COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss.

Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, AND INGRID MILES AS THEY ARE THE FEOFFEES 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.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AUTHORIZING THE FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH TO SELL THE LAND KNOWN AS LITTLE NECK, IPSWICH, MASSACHUSETTS, TO GRANT A MORTGAGE ON LITTLE NECK IN CONNECTION WITH REFINANCING DEBT, AND TO SETTLE AND COMPROMISE CLAIMS AGAINST THE FEOFFEES

I. INTRODUCTION

The Plaintiffs Feoffees of the Grammar School in the Town of Ipswich ("Feoffees") own a 36-acre parcel of land constituting Little Neck, Ipswich, Massachusetts (hereafter referred to as "the Property" or "Little Neck") in trust for the benefit of the Ipswich Public Schools. The testamentary trust was created by William Payne, who died in 1660, and contained the following clause: the land "is to be and remain to the benefit of the said scoole of Ipswich for ever as I have formerly Intended and therefore the sayd land not to be sould nor wasted."

For many years until near the end of the twentieth century, the Feoffees rented "lots" at Little Neck to individuals and families who built single-family cottages thereon and generated modest net income which the Feoffees distributed to the beneficiary. There are now 167 cottages on Little Neck owned by the occupants thereof and not by the Feoffees.

In the late 1990's, the Feoffees determined to increase to fair market value the rents charged to their tenants. Shortly thereafter, the Massachusetts Department of Environmental Protection (DEP) ordered the containment of wastewater at Little Neck. The containment was accomplished by, in essence, the construction by the Feoffees of a private sewer system serving all 167 cottages, which system collects all wastewater at a central location from which it is pumped into vehicles and trucked off site to the Ipswich wastewater treatment facility. The Feoffees borrowed just under $6,500,000 in 2005 to build the system. The loan was made by two participating banks, the Newburyport Five Cents Savings Bank and Ipswich Cooperative Bank, n/k/a the Institution for Savings in Newburyport and Vicinity ("IFS"). The latter is the servicing lender.

The increased rents sought by the Feoffees divided the cottage owners into two camps. Those in the smaller camp signed the lease proposed by the Feoffees in 2006. Those in the larger camp filed a self-styled class action lawsuit in the Essex Superior Court (referred to as the Superior Court action or litigation). Of the 167 cottage owners, 33 now lease from the Feoffees the land on which their cottages are located; the remaining 134 cottage owners make monthly use and occupancy payments to the Feoffees pursuant to a stipulation filed in the Superior Court action.

The Feoffees and the Little Neck Legal Action Committee ("LNLAC"), which represents the non-lessee cottage owners, reached a Settlement Agreement and Release ("Settlement

Agreement") in the Superior Court action on December 24, 2009, subject to the approval of the Probate Court. Approval of the Probate Court is required because the settlement calls for the sale of Little Neck to the cottage owners by way of the creation of a condominium, pursuant to G.L. c. 183A, §§ 1 et. seq., consisting of the Property owned by the Feoffees and the cottages owned by the occupants of those cottages, and such a sale can be accomplished only if the Probate Court permits a deviation from the no-sale provision contained in Mr. Payne's trust.

The condominium approach to the sale of Little Neck to the cottage owners, to be accomplished by combining ownership of the land and cottages in the Feoffees for the sole purpose of creating a condominium consisting of up to 167 units, each unit being an existing cottage, and a sale by the Feoffees of the units to the existing cottage owners, is necessitated by the fact that Little Neck consists of one parcel of land, not 167 individual lots. The division of the parcel into lots is not practicable in light of a recent decision of the Massachusetts Appeals Court which, while acknowledging that the owner of a parcel of land is entitled to a so-called approval not required (ANR) plan dividing the parcel into as many lots as were occupied by single-family dwellings as of the date that a town adopted the subdivision control law, declared that such dwellings did not enjoy the status of lawful non-conforming (commonly referred to as "grandfathered") structures.

The Feoffees have filed in this Court a first amended complaint for deviation pursuant to G.L. c. 214, §10B seeking, among others, the following relief: (a) permission to sell Little Neck on advantageous terms; (b) permission to grant a first mortgage to a prospective lender so as to obtain significant interest savings and to obtain funds necessary to implement and accomplish a sale; and (c) approval of the terms of a settlement agreement reached in the Essex Superior Court action brought against the Feoffees, by which agreement the Feoffees will create a condominium

at the Property and sell the Property to the cottage owners for a gross sales price of $29,150,000. The Feoffees file this memorandum in support of their motion for partial summary judgment authorizing them to borrow not more than $6,500,000 from Cambridge Savings Bank ("CSB"), to secure the credit facility from CSB by a first mortgage on said real estate, and to create a condominium at Little Neck and sell the Property for $29,150,000, all as more particularly set forth in the Plaintiffs' motion and their proposed form of judgment.

A sale of the Property on the terms set forth in the Settlement Agreement is in the best interest of the beneficiary for several reasons: (1) as set forth in the pro formas submitted by the Feoffees as part of this filing, such a sale will result in net proceeds of approximately $22,000,000, which will become a permanent endowment fund benefitting the Ipswich Public Schools; (2) such a fund will generate annual income of approximately $1,000,000 for the beneficiary, substantially greater than the average annual distribution by the Feoffees to the beneficiary of about $350,000 in the five years immediately preceding the Superior Court litigation; (3) a sale of the Property will free the trustees of the costs and expenses incurred in holding and managing the Property generally and, specifically, avoid the estimated cost of $900,000 to remedy serious erosion problems at Cliff Road and River Road; (4) the sale to the cottage owners is at a price well in excess of the Property's fair market value which has been determined by the Feoffees' appraiser LandVest, Inc. to be $25,400,000. It is important to note that such a value assumes that the highest and best use of the Property is as a site for 167 condominium units, a use which the Feoffees cannot make of the Property without the participation of the cottage owners because the Massachusetts condominium law requires ownership of land and buildings for the creation of a condominium and the buildings, the

cottages, are not owned by the Feoffees;[1] (5) the sale price of $29,150,000 exceeds the $26,500,000 sale price approved on behalf of the beneficiary by the Ipswich School Committee on November 20, 2008; and (6) approval of the sale will result in the dismissal of the Superior Court litigation in which the cottage owners seek substantial damages together with equitable relief, all without any money being paid to the plaintiffs in that litigation, and an end to the hundreds of thousands of dollars of legal fees incurred by the Feoffees in the defense of that action, which fees, in large part, have prevented the Feoffees from being able to make annual distributions to the beneficiary since the institution of the Superior Court litigation.

The Feoffees also seek permission to borrow money from Cambridge Savings Bank, in large part to pay off their existing loan to IFS. The Feoffees now pay to their existing lender principal and interest of $53,117.52 per month on a note the principal balance of which was $5,714,819.65 prior to the November, 2010 payment. The note currently bears interest at an annual rate of 7.61 percent.

At the urging of the Ipswich School Committee and its Ad Hoc Committee charged with reviewing the Settlement Agreement for feasibility, the Feoffees have obtained very favorable re-financing terms from CSB. Those terms include granting a first mortgage on the Property to CSB to secure the credit facility. The proposed refinance will reduce the annual interest rate from 7.61 percent to 5.5 percent and result in an annual interest savings, based on a $6,000,000 loan,[2] of $126,600.

