COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. PROBATE & FAMILY COURT
NO. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR, et al.,

Plaintiffs,

v.

ATTORNEY GENERAL of the Commonwealth of Massachusetts, et al.;

Defendants

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Ipswich School Committee and Superintendent Richard Korb (collectively "School Committee") respectfully submit this Memorandum in Opposition to the Plaintiffs' Motion for Partial Summary Judgment.

INTRODUCTION

Four private citizens, together with the three most senior selectmen of the Town of Ipswich serve as trustees – "Feoffees" – of the property in Ipswich known as Little Neck. The Trust requires that the Feoffees lease or rent the real estate and pay the net income of the trust to the School Committee. In the words of the bequest, the property is "not to be sold or wasted."

For many decades, the private citizen Feoffees acted as a four person committee without any involvement on the part of the selectmen Feoffees. They permitted the construction of 167 cottages on the property but charged the cottage-owners only nominal rents. Under pressure

from the Town, the Feoffees eventually agreed to increase average rents to fair market values, and to require the cottage-owners to pay for other costs, including the costs associated with a wastewater facility constructed for the disposal of Little Neck wastewater. But only thirty-three cottage-owners agreed to sign leases that required them to pay fair market rentals.

The private citizen Feoffees then sought to evict the tenants who did not sign leases. The tenants in turn filed a Superior Court purported class-action lawsuit to stop the eviction, obtain a determination of their rights, and recover damages from the private citizen Feoffees. The tenants did not seek damages from the selectmen Feoffees.

The Little Neck trust specifically prohibits the waste or sale of the property. After years of the collection of below-market rents, the Feoffees now seek this Court's permission to settle the Superior Court litigation against them by deviating from the no-sale prohibition in the Trust and selling Little Neck to the cottage-owners for a net price that is substantially less than fair market value. As part of the terms of the sale, the Feoffees propose to rebate more than eight hundred thousand dollars in previously collected rent and wastewater charges, to forgive several million dollars owed for use and occupancy of the real estate at fair market rates over the past three to four years, and to pay hundreds of thousands of dollars – or more – in condominium conversion expenses solely for the post-sale benefit of the cottage-owners. If the proposed sale is consummated, there will be, in perpetuity, far lower amounts available to the Ipswich Schools than it would realize in a rental scenario once the Feoffees-tenant dispute is resolved.

Now before the Court is the Feoffees' motion for partial summary judgment. Over the objection of the School Committee, the Feoffees contend, before there has even been an opportunity on the part of the School Committee to conduct discovery, that there are no material facts in dispute and that, as a matter of law, they are entitled to an order overriding the no-

sale/no-waste clause of the trust so that they can sell the property to the tenants at what the evidence shows to be a bargain price. In truth, however, the most critical facts are all in dispute. The School Committee has adduced evidence that for purposes of the motion for summary judgment must be credited, demonstrating that a sale is unnecessary and inappropriate; that the School Committee and the children it serves will fare far better if no sale occurs; and that the Feoffees are wrongly proposing to dispose of the property for far less than its fair market value. In short, because the Feoffees' motion for partial summary judgment rests on material facts that are in dispute, the Feoffees' motion should be denied. The Court should grant the parties an opportunity to conduct discovery and then determine the issues raised in the Feoffees' complaint at trial.

THE SCHOOL COMMITTEES' COUNTER-STATEMENT OF FACTS

For purposes of deciding the motion for summary judgment, the Court is legally required to disregard the Feoffees' disputed factual assertions and to assume that the facts are those supported by the School Committee's evidence. *E.g., Carey v. New England Organ Bank,* 446 Mass. 270, 273 (2006) (disputes or conflicts in summary judgment materials viewed in favor of nonmoving party). Applying this standard, the material facts can be summarized as follows:

1. The Feoffees are comprised of the three most senior selectmen in the Town of Ipswich, and four citizens who need not be public officials. They manage the Little Neck property in trust for the School Committee's benefit. (Feoffees' Exs. 5-7).

2. For many decades, the four private citizen Feoffees managed the Little Neck property on their own with no involvement from the three selectmen trustees. (School Committee Ex. 72 [Town Report]).

3. Over the years, the Feoffees permitted the construction of 167 cottages on the Little Neck property. (Feoffees' Memo, ¶ 12).

4. In 1998, the Department of Environmental Protection notified the Feoffees that they were unlawfully permitting sewage at Little Neck to be discharged in violation of the Clean Waters Act. (Feoffees' Memo, ¶ 19). The Feoffees determined that this problem could be resolved by requiring the cottage-owners at Little Neck to install, at considerable potential expense to the cottage-owners, tight tanks and drip irrigation systems. (Feoffees' Ex. 45, Counterclaim, ¶ 214)

5. The Feoffees identified an alternative, whereby a centralized wastewater facility could be constructed for all of Little Neck, which would save the Little Neck cottage-owners the expense of constructing their own systems. (*Id.*)

6. The tenants, directly and through their agents and association, offered to the Feoffees to pay the costs of the installation of a centralized wastewater collection system, which would serve in lieu of the individual tight tanks and disposal systems. (*Id.*)

7. In reliance on the tenants' offer, the Feoffees constructed a centralized wastewater collection system at a cost of millions of dollars. (*Id.* at 216) The wastewater collection system was financed through loans incurred by the Feoffees from Newburyport Five Cents Savings Bank and the Ipswich Cooperative Bank, now known as the Institution for Savings in Newburyport and Vicinity. (Feoffees' Memo, ¶ 29). The principal balance on those loans stood at approximately $5.7 million as of October 31, 2010. Although a number of tenants made some payments to the Feoffees on account of the wastewater system, millions of dollars remain due and owing to the Feoffees for the costs of the construction of this wastewater facility. (Feoffees' Ex. 45, Counterclaim, ¶ 218).

