

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

PROBATE & FAMILY COURT
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 FEOFFEEES OF)
THE GRAMMAR SCHOOL IN THE TOWN)
OF IPSWICH)

Plaintiffs,)

v.)

ATTORNEY GENERAL OF THE)
COMMONWEALTH OF MASSACHUSETTS,)
IPSWICH SCHOOL COMMITTEE, and)
RICHARD KORB, as he is Superintendent of)
Schools in the Town of Ipswich,)

Defendants.)

**PLAINTIFFS' ANSWER TO INTERROGATORY NO. 10 PROPOUNDED BY THE
DEFENDANT IPSWICH SCHOOL COMMITTEE**

The Plaintiffs answer Interrogatory No. 10 as follows:

INTERROGATORY NO. 10

Identify all expert witnesses you expect to call at trial, and for each expert identified, (a) state the subject matter on which the expert is expected to testify, and (b) state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

ANSWER NO. 10

The Plaintiffs have not yet determined the identity of all expert witnesses they expect to call at trial. The Plaintiffs do expect to call the following two witnesses:

1. James E. Monahan, LandVest, Inc., Ten Post Office Square, Boston, MA 02109. The subject matter on which Mr. Monahan is expected to testify and the substance of the facts and opinions to which Mr. Monahan is expected to testify and a summary of the grounds for each of Mr. Monahan's opinions are set forth in the

October 25, 2010 Appraisal Report completed by Mr. Monahan and produced by the Feoffees at tab 14 of Plaintiffs' Response to Defendants' First Request for Production of Documents dated January 7, 2011.

2. William A. LaChance; Peterson LaChance Regan Pino, LLC; 685 Centre Street, Suite 204, Boston, MA 02130 (formerly Peterson/LaChance Realty Advisors). The subject matter on which Mr. LaChance is expected to testify and the substance of the facts and opinions to which Mr. LaChance is expected to testify and a summary of the grounds for each of Mr. LaChance's opinions are set forth in the Real Estate Appraisal Report dated December 7, 2010, attached hereto.

Signed under the pains and penalties of perjury this 9th day of June 2011.

Alexander B.C. Mulholland, Jr., Chairman
The Feoffees of the Grammar School in the
Town of Ipswich

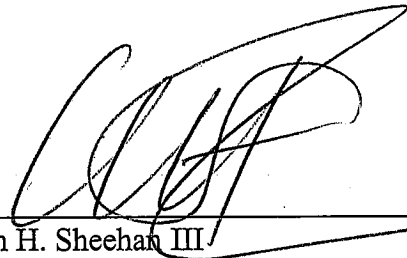
CERTIFICATE OF SERVICE

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 delivering the same, first class mail, postage prepaid, to the following attorneys:

Richard C. Allen, Esq.
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210

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

Dated: June 9, 2011



William H. Sheehan III

COMMONWEALTH OF MASSACHUSETTS

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RICHARD KORB, as he is Superintendent of)
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Defendants)

**PLAINTIFFS' MOTION FOR PROTECTIVE ORDER REGARDING PROPOSED
DEPOSITIONS OF JAMES E. MONAHAN, WILLIAM LaCHANCE AND KEEPERS OF
RECORDS OF COMPANIES WITH WHICH MR. MONAHAN AND MR. LaCHANCE
ARE AFFILIATED**

Pursuant to Mass.R.Civ.P. 26(b)(4) and 26(c), Plaintiffs Alexander B.C. Mulholland, Jr., et als., as they are The Feoffees of the Grammar School in the Town of Ipswich ("Feoffees"), move this Court for a protective order prohibiting Defendant Ipswich School Committee from taking the depositions of (1) James E. Monahan, real estate appraiser employed by LandVest, Inc. ("LandVest"); (2) the Keeper of Records of LandVest; (3) William LaChance, real estate appraiser of the firm of Petersen LaChance Realty Advisors; (4) the Keeper of Records of Petersen LaChance Realty Advisors; and (5) the Keeper of Records of Petersen LaChance Regan Pino, LLC. As grounds for this motion, the Feoffees state that Mr. Monahan and Mr. LaChance have been designated as trial experts in this Action. The three keeper depositions are of companies with which Mr. Monahan and Mr. LaChance are affiliated. Rule 26(b)(4) is clear with regard to the ability of a party to discover facts known and opinion held by experts retained

