

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
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.

FILED MAY 03 2012

AFFIDAVIT OF CLARK ZIEGLER
IN SUPPORT OF MOTION TO INTERVENE

I, Clark Ziegler, state the following on my own personal knowledge or information and belief:

1. I reside at 10 Woods Lane, Ipswich, Massachusetts.
2. I have a daughter who is a junior at Ipswich High School. My two older sons were also educated in the Ipswich schools – one graduated from Ipswich High School and the other attended the Winthrop School and then graduated from Landmark.
3. I and others have moved to intervene in this action because of our alarm over the recent decision by the School Committee to abandon its position with respect to the Feoffees and the William Payne Trust. We had been relying on the School Committee to vigorously litigate the issues of whether deviation from the Trust is permissible and whether the Feoffees should be

removed for their mismanagement of the Trust and replaced by town-appointed trustees with public accountability.

4. It was not until the School Committee's executive session vote on December 17, 2011, and the announcement of the proposed settlement with the Feoffees on December 20, 2011, that we realized we could no longer rely on the School Committee to vigorously litigate these issues and were forced to immediately intervene to protect the interests of our children, the true beneficiaries of the Trust.

5. I first became directly involved with the Feoffees in early 2010, when I was asked as one of three real estate financing experts to be part of an ad hoc committee to advise the School Committee on the feasibility of the proposed conversion of Little Neck to a condominium and sale of the land by the Feoffees to the current tenants. As a fifteen-year member of the Ipswich Finance Committee, including three years as chairman, I had long been aware that the Feoffees were not a reliable source of funding for the Ipswich Public Schools, that an investigation of the Feoffees had been launched by a vote of Town Meeting in 2001, and that serious mismanagement of the Trust had been identified in the Town's investigation.

6. As of 2001, the Attorney General was also aware of the Feoffees' mismanagement of the Trust and the likely need to remove them. Attached as Exhibit A is a copy of a letter dated December 17, 2001, from Deirdre Rosenberg, Assistant Attorney General in the Division of Public Charities, where she wrote that "the Attorney General has not decided whether the current Feoffees can continue to serve as trustees of Little Neck. However, I strongly suspect that the answer will be in the negative."

7. In the course of five-months' work on the ad hoc committee delegated by the School Committee, I saw no indication that the Feoffees had any understanding of the costs and

benefits of a sale to the tenants or had done any analysis to show why a sale was necessary or in the best interest of the beneficiaries. I am not aware of any analysis supporting the necessity of a sale having been presented to the School Committee or to the Court.

8. When it became clear to me that the Feoffees were violating the Trust and failing to fulfill their fiduciary responsibilities, I worked with other concerned Ipswich citizens to draft legislation to amend Chapter 5 of the Acts of 1765, the legal authority under which the current Feoffees serve as trustees, to replace the Feoffees with a publicly-appointed board of trustees. This legislation was presented to the 2011 Annual Ipswich Town Meeting on a citizens' petition, was approved by Town Meeting with unanimous support from the School Committee, Board of Selectmen and Finance Committee, and was ratified by a nine-to-one vote in a non-binding town referendum.

9. This citizens' effort to address abuses of the Trust is described in my testimony, and the testimony of citizen leader and School Committee member Rachel Roesler, that was presented at a public hearing before the Massachusetts Legislature's Joint Committee on Municipalities and Regional Government on October 18, 2011.

10. Specifically, I testified as follows at the public hearing:

My name is Clark Ziegler and I have lived in Ipswich for nearly 30 years. My wife and I have raised three kids educated in Ipswich Public Schools; two now in college and one at high school.

Until last year I paid little attention to the Feoffees. As one of a few real estate and finance experts, I was asked by the School Committee to review the viability of the proposed sale of the land at Little Neck to the tenants.

When I got involved I was shocked and appalled at the way the Feoffees conduct their business. There were none of the normal checks and balances associated with a nonprofit or a charitable trust. Meetings were held in secret, records were not kept. The three Selectmen who serve as Feoffees to provide public oversight were systematically excluded from all major decisions. There was no analysis whatsoever to support the

Feoffees' petition to Probate Court to sell the land at Little Neck and violate the explicit terms of their trust.

This past spring, a year after I first got involved, we were still in gridlock, with no money flowing to the Ipswich schools. The legal fees are already well over a million dollars with no end in sight. Every dollar the Feoffees pay their attorney to defend their current practices – which in turn forces the School Committee to spend another dollar to defend the interests of the community – is money that is permanently wasted and cannot be used to save academic programs or prevent teacher layoffs.

I am one of many citizens who has simply had enough. Earlier this year I got together with other parents and taxpayers who feel the same way. Part of that effort was focused on intervening in court, and you will hear in a minute about hundreds of families who made their voices heard through a brief filed in Probate Court. My role was to draft a citizens' petition that put this legislation back before Town Meeting and ultimately before you today as a home rule petition from the Town of Ipswich. I also worked with that citizens group to draft a referendum question that we successfully petitioned the Selectmen to include in this spring's town-wide election.

