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.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Applicants for Intervention Douglas J. DeAngelis, Catherine T.J. Howe, Jacqueline Phypers and Jonathan Phypers, Peter Buletza, Kenneth Swenson, Robert Weatherall, Jr., Joanne Delaney, Cara Doran, Andrew and Susan Brengle, Michele and Jason Wertz, Clark Ziegler, and Carl Nylen, individually and on behalf of their minor children (the "Interveners"), respectfully submit this memorandum in support of their motion to intervene.

Since filing the motion to intervene on December 20, 2011, the Interveners have made a number of supplemental filings supporting their motion.[1] Each of these supplemental filings and

[1] The prior supplemental filings are as follows: Supplement to Motion to Intervene; Answer and Counterclaim of the Applicants for Intervention; Second Supplement to Motion to Intervene; First Amended Answer and Counterclaim of the Applicants for Intervention ("Countercl."); Affidavit of Douglas J. DeAngelis in Support of Motion to Intervene ("Aff.

their attachments are incorporated into this memorandum, the purpose of which is to synthesize and summarize the grounds upon which the Interveners have moved to intervene as a matter of right pursuant to Rule 24(a) of the Massachusetts Rules of Civil Procedure.

INTRODUCTION

The Interveners are comprised of a representative group of parents of schoolchildren in the Ipswich Public Schools, together with the schoolchildren themselves, who are the true beneficiaries of what is alternatively called the Grammar School Trust, the William Payne Trust, or the Feoffee Trust (the "Trust"). Before addressing why intervention is appropriate, the Interveners first address why they are seeking to intervene.

Despite efforts to brand the Interveners as a band of zealots, they are not. They represent the majority view in the Town of Ipswich in opposition to the proposed sale of Little Neck. Their position is the same as that held by the School Committee – at least until very recently. Their position is also the same as that of the Selectmen Feoffees, who constitute a majority-vote within the Ipswich Board of Selectmen, in their independent opposition to the sale of Little Neck on summary judgment. (See McNally, Morley, and Surpitski's Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 5 ("Based on information that is currently available to the Selectmen Feoffees, they have serious doubts as to whether the sale of the Trust asset is, in fact, the best way to provide a perpetual benefit to the Ipswich Public Schools."); id. at 8 ("The

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DeAngelis"); Affidavit of Clark Ziegler in Support of Motion to Intervene (Aff. Ziegler"); Affidavit of Robert Weatherall, Jr. in Support of Motion to Intervene ("Aff. Weatherall"); Affidavit of Catherine T.J. Howe in Support of Motion to Intervene ("Aff. Howe"); Affidavit of Michele Wertz in Support of Motion to Intervene ("Aff. Wertz"); and Affidavit of Susan Brengle ("Aff. Brengle").

Two additional documents have been filed simultaneously with this memorandum: Supplemental Affidavit of Clark Ziegler ("Supp. Aff. Ziegler"); and Affidavit of Webster A. Collins, attaching the Real Estate Consulting Report of CB Richard Ellis/New England Partners ("CBRE Report").

Plaintiffs [Lifetime Feoffees] make a variety of arguments in support of their claim that the Trust asset is wasting, including pointing to legal fees and interest payments that have been incurred by the Feoffees and that have co-opted the payments to the School Department in recent years. These short-term problems in the generation of income from the Trust asset are minor when viewed in the context of the 350-year history of the Trust. . . . Viewed in this context, the Plaintiffs have not proven that the sale of Little Neck is necessary, or even preferable, to the continued rental of Little Neck for the purposes of providing a perpetual benefit to the Ipswich School Department.").)

As the Selectmen Feoffees rightly suggested, the relevant question under prudent investment standards is whether the settlement and sale of Little Neck would provide a greater benefit to the schools in the short term and the long term. Setting aside the issue of whether the doctrine of reasonable deviation allows a trust to be reformed merely because a purportedly "better" or "more convenient" form of trust has been proposed (it does not), and setting aside the additional issue of whether the Court has authority to order deviation from the terms of this statutorily-governed trust (it does not), basic math dictates that the settlement and sale of Little Neck would not provide a greater benefit to the schools in the short term and the long term. In fact, the opposite is true.

For example, the four appraisals submitted by the Feoffees, the Tenants, the School Committee, and the Finance Committee offer widely divergent views on the "fair market value" of Little Neck if it were sold. They are remarkably consistent, however, on the value of the land if it were *not* sold, i.e., the value on which rental rates could fairly be calculated. The aggregate value of the lots from each of the four appraisals are all within 7% of the average, which is $40,516,250. (See Summary Judgment Record Appendix, Ex. 54 at 59; Ex. 73 at 106, 110; Ex.

74 at 92; Ex. 75 at 23, 42.) This $40,516,250 represents the value of the corpus of the Trust under a no-sale scenario. Because future income under either scenario (sale v. no-sale) is a function of the value of the corpus, and because the sale scenario is projected to establish an investment-fund corpus with a value of approximately $22,000,000, the settlement and sale of Little Neck would effectively guarantee that the corpus of the Trust be diminished by more than $18,000,000 from the $40,516,250 average aggregate value of the lots. In other words, the settlement and sale would result in an instantaneous wasting of more than $18,000,000.[2]

These four appraisals further indicate that the average implied gross return if Little Neck were leased would be 4.62%. (See Summary Judgment Record Appendix, Ex. 54 at 59; Ex. 73 at 106, 110; Ex. 74 at 92; Ex. 75 at 23, 42.) This gross return of 4.62% is significantly higher than if an investment fund were to yield a return of even 5%, which is itself optimistically unrealistic, because more than half of this return would have to re-invested in the Trust to keep pace with inflation, whereas long-term leases could and would have an adjustment built in for inflation. The School Committee expanded on this point in its summary judgment brief:

> If one assumes a total return at this time of 3.5%, based on the rates of return for cash and notes assumed by Clasby, and if one assumes inflation of 3 percent per year, the distribution that could possibly be made to the School Committee if the fund is to be perpetual would be approximately 0.5 percent or around $110,000 per year, less expenses. This analysis is consistent with what is happening 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

[2] This wasting of more than $18,000,000 far exceeds the $800,000 that would be infused into the school system as a result of the settlement and sale. On this point it is worth noting that although the $800,000 would surely be a welcome addition to the school budget, the Ipswich Public Schools cannot be characterized as any worse off financially than the school systems in other towns in Massachusetts. (See, generally Supp. Aff. Ziegler.)

> percent, let alone the 5 or 6 percent that the Feoffees conjure up in their memorandum. School Committee Ex. 77 demonstrates that in just the five years covered by Clasby's pro formas, the Trust fund would lose over 10 percent of its value due to inflation if the Feoffees' approach of distributing all Trust income, without adding funds back to the corpus, were followed.

(Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, ¶ 42.)

Moreover, a settlement and sale of Little Neck would result in the conversion of 143 seasonal cottages to year-round residences and an increased burden on the town (e.g., increased infrastructure costs, increased student population). (See Aff. Weatherall, Ex. A.) This increased burden, together with the decrease in tax revenue from Little Neck as a result of the conversion, could actually harm the town. (Id. at ¶ 5; Aff. Ziegler, ¶¶ 12-14.) Inexplicably, this cause-and-effect has never been fully analyzed, despite the concerns expressed by the Planning Board. (See Aff. Weatherall, ¶ 6 & Ex. A.)

The fact that the settlement and sale of Little Neck would have a comparatively negative impact of the school system is confirmed by the CBRE Report, authored by Webster A. Collins, who recommends that Little Neck continue to be held in the Trust under a 60-year ground lease structure, with a CPI adjustment to the rent every five years (not to exceed 3% per year), and with management responsibilities delegated to a professional property manager. (See, generally CBRE Report.) Significantly, the CBRE Report notes that a similar structure has proven to be successful in similar circumstances, with similar land, including the trust that continues to hold and maintain Naushon Island (located between Buzzards Bay and Vineyard Sound). (Id. at 5-6.) In other words, the continued maintenance and rental of Little Neck would be neither difficult nor revolutionary.

For these reasons and others, the residents of Ipswich voted at Town Meeting to fund the School Committee's opposition to the proposed sale of Little Neck. (See Aff. DeAngelis, ¶ 16.)

While this Court is certainly not bound by the votes of the majority of Ipswich residents, the logic behind these votes and the objective mathematical analyses should not be ignored.

SUMMARY OF ARGUMENT

Under Rule 24(a), "[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Mass. R. Civ. P. 24(a) (emphasis added).

The motion to intervene meets these criteria – timeliness, interest, inadequacy of representation, and impairment:

- First, there can be no serious dispute as to the timeliness of the Interveners' application. They moved to intervene immediately upon the School Committee's abandonment of its opposition to the sale of Little Neck.
- Second, as actual beneficiaries and the parents of actual beneficiaries of the Trust, the Interveners have an interest in enforcing the express terms of the Trust that is different in both kind and degree from the interests of the named parties. The Interveners' interest is in maximizing the short-term and long-term benefit intended for the Ipswich schoolchildren under the Trust, and they are willing to fight for it.
- Third, the Interveners' interest is not being adequately represented, as evidenced by the proposed settlement itself.
- Fourth, the Interveners' ability to protect their interest would be impaired if intervention were denied, because there would be no party to advocate their position.

