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.	)

FEOFFEES' RESPONSE TO ADDITIONAL FACTS SUBMITTED BY IPSWICH SCHOOL COMMITTEE

INTRODUCTION

Set forth herein are the thirty-five additional facts set forth in the School Committee's response to the Plaintiffs' statement of facts, followed by the Plaintiffs' response to each.

1. In the recent past, the four private citizen Feoffees managed the Little Neck property on their own with no involvement from the three selectmen trustees. (School Committee Ex. 72 [Town Report]).

RESPONSE:[1] Disputed insofar as the statement pertains to times material to the issues presented for summary judgment. All seven of the then Feoffees voted to sell Little Neck for

[1] While some of the facts are disputed, there is no genuine issue as to a material fact which prevents summary judgment, all as will be established at oral argument. Facts identified as not in dispute are not in dispute for purposes of summary judgment.

$29,150,000 on September 10, 2009 and all seven of the current Feoffees voted on August 2, 2010 to seek the credit facility from the Cambridge Savings Bank and to urge the School Committee to support the sale for the reasons set forth in an August 2, 2010 letter reviewed and approved by all seven Feoffees. (Exh. 78)

2. After the Department of Environmental Protection notified the Feoffees of wastewater issues, the Feoffees identified a centralized wastewater facility that could be constructed for all of Little Neck, which would save the Little Neck cottage-owners the expense of constructing their own systems. (Feoffees' Ex. 45, Counterclaim, ¶ 214).

RESPONSE: Not disputed that the Feoffees made that allegation in their Superior Court counterclaim, which allegation was denied. (Plaintiffs' Reply, Exh. 79)

3. The tenants, directly and through their agents and association, offered to the Feoffees to pay the costs of the installation of a centralized wastewater collection system, which would serve in lieu of the individual tight tanks and disposal systems. (Ex. 45, Counterclaim, ¶ 214)

RESPONSE: Not disputed that the Feoffees made that allegation in their Superior Court counterclaim, which allegation was denied. (Exh. 79)

4. In reliance on the tenants' offer, the Feoffees constructed a centralized wastewater collection system at a cost of millions of dollars. (*Id.*¶ 216). Although a number of tenants made some payments to the Feoffees on account of the wastewater system, millions of dollar remain due and owing to the Feoffees for the costs of the construction of this wastewater facility. (Feoffees' Ex. 45, Counterclaim, ¶ 218).

RESPONSE: Not disputed that the Feoffees made that allegation in their Superior Court counterclaim, which allegation was denied. (Exh. 79)

5. The Feoffees are and at all relevant times have been under a fiduciary obligation to maximize revenues available to the School Committee through the collection of rents and other charges at fair market value from the occupants of the Little Neck property. (Feoffees' Ex. 45, Counterclaim, ¶ 5).

RESPONSE: Not disputed that the Feoffees made that allegation in their Superior Court counterclaim, which allegation was denied. (Exh. 79)

6. For many years prior to and through 1997, the private citizen Feoffees who were unilaterally managing the Trust charged relatively nominal rents of several hundred dollars per year for the occupancy of the valuable Little Neck real estate. At times, some of the private Feoffees who were setting the rents were also tenants. (School Committee Ex. 72 [Town Report]).

RESPONSE: The Feoffees dispute the characterizations contained in Paragraph 6 and add that School Committee members' relatives were and are tenants. (Exh. 80) That one or more Feoffees may have been a tenant or resident of Little Neck prior to 1997 is immaterial to the issues presented for summary judgment.

7. For the fiscal year ending on June 30, 2005, the Feoffees set annual rents at $5,000 for a seasonal use cottage and $5,500 for a year-round use cottage, (Feoffees' Memo, ¶ 17), even though, according to the Feoffees' appraiser, fair market rents ranged from a low of $6,400 to a high of $20,400, with an average of $11,600, depending on the particular lot in question. (School Committee Ex. 76, Landvest Feb. 21, 2006 appraisal letter p. 3).

RESPONSE: Disputed as a mischaracterization of Exh. 76.

8. The leases that 33 cottage-owners have signed effective July 1, 2006 required the cottage-owners to pay rents for the first three years in the amount of $9,700 per year for a

seasonal use cottage and $10,800 per year for a year-round use cottage, plus payment of all real estate taxes and other expenses. The leases also provided that commencing in 2009, Little Neck lots would be divided into ten tiers, based on each lot's individual characteristics, and that appropriate rents for each tier would be set by the Feoffees based on fair market value. (Feoffees' Ex. 13).

RESPONSE: Disputed that Exh. 13 supports the factual allegation that 33 cottage owners signed leases effective July 1, 2006 and that 33 cottage owners have signed leases with those terms.

9. The Little Neck tenants engaged their own appraiser to value Little Neck as of November 1, 2010. He concluded that $10,800 is a fair market rate for the lots. (School Committee Ex. 75, p. 23). This conclusion by the tenants' own appraiser is in accord with the determinations made by valuation experts for the Feoffees, the School Committee, and the town of Ipswich, all of whom have concluded that $10,800 per lot is approximately equal to or below the real estate's fair market rental value. (Feoffees' Ex. 54, p. 63; Foster Aff., ¶ 7).