The decision your committee makes about Senate 1927 is about respect for the democratic process. The legislation has been overwhelmingly supported by votes at the Ipswich Town Meeting, both in 2009 and again this year. It was supported by the voters in a town-wide election by a vote of nine to one. It is unanimously supported by the town's Selectmen, School Committee and Finance Committee.

Yes, there is some opposition to the bill, but that opposition is based on self-interest, not on the public interest. For the Feoffees to say that they will relinquish control after the land at Little Neck is sold – which explicitly violates the trust under which the Feoffees were established – is like saying we're happy to restore public accountability but only after it's too late to make any difference.

I urge your committee to respect the will of the town's voters and elected officials and approve S. 1927 without delay.

11. Ms. Roesler similarly testified as follows at the public hearing before the Joint

Committee on Municipalities and Regional Government:

My name is Rachel Roesler and I'm an Ipswich School Committee member and the mother of three children in the Ipswich public schools.

Year after year at Town Meeting I listen to people vent their frustrations over the poor management of this Trust. Solutions are offered, votes are taken, promises are made. Nothing changes. The disputes grow while the money for the schools dwindles. Enough is enough. We're here because it's time for change.

Last year I heard the Feoffees were having a meeting so I tried to attend along with a few other parents. We naively thought that if reasonable people could sit down and talk, perhaps solutions could be found. Instead we were told by Mr. Sheehan that we, as parents of Ipswich school children, have no right to question the actions of the Feoffees. We were made to leave.

The Feoffees are required to hold a public meeting once a year but until this year I was never able to find out when or where it was held. I don't even know if they were held because minutes, if they're taken, aren't made public. This March, after intense public pressure, a meeting was posted and held so the Feoffees could re-elect the positions of Chairman, Vice Chair, Treasurer, and so forth – five positions in total. This is what happened. A lifetime Feoffee would nominate a fellow lifetime Feoffee for a position and then a Selectman Feoffee would nominate a fellow Selectman Feoffee then a vote would be taken. Not surprisingly, the lifetime Feoffee would win the vote by a 4-to-3 count. Because there are four lifetime Feoffees and five positions, one lifetime Feoffee serves in two positions. The Selectman Feoffees are shut out each time and prevented from serving in any meaningful way.

Watching this sham take place, I couldn't help but think that I was watching something akin to a re-shuffling of chairs on the deck of the Titanic. The ship is going down fast but we're powerless to do anything about it.

I decided to run for a position on the School Committee to try and effect change. I also joined with other parents and citizens to start a citizens' action committee. In just one month the citizens' group was 750 members strong and it's growing daily. Many of the members are here today because we are asking for your help.

We know that when it comes to the struggles of properly funding schools, Ipswich is no different from your town. What does make Ipswich different is that our founding fathers did a brilliant and generous thing by establishing a land trust to benefit the schools, in perpetuity. Their one mistake was putting the trust into the hands of a body of people who aren't accountable to anyone but themselves.

My son Nicholas started Kindergarten in 2006. He's a 5th grader now. In all the time he's been an Ipswich student, he has never experienced the

benefit of this trust. Not a single penny has gone to the schools in all the time he's been a student. Money meant for kids is instead going to lawyers, who handle the growing number of legal disputes that seem to follow the Feoffees.

Little Neck is a gem to all who live there but it's nothing to the Ipswich school children. It's just a reminder of what could have been had the Feoffees remembered their duty to the beneficiaries of the Trust they manage.

The legislature attempted to create a more fair and accountable governance structure when it voted to add three Selectman as Feoffees. Unfortunately they are rendered powerless by their minority status. We hope that the legislature will act again but get it right this time. Your support of this bill will ensure that the trust is managed with the beneficiaries' best interest in mind and will enhance the learning experience of thousands of children for generations to come.

12. In my role as a former chairman and member of the Ipswich Finance Committee, and as a member of the Town's Growth Management Steering Committee, I have detailed knowledge of municipal finances and the ways in which land-use decisions impact funding for public schools. Given the constraints of the Proposition 2½ levy limit, the proposed sale of lots at Little Neck below their current assessed value would almost certainly result in a shift of property-tax burden from Little Neck homeowners to other taxpayers in Ipswich. A sale below assessed values would mean that total property-tax contributions to the Ipswich Public Schools from the property at Little Neck would be reduced from current levels, which directly violates the purpose of the Trust.

13. By holding Little Neck in trust the Feoffees now restrict land uses in ways that maximize support for public schools (e.g., the longstanding practice of limiting most cottage leases to seasonal occupancy has minimized the number of public school students from Little Neck and the associated cost-burden on the schools). From my service in town government I am aware that each new year-round dwelling at Little Neck would not produce sufficient revenue – at the town's current property tax limit and after taking into account the Commonwealth's

Chapter 70 education aid formula – to support the cost of a single additional child in the Ipswich Public Schools.