Moreover, if intervention were denied, the Court would not be able to fulfill its duty of ensuring the proper administration of the Trust, regardless of whatever the named parties might have agreed to as a matter of expedience. This Court has an independent obligation of review which it cannot meet without a full evidentiary hearing and comprehensive findings of fact, and it cannot conduct an evidentiary hearing or make findings of facts without the participation of a party to advocate that reasonable deviation from the terms of the Trust is the wrong outcome.

ARGUMENT

Contrary to the Attorney General's argument that the Interveners have no standing to intervene, there is no separate test for standing that the Interveners must meet. Tellingly, none of the cases cited by the Attorney General for her exclusive-standing argument involved an application for intervention.[3] This is because the test for standing is subsumed within the test for intervention. It would be wholly contradictory for a court to find (a) that an applicant possesses an interest that legally entitles him to intervene in an action to protect that interest, and also (b) that the applicant has no standing to protect that interest. Cf. Commonwealth v. One Hundred Twenty-Five Thousand One Hundred Ninety-One Dollars, 76 Mass. App. Ct. 279, 281 (2010) (standing and intervention requirements analogous). It follows, therefore, that if the Interveners satisfy the elements of Rule 24(a), then they "shall" be permitted to intervene as a matter of right.

I. THE INTERVENERS SATISFY EACH ELEMENT OF RULE 24(a)

A. First Element: The Motion to Intervene Is Timely

The motion to intervene was filed on December 20, 2011, the same day that the settlement agreement to sell Little Neck was announced and just three days following the School Committee's executive session vote to accept the settlement on December 17, 2011. (Aff. DeAngelis, ¶¶ 24-26; Aff. Ziegler, ¶ 4; see Supp. Aff. Ziegler, Ex. A (executive session meeting minutes).) Although an Agreement for Judgment was subsequently approved by the Court on

[3] The Attorney General should not be heard to argue that her exclusive standing should be enforced where she herself has allowed the School Committee to take the lead in representing the beneficiaries of the Trust. As illustrated by the Agreement for Judgment, on which the Attorney General is not a signatory, her role in this action has been limited. Accordingly, any exclusive standing held by the Attorney General has already been waived.

December 23, 2011, without notice to the Interveners, the Agreement for Judgment was not entered on the docket until January 12, 2012.

The School Committee's agreement to the sale of Little Neck is directly at odds with the School Committee's public position taken in open session meetings, at Town Meetings, and in the press. (Aff. Brengle, ¶¶ 9-10 & Exs. A, B.) Indeed, at the request of the School Committee, the Town of Ipswich spent hundreds of thousands of dollars in legal fees fighting a sale of Little Neck. (See Aff. DeAngelis, ¶ 16.) As recently as November 15, 2011, the Chairman of the School Committee reiterated its position: "There wont [sic] be any settlements that involve sale in any respect." (Id. at ¶ 22 & Ex. F.)

The motion to intervene was filed immediately – literally within minutes – after the School Committee gave the first public notice of its abandonment of this position. (See id. at ¶ 26.) The Interveners could not have moved to intervene any sooner. Up until it abandoned this position, the School Committee was adequately representing the interest of the Interveners, or so the Interveners reasonably believed in reliance upon the School Committee's public affirmations to that effect (See Aff. Howe, ¶ 8; Aff. Brengle, ¶¶ 6-7; Aff. DeAngelis, ¶¶ 4, 26).[4]

B. Second Element: The Interveners Have a Clear Interest In this Action

The Interveners have a clear interest in this action as the actual beneficiaries of the Trust. They include representative parents of schoolchildren who attend, are eligible to attend, or will be eligible to attend the Ipswich Public Schools, as well as the schoolchildren themselves. (See

[4] The filing of the motion to intervene should not have surprised the named parties. On page 19 of the Amicus Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment ("Amicus Brief"), incorporated herein, the Beneficiary Group previewed that intervention would be sought, and expressly reserved the right to intervene, "if the School Defendants were to succumb to the Feoffees' pressure to sell Little Neck, because the School Defendants would no longer be adequately representing the beneficiaries' interests."

Counterclaim, ¶¶ 1-12; Aff. Ziegler, ¶ 2; Aff. Weatherall, ¶ 2; Aff. Wertz, ¶ 2; Aff. Howe, ¶ 2; Aff. Brengle, ¶ 3; Aff. DeAngelis, ¶ 4.) As such, any decision regarding Little Neck directly affects the Interveners.

Their interest, consonant with the express language of William Payne's will and the Trust, is in opposing the proposed sale of Little Neck so that it can be maintained "forever" for the benefit of the schoolchildren of Ipswich. This interest in the continued maintenance of Little Neck in the Trust (but not by the current Feoffees) is based on the Interveners' belief, as current and former members of various town governmental bodies and school committees and organizations, that a sale of Little Neck would not benefit the schoolchildren of Ipswich in the short term or the long term. (See Aff. Ziegler, ¶¶ 12-17; Aff. Weatherall, ¶¶ 5-6 & Ex. A; Aff. Wertz, ¶ 4; Aff. DeAngelis, ¶ 7 & Ex. B; see also, generally CBRE Report.)

C. Third Element: The Interveners' Interest Is Not Adequately Represented by the Named Parties

The Interveners' burden of showing inadequate representation of their interest is "minimal." See Frostrar Corp. v. Malloy, 77 Mass. App. Ct. 705, 712 (2010); B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006).[5] Whether this minimal showing has been made is case-specific, see Maine v. United States Fish & Wildlife Serv., 262 F.3d 13, 19 (1st Cir. 2001) ("Maine"), but the Interveners need only offer "an adequate explanation as to why" their interest is not sufficiently represented by the named parties, and one way for the Interveners to show inadequate representation is to demonstrate that their interest is

[5] The language of Federal Rule 24(a) is identical to Massachusetts Rule 24(a), and so judicial construction of the Federal rule applies to the Massachusetts rule. Bolden v. O'Connor Café of Worcester, Inc., 50 Mass. App. Ct. 56, 62 n.11 (2000); Attorney General v. Brockton Agricultural Society, 390 Mass. 431, 434 n.3 (1983).

sufficiently different in kind or degree (i.e., intensity) from that of the named parties. See Kellogg USA, 440 F.3d at 546.

As explained below, the Interveners' interest is different in both kind and degree from that of the School Committee and the Attorney General.

1. Ipswich residents with school-aged children are a distinct minority whose interest differs from that of the School Committee

The parent Interveners who reside in Ipswich are a minority within the voting-age population of Ipswich. (See Aff. Brengle, ¶ 12 (census data indicates that only 17% of the voting-age population in Ipswich are parents or guardians of school-age children).) These parents, who do not have the majority-vote needed to elect members of the School Committee, are distinctly positioned and committed as the guardians of their children to enforcing the mandate of the Trust – that Little Neck never be sold – for the benefit of their children.

2. The interest of Rowley parents with Ipswich schoolchildren is not represented by the School Committee

Two of the Interveners, Jacqueline and Jason Phypers, are representative of non-Ipswich residents whose children attend the Ipswich Public Schools through the School Choice program. (Counterclaim, ¶ 3.) Not being residents of Ipswich, they have no voting rights in Ipswich, and thus they did not elect the School Committee and are not represented by it.

3. The recent actions by the Defendants demonstrate the divergent interests of the Interveners and the named parties

Even if the School Committee were able to represent the interest of the Interveners, despite the fact that the parent Interveners – as a voting minority in Ipswich or as non-Ipswich residents – did not elect the School Committee, the named parties' agreement to the settlement and sale of Little Neck proves a divergence of interests.

First, the Interveners are entitled to intervene because the Defendants have failed to represent the Interveners' interest vigorously. See Massachusetts Federation of Teachers v. School Committee of Chelsea, 409 Mass. 203, 207 (1991) ("Chelsea"). In Chelsea, the Court found that "[t]he record reflects that the defendants have both the incentive and the intent to litigate this matter fully." Id. at 209. In that case, the would-be parent interveners "presented no actual disagreement with either the goals or the actions of the school committee." Id. at 207. The facts in this case, as discussed above and in the Interveners' related filings, could not be further from those in Chelsea. Here an actual disagreement exists between the beneficiaries and the Defendants, who have abandoned their resolve to litigate this dispute and their loyalty to the terms of the 350-year old Trust, while the beneficiaries remain steadfastly true to the Trust's language and intent.

The School Committee's willingness to drop its opposition to the sale of Little Neck is itself evidence that the Interveners' interest is sufficiently different in "degree" from that of the named parties. See Kellogg USA, Inc., 440 F.3d at 546 (citing United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 2004); Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 675 (6th Cir. 2004 ("Asymmetry in the intensity . . . of interest can prevent a named party from representing the interests of the absentee.")). Unlike the Defendants, the Interveners are committed in their opposition to the sale of Little Neck, as this motion to intervene shows.

Second, the Defendants' agreement to the settlement and sale of Little Neck is evidence of "collusion," which is one of the factors that may be considered in the inadequacy-of-representation analysis. Chelsea, 409 Mass. at 207 (applicant for intervention demonstrates inadequate representation where school board has colluded with the opposing party or has failed to fulfill its duty of representation); Kellogg USA, 440 F.3d at 546 (collusion cited as illustrative

of inadequate representation). Through the settlement, the Defendants have effectively colluded with the Feoffees and the Tenants to sell Little Neck and thus deprive the Interveners of the full and intended benefit of the Trust. In particular, the School Committee's agreement to the settlement and sale in executive session, behind closed doors, despite its requested receipt of hundreds of thousands of dollars in funding for the specific purpose of opposing the proposed sale, despite its public position for years in opposition to the proposed sale, and despite its chairman's written affirmation of this position as recently as November 2011, smacks of collusion.