RESPONSE: The Feoffees do not dispute that the fair market rent for a lot which may be used year-round by a cottage owner is $10,800. That is the basis on which the Feoffees charge their year-round lessees that amount of rent. The Feoffees also do not dispute that the tenants' appraiser Mr. LaChance does say at page 23 of his appraisal (Exh. 75): ". . . my estimate of market rent is $10,800 per lot."

The School Committee goes on to state throughout its statement of additional facts and in its opposition to the Feoffees' motion for summary judgment that, based on the abovesaid language of Mr. LaChance, the tenants have now conceded $10,800 is fair market rent and that "the Feoffees have a clear legal entitlement to collect" about $2,500,000 of additional use and

occupancy charges. Indeed, the School Committee says often in its papers that the "forgiveness" of that $2,500,000 should be treated as a reduction of the net sales price.

While the Feoffees appreciate the optimism of the School Committee and join in the contention that $10,800 is fair market rent, the Feoffees are less sanguine than the School Committee that the issue of market rent is now either agreed upon or conceded. At that same page 23, Mr. LaChance appears to have based his estimate of market rent on his conclusion "that the subject is its own rental market" and his mistaken factual assumption that "[A]ll cottages, including the 32 whose owners have signed long term leases, are paying a reported $9,700 annual rent for seasonal use and $10,800 annual rent for year-round use." In fact, it is only the lessees who are paying those rents; the non-lessees, who make up eighty percent of the occupants, pay substantially ($4,200 - $4,800) less than those rents. The non-lessees have paid that differential into an escrow account pending a determination by the court of the value of use and occupancy, but those payments into escrow cannot fairly be considered a concession or agreement on the issue of fair market rent.

10. While the tenant litigation has been ongoing, the thirty-three cottage-owners who signed the leases continued to pay fair market rentals of $9,700 for seasonal use or $10,800 for year-round use, pursuant to their leases. (Feoffees' Memo ¶ 33). Meanwhile, the non-lease tenants agreed to pay to the Feoffees only $5,520 for seasonal use, or $6,000 for year-round use, as use and occupancy charges. (Feoffees' Memo ¶ 34). Pursuant to a stipulation between the parties, the tenants agreed commencing as of July 1, 2007 to pay into an escrow account the difference between the use and occupancy charges that the Feoffees were seeking and the amounts that the non-lessee tenants were paying. (Feoffees' Ex. 46). Because all of the valuation experts, including the tenants' own appraiser, now concur that the rents that are being

charged under the leases are in line with or below fair market value, the Feoffees have a clear legal entitlement to collect for the School Committee's benefit the additional use and occupancy charges that the tenants were paying into escrow for the period from July 1, 2007 onward. Based on 117 seasonal tenants at $348.33 per month, and 17 year-round tenants at $400.00 per month, these unpaid use and occupancy charges owed by the tenants total approximately $47,555.00 per month starting as of July 2007. (Foster Aff. ¶ 8). Under Massachusetts law, these amounts, which are contractual in nature, bear interest at the rate of 12 percent per annum from the date the payment should have been made. M.G.L. c. 231 § 6C.

RESPONSE: The Feoffees do not dispute that the lessees are paying $9,700 (seasonal) and $10,800 (year-round) annual rent and that, by stipulation, the non-lessees agreed to pay use and occupancy charges of $5,520 (seasonal) and $6,000 (year round) and pay the differential into escrow. The Feoffees hope, but do not believe, the non-lessees will agree that they are legally obligated to pay that differential to the Feoffees. See Para. 9 above. The Feoffees agree with the contention that interest may be recovered on any judgment they obtain against the non-lessees.

11. On or about December 24, 2009, without the School Committee's concurrence, the Feoffees entered into a Settlement Agreement with the tenants. (Feoffees' Ex. 48). The School Committee opposes the sale. The Settlement Agreement provided that subject to this court's approval, the Feoffees would convert the real estate, including the tenants' cottages, to condominiums and sell all of the Little Neck real estate owned by the Feoffees, including all of the improvements that the Feoffees constructed, for a stated gross amount of $29,150,000, and a net price, after approximately $3.7 million in credits, refunds, rebates, allowances, and expense reimbursements, of approximately $25.4 million. (Id.) (Foster Aff. ¶ 14). This net purchase price is at least $5.7 million below the fair value of the real estate that is proposed to be sold.

(Id. ¶ 15). Furthermore, the aggregate fair market value of the lots that the tenants would be acquiring, excluding the cottages, is approximately $42.5 million. In other words, even at a fair bulk sale price of $31.5 million, the tenants would enjoy a windfall by immediately winding up with real estate worth an aggregate $42.5 million. Only the size of the windfall to the tenants is in dispute. (Foster Aff. ¶ 18) Even the appraiser for the tenants concluded that the aggregate fair market value of the lots after the sale, excluding cottages, will be nearly $40 million. (School Committee Ex. 75; Foster Aff. ¶ 18).

