

# ANDERSON & KREIGER LLP

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January 28, 2011

**VIA HAND DELIVERY**

Essex Probate and Family Court  
36 Federal Street  
Salem, MA 01970  
Attn: Clerk's Office

Re: *Alexander B.C. Mulholland, et al. v. Attorney General, et al.*  
Civil Action No. ES09E0094QC

Dear Sir/Madam:

Enclosed for filing please find the following documents:

1. McNally, Morley and Surpitski's Opposition To Plaintiff's Motion for Partial Summary Judgment; and
2. McNally, Morley and Surpitski's Response Under Rule 27C To Feoffees' Statement of Material Facts and Legal Elements.

Please note that this matter is scheduled for hearing before Judge Sahagian on Monday, January 31, at 8:00 a.m.

Thank you.

Very truly yours,

  
Christine M. Griffin

CMG/elb  
Enclosures

cc: William Sheehan (by hand) (with enclosures)  
Richard Allen (by hand) (with enclosures)  
Johanna Soris (by hand) (with enclosures)  
Mark E. Swirbalus (by hand) (with enclosures) ✓

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

PROBATE & FAMILY COURT  
NO. ES09E0094QC

\_\_\_\_\_  
ALEXANDER B.C. MULHOLLAND, JR,  
PETER FOOTE, DONALD WHISTON,  
JAMES FOLEY, ELIZABETH KILCOYNE,  
PATRICK J. MCNALLY, AND  
INGRID MILES AS THEY ARE THE  
FEOFFEEES OF THE GRAMMAR SCHOOL  
IN THE TOWN OF IPSWICH,

Plaintiffs,

v.

ATTORNEY GENERAL OF THE  
COMMONWEALTH OF MASSACHUSETTS,  
IPSWICH SCHOOL COMMITTEE, AND  
RICHARD KORB, AS HE IS  
SUPERINTENDENT OF SCHOOLS IN THE  
TOWN OF IPSWICH,

Defendants.  
\_\_\_\_\_

**MCNALLY, MORLEY AND SURPITSKI'S OPPOSITION  
TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff (proposed Defendant) Patrick J. McNally ("McNally"), and proposed substitute parties (and proposed Defendants) Raymond Morley ("Morley") and Charles Surpitski ("Surpitski"),<sup>1</sup> now hereby oppose the Plaintiff's Motion for Partial Summary Judgment, and as reason for this Opposition, state the following:

**INTRODUCTION**

Plaintiffs Alexander B.C. Mulholland, Jr., Peter Foote, Donald Whiston, James Foley, Elizabeth Kilcoyne, Patrick J. McNally and Ingrid Miles were the Feoffees of the Grammar

<sup>1</sup> McNally, Morley and Surpitsky have previously filed a Motion to Substitute Parties and to Join Parties as Defendants in this matter. Through that motion, the Selectmen Feoffees seek to realign themselves in the litigation as Defendants. That motion is currently pending.

School in the Town of Ipswich (the “Feoffees”) at the time that this Civil Action was filed. The Feoffees own the real estate known as Little Neck, Ipswich, Massachusetts (“Little Neck”), containing approximately twenty-six acres (per Town Assessor’s Records), in trust (the “Trust”) for the benefit of the Ipswich Public Schools, which Trust was established by the Will of William Payne in 1660. *First Amended Complaint for Deviation Pursuant to G.L. c. 214, § 10B* (“Complaint”), at ¶1.

The governing structure for carrying out the Trust was established during the 18<sup>th</sup> century by the State Legislature.<sup>2</sup> The Trust currently operates pursuant to those legislative acts, and only those legislative acts (hereinafter referred to as the “governing structure statute”). There are no bylaws and no other comprehensive governance documents or rules for the Trust. *Answer and Counterclaim of Ipswich School Committee and Richard Korb, Ipswich Superintendent of Schools* (“Answer”) at Counterclaim ¶ 4.

Pursuant to the terms of that legislation, the Trust is presently governed by seven Feoffees, four of whom are appointed privately by their predecessors (the “Lifetime Feoffees”) and three of whom serve by virtue of being members of the Ipswich Board of Selectmen (the “Selectmen Feoffees”). Answer at Counterclaim ¶ 3.

Under the governing structure statute, the four Lifetime Feoffees serve unlimited terms and select and appoint their successors directly. *Id.* at Counterclaim ¶ 4. The other three Feoffees are comprised of the three most-senior members of the Ipswich Board of Selectmen at any given time. Chapter 5 of the Acts of 1765-66, § 2.