4. The governmental entities do not adequately represent the Interveners' interest

While it is true that the Interveners must make a somewhat greater showing of inadequacy of representation because governmental entities are involved, this presumption is easily rebutted where the Interveners' interest diverges from that of the School Committee and Attorney General. See Maine, 262 F.3d at 17-21 (all that is required to rebut presumption that governmental entity's representation is adequate is an explanation as to why it is not). In some situations, the government's representation of the general public interest puts the government in sufficiently sharp conflict with *private* interests such that those private interests may intervene because, in fact, they are not adequately represented by the government. Moore's Federal Practice, par. 24.03[4][a] (3rd ed. 2011). Here, the interest of the beneficiaries in enforcing the Trust on the one hand, and the interest of the School Committee and Attorney General in resolving this case by allowing for the sale of Little Neck on the other hand, are in direct conflict.

D. Fourth Element: The Interveners' Ability to Protect Their Interest Will Be Impaired if They Are Not Permitted to Intervene

The impairment of the Interveners' ability to protect their interest is obvious, because there would be no party to advocate for that interest.

For example, there would be no party to advocate that reasonable deviation from the terms of the Trust is not permissible under the circumstances, because the Feoffees have failed to offer evidence of their reasonable efforts to find a way to maintain Little Neck for the benefit of the Ipswich Public Schools. See Museum of Fine Arts v. Beland, 432 Mass. 540, 544-45 (2000) (reasonable deviation denied where the record showed that the trustees had not made reasonable efforts to explore locations for exhibiting rather than selling the paintings at issue). Indeed, a sale of Little Neck seems wholly unnecessary, and the negotiation of long-term leases on Little Neck seems easily attainable, in light of the Tenants' judicial admissions in their Superior Court Complaint (paragraphs 56-57) that they are amenable to long-term, market-rate leases and are willing to pay their fair share of the wastewater system costs:

> 56. Plaintiffs have always been and remain willing to pay a fair rent for their use and occupancy of the lots on Little Neck, upon which their homes have been built.
>
> 57. Plaintiffs have also been and remain willing to pay a fair and equitable share of the reasonable and legitimate costs of the wastewater system. However, upon information and belief, the wastewater system project has been seriously mismanaged by Defendants Foley, Foote, Mulholland and Whiston and, as delivered, is plagued by deficiencies.

(Class Action Complaint and Jury Demand, Lonergan v. Foley, Essex Superior Court, Docket No. ESCV2006-02328, ¶¶ 56 & 57.)

The CBRE Report recommends how the ground leases on Little Neck could and should be structured, consistent with similar land similarly held in trust. (See, generally CBRE Report.) As Mr. Collins suggests in the CBRE Report, no tenant would have signed the kind of lease that

had been tendered by the Feoffees to the Little Neck Tenants, which unreasonably allowed for the Feoffees to determine the annual rent in their sole discretion. (Id. at 3.) The Feoffees effectively forced the Tenants to file suit. By contrast, the ground lease structure proposed in the CBRE Report places a CPI cap on rent increases not to exceed 3% per year, with the adjustment to be made every five years. (Id. at 3, 8.)

Moreover, there would be no party to advocate the Intervener's position that legislative action is required to change the terms of the Trust, because the administration of the Trust and the Feoffees' authority under the Trust are entirely governed by statute. (See Amicus Brief, pp. 6-9.) Short of a finding of unconstitutionality, this Court lacks subject matter jurisdiction to alter the statute governing the Trust.[6] (Id.)

The notion that the Massachusetts Legislature is no longer "in the business" of enacting Special Acts regarding the administration of ancient trusts is simply not true. For example, with Chapter 129 of the Acts of 2010, entitled "An Act Relative to the Punchard Free School in the Town of Andover," as approved on June 28, 2010, the Legislature amended Chapter 7 of the Acts of 1851 and Chapter 47 of the Acts of 1877 by codifying the requirements and terms of the trustees of the trust for the benefit of the Punchard School. A copy of this Act is attached hereto as Exhibit A. See also Chapter 221, Acts of 2007 (amending Chapter 254 of the Acts of 1908 to codify who can vote for and serve as trustees of a trust for the benefit of the Jacob Sears Memorial Library in East Dennis, Massachusetts); Chapter 107, Acts of 1999 (amending Chapter

[6] As the CBRE Report notes, this Court could have a role in setting the market rent for the ground leases (see CBRE Report at 7-8), which could be done on a complaint for instructions or declaratory judgment filed by the Feoffees. Entering an order of instructions or declaratory judgment as to the market rent would be within this Court's subject matter jurisdiction under G.L. c. 215, § 6, because it would be equitable relief regarding the *administration* of the Trust pursuant to the statute, rather than an amendment to the statute itself.

15 of the Acts of 1793, as amended by Chapter 107 of the Acts of 1977, to codify the procedure for removing a trustee of a trust for the benefit of Williams College).

Further bolstering this point, the District Attorney for the Essex District concluded as follows on December 11, 2006:

> . . . the General Court acted on at least three later occasions (1835, 1892, and 1906) regarding the Feoffees, presumably at the entity's request, granting authority to do things beyond the powers listed in the 1765 Act. These legislative actions demonstrate that both the Feoffees and the General Court viewed the Feoffees as an entity with limited powers, which the Legislature could expand.

(Opinion of District Attorney, Essex District, December 11, 2006, at 11) (emphasis added) (attached hereto at Exhibit B).

In short, if the motion to intervene is denied, then Little Neck will be sold for condominiums in direct violation of the terms of William Payne's will and the Trust. The impairment of the Interveners' ability to protect their interest is not speculative – it is occurring.

II. DENIAL OF INTERVENTION WOULD UNDERMINE THE COURT'S DUTY TO ENSURE PROPER ADMINISTRATION OF THE TRUST

Despite this Court's apparent lack of authority to amend the legislation governing the Trust, this Court *does* have authority, and a duty, to ensure the proper administration of the Trust according to the statute. Specifically, this Court has a duty separate and apart from the Attorney General in ensuring the proper administration of public trusts. See Matter of the Trust Under the Will of Crabtree, 440 Mass. 177, 192-93 (2003); Matter of the Trust Under the Will of Fuller, 418 Mass. 466, 483-84 (1994) ("Fuller") (judge not bound by settlement between acting trustees and Attorney General); In re Wilson, 372 Mass. 325, 330 (1977) (Attorney General's role in connection with public trusts does not "provide[] a basis for displacing the court's traditional discretion" with respect to public trusts).

The terms of the Trust do not permit the sale of the land. That the Attorney General and School Committee have agreed to such a sale does not relieve this Court of its duty to enforce the Trust. This Court has an "independent obligation" of review, see Fuller, 418 Mass. at 472, which would not be served by accepting a deal – without the benefit of hearing all of the evidence and the chance to make comprehensive findings of fact – struck by parties who would disregard the clear language of the Trust and William Payne's explicit intent. It is difficult to imagine how this Court could fulfill its independent obligation of review and reach a fully-informed decision without a completed trial and the participation of a party who is actually advocating for adherence to the Trust's terms. On this additional basis, intervention is warranted and necessary.

CONCLUSION

For the above reasons and for all of the reasons stated in the motion to intervene, and the supplements thereto, and the affidavits filed in support of the motion, the Interveners respectfully request that this Honorable Court grant the motion to intervene pursuant to Rule 24(a), and grant such other and further relief as is just and appropriate.

Respectfully submitted,

DOUGLAS J. DeANGELIS, CATHERINE T.J. HOWE, JACQUELINE PHYPERS, JONATHAN PHYPERS, PETER BULETZA, KENNETH SWENSON, ROBERT WEATHERALL, JR., JOANNE DELANEY, CARA DORAN, ANDREW BRENGLE, SUSAN BRENGLE, MICHELE WERTZ, JASON WERTZ, CLARK ZIEGLER, and CARL NYLEN; individually and on behalf of their minor children,

By their attorneys,

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Dated: January 26, 2012

CERTIFICATE OF SERVICE

I, Mark E. Swirbalus, hereby certify that I served a copy of the foregoing upon counsel of record by electronic on January 26, 2012, and by first-class mail on January 27, 2012.

Mark E. Swirbalus

NOTICE OF HEARING

A hearing on this motion is scheduled for 8:30 a.m. on Friday, January 30, 2012.

Mark E. Swirbalus

EXHIBIT A

Print

Acts

2010

CHAPTER 129 AN ACT RELATIVE TO THE PUNCHARD FREE SCHOOL IN THE TOWN OF ANDOVER.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. Chapter 7 of the acts of 1851 is hereby amended by striking out section 3, as amended by section 1 of chapter 47 of the acts of 1877, and inserting in place thereof the following section:-

Section 3. The board of trustees of the Punchard Free School shall consist of 5 trustees, who shall be residents of the town of Andover elected by the registered voters of the town for a term of 3 years. At each annual town election, the voters shall elect a trustee to take the place of a trustee whose term is about to expire.

SECTION 2. Notwithstanding chapter 7 of the acts of 1851, the trustees who are in office on the effective date of this act shall serve until the expiration of their terms. At the first election of the successors to the trustees who are in office on the effective date of this act, the town shall elect 5 trustees, 2 of whom shall serve for terms of 3 years, 2 of whom shall serve for terms of 2 years and 1 of whom shall serve for a term of 1 year.

