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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. ESCV2006-02328D

WILLIAM M. LONERGAN, et al,)	
)	
Plaintiffs,)	
v.)	
)	
JAMES W. FOLEY, et al.,)	
FEOFFEES OF THE GRAMMAR)	
SCHOOL IN THE TOWN OF IPSWICH,)	
)	
Defendants,)	
v.)	
)	
DISTRICT ATTORNEY FOR THE)	
ESSEX DISTRICT, et al.,)	
)	
Additional Defendants)	
in Counterclaim.)	

OPPOSITION OF THE FEOFFEES OF THE GRAMMAR SCHOOL IN THE
TOWN OF IPSWICH TO COUNTERCLAIM DEFENDANTS'
MOTION FOR RECONSIDERATION

I. INTRODUCTION

The District Attorney for the Eastern District ("District Attorney") and the Attorney General for the Commonwealth ("Attorney General"), satisfied with the result, but unhappy with the rationale for the result, on their motion to dismiss, now ask this Court by way of a motion for reconsideration to change its rationale, but come to the same result. The motion for reconsideration should be denied. In the alternative, in the event of reconsideration, this Court should enter summary judgment for the Feoffees of the Grammar School in the Town of Ipswich ("Feoffees") declaring that they are not a governmental body for purposes of the Open Meeting Law ("OML"), G.L. c. 39, §23A, et seq., and the Uniform Procurement Act ("UPA"), G.L. c. 30B, §1, et seq.

FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX

JAN 15 2008


CLERK

II. ARGUMENT

A. The Court Correctly Concluded That The Feoffees Are Not A Governmental Body And That Conclusion Is Central To The Court's Dismissal Of The Counterclaims On The Ground That The Feoffees Are In No Danger Of "Prosecution".

The Court correctly concluded, for all the reasons stated in its opinion, that the Feoffees were not a governmental body under the OML and UPA and, on that basis, determined that they were under no danger of prosecution under those laws: "Because the Feoffees are not a governmental body, they are not subject to either the Open Meeting Law or the Uniform Procurement Act. The Feoffees are not in actual and imminent danger of a lawsuit based upon laws that do not apply to their conduct. Therefore, Feoffees have failed to allege an actual controversy against the District Attorney or the Attorney General." (Memorandum of Decision p. 6). (emphasis added). Central to the Court's decision was its conclusion that the OML and UPA "do not apply" to the conduct of the Feoffees. That inapplicability of the statutes to the Feoffees cannot be written out of the court's decision as the District Attorney and Attorney General now request.

B. Absent The Conclusion That The Feoffees Are Not A Governmental Body, The Feoffees Declaratory Judgment Action As To The Open Meeting Law Would Not Be Premature Because Here, Unlike In Bunker Hill Distributing, Inc. v. District Attorney For The Suffolk District, The District Attorney Has Already Concluded That The Statute In Question Applies To The Feoffees And That Statute Mandates Enforcement By The District Attorney.

The only disagreement that the Feoffees have with the Court's opinion, a disagreement the Feoffees raise only because of the reconsideration motion of the District Attorney and Attorney General, is the Court's adoption of the District Attorney's and Attorney General's claim that Bunker Hill Distributing, Inc. v. District Attorney for the Suffolk District, 376 Mass. 142 (1978), controls the instant case. Bunker Hill is not only inapposite; in many ways, it is the

antithesis of the instant case. First and foremost, unlike the instant case, Bunker Hill, in which the plaintiff, a distributor of films to theaters, sought a judicial determination of whether a particular film which had not been exhibited or distributed within the Commonwealth was obscene within the meaning of the state obscenity law, involved a constitutional question of First Amendment protection as to which “ ‘it is almost the undeviating rule of the courts . . . not to decide . . . until the necessity for such decision arises in the record before the court.’ ” Bunker Hill, at 145, quoting Cole v. Chief of Police of Fall River, 312 Mass. 523, 526 (1942). There is no constitutional issue implicated in the Feoffees’ claim for declaratory relief.

Second, central to Bunker Hill’s result was that the district attorney had not indicated to Bunker Hill that the obscenity statute in question applied to Bunker Hill’s motion picture. Bunker Hill, at p. 144. Indeed, there the district attorney accompanied his motion to dismiss with an affidavit that it was his policy not to issue opinions concerning the applicability of the obscenity statute to any films presumptively protected by the First Amendment. Bunker Hill, at p. 143. In stark contrast, in the instant case, the District Attorney has opined and has informed the Feoffees that the OML statute in question does apply to them. Attached hereto and marked “A” is the December 11, 2006 letter of the District Attorney so informing the Feoffees.

