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Chapter 14: Land Use Planning Law

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CHAPTER 14

Land Use Planning Law

JULIAN J. D'AGOSTINE *and* RICHARD G. HUBER

A. ZONING

§14.1. **Spot zoning and floating zones: Validity.** Land use controls involve two contradictory public policies that are in a state of constant friction: the necessity of flexibility to meet specific problems conflicts nearly always with the necessity of avoiding administrative license. The trend of American zoning law has been more toward the English standard of substantial administrative discretion controlled by careful regulations as to adequate procedural due process in the form of public notice and public hearings, but the general American enabling act requirement that zoning provisions be "in accordance with a comprehensive plan" has tended to make some types of flexible zoning of very questionable validity. One such type is the "floating zone." These zones are set out in the zoning ordinance but are not applied to any specific land until some time later when, in accordance with certain standards, the landowner¹ applies for assignment of this zone to his property. It is then granted by the administrative body if the land complies with the statutory requirements and if the body in its limited discretion so determines.

Noonan v. Moulton,² decided during the 1965 SURVEY year, approved something not too dissimilar from a floating zone. The town of Needham had, in 1961, voted seven articles of its town meeting warrant, the sum of which authorized for the first time an apartment district under the zoning by-law. The eighth article, which would have assigned this district designation to a specific area, was, however, defeated. In 1962, at the following year's town meeting, the meeting

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Mr. D'Agostine wrote Sections 14.5 through 14.22 of this chapter, the balance being written by Mr. Huber.

§14.1. ¹Of course, the landowner would be the one most interested in obtaining a desirable floating zone designation but there is no reason why the governmental unit or the administrative body could not initiate the zone change. The major objection, however, is based upon the fact that ordinarily those with private interests in the land would initiate the requests for the designation.

²1965 Mass. Adv. Sh. 397, 204 N.E.2d 897, also noted in §14.13 *infra*.

adopted a warrant assigning the apartment house designation to the locus. Thus, between March, 1961, and March, 1962, the town's zoning by-law included a provision for an apartment zone without any land being so districted.

The Supreme Judicial Court concluded, however, that the 1961 amendments to the zoning by-law could not "with any proper regard for accuracy be said to create a floating zone." In a sense the Court may here be dealing with semantics rather than substance, since the term "floating zone" carries with it connotations of invalidity. But, beyond this, the Court was merely pointing out that the new amendments creating this zone district were each valid when passed by the town meeting and that no condition subsequent as to their validity required the adoption of the article actually assigning specific land to the district. As is obvious, unless a zoning ordinance and a zoning map are adopted at the same instant, there will always be a time when a zone legally exists but has not been yet applied to any specific land. The difference in the present case from the usual example is thus merely one of time.

The Court also specifically pointed out what is sometimes forgotten, that the Massachusetts enabling act does not require a comprehensive plan.³ Thus the usual objection to "floating zones," that they constitute the very antithesis of the legally required preplanning of municipal development, has no statutory or constitutional basis in Massachusetts. Whether a floating zone is ordinarily desirable as a matter of planning itself is another matter; it will be good or bad planning depending upon the circumstances in individual cases. Certainly if, despite the Court's rejection of the term, the Needham by-law could be considered to create a floating zone, it was on its facts wise planning translated into zoning law.

A more conventional but ever serious issue was also involved in the *Noonan* case, that of whether the assignment of the apartment house district designation to a relatively small area in 1962 constituted spot zoning. The Court had earlier during the 1965 SURVEY year, in *Lanner v. Board of Appeals of Tewksbury*,⁴ restated its standards in spot zoning cases. These principles as stated may be roughly summarized in several sentences. While a court will not substitute its judgment for that of the legislative body, the latter may not amend the zoning law to confer an economic benefit upon the owner of a comparatively small area. A valid amendment must substantially relate to the furtherance of one of the general objects of the enabling act, chief among which is the promotion of the public welfare.⁵

³ See *Town of Granby v. Landry*, 341 Mass. 443, 445, 170 N.E.2d 364 (1960), noted in 1961 Ann. Surv. Mass. Law §12.12.

⁴ 1964 Mass. Adv. Sh. 1381, 202 N.E.2d 777.

⁵ The opinion was written in the usual context of spot zoning by an amendment but it is, of course, possible to create such zones by a totally new zoning ordinance or by-law. *Atherton v. Building Inspector of Bourne*, 343 Mass. 284, 178 N.E.2d 285 (1961), noted in 1962 Ann. Surv. Mass. Law §13.1.

In the *Lanner* case the Court found that substantial changes in conditions in the town and relative to the area rezoned justified the amendment as being for the general welfare. Once this was established, the Court noted, the local legislative body's determination of the location and size of the locus to be rezoned is final, at least if not unreasonable. In *Lanner* the town was shifting from rural to suburban and had had only one small area zoned as a business district, originally designated in 1947. It was reasonable and wise for the town to plan for its expansion and small business districts, convenient to areas being built up for residences, were legislatively proper. The fact that the owner of the relatively small locus being rezoned obtained an economic advantage over other nearby landowners was not pertinent, so long as the major purpose was enhancement of the public welfare.

The facts in the *Noonan* case, by which a 1962 article in the warrant assigned an apartment designation to land in a single residence district, could have, as compared to *Lanner*, more debatably been held to constitute spot zoning. But, although all nearby areas were zoned single-family residential, the locus was bounded by an access road to Route 128, a parochial school and church, a flood plain district adjoining the Charles River, and a street upon which faced the buildings of a private school, some institutional and some residential. The Court found that the land surrounding the locus, which was not itself rezoned, was not similar land "indistinguishable from it in character." It reversed the portion of the lower court's decree that held invalid the 1962 assignment of the apartment house designation to the locus.

Two other 1965 SURVEY year cases also involved spot zoning issues. In *Rousseau v. Building Inspector of Framingham*,⁶ a triangular locus, originally zoned residential, which was bounded by a business district to the south, an industrial district to the west, and residential districts to north and northeast, was rezoned for business use. The Court found the reasonableness of the rezoning was fairly debatable and thus sustained it.

*Muto v. City of Springfield*⁷ involved a rezoning from Residence A to Residence C zone, in the latter of which apartment buildings of considerable height were permitted. The zoning ordinance had been adopted in 1923 and the locus faced a street that had shifted from high class residential to more mixed uses, including a seminary, convalescent home, and dormitory. The locus also abutted on a Residence C district. Across from the property, on a side street, the Red Cross had a sizable commercial-type building. The Court certainly, upon these facts, was correct in finding rezoning was justified. The more difficult issue, however, was the rezoning only of the locus, whereas other basically similar properties in the area were not rezoned. The Court, admitting the case was only narrowly differentiated from cases wherein reclassification had been held invalid, upheld the lower court's determination that the locus's particular location in relation to other nonresidential uses

⁶ 1965 Mass. Adv. Sh. 599, 206 N.E.2d 399. See also §§14.8, 14.16 *infra*.

⁷ 1965 Mass. Adv. Sh. 1115, 209 N.E.2d 319.

in the area and with respect to a side road made it distinct from other nearby properties within the zone.

The four spot zoning cases decided during this 1965 SURVEY year, in all of which rezoning was sustained, suggest that the Court is being very cautious about possible overturning of local rezoning of even small areas. This policy is on the whole wise. Zoning can—and has—become a strait jacket too often, and changes in condition and development patterns have not been reflected by changes in zoning laws. The result can be that zoning inhibits rather than encourages healthy growth of communities. While ad hoc changes in zones may well be undesirable, the detailed and public steps now required in the amendment process tend to prevent ill-considered rezoning.⁸ It is thus becoming possible for the courts to accept rezoning more readily when the process of rezoning insures adequate public discussion and legislative consideration.

§14.2. Exemption from zoning regulations: Retroactive application. Section 7A of General Laws, Chapter 40A, was added to the zoning enabling act to provide a “freeze” period of exemption from the application of new zoning regulations when, at the time of the rezoning, the locus was part of an approved subdivision.¹ In *Building Inspector of Acton v. Board of Appeals of Acton*² the determinative issue was whether an amendment to Section 7A lengthening to five years the time interval between plan submission and actual building upon the locus operated retroactively to reactivate the exemption for a locus that had lost it under the three-year period that was effective earlier.

A subdivision plan was approved on September 23, 1957.³ At the time of the approval the locus was zoned residential and two-family residences were permitted in the zone. In 1960 the zoning by-law was amended to prohibit two-family residences in a residential zone. Under Section 7A, as effective in 1960, a three-year period was the prescribed maximum between plan approval and building if the benefits of the sections were to be obtained. In 1961, however, an amendment to Section 7A lengthened the period from three to five years.⁴ The owner sought and obtained from the Building Inspector permits to build two-family houses on lots in the subdivision, the permits being sought within five years after the approval of the plan.⁵ The Board of Ap-

⁸ G.L., c. 40A, §6, as amended by Acts of 1962, cc. 201, §27, Acts of 1961, c. 151, Acts of 1959, c. 377.

§14.2. ¹ Several amendments now protect land under some circumstances when only the preliminary plan under the subdivision control law has been submitted. G.L., c. 41, §81S.

² 1965 Mass. Adv. Sh. 195, 204 N.E.2d 296.

³ There was a real issue as to whether this approval was invalid because of procedural deficiencies, but the Court did not have to reach this issue under its grounds for decision.

⁴ Acts of 1961, c. 435, §2.

⁵ Under the local by-law the board of selectmen voted to issue the permits, which the Building Inspector then did.

peals reversed, rescinding the permits, but the Superior Court annulled the Board's decision and validated the permits. Upon appeal to the Supreme Judicial Court, the lower court's decree was reversed and the decision of the Board of Appeals reinstated.

The Court rather summarily rejected the argument that the 1961 amendment to Section 7A reinstated the exemption retroactively. It cited a number of cases in which it has held it would not apply legislation retroactively to affect substantive rights, unless the statutory language clearly requires that result. The Court's determination of this issue is supported by precedent but, as the petitioners' brief notes, the change from three to five years seems to have been intended to express a general policy vesting a less restrictive use of the land.⁶ A little more care in the draftsmanship of the 1961 amendment would have caused the Court to reach the result undoubtedly desired by the legislature.⁷ The present holding, sound though it is on precedent, does create an unwarranted distinction between properties whose only differences are the dates of entry into the subdivision control process.

§14.3. Equal protection of the laws: Posting bond on appeal. In *Begley v. Board of Appeal of Boston*,¹ the constitutionality of Section 18 of the old Boston zoning law was challenged.² This statute sets out the procedure for appealing from a zoning decision of the Board of Appeals of Boston and requires "the person applying for the review . . ." to "file a bond with sufficient surety, to be approved by the court, for such a sum as shall be fixed by the court. . . ."

The Boston Board of Appeal had granted an extension of commercial stores into an area where such stores were previously not permitted. The plaintiffs, by means of the procedure specified in Section 19 of the Boston zoning law,³ appealed to the Superior Court sitting in equity. The court determined that a \$15,000 bond should be posted. The plaintiffs excepted to this order, and the court entered a final decree dismissing the plaintiffs' bill on the ground that they failed to file the bond prior to the required date. The plaintiffs appealed from this decree, contending that the bond requirement imposed on them violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution. The basis for this claim is that General Laws, Chapter 40A, Section 21,⁴ which permits appeals to the Superior Court from the boards of appeals of cities and towns other than Boston, contains no such bond provision. The Supreme Judicial Court affirmed the lower court decree.

⁶ Brief for Petitioners, p. 11.

⁷ House No. 3944, rejected by the Senate on June 14, 1965, was a bill designed to limit the result of the 1965 amendment, Act of 1965, c. 366, by restoring the rule of this case, changed by the act as adopted. See §14.19 *infra*.

§14.3. 1 1965 Mass. Adv. Sh. 1091, 208 N.E.2d 799, also noted in §11.9 *supra*.

² Acts of 1924, c. 488, §19, as amended through Acts of 1941, c. 373, §18. Since January 1, 1965, the new Boston zoning law has been effective.

³ *Ibid*.

⁴ As amended through Acts of 1960, c. 365.