by other parties. Such discovery may be had only in limited situations: (1) by way of expert interrogatories regarding testifying experts as set forth in Rule 26(b)(4)(A)(i); (2) by way of other discovery, such as deposition, of testifying experts, but only upon motion and court order subject to restrictions as to scope and payment of expert fees, as set forth in Rule 26(b)(4)(A)(ii); or (3) by way of discovery of facts known and opinions held by non-testifying experts, but only upon a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means, as set forth in Rule 26(b)(4)(B). The School Committee has propounded an expert interrogatory, but it has not sought court approval of any further discovery of the facts known or opinions held by the Feoffees' experts. The Feoffees have answered the expert interrogatory as to Mr. Monahan and Mr. LaChance. The School Committee has not shown and cannot show why the answers to that expert interrogatory is not sufficient under the Rules.

The Feoffees will incur significant and unduly burdensome expense if the School Committee is permitted to take the proposed depositions.

As further grounds for this motion, the Feoffees incorporate by reference the attached Memorandum of Law.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al., Plaintiffs
by their attorney,

William H. Sheehan III, BBO #457060
Thomas J. Flannagan, BBO #564328
MacLean Holloway Doherty Ardiff & Morse, P.C.
8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123

Dated: June 9, 2011

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER REGARDING PROPOSED DEPOSITIONS OF JAMES E.
MONAHAN, WILLIAM LaCHANCE AND KEEPERS OF RECORDS OF COMPANIES
WITH WHICH MR. MONAHAN AND MR. LaCHANCE ARE AFFILIATED**

I. FACTUAL BACKGROUND

The facts giving rise to the instant dispute between the Feoffees, who hold title to Little Neck in trust for the benefit of the Ipswich Public Schools, and the Defendants are well known to this Court which recently heard extensive argument in connection with the Feoffees' motion for partial summary judgment. In lieu of reciting the facts in this memorandum, the Feoffees incorporate by reference the Statement of Material Facts contained in their memorandum in support of their summary judgment motion and, for the Court's convenience, attach as **Appendix A** hereto a copy of same.

On May 17, 2011, the Ipswich School Committee, by its counsel, noticed the depositions of James E. Monahan and the Keeper of Records of Mr. Monahan's employer LandVest, Inc. and the depositions of William LaChance and the Keeper of Records of two entities with which

Mr. LaChance is affiliated. See **Exhibit 1 – Deposition Notices**. For the reasons set forth below, the School Committee should be prohibited from deposing Mr. Monahan and Mr. LaChance and the keeper of records of the entities with which they are affiliated.

Mr. Monahan and Mr. LaChance have been designated by the Plaintiffs as testifying experts in this action. On May 20, 2011, the School Committee served its Second Set of Interrogatories on counsel to the Feoffees which includes an expert interrogatory. See **Exhibit 2 – Defendants’ Second Set of Interrogatories**. On June 9, 2011, the Feoffees served their answer to the expert interrogatory. See **Exhibit 3 – Plaintiffs’ Answer to Interrogatory No. 10 Propounded by the Defendant Ipswich School Committee**.

II. ARGUMENT

A. Rule 26(b)(4) Does Not Permit Deposition Of Experts In This Situation

A party is entitled, as a matter of right, to discover, by way of interrogatories, (1) the identity of another party’s testifying expert; (2) the subject matter on which that expert is expected to testify; (3) the substance of the facts and opinions to which the expert is expected to testify; and (4) a summary of the grounds for each opinion. See Mass.R.Civ.P. 26(b)(4)(A)(i). If a party wishes to obtain further discovery concerning an opposing testifying expert’s opinions, then that party must seek permission from the Court by motion, subject to restrictions as to scope. See Mass.R.Civ.P. 26(b)(4)(A)(ii).

“Depositions of experts are *sui generis* and are governed by Rule 26(b)(4). Generally, speaking, in Massachusetts state court, expert depositions of adverse party’s experts are not permitted.” Lauriat, McChesney, Gordon and Rainer, DISCOVERY §6.14 (49 Mass.Prac. 2000 & Supp. 2002)(emphasis in original). On the other hand, Federal practice has permitted

depositions of testifying experts, as a result of the 1993 amendment to Fed.R.Civ.P. 26(b)(4).¹ The Massachusetts rule, because it is silent on the point of depositions of expert witnesses, is more restrictive than its Federal counterpart.

In this case, the School Committee has propounded an expert interrogatory to the Feoffees and the Feoffees have provided an answer to same as to Mr. Monahan and Mr. LaChance. See **Exhibit 3**. The Court will find that answer to be adequate, complete, consistent, and in compliance with the provisions of Mass.R.Civ.P. 26(b)(4)(A)(i).