Third, the Bunker Hill court noted that “application of criminal statutes in the first instance generally lies with the public prosecutor. He cannot be compelled to render advisory opinions, at the behest of private citizens.” (emphasis added). There, the public prosecutor had not determined applicability of the statute in question and objected to rendering an advisory opinion. Here, the facts are exactly the opposite of those in Bunker Hill: a private citizen or citizens, not the Feoffees, asked for, and received, an opinion of the public prosecutor that the statute in question applied to the Feoffees. To suggest, as the District Attorney now does, that he

has made the determination that the OML applies to the Feoffees, but that his office has no interest in seeing that the Feoffees abide by the OML is preposterous, if not disingenuous, presuming, as it does, that the District Attorney will not carry out his statutory obligation to enforce the OML: "The district attorney of the county in which the violations occurred shall enforce the provisions of this section." G.L. c. 39, §23B. (emphasis added).

Fourth, the Bunker Hill court likened the case before it to those seeking injunctive relief against pending or threatened criminal prosecutions and relied on a series of cases holding for the proposition that, absent certain special criteria being met, such injunctive relief will not be granted. In the instant action, there are no criminal statutes involved and no criminal prosecutions sought to be forestalled. The OML provides for a civil fine in the event of a violation. G.L. c. 39, §23B. The UPA provides for the institution of a civil action to recover damages from a person causing a contract to be solicited or awarded in violation of the statute. G.L. c. 30B, §17(d).

Fifth, the Bunker Hill court concluded that the allegations that the film contained "scenes of explicit sexual congress" was insufficient and too general for a judge to conclude that an actual controversy exists under the obscenity statute. Bunker Hill, at p. 145. Here, in contrast, there is a very specific case for the Court to decide, to wit: whether the Feoffees are a governmental body, and, in fact, the Court had no difficulty in identifying and addressing that issue.

Finally, for all the reasons described in its opinion and discussed above, the Bunker Hill court "conclude(d), therefore, that Bunker Hill's request for relief is no more than a request for an advisory opinion." Bunker Hill, at p. 145. Here, the Feoffees do not request an advisory opinion; the District Attorney has already given its opinion. Here, the Feoffees contest that

opinion and G.L. c. 231A, §1 provides this Court with the power to adjudicate that contest “before or after a breach or violation . . .” (emphasis added) The law does not require, as the argument of the District Attorney and Attorney General would require, the Feoffees to meet in contravention of the requirement of G.L. c. 39, §23B, and subject themselves to a civil fine if a court were to conclude they are bound to follow the provisions of the OML.

C. Absent The Conclusion That The Feoffees Are Not A Governmental Body, The Feoffees’ Declaratory Judgment Action As To The Uniform Procurement Act Would Not Be Premature.

The inapplicability of Bunker Hill to the Feoffees’ claim concerning the OML extends to the Feoffees’ claim concerning the UPA. The UPA, like the OML, implicates no constitutional claim; no criminal prosecution is sought to be enjoined; and the dispute alleged is not too general, but, rather, is a specific one - - whether or not the Feoffees may rent real estate without abiding by the provisions of G.L. c. 30B, §16. G.L. c. 12, §27 provides that where, as here, the District Attorney and the Attorney General jointly appear, the former shall aid the latter and the latter shall have the control of the case. Here, the District Attorney has opined that the Feoffees are a governmental body, an opinion which, although given in the context of the OML, necessarily implicates the UPA.¹ The Attorney General has not contradicted that opinion. The Feoffees are not seeking an advisory opinion as to the UPA; they are challenging the District Attorney’s conclusion, implicitly adopted by the Attorney General, that they are a governmental body, with its implications under both statutes, and have properly named the Attorney General as the enforcement authority under the UPA.

¹ The OML defines governmental body as follows: “Governmental body”, every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting. G.L. c. 39, § 23A.

The UPA defines governmental body as follows: “Governmental body”, a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county. G.L. c. 30B, §2.

D. The Cases Cited By The Attorney General And District Attorney For The Proposition That The Feoffees Action Is Premature Are Inapposite.

The four cases cited in paragraph 2 of the motion for reconsideration are no more apposite than Bunker Hill. In Department of Community Affairs v. Massachusetts State College Building Authority, 378 Mass. 418 (1979), the Supreme Judicial Court reached the merits of a declaratory judgment action even where the plaintiff's interest was obscure because of the important public question involved. In the instant case, the Feoffees' interest is clear and specific. In Kelley v. Board of Registration in Optometry, 317 Mass. 187 (1966), declaratory relief was not available to the plaintiff where the defendant had no power to regulate the conduct of the plaintiff and there was no showing that the defendant had attempted to cause others to regulate such conduct. In the instant case, the District Attorney is the enforcement entity. The Kelley court specifically noted that "it is proper to bring a suit against a party which can regulate the plaintiff's activities." Kelley, *supra* at 192.