SECTION 3. This act shall take effect upon the approval by the Essex division of the probate and family court department of the trial court of changes to the will of the late Benjamin Hanover Punchard that are consistent with the provisions of this act.

Approved, June 28, 2010.

SENATE, NO. 2321

[Senate, March 11, 2010 - New draft of Senate, No. 2152 reported from the committee on Education.]

The Commonwealth of Massachusetts

IN THE YEAR OF TWO THOUSAND AND TEN

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SECTION 1. Chapter 7 of the acts of 1851 is hereby amended by striking out section 3, as amended by section 1 of chapter 47 of the acts of 1877, and inserting in place thereof the following section:-

Section 3. The board of trustees of the Punchard Free School shall consist of 5 trustees, who shall be residents of the town of Andover elected by the registered voters of the town for a term of 3 years. At each annual town election, the voters shall elect a trustee to take the place of a trustee whose term is about to expire.

SECTION 2. Notwithstanding chapter 7 of the acts of 1851, the trustees who are in office on the effective date of this act shall serve until the expiration of their terms. At the first election of the successors to the trustees who are in office on the effective date of this act, the town shall elect 5 trustees, 2 of whom shall serve for terms of 3 years, 2 of whom shall serve for terms of 2 years and 1 of whom shall serve for a term of 1 year.

SECTION 3. This act shall take effect upon the approval by the Essex division of the probate and family court department of the trial court of changes to the will of the late Benjamin Hanover Punchard that are consistent with the provisions of this act.

EXHIBIT B

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE
DISTRICT ATTORNEY FOR THE ESSEX DISTRICT
SALEM NEWBURYPORT LAWRENCE

JONATHAN W. BLODGETT
District Attorney

Ten Federal Street
Salem, Massachusetts 01970

VOICE
FAX
TTY

December 11, 2006

(Under the policy of the District Attorney Office, the names of persons seeking opinions on Open Meeting Law matters are not released. Accordingly the interior address information has been redacted from this opinion letter.)

Re: The Feoffees of the Grammar School in the Town of Ipswich

Dear (See Above Note):

You have asked for an advisory opinion regarding the status, relative to the Open Meeting Law, of the Feoffees of the Grammar School in the Town of Ipswich. We have received an inquiry from another source as well. We are advised that the status of this entity, whose origin was in the colonial-era, has become an acute concern because, among other issues, members of the Board of Selectmen are contemplating participating in the meetings of the Feoffees.

Although phrased differently, the inquiries raise two basic questions: 1) When the three Selectmen Feoffees[1] meet with the four Lifetime Feoffees, must the Open Meeting Law be followed? and 2) Are notes and votes of past meetings of the Feoffees subject to public disclosure?

In issuing this opinion, we are doing two things, both of which have significant limitations. First, we are indirectly stating the bases on which we would either undertake or forego an enforcement action under G.L. c. 39, §23B. Second, we are stating our belief as to how a court would decide these issues. As to the first, a lawsuit by this Office is not the only way that an Open Meeting Law matter can be brought to court. Three citizens also can initiate suit. Further, the Attorney General has enforcement authority, although will generally defer to the District Attorney's judgment regarding a local matter. Second, although this Office often issues opinions like this one, the authoritative interpretation of a statute would, of course, come from a court. In an area such as the Open Meeting Law where the case law is sparse, each newly-decided case has the potential to change that interpretation. With those limitations in mind, we issue this opinion.

Your request raises a complicated set of legal issues. With regard to the Feoffees, the response turns on whether that group is a governmental body. In addition to the need to

[1] As explained in the discussion of Province Law 1755-56 at pp. 5, 9-12, we view the current body as composed of two groups, referred to in this opinion as "Lifetime Feoffees" and "Selectmen Feoffees."

determine the nature of the Feoffees, a separate Open Meeting Law issue arises with regard to three Selectmen sitting as part of the Feoffees. In essence, the issue is whether in doing so, the Selectmen Feoffees are conducting "any public business or public policy matter over which the [Board of Selectmen] has supervision, control, jurisdiction or advisory power . . . . " See G.L. c. 39, §23A.

A full explanation of the reasoning that has lead to our opinion follows. In summary, though, this Office has concluded:

1. the Feoffees of the Grammar School is a governmental body, and therefore subject to the Open Meeting Law. As with any governmental body, the minutes of meetings of the Feoffees must be kept and made public. Access to other Feoffee records is governed by G.L. c. 66, §10.

2. even though a quorum of the Selectmen is present at a meeting of the Feoffees, a meeting of the Board of Selectmen is not taking place, unless a particular topic of Feoffee business also falls within the jurisdiction of the Board of Selectmen. The fundamental business of the Feoffees -- the management of property, the profits of which go to the public schools -- is not business within the jurisdiction of the Board of Selectmen. Consequently, as the general rule, a meeting of the full group of seven Feoffees does not also constitute a meeting of the Board of Selectmen. Accordingly, the only notice required under the Open Meeting Law is of a meeting of the Feoffees; the notice should be filed with the Ipswich Town Clerk.

The fundamental challenge presented as to the Feoffees is determining the applicability of 20th Century concepts of open government to the governance arrangement of an entity that long-preceded the emergence of those concepts. It is, therefore, necessary to discuss at some length the factual background and the legal principles that lead us to our opinion, including a review of the history of the Feoffees and an analysis of some of the case law related to governmental bodies.

The historical information presented here is necessarily limited both by the lack of definitive sources and the lack of extended time needed to research exhaustively the sources that are or may be available. Our research has been limited to that which is reasonably necessary to resolve the questions raised. Doubtless there are more facts that could be (perhaps literally) unearthed that would bear on the topic. "Whether, if these facts could be ascertained, they would materially affect the rights of the parties, is very doubtful." *Feoffees of the Grammar School in the Town of Ipswich* v. *Elias Andrews*, 49 Mass 584, 591 (1844).[2]

[2] Although this case deals directly with the Feoffees, it is not helpful on the current issues, though it is useful for information on the history of the group.

History of the Feoffees

"Feoffee" is a centuries-old term, most nearly equivalent to "grantee," as that term is used in modern land transactions. A "feoffee" is one to whom a "fee" is conveyed. In the sense here relevant, a "fee" is equivalent to ownership of land. Black's Law Dictionary, 5th Edition.

Very soon after its first European settlement in 1633, the Town of Ipswich (then Agawam) addressed the need to support education. In 1636, town records state, "A Grammar School is set up, but does not succeed."[3] On **November 14, 1650** the Town granted to Robert Paine, William Paine, Major Dennison and William Bartholomew land between the Chebacco[4] River and the Gloucester line "for the use of the school." Leases of portions of that land were promptly executed. Conveyances tracing back to within months of the November, 1650 action were at issue in *Feoffees v. Andrews*. The Town addressed the management of the school in greater detail two months later. Town records show that on **January 16, 1651,**[5] at Town Meeting:

> *For the better [ordering] of the schools and the affairs thereof, Mr. Symonds, Mr. Rogers, Mr. Norton, Major Denison, Mr. Robert Paine, Mr. William Paine, Mr. Hubbard, Deacon John Whipple, Mr. Bartholomew were chosen a committee to receive all such sums of money as have been and shall be given towards the building or maintenance of a grammar school and schoolmaster, and to disburse and dispose such sums as are given to provide a school house and schoolmaster's house, either in building or purchasing [same] house with all [convenient] speed, And such sums of money, parcels of land, rents or annuities as are or shall be given towards the maintenance of a schoolmaster, they shall receive and dispose of to the schoolmaster, that they shall call or choose to that office from time to time, towards his maintenance, which they shall have power to enlarge by appointing from year to year, which each scholar shall yearly or quarterly pay or proportionably, who shall also have full power to regulate all matters concerning the school master and scholars as in their wisdom they shall think meet from time to time, who shall also consider the best way to make provision for teaching to write and cast accounts.*[6]

Demonstrating himself to be a "piously disposed person[ ]", (**Province Laws 1755-56, c. 26**, reproduced in the Appendix,) Robert Paine (also spelled Payne) promptly[7] donated a building for the Grammar School. At about the same time, he also provided a dwelling and two acres of

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[3] History of Ipswich, Essex and Hamilton, Joseph B. Felt (1834), at page 83.

[4] Spelling was highly erratic in earlier times. In general, spelling, punctuation, and capitalization have been modernized in this document, except that proper names as they appear in quoted material appear in their original form.

[5] For clarity's sake, the date has been modernized. Until 1752, New Year's Day in the British Empire was March 25. Thus, at the time of this vote, January, 1650 FOLLOWED December, 1650.

[6] Portions of the original hand-written text which are difficult to decipher are indicated in brackets.

[7] See marginal note *Feoffees* v. *Andrews*, 49 Mass 584, 587 (1844).

land for the use of the schoolmaster. In 1683, Robert and Elizabeth Paine conveyed [redacted] and land to the town.[8]

Himself also evidently "piously disposed," William Paine further enlarged the land available for support of the Grammar School in his will of **October 2, 1660**:

> *I give unto the free school of Ipswich the little neck of land at Ipswich commonly known by the name Jeffrey's neck. The which is to be and remain to the benefit of the said school forever as I have formerly intended and therefore the said land not to be sold or wasted.*

This property, gifted by William Paine, now known as Little Neck, evidently comprises the bulk of the property now under the control of the Feoffees. However, the question before this Office regards the nature of the Feoffees. That question is only tangentially related to the ownership history of a particular parcel.

