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CAMBRIDGE OFFICE:
43 THORNDIKE STREET
CAMBRIDGE, MA 02141

April 17, 2012

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

RE: Alexander B.C. Mulholland, et al. v. Attorney General of the Commonwealth of Massachusetts, et al., Probate Docket No. ES09E0094QC

Dear Lisa:

Enclosed for filing and docketing, please find the following:

1. Motion of Plaintiffs to Strike Portion of Would-be Intervenors' Notice of Appeal and

2. Notice of Hearing.

Kindly mark said motion to be heard by Judge Sahagian on Friday, April 27, 2012, at 9:00 a.m.

Thank you.

Very truly yours,

William H. Sheehan III

Cc: Johanna Soris, Esq.
James E. Kruzer, Esq.
Stephen Perry, Esq.
Mark Swirbalus, Esq.
Client

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss. Docket No. ES09E0094QC

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

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, et al.
Defendants.

MOTION OF PLAINTIFFS TO STRIKE PORTION OF WOULD-BE INTERVENORS' NOTICE OF APPEAL

Plaintiffs, Feoffees of the Grammar School in the Town of Ipswich ("Feoffees"), hereby move to strike the portion of the would-be intervenors' Notice of Appeal which purports to appeal "[t]his Court's Judgment on Complaint for Deviation Pursuant to G.L. c. 214 §10B, entered on January 12, 2012." For the reasons set forth herein, the would-be intervenors are not parties to this action and cannot appeal the Judgment.

1. On December 23, 2012, the Feoffees and defendants Ipswich School Committee and Superintendent of Schools filed an Agreement for Judgment, which agreement was assented to by the defendant Attorney General of the Commonwealth of Massachusetts. **Exhibits 1 and 2, respectively.** The Agreement for Judgment was incorporated into a Judgment, which Judgment entered on the docket in this action on January 12, 2012. **Exhibit 3.**

2. By order dated February 6, 2012, this Court denied a motion by the would-be intervenors to intervene in this action. **Exhibit 4.**

3. On February 15, 2012 the would-be intervenors filed a Notice of Appeal in which they purport to appeal from both the denial of their motion to intervene and the Judgment. **Exhibit 5.**

4. Subsequently, the would-be intervenors filed a motion to stay the Judgment with the Single Justice session of the Massachusetts Appeals Court. During the oral argument on that motion, counsel to the would-be intervenors "conceded that they do not have standing to assert the public interest in place of or in competition with the Attorney General." **Exhibit 6, p. 14.**

5. On March 12, 2012, the Single Justice denied the would-be intervenors' motion to stay because the would-be intervenors do not have standing in this action. The Single Justice rejected the would-be intervenors' "position that the doctrine of standing should be subordinated to the overriding public policy concerns." **Exhibit 6, p. 19.**

6. Mass.R.App.P. 3(a) provides, in relevant part, that any appeal "permitted by law from a lower court shall be taken by filing a notice of appeal with the clerk of the lower court." Mass.R.App.P. 3(c) provides, in relevant part, "the notice of appeal shall specify the party or parties taking the appeal..." The would-be intervenors are not parties to this action and their purported appeal from the Judgment is not one permitted by law.

7. Absent rare circumstances that do not exist in this action, non-parties cannot appeal from a judgment. See Corbett v. Related Companies Northeast, Inc., 424 Mass. 714, 718-719("[M]erely commenting on, or objecting to, a proposed settlement... generally is insufficient to justify an appeal by a nonparty."); Baker v Bd. of Selectment of Town of Foxborough, 77 Mass.App.Ct. 1117, *3 (2011)[1] ("Because the appellants were not able to intervene and thus are not parties to the underlying case, they lack standing to appeal from the agreement for judgment entered by the Land Court."); Worcester Memorial Hospital v. Attorney General, 337 Mass. 769 (1958).

8. This motion is properly filed with this Court because it is based upon a procedural, not substantive, ground, to wit, a non-party, disappointed would-be intervenor's

[1] This case was decided pursuant to Appeals Court Rule 1:28, a copy of the decision is attached hereto as **Exhibit 7.**

appeal is limited to an appeal of the denial of his motion to intervene. See Rudders v. Building Commissioner of Barnstable, 51 Mass.App.Ct. 108, 110 (2001) for a discussion of the distinction between procedural and substantive grounds for striking a notice of appeal, and Peabody Federation of Teachers, Local 1289, AFT, AFL-CIO v. School Comm. of Peabody, 28 Mass.App.Ct. 410 (1990) for the right of appeal from the denial of a motion to intervene.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al.,
Feoffees of the Grammar School in the
Town of Ipswich
By their attorney,

William H. Sheehan III, BBO #457060
MacLean Holloway Doherty
Ardiff & Morse, P.C.
8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123
wsheehan@mhdpc.com

Dated: April 17, 2012

CERTIFICATE OF SERVICE

I, William H. Sheehan III, attorney for the Plaintiffs, hereby certify that I have served a copy of the above document and related notice of hearing upon all parties or counsel of record, by mailing the same, first class mail, postage prepaid, to the following attorneys:

Stephen M. Perry, Esq.
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210

Johanna Soris, Esq.
Commonwealth of Massachusetts
Office of the Attorney General
Public Charities Division
One Ashburton Place
Boston, MA 02108

And to the would-be interveners:

Mark E. Swirbalus
Day Pitney LLP
One International Place
Boston, MA 02110

James Kruzer
Posternak Blankstein & Lund LLP
The Prudential Tower
800 Boylston Street
Boston, MA 02199

William H. Sheehan III

Dated: April 17, 2012

COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss. Docket No. ES09E0094QC

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

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, et al.
Defendants.

AGREEMENT FOR JUDGMENT

Now come the parties by and through their counsel and stipulate and agree that the following judgment be entered on the docket pursuant to Mass.R.Civ.P. 58:

"1. On the plaintiffs' Complaint, judgment as follows:

A. The plaintiffs Feoffees of the Grammar School in the Town of Ipswich ("Feoffees") have presented to this Court for approval a certain Settlement and Agreement and Release ("Settlement Agreement") dated December 24, 2009, by and between the Feoffees and the Little Neck Legal Action Committee which was acting in a representative capacity in behalf of certain plaintiffs who filed a putative class action against the Feoffees in the Essex Superior court denominated William A. Lonergan et al. v. James W. Foley et al., Civil Action No. 06-02328D (the "Superior Court Action"). The Court has authority to approve a proposed settlement of claims and demands proposed by a trustee pursuant to G.L. c. 204, § 13.

The proposed settlement as set forth in the Settlement Agreement provides, in essence, for the Feoffees, who hold title to the land at Little Neck, Ipswich, Massachusetts for the benefit of the Ipswich Public Schools, to create a condominium at

Little Neck consisting ultimately of 167 units and to sell those units to the 167 cottage owners who currently reside at Little Neck, or their successors. The combined sale price of the 167 units is $29,150,000, less certain adjustments, as set forth in the Settlement Agreement. The Settlement Agreement also provides for the dismissal of all claims and counterclaims in the Superior Court Action without monetary consideration to any party. This Court is not satisfied with this aspect of the settlement, particularly with respect to the claim of the Feoffees against those who did not sign leases ("Non-Lessees") for use and occupancy. The Court hereby authorizes and permits the Feoffees to settle the Superior Court Action on the condition that the Non-Lessees pay in the aggregate a total of $2,400,000 more to the Feoffees on account of their use and occupancy. This amount will be treated as additional trust income for distribution to the School Committee over a period of three years as will be more fully set forth under the terms of the Trust Administration order discussed below. Under the terms of the Settlement Agreement and, specifically, the individual condominium purchase and sale agreements executed between the Feoffees and unit buyers, the lessees are to receive an adjustment to their purchase prices so that the total rent paid by each lessee will equal the use and occupancy payments made by a Non-Lessee. As a result of the increased use and occupancy payments by the Non-Lessees set forth herein, the aggregate credit to be received by the lessees at the time of sale for the difference between rent paid by lessees and use and occupancy paid by the Non-Lessees will be reduced by approximately $600,000, so that the Feoffees, after the sale of all of units, will have received close to $3,000,000 more than the monies described in the Settlement Agreement. The total consideration set forth in the Settlement Agreement, as modified by this Judgment, results in a fair and

satisfactory settlement of the Superior Court Action and a fair and reasonable price for the sale of Little Neck.

