

72

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss

SUPERIOR COURT
CIVIL ACTION
NO. 06-2328-D

WILLIAM M. LONERGAN, & another,¹ on behalf of themselves and
all others similarly situated

vs.

JAMES W. FOLEY, & others,² FEOFFEEES OF THE GRAMMAR SCHOOL IN THE
TOWN OF IPSWICH

vs.

DISTRICT ATTORNEY FOR THE EASTERN DISTRICT, ATTORNEY GENERAL
FOR THE COMMONWEALTH OF MASSACHUSETTS, & others³

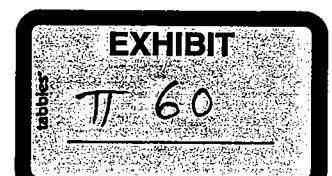
MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO
DISMISS OR IN THE ALTERNATIVE TO SEVER COUNTERCLAIMS

Plaintiffs William Lonergan and Diane Whitney-Wallace (collectively "plaintiffs") brought suit, on behalf of themselves and all others similarly situated, against the Feoffees of the grammar school in the town of Ipswich ("Feoffees"), asserting ten counts arising out of the Feoffees' management of a tract of land known as Little Neck, which is occupied by the plaintiffs. Feoffees countersued the plaintiffs and joined as counter-defendants two hundred fifty-five additional parties, including the District Attorney for the Eastern District ("District Attorney") and the Attorney General for the Commonwealth of Massachusetts ("Attorney General"). The relevant portion of the counterclaim requests (1) declaratory relief pursuant to

¹Diane Whitney-Wallace.

²Peter A. Foote, Alexander B. C. Mulholland, Jr., Donald F. Whiston, Elizabeth A. Kilcoyne, Patrick J. McNally, and Edward B. Rauscher.

³The defendants filed counterclaims against two hundred fifty-seven counter-defendants. The remaining two hundred fifty-five counter-defendants are not parties to the instant motion.



G. L. c. 231A, that the Feoffees are not a “governmental body” within the meaning of the Open Meeting Law, G. L. c. 39, §§ 23A-23C; and (2) declaratory relief that the Feoffees are not a “governmental body” under the Uniform Procurement Act, G. L. c. 30B, §§ 1-20. This matter is before the court on the District Attorney and Attorney General’s Motion to Dismiss for lack of subject matter jurisdiction under Mass. R. Civ. P. 12(b)(1)⁴ or, in the alternative, to sever Counts I and II from the remaining counts. After reviewing the briefs, the District Attorney and Attorney General’s motion to dismiss Counts I and II of the counterclaim is **ALLOWED**.

BACKGROUND

This case arose out of activities relating to the Feoffees’ ownership and management of a tract of land known as Little Neck. Plaintiffs sued the Feoffees under several theories, alleging a number of abuses of the Feoffees’ authority. Those events are not relevant to the instant motion. Neither the District Attorney nor the Attorney General is a party to the initial complaint.

On December 11, 2006, the District Attorney opined that the Feoffees constitute a “governmental body” within the meaning of G. L. c. 39, § 23A.⁵ The Feoffees object to this classification, as well as the implication that, if they are a governmental body, they are required to have open meetings. G. L. c. 39, § 23B (“All meetings of a governmental body shall be open to the public. . . .”). Additionally, the Feoffees claim that, if they are a governmental body, they will be required to adhere to the provisions of the Uniform Procurement Act, which “appl[ies] to

⁴Count III of the counterclaim does not assert a cause of action against the District Attorney or the Attorney General, and is not implicated by the instant motion.

⁵A governmental body is “every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constructed, and the governing body of a local housing, redevelopment or similar authority”

every contract for the procurement of supplies, services or real property and for disposing of supplies or real property by a governmental body” G. L. c. 30B, § 1(a). The Feoffees seek declaratory judgment that they are not a governmental body and are therefore not subject to either the Open Meeting Law or the Uniform Procurement Act. The District Attorney and the Attorney General moved to dismiss the claims against them, on the grounds that the Feoffees’ counterclaims fail to show an actual controversy.

DISCUSSION

I. Motion to Dismiss for Lack of Jurisdiction

Declaratory judgment is premature where the prosecuting authority has not initiated proceedings or indicated that it intends to take action. *Bunker Hill Distrib., Inc. v. District Attorney*, 376 Mass. 142, 144-145 (1978). A request for declaratory judgment “should be denied unless it is clear ‘that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree’” *Id.* at 146, quoting *Kenyon v. Chicopee*, 320 Mass. 528, 534 (1946). “Permitting declaratory or injunctive relief in the absence of a threat of enforcement removes control of litigation from the prosecutor” *Id.* at 147.

