

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

PROBATE & FAMILY COURT
DOCKET NO. ES09E0094QC

ALEXANDER B.C. MULHOLLAND, JR., et al.)
AS THEY ARE THE FEOFFEEES OF THE)
GRAMMAR SCHOOL IN THE TOWN)
OF IPSWICH)

Plaintiffs,)

v.)

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

Defendants.)

**PLAINTIFFS' MOTION FOR SEPARATE TRIALS ON PLAINTIFFS' AMENDED
COMPLAINT FOR DEVIATION AND DEFENDANTS' COUNTERCLAIM FOR
REVISION TO GOVERNANCE AND ADMINISTRATIVE STRUCTURE OF THE
FEOFFEEES, ORDER LIMITING DISCOVERY, AND SETTING OF TRIAL DATE**

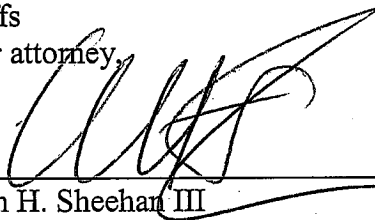
NOW come the Plaintiffs and move this Honorable Court, pursuant to Mass.R.Civ.P. 42(b), to order separate trials on the Plaintiffs' complaint and the Defendants' counterclaim. In addition, the Plaintiffs move for orders limiting discovery to the issues raised in the Plaintiffs' complaint pending a judgment on the complaint and setting a trial date on the Plaintiffs' complaint.

As grounds for this motion, the Plaintiffs say that separate trials will likely save substantial economic resources of the parties, an especially significant factor here because the attorneys' fees and costs incurred by all parties other than the Attorney General ultimately reduce the monies which would otherwise be available for the benefit of the Ipswich Public Schools; such a separation and the requested concomitant orders will expedite the discovery process and a

trial date; the issues presented by the Plaintiffs' complaint are very different in kind from those presented by the Defendants' counterclaim; and, in the event this Court grants the relief sought by the Plaintiffs in their complaint and permits sale of Little Neck, the expertise brought to the operation of Little Neck by the four private, life feoffees will no longer be necessary and, following sale, the Plaintiffs will have no objection to the endowment fund, to be created from the sales proceeds, being managed by persons other than the present life feoffees, thus making settlement of the counterclaim very likely.

The aforesaid grounds are more particularly set forth in the Plaintiffs' memorandum filed herewith in support of this motion.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al.,
Plaintiffs
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


Dated: June 9, 2011

CERTIFICATE OF SERVICE

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

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

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



William H. Sheehan III

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Defendants.)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SEPARATE TRIALS
ON PLAINTIFFS' AMENDED COMPLAINT FOR DEVIATION AND DEFENDANTS'
COUNTERCLAIM FOR REVISION TO GOVERNANCE AND ADMINISTRATIVE
STRUCTURE OF THE FEOFFEEES, ORDER LIMITING DISCOVERY, AND SETTING
OF TRIAL DATE**

I. INTRODUCTION

The Plaintiffs Feoffees of the Grammar School in the Town of Ipswich ("Feoffees") file this memorandum in support of their motion for separate trials on the Feoffees' complaint and the Defendants' counterclaim and for orders limiting discovery in the first instance and setting a trial date.

II. FACTS

The facts giving rise to the instant dispute between the Feoffees, who hold title to Little Neck in trust for the benefit of the Ipswich Public Schools, and the Defendants are well known to this Court which recently heard extensive argument in connection with the Feoffees' motion for

partial summary judgment. In lieu of reciting the facts in this memorandum, the Feoffees incorporate by reference the Statement of Material Facts contained in their memorandum in support of their summary judgment motion and, for the Court's convenience, attach as Appendix A hereto a copy of same.

III. STANDARD FOR SEPARATE TRIALS

Mass.R.Civ.P. 42(b) authorizes separate trials:

This court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial in the county where the action is pending or in a different county of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right to trial by jury as declared by the constitution of this Commonwealth or as set forth in a statute.

IV. ARGUMENT

Separate trials of the Plaintiffs' complaint and the Defendants' counterclaim, with the former trial first, will be conducive to expedition and economy.

A. The Complaint and Counterclaim Present Very Different and Distinct Issues.

The Feoffees seek by their complaint the following relief: permission to compromise the Essex Superior Court litigation between the Feoffees and the non-lessee cottage owners at Little Neck; deviation from the terms of William Payne's will to permit sale of Little Neck and, in conjunction with that sale, permission to receive mortgages to secure payment of so much of the purchase price as is paid by promissory notes; permission to borrow funds, and, in conjunction therewith, give a mortgage to secure repayment of monies borrowed; and a declaration that the

Uniform Procurement Act does not apply to the sale of condominium units as contemplated by the Feoffees.¹

Whether that relief is warranted turns, in essence, on three issues: (1) the reasonableness of the sale price of \$29,150,000; (2) the advantages of an endowment fund versus a single asset, real estate trust; and (3) the pros and cons of settling the Essex Superior Court litigation. Expert testimony and opinion will constitute the major part of the evidence before the court, much of it documentary.

