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Chapter 24: State and Local Government

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CHAPTER 24

State and Local Government

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A. COURT DECISIONS

§24.1. **Introduction.** Decisional law in the area of state and local government during the 1970 SURVEY year could be organized under several themes of stability and change. For the most part, the Supreme Judicial Court gave little reason to doubt its devotion to the doctrine of stare decisis. On matters of municipal tort liability, as well as property and tax interests, it reapplied settled definitions. On issues of doubtful or competing authority between state and municipality, the Court consistently upheld the spirit of Dillon's Rule,[1] most conspicuously by restrictive construction of the Home Rule Amendment.[2] The Court's assent to change in the law continued to spring predominantly from its deference for legislation. Thus it favored vigorous application of the conflict of interest statute and a liberal construction of legislation obviously designed to capture federal funds for local housing purposes. Showing that legislation can serve stability as well as change, it upheld the 1821 statutory taxation plan of Suffolk County. And acknowledging the clear mandate of the United States Supreme Court, it ordered reapportionment of the Commonwealth's senatorial districts.

Meanwhile the legislature, in the light of an election year, did not overlook local governmental instrumentalities in the enactment of both fashionable and necessary legislation. Most visible was legislation enabling local rent and eviction control, environmental regulation, consumer protection, and economic development. Of these possibilities, rent control seems destined to be the most implemented and controverted program. The success or failure of the remaining schemes turns directly on the local initiative.

§24.2. **Municipal tort liability.** Approving Supreme Judicial Court watchers are inclined to stress the virtues of continuity in the

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§24.1. [1] In capsule, the rule states: "Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the [municipal] corporation and the power is denied." 1 Dillon, Municipal Corporations §237 (5th ed. 1911).

[2] Mass. Const. amend. art. 89. For an analysis of the amendment, see 1967 Ann. Surv. Mass. Law c. 16.

law as preserved by that tribunal. During the 1970 SURVEY year the Court affirmed continuity in the law of municipal tort liability in the decisions of *Reynolds Boat Co. v. City of Haverhill*[1] and *Standard Paper & Merchandise Co. v. City of Springfield.*[2] Both cases turned on the traditional distinction between a municipality's *governmental* functions and its *proprietary* activities, and on the resulting general rule of municipal tort immunity in the performance of the former and the exception of liability in instances of the latter. The *Haverhill* case illustrated the general rule, the *Springfield* case the exception.[3]

In the *Haverhill* case, the plaintiff boat company alleged that the negligent failure of the city to maintain adequate water service through the nearest hydrant resulted in fire damage to its property. The plaintiff also averred a "promise," apparently implied, by the city to provide adequate water service to hydrants. The Court made short work of these allegations. Invoking the 1877 decision in *Tainter v. Worcester,* where the Court first held that fire protection is undertaken "for the benefit of the public and without pecuniary compensation,"[4] it first brushed aside the notion of an implied "promise" by the city. The service of fire protection creates no contract with, or liability to, property owners for municipal failure to furnish water. And, of course, the policy distinction between the extent of a municipality's undertaking in a governmental function, like fire protection, and its undertaking in commercial activity continues intact in Massachusetts, as in most jurisdictions. The Court rejected any intimations to the contrary which might be gleaned from *Cole Drug Co. v. City of Boston,*[5] a 1950 decision involving a mixed system of a commercial water

§24.2. 1 1970 Mass. Adv. Sh. 985, 260 N.E.2d 176. This case is the subject of a student comment in §24.21 *infra.*

2 356 Mass. 475, 253 N.E.2d 337 (1969).

3 For a recent attack on traditional doctrine, see Note, Assault on the Citadel: De-immunizing Municipal Corporations, 4 Suffolk U.L. Rev. 832 (1970). Immunity as a common law rule is generally traced to the 1788 English decision, Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788), and was relied upon in the first Massachusetts case, Mower v. Leicester, 9 Mass. 247 (1812). Both cases involved injuries suffered on defective municipal bridges.

The first Massachusetts decision to apply the rule of exception and to hold a city liable for torts committed in the performance of its *proprietary* functions was Thayer v. Boston, 36 Mass. 511 (1837), where the city, in the process of constructing new market facilities for rental to private tenants, obstructed the passageway in front of plaintiff's warehouse and caused the desertion of his tenants. The city's activity for income, said Chief Justice Shaw, made it liable as a proprietor.

Despite its certainty in the present cases, the Supreme Judicial Court has not always found the distinction between governmental and proprietary activity easily drawn, as municipal functions have grown increasingly variegated. See, e.g., Dickinson v. Boston, 188 Mass. 595, 75 N.E. 68 (1905) (fall of defective lamp post); Orlando v. Brockton, 295 Mass. 205, 3 N.E.2d 794 (1936) (operation of an almshouse); Baumgardner v. Boston, 304 Mass. 100, 23 N.E.2d 121 (1939) (turning on the source and amount of income to the city from refuse collection).

4 123 Mass. 311, 316 (1877).