In December of 2009, when this action was brought, McNally, Elizabeth Coyne, and Ingrid Miles were the three most-senior members of the Ipswich Board of Selectmen. See

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<sup>2</sup> Chapter 26 of the Acts of 1756, Chapter 5 of the Acts of 1765-66, and Chapter 55 of the Acts of 1786.

*Affidavit of Patrick J. McNally* (“McNally Aff.”), attached as Exhibit A to Motion to Substitute Parties and to Join Parties as Defendants, at ¶¶ 6-8. They were therefore Feoffees, and they were individually named, along with the other Feoffees, as Plaintiffs in this litigation. Complaint at ¶ 1. At the Town election in May, 2010, Elizabeth Coyne and Ingrid Miles retired from the Board of Selectmen, making McNally, Morley and Surpitski the most-senior members of the Board of Selectmen, and therefore making them the current Selectmen Feoffees. McNally Aff. at ¶ 8.

Under the Trust’s governing structure statute, the Lifetime Feoffees are supposed to operate together with the Selectmen Feoffees as a “joint committee,” governing the affairs of the Trust by majority vote.<sup>3</sup> On a board with four Lifetime Trustees and three Selectmen Trustees, this means that, as long as the Lifetime Trustees are in agreement, they have a majority and can control the activities of the Trust. However, it is clear from the structure of the statute that the legislature did not intend to create a board where the Lifetime Trustees simply ruled by fiat. Public input in the decision-making process, through the participation of the Selectmen Feoffees, was a vital part of the structure created by the legislature, especially in a Trust whose beneficiary is a public entity, the Ipswich Public Schools. See Chapter 26 of the Acts of 1756, Chapter 5 of the Acts of 1765-66, and Chapter 55 of the Acts of 1786.

The Feoffees have filed a Complaint for Deviation Pursuant to G.L. c. 214, § 10B, requesting that the Court grant them permission to sell the Trust property in contravention of the terms of the Trust. Pursuant to section 10B, the Feoffees request that the Court apply the doctrine of equitable deviation, arguing that the purpose of the charitable trust has been frustrated and that the Trust assets are “wasting.” See Complaint at ¶ 37.

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<sup>3</sup> Originally, those affairs included the management of the Ipswich Grammar School itself; a role which has been superseded by the current municipal structure of school governance.

The Lifetime Feoffees have now moved for Partial Summary Judgment in this matter, asking the Court to approve the sale of the Trust asset as part of a proposed settlement of pending Superior Court litigation between the Feoffees and their tenants. Although the Selectmen Feoffees originally supported settlement, and the filing of this Probate Court litigation, they no longer agree with the Lifetime Feoffees' about the benefits of settlement and they oppose the Lifetime Feoffees' assertion that Summary Judgment is appropriate at this time. Since this lawsuit was filed, new information has become available regarding the value of the settlement, and significant factual disputes exist that prohibit resolution of this matter through Summary Judgment. The Selectmen Feoffees have moved the Court to realign them as Defendants in this matter so that they may appear and be heard separately from the Lifetime Feoffees and, consistent with that Motion, the Selectmen Feoffees now oppose Summary Judgment.

The Defendants Ipswich School Committee and Superintendent Richard Korb (collectively, the "School Committee"), have filed an Opposition to Plaintiffs' Motion for Partial Summary Judgment. The Selectmen Feoffees join in that Opposition and expressly adopt and incorporate that Opposition herein. In addition to the Plaintiffs' Motion for Partial Summary Judgment, the Selectmen Feoffees state as follows:

**THE SELECTMEN FEOFFEES' COUNTER-STATEMENT OF FACTS**

For the purposes of deciding the motion for Summary Judgment, the Court must disregard the Plaintiffs' disputed factual assertions and assume that the facts are those supported by the parties opposing Summary Judgment. See *Carey v. New England Organ Bank*, 446 Mass. 270, 273 (2006) (disputes or conflicts in summary judgment materials are viewed in favor of the nonmoving party). The Selectmen Feoffees oppose Summary Judgment, and adopt and incorporate herein the School Committee's Counter-Statement of Facts and the School

Committee's Response Under Rule 27C To Feoffee's Statement Of Material Facts and Legal Elements. As argued further below, based on the School Committee's fact statements and response, it is clear that Summary Judgment is not appropriate at this time.

### **ARGUMENT**

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

##### **A. Standard of Review on Motion for Summary Judgment.**

As the School Committee recites in its Opposition to the Motion for Partial Summary Judgment, 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 for law."

*Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass.R.Civ.P. 56(c). Because many disputed issues of material fact exist, the Plaintiffs cannot meet this standard.