14. Under the proposed sale each cottage owner would be free to convert his or her cottage to year-round occupancy. Each additional public school student resulting from that change in allowable use would cause a net loss to the school budget and would thus directly harm the beneficiaries of the Trust. While I generally believe that communities should make land-use decisions irrespective of whether they increase students and school costs, this situation is entirely different because the Feoffees have a fiduciary duty to make decisions that benefit the public schools.

15. It is commonplace in Massachusetts for public and nonprofit property owners to allow residential use of their property while retaining permanent ownership of the land. This structure allows owners with a public or charitable purpose to maintain flexibility as circumstances change over time while continuing to benefit from long-term appreciation in value. In my capacity as Executive Director of the Massachusetts Housing Partnership, I have been directly involved in providing long-term mortgage financing for at least 30 residential real estate projects on leased land. In that capacity I have also been involved in providing 30-year mortgage financing through Massachusetts banks for several developments where individuals are able to purchase and improve homes on leased land.

16. There is no evidence that long-term ground leases at Little Neck are infeasible. In fact, there is overwhelming contrary evidence that this ownership and financing structure has been successful in many other Massachusetts cities and towns. Accordingly, there is no factual justification for violating an express condition of William Payne's will by selling the land at Little Neck and foregoing future appreciation in real estate value.

17. I do not believe the School Committee is representing the beneficiaries' interest because the School Committee has never shown that the sale of Little Neck – a fundamental violation of the Trust under which the land is owned – would yield more benefit to current and future schoolchildren than leasing the land at market rents under more competent management. Even if a sale were somehow found to be more beneficial than leasing, I believe the School Committee has failed to represent the beneficiaries' interest by agreeing to a sale of Little Neck at well below its market value. The report of the appraiser retained by the Ipswich Finance Committee is already part of the record in this matter and incorporated herein.

18. Moreover, that the School Committee would give general releases to the Feoffees as part of the agreement to sell Little Neck is inconceivable to me. Given the well-documented mismanagement of the Trust, and the Court's waiver of the statute of limitations on such claims, there is no reason why the School Committee's agreement to a general release of claims against the Feoffees is in the best interest of the beneficiaries.

Signed under the pains and penalties of perjury this 3rd day of January, 2012.



Clark Ziegler

EXHIBIT A



TOM REILLY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1598

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December 17, 2001

Ed Traverso
38 East Street
Ipswich, MA 01938

RE: Feoffees of Ipswich

Dear Mr. Traverso:

This letter is in answer to yours of December 12, 2001.

The Feoffees are trustees of a trust whose purposes are wholly charitable. That is, they hold the land known as Little Neck for the benefit of the Ipswich schools. Therefore, the trust is required to be registered with the Division of Public Charities of the Attorney General's Office, and to comply with all filing requirements, as set forth in M.G.L. c. 12, s. 8, including providing the Division with a form PC, Federal form 990, and for those charities with a gross annual income of \$250,000 or more, audited financial statements with an independent auditor's report. Because the Feoffees had never been registered with our office, on March 22, 2001, I wrote to their attorney, Donald Greenough, about the registration and filing requirements discussed above. A copy of my letter is enclosed.

Subsequently, on April 25, 2001, the Feoffees submitted Forms PC for the years 1997 through 2000. The forms 990 and audited financial reports were not provided. On April 26, 2001, Mr. Greenough and I discussed the missing material, and he assured me that the Feoffees did intend to provide the 990s and audited financial statements. We again spoke about this matter on at least July 3, 2001, September 17, 2001, October 19, 2001, and, most recently, on December 10, 2001. In our most recent conversation, Mr. Greenough informed me that I would be receiving the required filings within two weeks of the date of that phone call.

*Were they
ever
sent?*

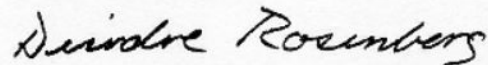
In your letter of December 12, you also asked whether it would be a conflict of interest for a tenant of Little Neck to simultaneously serve as a Feoffee. I believe that it would be. The Feoffee has a duty of loyalty to the Ipswich schools and his own personal interest as a

tenant of Little Neck could very well be, as it appears to have been in the past, at odds with the interests of the intended beneficiaries.

In answer to your final question, the Attorney General has not decided whether the current Feoffees can continue to serve as trustees of Little Neck. However, I strongly suspect that the answer will be in the negative. Also, as we have discussed, there will have to be a court proceeding to restate the trust's purposes and clarify its operating procedures.

I hope this letter has been helpful. Please let me know if you have further questions.

Sincerely,

A handwritten signature in cursive script that reads "Deirdre Rosenberg".

Deirdre Rosenberg
Assistant Attorney General
Public Protection Bureau
Division of Public Charities