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

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

10. In 1998, the private citizen Feoffees voted to increase gradually the Little Neck rental rates to fair market value over a period of five years. (Feoffees' Ex. 9)

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

12. In 2005 the Feoffees discussed with the tenants' attorneys proposed terms for long term leases that would govern the parties' relationship. (Feoffees' Memo ¶ 31) After these negotiations failed to lead to an agreement, in 2006 the Feoffees offered to each cottage-owner a twenty-year lease. These leases provided for cottage-owners to pay, for the first three years of the lease, rents in the amount of $9,700 per year for a seasonal use cottage and $10,800 per year for a year-round use cottage, plus payment of all real estate taxes and other expenses. The leases

also provided that commencing in 2009, Little Neck lots would be divided into ten tiers, based on each lot's individual characteristics, and that appropriate rents for each tier would be set by the Feoffees based on fair market value. (Feoffees' Ex. 13).

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

14. Thirty-three cottage-owners entered into the leases proposed by the Feoffees and have been paying the fair market rents called for by the leases. (Feoffees' Memo ¶ 33). The rest of the tenants declined to enter into the leases. Instead, in 2006, certain of the tenants brought a purported class action lawsuit in which they sought, among other things, a judicial declaration concerning a fair rental rate. (Feoffees' Ex. 44). They also sought damages from the private citizen Feoffees, but not the selectmen Feoffees, who were named only as necessary parties and in order to obtain declaratory relief. (*Id.*) The Feoffees filed counterclaims against the tenants. (Feoffees' Ex. 45).

15. While the tenant litigation was ongoing, the thirty-three cottage-owners who had signed the leases continued to pay fair market rentals of $9,700 for seasonal use or $10,800 for year-round use, pursuant to their leases. (Feoffees' Memo ¶ 33). Meanwhile, the non-lease tenants agreed to pay to the Feoffees only $5,520 for seasonal use, or $6,000 for year-round use, as use and occupancy charges. (Feoffees' Memo ¶ 34). Pursuant to a stipulation between the

parties, the tenants agreed commencing as of July 1, 2007 to pay into an escrow account the difference between the rent paid by the lessees under the leases and the lower amounts that the non-lessee tenants were paying for their use and occupancy. (Feoffees' Ex. 46). Because all of the valuation experts, including the tenants' own appraiser, now concur that the rents that are being charged under the leases are in line with or below fair market value, the Feoffees have a clear legal entitlement to collect for the School Committee's benefit the amounts that the tenants were paying into escrow for the period from July 1, 2007 onward. (See ¶ 13, *supra*). Based on 117 seasonal tenants at $348.33 per month, and 17 year-round tenants at $400.00 per month, these unpaid use and occupancy charges total approximately $47,555.00 per month starting as of July 2007.

16. In November 2008, the Feoffees presented to the School Committee a potential sale of the Little Neck real estate for a price of $26.5 million. (Feoffees' Memo ¶¶ 42-43) Through counsel, the Feoffees advised the School Committee that, according to the Feoffees' appraiser, this sale price substantially exceeded the fair market value of the premises. (Affidavit of Hugh O'Flynn ¶ 2) The School Committee voted at that time to support a potential sale of the real estate to the tenants for a price of $26.5 million. (Feoffees' Memo ¶ 43).

17. The sale as contemplated in November 2008 was unable to proceed. (Feoffees' Memo ¶ 45). On November 19, 2009, the School Committee voted to rescind its previous vote to support a sale of the real estate for $26.5 million. (Affidavit of Hugh Flynn, ¶ 3)

18. On or about December 24, 2009, without the School Committee's concurrence, the Feoffees entered into a Settlement Agreement with the tenants. (Feoffees' Ex. 48). The Settlement Agreement provides that subject to this court's approval, the Feoffees would convert the real estate, including the tenants' cottages, to condominiums and sell all of the Little Neck

real estate owned by the Feoffees, including all of the improvements that the Feoffees constructed, for a stated gross amount of $29,150,000, and a net price, after approximately $3.7 million in credits, refunds, rebates, allowances, and expense reimbursements, of approximately $25.4 million. (*Id.*; *see further* ¶¶ 20-25 *infra*). This net purchase price is at least $5.7 million below the fair value of the real estate that is proposed to be sold. (Foster Aff. ¶ 15). Furthermore, upon acquisition by the tenants, the aggregate fair market value of the lots excluding the cottages is approximately $42.5 million. In other words, even at a fair bulk sale price of $31.5 million, the tenants would enjoy a windfall by immediately owning real estate worth an aggregate $42.5 million. Only the size of the windfall to the tenants is in dispute. Even the appraiser for the tenants concluded that the aggregate fair market value of the lots after the sale, excluding cottages, will be nearly $40 million. (School Committee Ex. 75, p. 42; Foster Aff. ¶ 16).