The School Committee has not made any showing that the Feoffees' answer to expert interrogatory does not comply with Rule 26(b)(4). Moreover, the School Committee has not attempted to make the showing required by Rule 26(b)(4)(A)(ii) to entitle it to further discovery. Nevertheless, the School Committee seeks to depose the Feoffees' trial experts and seek records from their affiliated entities. Because such discovery is not permitted without specific cause, and because the School Committee has not shown, and cannot show, any such cause, the School Committee should be prohibited from taking the proposed depositions.

The Plaintiffs anticipate that the School Committee will contend that it should be permitted to depose Mr. Monahan as to facts and opinions not acquired or developed in anticipation of litigation and that it should be permitted to obtain non-privileged documents in the possession of LandVest that were not acquired or developed in anticipation of litigation. That contention must fail because one of the primary purposes of the Feoffees in seeking Mr. Monahan's opinions, dating back to his initial engagement in 1997, was the valuation of Little

¹ The Massachusetts Superior Court has held that the allowance of the deposition of an adverse party's trial experts "should only be exercised in certain narrowly defined circumstances." Lozoraitis v. Lachman, 16 Mass.L.Rptr. 809, 2003 WL 22461978 (Superior Court)(Agnes, J.)(copy attached for the Court's reference at Appendix B attached hereto) The Lozoraitis court held that only when answers to expert interrogatories are inadequate, incomplete, inconsistent, or when the discovering party is unable to obtain equivalent information through other means, should a court permit a deposition of an expert witness to be taken. See Lozoraitis, 16 Mass.L.Rptr. 809.

Neck for purpose of sale and sale necessarily anticipated litigation because, without permission of this court to deviate from the terms of William Payne, the Feoffees could not sell Little Neck. Permission to deviate could be obtained only by litigation; the filing an action with this court. G.L. c.214, §10B. In short, neither Mr. Monahan nor LandVest has facts, opinions or documents not acquired or developed in anticipation of litigation.

B. The Requested Protective Order is Necessary to Protect the Feoffees From Undue Burden and Expense

In addition to the fact that the School Committee has failed to make the requisite showing under Rule 26(b), depositions by the School Committee of the Feoffees' trial experts and the keepers of records of their companies would cause the Feoffees considerable undue burden and expense. The Feoffees would incur significant expense for legal fees relating to their counsel's preparation of these witnesses for their depositions. Preparation of Mr. Monahan and Mr. LaChance for an expert deposition would impose the most burdensome expense. Moreover, the Feoffees would incur significant expense as a result of their counsel's attendance at those depositions. Where the Rules provide for discovery of opinions by way of expert interrogatory, and where the Feoffees have provided the School Committee with a complete and detailed answer to that interrogatory, the Feoffees should not be forced to bear the added expense of these depositions. It is also worth noting here that the attorneys' fees and costs incurred by all parties other than the Attorney General ultimately reduce the monies which would otherwise be available for the benefit of the Ipswich Public Schools.

Accordingly, justice and economy require that the School Committee be prohibited from taking the five depositions which are the subject of this memorandum.

III. CONCLUSION

For the reasons set forth above, the Feoffees respectfully request that this Honorable Court issue a protective order prohibiting the School Committee from taking the depositions of Mr. Monahan, Mr. LaChance, and the keepers of records of their companies.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al., Plaintiffs
by their attorney,

William H. Sheehan III, BBO #457060
Thomas J. Flannagan, BBO #564328
MacLean Holloway Doherty Ardiff & Morse, P.C.
8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123

Dated: June ____, 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 mailing the same, first class mail, postage pre-paid, to the following attorneys:

Stephen M. Perry, Esq.
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Boston, MA 02210

Johanna Soris, Esquire
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One Ashburton Place
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William H. Sheehan III

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Defendants.)

**PLAINTIFFS' MOTION FOR SEPARATE TRIALS ON PLAINTIFFS' AMENDED
COMPLAINT FOR DEVIATION AND DEFENDANTS' COUNTERCLAIM FOR
REVISION TO GOVERNANCE AND ADMINISTRATIVE STRUCTURE OF THE
FEOFFEEES, ORDER LIMITING DISCOVERY, AND SETTING OF TRIAL DATE**

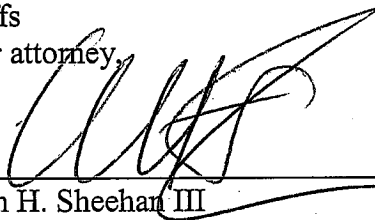
NOW come the Plaintiffs and move this Honorable Court, pursuant to Mass.R.Civ.P. 42(b), to order separate trials on the Plaintiffs' complaint and the Defendants' counterclaim. In addition, the Plaintiffs move for orders limiting discovery to the issues raised in the Plaintiffs' complaint pending a judgment on the complaint and setting a trial date on the Plaintiffs' complaint.