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[1] By the terms of the Settlement Agreement, individual cottage owners were to deliver bills of sale to the cottages to the Feoffees, to be held in escrow by the Feoffees pending approval of the sale, and to execute purchase and sale agreements with the Feoffees for the purchase of condominium units consisting of the cottages. The Feoffees hold in escrow bills of sale to one hundred sixty-five cottages.

[2] The proposed CSB credit facility is a $6,000,000 term loan and a $500,000 line of credit.

II. STATEMENT OF MATERIAL FACTS

A. Establishment of the Feoffees

1. A number of private individuals, among them Roger Payne and William Payne, a/k/a William Paine, and their successors, were granted, both by the Town of Ipswich and by other private individuals, land for the benefit of the Ipswich Public Schools, all as evidenced by the minutes of the Ipswich Town Meeting of November 14, 1650 (Exh. 2), the minutes of the Ipswich Town Meeting of January 26, 1652 (Exh. 3), the Will of William Payne (Exh. 1) who died in 1660, and the minutes of the Ipswich Town Meeting of January 12, 1756. (Exh. 4)

2. The particular land in question, now known as Little Neck, was devised by the will of William Payne unto the "free scoole of Ipswich" "which is to be and remain to the benefitt of the said scoole of Ipswich for ever as I have formerly Intended and therefore the sayd land not to be sould nor wasted." (Exh. 1, p. 3) In that will Mr. Payne named certain individuals as feoffees in trust. That will was made in 1660, by which time William Payne, with others, was holding land for the benefit of the school.

3. On January 12, 1756, Town Meeting, acting in concert with the feoffees holding title to, among others, the land in question, voted to apply "to the Great and General Court to obtain an Act, if they see meet, fully to authorize and empower the present four Feoffees and such successors as they shall time to time appoint in their stead, together with the three eldest Selectmen of this Town for the time being, other then such Selectman or men as may at any time be of the four Feoffees, to be a Committee in Trust, the major part of whom to order the affairs of the school land . . .." (Exh. 4)

4. The Great and General Court acted upon that application and enacted Chapter 26 of the Province Laws of 1755-56. (Exh. 5) In that enactment, the Great and General Court first

recognized the private nature of the transfer of Little Neck: "Whereas divers piously disposed persons . . . granted and conveyed to feoffees in trust, and to such their successors in the same trust as those feoffees should appoint to hold perpetual succession, certain lands . . .." It then recognized two issues: the power of the trustees who received the grants to appoint successors and the power to charge and collect rents.

5. The Great and General Court addressed and resolved those two issues by incorporating "a joint committee or feoffees in trust, with full power and authority by a majority of them to grant necessary leases of any of said land not prejudicial to any lease already made, and not exceeding the term of ten years, to demand and receive the said rents and annuities, and, if need be, to sue for and recover the same; . . ."

6. Most notably, the Great and General Court left all decision-making in the hands of a committee whose majority was composed of private citizens and not public officials. It named four individuals who were "the present surviving feoffees on the part of the private persons granting lands as afores(ai)d," and three of the then Selectmen to constitute the committee or feoffees in trust. To ensure that private citizens would always constitute a majority of the feoffees, the Great and General Court provided that the four private citizens would have the power to appoint the successors to their number, "according to the original intention of their first appointm(en)t"; the remaining three committee members would be the three selectmen most senior in service.

7. Chapter 26, by its own terms, was to expire in ten years.

8. By Chapter 5 of the Province Laws of 1765-66, the Great and General Court extended the existence of the "joint committee or feoffees in trust, for twenty-one years, making no changes, in the constitution of the feoffees and their method of succession." (Exh. 6)

9. By Chapter 54 of the Acts of 1786, the constitution and method of succession of the feoffees became permanent. (Exh. 7)

B. History of Rentals at Little Neck

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. (Exh. 54, p. 10)

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 cottages[3] 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. (Exh. 8) Among those 210 lots are 167 lots improved with cottages. In each instance, the cottage is owned by someone other than the Feoffees.

[3] There are also a community building and an MIS building owned by 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 cottage and the lot on which the cottage was located. The rent and taxes were paid every six months. (Exhs. 10, 11 and 12)

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. On May 19, 1998, at the 349th annual meeting of the Feoffees, the Feoffees voted to increase rents annually over the next five years. (Exh. 9) As of July 1, 2003, the annual rent charged to each cottage owner was $3,200 for a seasonal-use cottage and $3,600 for a year-round use cottage. (Exh. 11)

17. The following fiscal year, beginning July 1, 2004, the Feoffees increased the annual rent to $5,000 for a seasonal use cottage and $5,500 for a year-round use cottage. (Exh. 12)

C. Wastewater Issue at Little Neck

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

19. On December 10, 1998, the Department of Environmental Protection ("DEP") served on the Feoffees a Notice of Enforcement Action with the following factual allegation: "The Department has become aware of the fact that the Feoffees of the Grammar School own a

private parcel of land, known as Little Neck in the Town of Ipswich that discharges in excess of 15,000 gallons per day of sewage. This discharge does not comply with the Clean Waters Act and the Groundwater Permitting Program Regulations." (Exh. 23)

20. In September of 2000, the Feoffees entered into an Administrative Consent Order with DEP which incorporated a plan and schedule for complying with the Clean Waters Act. The essence of the plan was the installation of a tight tank or a drip irrigation system to service each of the 167 cottages, the former to service the seasonal cottages. (Exh. 24)

21. In May of 2001, at the request of the Feoffees, the DEP agreed to postpone the implementation of those systems and tight tanks so as to permit the Town of Ipswich to determine whether to extend the municipal sewer service to Great Neck and Little Neck. (Exhs. 25 and 26)

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.

23. A new Administrative Consent Order issued in April, 2004, setting forth a schedule for the installation of tight tanks and drip irrigation systems. (Exh. 27)

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

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). (Exh. 54, p. 11)

26. In the fall of 2004, a new Administrative Consent Order issued directing the Feoffees to submit plans to DEP for the proposed collection system. (Exh. 28) The Feoffees did so and on March 24, 2005, the DEP approved the plans. (Exh. 29) The Feoffees constructed the collection system under the direction of Lombardo. (Exhs. 30-36)

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. Feoffee Alexander B.C. Mulholland, Jr. loaned to the Feoffees nearly one million dollars, without interest, to commence construction and avoid enforcement action and penalties imposed by the DEP. (Exh. 19)

28. In order to raise the monies needed to comply with the DEP order, the Feoffees and the Ipswich Public Schools filed with the Probate Court on or about August 5, 2005 a stipulation and request for instructions seeking, in essence, the Court's approval to borrow $6,483,000 to construct the common wastewater collection system. (Exh. 37) On that date, the Court (Sahagian, J.) entered an order declaring that the Feoffees had the authority to borrow that sum without violating the terms of the Payne trust. (Exh. 38)

29. The Feoffees borrowed that sum from two banks, Newburyport Five Cents Savings Bank and the Ipswich Cooperative Bank, n/k/a Institution for Savings in Newburyport and Vicinity. The latter is the servicing lender. The loan was secured by, among others, a conditional assignment of rents and leases recorded at the Essex South District Registry of Deeds. The promissory note and security instruments are Exhibits 39-42.