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

20. The Settlement Agreement includes numerous provisions that lower by millions of dollars the actual net price that the tenants would pay to purchase the real estate. First, as noted in paragraphs 4-7 above, the Feoffees had constructed at a cost of some $6 million a wastewater facility for which, by the Feoffees' own admission, the tenants offered and were obliged to pay. As part of the Settlement Agreement, the Feoffees not only agree to convey this

facility to the tenants at no charge, but also to forgive the millions of dollars that the tenants owed to the Feoffees for building this facility. (Feoffees' Ex. 48). In addition, the Feoffees agreed to refund to the tenants payments totaling $83,000 that some of them had previously made toward the costs of that facility by crediting these amounts against the purchase price. (Feoffees' Ex. 48 and ex. H thereto).

21. Second, as noted in paragraph 13 above, all of the valuation experts, including the tenants' expert, now agree that despite the tenants' refusal to pay the rents being charged under the leases ($10,800 for full year occupancy), these lease rents were fair. From and after July 1, 2007, the tenants were paying only $5,520 per year to the Feoffees for full year occupancy, and $6,000 for partial year occupancy, with the balance of the fair market amount that they should have been paying for use and occupancy being paid into an escrow account pending the results of the litigation. (Feoffees' Memo, ¶¶ 34, n.4 and Feoffees' Ex. 46). The Settlement Agreement provides that if the Court approves the sale, the Feoffees will in effect refund to the tenants the entire balance of the escrow account – *i.e.*, the balance of the fair market use and occupancy charges due for the period from July 1, 2007 until early in 2010 when the escrowing ceased – by crediting these amounts against the purchase price. The Feoffees also agreed as part of the Settlement Agreement that starting early in 2010, the tenants would no longer need to pay the balance of the fair use and occupancy charges into escrow. The amount that is being given up in escrowed and non-escrowed fair market use and occupancy charges comes to $47,555 per month for the period from July 1, 2007 through the date of the proposed sale. (*See* ¶ 15, *supra*). If the proposed sale were to take place on November 1, 2011, the total amount in fair market value use and occupancy charges that the Feoffees will have agreed to forego through the refund of the escrow amounts and the acceptance of below market charges since July 1, 2007 will be

approximately $2,473,000. (Foster Aff. ¶ 35). If this court disapproves the sale, the Settlement Agreement will be nullified, and the Feoffees will have the right to collect these amounts for the benefit of the School Committee.

23. Third, as noted above in paragraph 14, the cottage-owners who signed leases have been making rent payments at fair market rates since July 1, 2006. The Feoffees say that they promised the lessees to give them the benefit of any reduced rents ultimately agreed to with the non-lessees. (Feoffees' Memo ¶ 83) Even though it is now agreed by all valuation experts that the lease rents are fair, the Feoffees agreed in the Settlement Agreement to accept until the closing of the proposed sale the below-market use and occupancy charges that the non-lessees have been paying, and to refund to the lessees, as credits against their purchase price, any fair market rents that they have paid since July 1, 2006 in excess of what the non-lessees will have paid. (Feoffees' Ex. 48). The Feoffees calculate the amount to be refunded to the Lessees through October 31, 2011 at $730,000. (Feoffees' Memo ¶ 83) Based on the monthly rent amounts and the use and occupancy figures provided by the Feoffees, however, the School Committee calculates this amount at $11,857 per month, which would total approximately $759,000 through October 31, 2011. (Foster Aff. ¶ 12)

24. Fourth, the Feoffees agreed to incur for the benefit of the cottage-owners all of the expenses associated with converting the real estate to condominiums. The Feoffees estimate these expenses at $400,000 (Feoffees' Memo ¶ 82). The report from the tenants' appraiser can be read as impliedly valuing the Feoffees' agreement to pay these costs at $1 million. (School Committee Ex. 75, Foster Aff. ¶ 10).

25. To determine the net price of the sale, one must reduce the stated $29.15 million purchase price by the foregoing refunds, rent concessions and expense allowances. If one

subtracts (a) the use and occupancy charges paid into escrow that are being credited against the purchase price, (b) the ongoing forgiveness until closing of fair market use and occupancy charges, (c) the refunds, through credits against the purchase price, of previously paid rent and wastewater charges, and (d) the cost to be borne by the Feoffees of converting to condominiums on the cottage owners' behalf, the effective net purchase price is reduced to $25.45 million, (Foster Aff. ¶ 14) This net price is at least $5.7 million dollars below the property's fair market value. (Foster Aff. ¶ 15). These calculations do not take into account that as part of the Settlement Agreement, the Feoffees are also forgiving a claim for another $6 million in reimbursements that, according to the Feoffees' counterclaim, the tenants agreed to pay in return for construction of the wastewater treatment plant.

26. The Feoffees have presented to the court "pro formas" that are designed to show that the annual payments that the School Committee would receive after a sale are significantly higher than what it would receive if there is no sale and the property continues to be rented. The Feoffees' pro formas are based on faulty factual assumptions and do not fairly reflect the consequences of either the proposed sale, or of a no-sale scenario. (Foster Aff. ¶ 19) Because these pro formas rest on faulty assumptions and disputed facts, they cannot serve as a basis for entering summary judgment.