5 326 Mass. 199, 93 N.E.2d 556 (1950).

main and a lateral pipe used exclusively to carry water from the main to a fire hydrant. After a break occurred at the junction of the lateral pipe and the hydrant, city repairmen negligently failed to shut off the *main* supply of water within a reasonable time, and excessive flooding damaged the goods of a nearby storekeeper. The Court was careful to base municipal liability on the negligent delay in shutting off the *main* water supply since it was also the *commercial* water supply. This rationale preserved the traditional rule, at least as an exercise in logic.[6] As a matter of policy, one might well question the equity wisdom of turning liability for negligent city repair efforts on the fortuities of the pipeline system.[7]

The Court's concluding passage in the *Haverhill* case does not permit any prospect for a judicial modification of present law: "Any change in the policy of this Commonwealth extending the undertaking of municipalities so as to create liability to individual property owners for damage caused by inadequacies in the system of fire protection, must lie with the Legislature."[8]

But in those proprietary functions especially committed to its responsibility, the municipality continues to be held to duties of "reasonable judgment, skill and care, according to the approved usages of . . . [the] trade."[9] In the *Springfield* case, the plaintiff sought flood damages incurred to its cellar storage as the result of a broken water meter. The meter, installed 39 years before and periodically tested at seven-year intervals by the city water department, had last received an "accuracy test" about four years and nine months before it appar-

[6] Chief Justice Wilkins authored both the present decision and, as an Associate Justice, the Cole Drug Company holding in 1950.

[7] The Cole Drug Company case remains a potentially useful decision for plaintiffs, if only to dramatize the possible inequity resulting from a rigid application of the governmental-propriety distinction in water main cases. As the Court left the law, city repairmen can, with immunity, continue to bungle the maintenance of an integrated water main system so long as they are fortunate enough to leave unrepaired the governmental rather than the proprietary pipe. One can continue to hypothesize pipeline arrangements which strain the logic of that holding.

[8] 1970 Mass. Adv. Sh. 985, 987, 260 N.E.2d 176, 178. Immunity has, of course, been under attack by distinguished commentators for some time. Most have urged legislative abrogation. The classic treatment is Borchard's six articles, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924-1925), and Government Responsibility in Tort, 36 Yale L.J. 1, 757, 1039 (1926-1927). Other significant works include Fuller and Casner, Municipal Tort Liability in Operation, 54 HARV. L. REV. 437 (1941); Harno, Tort Immunity of Municipal Corporations, 4 Ill. L.Q. 28 (1921); Repko, American Legal Commentary on the Doctrines of Municipal Tort Liability, 9 Law & Contemp. Prob. 214 (1942). For recommended legislation see Cobey, New California Governmental Tort Liability Statutes, 1 Harv. J. Legis. 16 (1964); Van Alstyne, Governmental Tort Liability: Judicial Law Making in a Statutory Milieu, 15 Stan. L. Rev. 163 (1963).

[9] Standard Paper & Merchandise Co. v. City of Springfield, 356 Mass. 475, 253 N.E.2d 337, 338 (1969). The Court points especially to Friese v. Boston Consol. Gas Co., 324 Mass. 623, 628-629, 88 N.E.2d 1, 5 (1949), and to Kelley v. Laraway, 223 Mass. 182, 184, 111 N.E. 794, 795 (1916).

ently burst. Expert testimony was introduced on the rate of corrosion of such a cast iron meter, its visible deterioration in thickness, and its susceptibility to fracture from occasional surges in water pressure, as was evidence that the water department's last accuracy test had not included a check of water pressure at the premises, or a pressure test of the meter itself. Finally, the evidence failed to show a visual inspection of the meter prior to reinstallation. This much, said the Court, was sufficient to take the case to the jury over the city's motion for a directed verdict, and to subject the city to the standard of reasonable skill under the approved usages of the trade.[10]

§24.3. Municipal property. The power of the Commonwealth to regulate by legislation the property interests of its cities and towns received careful restatement in the decision of *City of Cambridge v. Commissioner of Public Welfare*.[1] Writing for the Court, Justice Quirico was called upon to apply primary principles of municipal property rights and liabilities to the aftermath of a sweeping reallocation of state and local welfare responsibilities.

The controversy grew from the comprehensive transfer of welfare administration from the cities and towns to the Commonwealth as of July 1, 1968.[2] This reorganization of welfare administration and concomitant financial responsibility included the operation of the old age assistance program of Chapter 118 of the General Laws. Under Section 4 of that chapter, as it stood before July 1, 1968, Cambridge had taken liens on a number of parcels of real estate, or on interests in real estate, owned by recipients of old age assistance, and recorded them in the registry of deeds. As of the effective date of the new act, the city held a number of such liens on which no judicial proceedings for enforcement had begun.[3] The commissioner of public welfare subsequently released a number of such liens "upon request of interested

[10] 356 Mass. 475, —, 253 N.E.2d 337, 339 (1969).