##### **B. There Are Genuine Issues Of Material Fact as to Whether A Sale Is Necessary or Appropriate to Carry Out the Intent of the Trust.**

The Selectmen Feoffees are Trustees of the Trust and, as such, they have a fiduciary duty to carry out the intent of the testator. In this case, that means they have a fiduciary duty to manage Little Neck so that it provides perpetual benefit to the Ipswich Public Schools. See *In re Will of Crabtree*, 449 Mass. 128, 135 (2007) ("The trustee of a testamentary trust acts, in effect, as the instrumentality of the decedent to promote the well-being of the trust beneficiaries in a specific manner, dictated by the terms of the trust.") Based on the information that is currently available to the Selectmen Feoffees, they have serious doubts about whether the sale of the Trust asset is, in fact, the best way to provide a perpetual benefit to the Ipswich Public Schools.

**i. The Fair Market Value of the Land Is in Dispute.**

As recited in much greater detail in the School Committee's Opposition, in November, 2008, the Feoffees presented the School Committee with a proposal that included the sale of the Little Neck real estate for a price of \$26.5 million. The School Committee was told at that time that this sale price substantially exceeded the fair market value of the premises, and the School Committee voted to support a potential sale at that price. On November 19, 2009, after the sale had failed, the School Committee voted to rescind that vote. See School Committee's Opposition to Partial Summary Judgment ("School Committee's Memo") at ¶¶ 16-17, Feoffees' Memo at ¶¶ 42-43, Affidavit of Hugh O'Flynn at ¶¶ 2-3.

On or about December 24, 2009, the Feoffees entered into a Settlement Agreement with the tenants at Little Neck. Under the terms of that Settlement Agreement, the real estate owned by the Feoffees, including all improvements that the Feoffees constructed, would be sold for a gross amount of \$29,150,000, and a net price, after credits, refunds, rebates, allowances, and expense reimbursements, of approximately \$25.4 million. See School Committee's Memo at ¶¶ 18-25, Feoffees' Exhibit 48.

The Selectmen Feoffees have received additional appraisal information indicating that, upon sale of Little Neck to the tenants, the aggregate fair market value of the land, excluding the cottages, would be approximately \$42.5 million. School Committee's Memo at ¶ 18.

The Selectmen Feoffees have been presented with a variety of conflicting evidence about what the fair market value of Little Neck actually is. While they understand that it is difficult to determine a fair market value of a unique property like Little Neck with complete precision, the values presented vary from \$25.4 million to \$42.5 million, a substantial variation. The Selectmen Feoffees now believe that the School Committee has obtained and presented evidence

showing that the fair market value has not been properly established, and therefore do not believe that they have (or that the Court has) sufficient information to determine whether the sale price contemplated by the proposed settlement agreement is a reasonable settlement price. The Selectmen Feoffees therefore, in their role as fiduciaries, feel that they must oppose the settlement agreement at this time. Because the value of the property is a material fact that remains genuinely in dispute, Summary Judgment is also not appropriate at this time.

The Selectmen Feoffees are further concerned about public confidence in the outcome of this matter if this case is determined on Summary Judgment. Where there is doubt about both the fair market value of the land and the appropriate course of action going forward under the terms of the Trust, they believe that a hearing to determine these complicated matters is essential to engendering public confidence in the outcome of this litigation. For this reason, and for the reasons articulated above, the Selectmen Feoffees urge the Court to deny the motion for Summary Judgment, and to hear evidence on these matters.

**ii. The Future Value of the Rental Payments, If the Land Is Not Sold, and the Purchase Money, If the Land Is Sold, Have Not Been Determined With Any Precision.**

The Plaintiffs argue that a sale of Little Neck is required because, they assert, the purpose of the charitable trust has been frustrated and the asset is “wasting.” Whether or not the purpose of the charitable trust has been frustrated and the asset is wasting is a complex question, involving both factual and legal inquiry, as is the question of remedy. While it is true that in recent years the Feoffees have not made payments to the Ipswich Public School System as the result of the tenants’ failure to pay market rent, legal fees and interest payments incurred by the Feoffees, it is not clear that this is a permanent situation, or that the proposed settlement puts the beneficiaries in any better position than they would be without reformation of the Trust.



