COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX, SS.

APPEALS COURT
No. 2012-P-0635

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ALEXANDER B.C. MULHOLLAND, JR., ET AL.,
Plaintiffs/Appellees

v.

ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Defendants/Appellees

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ON APPEAL FROM A DECISION ENTERED IN THE PROBATE COURT
AND A DECISION OF THE SINGLE JUSTICE

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# OPPOSITION OF APPELLEES IPSWICH SCHOOL COMMITTEE AND RICHARD KORB TO REQUEST FOR DIRECT APPELLATE REVIEW

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## INTRODUCTION

The sole issue dispositive of this appeal is whether the probate court abused its discretion when it denied, for lack of standing, Appellants' attempt to represent the public's beneficial interest in a charitable trust that held land in Ipswich for the benefit of the Ipswich schools. The denial of the motion to intervene was mandated by a long and unbroken line of cases establishing that the Attorney General has the sole and exclusive right to represent the public's beneficial interest in a charitable trust, and that individual members of the public such as the Appellants have no standing to second-guess the Attorney General's decisions. Appellants' appeal from the denial of the motion to intervene raises no significant issues worthy of direct appellate review. Moreover, as non-parties, the would-be interveners are not entitled to raise any issues beyond the denial of their motion to intervene. For these reasons, and for the reasons stated in the memoranda submitted by the other two Appellees, and in the decision of the Single Justice denying a stay of judgment, the Request for Direct Appellate Review should be denied.

## COUNTER-STATEMENT OF FACTS AND PRIOR PROCEEDINGS

There were 167 cottages owned by individuals on the land held in trust for the Ipswich schools. Historically, the Feoffees rented to the cottage-owners the land underneath the cottages, but not for an amount that yielded a fair return. In 2005, the Feoffees sought to remedy this situation by requiring all cottage-owners to enter into long term leases at markedly higher rents. But eighty percent of them refused to sign, objecting to the rental terms. When the Feoffees tried to evict the tenants who did not sign leases, the tenants filed a class action lawsuit seeking compensatory and punitive damages on theories that included misrepresentation and breach of the covenant of good faith and fair dealing.

The tenant litigation not only resulted in extraordinary expense to the trust, and a cessation of any distributions to the schools (no such distributions have been made to the Schools since 2006), but also placed the trust assets themselves at grave risk. Even if the tenants were evicted, the trust would be exposed to claims of unjust enrichment running in the tens of millions of dollars. *See, e.g., Ward v. Perna*, 69 Mass. App. Ct. 532, 540 n. 11

(2007) (awarding evicted cottage-owner value of structure based on misrepresentations and implying a right to recover under theory of unjust enrichment).

Rather than risk the trust assets in class action litigation, the Feoffees entered into a settlement with the cottage-owners, subject to Probate Court approval. The settlement called for the land to be sold to the cottage-owners for $29.15 million. The sale proceeds, after debts and expenses, would create a permanent endowment for the Ipswich schools.

In late 2009, the Feoffees filed a petition with the Probate Court, naming the Attorney General and the School Committee as defendants, to permit a deviation from the no-sale terms of the trust and to approve the settlement. The will establishing the trust in 1660 provided that the land was not to be "sould", but settled law allowed deviation from such a restriction if, due to circumstances unforeseen by the grantor, it substantially impaired the accomplishment of the trust's dominant charitable purposes. *E.g., Trustees of Dartmouth College v. City of Quincy,* 357 Mass. 521, 531 (1970); *Museum of Fine Arts v. Beland,* 432 Mass. 540, 544 n.7 (2000); Restatement (Second) of Trusts § 381 (1989).

The School Committee opposed the sale and, due to longstanding concerns over the trust's management, filed a counterclaim that sought governance changes, including the replacement of the self-perpetuating Feoffees with publicly selected Feoffees. After extensive discovery and three days of trial, the parties, together with the Little Neck tenants, negotiated a settlement pursuant to which the tenant litigation would be resolved and the land would be sold, but with the cottage-owners increasing by approximately $3 million the amount to be paid and with the Feoffees substantially acceding to the governance reforms sought by the School Committee. The sale price exceeded what appraisers for the Feoffees and the tenants claimed to be the land's fair market value, and, adjusted by erosion costs to be borne by the buyers, was close to (but somewhat below) what the School Committee's appraiser considered the "fair value" of the land. After the reimbursement to the School Committee of litigation expenses of $575,000 from the sale proceeds, and payment of all debts and expenses, the remaining net proceeds of sale (over $24 million) is to be responsibly invested by newly

selected Feoffees in a diversified portfolio for the permanent benefit of the Ipswich schools.

The Attorney General's office concluded that the dominant purpose of the trust was to benefit the Ipswich schools, that the tenant litigation was substantially impairing this purpose and jeopardizing the trust assets, and that deviation was in the best interests of the trust's beneficiaries. The Probate Court judge concurred and approved an Agreement for Judgment reflecting the terms of the settlement.