Significantly, the 1660 will names both three executors and three feoffees:

> *I do hereby make my son John Paine, my son-in-law Samuel Appleton and the said Mr. Anthony Stodder my executors of this my last will and testament, and I do hereby request and empower the said Mr. Christopher Clarke, Mr. Joseph Tainter and Mr. Oliver Purches to be my overseers and feoffees in trust of this my last will and testament....*

The individuals named by Paine were not the same individuals then charged by the Town with managing the property dedicated by the Town for support of the school.

In **1661**, the "feoffees" (evidently, at least in this instance, meaning the persons acting under authority of the Town) bought a barn and orchard from Ezekiel Cheever. In **1662** the Town increased the number of "persons for ordering the school" to nine. In **1696**, the Town granted the school additional land. In **1720**, the Town sued the occupant of the "school farm," claiming the rent paid was inadequate. Two persons identified as "Feoffees," Rev. Messrs. John Rogers and Jabez Fitch, feeling the suit was unjust, refused to support it. In this context, "Feoffee" must be referring to the Town-created entity, since successors to the individuals named by William Paine would have no "standing" with regard to the "school farm," which was the land granted originally by the Town in 1650/1. In **1734**, the Town unsuccessfully sought a grant of land from the General Court for use of the school.[9]

The record of these 17th and 18th Century events may lack the clarity and specificity we now expect to see in land titles. However, "in construing conveyances made early after the settlement of the country, when conveyancing was little understood, the intention of the parties is to govern, without regarding the rigid rules of construction which would be applicable to recent conveyances . . . ." *Feoffees* v. *Andrews*, 49 Mass. at 592.

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[8] History of Ipswich, Essex and Hamilton, supra, at 84.

[9] This paragraph is drawn from History of Ipswich, Essex and Hamilton, supra, at 84-85.

There were evidently "endless disputes" between the Town and the Feoffees, r[illegible] management of land to support the school. To avoid the repetition of such disputes, the Town and "the present surviving feoffees on the part of the private persons" turned to the General Court. On **January 12, 1756**, the Town Meeting, with the consent of the Feoffees, asked the General Court "to authorize and empower the present four Feoffees and such successors as they shall time to time appoint in their stead, together with the three eldest Selectmen of this town for the time being, other then such Selectman or men as may at any time be of the four Feoffees, to be a Committee in Trust...." (The entire recorded motion is reproduced in the Appendix.) In response, the General Court and Royal Governor adopted **Province Laws 1755-56, c. 26** (reproduced in the Appendix). The critical language states that the four surviving Feoffees together with three named Selectmen "shall be and are hereby incorporated a joint committee or feoffees in trust...." The duration of the 1756 Act was limited, as requested in the Town Meeting vote, to ten years. The 1756 Act evidently worked to resolve the problems that had prompted its passage, because at the expiration of the initial ten years, the Act was renewed, with minor changes, for an additional twenty-one years, by **Province Laws, 1765-66, c. 5**, (reproduced in the Appendix). Finally, **St. 1786, c. 54** (reproduced in the Appendix) made the 1765 Act perpetual.

By its terms, the 1765 Act incorporates a single entity of seven members, "a joint committee," divided into two classes: four "Lifetime Feoffees" and three "eldest"[10] Selectmen, the "Selectmen Feoffees." The power to select successor Lifetime Feoffees is limited to survivors within that class. Succession within the Selectmen Feoffees flows from the electorate's periodic selection of Selectmen.

Subsequent acts of the General Court have authorized specific actions by the Feoffees, but nothing has changed their fundamental structure since the 1765 Act. See St. 1835, c. 106; St. 1892, c. 66; and St. 1906, c. 506.

Under the 1765 Act, the Feoffees were given two principal duties: (1) manage the land, the income from which is to support the school and (2) manage the school itself.

Legal Framework

The Open Meeting Law, G.L. c. 39, § 23A *et seq.*,[11] consists of a single definitions section followed by a single section of substantive provisions. The law requires that a governmental body do its business only at posted meetings, of which the public has had forty-eight hours notice. Those meetings must be open to the public, unless a stated exception applies and certain procedural requirements are met. Generally, Open Meeting Law cases involve a few basic questions: Is the entity a governmental body?; Did it have a meeting?; Was there proper

[10] We express no view as to whether "eldest" refers to time of service or chronological age, because no Open Meeting Law issue turns on that determination. We note, however, that the closing language of c. 5, § 2 implies that length of service as Selectmen is meant, since that language provides for a situation of an entire Board of Selectmen with no prior service.

[11] The separate Open Meeting Law, applicable to certain state entities and found at G.L. c. 30A, §11A *et seq.*, is discussed below.

notice? If a closed session occurred, was there an applicable exception, and were the [redacted] requirements met?

With regard to the Feoffees of the Grammar School, we are presented with the first question: Is it a governmental body? If not, then the Open Meeting Law does not apply.[12]

Case law construing the Open Meeting Law is not extensive, especially as to what is a "governmental body," perhaps because most entities at issue (school committees, City Councils and the like) are clearly such. Most instructive in the current situation is *District Attorney for the Northern District* v. *Board of Trustees of Leonard Morse Hospital*, 389 Mass 729 (1983.) There, the Supreme Judicial Court ruled on the status of the Board of Trustees of a hospital created by a will bequest that had been accepted by the Town of Natick. Under the terms of the bequest, the voters of Natick selected the Board members. By c. 216 of the Special Acts of 1916, the General Court incorporated the trustees "with all the powers and privileges and subject to all the duties, restrictions, and liabilities then or thereafter in force relating to charitable, religious, and educational corporations." *Leonard Morse*, 398 Mass. at 731. Over the years, the value of the original bequest has been dwarfed by the public funds appropriated. Further, public credit had been used to finance great expansion, far beyond the facility funded by the original bequest. Nonetheless, the Supreme Judicial Court concluded that the Board of Trustees was not a governmental body, principally because its origin was by private action. The Court also pointed out that the Trustees lacked traditional governmental powers like taxation, law enforcement and eminent domain.

The case of *Aaron Medlock* v. *Board of Trustees of the University of Massachusetts*, 31 Mass. App. 495 (1991), is also instructive. The issue was whether the Open Meeting Law applied to the activities of animal care and use committees created to comply with federal requirements. The Appeals Court, noting that the University Trustees had created the committees, simply assumed that they were governmental bodies. The Court read the statute to mean that a "meeting" occurred only if "public business" was done, reasoning that "public business" could only be an activity that fulfilled a "public purpose." The leading Massachusetts on "public purpose" is *Allydonn Realty Corporation* v. *Holyoke Housing Authority*, 304 Mass. 288 (1939) which provides a non-exclusive list of relevant factors in determining whether an entity is fulfilling a public purpose: To whom is the benefit available?; Is there a wide-spread need for the benefit?; Is there a direct bearing on public welfare?; Have private efforts failed?; Is there a need for a united control of a united effort?; Is eminent domain power conferred?; and Is the entity consistent with the historical development of the functioning of public government? By applying these factors, the Appeals Court in *Medlock* concluded that, though the animal care and use committees might be "governmental bodies," they did not gather for any "public purpose," and therefore had no "meetings." As such, the Open Meeting Law did not apply to the committees' activities.

[12] The separate question of whether a SELECTMEN'S meeting might be also occurring is discussed below.

Analysis

This brings us to the basic question: Are the Feoffees of the Grammar School a "governmental body"?

The question first arises whether the status of the Feoffees should be analyzed under the "municipal" Open Meeting Law, G.L. c. 39, §23A *et seq.* or the "state" Open Meeting Law, G.L. 30A, §11A *et seq.* We have concluded that the Feoffees as now constituted -- four Lifetime Feoffees and three Selectmen Feoffees -- are a creation of the state (or rather provincial) government. That does not, however, decide the question of which version of the Open Meeting Law should control.[13] The concerns addressed by the 1765 Act are limited to the Town of Ipswich, the membership on the Feoffees is limited to Ipswich residents, and the benefits (additional funding to the Ipswich Public Schools) are limited to that Town. Further, there is no involvement of any person or place outside the Town of Ipswich.[14] We conclude that it is the "municipal" version of the Open Meeting Law that should be used to determine whether the Feoffees are a governmental body.

Further, under both the "state" and "municipal" versions of the Open Meeting Law, the analysis of governmental body is essentially the same. Though the precise language in the two versions may differ, "[t]hey are framed in common, almost identical, language, and they have the same purpose: 'to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.' *Loren F. Ghiglione* v. *School Committee of Southbridge*, 376 Mass 70, 72 (1978).'" *Medlock*, 31 Mass. App. Ct. at 499. Further, although the "public purpose" language explicit in §11A does not appear in §23A, the Appeals Court in *Medlock* expressly noted that the *Allydonn* factors "are also consistent with the factors to be considered in deciding whether an entity is a governmental body." *Id.* at 501, n 6.