27. Turning first to the pro formas that assume no sale, the most obvious error in the Feoffees' presentation is that they assume that for the next five years the tenants will pay use and occupancy charges that total only $1,075,536 per year – even though the tenants' own valuation expert agrees that the fair market rental comes to $1,803,600 per year. (Foster Aff. ¶ 21 and School Committee Ex.75). The lower figure that the Feoffees have utilized in their pro formas is based on the amounts that the tenants have been voluntarily paying for use and occupancy

pending a retroactive determination of fair market rents. The valuation experts for all parties, including the tenants, now agree that the rents that the lessees are paying under the leases ($10,800 per year for year-round occupancy and $9,700 for partial year occupancy) are proper, and that the interim use and occupancy charges that the non-lessees are voluntarily paying are well below market value. (Foster Aff. ¶ 7). If one assumes for purposes of an apples to apples comparison that the restriction on year-round occupancy would be lifted in a rental scenario, as it would be in a sale scenario, the fair market rents for Little Neck would start out at $1,803,600 per year, not the figure of $1,075,536 per year utilized in the Feoffees' pro formas. (If there were an election to keep the seasonal use restriction in place, the rent would start out at $1,646,300). Furthermore, in a rental scenario, these fair market rent or use and occupancy charges will increase as the property appreciates and on account of inflation. The Feoffees' accountant wrongly increased expenses on account of inflation, without increasing the accompanying revenues. (Foster Aff. ¶ 21).

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

The Feoffees' failure to continue the escrow arrangement does not mean that the tenants will not owe this money if the sale is disapproved.

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

31. The Feoffees' rental pro formas also overstate the costs of servicing the existing debt on the Little Neck real estate. The existing debt is set to readjust to a lower rate in March 2011. And even if there is no sale, the Feoffees should be able to refinance the debt at rates far below the 7.61 percent rate that they are currently paying. Moreover, they should be able to do this without mortgaging the property. (Foster Aff. ¶ 39).

32. When the faulty assumptions contained in the Feoffees' rental scenarios are corrected, the result is that the continued rental of the property could be expected to generate for the School Committee over $1 million per year, an amount that would only increase over time as

the real estate appreciates and as the debt on the property is paid off. (Foster Aff. ¶ 38; School Committee Ex. 77). It is not only the School Committee's appraiser who reaches this conclusion. The tenants' appraiser has estimated that on a continued rental basis, the property will generate yearly net operating income, before debt service, of over $1.6 million per year. (School Committee Ex. 75, pp. 23-28). Even the Feoffees' expert, who inflated certain expenses, such as non-litigation attorneys' fees and the reserve for vacancy loss, determined that the net operating income from the property on a continued rental basis will exceed $1.4 million per year. (Feoffees' Ex. 54; Foster Aff. ¶ 34).

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

34. The Settlement Agreement gives cottage-owners an option to utilize seller financing at the rate of 6 percent, interest only, with a five-year balloon payment. (Feoffees' Ex. 48). This proposed financing is not competitive in today's market, in which purchasers can obtain fifteen or thirty year mortgages at rates of below 5 percent, or if they are willing to risk a rate adjustment in five years (comparable to the five-year seller financing under the Settlement Agreement), a five-year adjustable rate mortgage at well below 4 percent. (Foster Aff. ¶ 26) For this reason, the only purchasers who would reasonably consider a five-year interest only mortgage at 6 percent per year, with a balloon at the end, would be those who, due to issues such as creditworthiness, could not qualify for the cheaper and less risky mortgage financing generally available in the market. (*Id.*).

35. The Feoffees' analysis by accountant Daniel Clasby ("Clasby") noted that the amounts that would be paid to the School Committee if a sale occurred would depend on how

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

36. Clasby then proceeds to base his sale scenario pro formas on three alternate assumptions about how many purchasers will avail themselves of seller financing. Unfortunately, all three assumptions are unfounded. (Foster Aff. ¶ 30). His first scenario assumes that essentially **all** cottage-owners would opt for the above-market seller financing with a five year balloon payment. Under this hypothetical the Feoffees would receive 10 percent of the total sales proceeds in cash (which is assumed to earn 3 percent) and 90 percent of the purchase price would bear interest at 6 percent. His second scenario contains the unstated assumption that over 70 percent of the buyers would use seller financing, so that 30 percent of the sales proceeds would be paid in cash . (Under this scenario, around 23 percent of the owners would obtain private financing and pay all cash; around 72 percent would accept seller financing and pay a collective 7.2 percent in cash,, and around 5 percent of cottage-owners would not buy, with the tenants' association buying their lots in return for a purchase price note) (Foster Aff. ¶ 29). The third scenario contains an unstated assumption that approximately 50 percent of the buyers would use seller financing, so that 50 percent of the total sales proceeds are paid in cash (*i.e.*, around 45 percent of the owners would pay all cash and around 50 percent would pay one-

tenth in cash, with five percent not buying, so as to yield total cash of around 50 percent of the purchase price). (*Id.*).