It appears that all parties now agree that the fair market value rent for a Little Neck cottage for full-year occupancy is at least \$10,800 per year. School Committee's Memo at ¶ 28. Total annual rental income from the property for full-year occupancy of the cottages at this rental rate would be approximately \$1,803,600. *Id.* at ¶¶ 28, 32. When operating expenses and other costs are deducted, this annual rental income would still likely leave the Feoffees with over \$1 million per year to disperse to the School Committee. *Id.* This is significant annual income that is likely only to increase as the value of the property appreciates over time. *Id.*

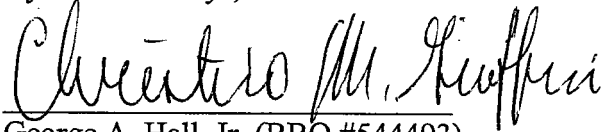
The Plaintiffs make a variety of arguments in support of their claim that the Trust asset is wasting, including pointing to legal fees and interest payments that have been incurred by the Feoffees and that have co-opted the payments to the School Department in recent years. These short-term problems in the generation of income from the Trust asset are minor when viewed in the context of the 350-year history of the Trust. Even in a worst-case scenario where the Trust paid no monies to the School Department during the pendency of the Superior Court litigation and paid no monies to the School Department while making interest payments on the money borrowed for construction of the waste water collection system, in a very short period of time both of those matters would be resolved, and the Trust would return to providing the School Department with significant income derived from the market-rate rental payments.

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 fiduciaries, the Selectmen Feoffees are not convinced that a sale is necessary at this time and, given the substantial disputed material facts at issue regarding the long-term benefits of sale, this issue is not appropriate for determination on a motion for Summary Judgment.

**Conclusion**

WHEREFORE, for the foregoing reasons, Plaintiff (proposed Defendant) Patrick J. McNally, and proposed substitute parties (and proposed Defendants) Raymond Morley and Charles Surpitski, hereby oppose the Plaintiff's Motion for Partial Summary Judgment.

Respectfully submitted,  
Plaintiff PATRICK J. MCNALLY and  
Proposed Parties  
RAYMOND MORLEY and  
CHARLES SURPITSKI,  
By their attorneys,

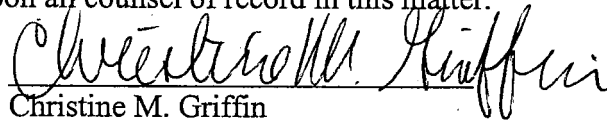


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Dated: January 28, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on January 28, 2011, I caused a true and accurate copy of the foregoing document to be served by hand upon all counsel of record in this matter.

  
Christine M. Griffin

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

PROBATE & FAMILY COURT  
NO. ES09E0094QC

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ALEXANDER B.C. MULHOLLAND, JR,  
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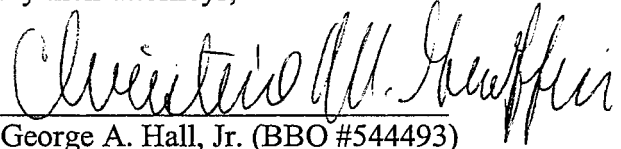
Defendants.

**MCNALLY, MORLEY AND SURPITSKI'S RESPONSE UNDER RULE 27C TO  
FEOFFEEES' STATEMENT OF MATERIAL FACTS AND LEGAL ELEMENTS**

Plaintiff (proposed Defendant) Patrick J. McNally ("McNally"), and proposed substitute parties (and proposed Defendants) Raymond Morley ("Morley") and Charles Surpitski ("Surpitski"),<sup>1</sup> hereby adopt and incorporate the Ipswich School Committee's Response Under Rule 27C To Feoffees' Statement of Material Facts and Legal Elements, and the materials provided in support thereof, in their entirety, in fulfillment of the requirements of Probate Court Rule 27C.

<sup>1</sup> McNally, Morley and Surpitsky have previously filed a Motion to Substitute Parties and to Join Parties as Defendants in this matter. Through that motion, the Selectmen Feoffees seek to realign themselves in the litigation as Defendants. That motion is currently pending.

Respectfully submitted,  
Plaintiff PATRICK J. MCNALLY and  
Proposed Parties  
RAYMOND MORLEY and  
CHARLES SURPITSKI,  
By their attorneys,

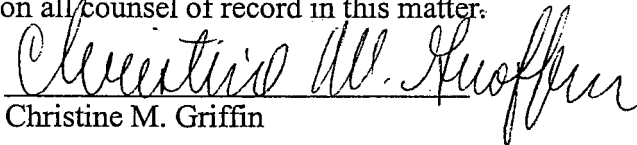


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Dated: January 28, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on January 28, 2011, I caused a true and accurate copy of the foregoing document to be served by hand upon all counsel of record in this matter.

  
Christine M. Griffin