30. The IFS note has a variable interest rate. The principal balance on the note as of October 31, 2010 was $5,714,819.65. (Ex. 43). The current annual interest rate is 7.61 percent. The present monthly principal and interest payment is $53,117.52. (Exh. 39)

D. Current Rentals/Use and Occupancy at Little Neck

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. (Exh. 13)

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 Superior Court action. (Exh. 46).[4]

35. The total annual rent and use and occupancy now charged by the Feoffees is $1,075,536. (Tab 14)

[4] The Stipulation also provided that the non-lessees pay into escrow the difference between the rent paid by the lessees and the use and occupation payments made by the non-lessees. The escrow payments have been stayed pursuant to the Settlement Agreement.

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. (Exh. 54, pp. 13-17)

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. (Exh. 46) 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.

E. The Superior Court Action, Settlement Negotiations and Proposed Sale

38. Those former tenants at will who did not sign the lease filed a purported class action lawsuit in the Essex Superior Court sub nom William M. Lonergan, et al. v. James W. Foley, et al., Essex Superior Court Civil Action No. 06-02328D. In that action, the plaintiffs alleged, among others, that the Feoffees had unlawfully raised rents and collected real estate taxes and wastewater assessments from the cottage owners. The plaintiffs in that action also alleged that their status was something other than tenants at will and that they had equitable rights to remain on Little Neck or, in the alternative, that the Feoffees, in the event they evicted the cottage owners, were obligated to pay the cottage owners the fair market value of the cottages. The plaintiffs' counts included claims for breach of the covenant of quiet enjoyment, breach of the covenant of good faith and fair dealing, violation of civil rights, violation of G.L. c. 93A, §§ 2 and 9, unjust enrichment, and recovery of past rent, real estate taxes and wastewater assessments. (Exh. 44)

39. The Feoffees filed an answer denying all alleged wrongdoing. (Exh. 45)

40. Discovery in the Superior Court action ensued. The costs of litigation were 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, 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.

44. The Feoffees and LNLAC jointly announced the tentative agreement to the public on December 9, 2008. (Exh. 47)

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. (Exh. 59)

49. The Branagan decision doomed the ANR sale methodology.

50. 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.

51. 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.

52. 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.

53. 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. (Exh. 48)

54. The Settlement Agreement, which contemplated that not all cottage owners might be willing and able to purchase units, can be summarized as follows:

a. Cottage owners convey their cottages, in escrow, to the Feoffees so as to permit the Feoffees to create a condominium to be owned by the cottage owners who participate by purchasing condominium units;

b. A condominium unit will consist of a cottage. Each unit owner will enjoy exclusive common area in the lot on which his or her cottage sits and will own an undivided interest in all common areas, permitting the owner to enjoy existing amenities (beach, dock, community building, etc.);

c. Total purchase price of 167 Units: $29,150,000;

d. Condominium and sale subject to Probate Court approval sought by way of complaint for deviation;

e. Feoffees not obligated to proceed unless $26,500,000 of purchase and sale agreements ("P&S"), with deposits, received on or before March 5, 2010;

f. All buyers treated equally, whether lessees or non-lessees;

g. All non-buyers treated equally, whether lessees or non-lessees;

h. Seller financing available to buyers: five-year, interest only note secured by a first mortgage, six percent per annum interest rate, fixed, up to 90% of purchase price;

i. Buyers acquire Little Neck "as is";

j. Dismissal of Superior Court action upon recording of Condominium Master Deed, with civil action to be stayed pending same;

k. Escrowed funds may be used for P&S deposits by those buying and for use and occupancy arrears by those not buying;

l. Lease option for non-lessees electing not to buy;

m. Interest on escrow account to be paid to the Ipswich School Committee following recording of the Master Deed, denominated as gift of LNLAC;

n. Balance of purchase price note, to cover non-buyers' share of $29,150,000, from Condominium trustees: six percent per annum interest rate, fixed; five-year maturity; twenty-year amortization.

55. 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.

56. 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.

57. 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.

58. The Ad Hoc Committee, the Feoffees and LNLAC met and exchanged information between February, 2010 and May, 2010, resulting in a May 20, 2010 memorandum from the Ad Hoc Committee to the Ipswich School Committee. (Exh. 53)

59. That memorandum concluded, in pertinent part, that ". . . the conversion of Little Neck to a condominium appears to be practical and achievable." As to the seller financing offered by the Feoffees under the Settlement Agreement, the Ad Hoc Committee concluded that "the availability of seller financing as a backup at a time when conventional credit markets are impaired strikes us as part of the 'glue' that would make any condominium agreement possible." and "The purchase prices established in the settlement agreement appear to result in a low loan-to-value ratios (sic) and cost burdens not significantly greater than current rents. If so, that increases the potential for private mortgage financing and reduces the risk of loss on seller financing that might be provided by the Feoffees." (Exh. 53, pp. 1-2)

60. The Ad Hoc Committee also made a series of financial recommendations: that the so-called Balance of Purchase Price Note to cover the non-buyers' share of the overall price of

$29,150,000 be no greater than $3,000,000; that the Feoffees obtain a satisfactory loan commitment to refinance the existing loan for the wastewater treatment system; that the Feoffees engage an experienced outside firm to manage all loan servicing and collections and to monitor property tax payments and insurance coverage on cottages; and that the Feoffees utilize a professional third party investment advisor.

61. The Feoffees have met and exceeded the recommendations of the School Committee's Ad Hoc Committee: 158 of 167 cottage owners are ready, willing and able to purchase condominium units as evidenced by duly executed purchase and sale agreements (Exh. 49) and by the delivery, in escrow pending the creation of the condominium, of bills of sale to the Feoffees for those 158 cottages (Exh. 50), resulting in a Balance of Purchase Price Note of $1,584,266, nearly half of the $3,000,000 ceiling proposed by the Ad Hoc Committee.

62. Another seven cottage owners have executed and delivered purchase and sale agreements and bills of sale in escrow (Exhs. 51-52), but, at the moment, their cottages are subject to chattel mortgages which, unless discharged, prevent those cottages from being included in the condominium.[5]

F. Value of Little Neck and Projected Distributions to Beneficiary

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.

64. Mr. Monahan has recently completed his appraisal of Little Neck. As of September 11, 2010, the fair market value of Little Neck is $25,400,000. (Exh. 54) That value assumes a sale of Little Neck to a profit-minded third party investor who would convert the land

[5] Those cottages may be added to the condominium in a subsequent phase or phases, but the Feoffees will already have received that portion of the $29,150,000 represented by those cottage owners by way of the Balance of Purchase Price Note.

to a condominium ownership and resell land interests to both current tenants and, presumably, some new buyers. (Exh. 54, pp. 59-60)

65. The value assumes that the highest and best use of the Property is as a site for a one hundred sixty-seven unit condominium. Such a use can be made of the Property only if the cottage owners agree with the Feoffees to create such a condominium.