In answering whether the Board of Trustees in *Leonard Morse* was a governmental body, the Supreme Judicial Court looked to the origin of body, discounting the operational facts of extensive public involvement. "The hospital is a charitable institution established under the will of Mary Ann Morse." *Leonard Morse*, 398 Mass. at 732. "[T]he only reason that the trustees are

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[13] Creation by the General Court does not necessarily make an entity subject to the "state" version of the Open Meeting Law. Obviously every school committee, for example, functions under state mandate, see generally G.L. c. 71, yet their actions are judged under the "municipal" version of the law. See also *Gerstein* v. *Superintendent Search Screening Committee*, 405 Mass. 465 (1989); *Connelly* v. *School Committee of Hanover*, 409 Mass. 232 (1991). Further, a local rent control board, existing under St. 1970, c. 842 has been held not to be a state "agency." *Anthony Gentile* v. *Rent Control Board of Somerville*, 365 Mass. 343, 349 n.6 (1974). Conversely, the Boston Housing Authority, existing under G.L. c. 121, § 3, was held to be subject to the audit of the Finance Commission of Boston. *Finance Commission of Boston* v. *John McGrath*, 343 Mass. 754, 763 (1962) ("Such an authority, or any similar authority for other purposes, is a public body, analogous in various respects . . . to a municipal corporation." citations omitted).

[14] This was not always so. In 1819, the area known as Chebacco, including the land contained in the Town's original 1650 grant in support of the school, was separated from the Town of Ipswich and created as the Town of Essex. Until given permission by the General Court to sell the land in Essex, see St. 1906, c. 506, the Feoffees continued to own property in that town.

[elected directly by the voters] is because the will of Mary Ann Morse, a private individual, so provided." *Id.* at 733. Applying that principle to this case, we must look to the origin of the Feoffees to determine the nature of the entity.

There are **three plausible characterizations** of the origin of the Feoffees as the entity now functions: it was created by the Town of Ipswich in 1650/1, or by private donors of land, or by the General Court in 1756 or 1765.

Created by the Town?

Town records demonstrate that it created a collective entity in 1650/1. With property under its management and with control of the grammar school itself, this can be fairly characterized as an endowed school committee. Is this a "public purpose?" If that collective entity fulfilled a public purpose when created, and if it still exists, it would, we believe, be a "governmental body" under the Open Meeting Law.

From the earliest days of the Massachusetts Bay colony, communities were encouraged, if not required, to have a public school. In 1650, when the Town arguably created the Feoffees, the operative law was the so-called Old Deluder Satan Law of 1647:

> *It being one chief point of that old deluder, Satan, to keep men from the knowledge of Scriptures, as in former times, by keeping them in an unknown tongue, so in these latter times, by persuading them from the use of tongues, that so at last the true sense and meaning of the original might be clouded by false glosses of saint-seeming deceivers, that learning might not be buried in the graves of our fathers, in church and commonwealth, the Lord assisting our endeavors . . . It is therefore ordered . . . [that] after the Lord hath increased [the settlement] to the number of fifty householders, [they] shall forthwith appoint one within their town, to teach all such children as shall resort to him, to write and read . . . and it is further ordered, That where any town shall increase to the number of one hundred families or householders, they shall set up a grammar school for the university.*[15]

The town school committee -- the modern analog of the collective entity created by the Town in 1650/1 -- is clearly a governmental body. In our view, when a town creates a collective body to fulfill a statutorily-required obligation, it has created a governmental body. Therefore, if the Feoffees of the Grammar School that functions today is the descendent of the entity created in 1650/1, we have no doubt that it is a governmental body.

Created by Private Action?

The suggestion has been advanced that the Feoffees were created by the private action of donors to the school. The only specific donors our research identified are the Paines, William, Robert, and Robert's wife, Elizabeth. Robert Paine was among those charged by the Town in

[15] In 1646 Ipswich had 146 households; in 1677 it had around 250 households, History of Ipswich, Essex and Hamilton, Joseph B. Felt (1834). The "university" was what is now Harvard College.

1650 with managing the granted land and the grammar school itself. When he and [redacted] their donations to the Town, therefore, he, and, presumably his wife, knew that the [redacted] mechanism in place to receive exactly the kind of donations that they were making.

The gift of *"the little neck of land at Ipswich commonly known by the name Jeffrey's neck"* in William Paine's 1660 will is different in several ways from the gifts by Robert and Elizabeth Paine. First, the bequest is made *"unto the free school of Ipswich,"* not directly to the Town itself. More important, William explicitly names *"feoffees in trust,"* although the will does not tell us what duties those feoffees were to perform. Further evidence that there was a privately-created entity, separate from the Town-created group, exists in the language of the Town Meeting vote of January 12, 1755, and of the preambles to the 1756 Act and the 1765 Act. (These documents are reproduced in the Appendix.) Collectively those documents indicate that private persons, in granting land for use of the school, had provided for succession in those charged with the management of that land. Those documents cite the failure of the Town in 1650/1 to provide for succession as a source of "endless disputes" between the Feoffees, as then existing, and the Town.

As mentioned, in William Paine's 1660 will three "Overseers and Feoffees in trust" were named,[16] but the will contained no language of succession. Further, no mechanism has been identified by which the three feoffees named by William Paine in 1660 could have become "the present four Feoffees," referred to in the Town Meeting vote of January 12, 1756.

However, on the strength of the legislative preambles, we must assume that "the present four Feoffees," referred to in the Town Meeting vote of January 12, 1756 requesting legislative action, are the successors to the Paine feoffees or those of unidentified private donors. If the Feoffees of the Grammar School that functions today is the descendent of the "feoffees in trust" created by William Paine or other unknown donors, they would be analogous to the Board of Trustees in *Leonard Morse,* and NOT a governmental body.[17]

Created by the General Court?

Next, we examine the implications of the Acts of 1756 and 1765. The 1756 Act expired of its own terms, and was replaced by the nearly identical 1765 Act, which subsequently become "perpetual." Therefore, it is the 1765 Act that we examine.

One could conclude that the 1755 request of the "the present four Feoffees" and the Town was in the nature of a petition for reformation of the trust, of the kind that today would be

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[16] The 1683 gift by Robert and Elizabeth Paine is to the Town itself, not to any group. That the land given by Robert Paine evidently passed under the control of the Feoffees was presumably by operation of the Town Meeting action that had authorized that group to handle "such sums of money, parcels of land, rents or annuities as are or shall be given towards the maintenance of a schoolmaster . . . . "

[17] Our research has not indicated what became of the group indisputably created by the Town In 1650/1. We note that in 1720 individuals other than those named to manage the school's land in 1650/1 are referred to as "Feoffees" and are involved in the Town's activities, not the activities of any private party. Clearly, notwithstanding the doubts about succession expressed some thirty years later, the Town-created Feoffees had, in fact, dealt with succession at least up to 1720.

directed to the Probate and Family Court.[18] The question arises whether in 1755 or [redacted] the Provincial Government had the power to extinguish or reform what we would today [redacted] call a testamentary trust.

At that time, the Province of Massachusetts Bay functioned under the so-called William and Mary Charter of 1691. The authority of the Provincial Government was derived from the power of the British sovereign, and the provisions of British law. As to testamentary matters, Blackstone writes:

> *Wills therefore, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them . . . how futile every claim must be that has not its foundation in the positive rules of the state.* Blackstone's Commentaries, Book Two, Chapter One.

Under the 1691 Charter, legislative power was bestowed to the Governor and General Court:[19]

> *To make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without (so as the same be not repugnant or contrary to the laws of this our realm of England) . . . .*

Additional specific power with regard to estates was granted by the 1691 Charter to the Royal Governor, comparable to the power of the sovereign in Britain:

> *We do . . . grant, establish and ordain that the Governor of our said Province ...with the Council . . . may do, execute or perform all that is necessary for the probate of wills and granting of administrations, for touching or concerning any interest or estate which any person or persons shall have within our said Province . . . .*

In *Drury v. Natick & another*, 92 Mass 169, (1865), a case regarding a testamentary trust that created a public library, the Supreme Judicial Court discussed the powers of the Provincial General Court:

> *Under the Province Charter the king disallowed all acts continuing in force colonial laws or establishing courts of chancery; the general court seem to have acted in the matter of charities by resolves or grants of incorporation.* *Drury*, 92 Mass. at 180-181.[20]

Lacking a Probate Court [redacted] an available mechanism to address the disputes that had arisen, the Town and People asked the General Court for help. Between the broad grant of legislative authority and the broad grant of specific power with regard to estates, it is clear that the Governor and Provincial General Court could reform a trust or even abrogate a will.

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[18] The ancestor of the Probate and Family Court Department was established by St. 1783, c. 46.

[19] Spelling, capitalization and punctuation are all modernized in quotations from the 1691 Charter.

[20] The Chancery Court had equitable rather than common law jurisdiction. Equity jurisdiction extended to wills and estates. Black's Law Dictionary, 5th Edition.

The response of the General Court, with the assent of the Royal Governor, to [redacted] for help from the Town and the Feoffees, can be viewed as a reformation that superseded whatever it was that William Paine or other unidentified donors had done. Indeed, even [redacted] creation of the Probate Court, the General Court made the seven Feoffee governance structure [redacted] perpetual and thrice granted specific additional power to the group.

We therefore conclude that whatever the actions of William Paine and any other private donors may have been, they are irrelevant to the determination of the nature of the Feoffees. Given that "the present surviving feoffees on the part of the private persons," referred to in the Town Meeting vote of January 12, 1756 requesting legislative action, are apparently the successors of the entity created by private donors, we must note that they joined in the request for that action. If a privately-created entity was extinguished or reformed by the General Court and Royal Governor, it was at its own request.