In cases involving the constitutionality of statutes, there is a strong presumption of validity.⁵ One who challenges a statute's validity, on the ground that it deprives him of equal protection of the law, has the burden of showing there is no reasonable basis to support the legislative classification.⁶ The plaintiffs' only claim was that they failed to see the justification for making it more difficult for a Boston aggrieved person to take an appeal from a decision of the Board of Appeal than for such a person in some other Massachusetts community to appeal a decision of his local board. Varying treatment of similar problems in different communities, however, is not precluded by the equal protection clause if the legislature reasonably believes that such treatment is desirable in the public interest.⁷ Boston is frequently the object of special legislation on the reasonable legislative conclusion that the largest city in the Commonwealth "may be subject to problems and conditions not found in comparable degrees in other communities."⁸ The Court felt that the legislature could reasonably determine that the number of frivolous or vexatious appeals from the Boston board would be considerably higher than the number of such appeals in other cities and towns, and that therefore a bond requirement in connection with Boston zoning appeals would be reasonable. Although the Court seemed on this point to delve into mere speculation as to legislative purpose, nevertheless the plaintiffs' failure to overcome the presumption of constitutionality required the result. The plaintiffs failed to show there were no reasonable grounds for the classification and their case thus also failed.⁹

§14.4. Government immunity: Extent. An essential government function, being performed by the Commonwealth or one of its agencies, cannot be prevented or prohibited by enforcement of local zoning laws.¹ In *Village on the Hill, Inc. v. Massachusetts Turnpike Authority*,² a case whose major eminent domain issues are discussed elsewhere,³ the plaintiff brought a mandamus action against the Boston building commissioner seeking to have him enforce the residential zoning requirement applicable to the premises upon which a factory was being built.

The premises were located on land owned by the Massachusetts

⁵ *Commonwealth v. Ferris*, 305 Mass. 233, 235, 25 N.E.2d 378, 380 (1940).

⁶ *Old Colony Railroad Co. v. Assessors of Boston*, 309 Mass. 439, 449, 35 N.E.2d 246, 253 (1941).

⁷ *Opinion of the Justices*, 341 Mass. 760, 781, 168 N.E.2d 858, 871 (1961).

⁸ *Id.* at 782-783, 168 N.E.2d at 872.

⁹ Justice Whittemore, in dissent, noted his disagreement not with the classification involved in the statute but with what he considered the excessive size of the bond, which at \$15,000 was certainly much more than could possibly be used for court costs.

§14.4. ¹ See *City of Medford v. Marinucci Bros. & Co.*, 344 Mass. 50, 181 N.E.2d 584 (1962), discussed in 1962 Ann. Surv. Mass. Law §13.5.

² 1964 Mass. Adv. Sh. 1245, 202 N.E.2d 602, also deciding the present case entitled *Village on the Hill, Inc. v. Building Commissioner of Boston*. See also §11.8 *supra*.

³ See §14.24 *infra*.

Turnpike Authority. The land had originally been in two units, one owned by the Boston and Albany Railroad and the other owned by the plaintiff. That part of the premises formerly owned by the plaintiff was zoned residential under the Boston zoning law.⁴ The Authority and Rivett Lathe & Grinder Co. had entered into a contract for the sale of the premises to Rivett for purposes of building a new plant to replace an older one taken by the Authority. At the time of the action, although Rivett had substantially completed the building and although the building permit had been issued to Rivett rather than to the Authority, the Authority still owned the land.

The Supreme Judicial Court found that the Authority's functions are sufficiently governmental in character so that they are exempt from local zoning. But this did not mean that land in excess of the Authority's turnpike needs, even though owned by the Authority, is exempt from local zoning. The Court reversed the lower court's contrary finding and thus held the trial judge should have ordered the commissioner to enforce the zoning regulations.

The Court then noted, however, that mandamus is a discretionary writ and the judge could, in determining if he were to grant immediate relief, consider the radical change in the neighborhood that was probably wrought by the turnpike. He could well grant a delay so that an application for a zoning change or a variance could be considered. The case was thus reversed and remanded for findings of facts that may determine if the discretion of the judge can be exercised so as to delay relief.

§14.5. Lots held separate and apart. In *Vassalotti v. Board of Appeals of Sudbury*¹ the Supreme Judicial Court held that, when three contiguous lots were held in 1932 by an owner who did not own any other adjoining land, the lots may be considered as a single lot under General Laws, Chapter 40, Section 5A. Section 5A exempts certain nonconforming lots from the operation of local zoning laws, and was applied in this case to exempt the locus from frontage and area requirements. The Court further held that, notwithstanding the fact that the case was an appeal under General Laws, Chapter 40A, Section 21, from the denial of a variance by the defendant Board, no variance could be granted as it was not necessary. In the interest of avoiding further litigation the Court treated the plaintiff's action as a request for declaratory relief and ruled that he was entitled to a building permit insofar as Section 5A was concerned.²

§14.6. Violation of building by-laws: Enforcement. In *O'Donnell v. Board of Appeals of Billerica*¹ it was held that proceedings, including those of the Board of Appeals, under a town building by-law

⁴ Acts of 1924, c. 488, as amended. This law has since been superseded.

§14.5. ¹ 1965 Mass. Adv. Sh. 425, 204 N.E.2d 924.

² Also involved was a similar section of the local zoning by-law that the Court found also would permit the proposed use of the premises.

§14.6. ¹ 1965 Mass. Adv. Sh. 919, 207 N.E.2d 877, also noted in §14.38 *infra*.

adopted under General Laws, Chapter 143, are not within the proceedings contemplated under General Laws, Chapter 40A, Section 14, which is limited to zoning matters. The Court further stated that there are no constitutional or statutory requirements for hearings and notice to abutters of proceedings under a building by-law as distinguished from a zoning by-law. In the event an abutter believes that a building by-law is being violated, and cannot obtain enforcement from the enforcing officer, the remedy is one of mandamus.

§14.7. **Side yard requirements: Interpretation.** In *Tambone v. Board of Appeals of Stoneham*¹ the Supreme Judicial Court ruled that the minimum side yard requirements, where a zone boundary bisects a given lot, are measured from the lot line and not from the zone boundary line. The Board of Appeals, upon a request for a special permit for the plaintiff's apartment house, had interpreted the side yard requirement to run from the zoning boundary. As the Court noted, this was an unique construction in general and also required the word "yard" to have a separate meaning in the side yard section of the local by-law, different from its meaning in other sections.

§14.8. **Final report of planning board: Adoption of zoning laws.** In *Rousseau v. Building Inspector of Framingham*¹ certain land was rezoned from residential to business. The planning board's final report, a prerequisite for adoption under General Laws, Chapter 40A, Section 6, failed to report favorably or unfavorably on the amendment, but rather recommended the matter be referred back to them for further study.² The Court held that this recommendation constituted a final negative report under Section 6, and upheld the zoning amendment.

§14.9. **Zoning: Education use.** In *City of Chicopee v. Jakubowski*¹ the Court held that the use of a portion of premises in a residential zone for the teaching of classes in ceramics was not a school within the meaning of the Chicopee zoning law. The Court also found that it did not constitute an educational purpose which is public within the meaning of General Laws, Chapter 40A, Section 2, prohibiting restrictions on such use. Even if the ceramics classes were educational in the sense of Section 2, a point the Court refused to decide, clearly the purpose was not public, and thus not within the statutory exemption.

§14.10. **Special permits: Improper delegation of authority.** In *Clark v. Board of Appeals of Newbury*¹ the premises were located in an agricultural-residential district and were used for commercial

§14.7. ¹ 1965 Mass. Adv. Sh. 85, 203 N.E.2d 802. See also §14.11 *infra*.

§14.8. ¹ 1965 Mass. Adv. Sh. 599, 206 N.E.2d 399. See also §§14.1 *supra*, 14.17 *infra*.

² The board was making a study of the complete area of which the locus was a part, and did not wish to make any recommendations concerning rezoning until the study was complete.

§14.9. ¹ 1964 Mass. Adv. Sh. 1393, 202 N.E.2d 913.

§14.10. ¹ 1965 Mass. Adv. Sh. 145, 204 N.E.2d 434.

purposes prior to the adoption of the local zoning by-laws. The Newbury by-law provided that the selectmen have the authority to permit commercial or industrial structures, but that no permits would be granted until a public hearing had been held by the selectmen and it had been established that the proposed business or industrial use was for the best interest of the town and not injurious or obnoxious to the neighboring properties.

The property owner in the present case applied for a permit to put an addition onto the nonconforming use for a doctor's office. The zoning by-laws had no provision for the extension of a nonconforming use. The selectmen granted the permit under the by-law provision and the Board of Appeals upheld the action. The Superior Court annulled the decision of the Board. Upon appeal, the Supreme Judicial Court held that the by-law violated Section 4 of General Laws, Chapter 40A, governing the granting of exceptions and special permits under zoning by-laws. The Newbury by-law was an improper delegation of authority and failed to designate sufficiently precise standards, thereby giving the selectmen the invalid power to indulge in spot zoning.

A case involving a similar situation was *Cooke v. Board of Appeal of Lowell*,² which held that a zoning by-law authorizing the Board of Appeal to grant special permits for the extension of pre-existing, nonconforming uses was invalid, since the by-law failed to set forth standards that would serve as a guide in the awarding of the permits.

§14.11. **Special permits: Standards.** In *Lombard v. Board of Appeal of Wellesley*¹ the property owner built her home in 1937 with a narrow, one-car garage, which accommodated the cars of that era but not modern cars. The by-laws of Wellesley authorized a special permit for the widening of the garage into the restricted side yard area. The majority of the Board favored her petition to widen the garage, which would encroach only 18 inches into the 20-foot side yard area. As a unanimous vote was required under Chapter 40A, however, the petition was denied. Upon appeal under Section 21 of General Laws, Chapter 40A, the Supreme Judicial Court held that the denial of the requested special permit was arbitrary and capricious, and ordered the permit to issue.

In *Tambone v. Board of Appeal of Stoneham*² the zoning law of Stoneham allowed the Board to grant a special permit for the extension of a building or use into a more restricted district if in its judgment the public welfare will be substantially served. The plaintiff requested a permit to extend parking facilities into a more restricted zone, but the permit was refused by the Board. The Court agreed with the Superior Court that the Board's denial was based on a misconception of the by-law requirements and sustained the annulment granted below. The majority of the Court sent the case back to the Board for

² 1965 Mass. Adv. Sh. 473, 205 N.E.2d 343.

§14.11. ¹ 1965 Mass. Adv. Sh. 255, 204 N.E.2d 471.

² 1965 Mass. Adv. Sh. 85, 203 N.E.2d 802. See also §14.7 *supra*.

consideration of issues not mentioned in the Board's earlier decision, although Justice Spiegel considered that the Board should be ordered to grant the permit.

In *Rando v. Board of Appeals of Bedford*³ the town zoning law stated that one must obtain a special permit from the Board of Appeals for the following business activities in business zones: "filling station, garage or storage of automobiles." The Court ruled that a "car wash" is a garage within the meaning of the by-law and, therefore, must obtain a permit from the Board.

§14.12. **Variations.** In *Chater v. Board of Appeals of Milton*¹ an owner applied for a variance to permit the building of residences on each of four lots, each being under the required 20,000 square feet in area, two being contiguous, and the remaining two being held separate and apart. The Board denied the request for variations and the owner appealed the decision to the Superior Court under General Laws, Chapter 40A, Section 21. The Superior Court upheld the denial of a variance as to the two contiguous lots but annulled the Board decision as to the two separate lots and decreed variations for them. The Supreme Judicial Court upheld the denial of the variance on the two contiguous lots, as they could be combined into one building lot that would comply with the zoning by-law. As to the two lots held separate and apart, the Court held that one of the lots was buildable as it was within the exceptions of the Milton zoning law relating to lots laid out prior to by-law adoption. As to the remaining undersize lot held separate and apart, the Court found that the lot was not buildable under the by-law exception because of the use of part of it for widening a private way, so that the lot lines were not the same as originally set out. But the Court also held that the Board was in error in finding that there was not any evidence of conditions especially affecting the lot, but not generally affecting the zoning district in which the lot was located. The Board of Appeals could have found the necessary hardship and lack of substantial detriment to the public good and substantial derogation from the intent or purpose of the by-law and thus could have granted the variance. The decision of the Board as to this lot was therefore annulled and the matter remanded to the Board for consideration of the application for a variance.