Each Non-Lessee may pay its share of the aforesaid use and occupancy charges in one of two ways: (1) in cash at the time he or she purchases the condominium unit as more specifically set forth in the Settlement Agreement; or (2) in the event the Non-Lessee obtains purchase money financing from the Feoffees, the Non-Lessee may pay the use and occupancy payment at the time the Non-Lessee purchases the condominium unit by way of a five-year, fully amortized unsecured promissory note bearing interest at the rate of four percent per annum with five equal annual principal and interest payments due on the anniversary date of the note; provided, however, that the full balance of such promissory note shall be due and payable immediately upon prepayment by the Non-Lessee of more than 10 percent of the principal due to the Feoffees under the purchase money financing.

Each Non-Lessee may elect to treat its share of the use and occupancy payment as consideration for the condominium unit in addition to the price set forth in Exhibit G to the Settlement Agreement. Each Non-Lessee who elects to do so will execute an amendment to the purchase and sale agreement with the Feoffees that reflects the new purchase price for the relevant condominium unit. In accordance with the principle of equal treatment of the lessees and Non-Lessees, each lessee may elect to treat his or her particular share of the aforementioned approximate $600,000 of rent previously paid to the Feoffees as consideration for the condominium unit in addition to the price set forth in Exhibit G to the Settlement Agreement and execute an amendment to the purchase and sale agreement as described above.

The date contained in the Settlement Agreement for delivery of so many of the Cottage Transfer Documents, as defined in the Settlement Agreement, as pertain to the release of an outstanding UCC Financing Statement or other security interest in a cottage which is to become a condominium unit, is extended to a date twenty days before the date of the recording of the Master Deed.

Each cottage owner shall maintain casualty and liability insurance on his or her cottage pending the sale to him or her of the condominium unit consisting of said cottage.

B. The proposed settlement by sale of Little Neck also presents the issue of whether deviation, pursuant to G.L. c. 214 § 10B, is warranted from the provision of the will of William Payne which directs that the land at Little Neck is "not to be sould nor wasted." Due to the dispute that is the subject of the Superior Court litigation, there has not been a distribution from the Feoffees to the School Committee since 2006, and absent this settlement, litigation could be expected to continue for an additional prolonged period at substantial expense and with the accompanying risks and uncertainties to the Trust, all of which has been and will continue to be a substantial impairment to the accomplishment of the purposes of the Trust. Deviation from the no sale provision of said will is hereby granted, and the Feoffees are hereby authorized and permitted to sell the land at Little Neck on the terms set forth in the Settlement Agreement as modified by this Judgment. The Court's authorization to the Feoffees of the sale as set forth in this Judgment is also pursuant to G.L. c. 203 § 16.

C. The Feoffees are hereby authorized and permitted to receive mortgages from buyers of condominium units on the terms set forth in the Settlement Agreement as modified by this Judgment.

D. The Feoffees shall grant to the Town of Ipswich a non-exclusive easement for use by the general public of that portion of Pavilion Beach owned by the Feoffees that lies outside the entrance columns of Little Neck. Said easement shall be given on the conditions, to be stated in the grant of easement, that the Town of Ipswich accepts the easement and agrees to insure, indemnify, defend and hold harmless the grantor, and its successors in title, including the trustees and unit owners of the condominium, from and against all claims arising out of the use by the public of said portion of Pavilion Beach.

E. The Feoffees in office for the period through the filing of the Master Deed shall be subject to the following constraints: (1) they shall operate the trust for the benefit of the beneficiary in the ordinary course and not engage in any unusual or out of ordinary course transaction without the written consent of the School Committee or Superintendent Korb except as may be specifically provided for in the Settlement Agreement and this Judgment; (2) they shall not enter into any contracts which will bind the Feoffees after June 30, 2012; and (3) they shall not compensate any of the life Feoffees or Selectmen Feoffees from and after December 19, 2011, except for Peter Foote who shall be compensated for his services as treasurer and manager at the rate of $840 per week, payable as it has been previously, until the first to occur of a) the date upon which a majority of Feoffees determine his services are no longer needed; b) the date upon which substantially all of the units have been sold; or c) the date that is 90 days after the recording of the Master Deed. Notwithstanding the foregoing, the Feoffees are hereby authorized to engage providers of engineering, surveying, architectural and legal services as needed, in an amount not to exceed $400,000 in the aggregate, to create the condominium documents and record the Master Deed and to represent the Feoffees in the

closing of 167 condominium unit sales. Insofar as no condominium sales will occur until such time as the trust has been reconstituted as a public body which is an agency of the Town of Ipswich or its subdivisions, as referred to below, the Court finds that the Feoffees will be exempt under the provisions of M.G.L. c. 64D, section 1, from the payment of taxes or fees under Chapter 64D in connection with the sale of the condominium units. Nothing herein shall prevent the Feoffees from performing any obligations they may have pursuant to paragraph 1 of the Settlement Agreement.

F. Absent extraordinary circumstances, the Feoffees shall record the Master Deed on or before May 1, 2012. The Feoffees and their successors, including any Feoffees appointed in place of the present Feoffees pursuant to the change in the Trust's governance, shall comply with all of the terms of the Settlement Agreement including, but not limited to, scheduling and conducting the unit closings in a diligent and expeditious manner. Unless caused by a breach by the School Committee of its obligations under this Judgment, or by a breach on the part of the reconstituted Feoffees in office after the filing of the Master Deed, any Non-Lessee who has not purchased his or her unit on or before July 1, 2012, whether due to a delay in the recording of the Master Deed or otherwise, but who has not breached his or her obligations under his or her purchase and sale agreement, shall begin paying monthly rent as of July 1, 2012 at the rate presently paid by lessees, with the rent for any partial months to be prorated. For avoidance of doubt, the rights and obligations with respect to any Homeowner who fails to close shall be as stated in paragraph 4 of the Settlement Agreement.

G. The Feoffees shall distribute to the School Committee within fourteen days of the entry of this Judgment (rather than ten days after the recording of the Master

Deed as originally provided in the Settlement Agreement), the interest from the Winchester Co-operative Bank, in the approximate amount of $50,000, said interest to be returned to the Feoffees (for escrow purposes) in the event the Master Deed is not recorded. In addition, to the extent cash flow allows, the Feoffees shall make monthly distributions of net rental income to the School Committee until the completion of the sales process.

H. It is declared that Massachusetts General Laws Chapter 30B does not apply to conveyances of condominium units as set forth in the Settlement Agreement as modified by this Judgment.

I. In the event that the provisions of Massachusetts Generals Laws Chapter 255E apply to the Feoffees, all parties to this action shall cooperate with the Feoffees in their obtaining a license under said chapter.

2. On the Defendants' counterclaim, judgment as follows:

The Ipswich School Committee and the Superintendent of Schools have presented to this Court a proposed revision to the trust of which the Feoffees are trustees, including a change in the manner in which the seven Feoffees are selected to serve as trustees. Presently, the seven Feoffees consist of four Feoffees who serve for life, absent resignation, with such a life Feoffee's replacement made by the remaining three life Feoffees, and the three longest-serving Selectmen serving ex-officio.

The Court finds that such a revision is fair and reasonable and is especially warranted both by the benefits of the trust's becoming a public entity and agency of the Town or its subdivisions and by reason of the sale of Little Neck, which obviates any need for the experience and familiarity with Little Neck provided by the life Feoffees.