66. Mr. Monahan also determined the value of Little Neck if the land were vacant: $7,220,000. (Exh. 54, p. 41) The value of the land if vacant assumes a 24-lot residential subdivision consistent with present zoning requirements.

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.

68. Exhibits 19-22 are the last four annual filings prepared by Mr. Clasby in behalf of the Feoffees. The filing for fiscal year 2010 (y/e June 30, 2010) is on extension.

69. The annual filings for the period July 1, 2005 to June 30, 2009 show that the last year during which a distribution was made to the beneficiary was fiscal year 2006. The distribution that year was $588,000.

70. The distribution of $588,000 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.

71. The amounts distributed by the Feoffees to the beneficiary in the years immediately preceding fiscal year 2006 were as follows:

Fiscal Year	Distribution
2002	$282,970
2003	$245,000
2004	$308,545
2005	$300,000

(Exhs. 15-18)

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.

Fiscal Year End	Interest Expense	Legal Expense
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

(Exhs. 19-22)

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

73. Mr. Clasby has prepared, at the request of the School Committee, the pro formas filed herewith as Exhibits 55-58.

74. Those pro formas show that the sale of Little Neck as proposed by the Feoffees will increase distributions to the beneficiary to record highs and is far preferable to the Feoffees' continuing to hold Little Neck and collect rents from largely recalcitrant cottage owners.

75. The pro formas show income statements (Exh. 56), balance sheets (Exh. 57), statements of cash available for distribution to the beneficiary (Exh. 55), and supporting subschedules (Exh. 58) for the next five years in six alternative scenarios.

76. Alternative 1A assumes the continuation of the status quo plus the need to remedy the erosion problems, at an estimated cost of $900,000, at Cliff Road and River Road. That cost estimate is the latest estimate of Vine Associates, Inc. (Exh. 60) The $900,000 is assumed to be raised by borrowing, as of January 1, 2011, that amount at an interest rate of six percent (6%) per annum, amortized over ten years ($9,992 per month). This alternative assumes no sale of Little Neck and no refinance of the current Institution for Savings ("IFS") debt.

77. Alternative 1B assumes no sale of Little Neck, but a refinance of the IFS debt with a $6,000,000 loan from Cambridge Savings Bank ("CSB") at a much more favorable interest rate. The proceeds from that loan are used to pay off the existing IFS debt and to pay down the existing Eastern Bank debt described infra. This alternative also assumes the same borrowing to remedy the erosion problems as explained in Alternative 1A.

78. Alternative 1C assumes no sale of Little Neck, but a refinance with CSB. It differs from Alternative 1B in that it assumes no erosion remediation in the next five years.

79. The fourth ("Alternative 2A"), fifth ("Alternative 2B") and sixth ("Alternative 2C") alternatives all assume a sale of Little Neck per the Settlement Agreement. They differ based on how much of the sales proceeds are received in cash versus secured promissory notes: Alternative 2A assumes that all buyers use seller financing such that ten percent of the sales proceeds are received in cash and ninety percent of the sales proceeds are received in secured notes; Alternative 2B assumes that thirty percent of the sales proceeds are received in cash and seventy percent of the sales proceeds are received in secured notes; and Alternative 2C assumes

that fifty percent of the sales proceeds are received in cash and fifty percent of the sale proceeds are received in secured notes. The Settlement Agreement and the individual purchase and sale agreements call for a sale of Little Neck AS IS; hence, there is no provision for erosion remediation.

80. All of the alternatives except Alternative 1A assume a $6,000,000 loan as of November 1, 2010, from CSB per the terms of CSB's commitment letter (Exh. 65): interest only payments in year one at an annual rate of 5.5%; and payments of principal and interest in years two and three at an annual rate of 5.5%, twenty year amortization schedule. Further assumed is an extension of the CSB loan for years four and five at an annual interest rate of 6.0%, principal and interest payments based on a twenty-year amortization schedule. Exhibit 66 states CSB's willingness to extend the loan beyond five years. The Feoffees anticipate an additional commitment extension.

81. All of the alternatives assume the existing $300,000 loan from Eastern Bank as of November 1, 2010, on the following terms: interest only in year one at a rate of 4.25%; interest only in years two and three at a rate of 5.75%; and interest only in years four and five at a rate of 6.0%. The note evidencing the existing loan is a demand note. (Exh. 61) It has been guaranteed personally by three of the life Feoffees. (Exhs. 62-64)

82. Operating expenses, except for legal fees, in all alternatives are based on the Feoffees' historical expenses with five percent annual increases assumed. General, non-litigation legal fees in Alternatives 1A, 1B and 1C are assumed at $10,000 per month during the five-year period shown on the pro formas. Legal fees specific to the Superior Court action and an appeal therefrom are estimated at $25,000 per month for the next thirty months. There will be little in Superior Court fees, estimated on the high side as $10,000, if this Court gives the

Feoffees permission to settle the Superior Court litigation and sell the land. General, non-litigation legal fees in Alternatives 2A, 2B and 2C are assumed at $10,000 per month during the first year, while the Feoffees still own the land, and decrease to $10,000 per year, with a five percent annual increase assumed following sale. The legal and engineering expenses associated with the creation of the condominium and the sale of units, estimated at $400,000, are shown as a one-time expense paid at closing (See Subschedule category "Cash From Sale of Units" in each of Alternatives 2A, 2B and 2C), and not as an operating expense, so as to provide a clear picture of the net proceeds to be derived from the proposed sale.

83. Also deducted from the sales proceeds on the subschedules of Alternatives 2A, 2B and 2C are a contingency of $220,000 and a return of monies to the lessees at closing, estimated at $730,000, which amount represents the difference between rent collected by the Feoffees from lessees since July 1, 2006 less use and occupancy monies collected by the Feoffees from non-lessees since July 1, 2006, calculated through October 31, 2011. As an incentive to the lessees to keep their leases in effect (the leases provide the lessees a right to terminate on sixty days notice) and to help with cash flow during the Superior Court litigation, the Feoffees agreed with the lessees that they would not settle the Superior Court litigation on terms which would result in the lessees paying more in rent than the non-lessees paid for use and occupancy.

84. There are two line items of operating expense for which there is no historical data, investment management expenses and loan servicing fees, both of which will be incurred in the event of sale. Those expenses and fees are based on fee schedules produced to the Feoffees by CSB. (Exh. 67-68)

85. All cash has been estimated to earn a three percent annual return. Cash received at closings is shown as used to pay down bank indebtedness to the extent possible.

86. In Alternatives 1A, 1B and 1C, which assume continued ownership of the land by the Feoffees, the Feoffees show a reserve fund created to have cash on hand for major repairs to, or replacement of, infrastructure, thus reducing cash available for distribution to the beneficiary. The reserve fund is fifty percent of actual depreciation, excluding erosion remediation.