As grounds for this motion, the Plaintiffs say that separate trials will likely save substantial economic resources of the parties, an especially significant factor here because the attorneys' fees and costs incurred by all parties other than the Attorney General ultimately reduce the monies which would otherwise be available for the benefit of the Ipswich Public Schools; such a separation and the requested concomitant orders will expedite the discovery process and a

trial date; the issues presented by the Plaintiffs' complaint are very different in kind from those presented by the Defendants' counterclaim; and, in the event this Court grants the relief sought by the Plaintiffs in their complaint and permits sale of Little Neck, the expertise brought to the operation of Little Neck by the four private, life feoffees will no longer be necessary and, following sale, the Plaintiffs will have no objection to the endowment fund, to be created from the sales proceeds, being managed by persons other than the present life feoffees, thus making settlement of the counterclaim very likely.

The aforesaid grounds are more particularly set forth in the Plaintiffs' memorandum filed herewith in support of this motion.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al.,
Plaintiffs
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

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SEPARATE TRIALS
ON PLAINTIFFS' AMENDED COMPLAINT FOR DEVIATION AND DEFENDANTS'
COUNTERCLAIM FOR REVISION TO GOVERNANCE AND ADMINISTRATIVE
STRUCTURE OF THE FEOFFEEES, ORDER LIMITING DISCOVERY, AND SETTING
OF TRIAL DATE**

I. INTRODUCTION

The Plaintiffs Feoffees of the Grammar School in the Town of Ipswich ("Feoffees") file this memorandum in support of their motion for separate trials on the Feoffees' complaint and the Defendants' counterclaim and for orders limiting discovery in the first instance and setting a trial date.

II. FACTS

The facts giving rise to the instant dispute between the Feoffees, who hold title to Little Neck in trust for the benefit of the Ipswich Public Schools, and the Defendants are well known to this Court which recently heard extensive argument in connection with the Feoffees' motion for

partial summary judgment. In lieu of reciting the facts in this memorandum, the Feoffees incorporate by reference the Statement of Material Facts contained in their memorandum in support of their summary judgment motion and, for the Court's convenience, attach as Appendix A hereto a copy of same.

III. STANDARD FOR SEPARATE TRIALS

Mass.R.Civ.P. 42(b) authorizes separate trials:

This court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial in the county where the action is pending or in a different county of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right to trial by jury as declared by the constitution of this Commonwealth or as set forth in a statute.

IV. ARGUMENT

Separate trials of the Plaintiffs' complaint and the Defendants' counterclaim, with the former trial first, will be conducive to expedition and economy.

A. The Complaint and Counterclaim Present Very Different and Distinct Issues.

The Feoffees seek by their complaint the following relief: permission to compromise the Essex Superior Court litigation between the Feoffees and the non-lessee cottage owners at Little Neck; deviation from the terms of William Payne's will to permit sale of Little Neck and, in conjunction with that sale, permission to receive mortgages to secure payment of so much of the purchase price as is paid by promissory notes; permission to borrow funds, and, in conjunction therewith, give a mortgage to secure repayment of monies borrowed; and a declaration that the

Uniform Procurement Act does not apply to the sale of condominium units as contemplated by the Feoffees.¹

Whether that relief is warranted turns, in essence, on three issues: (1) the reasonableness of the sale price of \$29,150,000; (2) the advantages of an endowment fund versus a single asset, real estate trust; and (3) the pros and cons of settling the Essex Superior Court litigation. Expert testimony and opinion will constitute the major part of the evidence before the court, much of it documentary.

In stark contrast, the Defendants' counterclaim asks for a new governance scheme, relying on a variety of alleged failings by the Feoffees, ranging from complaints about the installation of a private sewer system on Little Neck to a failure to make satisfactory distributions to the Ipswich Public Schools. The proof of those alleged failings, which the Feoffees deny, will require numerous fact witnesses who will offer little or no evidence on the Plaintiffs' complaint. Indeed, testimony on the construction of the private sewer system alone will extend for days.