In stark contrast, the Defendants' counterclaim asks for a new governance scheme, relying on a variety of alleged failings by the Feoffees, ranging from complaints about the installation of a private sewer system on Little Neck to a failure to make satisfactory distributions to the Ipswich Public Schools. The proof of those alleged failings, which the Feoffees deny, will require numerous fact witnesses who will offer little or no evidence on the Plaintiffs' complaint. Indeed, testimony on the construction of the private sewer system alone will extend for days.

Where, as here, there will be no, or very little, overlap of fact issues, separate trials are reasonable and prudent. Williams v. C.S.X. Transp., Inc., 2002 WL 31618455, not reported in F.Supp. 2d. (copy of case attached as Appendix B).

B. There Is A Reasonable Likelihood That There Will Be No Need Of A Trial Of The Defendants' Counterclaim.

A separate trial on the Feoffees' complaint is particularly prudent because, if the Feoffees prevail, there is little likelihood the Defendants' counterclaim will proceed to trial. The thrust of the Defendants' counterclaim is the elimination of the private, life feoffees, leaving control of the

¹ The Superior Court has ruled on that issue: "Because the Feoffees are not a governmental body, they are not subject to either the Open Meeting Law or the Uniform Procurement Act." See Decision of Riley, J., dated December 18, 2007, in Loneragan, et al. v. Foley, et al. Essex Superior Court Action No. 06-2328-D.

trust solely in the hands of persons appointed by Ipswich governmental bodies. The private, life feoffees provide the expertise necessary to operate Little Neck. If Little Neck is sold and the proceeds deposited into an endowment fund, the expertise provided by the private, life feoffees will no longer be necessary and the Feoffees will have no objection to that fund being managed by persons other than the present Feoffees. There is a great likelihood of settlement of the Defendants' counterclaim if Little Neck is sold. Such a settlement will save many days of trial time.

C. The Two Goals Of Separate Trials, Expedition And Economy, Will Be Accomplished By Separating The Trials As Requested By The Feoffees

Economy and the preservation of parties' resources are important in every case; they are of particular importance in the instant case. Every dollar spent on counsel fees by every party to this action, with the exception of the Attorney General, is one dollar fewer that is available to benefit the Ipswich Public Schools. The Feoffees have acted, and continue to act, in a way so as to reduce their legal costs. They sought and obtained the School Committee's assent to a settlement of the Superior Court litigation and sale of Little Neck which would have the salutary effect of putting an end to the substantial cost of that litigation. Unfortunately, the School Committee, after twice approving the sale, changed its mind, resulting in another round of litigation, now in the Probate Court. In this action, the Feoffees moved for partial summary judgment, again, in part, to save the cost of a trial. The School Committee successfully opposed the motion by using an appraisal of Colliers Meredith and Grew, an appraisal which the Committee's own appraiser discredited, thus creating an issue of fact as to whether the proposed sale price was reasonable.

The Feoffees now propose another means of reducing legal expenses: separate trials and a concomitant order limiting discovery in the first instance to the issues to be tried in the

Feoffees' complaint. The savings generated by limiting discovery and trying first the Feoffees' complaint will be, conservatively, in the tens of thousands of dollars. If the Feoffees prevail and sale is approved, the Defendants' counterclaim will likely be settled and the savings will be substantial and permanent. See Guidi v. Inter-Continental Hotels Corp., 2003 WL 1846864, not reported in F.Supp. 2d. ("Moreover, the potential time-saving effect of bifurcation is not insignificant The possibility of the elimination of this lengthy portion of the case is, without doubt, conducive to expedition and economy. Fed.R.Civ.P. 42(b).") (copy of case attached as Appendix C).

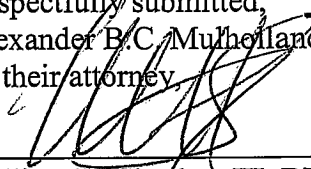
Separate trials and limited discovery in the first instance will also result in a speedier trial date. All of the parties will gain by the earliest possible determination of whether the Feoffees will be permitted to sell Little Neck. No party will be adversely prejudiced by separate trials.

CONCLUSION

For the reasons set forth above, this Court should enter the following orders:

- (1) that the Plaintiffs' complaint and the Defendants' counterclaim be tried separately;
- (2) that the Plaintiffs' complaint be tried first on a date convenient to the Court; and
- (3) that discovery be limited to the issues raised in the Plaintiffs' complaint pending judgment on the Plaintiffs' complaint.

Respectfully submitted,
Alexander B.C. Mulholland, Jr., et al., Plaintiffs
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

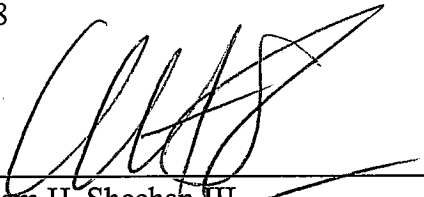
Dated: June 9, 2011

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

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

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



William H. Sheehan III

Dated: June 9, 2011