It was at this point that a group of Ipswich citizens who vehemently objected to the sale sought to intervene in the case. They sought the right to continue to contest the sale in the probate court (thereby risking that the court would approve the sale on the less advantageous terms set forth in the petition before it); if the probate court disapproved of the sale, as they hoped, they were prepared to expose the trust to the risks and expenses of the tenant class action in Superior Court. In view of the Attorney General's exclusive authority to represent

the public's interest in charitable trusts, the probate court denied the motion to intervene.[1]

Appellants appealed the denial of their motion to intervene and sought a stay of the judgment authorizing the sale. The probate court denied the requested stay, as did a Single Justice, who found that appellants had no likelihood of success on appeal. There being no stay, the sale took place in August 2012. Specifically, the Feoffees took temporary title to the cottages, converted Little Neck to condominiums, and sold the land and cottages back to the tenants in 167 separate transactions, some of which involved third-party financing. The Feoffees used millions of dollars of the sales proceeds to pay off bank indebtedness that had been draining trust assets due to well-above market interest rates.[2]

The would-be interveners have appealed from the denial of their motions to intervene and for a stay, and from a probate court order striking so much of

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[1] The court did not state its reasoning in denying the motion to intervene but referred to the lack of standing in denying related motions at the same time.

[2] There would be mootness issues even if there were otherwise any merit in the appeal.

their notice of appeal as purported to appeal from the underlying judgment to which they were not parties.

## ARGUMENT

### There Are No Issues Warranting Direct Appellate Review Because Controlling Case Law Required the Denial of Appellants' Motion to Intervene

As set forth below, it could hardly be clearer under Massachusetts law that the would-be interveners lack standing to litigate the public's beneficial interest in a public charity. This lack of standing disposes of all issues in this appeal. No matter how zealously the would-be interveners oppose the decision to sell Little Neck, they cannot bootstrap their unsuccessful attempt to intervene, which was properly denied, into a review of the underlying case.

Appellants do not dispute that the trust for the benefit of the Ipswich schools is a public charity. *See, e.g., Peakes v. Blakely*, 333 Mass. 281, 284-285 (1955) (gifts to Brookline School Committee for the benefit of Brookline High School); *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219 (1954).

G.L. c. 12 § 8 grants the Attorney General the exclusive right to protect the public's generalized interest in the operation of public charities. Time and again the courts have held that members of the

public such as the Appellants lack standing to initiate or join in lawsuits such as this one. *E.g.*, *Garland v. The Beverly Hospital Corp.*, 48 Mass. App. Ct. 913 (1999) (rescript); *Weaver v. Wood*, 425 Mass. 270 (1997); *Worcester Memorial Hospital v. Attorney General*, 337 Mass. 769 (1958) (interveners could not appeal hospital merger approved by Attorney General); *Dillaway v. Burton*, 256 Mass. 568 (1926); *Burbank v. Burbank*, 152 Mass. 254 (1890); see *Ames v. Attorney Gen.*, 332 Mass. 246, 252 (1955)(Attorney General's determinations were not "subject to attack in court by self appointed members of the public").

A party without standing to bring his own case likewise cannot intervene in a charities case to which the Attorney General is a party, *Dillaway v. Burton*, 256 Mass. 568, 575-76 (1926). Nor can citizens intervene to challenge a settlement to which the Attorney General has agreed. *Burbank v. Burbank*, 152 Mass. 254 (1890)(rejecting citizens' attempt to become parties to appeal settlement).

To establish standing an individual must demonstrate a specific, personal interest distinct and separate from the interest held by members of the public who might benefit from the charity. *E.g.*,

*Weaver v. Wood*, 425 Mass. at 276. For example, a member of an organization who was denied a right to vote in violation of the organization's bylaws has standing to enforce his right to vote. *Id.* But merely belonging to the general class of those who may derive a benefit from the charity is insufficient.

In their Complaint for Intervention Appellants alleged a separate and distinct interest "because, inter alia, of their active involvement in the Town of Ipswich and town governance generally and the Ipswich Public Schools specifically." Manifestly, the Appellants' community activism, no matter how laudable, was not a distinct and separate interest entitling them to supplant the Attorney General.

In *Burbank v. Burbank*, 152 Mass. 254 (1890), members of the public similarly sought to appeal from a settlement approved by the attorney general, claiming the "right to represent those entitled to the beneficial interest in a public charity." This Court dismissed their appeal, stating,

> the law has provided a suitable officer to represent those entitled to the beneficial interest in a public charity. It has not left it to individuals to assume this duty, or even to 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.*

152 Mass. at 256 (emphasis added).

In short, the probate court's denial of the motion to intervene was in accordance with controlling case law and raises no issue worthy of direct appellate review. The filing of a motion to intervene in disregard of controlling case law, followed by an appeal from that motion's denial in further disregard of controlling case law, cannot be bootstrapped into a review of the underlying judgment to which the would-be interveners were not parties. *E.g., Corbett v. Related Companies Ne., Inc.*, 424 Mass. 714, 722 & n. 13 (1997); *Bolden v. O'Connor Cafe of Worcester, Inc.*, 50 Mass. App. Ct. 56 (2000)(refusing to allow non-party to appeal from underlying judgment where its application for intervention was properly denied).

**Conclusion**

For the foregoing reasons, and for the reasons set forth in the memoranda of the other Appellees, the Ipswich School Committee and Superintendent Richard Korb respectfully request that the Appellants' Request for Direct Appellate Review be denied.

Respectfully submitted,
IPSWICH SCHOOL COMMITTEE
and RICHARD KORB
By their attorneys,

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CERTIFICATE OF SERVICE

I, Stephen M. Perry, hereby certify that on this 1st day of October, 2012, I served a copy of the foregoing by first class mail upon the following counsel:

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