RESPONSE: Most of the allegations of the School Committee in this paragraph are disputed. The School Committee voted not once, but twice, to approve a sale of Little Neck for a gross price ten percent less than the $29,150,000 price now to be received. Only after the Plaintiffs filed their complaint for deviation in October, 2009 and public opposition, stirred by acts of the Ipswich Finance Committee, which holds the purse strings to the School Committee's budget, which acts included putting on the Town's website a portion of an appraisal performed by Colliers, Meredith and Grew ("Colliers") stating that Little Neck was worth $42,000,000, did the School Committee change its position. Steven Foster, of Lincoln Property Company ("Lincoln"), was retained by the School Committee to perform his own appraisal because Foster and the School Committee knew the $42,000,000 alleged value was not the right value. (Tri-Board Meeting Notes of November 9, 2010, Exh. 81).

The Plaintiffs note with great interest that the statement in this paragraph: "The School Committee opposes the sale." has no evidentiary support, unlike almost every other sentence of the School Committee's statement of additional facts. The Plaintiffs suspect that the reason for this omission – a certificate of vote of the School Committee would be expected – is that the

School Committee would rather this Court not know that the School Committee is deeply divided on the issue of sale.

The "net purchase price" is not $25,400,000; after deducting anticipated costs of creating the condominium of $400,000 and deducting the $730,000 of adjustments in favor of the lessees, the net price is $28,020,000. Even after deducting the additional $83,000 referenced by the School Committee, the net price is $27,937,000. That net price is in excess of every appraiser's opinion of market value of the land as defined by the School Committee's own appraiser (November 5, 2010 Appraisal Consulting Report of Lincoln, p. 2, Exh. 82):

LandVest (Feoffees) $25,400,000
Petersen/LaChance (Tenants) $26,700,000
Colliers, Meredith & Green (FinCom) $26,400,000
Lincoln Properties (School Committee) $20,500,000

The School Committee's appraiser acknowledges that the price of $31,500,000 mentioned in his appraisal contains an assumption inconsistent with that number meeting the standard definition of market value. (Exhs. 73, 82)

The Feoffees dispute that the market value of the lots the tenants would acquire approximates $42,500,000, but do not dispute that the tenants will make a profit, just as the Feoffees will earn a profit to be enjoyed by their beneficiary. The Feoffees dispute the characterization of the tenants' profit as a "windfall," but do agree that the amount of the profit to be received by the tenants is disputed. The amount of the tenants' profit, like every other disputed fact between the parties, is not material to this Court's determination of whether to enter partial summary judgment for the Feoffees authorizing the compromise of the Superior Court litigation; the borrowing from Cambridge Savings Bank and the concomitant mortgaging of Little Neck; and the sale of Little Neck.

12. As part of the proposed sale of the property, all cottage-owners would be allowed to use the property on a year-round basis, rather than seasonally. (Feoffees' Ex. 48). The wastewater concerns that had led to most cottages being restricted to seasonal use were resolved by the wastewater facility. In order to compare on an apples to apples basis a proposed sale scenario to an ongoing rental scenario, it should be assumed that the lots would be rented for year round use. (Foster Aff. ¶ 20).

RESPONSE: The facts contained in this paragraph are not disputed, but the Feoffees disagree with the assumption that all lots would be rented for year-round use. Why would tenants owning summer cottages be assumed to use them year-round and pay therefor additional rent?

13. The Settlement Agreement included numerous provisions that lower by millions of dollars the actual net price that the tenants would pay to purchase the real estate. First, the Feoffees had constructed at a cost of some $7 million a wastewater facility that, by the Feoffees' own admission, the tenants offered and were obliged to pay for. As part of the Settlement Agreement, the Feoffees not only agreed to convey this facility to the tenants at no charge, but also to forgive the millions of dollars that the tenants owed to the Feoffees for building this facility. (Feoffees' Ex. 48). In addition, the Feoffees agreed to refund to the tenants payments totaling $83,000 that some of them had previously made toward the costs of that facility by crediting these amounts against the purchase price. (Feoffees' Ex. 48 and ex. H thereto).

RESPONSE: For a discussion of net price, see Para. 11 above. The statement that the wastewater system is being conveyed "at no charge" is wholly incorrect. Every appraiser states that what is being sold is the land at Little Neck with all Feoffee - owned improvements thereon.