§14.13. **Procedure: Declaratory relief.** In *Noonan v. Moulton*¹ an abutter instituted proceedings in equity in the Superior Court for a declaratory decree, under General Laws, Chapter 231A, as to the validity of zoning amendments of the town of Needham. The Court held that the Superior Court had jurisdiction and limited *Sisters of the Holy Cross v. Town of Brookline*² to situations in which the land-

³ 1965 Mass. Adv. Sh. 15, 203 N.E.2d 375.

§14.12. ¹ 1964 Mass. Adv. Sh. 1401, 202 N.E.2d 805.

§14.13. ¹ 1965 Mass. Adv. Sh. 397, 204 N.E.2d 897, also noted in §14.1 *supra*.

² 347 Mass. 486, 198 N.E.2d 624 (1964), noted in 1964 Ann. Surv. Mass. Law §§11.6, 14.5.

owner is petitioning for a determination of the zoning law as it applies to his own land, in which case the Land Court has exclusive jurisdiction. As to the objection that the zoning law created an "apartment district" in 1961 and did not assign any specific land to said district until a town meeting in 1962, the Court held this did not create a "floating zone" and was a proper exercise of zoning power.

In *Woods v. City of Newton*³ abutters to an area rezoned by a vote of the board of aldermen, contending the vote was invalid, instituted suit in the Superior Court for declaratory relief under General Laws, Chapter 231A. The bill alleged that the owner had filed or intended to file for a permit to construct a motor hotel on the rezoned premises. The defendants demurred contending that the bill did not set forth that an actual controversy had arisen, as is required under Section 1 of General Laws, Chapter 231A. The Court further limited *Sisters of the Holy Cross v. Town of Brookline*⁴ by stating that the grant of exclusive jurisdiction to the Land Court is limited not only to cases in which the property owner is the petitioner but also to those cases in which there is no actual controversy in the usual acceptance of that term. A landowner, therefore, in cases in which an actual controversy exists, may institute proceedings for declaratory relief either in the Land Court or in Superior Court under General Laws, Chapter 231A. The Court remanded the case to the Superior Court so that the plaintiffs could amend and obtain a trial on the substantive issues. Justices Spiegel and Kirk concurred with the result reached by the majority, but strongly dissented to that part of the dictum of the majority that confined *Sisters of the Holy Cross* to cases in which there is no actual controversy, on grounds that to limit the case further would add confusion rather than clarification to the law, and emasculated the holding of the earlier case.

In *Town of Stow v. Pugsley*⁵ the town brought a bill for declaratory relief under General Laws, Chapter 231A, alleging that a controversy existed because the respondent Pugsley was constructing a cement building for use as a motor vehicle repair garage, and seeking a determination whether this use violated both the Stow general and zoning by-laws. Subsequent to the filing of the bill, four abutters instituted mandamus proceedings against the selectmen to enforce the by-law. The Supreme Judicial Court ruled that the bill for declaratory relief was properly instituted and that the mandamus petition should be abated. The town had asked to be instructed whether there were violations of the by-laws and had already invoked the enforcing power given to the Superior Court by General Laws, Chapter 40A, Section 22, so mandamus to seek the enforcement was redundant.

In *Bob Ware's Food Shops, Inc. v. Town of Brookline*,⁶ a corpora-

³ 1965 Mass. Adv. Sh. 989, 208 N.E.2d 508.

⁴ 347 Mass. 486, 198 N.E.2d 624 (1964).

⁵ 1965 Mass. Adv. Sh. 925, 207 N.E.2d 908.

⁶ 1965 Mass. Adv. Sh. 1001, 208 N.E.2d 505.

tion owning land adjoining a municipally operated off-street parking area sought declaratory relief under General Laws, Chapter 231A, to determine the validity of the town's action in adopting warrants relative to the acquisition of additional land, including the petitioner's, for an extension of the parking area. The Supreme Judicial Court sustained the dismissal of the bill. Among other grounds, the petitioner sought to establish that the action would cause a violation of the town's zoning and building laws upon land adjoining the petitioner's. The Court stated that the corporation, being at most an abutter, had to allege (presumably to constitute a controversy) a request to the appropriate town officials to enforce the by-law and their refusal or failure to do so, as this is a necessary condition precedent to relief even to a person owning land abutting on land alleged to be used in violation of zoning by-laws. The Court further held that, even if relief could have been granted, the owners of the adjoining lots should have been joined as parties, citing General Laws, Chapter 231A, Section 8.

§14.14. Procedure on appeal: Mandamus. In *Dresser v. Inspector of Buildings of Southbridge*,¹ it was held that mandamus would lie to enforce a zoning by-law although the petitioners did not appeal the granting of the building permit several years earlier. The Court stated that mandamus proceedings are in the general public interest to enforce the public right; however, in the present case, where the property owner was not made a party, no direct enforcing order could issue. In issuing the writ of mandamus, the Court held that the existence of a zoning violation will be an issue in equity enforcement proceedings brought by the town under General Laws, Chapter 40A, Section 22.

§14.15. Procedure on appeal: Person aggrieved by decision of building inspector. In *Brady v. Board of Appeals of Westport*,¹ a property owner sent a letter to the building inspector complaining that an abutter's activities were in violation of the town zoning law. The town counsel replied to the letter advising that such use was not in violation and that the town would take no action. The property owner appealed to the Board of Appeals and, receiving an unfavorable decision, appealed to the Superior Court, which reversed the Board of Appeals. The Supreme Judicial Court, in sustaining the Superior Court, held that certain procedural difficulties exist in the enforcement of a zoning by-law, and the normal course of action when the zoning law is not enforced is mandamus. The Court held, however, that in the case at bar the town counsel's letter constituted a decision in the sense it is used in General Laws, Chapter 40A, Section 13, and that the property owner's appeal was proper although he also had the right to bring mandamus.

§14.16. Procedure on appeal: Notice to clerk. In *Maria v. Board*

§14.14. ¹ 1965 Mass. Adv. Sh. 513, 205 N.E.2d 724.

§14.15. ¹ 1965 Mass. Adv. Sh. 271, 204 N.E.2d 513.

of *Appeal of Lowell*,¹ the Supreme Judicial Court ruled that the Superior Court was without jurisdiction to hear an appeal under General Laws, Chapter 40A, Section 21, where the plaintiff failed to give notice to the city clerk of his bill in equity within twenty days of the filing of the Board's decision with the clerk. The Court cited *Lincoln v. Board of Appeals of Framingham*,² in which it clearly called attention to the necessity of specifically following the provisions of Section 21.

Another question of proper procedure was involved in *Halko v. Board of Appeals of Billerica*,³ in which the required town clerk's certificate, accompanying the copy of the Board of Appeal's decision, which is attached to the bill in equity, was undated. The Court held that the Superior Court was not deprived of jurisdiction as the facts clearly required the finding that the bill was filed and notice of the same given and received by the town clerk, all within the required twenty-day period. It was further held that the failure to include the addresses of the defendants was not a jurisdictional defect, especially where the affidavit as to notice was filed within the required twenty-one days of the filing of the bill in equity and listed the correct addresses of the defendants to whom the required notices were sent.

§14.17. Procedure on appeal: Notice to owners of property. In *Rousseau v. Building Inspector of Framingham*¹ the Court held that in hearings before the board of appeals, under General Laws, Chapter 40A, the notice provisions of Section 17 as to mailing notice to the petitioner and to the owners of all property deemed to be affected thereby, require reasonable notice be given. The Court stated that had the legislature intended fourteen days' notice in mailing, as in the case of publishing, it would have so stated. In the present case, however, four days' notice by mail was held unreasonable, notwithstanding the fact that the party was present at the hearing. The party did not have opportunity to prepare his opposition, but the Court avoided the question as to the number of days necessary to constitute reasonable notice. It is suggested that consideration be given to amending Section 17 to establish a fixed time prior to a hearing for the mailing of these notices.

§14.18. Costs of appeal. In *Bouchard v. Ramos*,¹ which had been previously before the Court,² the plaintiff was held not entitled under Section 21 of General Laws, Chapter 40A, to costs. Costs cannot be granted against a board of appeals unless it appears that the board acted with gross negligence, in bad faith, or with malice, or against

¹ 1965 Mass. Adv. Sh. 589, 206 N.E.2d 94.

² 346 Mass. 418, 193 N.E.2d 590 (1963), noted in 1964 Ann. Surv. Mass. Law §14.4.

³ 1965 Mass. Adv. Sh. 1099, 209 N.E.2d 323.

§14.17. ¹ 1965 Mass. Adv. Sh. 599, 206 N.E.2d 399, also noted in §§14.1, 14.8 *supra*.

§14.18. ¹ 1965 Mass. Adv. Sh. 9, 203 N.E.2d 678.

² 346 Mass. 423, 193 N.E.2d 691 (1963).

the party appealing from a decision unless the appeal was made in bad faith or with malice.

§14.19. **Legislation.** Chapter 63 of the Acts of 1965 amended General Laws, Chapter 40A, Section 4, to require boards of appeals, selectmen, or city councils, when acting to consider a request for a special permit, to comply with the notice requirements of Section 17 and to hold a public hearing. Other requirements of Sections 18 through 21, governing board of appeals' procedures, will also govern action by city councils and selectmen.

Chapter 65 of Acts of 1965 amended Section 7A of General Laws, Chapter 40A, so as to grant the "freeze period" to disapproved subdivisions, provided a timely appeal from such disapproval is taken and it complies with the applicable provisions of the subdivision control law.

Chapter 366 of the Acts of 1965 further amended Section 7A so as to extend the "five-year freeze period" to seven years. Section 2 of the act provides that the provisions of Section 7A shall apply to plans submitted prior to this amendment's effective date, thereby making the freeze period retroactive. The effect is to change the rule of *Building Inspector of Acton v. Board of Appeals of Acton*,¹ which had held the original section did not have the effect of reactivating the freeze period when it was lengthened after the original shorter period had run.²

B. SUBDIVISION CONTROL

§14.20. **Failure to notify town clerk within sixty days.** In *Board of Selectmen of Pembroke v. R. & P. Realty Corp.*,¹ a definitive subdivision was submitted to the planning board who, within sixty days after submission, approved the plan subject to eight conditions. The board failed, however, to send the sixty-day notice of its decision as required by General Laws, Chapter 41, Section 81U, to the town clerk until sixty-six days after the submission of the plan. The petitioner, acting under Section 81V of General Laws, Chapter 41, requested a certificate from the town clerk of "constructive approval" by virtue of the planning board's failure to give notice of its final action under the provisions of Section 81U to the town clerk within sixty days of the filing of the plan. The clerk's certificate was issued and recorded in the registry of deeds. The certificate also set forth that no notice of appeal was received within the twenty days prescribed by Section 81BB of General Laws, Chapter 41. The Supreme Judicial Court held that the failure of the planning board to give notice within the sixty-day period constituted constructive approval of the plan in its submitted form, thus giving it the status of an approved plan. The decision of the Court went on to state, however, that the planning board is

§14.19. ¹ 1965 Mass. Adv. Sh. 195, 204 N.E.2d 296.

² The case is discussed in more detail in §14.2 *supra*.

§14.20. ¹ 1964 Mass. Adv. Sh. 1267, 202 N.E.2d 409, also discussed in §13.7 *supra*.

not without relief, as under the provisions of Section 81W (on its own motion or the motion of any other interested party) it may modify, amend, or rescind its approval. However, this action cannot be taken as against lots which have been sold or mortgaged for a valuable consideration subsequent to the approval of plans, without the consent of the owner or mortgagee.

§14.21. Approval of plan: Conditions imposed by planning board. In *Ellen M. Gifford Sheltering Home Corp. v. Board of Appeals of Wayland*¹ a subdivision was duly approved by the planning board of Wayland, in which it imposed as a condition that only one dwelling should be erected on each of Lots 11 and 12. Shortly thereafter, the by-laws of the town were amended to require a special permit from the Board of Appeals for the building of charitable buildings in single-residence districts. The Supreme Judicial Court ruled that, notwithstanding the fact that ordinarily under the provisions of General Laws, Chapter 40A, Section 7A, the zoning applicable at the time of the subdivision's approval is controlling (which would have authorized the construction of a structure to house 150 or 200 cats), this proposition is limited by any conditions imposed by the planning board upon approval of the plan. Furthermore, in the absence of an appeal within the statutory period, these conditions imposed under General Laws, Chapter 41, Sections 81Q and 81R, are deemed reasonable and proper. The petitioner had, therefore, to comply with the limitation of buildings to single-family residences.