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

38. The Feoffees' own evidence is that very few of the cottage-owners intend to accept the above-market seller financing. Feoffees' Exhibit 53 states that out of 105 cottage-owners responding to a survey, only 13 of them intended to utilize the seller financing. Factoring in the financing of approximately 5 percent of the lots that would be purchased by the tenant association, approximately 85 percent of the purchase price can be expected to be paid in cash, on which the Feoffees would earn, per Clasby's analysis, 3 percent per year, while only 15 percent of the price would be financed at 6 percent per year. This yields a blended total rate of return for the Trust of 3.53% per year. (Foster Aff. ¶ 31).

39. If one corrects Clasby's pro formas so as to assume, more accurately, that eighty-five percent of the sale price will be paid in cash, and that the investment return will be as Clasby assumed, , the total investment income over the next five years drops significantly to roughly $600,000 to $650,000 per year. (School Committee Ex. 77)

40. But this is only part of the story. Under the continued rental scenario, in which the School Committee could expect to net over $1 million per year, the asset is real estate, which, over time, is protected against inflation. As prices increase, the property's value and the rents being charged will likely increase as well. (Foster Aff. ¶ 21).

41. By contrast, under the sale scenario, it is essential that some portion of the income be added back to corpus every year to offset inflation. If all of the earnings are distributed to the School Committee, with no growth in the corpus, as assumed in the Feoffees' pro forma, the Trust fund will be dissipated over time by inflation. (Foster Aff. ¶ 32).

42. If one assumes a total return at this time of 3.5 percent, 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 be responsibly 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 occurring in the bond markets. United States Treasury Inflation Protected Securities (TIPS) provide for a fixed rate of return, with principal increased at the end of the bond period based on changes in the Consumer Price Index. At present, the yield on five-year TIPS is only 0.2 percent. The yield on 30 year TIPS is in the range of 2.0%. (Foster Aff. ¶ 32). Assuming a conservative investment philosophy, it is not realistic to expect rates of return, after inflation, of 3.5 percent, let alone the 5 to 6 percent that the Feoffees 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's approach of distributing all Trust income, without adding funds back to corpus, were followed.

[43. Restatement of the Clasby pro formas based on more appropriate factual assumptions demonstrates that the School Committee will likely fare far better both over the next five years and thereafter from the continued ownership and rental of the property than it would from the proposed sale under consideration. (Foster Aff. ¶¶ 37-38; School Committee Ex. 77).

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

45. Finally, as noted above, the Feoffees seek permission to refinance the property and to secure the refinancing with a mortgage on the property. If the mortgage were foreclosed, the Feoffees could lose the property. The Feoffees could likely obtain refinancing at lower rates than the Trust is paying, secured by a collateral assignment of rents, without having to mortgage the property (Foster Aff. ¶ 39) with the attendant risk that the property would be lost through foreclosure. The Feoffees have not proven that such alternative financing is not available. Moreover, even if there were no refinancing, Clasby and the Feoffees have utilized a 7.61 percent interest rate even though the adjustable rate mortgage currently in place is slated to come down to 6.75 percent in March 2011. (Feoffees' Ex. 37).

ARGUMENT

THERE ARE MATERIAL FACTS IN DISPUTE THAT PRECLUDE THE ENTRY OF PARTIAL SUMMARY JUDGMENT.

I. Standard of Review on Motion for Summary Judgment.

Under Massachusetts law, a motion for summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Community Nat'l. Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The Court must view all facts and inferences thereof in the light most favorable to the

non-moving party. *Attorney General v. Bailey*, 386 Mass. 367, 371, *cert. denied sub nom. Bailey v. Bellotti,* 459 U.S. 970 (1982). In order to prevail, the moving party must conclusively show that no genuine issue of material fact exists on *any* relevant issue, even if it would not have that burden at trial. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). In the present case, there are a multitude of disputed facts, including (a) whether the donative intent can be achieved through the continued rental rather than sale of the property; (b) whether the continued rental of the property would, contrary to the Feoffees' claims, provide a far better stream of income to the School Committee than would a sale; and (c) assuming arguendo that a sale were to be considered, whether the proposed sale is on terms and at a price fair to the beneficiary.

II. There Are Genuine Issues Of Material Fact as to Whether a Sale is Necessary to Carry Out the Intent of the Trust.

The doctrine of reasonable deviation permits the court to "'direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.'" *Museum of Fine Arts v. Beland,* 432 Mass. 540, 544 n.7 (2000), *quoting* Restatement (Second) of Trusts § 381 (1989), and citing *Trustees of Dartmouth College v. City of Quincy,* 357 Mass. 521, 531 (1970). The primary purpose of the Payne bequest is to generate income for the *perpetual* benefit of the Ipswich public schools. The Feoffees' position amounts to a claim that they cannot comply with this objective because the tenants filed litigation, which the Feoffees concede to be meritless, and refused to pay rent that their own expert now concedes to be fair. For purposes of the motion for summary judgment, it must be assumed that, as the Feoffees say they fully expect, the Feoffees will prevail in the litigation. They have presented no

evidence that would suggest that the Superior Court litigation would result in rent being set at levels below what the tenants' own valuation expert states to be fair.