87. In summary, the pro formas show that, assuming a sale of condominium units completed by November 1, 2011, the amount of money available for distribution to the beneficiary for years ending October 31 range as follows:

Year	Cash Available for Distribution
2011	$426,136
2012	$905,432 - $1,068,059
2013	$946,871 - $1,110,083
2014	$943,913 - $1,106,886
2015	$901,287 – 1,064,007
	(Exh. 55, Alt. 2A-2C)

88. The range of cash available for distribution reflects the difference in anticipated income depending upon how much of the sales price is received in cash, which is projected to earn three percent per year, and how much is received in promissory notes, bearing interest at six percent per year, secured by first mortgages.

89. In summary, the pro formas show that, in the event sale is not permitted, there will be no money available for distribution to the beneficiary for the next five years, assuming remediation of the erosion problems at Little Neck (Alternative 1A and 1B). The worst situation

economically is no sale and no refinancing of the existing debt (Alternative 1A). Even if no erosion remediation were undertaken, there is no year in the next five years in which cash available for distribution reaches $100,000. The Feoffees believe that failure to remedy the erosion problem if there is no sale is unwise.

90. The pro formas 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 (Exh. 48, p. 16) provides for the Feoffees to make in 2016, at the then prevailing interest rate, 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.

91. 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.

92. Presently (2010 assessments), the assessed value[6] of land and buildings at Little Neck as to which the taxes are passed through to the cottage owners is $56,567,000 (Exh. 54, pp. 13-16), an average assessed value of $338,725.

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.

[6] G.L. c. 59, §2B creates a legal fiction which is advantageous to the Town of Ipswich in that it allows the Town to tax Little Neck as if it were 210 individual lots and not one lot. The statute says, in pertinent part: ". . .[R]eal estate . . . held in trust for the benefit of . . . a . . . town, or any instrumentality thereof . . . if . . . leased or occupied for other than public purposes, shall for the privilege of such lease or occupancy, be valued, classified, assessed and taxed annually . . . to the lessee or occupant in the same manner and to the same extent as if such . . . lessee or occupant were the owner thereof in fee . . .."

G. Proposed Re-Finance and Cambridge Savings Bank

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 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.

96. The refinance to which CSB has committed satisfies the recommendation of the School Committee's Ad Hoc Committee for such a refinance. CSB has agreed to provide partial releases of its mortgages as condominium units are sold. (Exh. 65)

97. CSB has also agreed to perform the loan servicing and collections services as recommended by the Ad Hoc Committee. (Exhs. 67 and 53)

98. CSB has also offered to provide the professional third party investment advice recommended by the Ad Hoc Committee. (Exh. 68)

III. STATEMENT OF LEGAL ELEMENTS

A. Massachusetts General Laws authorize this Court to permit the Feoffees to deviate from the terms of William Payne's testamentary trust and to sell Little Neck, to refinance the existing IFS debt and to mortgage Little Neck, and to settle the Superior Court litigation. See G.L. c. 214 §10B, G.L. c. 203, §§ 16, 23, and G.L. c. 204, §§6,13.

B. A testator's "dominant intent...must prevail over any small detail which interferes with it..." Trustees of Dartmouth College v. City of Quincy, 357 Mass. 521, 528 (1970).

C. "Authorizing sensible changes in the prescribed, but no longer appropriate, mechanics of achieving a testator's primary charitable objective is within 'the general power of courts of equity in the administration of charitable trusts to permit deviation short of cy pres applications.'" Wigglesworth v. Cowles, 38 Mass.App.Ct. 420 (1995), quoting, Trustees of Dartmouth College at 531.

IV. STATEMENT OF ISSUES PRESENTED

A. Should this Court authorize the sale of Little Neck?

B. Should this Court authorize the re-finance of the existing Institution for Savings loan by a loan from Cambridge Savings Bank and the concomitant grant of a mortgage of Little Neck?

C. Should this Court authorize the settlement of the Essex Superior Court litigation?

V. ARGUMENT

A. This Court Should Permit Deviation From the No-Sale Provision of the William Payne Trust and Authorize The Feoffees to Sell Little Neck

G.L. c. 214, §10B provides, in pertinent part, as follows:

> Upon a petition to permit reasonable deviation from any of the subordinate terms of a charitable gift of a donor who has died, the court may exercise jurisdiction without requiring that those who would be entitled to take upon failure of such gift be joined as parties or notified of the proceedings.

In 1660 William Payne made a charitable gift for the benefit of the Ipswich Public Schools of pasture land at Little Neck. This court has the power to permit deviation from the "not to be sould nor wasted" subordinate terms of the gift, and, for the reasons set forth herein, should permit such a deviation and authorize the sale of Little Neck by the Feoffees for a gross sales price of $29,150,000.

The leading Massachusetts case on deviation is Trustees of Dartmouth College v. City of Quincy, 357 Mass. 521 (1970) (hereafter referred to as the Dartmouth case) wherein the Supreme Judicial Court considered a deviation from the terms of a charitable gift made by way of a testamentary trust created by Dr. Ebeneezer Woodward, who died in 1869, "for the education of females . . . who are native born, born, I wish it to be understood, in the Town of Quincy, and none other than these, to be allowed to attend this Institute which I wish to be as perfect and as well conducted as any other in the state." Dartmouth, at 523 (emphasis added). Dartmouth College was named to receive the gift over in the event the trust property was used "for any other purpose than contemplated in this will." Dartmouth at 527.

By 1968, the trustees were unable to cover the operating expenses of the Woodward School with income from the trust fund. Although the school had a capacity of 100 students, 75 or fewer students had attended the previous two years. "Financial difficulties had adversely affected the school's accreditation. Tuition income, however, could be increased materially if the school were able to operate at capacity, and accreditation could probably be restored. It had been lost largely because of uncertainty concerning the school's financial future." Dartmouth at 525.

Faced with the need of additional income, the trustees formulated a proposal to permit non-Quincy born girls to attend the school only to fill otherwise unused seats and have the non-Quincy girls pay more tuition than Quincy girls, the tuition differential being equal to the income of the trust fund which, in essence, would benefit equally each of the Quincy-born girls attending the school. Such a proposal, said the trustees, would assure economic viability and keep the high admission standards desired by the grantor (". . . this Institute which I wish to be as perfect . . .").

The Supreme Judicial Court held that the proposal of the trustees constituted a reasonable deviation from the express terms of Dr. Woodward's trust language despite the specific prohibition against the admission to the school of non-Quincy born girls. In so holding, the Court stated, quoting from an earlier case involving the same trust:

> At least it is plain from the whole will that the great thing in the testator's mind, his dominant intent, was to establish the female institute, and the general intent gathered from all the words must prevail over any small detail which interferes with it unless clearly he makes exact compliance essential. (emphasis in original). Dartmouth, at 528, quoting from Quincy v. Attorney General, 160 Mass. 431, 436 (1894).

Rejecting Dartmouth College's contention that the Court had no power to approve variations in Dr. Woodward's precise plan or to modify his express language and the college's reliance on a rigid interpretation of the will, the Court said that the college's arguments were especially unavailing . . . "where a valid charitable trust and enterprise, carrying out the testator's dominant charitable purpose, has been in actual operation for over seventy-five years before changed circumstances have made desirable or necessary the abandonment of certain details of the original plan. If Dr. Woodward's dominant intention . . . is to be realized . . . more income is necessary - . . .". Dartmouth, at 530 (emphasis added).