A court may make a binding declaration of right “in any case in which an actual controversy has arisen and is specifically set forth in the pleadings.” G. L. c. 231A. In the absence of an actual controversy, a declaratory judgment is unavailable. *Gay & Lesbian Advocates & Defenders v. Attorney Gen.*, 436 Mass. 132, 134 (2002). An actual controversy is “a real dispute caused by the assertion of one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that

unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.” *Bunker Hill Distrib., Inc.* 376 Mass. at 144, and cases cited.

This court finds that no such dispute is present in the instant case. The District Attorney has not initiated any action against the Feoffees under the Open Meeting Law, nor has the Attorney General given any indication that she intends to pursue the Feoffees for a violation of the Uniform Procurement Act.⁶ See *Bunker Hill Distrib., Inc.*, 376 Mass. at 144.

Additionally, because Feoffees do not meet the definition of a “governmental body” as set forth in G. L. c. 39, § 23A, they are in no danger of prosecution under either the Open Meeting Law or the Uniform Procurement Act. The Feoffees have none of the traditional powers granted to government, such as the power to tax, to regulate, or to take property by eminent domain. See *District Attorney v. Board of Trs. of the Leonard Morse Hosp.*, 389 Mass. 729, 733 (1983).

In determining whether a group of individuals is a governmental body within the meaning of the Open Meeting Law, courts look at a number of factors, including whether the land was granted by statutory authority and how members of the group are chosen. See *District Attorney*, 389 Mass. at 732. The fact that the Feoffees are indirectly chosen by the voters is not determinative as “the means by which the members of a particular board are selected is only one factor among many to be considered in evaluating whether a particular entity is a governmental body.” *Id.* at 732-733. The Feoffees are not a group that was initially created by statute or bylaw. See *Connelly v. School Comm.*, 409 Mass. 232, 235 (1991). Although the plaintiffs pay taxes along with their yearly rents, the Feoffees use these funds to pay the property taxes on the

⁶Indeed, because the Attorney General has not expressed any opinion regarding whether Feoffees are a governmental body within the meaning of the Uniform Procurement Act, there is no reason to think that the Feoffees will be prosecuted under the Act.

entire parcel. The plaintiffs do not pay taxes directly to the Feoffees.

In order to make a determination regarding the Feoffees' status, it is necessary to go back to the initial land grant. "In construing conveyances made early after the settlement of the country . . . the intention of the parties is to govern, without regarding the rigid rules of construction which would be applicable to recent conveyances . . . however clearly that might be made to appear." *Feoffees of the Grammar Sch. v. Andrews*, 49 Mass. 584, 592 (1844), citing *Adams v. Frothington*, 3 Mass. 352 (1807). Initially, the land was granted by will, with a number of designated Feoffees named to oversee the management of the land. *Id.* When all but one of the original grantees of the land was deceased, in 1683, "provision [was] made for the choice of successors, whenever any of the trustees should die, or in any other way be removed . . ." *Id.* In 1720, the town laid claim to the land, asserting that ownership reverted to them upon the death of the original Feoffees. *Id.* The town reverends objected to the suits and requested that, in the interest of protecting the town from "a general odium and guilt of public injustice," and, specifically, lawsuits against the town, the town should reconsider its position that it owned the land. *Id.* at 593. The town then determined that the land had been granted to the school permanently, to be overseen by the Feoffees. *Id.* Thus, the fact that the Feoffees are composed of the town selectmen appears to be as a matter of convenience, and because "the town were pleased with the doings of the Feoffees," rather than out of a recognition by the town that the Feoffees have governing authority over Little Neck. *Id.*

When faced with this question more than one hundred fifty years ago, the Supreme Judicial Court held that the town granted Little Neck to the Feoffees in fee, with the intent that the premises be held in trust by certain persons, "being a committee for the management of the

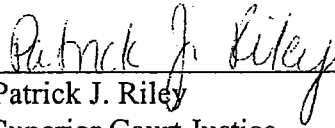
school.” *Feoffees*, 49 Mass. at 592. This court sees no reason to revisit that decision. Because the Feoffees are not a governmental body, they are not subject to either the Open Meeting Law or the Uniform Procurement Act. The Feoffees are not in actual and imminent danger of a lawsuit based upon laws that do not apply to their conduct. Therefore, Feoffees have failed to allege an actual controversy against the District Attorney or the Attorney General.

II. Motion to Sever Counterclaims

Because this court finds that it lacks subject matter jurisdiction over Counts I and II of the Feoffee’s counterclaim, it is not necessary to determine whether those counts should be severed.

ORDER

Based on the foregoing, the Motion to Dismiss Under Mass. R. Civ. P. 12(b)(1) For Lack of Jurisdiction is **ALLOWED**.



Patrick J. Riley
Superior Court Justice

Dated: December 18, 2007