Where, as here, there will be no, or very little, overlap of fact issues, separate trials are reasonable and prudent. Williams v. C.S.X. Transp., Inc., 2002 WL 31618455, not reported in F.Supp. 2d. (copy of case attached as Appendix B).

B. There Is A Reasonable Likelihood That There Will Be No Need Of A Trial Of The Defendants' Counterclaim.

A separate trial on the Feoffees' complaint is particularly prudent because, if the Feoffees prevail, there is little likelihood the Defendants' counterclaim will proceed to trial. The thrust of the Defendants' counterclaim is the elimination of the private, life feoffees, leaving control of the

¹ The Superior Court has ruled on that issue: "Because the Feoffees are not a governmental body, they are not subject to either the Open Meeting Law or the Uniform Procurement Act." See Decision of Riley, J., dated December 18, 2007, in Loneragan, et al. v. Foley, et al. Essex Superior Court Action No. 06-2328-D.

trust solely in the hands of persons appointed by Ipswich governmental bodies. The private, life feoffees provide the expertise necessary to operate Little Neck. If Little Neck is sold and the proceeds deposited into an endowment fund, the expertise provided by the private, life feoffees will no longer be necessary and the Feoffees will have no objection to that fund being managed by persons other than the present Feoffees. There is a great likelihood of settlement of the Defendants' counterclaim if Little Neck is sold. Such a settlement will save many days of trial time.

C. The Two Goals Of Separate Trials, Expedition And Economy, Will Be Accomplished By Separating The Trials As Requested By The Feoffees

Economy and the preservation of parties' resources are important in every case; they are of particular importance in the instant case. Every dollar spent on counsel fees by every party to this action, with the exception of the Attorney General, is one dollar fewer that is available to benefit the Ipswich Public Schools. The Feoffees have acted, and continue to act, in a way so as to reduce their legal costs. They sought and obtained the School Committee's assent to a settlement of the Superior Court litigation and sale of Little Neck which would have the salutary effect of putting an end to the substantial cost of that litigation. Unfortunately, the School Committee, after twice approving the sale, changed its mind, resulting in another round of litigation, now in the Probate Court. In this action, the Feoffees moved for partial summary judgment, again, in part, to save the cost of a trial. The School Committee successfully opposed the motion by using an appraisal of Colliers Meredith and Grew, an appraisal which the Committee's own appraiser discredited, thus creating an issue of fact as to whether the proposed sale price was reasonable.

The Feoffees now propose another means of reducing legal expenses: separate trials and a concomitant order limiting discovery in the first instance to the issues to be tried in the

Feoffees' complaint. The savings generated by limiting discovery and trying first the Feoffees' complaint will be, conservatively, in the tens of thousands of dollars. If the Feoffees prevail and sale is approved, the Defendants' counterclaim will likely be settled and the savings will be substantial and permanent. See Guidi v. Inter-Continental Hotels Corp., 2003 WL 1846864, not reported in F.Supp. 2d. ("Moreover, the potential time-saving effect of bifurcation is not insignificant The possibility of the elimination of this lengthy portion of the case is, without doubt, conducive to expedition and economy. Fed.R.Civ.P. 42(b).") (copy of case attached as Appendix C).

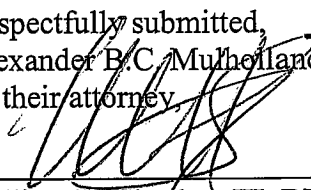
Separate trials and limited discovery in the first instance will also result in a speedier trial date. All of the parties will gain by the earliest possible determination of whether the Feoffees will be permitted to sell Little Neck. No party will be adversely prejudiced by separate trials.

CONCLUSION

For the reasons set forth above, this Court should enter the following orders:

- (1) that the Plaintiffs' complaint and the Defendants' counterclaim be tried separately;
- (2) that the Plaintiffs' complaint be tried first on a date convenient to the Court; and
- (3) that discovery be limited to the issues raised in the Plaintiffs' complaint pending judgment on the Plaintiffs' complaint.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al., Plaintiffs
by their attorney



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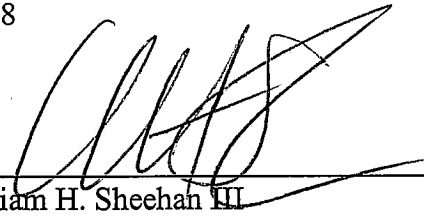
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