This Court is not compelled to give a financial windfall to the tenants at the extraordinary and perpetual expense of the Ipswich schools, as provided for in the proposed Settlement Agreement, merely because the tenants have become so disputatious as to cause significant expense to the Trust. The Superior Court litigation, while frustrating to the Feoffees and the School Committee, is just a temporary and reversible setback in the life of a 360 year old perpetual trust. For purposes of the motion for summary judgment, this Court must accept the evidence proffered by the School Committee that despite the litigation, the continued rental of the property would fully serve and carry out the original intent of the trust, by providing a predictable and steady stream of annual rental income – in excess of $1 million per year – that will grow over time and be paid to the School Committee in perpetuity. This income far greater than that which could be realized from the proceeds of a sale.

The tenants' expert appraiser, in the course of providing his valuation, has also demonstrated the feasibility of the continued use of the property for rental purposes. The Petersen/LaChance appraisal analyzed the net rental income that the property could be expected to generate. The appraisal (School Committee Ex. 72) states, "after an allowance for litigation the property is not anticipated to experience broad fluctuations in net operating income (NOI) in the coming few years." The appraisal further states, "my estimate of market rent is $10,800 per lot," with the tenants paying all taxes and wastewater usage fees. The appraisal also notes "A significant number of . . . tenants are paying just a $5,500 portion of their rent and putting the rest in an escrow account until litigation is resolved." The tenants' appraiser determines that the annual net operating income from the property, after allowing for all of the expenses of operating

and maintaining the property, would be $1.625 million per year – far more than the Feoffees claim in their pro forma. This analysis again shows that after debt service, there would still be more than $1 million per year for the Ipswich schools if the property continues to be rented.

The Feoffees' claim that they cannot fulfill the donor's intent without selling the property is based on hotly disputed factual assumptions, some of which are demonstrably false. These disputed factual assertions cannot serve as the basis for summary judgment. The Feoffees' pro formas wrongly show the collection of rent over the next five years only at the rate of $1.075 million per year, with *no recovery of fair market rents for the period from July 1, 2007 through November 2016.* The Feoffees make this incorrect and, in our submission, misleading presentation even though (1) they acknowledge their right and duty to collect fair market rent; (2) use and occupancy rent must be paid at fair market value under Massachusetts law, *.e.g, Kobayashi v. Orion Ventures, Inc.,* 42 Mass. App. Ct. 492, 502, *rev. denied,* 425 Mass. 1102 (1997); G.L. c. 186 § 3; and (3) all of the valuation experts, including the tenants' expert, agree that fair market rents total approximately $1.8 million per year or more for full-year use (and at least $1.64 million for seasonal use), as opposed to the annual payments of $1.075 million currently being made and reflected in the Feoffees' pro formas.

If (and, unfortunately only if) this Court disapproves the sale, the Feoffees will have the right not only to collect fair rents going forward, but to collect from the tenants past-due fair market rent for use and occupancy since July 1, 2007, which will total $2.5 million by the end of this year, exclusive of prejudgment interest at the rate of 12 percent per annum. Approximately $1.5 million of the past-due rent is already maintained in an escrow account. The proceeds of this escrow account would be credited to the tenants under the proposed sale and Settlement

Agreement, thereby effectively reducing the purchase price and allowing them to buy the property from the Feoffees with past-due rent that belongs to the School Committee.

As shown in the School Committee's Counter-Statement of Facts and supporting materials, the substantial back rent of roughly $2.5 million, exclusive of prejudgment interest, that the tenants will owe if the sale is not approved will be more than enough to fund any expenses associated with erosion, to fund any conceivable litigation expenses and to make a substantial payment towards the principal amount of indebtedness and/or a distribution to the School Committee. Once the rent is set at fair market value on a going-forward basis, which it inevitably will be if the sale is not approved, there will be revenues more than sufficient to pay all expenses associated with the property and capable of providing the School Committee, on a perpetual basis, as intended by the donor, with a predictable and steady stream of income that will start at over $1 million per year and increase over time. In sum, on the facts adduced by the School Committee, which must be accepted as true at this stage, a sale is entirely unnecessary.

The below-market value sale proposed by the Feoffees would cause the School Committee to suffer a devastating financial loss when compared to a long-term rental scenario. First, the School Committee, which has been deprived of annual distributions due to the tenants' obstinance, would be forfeiting any right to recover the $2.5 million plus interest owed in back rent. Second, the net cash available from a sale, after paying debt, would be only $21.8 million. This must be compared to an aggregate fair market value of the lots that the four valuation experts estimate, exclusive of cottages, is in the range of $40 million. It is not surprising that when lots with an aggregate fair market value of $40 million or more are rented at fair market value, they generate, even after accounting for associated debt of around $6 million, a steady stream of income far higher than can be predictably and responsibly generated by a $21.8 million

cash fund. The real estate and rents are inherently protected against inflation, and can generate income indefinitely, because, over time, rents will rise and the property will appreciate.

By contrast, the return on the cash proceeds at this time, once the Feoffees' pro formas are corrected for erroneous assumptions, would be approximately 3.5 percent per year, and some of this amount would need to be added to corpus, rather than distributed, to prevent the Trust from being diminished by annual inflation. (School Committee Ex. 77). If one assumes inflation of 3 percent annually, the return net of inflation would be 0.5 percent, only enough to generate some $110,000 per year in income to the School Committee, less expenses. This low "real" return after inflation is not an exaggeration. Currently, five year Treasury Inflation Protected Securities are yielding only 0.2 percent; thirty year TIPS are yielding close to 2.0%. (Foster Aff. ¶ 32). This reflects the safe return one can generate from investing cash, after allowing for inflation.