14. Second, all of the valuation experts, including the tenants' expert, now agree that despite the tenants' refusal to pay the rents being charged under the leases ($10,800 for full year occupancy), these lease rents were fair. (Foster Aff. ¶ 7) From and after July 1, 2007, the tenants were paying only $5,520 per year to the Feoffees for full year occupancy, and $6,000 for partial year occupancy, with the balance of the fair market amount that they should have been paying for use and occupancy being paid into an escrow account pending the results of the litigation. (Feoffees' Memo, ¶ 34, n.4 and Ex. 46) The Settlement Agreement provides that if the Court approves the sale, the Feoffees will in effect refund to the tenants the entire balance of the escrow account – *i.e.*, the balance of the fair market use and occupancy charges due for the period from July 1, 2007 until early in 2010 when the escrowing ceased – by crediting these amounts against the purchase price. The Feoffees also agreed as part of the Settlement Agreement that starting early in 2010, the tenants would no longer need to pay the balance of the fair occupancy charges into escrow. The amount that is being given up in escrowed and non-escrowed fair market use and occupancy charges comes to $47,555 per month for the period from July 1, 2007 through the date of the proposed sale. (Foster Aff. ¶ 11) If the proposed sale were to take place on November 1, 2011, the total amount in fair market value use and occupancy charges that the Feoffees agreed to forego through the refund of the escrow amounts and the acceptance of below market charges since July 1, 2007 comes to approximately $2,473,000. (*Id.*) If this court disapproves the sale, the Settlement Agreement will be nullified, and the Feoffees will have the right under the Settlement Agreement to collect these amounts for the benefit of the School Committee.

RESPONSE: As set forth above in Paras. 9 and 10 above, the Feoffees fear that the School Committee reads too much into p. 23 of the Petersen/LaChance appraisal (Exh. 75) when

the Committee concludes that non-lessees now concede that fair market rent is $10,800 per year. That is certainly contrary to the position to date of the non-lessees in the Superior Court action. That said, even if, as the School Committee contends, there is $2,473,000 that the Feoffees have "the right . . . to collect," it has been collected by the sale price, even using the net sale price of $28,020,000. $28,020,000 less $2,473,000 equals $25,547,000, a figure greater than either party's appraiser's opinion of market value; indeed the $25,547,000 is twenty-five percent higher than Lincoln's opinion of market value.

The Feoffees are not "refund[ing]" to the non-lessees monies from the escrow account created under the Stipulation dated March 6, 2007 and filed in the Superior Court action. The Feoffees successfully negotiated with the non-lessees in the Superior Court action the non-lessees' obligation to pay into escrow the differential between the annual use and occupancy payments being made by the non-lessee ($5,520, seasonal; $6,000, annual) to the Feoffees and the lease payments being made by the lessees, as security in the event the Feoffees obtained a judgment against the non-lessees for use and occupancy greater than what they had paid to the Feoffees. The monies paid into escrow did not thereby become the monies of the Feoffees. The monies were exclusively paid by, and belonged to, the non-lessees until if, as and when the Feoffees obtained a judgment against the non-lessees. The Settlement Agreement calls for the dismissal of all claims and counterclaims of the Superior Court action so long as sale is permitted. In the event of such a sale, the monies in escrow would not be used to satisfy a judgment for additional use and occupancy payments. Thus, it made sense to all parties to move the non-lessees' monies from the Stipulation – mandated escrow account at Winchester Co-operative Bank into, in essence, individual escrow accounts as part of the monies on deposit under the individual purchase and sale agreements ("P&S's"). The non-lessees' monies in

escrow under the P&S's, once at Winchester Co-operative Bank, are now being used by the non-lessees to pay a part of their obligations to pay the purchase prices under the P&S's, just like any buyer under a standard P&S. The Settlement Agreement also provides that, if sale should be disallowed, the P&S deposits will go back to the Winchester Co-operative Bank and again stand as security in the event the Feoffees obtain a judgment for additional use and occupancy.

15. Third, the cottage-owners who signed leases have been making rent payments at fair market rates since July 1, 2006. The Feoffees say that they promised the lessees to give them the benefit of any reduced rents ultimately agreed to with the non-lessees. (Feoffees' Memo ¶ 83) Even though it is now agreed by all valuation experts that the lease rents are fair, the Feoffees agreed in the Settlement Agreement to refund to the lessees, as credits against their purchase price, any fair market rents that they have paid since July 1, 2006 in excess of what the non-lessees will have paid. (Feoffees' Ex. 48). The Feoffees calculate the amount to be refunded to the Lessees through October 31, 2011 at $730,000. (Feoffees' Memo ¶ 83) Based on the monthly rent amounts and the use and occupancy figures provided by the Feoffees, the School Committee calculates this amount at $11,857 per month, which would total approximately $759,000 through October 31, 2011. (Foster Aff. ¶ 12)

RESPONSE: The Feoffees' calculation of the monies to be returned to lessees at closing is correct. The School Committee's calculation is wrong because it assumes that all lessees began their leases on July 1, 2006, which assumption is erroneous.

16. Fourth, the Feoffees agreed to incur for the benefit of the cottage-owners all of the expenses associated with converting the real estate to condominiums. The Feoffees estimate these expenses at $400,000 (Feoffees' memo ¶ 82). The tenants' appraisal can be read as

impliedly valuing the Feoffees' agreement to pay these costs as worth $1 million. (Foster Aff. ¶ 10; Ex. 77, p. 45).