§14.22. Legislation. Chapter 61 of the Acts of 1965 amended Section 81L of General Laws, Chapter 41, to alter slightly the definition of "subdivision." Exemption from control because each lot has frontage upon a way shown in an approved subdivision plan was further qualified to require not only approval but endorsement. It may be questioned whether a subdivision approved by default under Section 81U, with the appropriate town clerk's certificate, constitutes an endorsement within the new statutory language.

Chapter 62 of the Acts of 1965 amended Section 81U of General Laws, Chapter 41, to require, as to completion of the construction of ways, installation of municipal services, or performance of a covenant, that the applicant send the written statement by registered mail not only to the town clerk, as was previously required, but also to the planning board.

Chapter 64 of the Acts of 1965 amended Section 81Q of General Laws, Chapter 41, to require specific statutory notices of the public hearing held by a planning board before adopting or amending its rules and regulations. The general requirement of "due notice" has been changed to a fourteen-day minimum period with two newspaper notices or, if there is no newspaper in the community, by public posting in the city or town hall at least fourteen days before the hearing.

¹§14.21. 1965 Mass. Adv. Sh. 885, 208 N.E.2d 207.

C. EMINENT DOMAIN

§14.23. **Taking or regulation.** In *Commissioner of National Resources v. S. Volpe & Co.*¹ the Supreme Judicial Court had to determine if a conservation condition imposed by the plaintiff Commissioner and the Director of Natural Resources constituted a taking of the defendant corporation's land for which it would be entitled to compensation. The corporation had purchased a large part of Broad Marsh in Wareham and, in accordance with General Laws, Chapter 130, Section 27A, gave notice of its intent to dredge. It intended to fill the marsh and to use a dredged channel, basin, and marina to furnish boating and water rights to lot owners. After proper hearings, the director accepted the proposal for dredging the channel and basin but imposed the condition that no fill be placed in the marsh so as to protect the food supply of the nearby marine fisheries.

The Court recognized that the vital question was whether the condition, imposing as it did a requirement that prevented reasonable residential development of the marsh area, constituted a taking without compensation. It noted the analogy to the various zoning cases that have held invalid regulations that deprive a landowner of the use of his property without any countervailing public benefit.² The Court also discussed New Jersey and Connecticut cases finding that limits placed upon land uses for flood control purposes constituted upon their facts a taking of property without compensation, and finally quoted from the famous — or perhaps infamous — opinion of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.³

The issue then became one of fact. The president of the defendant corporation testified that fill was necessary to carry out the project he proposed. But this, of course, did not determine whether there was "such a deprivation of the practical uses of the marsh as to be equivalent to a taking without compensation." The plaintiffs' contentions that conservation measures must be supported as valid regulations had to be rejected by the Court. No matter how important or vital a public purpose may be, carrying out this purpose in such a way that a landowner's property is permanently restricted from any reasonable use constitutes a taking and is not mere regulation.⁴

The Court remanded the case for the taking of further evidence and for further findings on some eight pertinent factors. The Court also listed five issues that should be developed in briefs and oral arguments upon any subsequent appeal to the Court. This listing of factual and

§14.23. ¹ 1965 Mass. Adv. Sh. 671, 206 N.E.2d 666, also noted in §11.2 *supra*.

² The Court cited, among others, the leading case of *Barney & Carey Co. v. Town of Milton*, 324 Mass. 440, 87 N.E.2d 9 (1949), as well as the most recent case in this area, *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964), noted in 1964 Ann. Surv. Mass. Law §14.1.

³ 260 U.S. 393, 415-416, 43 Sup. Ct. 158, 160, 67 L. Ed. 322, 326 (1922). Mr. Justice Brandeis dissented.

⁴ The Court quoted the leading case of *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 591-592 (1938), on this point.

legal issues seems to be unique among the Court's opinions and constitutes a desirable practice when issues are complicated and the Court wishes to be certain all issues it considers pertinent will be argued without further delay and remand. It may be added that the lists of the factual and legal issues are precise and complete and will aid the parties and the lower court greatly in their further handling of the case. This opinion writing technique, although sometimes used by the United States Supreme Court, has been only seldom used by the state courts. It offers, however, an efficient means of expediting a final decision in complicated cases and the Supreme Judicial Court deserves congratulations for adopting it.

In order to deal with the problem of preservation of unspoiled salt marshes, the Governor sent a message proposing legislation to regulate and control them.⁵ House Bill No. 3861 was reported as a slight modification of the Governor's bill and, as of the date of this writing, seems assured of passage. This bill proposes, in the exercise of police power, to restrict dredging, filling, removing, polluting, or otherwise altering coastal wetlands. In order to restrict an area under the bill, the Department of Conservation must: (a) hold a public hearing in the community where a restriction has been proposed; (b) record the written order, setting forth the restrictions and reasons therefor, a list of the lands restricted, and the names of the assessed owners as listed in the most recent records; and (c) mail a copy of the order to each assessed owner.

No person will be able to use the restricted coastal wetlands contrary to the order, and the Superior Court sitting in equity will have jurisdiction to restrain a violation. An owner of restricted land will be able to recover compensation if he files an action in the Superior Court within two years from the date of the recording of the restriction order, and if the order is deemed by the court to constitute a taking. In view of the decision in *Commissioner of Natural Resources v. S. Volpe & Co.*, discussed above in this section, this procedure will help assure that the designation of restricted wetlands will be carefully considered but that the regular systematic approach required by the bill will assure the desired protection. In a number of cases it is probable that compensation will be required to be paid but the importance of the conservation involved makes these expenditures fully desirable.

§14.24. Public purpose. *Commissioner of Natural Resources v. S. Volpe & Co.*,¹ discussed immediately above, also involved a second issue perennial in eminent domain as well as many other cases. In this case the lower court had determined that the Commissioner's powers under General Laws, Chapter 130, Section 27A, to impose conditions to protect shellfish and marine fisheries constituted an exercise of a valid public purpose. The correctness of this decision was too

⁵ House No. 3861 (1965).

¹ 1965 Mass. Adv. Sh. 671, 206 N.E.2d 666.

obvious to require any discussion by the Supreme Judicial Court. The public purpose issue did, however, arise in two other cases, and in at least one of which the question was a close one.

In *Village on the Hill, Inc. v. Massachusetts Turnpike Authority*² the Authority had taken land owned by Rivett Lathe & Grinder Co. (Rivett). In the course of negotiation Rivett and the Authority agreed that Rivett could purchase as a site for its new plant a portion of the Faneuil Dump area which the Authority had the power to purchase under its contract with the Boston and Albany Railroad. Engineering studies revealed, however, that a present road would most desirably have to be relocated in such a way that it would require part of the land originally planned for Rivett's new plant as well as some land of the plaintiff, Village on the Hill, Inc. (Village). Further negotiation led to a contract between Rivett and the Authority by which a new location for the Rivett plant was settled upon, a substantial part of which was on land taken from Village but which was now between the relocated street and Village's remaining property.

The lower court found that the engineering study resulting in the street relocation and the consequent taking of the land that was afterward the subject of the contract of sale to Rivett was done upon sound engineering principles and was not done to assist Rivett. It also found that the Authority did not take Village's land for the purpose of sale or lease to Rivett, and thus did not under the guise of public need deprive Village of its property to turn it over to Rivett for its private purpose. This decree was affirmed by the Supreme Judicial Court.

The general rule as to public purpose in the Massachusetts decisions requires that the public purpose must predominate over any private purpose if the action involved is to be considered constitutionally valid.³ The Court found this requirement not overly difficult to meet on the facts of the present case. The Authority had the right to provide access to that part of the Faneuil Dump area which would otherwise have no access to highways after the turnpike was built. The Authority could sell excess land in the Faneuil Dump area and provide it with substantial access. Its judgment as to the location of that access would not be disturbed by the Court when the facts indicated it was a reasonable engineering decision. The action of selling the excess land to Rivett was a valid "by-product" of the public purpose of turnpike construction.

The issue of public purpose is constitutional, but taking authorities do not necessarily have the right to exercise eminent domain powers to their constitutional limits. The enabling act authorizing the Authority to build the turnpike gave it the power to take land, in the

² 1964 Mass. Adv. Sh. 1245, 202 N.E.2d 602, zoning aspects of which are discussed in §14.4 *supra*.

³ See, e.g., 1964 Ann. Surv. Mass. Law §14.22; 1960 Ann. Surv. Mass. Law §§10.2, 13.8.

name of a city or town, to change the location of a public highway.⁴ In the present case, however, the authority had not obtained the approval of the state Department of Public Works, which would be required if the relocation were considered that of a public way. But the Court noted that the Department's approval is not, under the statute, a condition precedent to the relocation and that it could now be obtained.

If the Authority treated the relocation as being of a private way, the Department would not have to approve the relocation, but the statute did not authorize the Authority to take under these circumstances in the name of the city. The Court dismissed this objection, stating that the Authority could have taken the land for a private way directly in its own name and then transferred it to the city to lay out as a public way. Thus the Authority did in one step what it could clearly have done, technically more correctly, in two steps. The Court then left it to the Authority to obtain department approval of the whole way or to obtain city approval to lay out the formerly private way section of the street as a public way.

In an *Opinion of the Justices*⁵ the Justices determined that payment to the holders of retired alcoholic beverage licenses was for a valid public purpose. The proposed legislation was designed to meet the difficult problem raised by the necessity of reducing the number of Boston licenses. The need for reduction was created largely by renewal projects under the Boston Redevelopment Authority but also in part was the result of population reduction in the center city over the past twenty years.

The Court, while stating that a liquor license is revocable at the pleasure of the granting authority, realistically noted that it does have an economic value. The Court found one public purpose in the reduction of establishments which, when excess in number, tend for competitive reasons to become nuisances or near nuisances. As to payments to individual licensees, the Court accepted the analogies of the eminent domain cases. The legislature can and does grant eminent domain damages in some situations in which damages are not constitutionally required but in which the owner would suffer substantial hardship if he were deprived of compensation. The legislature, if it decides that the loss of a liquor license may create a moral obligation on the state, can, if it wishes, compensate the licensee.

While this opinion dealt with expenditure of public funds rather than the taking power, the practical closeness of the retirement of a license to a taking of property makes the opinion a valuable precedent in the eminent domain area.

§14.25. Taking agencies: Conflicts and co-operation. When one agency takes, or wishes to take, property owned by another agency that is being used for public purposes, seeds of conflict exist. Several

⁴ Acts of 1952, c. 354, §7, as amended by Acts of 1958, c. 384.

⁵ 1965 Mass. Adv. Sh. 1037, 208 N.E.2d 823.

cases and statutes dealt with various aspects of these problems during the 1965 SURVEY year.

In its opinion in *Commonwealth v. Massachusetts Turnpike Authority*¹ the Supreme Judicial Court decided two cases. The first case was a bill in equity to have the Authority's taking of the Irvington Street Armory in Boston declared void. As the armory had been demolished prior to any decision in this case, the Commonwealth filed its second suit for assessment of damages under General Laws, Chapter 79. A jury verdict of \$895,000 was returned. After the decision of *Massachusetts Turnpike Authority v. Commonwealth*,² the Authority unsuccessfully filed a motion to dismiss the present damages suit on the ground that General Laws, Chapter 79, does not apply to public land taken for highway purposes.