The Feoffees' pro formas set forth a scenario where all income from the cash proceeds is distributed to the School Committee and no steps are taken to prevent the corpus from diminishing in value due to inflation. This strategy, over time, would render the Trust worthless, and the donor's goal of a perpetual stream of income would thereby be defeated.

In short, there are material issues of disputed fact concerning both the sale and no-sale scenarios. When those disputed facts are resolved in favor of the School Committee, as they are required to be at this stage, the continued use of the property for rental purposes is vastly superior to the proposed sale. Not only is the proposed sale unnecessary to carry out the donor's intent, it would thwart that intent by depriving the Ipswich Schools of badly needed income. Because material issues of fact are in dispute, the Feoffees' motion for summary judgment must be denied.

III. The Museum of Fine Arts Case Requires the Denial of the Feoffees' Motion

In *Museum of Fine Arts Museum of Fine Arts v. Beland,* 432 Mass. 540 (2000), the late Reverend William E. Wolcott bequeathed 17 paintings to the trustees of The White Fund, a charitable trust, with the proviso that the paintings were to be offered for purposes of exhibition to the Museum of Fine Arts in Boston (the "Museum"), unless the trustees determined that a suitable public gallery existed in the city of Lawrence. The donor's express purpose was "to create and gratify a public taste for fine art, particularly among the people of the City of Lawrence." Ownership and control of the paintings was "vested permanently and inalienably in trust" to the White trustees. *Id.* at 541.

The Museum regularly exhibited three of the paintings. The other fourteen were stored and insured, but the Museum had no intention of exhibiting them, although it made them available for viewing upon request. *Id.* at 542. The White trustees let it be known that they intended to sell some or all of the paintings, so the Museum moved for a declaratory judgment that they had no authority to do so. *Id.*

The Supreme Judicial Court held that the general charitable intent was to create and gratify a public taste for fine art with a preference for the people of Lawrence, and that this intent was met by the regular public display of three of the seventeen paintings. There was thus no basis for equitable deviation from the no-sale provisions of the Trust as to those paintings. As for the remaining fourteen in storage, the Court held that the trustees had failed to show that there was no other suitable place to exhibit the paintings. Because the Trustees failed to show the impossibility of fulfilling the original intent of the donor without a sale, the court held that as a matter of law the doctrine of reasonable deviation did not apply and that none of the paintings could be sold. *Id.* at 544-45.

Here, similarly, the Feoffees have failed to establish, through undisputed facts, that the donor's charitable intent cannot be fulfilled without a sale of the property that the donor specifically prohibited. While no one welcomes litigation, the Feoffees have made no showing that they cannot achieve the purposes of the Trust by judicially enforcing their right to collect fair market rents from the tenants. The collection of rents at fair market value would generate more than enough money for substantial annual distributions to the School Committee that would exceed $1 million per year and grow over time – perpetual distributions much higher than could be obtained through investment of the proceeds of the proposed below-market value sale.

IV. The Proposed Sale At Below Fair Market Value Would Waste Trust Assets and Breach the Trustees' Fiduciary Duties.

It is a breach of the fiduciary duty that trustees owe to their beneficiaries to make an imprudent sale of land below its fair market value. *E.g., Exchange Trust Co. v. Doudera,* 270 Mass. 227 (1930). In *Exchange Trust*, the Supreme Judicial Court upheld a finding that a trustee had breached its fiduciary duty by selling certain property for $20,000 when there was disputed evidence sufficient to find that the property was worth $30,000 to $32,000. The Court held that by selling the property for less than its fair market value, the trustee failed to "use sound judgment" and to use "a wise discretion or act as men of prudence and intelligence would act in their own affairs." *Id.* at 229. *See also Forester v. O'Connell & Lee Mfg. Co.,* 328 Mass. 377, 380 (1952) (affirming the authority of trustees to disavow a contract to sell in favor of a better offer, because "[t]he trustees were bound to secure a sale that would be in the best interests of their beneficiaries.")

Here, the School Committee has established that net of various rebates and allowances, the true sale price that the tenants would pay is approximately $25.4 million. This is because the

tenants will be relieved of paying close to $2.5 million that they owe in rent (of which around $1.5 million is in escrow); the Feoffees will rebate over $800,000 in previous payments to lessees and cottage-owners; and the Feoffees will be paying $400,000 or more for the expenses of condominium conversion. For purposes of the motion for partial summary judgment, the evidence from the School Committee that the property is worth a net price of over $31 million (per its appraiser) or as much as $42 million (per the appraiser for the town of Ipswich), must be accepted. The School Committee's valuation expert has also determined that if an appropriate capitalization rate is used, the tenant's estimate of the property's net operating income for rental purposes supports a value of as much as $36 million. (Foster Aff. ¶ 16). Compared to these valuations, a net sale price of around $25 million is unreasonably low.

Therefore, even assuming arguendo that the Court were to find, contrary to the presumptions due in favor of the School Committee's evidence, that the donor's intent can be fulfilled only through a sale, there are disputed issues of fact concerning the property's value, whether the net sale price and terms of the sale are fair to the School Committee as the trust beneficiary, and whether it would breach the Feoffees' fiduciary duty to proceed with the proposed sale. For this additional reason, and considering the donor's express requirement that the property is not to be "sold or wasted," the motion for partial summary judgment must be denied.