RESPONSE: The Feoffees agreed as part of the Settlement Agreement to provide and pay for the legal and engineering services, estimated at $400,000. That cost was one of the many factors considered by the Feoffees in determining the price to be charged by the Feoffees for sale. The Feoffees did not agree to incur any cost in order to "benefit . . . the cottage owners." In the event, and to the extent, the Feoffees obtained a price increase of $1,000,000 for a cost of $400,000, the Feoffees are to be commended.

17. To determine the net price of the sale, it is appropriate to reduce the stated $29.15 million purchase price by the refunds, rent concessions and expense allowances described above. If one subtracts (a) the use and occupancy charges paid into escrow that are being credited against the purchase price, (b) the ongoing forgiveness until closing of fair market use and occupancy charges, (c) the refunds, through credits against the purchase price, of previously paid rent from lessees and wastewater charges by certain lessees and non-lessees, and (d) the cost to be borne by the Feoffees of converting to condominiums on the tenants' behalf, the effective net purchase price is reduced to $25.45 million.. (Foster Aff. ¶ 14) This net price is roughly $5.7 million dollars below the property's fair market value on an equivalent basis as determined by Mr. Foster, and even more below the $42.5 million valuation prepared by Colliers, Meredith and Grew for the Town of Ipswich (School Committee Ex. 74) These calculations do not take into account that as part of the Settlement Agreement, the Feoffees are also forgiving a claim for another $6 million in reimbursements that, according to the Feoffees' counterclaim, the tenants agreed to pay in return for construction of the wastewater treatment plant. Nor do these

calculations take into account very substantial prejudgment interest that the tenants would owe on the claim against them for additional rent for their use and occupancy of the premises.

RESPONSE: See responses in Paras. 11 and 13. The net price of $28,020,000, even after deducting therefrom the $2,473,000 referenced by the School Committee as use and occupancy owed, greatly exceeds the $20,500,000 opinion of market value of the School Committee's appraiser (Exh. 82) The School Committee's purported reliance on the Colliers' number of $42,500,000 could not be more disingenuous. The School Committee's own appraiser says, at p. 2 of his Appraisal Consulting Report dated November 5, 2010 (Exh. 82), in discussing the market value of Little Neck of $20,500,000, the following: "This ($20,500,000) is the value which most conforms with the standard definition of market value, which is the value of a property between unrelated parties, without special interest." See also the November 9, 2010 Tri-Board Minutes, Exh. 81: "He (Foster) said that the $42.6 million isn't the right value - - it is the value to 167 cottage owners. That is not to be confused with market value." (emphasis added)

In page 1 of the side letter[2] of June 25, 2010 from Colliers to Ipswich Town Counsel, Colliers described its $26,400,000 opinion of value (as contrasted with its $42,000,000 – plus number) as "[T]he market value of the property under the condition that it will be sold to a third party. This new ownership motivated soley (sic) by a 'developers' profit would then perform a sell out of the 167 condominium units." That description is the same as the School Committee's appraiser's definition of market value. The School Committee knows full well that Colliers' opinion of market value is $26,400,000, not $42,000,000 – plus.

[2] The Court will recall that the Town posted on its website the $42,325,000 conclusion of Colliers while secreting the $26,400,000 value contained in the side letter and that the Feoffees had to fight through a requested protective order to obtain that information.

As for the alleged failure to recover the $6,000,000 of wastewater system construction costs from the tenants, a claim of the Feoffees in the Superior Court litigation which the non-lessees dispute, the School Committee's own appraiser acknowledges that, by obtaining a price of even $20,500,000 from the tenants, the Feoffees have recovered that cost. (Exh. 73)

18. The Feoffees have presented to the court "pro formas" that are designed to show that the annual payments that the School Committee would receive after a sale are significantly higher than what it would receive if there is no sale and the property continued to be rented. The Feoffees' pro formas are based on faulty factual assumptions and do not fairly reflect the consequences of either the proposed sale, or of a no-sale scenario. (Foster Aff. ¶ 19, et. seq.)

RESPONSE: Disputed, with the Feoffees recognizing that pro formas do not purport to set forth facts, but only projections based on certain assumptions.

19. Turning first to the pro formas that assume no sale, the most obvious error in the Feoffees' presentation is that they assume that for the next five years the tenants will pay use and occupancy charges that total only $1,075,536 per year – even though the tenants' own valuation expert agrees that the fair market rental comes to $1,803,600 per year. (Foster Aff. ¶ 21 and School Committee Ex. 75). The lower figure that the Feoffees have utilized in their pro formas is based on the amounts that the tenants have been voluntarily paying for use and occupancy pending a retroactive determination of fair market rents. The valuation experts for all parties, including the tenants, now agree that the rents that the lessees are paying under the leases ($10,800 per year for year-round occupancy and $9,700 for partial year occupancy) are proper, and that the interim use and occupancy charges that the non-lessees are voluntarily paying are well below market value. (Foster Aff. ¶ 7). If one assumes for purposes of an apples to apples comparison that the restriction on year-round occupancy would be lifted in a rental scenario, as it

would be in a sale scenario, the fair market rents for Little Neck for would start out at $1,803,600 per year, not the figure of $1,075,536 per year utilized in the Feoffees' pro formas. Furthermore, in a rental scenario, these fair market rent or use and occupancy charges will increase as the property appreciates and on account of inflation. The Feoffees' accountant wrongly increased expenses on account of inflation, without increasing the accompanying revenues on account of increases in fair rental value. (Foster Aff. ¶ 21).