The Supreme Judicial Court held that, upon the rather special facts of the case, the Authority's taking of the Commonwealth's armory was valid. In an earlier case with the same name as the present case,³ the Court had held that the Authority's general power to acquire "by . . . eminent domain . . . such public lands . . . as it may deem necessary,"⁴ did not constitute a blanket authorization to take land being used for other public purposes. But even if the original taking of the armory may have been invalid under this principle, the taking was ratified by the General Court in a 1962 act that indicated how the funds received from the Authority for the armory were to be expended.⁵

The Court, however, upheld the Commonwealth's contention that it was entitled to full and complete compensation under General Laws, Chapter 79. It is settled law that land owned by a municipality in its public capacity can be taken by the General Court without any obligation to pay.⁶ Thus, with the armory being held by the Commonwealth in its public, as opposed to private, proprietary capacity, the right to compensation depended upon the statutes. The Court, quoting Chief Justice Shaw's opinion in *Commonwealth v. Boston & Maine R.R.*,⁷ found that a specific and affirmative statutory statement to the effect that state land was to be given without any obligation to pay was required if liability for damages was to be avoided. The statute creating the Authority⁸ evidences the legislative intentions that the

§14.25. ¹ 1965 Mass. Adv. Sh. 557, 206 N.E.2d 74.

² 347 Mass. 524, 199 N.E.2d 175 (1964), discussed in 1964 Ann. Surv. Mass. Law §14.24.

³ 346 Mass. 250, 191 N.E.2d 481 (1963), discussed in 1963 Ann. Surv. Mass. Law §13.15.

⁴ Acts of 1952, c. 354, §5(k).

⁵ Acts of 1962, c. 717, §1.

⁶ The Court quoted from *City of Worcester v. Commonwealth*, 345 Mass. 99, 185 N.E.2d 633 (1962), noted in 1963 Ann. Surv. Mass. Law §13.15, for this established proposition.

⁷ 3 Cush. 25, 43 (Mass. 1849). The Court noted that, in the present case, the fact that the taker was a public authority rather than a private railroad did not affect the applicability of the Shaw rationale.

⁸ Acts of 1952, c. 354.

turnpike is to be financed by borrowing, that it shall become the property of the Commonwealth when its debts are paid, and the Commonwealth is to bear no direct part of the costs. Clearly, therefore, this statute failed to make the necessary affirmative statement that no compensation need be paid.⁹

The Court then distinguished its language in its earlier opinion, *Massachusetts Turnpike Authority v. Commonwealth*,¹⁰ in which it held that a taking by the Commonwealth of land of the Authority did not entitle the latter to compensation. While certain language of this opinion was ambiguous on the issue of Authority liability for damages, the Court readily and correctly found it inapplicable to the actual case now before it.

The main permanent importance of this opinion and its two immediate predecessors with the same parties may well be to suggest that a general legislative solution of these intergovernmental conflicts be enacted. This solution would then be applicable unequivocally unless precise language evidencing a contrary intent was adopted in specific legislation.

The second case involving intergovernmental conflict, *The Trustees of Reservations v. Town of Stockbridge*,¹¹ involved rather narrow points of law. The town sought to attain for a school site certain property owned by the trustees. The General Court, in Acts of 1963, Chapter 824, authorized the town to acquire the specific land "by purchase or otherwise," in accordance with a town meeting vote. Despite ingenious and persuasive arguments for the trustees, the Court accepted the legislative decision as final and declared the taking valid. The most controversial aspect of the case involves not the Court's decision but the act of the legislature in permitting the taking of land that has scenic and historic interest to the public. At a time when most persons and agencies are pointing out the nation's vital interest in retaining and rebuilding amenities in urban areas, it may seem a bit contradictory to have the General Court take property from the trustees who are devoting it to what is not only a popular but seemingly an essential use if urban life is to remain livable.

Two statutes of a local nature adopted during the 1965 SURVEY year reveal that the General Court will in most cases consider the retention of amenities and open spaces sufficiently important to require legislative support. In Acts of 1965, Chapter 353, damages to be paid the city of Springfield for taking a section of a park are to be used only for improvement of the recreation facilities of the park. In Acts of 1965, Chapter 51, the compensation for the taking of a portion of park land for a police and fire station is required to be used for acquisition of additional park land or for creation of a park from land already

⁹ The Authority's argument was not perhaps as weak as the opinion might suggest. See Reply Brief of the Defendant, pp. 4-6. But the Court's opinion seems to be the best reading of a somewhat doubtful legislative intent.

¹⁰ 347 Mass. 524, 199 N.E.2d 175 (1964); 1964 Ann. Surv. Mass. Law §14.24.

¹¹ 1965 Mass. Adv. Sh. 265, 204 N.E.2d 463.

owned by the town. The legislature indicated some doubts as to the validity of the latter course of action, stating “. . . if such use is determined to be lawful by a court of competent jurisdiction.”

§14.26. **Damages: Entitlement and admissible evidence.** The most common issue in eminent domain cases is the amount of damages the taker must pay. Several cases arising during the 1965 SURVEY year dealt with various aspects of damages issues.

*LaCroix v. Commonwealth*¹ involved an application of General Laws, Chapter 81, Section 7C, which entitles a landowner to special damages when he is deprived of his access to a public way because a limited access highway has been built. If this section does not apply on given facts, a landowner is remitted to his right to damages under General Laws, Chapter 79, Section 12, which gives damages for access loss only to the extent that the loss is special and peculiar to the landowner and is not a general loss by the public at large.²

In *LaCroix* the Authority took a small corner of the land owned by the plaintiff but also, by taking other land nearby, cut off LaCroix's ready access over his frontage road to a major road somewhat to the south of his locus. Instead of a direct route of a quarter mile LaCroix now had to travel three or four miles to reach the same point on this major way. But, the Court noted, the actual way abutting LaCroix's premises was not touched and his access to this local way was unimpaired. The only problem was that this local way was terminated at the new highway's edge instead of continuing on to join the major route some hundreds of feet beyond. The Court read Section 7C narrowly but correctly as limiting these extraordinary damages to instances in which there was a loss of access to the public way, and not merely an increase in difficulty in attaining the way. In *LaCroix*, the landowner had exactly the same access to exactly the same way after, as he did before, the taking. Thus the lower court had erred in applying Section 7C to these facts.

Despite the correctness of the Court's application of the statutory language, one may well wonder if the Massachusetts rule limiting recovery for loss of access is a sound one under present conditions. While a state must be careful to avoid overcompensating individuals, it is even more grossly unfair to require individual landowners, who, as in the present case, have suffered a serious reduction in property value, to bear a large and very disproportionate share of the costs of a public improvement. The present rules governing damages are often not sufficiently sophisticated to make compensation realistic.

Even in those situations in which the damages rules are adequate, questions often arise as to what evidence is properly admissible to prove the damages. The general rule leaves a great amount of discretion in the trial judge, and his decision will be supported even

§14.26. ¹ 1965 Mass. Adv. Sh. 419, 205 N.E.2d 228.

² See *Tassinari v. Massachusetts Turnpike Authority*, 347 Mass. 222, 197 N.E.2d 584 (1964), discussed in 1964 Ann. Surv. Mass. Law §14.23.

though the Supreme Judicial Court assumes that a contrary ruling on the admissibility would also have been supportable. Thus in *Boyd v. Lawrence Redevelopment Authority*³ the Court sustained a ruling by the trial judge that testimony concerning the sale of the adjoining tract was inadmissible, although it assumed that the judge could also properly have admitted the testimony. The more difficult issue in the *Boyd* case, however, involved the admission by the trial judge of evidence about sales of four parcels of industrial property in the Lawrence area, although the four parcels were substantially smaller and somewhat further out from the city center. The Court noted there was adequate evidence that there was little vacant industrial land in the Lawrence area and that the industrial use of the premises would have involved small plants, so that differences in sizes of the plots were unimportant.⁴ Thus the sales evidence and the expert's opinion based upon it were highly relevant and therefore admissible. Differences between the locus and the four parcels would go only to the weight to be given the value evidence, not to its admissibility.

In *Gregori v. City of Springfield*⁵ the trial judge had admitted evidence of the sale price of adjoining land. The locus was in a Residence B zone but the adjoining land was sold contingent upon its being rezoned to Residence C, which had been done. The Court overruled exceptions to the admission of this evidence, noting that differences in zone classifications of property do not require a rejection of value evidence as inadmissible. Clearly the zone difference is a factor the judge should consider in determining if the value evidence relates to sufficiently comparable property to be useful. But, just as with any other difference between a locus and property claimed to be comparable, a zoning difference does not require a flat ruling of inadmissibility. This was further supported by the fact that the judge fully instructed the jury upon the effect of zoning regulations on comparable sales evidence.

In *Paradysz v. Commonwealth*⁶ the Court, in rescript opinion, upheld the lower court's rulings admitting evidence concerning sales of lands claimed to be comparable to the locus. A more interesting and perhaps controversial rescript opinion, however, is *Sinoyan v. Massachusetts Turnpike Authority*.⁷ The petitioner, who owned a "bowladrome" that was taken by the respondent Authority, sought to prove damages by showing the building's reproduction cost less the depreciation that had occurred. When there are no sales that are adequately comparable, value must be proven by other techniques.

³ 1964 Mass. Adv. Sh. 1219, 202 N.E.2d 297.

⁴ A similar consideration was involved in *Consolini v. Commonwealth*, 346 Mass. 501, 194 N.E.2d 407 (1963), noted in 1964 Ann. Surv. Mass. Law §14.26. In *Consolini* the Court held it error not to have admitted evidence of sales of dissimilarly sized plots when there was no plottage factor.

⁵ 1965 Mass. Adv. Sh. 127, 204 N.E.2d 113.

⁶ 1964 Mass. Adv. Sh. 1433, 202 N.E.2d 795.

⁷ 1964 Mass. Adv. Sh. 1456, 203 N.E.2d 380.

As to certain types of property held exclusively for investment, value can be estimated with fair accuracy under a capitalization of income method. But some properties are sufficiently unique so that comparable sales are essentially impossible to find and income factors are not crucial in determining value. Whether a bowladrome is unique in this sense will be debatable but the lower court, sustained by the Supreme Judicial Court, held this valuation technique appropriate.

The lower court had admitted evidence of the gross receipts of the bowladrome business for the two years prior to taking. Admission was upheld by the Supreme Judicial Court, upon the authority of *City of Revere v. Revere Construction Co.*⁸ That case had permitted the introduction of evidence of net profits in determining property values in cases in which the profits of a business depend primarily upon its location rather than the business acumen of the entrepreneur. The gross receipts evidence of *Sinoyan* would seem, if combined with other business experience statistics, to relate as well as net profits to determining value upon the basis of reproduction costs less depreciation. It would seem, however, to indicate also that the capitalization of income technique of valuation could have been used upon the facts of the case. Generally, this technique will give a valuation estimate of higher quality and greater accuracy than will the technique of using reproduction costs less depreciation.

The Court also sustained the admission of evidence of maintenance carried out by the bowladrome owner. Since this would relate directly to depreciation, the Court, once it had accepted the reproduction cost less depreciation method of setting value, correctly upheld the lower court's rulings. On the question of whether the alleys were part of the realty or separate personalty, the lower court had correctly left this, upon proper instructions, to the jury. Thus evidence of alley maintenance was also properly admitted.

The confusion and difficulties in the proof of value in eminent domain cases would suggest that some techniques be developed to simplify the proof process while perhaps improving its accuracy. Chapter 8 of the Resolves of 1965 sent House Bill No. 2496 to the Judicial Council for study. This bill would amend General Laws, Chapter 233, by inserting a new section dealing with the introduction of evidence of the sale price of comparable property in eminent domain cases. Under subsection (a), the sales price or other relevant circumstances surrounding the transfer of comparable property will no longer be inadmissible by reason of its hearsay nature, provided that the party seeking to introduce such evidence furnishes the opposing party, at least sixty days before the trial, with a list of such of these transfers as he intends to introduce. Any objection to this evidence will be heard by the trial judge without the jury, and it will be entirely within his discretion whether to allow it in. The passage of this subsection would mean added convenience and lack of

⁸ 285 Mass. 243, 248-250, 189 N.E. 73, 75-76 (1934).

delay in the trial of eminent domain cases. Instead of requiring four or five actual participants of comparable sales to testify at the trial, a single source could present the facts and figures of all the comparable sales. Less time would be required for the trial, and there would be fewer continuances because of unavailability of witnesses.

