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.	)

PLAINTIFFS' REPLY MEMORANDUM TO OPPOSITION OF DEFENDANTS IPSWICH SCHOOL COMMITTEE AND RICHARD KORB TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Plaintiffs file this reply memorandum to the opposition of Defendants Ipswich School Committee and Superintendent of Schools Richard Korb to the Plaintiffs' motion for summary judgment in order to address two legal issues raised by said Defendants: (1) that this Court must assume that the Feoffees will prevail in the Superior Court litigation which the Feoffees seek permission to compromise (Defendants' Opposition, p. 19); and (2) that the deviation sought by the Feoffees must be denied by reason of the holding in Museum of Fine Arts v. Beland, 432 Mass. 540 (2000) (hereafter "Beland").

ARGUMENT

1. Settlement of the Superior Court Litigation.

At its core, this is an action to compromise claims.[1] The Feoffees have determined that the Superior Court litigation should be settled on terms set forth in the Settlement Agreement dated December 24, 2009, and come before this Court for permission to settle on those terms. G.L. c. 204, §13 provides for such a review for a careful trustee so as to prevent an improvident compromise. Indeed, as pointed out in the Attorney General's brief filed in this matter, under the present circumstances, the Feoffees have a fiduciary duty to bring this matter to this Court and they do so undeterred by the enormous public pressure brought to bear upon them.

The standard of review to be applied by the Court to the Feoffees' decision to settle is set forth in 1 Belknap, Newhall's Settlement of Estates and Fiduciary Law in Massachusetts, §36:22 (5th ed. 1994): "If the court finds that the trustee acted in good faith and with sound discretion it will approve the compromise." The Supreme Judicial Court applied that standard in Kinion v. Riley, 310 Mass. 338, 340 (1941) in approving the settlement by successor trustees of a claim against a predecessor when such a settlement was challenged in a dispute over the successor trustees' first account:

> There is no claim of bad faith or that the compromise was not made in the exercise of sound judgment and discretion. The record does not disclose any facts upon which it could be ruled that the trustees had not sustained the burden of showing that they were justified in entering into this agreement . . ..

[1] Were it not for the need for equitable deviation because of the language in William Payne's will, permission to compromise would be the sole issue.

That same standard was enunciated in Jones v. Jones, 297 Mass. 198, 207 (1937) in discussing the power of trustees to compromise a disputed claim without a decree of court:

> The trustee, however, had power, without a decree of court, to compromise a disputed claim made by the respondent against the trust estate, subject to being required to account for money paid to the respondent in pursuance of such compromise and to the risk of liability therefor to the beneficiaries of such estate – if they had not agreed to the compromise (citation omitted) – unless the payment was made in good faith and in the exercise of a sound discretion. (emphasis added).

In passing on the Plaintiffs' request to compromise claims, the Court does not assume the Feoffees will prevail in the litigation. Were that the standard, rarely, if ever, would permission to compromise be granted. Here the Court should, and must, decide whether the Feoffees have acted in good faith and exercised sound judgment and discretion in determining, subject to this Court's approval, to settle the Superior Court litigation.

2. The Deviation Sought by the Feoffees Is Not Controlled by Beland.

In Beland, the Supreme Judicial Court rejected the application of the doctrine of reasonable deviation so as to permit a sale of fourteen paintings left in trust by grantor Wolcott with a prohibition against sale where the grantor's general intent was "to create and gratify a public taste for fine art" and "[A] sale of the fourteen paintings would be the antithesis of Wolcott's intent because the sale could deprive the public of any opportunity to view them." Beland, at 544. In contrast, the sale of Little Neck as proposed is consistent with, not antithetical to, the dominant intent of Payne to benefit economically the Ipswich Public Schools.

The instant case is controlled by Trustees of Dartmouth College v. City of Quincy, 357 Mass. 521 (1970) and Wigglesworth v. Cowles, 38 Mass.App.Ct. 426 (1995), as set out in the Plaintiffs' memorandum in support of summary judgment. See also Amory v. Atty. General, 179 Mass. 89, 105 (1901), discussed in the Attorney General's brief filed in the instant action.

CONCLUSION

For the reasons set forth herein and in the Plaintiffs' other filings and those set forth at oral argument, this Court should enter partial summary judgment authorizing the sale of Little Neck, the refinance of the existing Institute for Savings Bank debt, and the concomitant mortgage of Little Neck, and the settlement of the Superior Court litigation.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al.,
Feoffees of the Grammar School in the
Town of Ipswich
By their attorney,

William H. Sheehan III
BBO #457060
MacLean Holloway Doherty
Ardiff & Morse, P.C.
8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123

Dated: January 31, 2011

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:

Donna M. Brewer, Esq.
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210

Johanna Soris, Esq.
Commonwealth of Massachusetts
Office of the Attorney General
Public Charities Division
One Ashburton Place
Boston, MA 02108

William H. Sheehan III

Dated: January 31, 2011