RESPONSE: Disputed. The assumption that rental income for the next five years will remain at under $1,100,000 is reasonable because it anticipates that the non-lessees will not pay more than they are paying now unless and until the Superior Court action is tried to conclusion and is appealed to the Supreme Judicial Court. That assumption is certainly far more reasonable than Mr. Foster's suggestion that the Feoffees will begin collecting $1,800,000 some time next year.

20. The Feoffees' rental pro formas, which presume that this Court disapproves a sale, are also in error in their failure to account for the collection of some $2.5 million dollars in additional retroactive charges for the use and occupancy of the cottages between July 1, 2007 and October 31, 2011. (Foster Aff. ¶ 35). There would also be a right to collect prejudgment interest at 12 percent per annum on these amounts. If the sale is disapproved, the Feoffees will have the right and duty to recover these amounts. Of these past-due amounts for additional use and occupancy charges, the School Committee estimates that approximately $1.5 million is already sitting in an escrow account that was established to ensure that these amounts could be collected. The rest of the past-due use and occupancy charges are no longer being escrowed only because as part of the Settlement Agreement the Feoffees agreed to lift the escrow arrangement. (Feoffees' Memo ¶ 34 n. 4)

RESPONSE: The Feoffees agree that the no-sale pro formas are neutral as to the result of the Superior Court litigation and believe that such neutrality is superior to the School Committee's presumption that the Feoffees will prevail in that litigation.

21. The Feoffees' rental pro formas are inaccurate in that they grossly inflate certain expenses. For example, the Feoffees' rental pro formas assume that the Feoffees would incur an astonishing $120,000 per year in non-litigation legal fees for each of the next five years (Feoffees' memo ¶ 82), even though, historically, legal fees for the Trust averaged only $4,000 per year before the litigation erupted. (Feoffees' Exs. 18-19). The tenants' valuation expert performed an analysis of potential net operating income on a rental basis and estimated annual legal fees at approximately $20,000 per year, not $120,000 per year. (Foster Aff. ¶ 22). The Feoffees also overstate the likely litigation costs if the property is not sold. Now that the tenants' own appraiser has determined that the rents being charged to lessees are consistent with fair market value, there is no reason that it should cost the Feoffees' $750,000 in additional legal fees to bring the Superior Court litigation to a fair and equitable conclusion on the basis of ongoing rental of the property. (Foster Aff. ¶ 23).

RESPONSE: Mr. Foster, real estate expert, has provided absolutely no basis for his opinion as to what legal fees the Feoffees face to (a) conduct the Superior Court litigation and handle an appeal from the judgment entered therein; and (b) to conduct business as landlords going forward. The Feoffees' estimate of $750,000 in legal fees is based on $25,000 per month for thirty-months, not an unreasonable estimate based on nearly $300,000 of legal fees incurred in fiscal year 2008. The legal fees for fiscal year 2009 were less because the parties to the Superior Court spent more time trying to resolve the case than to discover it. The Feoffees suggest that $10,000 per month in legal fees unrelated to the Superior Court litigation is not

unreasonable in light of the fact that the Feoffees will have eighty percent of their occupants unhappy about the rents sought to be charged by their landlord.

22. The Feoffees' rental pro formas also overstate the costs of servicing the existing debt on the Little Neck real estate. Even if there is no sale, the Feoffees should be able to refinance the debt at rates far below the 7.61 percent rate that they are currently paying. Moreover, they should be able to do this without mortgaging the property. (Foster Aff. ¶ 39). In addition, the current note by its terms will adjust to a lower rate of 6.75 percent in March, 2011. (Feoffees' Ex. 39; Foster Aff. ¶ 24).

RESPONSE: There is no basis for Mr. Foster's conclusory statement that the Feoffees "should be able to refinance the debt" and "should be able to do this without mortgaging the property." The only bank willing to re-finance is the Cambridge Savings Bank and it requires a mortgage as security. (Exhs. 65, 78) Foster's unsupported statement at Para. 24 of his affidavit that a bank would likely accept now, as collateral, a stream of rental income which is the subject of litigation is, politely put, unreasonable.

23. The tenants' appraiser has estimated that contrary to the Feoffees' pro formas, on a continued rental basis, the property will generate yearly net operating income, before debt service, of over $1.6 million per year. (School Committee Ex. 75, pp. 23-28). If one corrected the inflated capitalization rate of 7 percent that he applied to this income stream, and utilized a more appropriate rate of 4.5 to 5 percent, the result is a fair market value for the property on an ongoing rental basis of $32.5 to $36 million. (Foster Aff. ¶ 16). Even the Feoffees' valuation expert, LandVest, while inflating certain expenses, such as non-litigation attorneys' fees and the reserve for vacancy/collection loss, determined that the net operating income from the property would exceed $1.4 million per year. (Feoffees' Ex. 54, p. 63). If one adds back on to LandVest's

net operating income $100,000 in overstated legal fees, and $72,000 in vacancies and collection losses, LandVest too would estimate net operating income from the premises at over $1.6 million per year.