Effective upon the recording of the Master Deed which creates the condominium contemplated by the Settlement Agreement, two of the life Feoffees will resign from and split off from the Feoffees and form their own unincorporated association to be named and known as the Life Feoffees. Contemporaneously with that split-off, the Feoffees will be reconstituted as follows: the Selectmen Feoffees shall resign and their replacements will be selected, one each, by the Selectmen, the School Committee and the Finance Committee. The other four Feoffees will be the two life Feoffees who have not become Life Feoffees, one additional appointee of the Selectmen, and one additional appointee of the School Committee. Upon the first to occur of the sale of the last condominium unit or ninety days from the date of the recording of the Master Deed, the two life Feoffees then still serving as Feoffees will resign and join the Life Feoffees. The Life Feoffees shall then appoint one Feoffee and the Finance Committee shall appoint one Feoffee. In all other respects the selection and appointment of Feoffees thereafter shall be in accordance with a Trust Administration Order which the School Committee will submit to the Court for approval with input from the Office of the Attorney General and which will provide that the Trustees will consist of two appointees each by the Selectmen, the School Committee and the Finance Committee and one appointee of the Life Feoffees, all of whom will serve for fixed terms as will be set forth in the forthcoming Trust Administration Order. The Feoffees hereby consent to such Trust Administration order provided that it is not inconsistent with the provisions hereof.

Following the spin-off, the Life Feoffees shall be a private body, selecting their members and successors as they see fit in their sole discretion. The Life Feoffees may maintain custody of the original historical books and records of the Feoffees, copies of all of which shall also be made freely available to the reconstituted Feoffees. From the time the Feoffees are initially

reconstituted following the filing of the Master Deed, the Feoffees shall be deemed for all purposes a public body and shall be governed by the aforesaid Trust Administration Order.

The Feoffees, the School Committee and the Superintendent, and their members, predecessors, successors, representatives, assigns, agents, servants, attorneys, employees, executors, administrators, and heirs release and forever discharge the Feoffees, the Life Feoffees, their members, predecessors. successors, representatives, assignees, agents, attorneys, employees, executors, administrators, and heirs of and from any and all claims, debts, demands, defenses, liabilities, costs, attorneys' fees, actions suits at law or equity, compensation, obligations, contracts, losses, expenses, damages, whether general, specific or punitive, exemplary contractual or ex-contractual and causes of action of any kind or nature, known or unknown, derivative or direct, asserted or unasserted, from the beginning of the world to the date of this judgment; provided, however, this release shall not apply to any unknown claims of intentional misconduct.

Except for claims for intentional misconduct that are excluded from the release set forth above, the Feoffees shall, and are hereby authorized to, indemnify, defend and hold harmless the Selectmen Feoffees and Life Feoffees, both individually and in their capacity as Feoffees, their predecessors, heirs, predecessors, successors, representatives, assignees, agents, attorneys, employees, executors, administrators, and heirs of and from any and all claims, debts, demands, defenses, liabilities, costs, attorneys' fees, actions, suits at law or equity, compensation, demands, obligations, contracts, losses, expenses, damages, whether general, specific or punitive, exemplary, contractual or ex-contractual and causes of action of any kind or nature, known of unknown, derivative or direct, asserted or unasserted, from the beginning of the world to the date of this judgment, whether those claims are made against the Selectmen Feoffees or Life Feoffees

in their individual capacity or representative capacity or both, arising out of or related to their actions or omissions or status as Selectmen Feoffees or Life Feoffees, including, but not limited to, any and all claims, whether now in existence or later added, in the Superior Court litigation or relating to conducting the instant Probate Court action.

Nothing in the release or indemnity obligations set forth in this Judgment shall be deemed applicable to any claim, action or demand that may asserted in the future by the Office of the Attorney General.

3. Judgment is entered without costs. Due to the benefit to the Trust that has been created, the School Committee and Richard Korb are entitled to an award of attorneys' fees and expenses which they shall submit to the Court within sixty days from the date of this Judgment with notice to counsel for the Feoffees and the Office of Attorney General. Any such award will be paid out of the sale proceeds. All parties acknowledge that the fees and expenses of the Feoffees have already been paid from trust assets.

4. All rights of appeal are hereby waived."

Respectfully submitted,

Feoffees of the Grammar School in
the Town of Ipswich
By their attorney,

William H. Sheehan III
BBO #457060
MacLean Holloway Doherty
Ardiff & Morse, P.C.
8 Essex Center Drive
Peabody, MA 01960
(978) 774-7123
wsheehan@mhdpc.com

Ipswich School Committee
and Richard Korb,
Superintendent of Schools
By their attorney,

Stephen M. Perry, Esq.
BBO # # 395955
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210
(617) 426-5900

Approved and so Ordered as a Judgment of the Court:

_____

By the court: (Sahagian, J.)

COMMONWEALTH OF
MASSACHUSETTS PROBATE AND FAMILY
COURT DEPARTMENT

ESSEX, SS. Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, AND INGRID MILES AS THEY ARE THE FEOFFEES OF THE GRAMMAR SCHOOL IN THE TOWN OF IPSWICH Plaintiffs, v. ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IPSWICH SCHOOL COMMITTEE, and RICHARD KORB, as he is Superintendent of Schools in the Town of Ipswich, Defendants.	)

ASSENT of the ATTORNEY GENERAL

The Attorney General hereby assents to the Agreement for Judgment in the above-captioned case.

By: _____

Johanna Soris, BBO #473350
Assistant Attorney General
Nonprofit Organizations/
Public Charities Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617-727-2200

Dated: December 23, 2011

Commonwealth of Massachusetts
The Trial Court
Essex Division Probate and Family Court Department Docket No. ES09E-0094-QC

Judgment on Complaint for Deviation Pursuant to G.L.c. 214 § 10B filed October 6, 2009

Alexander B.C. Mulholland, Jr., Peter Foote, Donald Whiston, James Foley, Elizabeth Kilcoyne, Patrick J. McNally, and Ingrid Miles as They Are The Feoffees Of The Grammar School In The Town of Ipswich, Plaintiffs

v.

Attorney General Of The Commonwealth Of Massachusetts, Ipswich School Committee, and Richard Korb, As He Is The Superintendent Of Schools In the Town Of Ipswich, Defendants

This action came on for (trial) (~~hearing~~) before the Court, Mary Anne Sahagian, Justice presiding, and the issues having been duly (tried) (~~heard and a decision having been duly rendered~~).

It is Ordered and Adjudged

The signed Agreement for Judgment filed December 23, 2011 is hereby incorporated into and made a part of this Judgment.

Date December 23, 2011

Justice of the Probate and Family Court

CJ-D 420 (3/90)

FILED DEC 2 0 2011

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss

Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, and INGRID MILES, as they are the Feoffees of the Grammar School in the Town of Ipswich,

Plaintiffs,

v.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IPSWICH SCHOOL COMMITTEE, and RICHARD KORB, as he is Superintendent of Schools in the Town of Ipswich,

Defendants.

ESSEX, ss. PROBATE & FAMILY COURT
Feb. 06 2012
~~allowed~~
The within action is hereby denied -
Justice of Probate & Family Court

MOTION TO INTERVENE

Pursuant to Rule 24(a) of the Massachusetts Rules of Civil Procedure, Douglas J. DeAngelis hereby respectfully moves for leave to intervene as a party defendant in this action. In support of this motion, Mr. DeAngelis states the following:

1. The Feoffees of the Grammar School in the Town of Ipswich seek in their complaint to deviate from the terms of the so-called Grammar School Trust, pursuant to which the Feoffees shall maintain the land in Ipswich known as "Little Neck" for the benefit of the Ipswich Public Schools. Also pursuant to the terms of the Trust, Little Neck cannot be sold or wasted.

2. On January 27, 2011, Mr. DeAngelis filed an amicus brief in opposition to the Feoffees' motion for partial summary judgment, in which the Feoffees sought authority to sell

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FILED FEB 15 2012

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss

Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., PETER FOOTE, DONALD WHISTON, JAMES FOLEY, ELIZABETH KILCOYNE, PATRICK J. MCNALLY, and INGRID MILES, as they are the Feoffees of the Grammar School in the Town of Ipswich,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, IPSWICH SCHOOL COMMITTEE, AND RICHARD KORB, as he is Superintendent of Schools in the Town of Ipswich.