The Dartmouth Court's rationale for ordering deviation included the following:

> We think that the present case is one where the means and detailed methods stated by the testator "must have been subordinate in his mind to the [predominant charitable] end which he had in view." [Ford v. Rockland Trust Co., 331 Mass. 25, 28 (1954)] . . . He [Dr. Woodward] could not foresee the changes in preparatory education costs and in the habits of our population (now much more mobile and migratory than it was) which have taken place in the last 101 years . . .. We think the proposal now before us is . . . a proper method of carrying out Dr. Woodward's primary charitable trust without violating any of its basic charitable purposes.

. . .

> The justification for allowing a charitable gift to continue indefinitely, without regard to the Rule against Perpetuities or related rules, is the public benefit from achievement of important charitable objectives. The same justification does not necessarily apply to subordinate details of such a charitable gift, particularly those which tend unduly to restrict adapting use of the gift to changing conditions. In some cases, indeed, subordinate provisions, originally may have been imposed, not to facilitate the achievement of a general charitable purpose, but for the personal gratification of the donor in respects wholly irrelevant to any effective execution of a public purpose. There is strong ground for disregarding such subordinate details if changed circumstances render them obstructive of, or inappropriate to, the accomplishment of the principal charitable purpose. (footnote omitted). A donor who brings into existence a charitable institution must recognize that most institutions are likely to change with time, that they will become sterile if they remain static, and that they must be adaptable to new public considerations and unpredictable economic circumstances. For this reason, the intention to make mandatory even detailed restrictions on the conduct of such institutions is not lightly to be inferred. If it appears that the unduly restrictive effect was in fact intended, provisions no longer appropriate must be tested against the requirements of current public policy concerning the donor's fundamental charitable objectives. Dartmouth, at 531-534.

The instant case is controlled by Dartmouth; indeed, the instant case presents an even stronger case for deviation than Dartmouth. Here, as in Dartmouth, the grantor created a testamentary trust for a charitable purpose. Here, as in Dartmouth, the grantor wanted his gift to provide for the education of students in a particular town. Here, as in Dartmouth, at the time of the requested deviation, the charitable trust enterprise has been in actual operation for many years, far more than the 75 years in the Dartmouth case. Here, as in Dartmouth, the great thing in the testator's mind, his dominant intent, namely to benefit the Ipswich Public Schools, is threatened by changed circumstances. Compliance with the Clean Waters Act has resulted, in essence, in a $600,000-plus annual price tag until 2026 by which time there is no guaranty that

the wastewater collection system will not be in need of substantial repair or replacement. A bill nearing $1,000,000 will soon be incurred to remedy erosion problems at Little Neck. It is not unrealistic to conclude that erosion will be a continuing problem at Little Neck. The Feoffees have increased rents consistent with the recommendations of their advisor LandVest, but the latest increase has resulted in substantial litigation against the Feoffees which has been extremely expensive to defend. The Feoffees have had no choice but to defend the litigation: the rents they seek to charge are not only supported by the opinion of James Monahan of LandVest, but they are also needed to cover the costs and expenses of operating Little Neck and to permit the Feoffees to generate monies for the beneficiary. That said, the Feoffees have concluded that sale of Little Neck and cessation of the obligations and risks of ownership are far preferable to continued ownership and continued reliance on the income stream of rents paid by largely discontented tenants.

The changed circumstances have made desirable, and from a maximization of income viewpoint necessary, abandoning the detail of Mr. Payne's plan which prohibits sale absent deviation just as changed circumstances warranted the Dartmouth Court's deviation from the much stronger language of Dr. Woodward prohibiting admission to his school of non-Quincy born young women. Here, unlike in Dartmouth, the benefit of Mr. Payne's largesse remains with Ipswich Public School students and not students from other cities and towns.

The pro formas discussed in the Facts section of this memorandum establish the wisdom and desirability of sale. A sale, assuming a modest return on investment, will result in approximately $1,000,000 per year being available for distribution to the beneficiary with virtually no offsetting expenses. The only risk is investment risk, a risk which can be managed by a conservative and prudent investment strategy. The first mortgages offered to buyers by the

Feoffees will result in a better-than-market annual rate of return of six percent per annum. Those mortgages also have the benefit of a low loan to value ratio. The average sale price of a "lot" is approximately $175,000 ($29,150,000 divided by 167 = $174,551). The average assessed value of a cottage is over $105,000 ($17,761,100 divided by 167 = $106,354). Even assuming that no additional value will be created by the marriage of land and cottage in the condominium form of ownership, the average loan to value of a mortgage loan by the Feoffees would be .56 (ninety percent of $174,551 divided by $280,000) in a world where eighty to ninety percent mortgages are commonplace. Such an assumption of no additional value is conservative. The very reason that the cottage owners are willing to pay the substantial premium of $3,750,000 over the fair market value of Little Neck as determined by LandVest is that there will likely be added value by the combined ownership of land and buildings. To those who might object to the cottage owners enjoying that added value, the Feoffees say: (1) the cottage owners are paying a substantial premium for that added value; (2) the cottage owners have made possible the creation of the condominium and the collection of that premium by the Feoffees by having built the cottages in the first place and by agreeing to the creation of a condominium -- without the cottages at Little Neck the land is worth less than thirty percent of its value ($7,220,000 versus $25,400,000) as improved; and (3) every sound business deal has an element of benefit for each party to the transaction.

The pro formas establish that continued ownership and non-sale of Little Neck by the Feoffees are economically disastrous in the short term: there will be no money available for distribution to the beneficiary in the next five years. The Feoffees believe that continued ownership presents a similarly dismal picture in the long term. Without in any way suggesting that the Feoffees will not prevail in the Superior Court action if sale is denied by this Court and

the Superior Court litigation proceeds to completion of discovery and trial, the Feoffees, nonetheless, cannot guarantee victory and have weighed the advantages of sale with the disadvantages of litigation, win or lose, long-term.

The long-term advantages of sale are similar to the short-term advantages of sale: the creation of an endowment fund of some $22,000,000 which, even under an assumed five to six percent net rate of return, would generate $1,100,000 to $1,320,000 of income available for distribution to the beneficiary and no concomitant expenses and risks of real estate ownership.

What are the disadvantages associated with the Superior Court litigation? In the event the Feoffees lose in the litigation, the disadvantages are obvious. A substantial damage award will cripple the Feoffees' ability to make distributions to the beneficiary for years. In the event the Superior Court should conclude that the Feoffees lack the authority to set the rent and are subject to a rent set by a third party, the Feoffees' ability to make distributions may be substantially impaired. For example, at least until the IFS note is paid off in 2026, even after the Superior Court litigation cost is at an end, annual gross rental income will be offset by $636,000 of principal and interest payments and $300,000 of operating expense. To that must be added the cost of erosion remediation, annual principal and interest payments of $120,000, assuming the Feoffees are able to obtain a ten-year loan at six percent annual interest. An annual contribution to a sinking fund for infrastructure repairs and replacement of $120,000 is prudent. Those payments and set asides total $1,176,000. If rent is set at the rates which the cottage owners seek, $5,000 and $5,500, and each cottage owner is charged $500 for the operation and management of the wastewater system (see the Superior Court stipulation, Exh. 46), total income would be $930,500 ($5,500 x 143 + $6,000 x 24),[7] resulting in an annual shortfall of nearly a

[7] The lessees would undoubtedly exercise the sixty-day termination clause in their leases and pay the lesser rent.

quarter million dollars. If rent is set halfway between the aforesaid rents and the lease rates, total income would be $1,288,400, barely enough to generate a $100,000 annual distribution.