RESPONSE: The Feoffees do not dispute that, if they are successful in the Superior Court litigation, gross rental income will exceed the sum of $1,075,000 set forth in the pro formas, but that increase is not likely to be realized, if at all, until after October 31, 2015 given the reasonable assumption set forth in Para. 19 above that only an affirmance by an appellate court of a judgment awarding $9,700/$10,800 in own annual use and occupancy will cause the non-lessees to pay same.

As to the references to market value of Little Neck in the paragraph, the Feoffees direct the Court to Mr. Foster's appraisal consulting report wherein he stated that his opinion of market value of Little Neck was $20,500,000.

24. The Feoffees' sale scenario pro formas are also factually incorrect, because they exaggerate what would be available to the School Committee if a sale were to take place. (Foster Aff. ¶ 25).

RESPONSE: The Feoffees sale pro formas contain the valid assumptions of a $29,150,000 price against which are deducted the adjustment in favor of lessees of $730,000, and $400,000 for legal and engineering costs to create a condominium. The Feoffees also show a $220,000 general contingency reduction. (Exhs. 55-58)

25. The Settlement Agreement gives cottage-owners an option to utilize seller financing at the rate of 6 percent, interest only, with a five-year balloon payment. (Ex. 48). This proposed financing is not competitive in today's market, in which purchasers can obtain fifteen or thirty year mortgages at rates of below 5 percent, or if they are willing to risk a rate

adjustment in five years (comparable to the five-year seller financing under the Settlement Agreement), a five-year adjustable rate mortgage at well below 4 percent. (Foster Aff. ¶ 26) For this reason, the only purchasers who would reasonably consider a five-year interest only mortgage at 6 percent per year, with a balloon at the end, would be those who, due to issues such as creditworthiness, could not qualify for the cheaper and less risky mortgage financing generally available in the market. (*Id*.).

RESPONSE: The short answer is that the parties do not know what interest rates will be at time of closing and how many buyers will avail themselves of seller financing. The irony here is that the School Committee was initially concerned about the Feoffees making too many loans. (See Exh. 53)

26. The Feoffees' accountant, Daniel Clasby ("Clasby"), analysis noted that the amounts that would be paid to the School Committee if a sale occurred would depend on how many cottage-owners accepted the seller's higher than market-rate financing. Clasby assumes that the average return that the Feoffees could expert to earn on purchases paid in cash (*i.e.*, purchases that are privately financed) would be three percent a year. By contrast, those who accept seller-financing would pay interest at the rate of six percent per year. Thus, Clasby concludes, the higher the percentage of tenants that accepted seller-financing, the greater the rate of return and cash available to the School Committee over the next five years, and vice versa. (Feoffees' Memo ¶ 79 and Feoffees' Exs. 55-58).

RESPONSE: See Para. 25. In addition, the Feoffees respond that Mr. Clasby did assume a conservative three percent rate of return on non-note assets for the first five years.

27. Clasby then proceeds to base his sale scenario pro formas on three alternate assumptions about how many purchasers will avail themselves of seller financing. All three

assumptions are unfounded. His first scenario assumes that essentially 100 percent of cottage-owners would opt for the above-market seller financing with a five year balloon payment. Under this hypothetical the Feoffees would receive 10 percent of the total sales proceeds in cash (which is assumed to earn 3 percent) and the rest of the purchase price would bear interest at 6 percent. His second scenario contains the unstated assumption that approximately 72 percent of the buyers would use seller financing, so that 30 percent of the sales proceeds would be paid in cash (*i.e.*, under this scenario, around 23 percent of the owners would obtain private financing and pay all cash, around 72 percent would take seller financing and pay one-tenth in cash, yielding total cash of 30 percent of the purchase price, and around 5 percent of the lots would be purchased by the tenants' association without any down payment). The third scenario contains an unstated assumption that approximately 50 percent of the buyers would use seller financing, so that 50 percent of the total sales proceeds are paid in cash. (Foster Aff. ¶¶ 28-30)

RESPONSE: See Para. 25. The School Committee's reference to "unstated assumption" is puzzling. Each of the pro forma income statements assuming sale is headed: "____% Cash at Closing," with 10, 30 and 50 percent scenarios shown.

28. In sum, Clasby's sale scenarios assume that between 50 percent and 100 percent of cottage-owners would eschew much cheaper and less risky private financing, and borrow from the Feoffees at the above-market interest rate of 6 percent, interest only, with a fifth year balloon payment. (Foster Aff. ¶ 30).

RESPONSE: See Paras. 25-27.