NOTICE OF APPEAL

Please take notice that the proposed Interveners in the above-captioned matter, Douglas J. DeAngelis, Catherine T.J. Howe, Jacqueline Phypers, Jonathan Phypers, Peter Buletza, Kenneth Swenson, Robert Weatherall, Jr., Joanne Delaney, Cara Doran, Andrew Brengle, Susan Brengle, Michele Wertz, Jason Wertz and Clark Ziegler, individually and on behalf of their minor children, hereby appeal from:

1) This Court's order dated February 6, 2012, entered on February 9, 2012, denying their motion to intervene; and

2) This Court's Judgment on Complaint for Deviation Pursuant to G.L. c. 214, §10B, entered on January 12, 2012.

Respectfully Submitted,

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

By their attorney,

Catherine J. Savoie, BBO# 544599
POSTERNAK, BLANKSTEIN & LUND, L.L.P.
The Prudential Tower
800 Boylston Street
Boston, MA 02199
(617) 973-6100
csavoie@pbl.com

Dated: February 14, 2012

CERTIFICATE OF SERVICE

I, Catherine Savoie, hereby certify that on this 14th day of February, 2012, I served a copy of the foregoing by first-class mail upon the following counsel:

William Sheehan, III
MacLean Holloway Doherty
Ardiffe & Morse
8 Essex Center Drive
Peabody, MA 01960

Johanna Soris
Commonwealth of Massachusetts
Office of the Attorney General
Public Charities Division
One Ashburton Place
Boston, MA 02108

Stephen Perry
Casner & Edwards, LLP
303 Congress Street
Boston, MA 02210

Mark E. Swirbalus,
Day Pitney LLP
One International Place
Boston, MA 02110

Catherine Savoie

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2012-J-0059
(Essex Probate & Family Ct.
No. ES09E0094QC)

ALEXANDER B.C. MULHOLLAND, JR., et al.[1],
Plaintiffs

v.

ATTORNEY GENERAL
OF THE COMMONWEALTH, et al.[2],
Defendants

MEMORANDUM AND ORDER

1. Introduction. Douglas J. DeAngeles, Catherine T.J. Howe, Jacqueline Phypers, Jonathan Phypers, Peter Buletza, Kenneth Swenson, Robert Weatherall, Jr., Joanne Delaney, Caras Doran, Andrew Brengle, Susan Brengle, Michele Wertz, Jason Weertz, Clark Ziegler, and Carol Nylen, as residents of the Town of Ipswich, individually and on behalf of their minor children, assert standing and seek intervener status to request a stay of the judgment of the Probate and Family Court Department (Sahagian, J.) dated December 23, 2011 and docketed on January 12, 2012 approving a settlement of a civil action. The case in

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[1] The other plaintiffs are Peter Foote, Donald Whiston, James Foley, Elizabeth Kilcoyne, Patrick McNally, and Ingrid Miles as they are the Feoffees of the Grammar School in the Town of Ipswich.

[2] The other defendants are the Ipswich School Committee and Ronald Korb as he is the Superintendent of School in the Town of Ipswich.

question is Essex Probate and Family Court docket No. ES09E0094QC brought by the above plaintiffs as the Feoffees of the Grammar School in the Town of Ipswich against the Attorney General of the Commonwealth and the School Committee and Superintendent of Schools of the Town of Ipswich. The settlement which the Probate Court approved as a judgment has the effect of deviating from the terms of a testamentary trust that was created by William Payne aka William Paine (hereafter "Mr. Paine") who died in 1660. It is undisputed that Mr. Paine's will devised a spit of land consisting of approximately twenty-six acres and known as "Little Neck" "unto the free scoole of Ipswich" and declared that the land "is to bee and remaine to the benefitt of the said scoole of Ipswich for ever as I have formerly Intended and therefore the sayd land not to be sould nor wasted."[3]

2. Brief background. Some brief background about the litigation that has preceded the request for a stay of execution of the judgment of the Probate and Family Court will be useful to an understanding of the discussion that follows. Prior to the agreement for judgment, which is at the heart of the dispute in this case between the proposed interveners and the other parties,

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[3] Mr. Paine acquired the land in 1649. During the next 250 years, it was used primarily as a pasture for grazing animals. "A portion of it has been cultivated some of the time as a farm, and in recent years many cottages have been erected upon it along the shore, which are occupied by summer residents." Feoffees of Grammar School in Ipswich v. Proprietors of Jeffreys' Neck Pasture, 174 Mass. 572, 574 (1899).

and based on the terms of Mr. Paine's original testamentary trust and legislation enacted in the eighteenth century there are a number of undisputed facts: (i) "Little Neck," the land in question, was not owned by the Town of Ipswich, (ii) the feoffees[4] administered the land as trustees of a charitable trust within the meaning of G. L. c. 12, § 8, (iii) the feoffees were authorized to appoint successors and to charge and collect rents from those who own or occupy cottages or otherwise use the land, (iv) the feoffees held title to the land for the benefit of the Ipswich public schools, (v) at the present time there are approximately 167 privately owned cottages located on the land in question, twenty-four of which are available for year round use and the remaining 143 for seasonal use, (vi) some of the Little Neck residents (about 33 in number) have signed leases with the feoffees but others have refused to do so, and (vii) two of the tenants have filed a civil action in the Essex County Superior Court (captioned Lonergan et al. v. Foley et al., Docket No. ESSC 2006-02328D) in their individual capacity and as representatives of about 80% of the cottage owners seeking damages from the

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[4] Feoffees are fiduciaries appointed by a property owner to hold legal title to property in trust for the benefit of others. See, e.g., Feoffees of Grammar School in Town of Ipswich v. Andrews, 8 Metc. 584, 592-93 (1844). According to Black's Law Dictionary (9th ed. 2009), a "feoffee" is defined as "[a] person to whom land is conveyed for the use of a third party (called a cestui que use); one who holds legal title to land for the benefit of another."

trust. Under the terms of an interlocutory stipulation, some rents, taxes and other payments are being made by the residents of Little Neck who have not signed leases which are being used in part for ongoing maintenance costs of infrastructure associated with Little Neck with other funds going into escrow. As a result, the feoffees have not made any payments to the beneficiaries of the trust-the Ipswich schools since 2006.

3. It also appears from the record (in particular, from the allegations contained in the complaint brought by the feoffees) that until 2006, the feoffees collected rents from seasonal and year round users and distributed net rental income to the Ipswich schools. The amount of that net income in 2006 was approximately 1.4 million dollars. The Ipswich schools also received approximately 60% of the real estate tax revenue generated by the land and buildings thereon as well.[5] Around this same time the feoffees, in a separate civil action, Essex County Probate and Family Court No. 05E-0026-GC1, secured the permission of the court, with the assent of the Attorney General and the Ipswich Public Schools, to borrow in excess of 7 million dollars from a

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[5] The record indicates that the principal reason why beginning in the 1930s the Feoffees allowed cottages to be constructed on Little Neck was to increase the value of the land (which historically had been used for pasturage) and to create an income stream based on real estate taxes that would benefit the Ipswich schools. The existence of the cottages, however, is at the core of the concerns that has led the parties to reach a settlement. See text and note 6, infra.

commercial lender, secured by a conditional assignment of leases and rents and other income streams, in order to comply with the terms of an Administrative Consent Order by the Massachusetts Department of Environmental Protection to construct an upgrade to the electrical distribution network on Little Neck. The construction of this project is complete.[6]

4. The present lawsuit was brought by the feoffees in order to obtain an order from the Probate and Family Court for equitable deviation from the terms of Mr. Paine's testamentary trust to permit the feoffees to move ahead with a plan to sell the land consisting of Little Neck by creating a condominium form of ownership and the sale of condominium units. The basis for the request was to enable the feoffees to meet their obligations to the commercial lender, to bring an end to the pending

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[6] The existence of the 167 cottages on Little Neck is at the heart of the issues in this case and the pending Superior Court case. Without digressing too far from the issues before me, suffice it to say that the parties in this case were required to weigh and assess the potential for the Paine trust to be effectively destroyed as a result of the Superior Court case. That case in which approximately 80% of the cottage owners are challenging the effort by the feoffees to use rental fees to offset expenses incurred by the feoffees due to the need to comply with state and federal laws relating to water treatment and related issues. If there was a judgment against the trust in that case, there is no income available to the feoffees with which to pay the judgment. If the feoffees win that lawsuit, there is legal authority which indicates they could be required to pay the owners of the cottages market value for their cottages, and that the total cost could be substantially in excess of the highest appraisal estimate of the value of Little Neck.

litigation in the Superior Court and the associated risks that could make the trust liable to the owners of the cottages (see note 6) for the value of those structures depending on the outcome of the litigation before the Superior Court, and to diversify the trust asset so as to free them from future obligations to maintain the land and enable them to create a steady income stream for the beneficiaries. See Proposed Interveners R.A. at 8 et seq.