If the Superior Court allowed the Feoffees to set the rents and evict non-paying cottage owners, but required the Feoffees to pay an evicted owner for the value of his or her cottage, the practicability of eviction would be substantially impaired. The Feoffees would have to seek to borrow the purchase price from a lender willing to make such a loan or market the cottage to a potential buyer while the cottage was occupied by an unhappy cottage owner – not an ideal situation.

Even if the Feoffees are totally successful in the Superior Court action and win the right to evict all non-paying cottage owners forthwith and to set the rents in their sole discretion, there is a limit to what they can reasonably charge in rent. At present lease rates, the average seasonal cottage owner who uses his cottage for the three summer months and fifteen additional weekends is paying rent, taxes and wastewater use charges of $17,500. Can the Feoffees find 167 tenants willing to pay that amount? How much more, if any, will 167 tenants be willing and able to pay? Even if all 167 cottage owners pay present lease rates, gross rental income would be $1,646,300. In 2026, after the IFS note and the erosion remediation rates are paid in full, after the deduction of $300,000 of operating expenses and $120,000 per year for a sinking fund, there would be $1,226,300 available for distribution without other contingencies or rent and operating expense increases. That amount is the equivalent of about a five and one-half percent rate of return on the $22,000,000 endowment fund which would be created in the event of a sale.

The rationale of the Dartmouth case is apposite here: the no-sale provision must be viewed as subordinate to William Payne's predominant charitable goal of benefitting the Ipswich Public Schools. Mr. Payne likely did not foresee costly compliance with environmental laws,

tenants' rights, and complex civil litigation. The sale proposal of the Feoffees is a proper method of carrying out Mr. Payne's primary charitable trust without violating its basic charitable purpose. Moreover, this Court can and should find that sale is required to prevent the second part of the disjunctive: that the land not be wasted. For the last four years, the beneficiary has not received any distributions, a development with which Mr. Payne would not be pleased. Where, as here, a sale has short-term, mid-term and long-term advantages over continued ownership, sale should be authorized.

The provision against sale restricts adapting use of Mr. Payne's gift to the changing conditions set forth in this memorandum. Those changed circumstances render the no-sale provision obstructive of, or inappropriate to, the accomplishment of Mr. Payne's principal charitable purpose: the improvement and advancement of the Ipswich Public Schools. When tested against the requirements of current public policy concerning the donor's fundamental charitable objectives, the no-sale provision is no longer appropriate; it is counter-productive.

Wigglesworth v. Cowles, 38 Mass.App.Ct. 420 (1995), also supports the deviation sought by the Feoffees. At issue in Wigglesworth were the will and codicils of Roxana Cowles whose primary testamentary purpose was the establishment and operation of a convalescent home memorializing Stephen Caldwell, which purpose she sought to accomplish by a testamentary trust. The convalescent home was to be operated from her dwelling house on Green Street, Ipswich, Massachusetts. Ms. Cowles' will provided that "said house and land shall not be sold, and if used for any other purpose than a convalescent home, said house and land shall revert to my heirs." Wigglesworth, at 421. Two other homes were left to the trustees who were to use the income therefrom to support the convalescent home. Ms. Cowles died in 1921.

By 1956, the life estates to which the gift to the trustees were subject were renounced. The dwelling house was then ill-suited for a convalescent home. The trustees razed all three houses and built at Green Street the Stephen Caldwell Memorial Convalescent Home.[8] The Wigglesworth court rejected the Cowles' heirs' claim that the razing of the house at Green Street triggered a reversion of the property to the heirs:

> A fair reading of her will and codicils indicates that Roxana C. Cowles's primary testamentary purpose was the establishment and operation of a convalescent home memorializing Stephen Caldwell. The means and methods for accomplishing that objective are secondary in nature and constitute subordinate provisions of the testamentary trust. It is well established that trustees reasonably may deviate from such subordinate provisions in order to achieve the testator's dominant purpose and to avoid a forfeiture of the trust. See *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521, 531 (1970); Restatement (Second) of Trusts §§ 167 & 381; 2A, 4A Scott on Trusts §§ 167 & 381 (4th ed. 1988, 1989); Bogert, Trusts and Trustees §396 (2d ed. 1977). Authorizing sensible changes in the prescribed, but no longer appropriate, mechanics of achieving a testator's primary charitable objective is within "the general power of courts of equity in the administration of charitable trusts to permit deviation short of cy pres applications." *Trustees of Dartmouth College v. Quincy, supra* at 531. Wigglesworth at 429.

The provision in the trust of William Payne for continued ownership of Little Neck is no more than a means and method selected by the trustor to accomplish the primary testamentary purpose of benefitting the Ipswich Public Schools. That means and method is secondary in nature and constitutes a subordinate provision of the testamentary trust. Here, as in Wigglesworth, the trustees, the Feoffees, should be permitted to deviate from the subordinate provision in order to achieve the testator's dominant purpose.

[8] Many of the actions of the trustees followed their creation of a charitable corporation to which they conveyed the real estate, which conveyance was unsuccessfully challenged by the Cowles' heirs.

For the reasons set forth above, this Court should permit deviation from the no-sale provision of the William Payne trust and authorize the Feoffees to sell Little Neck in accordance with the terms of, and for the price of $29,150,000 set forth in, the Settlement Agreement.

The general power of this Court to authorize trustees to sell real estate is granted by G.L. c. 203 §16 which provides, in pertinent part, as follows:

> If the sale and conveyance, transfer or exchange of any real or personal property held in trust appears to be necessary or expedient, the supreme judicial court, the superior court or the probate court may, upon petition of a trustee or other person interested, after notice, order such sale and conveyance, transfer or exchange to be made, and the investment, reinvestment and application of the proceeds of such sale in such manner as will best effect the objects of the trust.

B. <u>This Court Should Permit Deviation From The No-Sale Provision of the William Payne Trust and Authorize the Feoffees to Borrow $6,500,000 From Cambridge Savings Bank and to Secure That Credit Facility With, Among Others, A First Mortgage On Little Neck</u>.

G.L. c. 203, §23, in effect until July 1, 2011, provides as follows:

> The Court having jurisdiction of a trust created by a written instrument may, upon petition and after notice to all persons interested, if upon hearing it appears to be for the benefit of the trust estate, authorize trustees to mortgage any real estate held by them in trust for the purpose of paying assessments upon the trust estate for betterments or for the expense of repairs and improvements on such estate made necessary by such betterments or by the lawful taking of such estate or of a part thereof by public authority; for the purpose of paying the expense of erecting, altering, completing, repairing or improving a building on such estate; or for the purpose of paying the expense of other improvements of a permanent nature made or to be made on such estate; or for the purpose of paying an existing lien or mortgage on such estate or on a part thereof; or it may authorize such trustees to make an agreement for the extension or renewal of such existing mortgage.