Subsection (b) of the bill would require all witnesses for either party, who are expressing opinions as to the value of a parcel based in whole or in part upon transfers of similar property in which sale they did not participate as principal or agent, to follow the notice provisions of subsection (a). This does not add anything significant to the substantive law of evidence in eminent domain cases. It will, however, remove the possibility of surprise as to what comparable parcels are going to be used by an expert witness. It will require attorneys preparing for trial to engage their experts, and require the experts to, in effect, prepare their opinions considerably before trial. The net result, however, would seem to be a simpler and more orderly trial without any loss of availability of pertinent evidence.

§14.27. Procedures: Protection of those affected by a taking. The extensive additions to General Laws, Chapter 79, made by Acts of 1964, Chapter 579, were designed to protect those who suffer hardship when land is taken, but the legislation created some problems.¹ Despite some rather obvious difficulties the only remedial act passed as of the date of this writing is Acts of 1965, Chapter 573. The 1964 legislation had, in a new Section 7D of General Laws, Chapter 79, made provision for the taking authority in certain cases to pay the compensation to the Justices of the Superior Court, giving the Justices the discretion to permit deposit of the fund. Serious doubt arose about the feasibility of this section, since the Justices were not designed to be and were probably not interested in becoming a type of collection agency. The discretion lodged in the Justices to accept or reject the petition of deposit, with no alternative in case the petition was refused, created doubts whether the section would work. Some of the problems of the section were solved by the adoption of a revised Section 7D under Acts of 1965, Chapter 573. The damages are made payable not to the Justices of the Superior Court but to the Superior Court of the appropriate county. The petition for deposit is no longer discretionary and the court is required to direct the investment or deposit of the fund. The court in which the petition is brought, rather than the Justices generally, retains control over the fund. The revision also added a provision assuring that this section would not conflict with Section 16 of the chapter, which sets out the prescriptive periods for actions for compensation. The section still involves two difficult problems that the amendment does not solve. Someone must first of all make the decision that there is some defect so that no one is in a payable position. The taker cannot bind the courts on this, so in cases of doubt the Superior Court will have to decide. In close cases this

§14.27. ¹ See comments in 1964 Ann. Surv. Mass. Law §14.27.

should, of course, be the rule, but many cases are likely to go to court when only a bit of imagination would indicate the legal result. The second objection reflects on the cost of this process. It seems horribly expensive in cases in which awards are relatively small.

Acts of 1964, Chapter 633, Section 1, inserted a new Section 8B in General Laws, Chapter 79, requiring a taking body to give four months' notice to certain persons before requiring them to vacate the property.² Those entitled to notice were those whose property was taken or who were otherwise entitled to damages under General Laws, Chapter 79, Section 7C. Acts of 1965, Chapter 468, added a new paragraph to Section 8B, requiring the taking authority to give four months' notice to tenants and lessees in possession of property taken, if they are being used for residential or business purposes. The amendment seems salutary, although it will create administrative problems for taking authorities who may well find it difficult in some cases to give the requisite notice. Four months is a fairly long delay, and any further delay caused by difficulties in notifying those entitled under this amendment could create unacceptable limitations on the progress of some types of public improvements. The statute does, however, permit alternative service by certified mail, or by leaving the written notice at the usual place of abode or at the portion of the property taken which is used for residential or business purposes. If these methods can be used alternatively to personal service, without any necessity of attempting to locate the tenant, the delay will be minimal and should be fully acceptable to taking authorities.

A bill adopted as Chapter 653 of the Acts of 1965 involves the interest payable on compensation awards.³ House Bill No. 3957, reported as Senate No. 1124, is designed to permit the taking authority a thirty-day grace period in which to pay a damages award without being liable for interest. The procedure for payment of highway awards, for example, requires the clerk of the Superior Court to forward to the Comptroller a certificate of judgment, showing the amount owing by the Commonwealth. The Comptroller forwards this information to the Department of Public Works, which obtains the necessary releases, apportionment agreements, and any other documents required, and forwards these and its invoice to the Governor and Council for approval. The Governor, upon approval, draws his warrant and the Treasurer issues his check. The bill is designed to encourage the most prompt possible carrying out of this rather involved process since doing it within thirty days relieves the award of interest, but if the award is not paid within thirty days, interest commences as of the date of entry of the judgment.

Numerous bills to alter various aspects of eminent domain procedure

² The 1964 act is noted in 1964 Ann. Surv. Mass. Law §14.28.

³ Acts of 1964, c. 548, §2, made interest payable by the Commonwealth at the rate of 6 per cent. The Commonwealth was not, prior to this time, liable for interest on awards against it. See *General Electric Co. v. Commonwealth*, 329 Mass. 661, 110 N.E.2d 101 (1953).

and to limit or regulate it were filed. As of the date of this writing many were still somewhere in the legislative process. The existence of such a number of bills would suggest that the time has come for a fairly exhaustive study of the eminent domain law of the Commonwealth.

§14.28. Federal standards for taking procedures. For some time the Select Subcommittee on Real Property Acquisition of the Committee on Public Works of the U.S. House of Representatives has been making extensive studies of the impact and effect of eminent domain procedures in the various federal and federal-assisted programs. The study is now largely complete and several of the subcommittee's recommendations were adopted in the Housing and Urban Development Act of 1965.¹

In order to receive federal assistance in connection with urban renewal, public housing, urban mass transportation, public facility loans, open space land, basic public works, neighborhood facilities, and advance land acquisition, the applicant must comply with the following policies in connection with the acquisition of real property by eminent domain:

(1) the applicant must make every reasonable effort to acquire the property by negotiated purchase;

(2) no owner shall be required to surrender possession before the applicant pays to the owner either the agreed purchase price arrived at by negotiation or, in any case where only the amount of the payment to the owner is in dispute, not less than 75 per cent of the appraised fair value of such property as approved by the applicant;

(3) the construction or development of any public improvements should be scheduled so that no lawful occupant of the real property involved shall be required to move without at least a ninety-day written notice from the applicant.

§14.29. Air rights. The desirability of using the air rights above public uses of the surface of land, such as roads and parking spaces, has led to the adoption of various statutes within the Commonwealth.¹ Several new ones were adopted during the 1965 SURVEY year. Acts of 1965, Chapter 446, extended the time within which the Massachusetts Turnpike Authority can lease air rights over the Boston extension from 1966 until 1969. Most takers should show up by then. Uniquely, Acts of 1965, Chapter 262, amended General Laws, Chapter 172, Section 55(A)(4), to permit trust companies to invest in mortgage loans of leasehold interests created under the Massachusetts Turnpike Authority enabling act.

The city of Boston's power to construct and maintain bus terminals was amended by Acts of 1965, Chapter 218, to include the right to

¹Pub. L. 89-117 of Aug. 10, 1965. The amendments to eminent domain procedures are included in Title IV of the statute, §§401-404.

¹Some of the statutes and underlying legal issues are discussed in 1962 Ann. Surv. Mass. Law §13.25 and 1963 Ann. Surv. Mass. Law §13.14.

lease air rights above public off-street parking facilities in the government center renewal project area. Acts of 1965, Chapter 342, further amended the section in its bus terminal provisions, but did not affect the earlier air rights amendment.

A bill seeking authority for the state Department of Public Works to lease air rights over state highways was still in the legislative process at the time of this writing.

§14.30. Relocation. Various proposals, as well as one statute, relating to relocation payments and assistance have been noted in these pages before.¹ As of the date of this writing, none of the numerous proposals before the General Court this SURVEY year has advanced to enactment. Governor Volpe submitted a message that included a bill authorizing a Bureau of Relocation in the state Department of Commerce and Development.² This bill is equivalent to others introduced during the session.³ Numerous other bills, some destined for lingering but inevitable death but others with an excellent chance for enactment, are also before the General Court. All this ferment suggests that the present provisions are inadequate and that a comprehensive and civilized system of relocation should be adopted. The problem is not only and no longer a question of justice to displaced individuals, since one need not be a cynic to realize that government can — as it must at times — ignore some injustice to the individual if the general public sufficiently benefits. But one need have no more than a casual consciousness of communication media to realize that failure to solve relocation problems may well bring entire public programs to a complete standstill. This far from remote possibility will hopefully insure the enactment soon of some progressive and adequate relocation system.

D. URBAN RENEWAL AND HOUSING

§14.31. Constitutional and statutory issues: Judicial review. *Electronics Corporation of America v. City Council of Cambridge*¹ involved the selection of the Kendall Square Industrial Area in the city of Cambridge for the proposed site of the National Aeronautical and Space Administration (NASA) center. Of the ninety-four business concerns in the area, twenty-seven brought a bill in equity for both injunctive and declaratory relief against several defendants, including the city, the city council, the city manager, and the Cambridge Redevelopment Authority. The declaratory relief prayed for was a determination that the area did not constitute a valid subject for an urban renewal project under General Laws, Chapter 121. Injunctive relief was sought to stop advancement of the project during pendency of the suit, and

¹ 1964 Ann. Surv. Mass. Law §14.28; 1963 Ann. Surv. Mass. Law §13.13.

² Senate No. 1030.

³ House No. 3803, with the same provisions as Senate No. 1030, is based upon House Nos. 860, 2409, and 2748.

§14.31. ¹ 1965 Mass. Adv. Sh. 323, 204 N.E.2d 707, also noted in §§11.11, 13.2 *supra*.

a permanent injunction was prayed for to stop any urban renewal project in the area. The lower court sustained four demurrers to the plaintiffs' claim, and before proceeding further, reported the case to the Supreme Judicial Court for a determination of the interlocutory decrees. The Court affirmed the lower court and sustained the demurrers.

On September 30, 1964, the Cambridge Redevelopment Authority adopted a resolution that the area was appropriate for an urban renewal project under General Laws, Chapter 121. This resolution was adopted by the city council and approved by the city manager. Under General Laws, Chapter 121, Section 26QQ,² a redevelopment authority has the same "functions, rights, powers, privileges and immunities" as a housing authority. A housing authority, under General Laws, Chapter 121, Section 26P(b),³ has the power to determine the areas within its jurisdiction which "constitute sub-standard, decadent or blighted open areas and to prepare plans for clearance thereof." Substandard is defined in General Laws, Chapter 121, Section 26J, as "an area wherein dwellings predominate which by reason of dilapidation, overcrowding, . . . lack of . . . sanitation facilities, . . . are detrimental to safety, health, morals, welfare or sound growth of a community." A decadent area is defined as detrimental because of the existence of buildings which are "out of repair, physically deteriorated. . . ." A blighted open area is defined as a predominantly open area which is detrimental because "it is unduly costly to develop it soundly through the ordinary operations of private enterprise. . . ." The plaintiffs' bill prayed for a ruling that the area is not substandard, nor decadent, nor a blighted open area within the definition of General Laws, Chapter 121, Section 26J. If this ruling had been made by the Court, the Cambridge Redevelopment Authority would have been guilty of designating an area as being appropriate for an urban renewal project solely to provide a site for NASA. An arbitrary taking of this kind would deprive the plaintiffs of their property without due process of law.

It was pointed out by the Court, however, that under General Laws, Chapter 121, Section 26ZZ,⁴ an urban renewal project cannot be undertaken until a plan is submitted to the Commonwealth Division of Urban and Industrial Renewal, and its approval granted. No approval by the division had even been requested. Therefore, the only action that had taken place at the time of the case was the adoption of the resolution by the Cambridge Authority designating the areas as appropriate for urban renewal, and the filing of an application for federal funds to make surveys and plans in relation to the area. This amounted only to the Authority making a study of the area, an action clearly within its jurisdiction. Since the Authority has made no attempt to proceed under Chapter 121, the Court ruled that there was neither any controversy to settle nor any grounds for injunctive relief. If the

² As amended by Acts of 1957, c. 150, §1.

³ As amended by Acts of 1955, c. 640, §2.

⁴ As amended by Acts of 1960, c. 776, §6.

Authority does act under Chapter 121, and obtains the necessary approval, the plaintiffs will then have a remedy in the courts. Until then, the Supreme Judicial Court refused to substitute its judgment for that of the Authority.

How effective the right of property owners to contest a taking as not being proper under the urban renewal statutes may, however, be seriously questioned. The opinion of the majority in *Moskow v. Boston Redevelopment Authority*⁵ found that, in five cases brought by landowners concerning the taking of their property for an urban renewal project, demurrers by the various defendants were properly sustained.