29. In point of fact, very few of the cottage-owners intend to accept the above-market seller financing. Feoffees' Exhibit 53 states that out of 105 cottage-owners responding to a survey, only 13 of them (around 12.5 percent) intended to utilize the seller financing. Based on

this survey, it can be expected that approximately 85 percent of the purchase price would be paid in cash, on which the Feoffees would earn, per Clasby's analysis, 3 percent per year, while only 10 percent of the price would be financed at 6 percent per year. This yields a blended total rate of return for the Trust of 3.5% per year. (Foster Aff. ¶ 31)

RESPONSE: The School Committee's own Ad Hoc Committee says it best: "It is very difficult – especially under current market conditions – to evaluate the likelihood of private financing being made available on terms equal or better than what would be available from the Feoffees." The Feoffees note that the pro formas containing the assumption that all buyers opt for seller-financing, an assumption now scoffed at by the School Committee, was specifically requested by the Ad Hoc Committee. (Exh. 53)

30. If one corrects Clasby's pro formas so as to assume, more accurately, that 85 percent of the sale price will be paid in cash, and that the investment return will be as Clasby assumed, the total investment income earned by the Trust over the next five years drops to roughly $600,000 to $650,000 per year, before allowing for additions to corpus on account of inflation. (School Committee Ex. 77; Foster Aff. ¶ 36)

RESPONSE: The Feoffees dispute that an assumption of 85% of sale price will be paid in cash is "more accurate."

31. This potential trust income of up to $650,000 per year does not represent what could be prudently distributed to the School Committee because it does not account for the fact that, unlike in the rental scenario, some of the potentially available income will need to be added back to corpus to offset inflation. Otherwise the trust fund will, in short order, be dissipated. If inflation is assumed over the next five years to be 3 percent per year, then with an overall 3.5% return the "real" rate of return would be 0.5%, and there would be relatively trifling amounts, on

the order of $110,000 per year, available to pay to the School Committee under a sale scenario. (Foster Aff. ¶ 32).

RESPONSE: Whether all annual income should be distributed to the School Committee will depend on a number of factors, some of which are the School Committee's need for same, whether the trust corpus has increased in value during the year, and inflation. One can posit a situation where a $22,000,000 trust fund would generate $500,000 for a yearly distribution just as one can posit a situation where it would generate $2,000,000 for a yearly distribution. The advantages of a sale and investment of proceeds include a diversification of assets by prudent and skillful investments in contrast to the inherent danger of a single asset investment best exemplified by the current situation: with no asset other than the land and the net income from that land suffering a sharp reduction due to the disagreements identified in the Superior Court litigation, the Feoffees have been unable to continue the distributions which averaged nearly $350,000 per year prior to the litigation.

32. This analysis of a likely real rate of return below 1 percent per year is consistent with what is occurring in the bond markets. United States Treasury Inflation Protected Securities (TIPS) provide for a fixed rate of return, with principal increased at the end of the bond period based on changes in the Consumer Price Index. At present, the yield on five-year TIPS is only 0.2 percent. The yield on 30 year TIPS is in the range of 2.0%. (Foster Aff. ¶ 32). Assuming a conservative investment philosophy, it is not realistic to expect rates of return, after inflation, of 3.5 percent, let alone the 5 to 6 percent that the Feoffees refer to in their memorandum.

RESPONSE: See Para. 31 above. The Feoffees note that Mr. Foster's using today's data on low rates of return to suggest that a $22,000,000 diversified trust fund, which can over

time both grow in value of corpus and generate substantial income, is not in the interest of the beneficiary, is intellectually dishonest.

33. Restatement of the Clasby pro formas based on more appropriate factual assumptions demonstrates that the School Committee would fare far better over the next five years, and thereafter, from the continued rental of the property than it would from the proposed sale under consideration. (Foster Aff. ¶ 37; School Committee Ex. 77).

RESPONSE: Disputed that Exhibit 77 contains more appropriate factual assumptions, but reiterates that pro formas are only projections based on certain assumptions.

34. The Feoffees have only prepared pro formas that show the projected proceeds to the School Committee for the first five years after a sale. A sale is forever. The superiority of a rental scenario over a proposed sale scenario would likely increase as one goes out over a period beyond five years because (a) over time the property is likely to appreciate substantially, while Clasby's analysis provides for no growth of corpus and (b) the Trust's existing debt will be reduced each year through payments of principal. (Foster Aff. ¶ 38).

RESPONSE: The Feoffees dispute the suggestion that real estate is the only asset which can both grow in value and generate income annually. The Trust's existing debt will be paid much faster by sale.

35. Finally, as noted above, the Feoffees seek permission to refinance the property and to secure the refinancing with a mortgage on the property. If the mortgage were foreclosed, the Feoffees could lose the property. The Feoffees could likely obtain refinancing at lower rates than the Trust is paying, secured by a collateral assignment of rents, without having to mortgage the property with the attendant risk that the property would be lost through foreclosure. (Feoffees' Ex. 39; Foster Aff. ¶ 39).

RESPONSE: Disputed that the Feoffees can obtain re-financing without mortgaging Little Neck. (Exhs. 65, 78)

Respectfully submitted,
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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:

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