5. The feoffes and the school committee entered a settlement agreement which resolved the case while the trial was ongoing. The terms of the settlement agreement was approved by both the Attorney General and the trial judge. Under the terms of the settlement agreement, Little Neck is to be converted into a condominium and sold to the tenants who had brought the lawsuit against Mr. Paine's trust for a price of $29,150,000 plus $2,400,000 for the use and occupancy of certain tenants prior to the sale. Some of this money will go to resolving various debts incurred in paragraph three (3), while the remainder is to be invested. The returns from that investment will be for the benefit of the Ipswich public school.[7] The schools also will benefit over time from the income stream that results from

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[7] The settlement also resolves a concern of the School Committee by changing the governance of Mr. Paine's trust from one consisting of a majority of privately appointed trustees to a public body, primarily appointed by public officials.

property taxes paid by the owners.

6. Beyond the propositions set forth in paragraph two (2), three (3), four (4), and five (5), there are numerous points of disagreement between the proposed interveners and the parties. The proposed interveners take issue with the competence of the feoffees and accuse them of being conflicted between their personal interests (some of them own some of the Little neck cottages) and their duties as fiduciaries of the trust. The proposed interveners question the risks (present and future) of the litigation now pending before the Superior Court and challenge the judgment of the parties that those risks and other uncertain potential liabilities are significant enough to justify a deviation from the terms of Mr. Paine's testamentary trust. The proposed interveners believe that the land in question is worth more than the value contained in several of the appraisals and that it will continue to increase in value and could generate income in the future that is greater than the rate of return of a the assets of the new trust fund that will be created under the terms of the settlement with the proceeds of the sale of Little Neck. Finally, the proposed interveners challenge the lawfulness of the agreement for judgment in this case on grounds that it violates the rule that an equitable deviation cannot alter the predominant charitable purpose of a trust (which they assert in this case is that "Little Neck" not be sold or wasted), and, in

any case, that it is not supported by adequate findings and rulings by the trial court. The parties, on the other hand, vigorously dispute the allegations made by the proposed interveners. The parties and the proposed interveners have filed comprehensive written briefs, compiled a complete record of the proceedings below, and participated in a ninety minute oral argument in which they outlined their positions with clarity, conciseness and considerable forensic skill.

7. Discussion. A judge of the Probate and Family Court Department has the equitable power to change the terms of a charitable trust based on the doctrine of reasonable deviation which is sometimes referred to as "cy pres." "The court will 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." Restatement (Second) of Trusts § 381 (1959). See Museum of Fine Arts v. Beland, 432 Mass. 540, 544 (2000); Trustees of Dartmouth College v. Quincy, 357 Mass. 521, 531 (1970). For the reasons stated in the remainder of this opinion, it is neither necessary nor appropriate for me, as the Single Justice, to decide whether there was an error of law or an abuse of discretion in the

decision made by the lower court in this case to approve the settlement.[8]

8. One important preliminary issue concerns a specific charge made by the proposed interveners about the manner in which the trial judge exercised her responsibilities in this case. The proposed interveners allege that the trial judge made remarks at the outset of what was to be a multi-day trial in this case and before the settlement was reached that indicated that she had prejudged the matter and that she pressured the parties to reach

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[8] It is important to note, however, that counsel for both the Feoffees, the School Committee and the Attorney General, explained at length, during the oral argument, the deliberate process that led them to reach a settlement. The settlement agreement was reached only after a lengthy summary judgment proceeding as a result of which the trial judge became familiar with the issues. The parties actually commenced the trial which included the court taking a view and the introduction of more than 160 exhibits and some trial testimony. The record before the trial judge who approved the settlement was extensive. See Memorandum of Plaintiff Feoffees at 1 n. 2. It is also important to note that the position of the defendant School Committee and the Attorney General has evolved over time from initial support for a sale of the land in 2008, to a position of opposition to the proposed sale in 2009, and finally to a position of support for the Agreement for Judgment in December, 2011. The ultimate settlement was described as the result of evidence that the plan to condominiumize the cottages and the land will yield a total of 31.45 million dollars (sale price and back rent), compared to a substantially lower proposed sale price when the litigation began. Only after the School Committee and the Attorney General (1) determined that the current sale price is in line with most of the appraisals, (2) made an assessment of the risks associated with the outcome of the pending Superior Court case, and (3) engaged in two intense days of negotiations, was a settlement reached. It should also be noted that the Ipswich Town Meeting has previously authorized the sale of the land top resolve the lawsuits. See Supplemental Record Appendix 45.

a settlement. Based on my review of the various affidavits submitted on this point and my consideration of the arguments of counsel, I find no basis for such claims, and no evidence that the trial judge failed to act impartially and independently.

9. In their motion to stay judgment, the proposed interveners allege that (1) that the lower court erred in ruling that they lack standing to intervene in this case pursuant to Mass.R.Civ.P. 24(a) because they have a personal stake in the outcome and are the only putative party which represents the public interest, (2) the agreement for judgment in this case is contrary to the express terms of Mr. Paine's will and not within the scope of the doctrine that authorizes courts to deviate from the terms of a testamentary trust on equitable grounds, (3) that they will suffer irreparable harm unless the motion for a stay is granted, and (4) that a consideration of public policy weighs in favor of granting the motion for a stay. Under the legal framework that governs proceedings before a Single Justice of the Appeals Court, I must address the first of these four questions before addressing any of the other issues in this case.

10. Intervention. A. The legal standard. The question whether the plaintiffs should be permitted to intervene is governed by settled principles of law. A "proposed intervener as of right [under Mass.R.Civ.P. 24(a)] must satisfy four criteria: (1) the application [to intervene] must be timely; (2) the

applicant must claim an interest relating to the . . . transaction which is the subject of the litigation in which the applicant wishes to intervene; (3) the applicant must show that, unless able to intervene, the disposition of the action may, as a practical matter, impair or impede his ability to protect the interest he has; and (4) the applicant must demonstrate that his interest in the litigation is not adequately represented by existing parties." Bolden v. O'Connor Café of Worcester, Inc., 50 Mass.App.Ct. 56, 61 (2000). Alternatively, when intervention is sought as a matter of discretion, see Mass.R.Civ.P. 24(b), the proposed intervener must demonstrate, at least, an interest in the dispute that is not adequately represented by the existing parties. See Planned Parenthood League of Mass., Inc. v. Attorney General, 424 Mass. 586, 599 (1997). The common denominator to motions under Rule 24(a) and Rule 24(b) is that the proposed intervener must demonstrate that his interest is not adequately represented by the existing parties.

11. B. Review of decision to deny motion to intervene. This is not a case in which the Single Justice is authorized to act as a trial judge would and to decide the case anew based on my understanding of the law and the competing interests at stake. The standard of review I must apply to the decision below to deny the motion to intervene and for a stay is that it must be affirmed unless the plaintiffs demonstrate that the court abused

its discretion. See Cosby v. Department of Social Servs., 32 Mass.App.Ct. 392, 395 (1992). "In assessing whether a judge has abused his discretion, we do not simply substitute our judgment for that of the judge, rather, we ask whether the decision in question rest[s] on whimsy, caprice, or arbitrary or idiosyncratic notions." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 266 (2001). See also Greenleaf v. Massachusetts Bay Transp. Authy., 22 Mass.App.Ct. 426, 429 (1986) (abuse of discretion is an "arbitrary determination, capricious disposition, whimsical thinking, or [an] idiosyncratic choice").