In 1765, when the Provincial General Court acted, the town was required (by Province Law 1692-93, c. 26, §5) to have a grammar school, just as it had been in 1650. Thus, whether the relevant time is taken as 1650/1 or 1765, the statutory requirement was the same (though the Puritan rhetoric was discarded): every community with more than one hundred households was required to have a grammar school or face a fine. While the exact size of Ipswich in 1765 could not be quickly determined, the 1790 Census shows 601 households.[21]

As noted, the General Court acted on at least three later occasions (1835, 1892, and 1906) regarding the Feoffees, presumably at the entity's request, granting authority to do things beyond the powers listed in the 1765 Act. These legislative actions demonstrate that both the Feoffees and the General Court viewed the Feoffees as an entity with limited powers, which the Legislature could expand.

If the town action of 1650 /1 is the origin of the Feoffees, then we have a town creating a collective entity to fulfill a statutorily-required function. If, as we think is sounder, the 1765 Act is the origin of the Feoffees, then we have the Provincial government, at the request of the Town and the surviving Feoffees, incorporating a collective entity to fulfill a statutorily-required function.

Considering the 1765 Act, with the *Allydonn* factors in mind, we see that the benefit -- the availability of a grammar school -- has wide-spread application, and directly benefits the public. The General Court passed the predecessor of the 1765 Act in response to a request from the Town and the surviving Feoffees. Thus, the 1765 Act has its roots in the failure of other governance arrangements. The confusion that led to the 1756 request amply demonstrated the need for unified control of a unified effort. Finally, as with the Town's own earlier action, the 1765 Act was passed at a time when the Town was obliged to have a grammar school. It is true

[21] US Census Department. The known population data-points allow a reasonable projection of the 1765 figure. The household figures for Ipswich for 1800 and 1810 could not be determined, but projecting the state-wide growth figures for the twenty years 1790-1810 backward to 1765 from 1790 yields a number of about 480 households, which is consistent with its known size of 250 households in 1677.

that the Feoffees have no eminent domain power, but under *Allydonn*, no single [redacted] decisive. We conclude that the 1765 Act was directed at fulfilling a public purpose.

A final issue regarding the Feoffees status as a governmental body needs to be [redacted]. The suggestion has been made that the advent of the modern school committee, by depriving the Feoffees of control of the grammar school, effectively precludes the Feoffees from being a governmental body. The Feoffees' power over the Grammar School was lost to the modern school committee at least by 1860.[22] However, the power to manage property for the benefit of the public schools is not a power given to school committees in general. As such, the Feoffees retained that power, and exercise it to this day. We also note that, even after the creation of modern school committees, the General Court has twice given the Feoffees power to sell specific parcels. Had the General Court, by creating an Ipswich School Committee, rendered the Feoffees superfluous, it would hardly have given it additional power.

Conclusion Regarding the Feoffees

We conclude that whether the origin of the Feoffees is the Town's 17th century actions or the 1765 Act of the Provincial Government, the entity is a publicly-created collective body fulfilling a public purpose, unlike the hospital in *Leonard Morse*. Further, while c. 216 of the Special Acts of 1916 gave the pre-existing Leonard Morse Hospital Board of Trustees a new label, that act changed nothing about the composition or mode of selection of the Board. Province Laws 1755-56, c. 26, on the other hand, completely remade the composition of the Feoffees, by adding Selectman. At its birth, therefore, the Feoffees constituted a group that would later come under the description of "governmental body." Even if one or more private donations had created a parallel group, that group was superseded by the Province, and later, the Commonwealth.

Selectmen as Feoffees

A question has also been raised regarding the significance under the Open Meeting Law of the actions of the three "eldest" members of the Board of Selectmen as Feoffees.[23] We are advised that the Board of Selectmen in Ipswich has five members. Therefore any three Selectmen would constitute a quorum of that Board. If all three Selectmen Feoffees attend a meeting of the Feoffees, then a quorum of the Board of Selectmen will be present at that meeting. Would such an occurrence amount to a "meeting" of the Board of Selectmen for which a notice must be posted?

G.L. c. 39, §23A defines a "Meeting" as

> any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter

[22] G.S. 1860, c. 38, §16 provides, in relevant part: "Every town shall at the annual meeting choose, by written ballots, a board of school committee, which shall have the general charge and superintendence of all public schools in town."

[23] We are advised that one current Lifetime Feoffee is also a current Selectman.

over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

Under the circumstances described above, a "corporal convening" will have occurred. It would not be a "chance meeting[] or social meeting" -- declared by the statute not to be an Open Meeting Law violation -- since, in fact, the presence of the Selectmen Feoffees will have been planned. The issue becomes whether the Feoffees discuss or consider "any public business or public policy matter over which the [Board of Selectmen] has supervision, control, jurisdiction or advisory power . . . ."

With the creation of the Ipswich School Committee, the Feoffee's mandate was limited to managing property, with the profits benefiting the public schools. We must, therefore, examine the role of the Board of Selectmen, relative to the funding of those schools. We are advised that the school budgeting process in Ipswich works essentially as follows: the School Committee formulates an operating budget, based on apparently available property tax and other revenue, likely operational needs, and the requirements of state statute; that Committee's recommendation/request is forwarded to the Town Finance Committee, which attempts to integrate the recommendation/request with other demands on available revenue; the Finance Committee then forwards its total budget, including the School Department's line-item, to the Town Meeting, which is the final actor in the process. Noticeably absent is a formal role for the Board of Selectmen. It is possible or even likely that Selectmen, as a Board or as individuals, express their views during the process, but the school budget is not, in any meaningful sense, within their "supervision, control, jurisdiction or advisory power."

Finally, several additional arguments warrant a response. Just because the Board of Selectmen is a governmental body, a notice of a meeting need not be posted whenever a majority of Selectmen gather because a meeting of the body under the Open Meeting Law occurs only when the public business of the body is being done. See *Medlock*, 31 Mass. App. Ct. at 502. Further, just because the tenants of the Feoffees are taxpayers, the business of the Feoffees need not be done in public. If business regarding taxpayers always had to be done in public, then every condominium association board would be a governmental body. Finally, the argument that the voters of Ipswich choose the Selectmen, and thus the actions of a majority of Selectmen must always be public, was rejected in *Leonard Morse* where the voters selected the Trustees.

Because the Feoffees are not generally doing business that is also "public business" of the Board of Selectmen, even if all the Selectmen Feoffees and the Lifetime Feoffee who is a Selectman are present, no "meeting" of the Board of Selectmen is occurring, as a general rule. It is possible that certain business before the Feoffees may also fall within the "supervision, control, jurisdiction or advisory power" of the Board of Selectmen. This Office knows too little of the substantive agenda of the Feoffees to predict the circumstances in which this possibility might actually arise. Even if there is no obligation to post a meeting of the Board of Selectmen when they act as Feoffees, the Open Meeting Law does not prohibit a discretionary posting of notice.

Responses to Specific Inquiries

When the three Selectmen Feoffees meet with the four Lifetime Feoffees, must the Open Meeting Law be followed?

Yes, because the Feoffees are a governmental body

Are notes and votes of past meetings of the Feoffees subject to public disclosure?

Yes, at least to some extent. G.L. c. 39, §23B requires a governmental body to keep minutes. Minutes are subject to public disclosure, whatever their age. Access to public records generally is governed by G.L. c. 66, §10. Questions with regard to public records access should be directed to the Supervisor of Public Records in the Office of the Secretary of the Commonwealth.

We hope this response has addressed the inquiries made. Please feel free to contact this Office in this or any other regard within our jurisdiction.

Very truly yours,

Charles F. Grimes
Assistant District Attorney

Appendix

Ipswich Town Meeting on January 12, 1756

Whereas, the Town in granting the school farm at Chebaco did not give those persons to whose trust they committed the improvement of said farm a power to appoint successors as the private persons who granted lands in the Town for the same use did, as appears by examining the respective grants, by which means, those grants being differently constituted and the persons entrusted by the Town as aforesaid being long since dead, endless disputes may arise between the Town and Feoffees about the school (to the support of which the whole income if needed is to be applied) unless relief be had from the General Court, and in as much as the present Feoffees have manifested their agreement thereto,

Voted, that a joint application be made to the Great and General Court to obtain an Act, if they see meet, fully to authorize and empower the present four Feoffees and such successors as they shall time to time appoint in their stead, together with the three eldest Selectmen of this town for the time being, other then such Selectman or men as may at any time be of the four Feoffees, to be a Committee in Trust, the major part of whom to order the affairs of the school land, appoint the schoolmaster from time to time, demand receive and apply the income agreeably to the intension of the donor. No Feoffee hereafter to be appointed by the present Feoffees or by their successors other than an inhabitant of this Town, and not to act after he remove his dwelling out of it, and to have no more than four at one time, And least any unforeseen inconvenience may happen in this method, it is agreed that the Act be only for ten years at first.