The cases are complex and the points decided in the opinion are numerous. The importance of the case to urban renewal demands, however, a brief summary of the most important facts, claims, and issues. The plaintiffs, the same persons in all actions, were the owners of a building that was one of two in Parcel 8, a portion of the Government Center Project in Boston. In the principal bill for declaratory relief, it was alleged that the bank defendant, objecting to the taking of its State Street principal office, entered into an understanding with the Boston Redevelopment Authority and a developer that it would withdraw its objections if the plaintiffs' building were purchased and a new tower building with the bank as principal tenant were built on the land upon which the plaintiffs' office building was then located. If purchase by the bank was not possible, the Authority agreed to include the plaintiffs' property in the renewal area and take it under eminent domain, which was done. The bill continued with the history of the Government Center Project, including the Boston City Council's refusal to approve the project in 1963 because of Parcel 8 and its reversal of this decision in 1964 after new council members were elected. It was alleged that both at the council hearings and the later hearing before the director of the Division of Urban and Industrial Renewal the plaintiffs were refused their rights to be represented by counsel, to intervene, and to examine and cross-examine witnesses. It was also claimed that the plan submitted by the Authority did not, as required by General Laws, Chapter 121, Section 26ZZ, conform to a Boston general plan nor did it indicate zoning changes required for the proposed tower building to be built on Parcel 8.

The majority of the Supreme Judicial Court, in an opinion by the Chief Justice, first eliminated as defendants the bank and one of its directors as unnecessary to the discussion of the allegations. The opinion found that the bank, although more than an interested bystander, did not have the type of interest required by General Laws, Chapter 231A, Section 8; i.e., it did not have or claim any interest that would be affected by the requested declaratory judgment. On this point, Justice Kirk, joined by Justice Spiegel, dissented. They found the allegations raised the issue of whether there was not a taking by a public body from one private owner for the benefit of another private owner.

⁵ 1965 Mass. Adv. Sh. 1203, 210 N.E.2d 699, also noted in §11.8 *supra*.

Thus the dissenters felt that the allegations succeeded in raising the issue of whether the taking was for a public purpose, and disagreed with the majority on whether the allegations did not come within the example of Chief Justice Qua in *Despatchers' Cafe Inc. v. Somerville Housing Authority*.⁶ The bank director was held not to have any interest that could be affected by the requested declaration.

The most difficult issue was whether the demurrer had been properly sustained in favor of the Boston Redevelopment Authority. The dissenters found that the allegations, raising as they did the issue of public purpose, could not be determined upon demurrer. The majority, however, found otherwise, by what was a very careful and arguably overly technical reading of the pleadings. Thus the allegations that the dissenters found had raised the public purpose issue, the majority dismissed as rhetoric unsupported by adequate allegations of facts. The administrator, not the Authority itself, was also charged with the acts complained of, and the majority did not believe that, under normal rules applicable to the interpretation of pleadings upon demurrer, the actions of the administrator could be inferred to be those of the Authority.

The numerous objections concerning action of the city council and the Division of Urban and Industrial Renewal were essentially rejected upon the determination that the decisions of these bodies were political and thus legislative. Due process objections based upon denials of rights to intervene and to examine and cross-examine witnesses were, therefore, irrelevant.

Objections based upon the claim that General Laws, Chapter 121, Section 26ZZ, requirements for conformity with the general plan and inclusion of zoning changes were not met, were summarily rejected. There was no showing that a general plan existed for Boston and the statutory phrase only meant that, if there was a general plan, the proposed Project Plan had to comply with it. The "zoning change" objection was rejected as none too clear and at least partly answered by the plaintiff's own allegations that the Project Plan showed that the permitted height in the zone was 155 feet whereas the proposed tower was over 300 feet.

The companion cases, involving the same parties but seeking relief upon different bases—two writs of certiorari, a bill in equity and a petition under the State Administrative Procedure Act—were also quickly rejected by the Court, largely upon the same substantive grounds expressed in relation to the principal bill for declaratory relief. The administrative decisions were not "in an adjudicatory proceeding" under General Laws, Chapter 30A, Sections 1(1), 14, and thus APA relief was not obtainable. The Court intimated that the plaintiffs

⁶ 332 Mass. 259, 263, 124 N.E.2d 528, 531 (1955): "It is perhaps possible to imagine a case where the authorities ostensibly taking land for a schoolhouse have no intention of building any schoolhouse at all but are really taking the land to let it lie open for the benefit of adjoining land owned by themselves or for some other irrelevant purpose."

had no rights as parties in the bill in equity seeking relief under General Laws, Chapter 268A, Section 21. Section 21 provides the remedy of rescission and annulment of municipal action brought about by breaches of the statutes regulating the conduct of public officials and employees. The issue as to standing did not have to be decided, however, since the Court had already rejected contentions that certain city councilmen had violated the standards set by the statutory code of ethics.

One can sympathize with Justice Kirk's statement in dissent that landowners after this decision will find it difficult to gain access to a forum to show that a public authority is exercising its power of eminent domain for primarily private purposes. Clearly, however, the majority would not agree with this analysis. The demurrers were sustained essentially because the majority did not find the allegations to be of a sufficiently factual nature. Other allegations giving more facts, and specifically those facts that relate to illegal acts of the defendants, would apparently withstand demurrers. Arguably, however, the majority might have read the allegations in the present case more sympathetically, thus leaving the determination of even problematical issues to trial.

§14.32. Federal housing and renewal legislation. The Federal Housing and Urban Development Act of 1965¹ has several far-reaching provisions which will have their effect on urban renewal and housing programs in Massachusetts. The emphasis of the new law is on low-income housing. The major innovation is a rent supplement provision in Title I of the act. This authorizes the administrator of the Housing and Home Finance Agency to make an annual payment to a housing owner on behalf of qualified tenants. In order to receive payment the housing owner must be a nonprofit, co-operative, or limited dividend organization. The complete operation of the rent supplement section calls for new construction to be financed under the Section 221 low-cost housing program, with interest at regular market rates and subject to FHA requirements. Eligible tenants for this housing are to be chosen from those families whose income is below the maximum set for public housing and who, in addition, are elderly, handicapped, displaced from their homes by government action, living in slums, or are victims of natural disasters. The selected tenants will then pay 25 per cent of their income toward the fair market rent established by the FHA, with the rent supplement paying the balance of the fair rent. This program is expected to generate 375,000 units of low-income housing over the next four years.

The rent supplement provisions, however, only deal with new construction. In order to help alleviate the present demand for low-income housing, the so-called Widnall program was passed. This allows exist-

§14.32. ¹ Pub. L. 89-117 of Aug. 10, 1965. [Ed. Note: The appropriations for the rent supplement program failed to pass the Congress because of apparent doubts about the standards imposed by the tentative regulations prepared by the Housing and Home Finance Agency.]

ing private housing to come into use in the rent supplement program. Owners of private housing will be invited to put their buildings on a listing kept by the housing authority. Not more than 10 per cent of a multifamily structure will be allowed to be used for this low-rent housing. The local housing authority and the owner will then negotiate the rental charge; the owner will select the tenant from among those qualified; the owner and the local authority will then agree upon the rent to be paid by the tenant with the balance a supplement by the authority. Requirements for maintenance and replacement are established and the authority will retain the right to give tenants notice to vacate. A contract of this type could run from twelve to thirty-six months and could be renewable. The tax exemption feature of the public housing program does not apply to this type of housing and building owners will pay their regular taxes.

Two other provisions of the housing act that may have considerable effect in Massachusetts are the rehabilitation grants and the beautification section. The rehabilitation grants will permit payment of up to \$1500 to low-income home owners (annual income less than \$3000) in urban renewal areas, when urban renewal plans require them to make repairs. While these grants are part of the renewal project cost they are fully federal and require no local matching. This program supplements the special rehabilitation loan program authorized in 1964, which program was also liberalized and increased by the 1965 act.

The beautification and open space provisions call for matching grants for such things as street landscaping, park improvements, tree planting, upgrading of malls and squares, and the acquisition and development of land for recreational, conservation, and other public uses.

A large number of other largely technical changes in the various renewal and housing programs were adopted. These include some extensions and modifications of the public housing programs and the use of a flat 3 per cent interest rate for federal loans for several housing programs. The urban renewal provisions were subject to numerous amendments which cannot be detailed here but are of importance to any community involved in the program. Code enforcement provisions were substantially changed to authorize grants to the communities themselves rather than to the renewal authorities. The proposals for support of "New Town" development eventually resulted only in the adoption of a mortgage insurance program, but this may lead the way in time toward substantial federal financial encouragement of this particular solution to urban overcrowding and strangulation.

§14.33. Low-income housing. Nearly thirty years after public housing was first authorized on the federal level, adequate housing still does not exist for much of our urban and rural populations. The problems of low-income housing have in many states been left to the federal government, while the state authorities spend their time complaining of federal encroachment on states' rights. Massachusetts has been fortunate, however, in having had a long-time and continued in-

terest in low-income housing. The continuing urgency of these problems, combined with the special problem of the housing of Negroes and other minority groups, led to the appointment in 1964 of a Special Commission on Low Income Housing, the chairman of which was Malcolm E. Peabody, Jr., and whose members included distinguished legislators and private citizens. The final report of this committee, published during the 1965 SURVEY year, reviews the history of housing legislation and makes many outstanding suggestions, which in combination would solve much of the Commonwealth's housing problems.¹ No one interested in housing should fail to read this report. If a few of the Commission's recommendations are a bit rich for some tastes, the pattern of programs proposed provides a superb blueprint for state action. Certainly the Commission would itself be the first to welcome constructive criticism and new approaches, realizing as it does that its solutions are hardly infallible. But the Commonwealth owes the Commission a great debt of gratitude for its dedication and imagination, a debt that can best be paid by adopting the Commission's recommendations even if some adoptions were treated as experimental.

The report cannot be adequately summarized by noting its major recommendations, but they will give some idea of the scope and depth of the study. In its study of existing programs, the Commission recommended the shift of the veterans' housing programs under Acts of 1946, Chapter 372, and General Laws, Chapter 121, Sections 26NN-26PP, to low-income housing but with appropriate increases in the state's annual subsidy. An increase in state support of housing programs for the elderly is also called for. As to families displaced by public action, the Commission recommended that housing authorities be forbidden to impose local residency requirements. Its final recommendation as to existing programs was the establishment of a study commission to investigate the problem of the housing of those receiving public welfare assistance.

The Commission's recommendations for new programs reveal the desirable combination of common sense and imagination. It recommended the creation of a state housing finance agency to make direct mortgage loans for certain types of low- and moderate-income housing. A rent supplement program of a complete and sophisticated nature was also proposed. A state-aided public housing program, desirably designed to avoid the pitfalls that have dogged public housing in the past, is one of the best practical reviews that exists of problems and solutions in this area.

To help solve the problems created by the deteriorating housing stock in large parts of the Commonwealth's urban areas, the Commission made four major proposals. The first would create conditions, including an insurance fund, to encourage mortgagees and real estate investors to come into deteriorating areas and to help rehabilitate

§14.33. ¹ House No. 4040 (1965). A summary report stating in broad strokes the major recommendations, entitled "Decent Housing for All," was published in March, 1965.

them. Half of the personnel costs of code enforcement would be borne by the state. Extensive changes recommended in the rights and obligations of landlords and tenants are designated to encourage adequate upkeep of residential properties. The absentee landlord would be required to appoint an agent for service of process or to have been deemed to have appointed the local city or town clerk. In addition the Commission proposed a pilot project involving the appointment of a housing investigation officer in the Roxbury District Court, to investigate and consult concerning housing, and to aid the judges in disposing of the landlord-tenant cases that come before the court.

The Commission also recommended an adequate and long-overdue relocation program and the appointment of three study commissions to cover building code, real estate assessment, and fire insurance problems.

If the Commission's program is revolutionary in certain aspects, it is so only because the housing problem has become an increasing source of interracial and other social conflict. The Los Angeles riots have recently again pointed out that housing, of course, represents but one aspect of the social problems that lead to violence and discord. Attacks on this one source of conflict, however, will do much to alleviate tensions and encourage the solutions of other problems. Many of the Commission's recommendations are not particularly radical, because they deal with problems of a less urgent nature or are in the process of solution. But some problems are so great and so complex that radical measures will have to be taken if even more drastic solutions are not to be forced upon the governments. The Commission's proposals are designed to accomplish an extensive evolution and hopefully avoid revolution.