12. C. Timeliness, interest in the dispute and risk of impairment. I will assume, for purposes of this proceeding, that as residents of the Town of Ipswich and parents of school children attending the public schools of Ipswich, the proposed intervenors have a sufficient interest in the dispute to qualify for intervention under Rule 24. I also will assume that the plaintiffs' motion to intervene was filed in a timely manner in view of the fact that they had every reason to believe the underlying lawsuit would proceed on the merits until after the trial commenced. See Johnson Turf & Golf Mgmt., Inc. v. Beverly, 60 Mass.App.Ct. 386, 389 (2004) (explaining why sometimes a would-be intervener's interest does not arise until after the action has begun or, in some cases, judgment has entered).

13. D. Whether the interest of the proposed interveners will be impaired if they are not allowed to intervene and whether their interests are adequately represented by the parties. It might seem at first blush that the answer to these questions is a simple and straightforward "no" because the proposed interveners are opposed to the agreement for judgment and the sale of the land while the existing parties all favor it. However, that is not the correct way to determine the adequacy of the representation of their interests in this context. The legal test to be applied is not whether the existing parties in the case adequately represent the point of view taken by the proposed interveners, but rather whether one of two circumstances exist: First, is there an adversity or conflict of interest between the Proposed Interveners and the existing parties, in particular the Attorney General of the Commonwealth, and the School Committee and Superintendent of Schools of the Town of Ipswich;[9] Second, is there evidence that those parties have failed for any reason to diligently, honestly, and independently represent the public interest and the interest of the beneficiaries namely, the Ipswich public schools. See Attorney General v. Brockton Ag. Sc., 390 Mass. 431, 435 (1983).

14. [I] The conduct of the Attorney General. The Supreme

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[9] Stated more simply this question asks whether there is a legally recognizable interest represented by the proposed interveners that is not represented by these parties.

Judicial Court has declared that the Attorney General is the sole and exclusive authority charged with the representation of the public interest in connection with charitable trusts. See, e.g., Ames v. Attorney General, 332 Mass. 246, 249 (1955).[10] At the oral argument in this case, counsel for the proposed interveners conceded that they do not have standing to assert the public interest in place of or in competition with the Attorney General.

15. [ii] The conduct of the School Committee and Superintendent of Schools. The remaining consideration, therefore, in determining whether the proposed interveners have demonstrated standing and a basis for intervention is that they have a genuine interest as people who will benefit from Mr. Paine's testamentary trust that is not adequately represented by the School Committee and Superintendent of School of the Town of Ipswich. On the record before me, it is evident that the proposed interveners do not have an legally protectable interest in the trust established by Mr. Paine that is distinct from that of the residents of Ipswich, including all those families in the

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[10] See also G.L. c. 12, § 8. "[I]t is the exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings. It is h[er] duty to see that the public interests are protected and . . . to proceed as those interests may require." Lopez v. Medford Community Center, Inc., 384 Mass. 163, 167(1981), quoting from Ames v. Attorney Gen., supra, 332 Mass. at 246, 250-251. The authority of the Attorney General encompasses both charitable "assets" as well as charitable "funds." See Weaver v. Wood, 425 Mass. 270, 275 (1997).

town with children in the public schools or who might at some point have children who will attend the public schools. See Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 245 (2007). The proposed interveners were not elected to represent the residents of Ipswich, and do not claim to speak for all of the residents of Ipswich.

16. Apart from the fact that the proposed interveners represent only a subset of the people who benefit from Mr. Paine's testamentary trust and therefore cannot claim to represent the interests of all the members of that indefinitely large class of people, there is a more fundamental problem with their argument - the only entity with both a legal right and a legal duty to protect the interests of the beneficiary of Mr. Paine's testamentary trust is the School Committee. See G.L. c. 71, §§ 37 and 68; G.L. c. 44, § 53. See also Molinari v. City of Boston, 333 Mass. 394 (1955); Parents Council, Inc. v. City of Boston, 27 Mass.App.Ct. 739 (1989). Chapter 71 of the General Laws, within a broader framework of local and state regulatory authority, gives the school committee the authority and the responsibility for the content of public education, the hiring of teachers and other school personnel, and the erection and maintenance of school buildings and facilities. It is the local school committee which is charged by law with a fiduciary duty to safeguard public funds and charitable funds appropriated or set

aside for the benefit of the public schools. Members of the school committee are elected by the people of Ipswich and are directly answerable to the voters. In this case, the school committee voted to endorse the settlement after initially supporting a sale, and later expressing opposition to the sale. Only after voluminous discovery, the beginning of a trial, and intensive negotiations, with input from counsel and a consideration of the independent voice of the Attorney General, did the school committee and superintendent of schools reach an agreement with the feoffees to sell the land. There is no evidence in the record before me that the agreement that led to the settlement was endorsed by the school committee because they caved in to pressure from the court or another party. Instead, the parties and proposed interveners agreed during the argument before me that the school committee was prepared to try this case to a conclusion. What changed, according to attorney Perry, counsel for the school committee and school superintendent, was the cost-benefit analysis he and the Attorney General's Office undertook based on the land appraisals and the risk associated with the case pending in the Superior Court. According to the Office of the Attorney General, that lawsuit posed a grave and serious risk of harm to the viability of the Paine trust, i.e., to the ownership and control of Little Neck for the benefit of the Ipswich schools, as a result of the potential for a

catastrophic damage award that could force the feoffees to sell Little Neck on terms fare less favorable than those that now make up the settlement. As Attorney Perry put it during the oral argument in this case, "the settlement was forged in the crucible of litigation."

17. The distinction between those who benefit from a charitable trust and the beneficiaries of a charitable trust is not merely a matter of semantics. An essential characteristic of a charitable trust is its design to benefit a broad community of interests. See Jackson v. Phillips, 96 Mass. 539, 556 (1867) (a charitable trust benefits an indefinite number of people). Mr. Paine's testamentary trust was specifically and unequivocally created to benefit a public school (and today a municipal school system) which has and will serve in the future to benefit an indefinite number of people. The proposed interveners do not have an interest in the Ipswich public schools that is "personal, specific and exist[s] apart from any broader community interest." Maffei, supra.

18. Whether the Attorney General and the School Committee have acted independently and honestly. A remaining argument advanced by the proposed interveners is that even if they do not meet the legal requirement for standing, they should nonetheless be allowed to intervene because the Ipswich School Committee and the Attorney General have not acted diligently, honestly and

independently in agreeing to the settlement and the terms of the deviation from Mr. Paine's testamentary trust. The proposed interveners have intimated that an improper and unlawful bargain was struck between the feoffees, the School Committee, the Attorney General, and the trial judge in this case to advance the interests of the feoffees and that such collusion was the source of the Attorney General and School Committee's alleged abandonment of their duties. Quite to the contrary, the record reveals a hard fought litigation that ended in a settlement which the defendant Attorney General, as representative of the public interest, and the School Committee and superintendent of schools, as the beneficiary, thought was fair, reasonable and prudent based on a calculation of likelihood of success and the risks. See Sniffin v. Prudential Ins. Co., 395 Mass. 415, 421 (1985) ("[T]he essence of a settlement is compromise . . . Because the settlement of . . . any litigation[] is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the [parties] and the public") quoting from Armstrong v. School Directors of Milwaukee, 616 F.2d 305, 313 (7th Cir. 1980). Even outside of that deficiency, the proposed interveners have offered no credible evidence to support their hypothesis of collusion and

among the parties.[11] The proposed interveners have thus not shown that the Attorney General has abandoned her role as the elected representative of the public or that the school committee has abandoned its role as the elected representative of the Ipswich schools. The mere fact that, as private parties, the proposed interveners disagree with the Attorney General and the school committee's decisions as public representatives does not render those decisions unlawful or unreasonable.

