$588,000 to the beneficiary was the largest ever by the Feoffees, made possible by the increased rents collected by the Feoffees and by the fact that substantial interest expense on the borrowing in connection with the wastewater system construction had not yet been incurred.

72 • The Feoffees have not had sufficient monies to make any distributions to the beneficiaries since fiscal year 2006. The primary reasons therefor are the substantial interest expense on the wastewater system loan and the substantial legal expenses incurred by the Feoffees, primarily in the defense of the Superior Court civil action.

<u>Fiscal Year End</u>	<u>Interest Expense</u>	<u>Legal Expense</u>
June 30, 2006		\$3,673
June 30, 2007	\$521,842	\$251,714
June 30, 2008	\$479,663	\$287,901
June 30, 2009	\$468,562	\$191,505

The proposed sale of Little Neck and the concomitant settlement of the Superior Court action will substantially end those expenses.

• The pro formas prepared by Daniel Clasby extend through October 31, 2015. In the event of sale as aforesaid, the year ending October 31, 2016 would be very little different from the previous year because the year ending October 31, 2016 would be the fifth and final

year of the purchase money mortgage notes from the condominium unit purchasers. The Settlement Agreement provides for the Feoffees to make, at the greater of the then prevailing interest rate and six percent, a twenty-year fixed rate, fully amortized loan secured by a first mortgage to unit owners who desire same and cannot otherwise obtain financing. Cash available for distribution for years ending October 31, 2017 and beyond will depend upon how many such loans are made, the then prevailing interest rate, and the rate of return on the Feoffees non-note assets. So long as the net rate of return on assets equals or is greater than five percent on the \$22,000,000 endowment fund, the Feoffees will have available for distribution to the beneficiary approximately \$1,000,000 annually. Importantly, the Feoffees' operating expenses will remain very low with no significant risks with which to contend.

- In the event no sale is permitted, projected cash available for distribution beyond October 31, 2015 is far less predictable, but what is known is that about \$636,000 per year will be paid to IFS through 2026 if there is no refinance. Added to that will be annual operating expenses of approximately \$300,000. A substantial sum, well in excess of \$100,000, should be set aside annually in a sinking fund for infrastructure repair and replacement. Erosion issues are not likely to disappear. The amount of annual income will depend, in large part, upon the outcome of the Superior Court litigation. If the Feoffees prevail in the litigation and are permitted to charge what they maintain is fair market rent, gross rent charged will increase to \$1,646,300 (\$9,700 times 143 seasonal-use rentals equals \$1,387,100; \$10,800 times 24 year-round rentals equals \$259,200), an increase of \$570,000. The Feoffees expect to prevail in that litigation. If the Feoffees do not prevail, if rent is set by someone other than the landlord at a lesser rent or if there is a substantial damage award against the Feoffees or if the Feoffees' ability to evict non-paying tenants is hindered by reason of having to purchase cottages in the event of

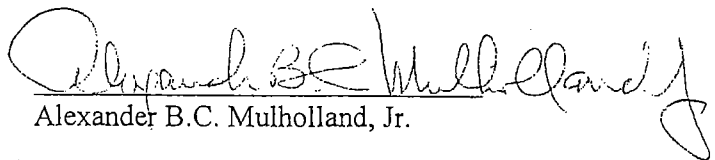
evictions, the Feoffees may be able to provide little, if any, money to the beneficiary for many years.

93 • The Feoffees generate substantial real estate tax revenue to the Town of Ipswich, about sixty percent of which goes to the benefit of the Ipswich Public Schools. At the existing rate of \$11.54, Little Neck generates over \$650,000 in taxes which are paid by the cottage owners, about \$390,000 of which benefits the public schools. That revenue stream to the schools will not be interrupted by the proposed sale; if the creation of the condominium has the effect of increasing the value of real estate at Little Neck, that revenue stream will increase.

94 • Among the relief requested by the Feoffees is the refinance of the existing IFS debt. The interest saving is obvious. The IFS note now bears interest at an annual rate of 7.61%. The proposed Cambridge Savings Bank ("CSB") loan will be at 5.5% for three years. Based on a \$6,000,000 balance, the annual interest savings is \$126,600.

95 • The CSB loan will be interest only for the first year, resulting in monthly payments of \$27,500. That payment compares to the \$53,117.52 monthly payment to IFS. The cash flow savings is over \$25,000 per month, over \$300,000 for the year.

Executed under the pains and penalties of perjury this 1st day of December 2010.


Alexander B.C. Mulholland, Jr.