§14.34. Slum housing. House Bill No. 3685, designated as an emergency law, was reported to the House Ways and Means Committee on April 7, 1965, and relates to the enforcement of the minimum standards of fitness for housing under the state Sanitary Code.¹ Section 1 of the bill has five parts: (1) Tenants are to make rental payments into court upon a finding by the District Court that a building violates the standards of the Sanitary Code, or any local board of health standards, and if these conditions may materially impair the health of the tenant, and if the condition was not substantially caused by the tenant. (2) A petition may be filed by any tenant, in the District Court, for a nominal fee. At least ten days before filing a petition, however, the tenant must give written notice of the alleged violation to the owner of record and to the local board of health. If the owner takes no action, the petition can be filed and a hearing will be held within fourteen days. (3) A certified copy of any state or local enforcement agency investigation will be admissible evidence and will constitute prima facie evidence of the facts stated therein. (4) Upon a finding of a violation,

¹ §14.34. The bill would add new Sections 128G-128J and amend Sections 5 and 124 of G.L., c. 111.

the court may order any or all tenants of the building in which the violation occurred to pay their rent into the clerk of the court, providing such tenant is not in arrears on his rent. The court may then direct the use of the rental payments held by the clerk in the manner which will, in the court's judgment, best effectuate the removal of the violation. (5) Any time after thirty days from the date of the court's order authorizing rental payments to be paid to the clerk, but before final judgment, any party can pay a removal fee of five dollars, and the case will be removed to Superior Court for further proceedings as if the petition had originally been brought in that court.

Section 2 of House No. 3685 would allow the local board of health or any tenant to file a petition in the Superior Court to force an owner to comply with an order of the board which has been unheeded for ten days. The court may then (a) issue appropriate restraining orders or injunctions; (b) authorize rental payments to the clerk of the court; (c) close up said premises; (d) appoint a receiver.

At the time of this writing, this bill has not yet been reported out of committee.

A further measure was proposed in House No. 3178 to help alleviate the problem of enforcing the Sanitary Code against the owners of slum housing. This act would require a mortgagor, upon every sale or transfer of real estate, to list or furnish the name of the true owner of property, and not merely the owner or mortgagee of record for concealment purposes. The provision carries with it a fine for violation. Although referred to the next annual session, and so for all practical purposes defeated, the legislature will in time have to provide means for identification of the owners of slum housing in order to enforce Sanitary Code provisions.

Also referred to the next annual session was a bill penalizing a landlord who willfully or intentionally fails to provide a service he contracted to provide at a time when such service is necessary to the proper or customary use of such building.² This bill was another aimed at the "slum lord" in order to force him to provide heat, hot water, gas, and other such utilities and services.

§14.35. Antidiscrimination legislation. During the 1965 SURVEY year, General Laws, Chapter 151B, the antidiscrimination chapter, was amended several times.¹ In Section 1 a new subsection defined commercial space, while Section 4 made it unlawful to discriminate in the selling or renting of such commercial space.

Commercial space is defined as any space in a building structure which is used, occupied, arranged, designed, or intended to be used for the manufacture, sale, resale, or distribution of personal property; or space designed, arranged, or intended to be used as a separate business or professional unit. Under Section 4(8), it is now unlawful for the owner, lessee, sublessee, or manager of such commercial space to dis-

² House No. 563 (1965).

§14.35. ¹ Acts of 1965, cc. 213, 569.

criminate against any person because of his race, creed, color, or national origin in the rental, sale, or lease of such commercial property. Furthermore, it is unlawful to make any written or oral inquiry into the race, creed, color, or national origin of a person seeking to rent, lease, or buy any such commercial space.

Acts of 1965, Chapter 569, amended Section 5 of General Laws, Chapter 151B, to permit a petitioner who has been discriminated against by any unlawful practice to receive damage of up to one thousand dollars in addition to any other action taken. These damages could include, but are not limited to, expenses incurred in obtaining alternative space, expenses for moving costs, and expenses for storage incurred as a result of the unlawful practice.

Resolves of 1965, Chapter 13, provides for a study by the Judicial Council of a bill designed to impose sanctions for inciting racial tension and fear so as to induce the sale of real estate. The bill is designed primarily to discourage the "blockbusting" techniques by which some speculators have used artificially created racial tensions to reap large financial rewards.

§14.36. **Public housing.** In *Sullivan v. Fall River Housing Authority*¹ a tenant sought to prevent a proposed rent increase in the defendant's public housing. The Supreme Judicial Court affirmed the decree dismissing the bill in equity. The pertinent statute, General Laws, Chapter 121, Section 26U, gave to the State Housing Board (now the Department of Commerce and Development) the exclusive right to bring a bill in equity to enforce the housing law, including the rental provisions in General Laws, Chapter 121, Section 26FF. If the state agency refused to enforce these rent provisions against the local housing authority, a tenant's remedy would be by writ of mandamus against the state agency. The Court thus rejected the plaintiff's argument that denial of his bill in equity would leave him without recourse to the courts.

Retirement rights of certain veterans employed by housing authorities were adopted by Acts of 1965, Chapter 498, amending the provision of General Laws, Chapter 32, that governs retirement rights of those veterans who were employed by government units prior to June 30, 1939.² The legislation undoubtedly affects relatively few housing authority employees but places them on a par with their peers in local government.

E. OTHER LAND USE MATTERS

§14.37. **Regional planning.** During the 1965 SURVEY year, several enactments have changed the scope and power of the Metropolitan Area Planning Council. Section 114 of General Laws, Chapter 6, was amended so as to give the Council the authority to enter into contracts and agreements with any division of the federal or state government,

§14.36. ¹ 1965 Mass. Adv. Sh. 523, 205 N.E.2d 701, also noted in §13.9 *supra*.

² Corrective changes were made to the act by Acts of 1965, c. 680.

or any private party, in connection with the work of the Council.¹ Services or money consideration may be contributed or received by the Council in such contracts and agreements. The amendment further provided that the Council may keep and expend such funds, or funds received by gift, grant, or agreement from any source, in addition to the funds appropriated by the General Court. Formerly, the amount of such resources was deducted from the appropriations made by the General Court.

Section 109 of the General Laws, Chapter 6, was amended to make the Commissioner of Natural Resources an *ex officio* member of the Metropolitan Area Planning Council.² This is another step in the present process in Massachusetts and throughout the nation for furthering conservation and open space planning. Section 111 was also amended and now specifically lists the cities and towns included in the Metropolitan Area Planning District.³ This is a simplified reference, as opposed to the former referral to those towns making up or contingent to the other cities and towns comprising the metropolitan sewage, park, or water districts.

In the area of regional planning, several significant pieces of legislation were proposed but were not acted upon in this SURVEY year. One such proposal was for the General Court to appropriate an amount to each district planning commission equal to the amount assessed the district.⁴ This attempt to have the state finance part of the work of the district commissions was referred to the next annual session, but is the type of legislation that eventually will have to be enacted. A second proposal called for the creation of county planning departments, to stimulate and develop regional planning.⁵ In some areas of the United States the county is a very logical geographic unit for planning. But Massachusetts county lines only accidentally coincide with the type of areas requiring regional planning. Regular regional planning districts would seem to remain the best solution for the Commonwealth. The bill itself was withdrawn.

A third proposal, presented by Governor Volpe as a result of a meeting of the New England Governors, takes a step in the opposite direction. This calls for an interstate agency to handle New England regional planning.⁶ This type of program would be of benefit in the areas of conservation, tourist expansion, economic development, and transportation networks. Of more importance, such joint programs would increase and more effectively use available federal funds. More and more the federal government is promoting interstate regional planning and development. The Appalachia economic bills are one example, as are the proposed federal programs in commuter transpor-

§14.37. ¹ Acts of 1965, c. 389.

² *Id.*, c. 145.

³ *Id.*, c. 178.

⁴ Senate No. 769 (1965).

⁵ House No. 1888 (1965).

⁶ House No. 3666 (1965).

tation. As of the date of writing the Governor's bill has not been acted upon.

§14.38. **Building and safety regulations.** In *O'Donnell v. Board of Appeals of Billerica*¹ a builder sought permission to build homes without cellars although they were required by the local building code. Under the by-law the local Board of Appeals could grant relief from the provisions of the code upon proper showing. In this case the Board granted the variation sought. The petitioners, nearby landowners, sought review of this decision by a writ of certiorari. The dismissal of the writ by the Superior Court was sustained on appeal.

The petitioners sought to have the Court apply General Laws, Chapter 40A, Sections 14 and 17. These sections of the zoning enabling act require notice to be given of the hearings of the board of appeals. The Supreme Judicial Court held Chapter 40A inapplicable to building code cases. It also refused to follow the analogy to the zoning procedures, noting that the Board in the present case was not hearing an appeal but was acting as the public representative making the original determination. The Court did not decide, since it was irrelevant, whether notice would be required in a case in which the Board was actually reviewing the grant or denial of a permit by another administrator. The Board in this case was not acting as a tribunal performing a judicial function but was merely the administrator, and so certiorari would not lie.

The Court noted that the Federal and State Constitutions and state statutes do not require a hearing on the issuance of building permits and that the petitioners could show no special injury that might suggest they should have a means of directly attacking the grant. Mandamus proceedings are available to insure that enforcing officers act under the building codes but no such officer was even a party to this proceeding.

The Court finally stated that, had the judge below had jurisdiction, his denial of the writ on discretionary grounds would not have been erroneous. It was then pointed out that the writ of mandamus is also discretionary, the Court by footnote detailing some of the issues that would be pertinent if this writ were brought.

When the grant of a building permit involves only the safety and health of the locus, public policy, as the Court indicated, does not require general public hearings and notice. The grantor of the permit represents the public interest and can insure that those factors of direct interest to the public are completely considered. It may be that adjoining property owners might feel their properties would be somewhat decreased in value if new homes are built on slabs rather than over basements. But, beyond the uncertainty of this premise itself, building codes should not be used primarily to preserve property values, although a number of communities use these codes to limit new building.

§14.38. ¹ 1965 Mass. Adv. Sh. 919, 207 N.E.2d 877. See also §14.6 *supra*.

§14.39. **Tidelands and wetlands.**¹ Chapter 220 of the Acts of 1965, enacted during the 1965 SURVEY year, amended General Laws, Chapter 131, by adding a new Section 117C. Written notice must now be given to the board of selectmen in a town or the mayor of a city, and to the state Departments of Public Works and Natural Resources, if a person intends to remove, fill, or dredge any bank, flat, marsh, meadow, or swamp bordering on any inland waters. The notice must be sent at least thirty days prior to any removing, filling, or dredging. A public hearing must then be held within ten days of receipt of said notice. The person intending to do the work will be notified of the time and place of the hearing. Flood plain zones designated by the Water Resources Commission, land used for agricultural purposes, mosquito control projects, and Chapter 252 projects for improvement of lowlands and swamps are exempt from the new statute. The Commissioner of Natural Resources may also exempt land from this statute under certain standards.

Chapter 375 of the Acts of 1965 was also adopted during the 1965 SURVEY year. It amended General Laws, Chapter 130, Section 27(A), so as to now require publication, in addition to written notices, on hearings relative to removal, filling, and dredging in areas bordering on the coastal waters. In *Commissioner of Natural Resources v. S. Volpe & Co.*,² discussed in detail elsewhere, the Supreme Judicial Court determined that a restriction on use of wetlands would constitute a taking and not just a regulation, if it deprives an owner of any reasonable use of his land.

Also, during the 1965 SURVEY year, a resolve was sent to the Governor authorizing the Department of Natural Resources to make an investigation and study of House Bill No. 1916, which calls for the creation of at least one public shore reservation in every city and town in which there is a tidal shore.

§14.39. ¹ See also discussion in §14.23 *supra* of coastal wetlands legislation.

² 1965 Mass. Adv. Sh. 671, 206 N.E.2d 666, noted in §14.23 *supra*.