19. Standing is not a technicality. The proposed interveners' position that the doctrine of standing should be subordinated to the overriding public policy concerns they seek to raise warrants a comment. Standing is not merely a procedural technicality but, rather, it is a necessary requirement to the exercise of a court's jurisdiction over the subject matter. Standing also makes it possible for disputes to proceed to a trial or a settlement in an orderly and efficient manner. If the proposed interveners were allowed to participate as a party in this case simply on the basis of their claim that they are a class of people with an interest in the case and a point of view that is at odds with the other parties, it would open the floodgates to participation in litigation involving issues of

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[11] It is worth noting that the Attorney General allowed the proposed interveners to submit an amicus brief in the lower court to ensure that the lower court had the benefit of their views of the case.

public concern by a multitude of persons and organizations who could similarly claim a legitimate interest in the outcome of the case. It would transform the judicial process into something resembling the process followed by an Executive Branch agency or Legislative Committee which is not a workable method for resolving legal disputes. The proposed interveners are absolutely correct in their assertion that this is not an ordinary lawsuit in which parties should be permitted to reach a settlement free from public scrutiny. Both the Supreme Judicial Court and the Legislature have addressed the concern voiced by the Proposed Interveners that there are weighty issues of public policy at stake in cases involving equitable deviation from the terms of a charitable trust, especially one like the testamentary trust established by Mr. Paine in this case which is described as the oldest land trust in the United States, that cannot be left to the judgment of the feoffees and the school committee alone. Under both Massachusetts common law and the terms of G.L. c. 12, § 8, there is one neutral party with standing to represent the interests of the public, namely the Attorney General, a statewide officeholder and the highest law enforcement officer in the Commonwealth:

> [T]he law has provided a suitable officer to represent those entitled to the beneficial interests in a public charity. It has not left it to individuals to assume this duty or even the court to select a person for its performance. Nor can it be doubted that such a duty can be more satisfactorily performed by one acting under official

> responsibility than by individuals, however honorable their character and motives may be.

Ames v. Attorney General, 332 Mass. at 251, quoting from Burbank v. Burbank, 152 Mass. 254, 256 (1890). Furthermore, even after the Attorney General does her due diligence and approves the terms of a settlement, it must be approved, as it was in this case, by a neutral, impartial and independent judge.

20. Motion for a stay pending final adjudication of the question of standing and intervention. Finally, the proposed interveners argue that even though the trial judge and this court have rejected their claim that they have standing, I should nonetheless reach the merits and grant a stay of any further action pending the final resolution of all other avenues of appeal because this litigation involves "questions of pressing public importance" which touch on the public policy of the Commonwealth and "the issues have been fully briefed." Memorandum of Proposed Interveners at 2, citing School Committee of Boston v. Board of Education, 352 Mass. 693, 697 (1967). Courts must proceed with caution when a public policy concern and not a legally cognizable right is presented as the basis for invoking the court's jurisdiction. Apart from the fact that there is already a party in this case, the Attorney General, who has the duty to represent the public interest and who could, if she deemed it advisable and necessary, appoint a Special Assistant Attorney General to advocate against the settlement,

judges are not nearly as well equipped as the elected representatives of the other branches of government to ascertain what is or what is not in the public interest. It has been observed that public policy "is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from sound law." Richardson v. Mellish, 130 Eng. Rep. 294, 303 (1824). Suffice it to say that a Single Justice of the Appeals Court does not have the authority to exercise the discretionary jurisdiction requested by the Proposed Interveners.

ORDER

For the above reasons, the motion for a stay of the Agreement for Judgment and the motion to intervene are DENIED.

By the Court (Agnes, J.)

Joseph Stanton
Clerk

Entered: March 12, 2012

Unpublished Disposition
77 Mass.App.Ct. 1117
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

1 Sandra Kendall, David M. Will, Suellen E. Will, Alanna Conlon, Chris A. Conlon, Glen D. Conlon, Alexander T. Spare, Maureen A. Doyle-Spare, Ronald F. Costello, Gloria A. Costello, Rene J. Dekkers, Perry Dekkers, Henry J. Smith, Lorraine L. Smith, Daniel A. Smith, and Susan Smith (the Baker group).

Donald A. BAKER & others [1]

v.

BOARD OF SELECTMEN OF the TOWN OF FOXBOROUGH & another. [2]

2 The conservation commission of the town of Foxborough.

No. 09-P-367. | Aug. 19, 2010.

Synopsis

Background: Residents, who favored no-leash dog park, appealed from decision of the Land Court Department, Norfolk County, 2008 WL 4799468, allowing agreement for judgment to close dog park, and denying their motion to intervene.

Holdings: The Appeals Court held that:
1 land court judge acted within his discretion in denying motion to intervene, and
2 residents lacked standing to appeal.

Affirmed; appeal dismissed.

West Headnotes (3)

1 **Towns** ⇐ Public Buildings and Other Property

Land court judge acted within his discretion in denying motion to intervene of residents who favored no-leash dog park, in proceeding in which town officials and opponents of dog park reached agreement to close dog park; town manager act placed control of all interests in donated land, used for dog park, exclusively in town's board of selectmen and town manager, and act conferred power over municipal lands and municipal litigation to board and town manager. Rules Civ.Proc., Rule 24(a)(2), 43A M.G.L.A.

2 **Towns** ⇐ Public Buildings and Other Property

Residents who favored no-leash dog park lacked standing to appeal from agreement for judgment entered by land court, in which town officials and opponents of no-leash dog park reached agreement to close dog park; residents were not able to intervene, and thus, were not parties to underlying case.

3 **Towns** ⇐ Costs

Board and town manager were not entitled to award of double costs or appellate attorney fees in appeal of residents from agreement for judgment entered by land court, in which town officials and opponents of no-leash dog park reached agreement to close dog park; appellate effort by residents, who favored dog park, was competent, vigorous,

and ostensibly grounded in good faith, and was not frivolous or visibly lacking any reasonable expectation of a reversal under well settled law. Rules App.Proc., Rule 25, 43C M.G.L.A.

By the Court (GRASSO, COHEN & SIKORA, JJ.).

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 This appeal arises from a dispute concerning the use for a dog park of land donated to the town of Foxborough. The Land Court allowed an agreement for judgment to close the dog park and denied the appellants' motion to intervene. The appellants, proposed interveners who favor the dog park and whom we shall call the Stewart group,[3] challenge both rulings. We affirm the order denying intervention and dismiss the appeal from the agreement for judgment.

3 Debbie Stewart, Michael Stewart, Debbie Cunniff, Chris Cunniff, Anita Kloss, Marty Kloss, Diana Griffin, Matt Griffin, Paul Hubrich, Steve Harding, and Heather Harding (the Stewart group).

Background. The following undisputed material facts emerge from the appellate record. In 2006, residents of the town of Foxborough established a 2.8 acre no-leash dog park with the approval of the town's conservation commission within the Cocassett River Recreational Area, a forty-six acre parcel of land, portions of which donors had contributed to the town by deeds executed in 1962 and 1965.

In 2008, other residents, opponents of the dog park whom we shall call the Baker group, filed this action in the Land Court against the defendants, the town's board of selectmen (board) and the conservation commission. Among other relief, these plaintiffs-appellees sought, pursuant to G.L. c. 214, § 3(10), to discontinue the dog park because they believed that such a use contradicted the deed restrictions of the land donated to the town. During the course of the litigation, the Land Court issued a preliminary injunction requiring that dogs be leashed at all times at the dog park but later revised the injunction so that dogs could roam unleashed within the dog park area subject to certain conditions. Trial, originally scheduled for August 6, 2008, was continued to November 12, 2008, to allow the parties time for settlement negotiations.

On October 14, 2008, the board and the conservation commission held a meeting with the town manager to discuss litigation strategy. The board, pursuant to the Foxborough town manager act, St.2004, c. 5, voted to settle the lawsuit and directed the town manager to do so out of concern over litigation costs to the town. The conservation commission, which viewed the dog park an appropriate use of the land under the deed restrictions, opposed the closure of the dog park as part of the settlement of the action. Over the conservation commission's opposition, the town manager filed a joint motion for entry of a consent order, later re-filed as an agreement for judgment, by which the parties agreed to close the dog park, remove the dog park facilities, bar unleashed dogs within the recreational area, allow other uses within the dog park area, and dismiss all claims against the municipal defendants.[4]

4 Notably, the settlement did not prohibit the presence of leashed dogs within or without the dog park area.

In response, the Stewart group appellants, eleven residents favoring the dog park, filed an emergency request to be heard on the joint motion and a conditional request to intervene, which, if allowed, would permit them to appeal the decision of the Land Court if it approved the settlement between the original parties to the action. The appellants now challenge the judge's allowance of the agreement for judgment[5] and the order denying their motion to intervene.[6]

5 The final adjudication that entered after the judge approved the settlement was styled as an "agreement for judgment," and we shall so refer to it in this memorandum and order.