G.L. c. 203, §24, also in effect until July 1, 2011, provides as follows:

> Such petition shall set forth a description of the estate to be mortgaged, the amount of money necessary to be raised and the purposes for which such money is required, and, if made to a probate court, shall be made in the county where trustees were appointed, if the trust was created by will, or, if it was not so created, in the county where the estate, or a part thereof, which is the subject of the petition is situated. The decree of the court upon such petition shall fix the amount for which the mortgage may be given and the rate of interest which may be paid thereon, and may order the interest and the whole or any part of the money secured by the mortgage to be paid from time to time from the income of the property mortgaged.

The mortgage loan sought by the Feoffees, the details of which are set forth at Facts Nos. 94 and 95, supra, and in the proposed partial judgment filed with the motion for summary judgment, provides an obvious benefit to the trust estate. The CSB loan will bear interest at a rate over two points less than the existing loan to be re-financed, saving in annual interest over $120,000. The proposed loan, being interest only for the first year, will provide extra cash of $300,000 for the year during which the Feoffees expect to create the condominium and complete the sale of Little Neck.

The Court has the power to authorize the Feoffees to obtain the mortgage loan pursuant to G.L. c. 203, §23: the mortgage loan is for the purpose of refinancing the loan previously authorized by this Court in 2005 to pay the expenses associated with bettering Little Neck with the private wastewater collection system described in Fact No. 25, supra. Those expenses were incurred in the course of erecting, completing and improving the MIS building and the collection system generally which is an improvement of a permanent nature. There is presently a lien on Little Neck in the form of a conditional assignment of rents and lease which is duly recorded at the Essex South District Registry of Deeds (Fact No. 29). The loan sought by the Feoffees will be used to pay IFS and satisfy that lien. The proposed final judgment contains all of the elements required by G.L. c. 203, §24: it fixes the amount for which the mortgage may be given;

the rate of interest which may be paid thereon; and orders that interest and principal may be paid from the income generated by Little Neck. It also provides, pursuant to G.L. c. 204, §6[9], that the mortgage is made under license of court.

The proposed credit facility from CSB consists of a five-year $6,000,000 term loan and a $500,000 line of credit. The term loan will result in about $300,000 of available cash after payment of the approximate $5,700,000 balance due on the IFS note. That cash will be used, in the event sale is authorized, to pay costs associated with the continued rental of Little Neck and the sale thereof, primarily legal and engineering fees and costs associated with the creation of the condominium, or to pay down the existing Eastern Bank loan which the Feoffees obtained in July, 2010. The line of credit will be available in the event additional monies are needed to implement the sale.

The loan will be repaid from the sales proceeds of the units, all as shown on the pro formas, Alternatives 2A, 2B and 2C. To the extent there is insufficient cash to pay off CSB following all sales, which sales are reasonably anticipated to be completed in less than one year from court approval, CSB has agreed to substitute conditional assignments of promissory notes and mortgages held by the Feoffees from unit buyers for CSB's first mortgage lien. Unless the Feoffees finance in excess of seventy-five percent of the total purchase price, there will be sufficient cash proceeds to pay off CSB even assuming legal and engineering fees of $400,000 and contingencies of $220,000.

The proposed CSB loan follows the recommendation of the Ad Hoc Committee of the Ipswich School Committee that the Feoffees receive "a satisfactory loan commitment to refinance the existing loan for the wastewater treatment system if there are insufficient cash

[9] G.L. c. 204, §6 provides: "A mortgage given by an executor, administrator, guardian, conservator or trustee under license of court may contain a power of sale, and every such mortgage shall state that it is made under license of court and the date of such license."

proceeds (i.e., private condominium financing) at closing to pay off the current debt." CSB's commitment letter (Exh. 65, pp. 3-4) specifies that it will issue partial releases for individual units as the units are sold and take back conditional assignments of notes and mortgages.

The Feoffees and CSB both anticipate this Court's authorizing sale of Little Neck for all the reasons set forth in this memorandum and, in such an event, authorization to re-finance and mortgage would follow naturally. CSB's willingness to re-finance the IFS debt is not limited to a sale scenario: it is willing to re-finance that debt even without a sale. (Exh. 65, pp. 5-6) Should this Court authorize the re-finance and mortgage in the most unlikely event it does not approve the sale?

The Feoffees suggest that, on balance, re-finance of the IFS note with the CSB is wise and warranted for the following reasons: (1) the interest savings over the next three years, comparing the current annual IFS interest rate of 7.61% and the proposed CSB fixed annual interest rate of 5.5%, exceeds $375,000; (2) even without sale and even if rents are rolled back to 2006 rates with an additional $500 annual charge for operation and maintenance of the wastewater system, the resultant $935,000 of annual income is sufficient to pay the anticipated principal and interest of about $500,000 per year to CSB plus operating expenses of $300,000; (3) some or all of the $500,000 line of credit plus the approximately $300,000 of cash after the IFS payoff can be used towards remediation of the erosion problem in the event the Feoffees do not qualify for an additional $900,000 loan for erosion remediation; and (4) although CSB has not committed to extending the loan term beyond five years, it states in its September 2, 2010 letter (Exh. 66) that there is a reasonable likelihood of extending the loan beyond the initial five-year term.

C. **This Court Should Authorize Settlement of the Essex Superior Court Litigation.**

G.L. c. 204, §13 provides as follows:

> The probate court may authorize . . . a trustee, to adjust by arbitration or compromise any demand in favor of or against the estate by him represented.

The Settlement Agreement calls for a dismissal of all claims and counterclaims in the Superior Court litigation without any monies exchanged between the parties. The bulk of the claims and counterclaims being against the Feoffees, dismissal benefits the Feoffees. The only monetary claim which the Feoffees propose to dismiss is a reliance-based claim seeking to recover from non-lessees the costs of construction of the wastewater collection system. The claims which the cottage owners propose to dismiss are varied and are described in some detail at Fact No. 38, supra.

Although no monies are being exchanged pursuant to the terms of the Settlement Agreement for dismissal of claims and counterclaims, the Feoffees are receiving from the cottage owners $3,750,000 more than the fair market value of the land the Feoffees are selling, a fair market value which itself was created in large part by reason of the cottage owners spending their own funds to construct cottages. Settlement of the Superior Court action is on terms extremely favorable to the Feoffees and this Court should authorize compromise of the Superior Court action on the terms set forth in the Settlement Agreement.

VI. CONCLUSION

For the reasons set forth above, this Court should enter partial summary judgment authorizing the sale of Little Neck, the refinance of the existing IFS debt and the concomitant mortgage of Little Neck, and the settlement of the Superior Court litigation.

Respectfully submitted,
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Dated: December 2, 2010

CERTIFICATE OF SERVICE

I, William H. Sheehan III, attorney for the Plaintiffs hereby certify that I served a copy of the above document upon all parties or counsel of record, by hand delivering the same, to the following attorneys:

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