Commonwealth v. Boston Edison Co., 444 Mass. 324 (2005), is not a declaratory judgment action, but rather a case interpreting the Commonwealth's duties under G.L. c. 21E. In the course of its discussion, the Supreme Judicial Court acknowledged the general rule that the proper exercise of enforcement discretion is not ordinarily judicially reviewable, an issue not involved in the instant case where the District Attorney has already opined that the Feoffees are subject to the OML and the statute obligates the District Attorney to enforce the law's provisions. Moreover, that opinion necessarily implicates the UPA. Similarly, DiCicco v. Department Environmental Protection, 64 Mass.App.Ct. 423 (2005), not a declaratory judgment action, but rather a case arising under G.L. c. 214 and G.L. c. 131 in which the Appeals Court agreed with the lower court that judicial intrusion into agency discretion in enforcement matters

is inappropriate, is inapposite to the instant dispute because the District Attorney has already exercised its discretion in deciding to issue its opinion on the Feoffees and the OML.

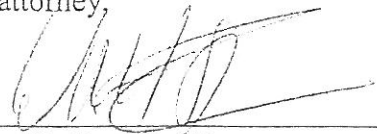
E. The Counterclaim Defendants' Claim That It Had No Opportunity To Brief The Issue Of The Feoffees As A Governmental Body Is Incorrect.

The Feoffees opposed the Defendants' motion to dismiss and specifically referenced the Feoffees' history as supporting their contention that they were not a governmental body. The Counterclaim Defendants filed a reply memorandum to the Feoffees' opposition, but elected not to address the issue of whether the Feoffees were a governmental body. At oral argument, the Court inquired of the parties as to their positions on that issue and the Counterclaim Defendants elected to respond solely by saying that the Attorney General had no position. Notably, the Counterclaim Defendants sought no leave to brief the issue. They should not be heard now to say they lacked the opportunity to address the issue.

III. CONCLUSION

The Court's conclusion that the Feoffees are not a governmental body and, therefore, the provisions of the Open Meeting Law and Uniform Procurement Act do not apply to them, is correct. In the view of the Feoffees, such a conclusion could lead to either of two results: a dismissal of the declaratory judgment counts for lack of a controversy or a summary judgment declaring the inapplicability of the statutes. The result now sought by the Counterclaim Defendants, dismissal based only on the claims being premature, would be contrary to law for the reasons set forth above. Accordingly, the Counterclaim Defendants' Motion for Reconsideration should be denied. In the alternative, summary judgment should enter declaring that the Feoffees are not a governmental body for purposes of the Open Meeting Law and the Uniform Procurement Act.

Respectfully submitted,
Feoffees of the Grammar School in the
Town of Ipswich
By its attorney,



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Dated: January 8, 2008


CERTIFICATE OF SERVICE

I, William H. Sheehan III, attorney for the Defendants, hereby certify that a true copy of the within document was served upon each pro se parties listed on the Schedule 1 attached hereto and the following attorneys of record via first class mail, postage prepaid, by mail to the following:

Mary E. O'Neal, Esq.
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William H. Sheehan III

Dated: January 9, 2008

Schedule 1

Mary C. Anderson, Trustee of the 57 River Rd. Trust and Trustee of the Baycrest Trust

Richard Betts, Trustee of the Richard Betts Trust

Clifford Bouvier

Joan Blake

Richard Hanson

Albert H. Cairns

Pamela Cairns

Julia Collins

John Cook

Barbara Cook

Phyllis Cronin

Joseph Cronin

Mary Spinney Donaldson

Susan Donaldson

Andrew Donaldson

John F. Duran, III, Trustee of the KSJ Realty Trust

Virginia Fitz

Richard Gilbert

Marilyn Gilbert

Malcolm R. Green, Trustee of the Light House Trust

Richard S. Green, Trustee of the Light House Trust

Kyle Gillietti

Donald K Greenwood

Marsha A. Dean

Roland Harrington

Judith Harrington

Raymond S. Hodgdon, Jr.

Enos F. Hodgdon

Michael M. Kersker

Janice G. Kersker

Frank Kiley

Renay Krupanski

Faye Kurnick

Ellen F. Laughton

Charles A. Laughton, Individually and as Trustee of the Lot 26 Little Neck Nom. Trust

Barbara Lewis

Lisa Manzi

Patricia Martin

David C. Pickul

Kimberly W. Pickul

John Reardon, Trustee of John A. Reardon Trust

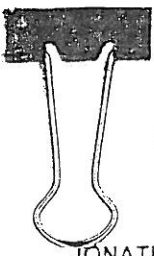
Philip L. Rhodes

Kathleen M. Rhodes

Richard Siebert

Paula Siebert
Gary A. Snyder
Ron Thornton
Arthur Veno
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EXHIBIT A



JONATHAN W. BLODGETT
District Attorney

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December 11, 2006

William H. Sheehan III, Esq.
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8 Essex Center Drive
Peabody, MA 01960

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

Dear Mr. Sheehan:

Thank you for your letter of October 24, 2006, and your thoughts on the appropriate characterization for Open Meeting Law purposes of the above-referenced entity.

I enclose for your files the opinion letter that this Office is issuing today in that regard. As you will see, we are of the opinion that the Feoffees are a governmental body as defined under G. L. c. 39, §23A et seq.

Your attention to this matter is sincerely appreciated.

Very truly yours,

Charles F. Grimes
Assistant District Attorney