6 The Land Court approved all of the provisions within the agreement for judgment, except for the provision requiring removal of the dog park facilities. It stayed that request pending further order of the Land Court or an appellate court.

*2 *Analysis.* For the reasons discussed below, we find proper the Land Court judge's denial of the appellants' motion to intervene. Because the Stewart group appellants were not parties to the litigation below, we need not assess the propriety of the agreement for judgment.

1 1. *Appellants' motion to intervene.* Pursuant to G.L. c. 214, § 3(10), the Stewart group appellants, supportive of the conservation commission's position that the dog park was a proper use of the gifted land, sought to intervene in the action between the town officials and the Baker group plaintiffs because the appellants believed that the conservation commission's position and their own lacked representation from the board and town manager. The Stewart group asserted a protectible interest within the meaning of Mass.R.Civ.P. 24(a)(2), 365 Mass. 769 (1974). They argued that the agreement for closure of the dog park by the board and town manager violated the terms of the deeds originally conveying the donated land to the town in 1962 and 1965 because those deeds purportedly required management of the land exclusively by the conservation commission pursuant to G.L. c. 40, § 8C.

The Foxborough town manager act (act) provides that "the [town] shall be governed by the provisions of this act. To the extent that this act modifies or repeals existing General Laws and special acts or the by-laws of the [town], this act shall govern." St.2004, c. 5, § 1. The act vests "[t]he executive powers of the town ... in the [board] ... [which] shall have all the powers given to boards of selectmen by the General Laws, except for those executive powers granted to the town manager." *Id.* § 3(A). The act grants the board "general administrative oversight of such boards, committees and commissions appointed by the [board]." *Id.* § 3(D)(4). It also requires the board to "[e]xercise, through the town manager, general supervision over all matters affecting the interests or welfare of the town." *Id.* § 3(D)(2).

Under the act, the "town manager shall be the chief administrative officer of the town and shall act as the agent for the [board] ... [and] shall be responsible to the [board] for coordinating and administering all town affairs under the jurisdiction of the [board]." *Id.* § 4(A). In particular, the town manager is authorized to "[m]anage and be responsible for all the town buildings, properties and facilities, except those under the jurisdiction" of certain other named boards or agencies, which do *not* include the conservation commission. *Id.* § 4(B)(21). Additionally, the act grants the town manager the power to "[p]rosecute, defend or comprise [*sic*] all litigation for or against the town in accordance with the guidance provided by the [board]." *Id.* § 4(B)(23).

While the language of the deeds for the land gifted to the town appears to assign exclusive management of their respective parcels to the conservation commission pursuant to G.L. c. 40, § 8C, it also contemplates and allows for later amendment to that statute. The first deed conveyed a parcel of land to the town "under the provisions of General Laws [c. 40, § 8C,] *as it may hereafter be amended* to be managed and controlled by the Conservation Commission of the Town of Foxborough for the promotion and development of the natural resources of said Town" (emphasis added). The deeds comprising the second conveyance stated that the land was conveyed "for the purposes authorized by General Laws [c. 40, § 8C,] *as it may hereafter be amended,* and other Massachusetts statutes relating to Conservation, including the protection and development of the natural resources and the protection of the watershed resources of the Town of Foxborough" (emphasis added).

*3 The original deeds of the donated lands allow for control of the land in accordance with any later amendment to G.L. c. 40, § 8C. The 2004 act constitutes such an amendment. It does so by (1) empowering the board with responsibility for the town's interests and welfare, (2) directing that the town manager act as agent for the board, and (3) granting to the town manager the power to manage the town's buildings, properties, and facilities and to prosecute, defend, or settle all litigation involving the town. St.2004, c. 5, §§ 3(D)(2), 4(A), 4(B)(21) & (23). Thus, the act vested authority over management of the dog park and the litigation concerning the dog park in the town manager as guided by the board. Additionally, the act provides expressly that "[t]o the extent that this act modifies or repeals existing General Laws and special acts or the by-laws of the town of Foxborough, this act shall govern ." *Id.* § 1.

It is well settled that a specific statute supersedes a more general one. See *Doe v. Attorney Gen.*, 425 Mass. 210, 215, 680 N.E.2d 92 (1997) ("[W]hen two statutes (or provisions within those statutes) conflict, we have stated that the more specific

provision, particularly where it has been enacted subsequent to a more general rule, applies over the general rule"). Accordingly, the act, by virtue of its own express provision regarding its primacy against conflicting statues and its more specific nature, governs or supersedes G.L. c. 40, § 8C, the general law allowing conservation commissions to exercise authority over certain municipal lands.

The action taken by the town officials in accordance with the act did not violate any restrictions placed on the donated land by the deeds. The act confers power over municipal lands and municipal litigation to the board and town manager. We see no independent "interest" in taxpayer residents for enforcement of gifts for conservation purposes under implied authority from G.L. c. 40, § 8C. Donors transferred the land to the town generally for conservation, and the deeds accepted later amendment of the conservation legislation.

Thus, the act placed control of all interests in the donated land exclusively in the board and town manager. No independent interests exist in the Stewart group for representation by intervention under Mass.R.Civ.P. 24(a)(2). The Land Court judge acted well within his discretion by denial of the appellants' motion to intervene. See *Cosby v. Department of Social Servs.*, 32 Mass.App.Ct. 392, 395 n. 8, 589 N.E.2d 349 (1992) (standard of review for denial of intervention as of right is abuse of discretion).

2 2. *Agreement for judgment.* Because the appellants were not able to intervene and thus are not parties to the underlying case, they lack standing to appeal from the agreement for judgment entered by the Land Court. See *Corbett v. Related Cos. Northeast, Inc.*, 424 Mass. 714, 718, 677 N.E.2d 1153 (1997) (general rule is that appeals are limited to parties to the underlying case).

*4 3 3. *Request for costs and fees.* The appellate effort by the Stewart group was competent, vigorous, and ostensibly grounded in good faith. It was not "frivolous" or visibly lacking any "reasonable expectation of a reversal" under well settled law. *Avery v. Steele,* 414 Mass. 450, 455, 608 N.E.2d 1014 (1993), quoting from *Allen v. Batchelder,* 17 Mass.App.Ct. 453, 458, 459 N.E.2d 129 (1984). Consequently the board and town manager are not entitled to the award of double costs or appellate attorney's fees under Mass.R.A.P. 25, as appearing in 376 Mass. 949 (1979).

Conclusion. We affirm the Land Court order denying the appellants' motion to intervene. Because that denial was proper, the appellants lack standing to appeal from the agreement for judgment. Accordingly, we dismiss the appeal from the agreement for judgment. See *Tofias v. Energy Facilities Siting Bd.*, 435 Mass. 340, 351-352, 757 N.E.2d 1104 (2001).

Order denying motion to intervene affirmed.

Appeal from agreement for judgment dismissed.

Parallel Citations

932 N.E.2d 311 (Table), 2010 WL 3257845 (Mass.App.Ct.)

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COMMONWEALTH OF MASSACHUSETTS
PROBATE AND FAMILY COURT DEPARTMENT

ESSEX, ss. Docket No. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., et al. Plaintiffs,	)
v.	)
ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, et al. Defendants.	)

NOTICE OF HEARING

Notice is hereby given that the Court in this action will hold a hearing on the Motion of Plaintiffs to Strike Portion of Would-be Intervenors' Notice of Appeal at the Salem Division of the Essex Country Probate and Family Court Department of the Trial Court, 36 Federal Street, Salem, Massachusetts on April 27, 2012 at 9:00 a.m.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al.,
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Dated: April 17, 2012