V. Whether the Proposed Mortgaging of the Property is Necessary and Appropriate Depends on the Resolution of Disputed Facts.

The Feoffees also seek this Court's permission to refinance the property by placing a mortgage on the real property for the first time in the 360 year history of the Trust. The current loan is secured by the Trust's rental income, not through any security interest in the property

itself. The proposed refinancing requires repayment in full in no more than five years.[1] The Feoffees suggest on p. 41 of their memorandum that the refinancing and mortgage should be approved even if the sale is not. But this would require that the Trust find new financing at the end of the five year term or face losing the property. The Feoffees' argument in favor of mortgaging the property pursuant to the lender's five year commitment rests on no more than a wish and a prayer – "there is a reasonable likelihood" that the lenders will extend the loan. Feoffees' Memo, p. 41.

At this stage, there is at least a strong possibility that the proposed sale of the real estate will ultimately not be approved. Approval of the proposed refinancing and mortgage before any sale has been approved would constitute an unnecessary gamble with the Trust's sole asset, in contravention of the donor's requirement that the property not be "sold or wasted." The Trust would run the risk of losing the property in the event that at the end of the five years the lender does not extend the proposed loan, something it is not required to do, and in the event that due to market conditions when the loan becomes due, the Feoffees cannot obtain substitute financing. It is wholly unnecessary to run this risk. The current loan's interest rate stands to decrease by almost 0.9% in a little over a month from now. Interest rates in general are low. The Feoffees should be able to obtain a loan at a reasonable interest rate secured only by a collateral assignment of rents, without the need for a mortgage on the property. (Foster Aff. ¶ 39).

Because there are disputed issues of fact concerning the availability of a lower rate loan without a mortgage, and the necessity of mortgaging the property, the Court should deny the motion for partial summary judgment regarding the proposed refinancing and mortgage.

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[1] The loan has a three year, fixed rate term. At the end of that term, the Feoffees can exercise up to two one-year extensions, although the Feoffees must pay a fee upon exercise and the rate may change. (Feoffees' Ex. 65).

VI. The Court Should Deny the Feoffees' Request for Authorization to Settle the Essex Superior Court Litigation On the Terms Currently Proposed.

The Feoffees also seek to have this Court enter an order, over the School Committee's objections, approving the settlement of the Superior Court litigation. The Settlement Agreement would require the sale of the real estate, which is prohibited by the terms of the Trust. Accordingly, this Court cannot properly approve the Settlement Agreement without first determining that an equitable deviation from the terms of the Trust is warranted – a determination that cannot be made in response to the Feoffees' motion for summary because material facts are in dispute.

It should also be noted that the Feoffees' description to the Court of the Settlement Agreement is, at best, incomplete. The Feoffees claim that damages claims are predominantly being made by the tenants against the Feoffees, and not vice versa, and that the settlement is all in the Feoffees' favor. The School Committee disagrees. The non-lessee tenants have steadfastly refused since July 1, 2007 to pay any rent beyond the amount they concede to be due. The amount they concede to be due is far less than fair market rent as determined by four separate valuation experts, including their own. The tenants, who continue to use and occupy the cottages for which they are not paying fair rent, will be hard-pressed to assert any plausible damage claims against the private citizen Feoffees – and certainly not any such claims that would be chargeable to the assets of the Trust. By contrast, the Feoffees have a clearly valid claim against the tenants, which they propose to release through the Settlement Agreement, for rent totaling nearly $2.5 million, plus prejudgment interest, on account of the tenants' use and occupancy of the real estate since July 1, 2007. This $2.5 million rent claim, plus interest, is in

addition to the claim that the Feoffees asserted in their counterclaim for over $6 million to build the wastewater facility.

The Settlement Agreement, if approved, would allow the property be sold to the tenants for an amount, net of what the tenants owe in rent and net of direct rebates and allowances, that comes to $25.4 million. Highly qualified appraisers for the School Committee and for the Town of Ipswich have valued the property at substantially higher amounts. The appraisers for the Feoffees and the tenants, who valued the real estate at approximately $25.4 million and $26.7 million, respectively, reached these lower figures by assuming that a third party who purchased the property in bulk for $25 million would resell it to the tenants and others for an aggregate amount of almost $40 million. In fact, all of the appraisers concur that if the proposed sale occurs, the tenants will, in effect, receive a windfall, because they will acquire for less than $30 million lots worth, in the aggregate, approximately $40 million. (Foster Aff. ¶ 17)

Because the Settlement Agreement cannot be approved without resolving the issue of equitable deviation, and because there are disputed facts concerning the value of the property and the terms of the sale, the plaintiff's motion for approval of the Settlement Agreement should be denied.

Dated: January 26, 2011

Defendants and Counterclaim Plaintiffs,
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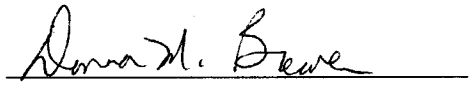
CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2011, I caused a copy of the foregoing document to be served by hand upon all counsel of record.



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