Province Laws 1755-56, c. 26:

Whereas divers piously disposed persons in the first settlement of the town of Ipswich, within the county of Essex, granted and conveyed to feoffees in trust, and to such their successors in the same trust as those feoffees should appoint to hold perpetual succession, certain lands, tenements and annuities by them mentioned, for the sue of school-learning in said town forever; of which feoffees the honorable Thomas Berry, Esq., Daniel Appleton and Samuel Rogers, Esqrs., with Mr. Benjamin Crocker, are the only survivors; *and whereas* the town of Ipswich did also, in their laudable concern for promoting learning, about the same time, and for the same use, give and grant to certain persons in said grant mentioned, and to such others as the said town should appoint, a large farm, then called a neck of land, situate in Chebacco, in the same town, with some of the lands adjoining; all which farm and lands were soon after leased out for the space of one thousand years, the rents to be applied to the uses of learning in said town as aforesaid; but, as is apprehended by some, no power was given by the said town to their trustees to appoint successors in that trust for receiving and applying the rents, or of ordering and directing the affairs of the school in said town, as in the first-mentioned case is provided; from which difference in the original constitution of those grants, which were all designed for one and the same use, considerable disputes have already arisen between the said town and the feoffees; and not only so, but some doubts are started whether it is in

the power of said town or feoffees to compel payment of the rents of the [redacted] adjoining land before mentioned; *and inasmuch* as the said town of Ipswich, [redacted] of the twenty-second day of January, one thousand seven hundred and fifty-[redacted] with the consent of the aforementioned feoffees, have agreed to apply to this court for [redacted] in the manner in said vote mentioned; wherefore,

(Section 1) That from and after the first day of March next, for and during the space of ten years, the aforementioned Thomas Berry, Daniel Appleton and Samuel Rogers, Esqrs., with Mr. Benjamin Crocker, the present surviving feoffees on the part of the private persons granting lands as afores(ai)d, together with Francis Choate Esq., Capt. Nathaniel Treadwell and Mr. John Patch, Junr., three of the present selectmen of said town, shall be and are hereby incorporated a joint committee or feoffees in trust, with full power and authority by a majority of them to grant necessary leases of any said land not prejudicial to any lease already made, and not exceeding the term of ten years, to demand and receive the said rents and annuities; and if need be, to sue for and recover the same; to appoint grammar-school masters from year to year and time to time, and agree for his salary; to apply the rents and annuities for the paym(en)t of his salary and other necessary charges arising by said school; to appoint a clerk and treasurer, and if found necessary, to impose some moderate sum and sums of money to be paid by such scholars as may attend said school, for making up and supplying any deficiency that may happen in the yearly income and annuities of said lands; for defr(a)ying the necessary charges that may arise by said school, and enforce the payment; to inspect said school and schoolmaster, and in general to transact and order all matters and things relative to such school, so as may best answer the original intent and design thereof.

(Section 2) And the said committee or feoffees and their successors shall, at the anniversary meeting of said town in March, yearly, during the continuance of this act, lay before said town a fair account of their proceedings relating to said school for the year then last past.

And for the continuance of the succession of the before-named committee or feoffees, Be it enacted

(Section 3) That if either the said Thomas Berry, Daniel Appleton, Samuel Rogers or Benjamin Crocker, shall decease, or remove out of said town of Ipswich, or otherwise become uncapable (sic) or unfit to discharge said trust, it shall and may be lawful for the surviving and qualified remainder of those four gentlemen to appoint some other suitable person or persons in his or their room so deceasing, removing or otherwise unqualified, according to the original intention of their first appointm(en)t, so as to keep up the same number of four feoffees thus constituted, and no more; and no person to be appointed a feoffee but an inhabitant of the town of Ipswich; and the aforementioned selectmen shall, from year to year, be succeeded by the three oldest in that office of the selectmen of said town for the time being, other than such of them as may be also one of the aforesaid four feoffees; and in case it should at any time happen that there is not three selectmen chosen by said town that may have served the town before in that office, the deficiency shall be supplied (sic) by those first named in the choice of the town.

And for rend(e)ring the whole effectual,

(Section 4) That the afores(ai)d committee or feoffees in trust may, in all matters relative to s(ai)d grammar school, in which they may by force of this act be concerned, sue or be sued by the name or character of the feoffees of the grammar school of the town of

Ipswich, in the county of Essex; and in this power their successors shall be [redacted] respect to the transactions of those that may have preceeded (sic) them in [redacted] (Section 5) This act to continue and be in force for the space of ten years, [redacted]

Province Law, 1765-66, c. 5

Whereas divers piously disposed persons in the first settlement of the town of Ipswich, within the county of Essex, granted and conveyed to feoffees in trust, and to such their successors in the same trust as those feoffees should appoint to hold perpetual succession, certain lands, tenements and annuities by them mentioned, for the sue of school-learning in said town forever; of which feoffees John Choate, Samuel Rogers, Aaron Porter and Francis Choate, Esqrs, are the only survivors; *and whereas* the town of Ipswich did also, in their laudable concern for promoting learning, about the same time, and for the same use, give and grant to certain persons in said grant mentioned, and to such others as the said town should appoint, a large farm, then called a neck of land, situate in Chebacco, (sic) in the same town, with some of the lands adjoining; all which farm and lands were soon after leased out for the space of one thousand years, the rents to be applied to the uses of learning in said town as aforesaid; but, as is apprehended, no power was given by the said town to their trustees to appoint successors in that trust for receiving and applying the rents, or of ordering and directing the affairs of the school in said town, as in the first-mentioned case is provided; from which difference in the original constitution of those grants, which were all designed for one and the same use, disputes have heretofore arisen between the said town and the feoffees; and also, but some doubts have arisen whether, by the constitution of those grants as aforesaid, it is in the power of said town or feoffees to compel payment of the rents of the farm and other lands granted by the town as before mentioned; *and whereas* for the removal of the aforesaid difficulties, on the joint application of both said town and the then feoffees, this court did, in the twenty-ninth year of his late majesty King George the Second, by one act then passed, initialed "An Act for regulating the grammar school in Ipswich, and for incorporating certain persons to manage and direct the same," empower the then surviving feoffees, with their successors, together with part of the selectmen of said town, for the time being, as an incorporate body, to manage and direct the affairs of said school for ten years then next coming, in manner as in said act is expressed, which ten years will expire on the first day of March next; *and whereas* it has been found by experience that the said act has been of great advantage to the interest of learning in said town, and all doubts and disputes aforementioned, from the passing of said act, have ceased, and the parties concerned have desired the continuance of the act of this court touching the premises, wherefore (Section 1) That from and after the first day of March next, for and during the space of ten years, the aforenamed John Choate, Samuel Rogers, Aaron Porter and Francis Choate, Esqrs,, the present surviving feoffees on the part of the private persons granting lands as aforesaid, together with Michael Farlow, Samuel Burnham and Samuel Lord the third, three of the present selectmen of the town of Ipswich, shall be and they are hereby incorporated a joint committee or feoffees in trust, with full power and authority by the whole, or the major part of them to pass necessary leases of any said land not prejudicial to any lease already made, and not exceeding the term of twenty-one years, also to demand and receive the said rents and annuities; on such other grants or leases relative to said school, that now is or that hereafter may be, and if need be, to sue for and recover the

same, either by themselves or by their attorney; to appoint a clerk and treasurer, [redacted] grammar-school master from year to year and time to time, and agree with [redacted] for his and their salaries; to apply the said rents, grants and annuities for the payment of his and their salaries and for the discharge of other necessary expenses attending this affair, so far as those rents, grants, and annuities will go, ; with a like power from time to time,; to inspect said school and master, and in general to transact and order all matters and things relative to such school, and to all lands, grants annuities that do now, or that may hereafter, belong to said school, arising from the donations aforesaid, so as best to answer the general design and intent thereof, annually laying an account of their proceedings in this trust before the said town, at their March meeting, for their inspection.

And for the continuance of the succession of the before-named committee or feoffees, Be it enacted

(Section 2) That if either the said John Choate, Samuel Rogers, Aaron Porter or Francis Choate, shall decease, or remove out of said town of Ipswich, or otherwise become or unfit to discharge said trust, or unreasonably neglect to do it, it shall and may be lawful for the surviving and qualified remainder of those four persons, from time to time, to appoint some other suitable person or persons in his or their room so deceasing, removing or otherwise unqualified, or neglecting his or their duty as aforesaid, which power of appointment shall descend to those so appointed,so as always to have four of said feoffees constituted in this way, and no more; and no person at any time to be appointed that is not an inhabitant of the said town; and the selectmen aforesaid, by this act incorporated as aforesaid, shall, from year to year, be succeeded by the three oldest in that office of the selectmen of said town for the time being, other than such of them as be also one of the feoffees constituted as aforesaid; and in case it should at any time happen that there is not three selectmen chosen by said town that may have served the town in that office before, then those first named in such choice shall succeed as aforesaid.

And for rendering the whole effectual,

(Section 3) That the aforesaid committee or feoffees in trust may, in all matters relative to said grammar school, in which they may by force of this act be concerned, sue or be sued by the name or the Feoffees of the Grammar School of the town of Ipswich, in the county of Essex; and in this power their successors shall be included with respect to the transactions of those that may have preceeded (sic) them in said office.

(Section 4) This act to continue and be in force for the space of twenty-one years from the first day of March next, and no longer.

St. 1786, c. 54

Whereas *(illegible)*

Was enacted in the year one thousand seven hundred and sixty five, to be in force for a term of twenty one years, from the first of March, One thousand seven hundred and sixty five, which Law has been found beneficial and to answer the purposes for which it was enacted;

Be it therefore Enacted by the Senate, and House of Representatives, in General Court assembled by the authority of the same, That the said Law entitled "An Act for regulating the grammar School in Ipswich, in the county of Essex, and for incorporating certain persons to manage and direct the same," Be and hereby is made perpetual.