§24.3. [1] 1970 Mass. Adv. Sh. 423, 257 N.E.2d 782. Cambridge brought a bill in equity against the Commissioner of Public Welfare, under G.L., c. 231A, for a declaratory decree. The case was heard in the Superior Court on a statement of agreed facts, and was reserved and reported without decision to the Supreme Judicial Court.

[2] Acts of 1967, c. 658. The act transferred to the Commonwealth responsibilities formerly delegated to local government by a number of statutes "establishing a comprehensive municipally administered welfare program for furnishing aid and assistance to various segments of the inhabitants of the Commonwealth." 1970 Mass. Adv. Sh. 423, 428, 257 N.E.2d 782, 786. "The total program included aid to veterans under c. 115, aid to poor and indigent persons generally under c. 117, aid to families with dependent children under c. 118, aid to the aged under c. 118A, and aid to disabled persons under c. 118D." Id. Chapter 658 of the Acts of 1967 transferred to the Commonwealth administration of all programs except aid to veterans under Chapter 115, and relieved the municipalities from financial responsibility for the functions so transferred.

[3] Where proceedings had been begun, the Acts of 1967, c. 658, §80, authorized their completion by the Department of Public Welfare.

persons and for the purpose of clearing record titles of such liens." The commissioners did not ask the city to transfer any such liens to the Commonwealth or offer to pay the city any consideration for them.[4] While the case was before the Superior Court, legislation was enacted to provide expressly that "liens given by recipients to the cities and towns under any assistance program administered by the department of public welfare prior to the enactment of [the welfare reorganization law] are hereby abolished. A release of such liens shall be given by the treasurer of such city or town."[5] The issue at hand, then, became whether the Massachusetts Constitution permitted the legislature to abolish these old age assistance liens without requiring the Commonwealth to compensate the municipalities for their loss of those property interests.

The Court's inquiry began with a recitation of basic principles controlling the power of the legislature to deal with the property of the municipalities.[6] The dual character of a municipality as a governmental agency of the state and a proprietary corporation determines the susceptibility of particular property to legislative control. Property which a municipality has acquired and owns as a governmental agency of the state, and which it holds solely for public use, is subject to legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be taken from the municipality by the Commonwealth and devoted to other public uses and purposes without payment of compensation.[7] Still, the legislative power to take or transfer this class of property remains limited. That power is to be exercised only for the achievement of some public purpose under the Massachusetts Constitution.[8]

On the other hand, property which a municipality holds in its private or proprietary capacity is not subject to the same legislative con-

[4] "During the fiscal years ending June 30, 1967, and June 30, 1968, the sums of $953,256.82 and $1,271,346.98 were recovered, respectively, on liens of this type throughout the Commonwealth. These sums were distributed as follows: 12% to cities and towns, 60% to the Federal government, and 20% to the Commonwealth." 1970 Mass. Adv. Sh. 423, 424, 257 N.E.2d 782, 784.

[5] Acts of 1969, c. 885, §28.

[6] The Court found these principles enunciated in Higginson v. Treasurer and School House Commrs. of Boston, 212 Mass. 583, 584-585, 99 N.E. 523, 524-525 (1912).

[7] See Worcester v. Commonwealth, 345 Mass. 99, 100, 185 N.E.2d 633, 634 (1962); Massachusetts Turnpike Authority v. Commonwealth, 347 Mass. 524, 526-529, 199 N.E.2d 175, 177-178 (1964).

[8] Part II, c. 1, §1, art. 4, states that "full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, . . . so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same . . . ." See Horrigan v. Mayor of Pittsfield, 298 Mass. 492, 497-500, 11 N.E.2d 585, 588-590 (1937); Berube v. Selectmen of Edgartown, 336 Mass. 634, 638, 147 N.E.2d 180, 184 (1958).

trol as that held in its governmental capacity. While this class of property also may be taken for public purposes, the Commonwealth must compensate the municipality for it. The municipality enjoys the same right to just compensation as an individual under Article 10 of the Declaration of Rights.[9]

In the main case, the old age assistance liens remained to be characterized as property held in a municipality's governmental or private capacity. For guiding classifications of municipal functions, the Court consulted the analogous law of municipal tort liability for negligence, its imposition of liability in proprietary activity[10] and its bestowal of immunity in clearly governmental functions.[11] The predominant case law involving municipal tort liability in the administration of general welfare programs characterized such effort as a governmental function.[12]

In this light the Supreme Judicial Court held the old age assistance program as administered by the municipalities before July 1, 1968, to have been clearly a governmental function, and all property acquired or held by communities in that function to have been held in a governmental capacity. Consequently that property, including liens, remained subject to legislative control, including the power to abolish liens without compensation to the municipalities, if done for the accomplishment of a public purpose. Here the general purpose of welfare reorganization was undeniably public, as was the specific subsidiary purpose to facilitate that reorganization by abolition of the municipal liens in question.

§24.4. Local taxation. In the law of taxation, town governments won a noteworthy victory of statutory construction under provisions requiring compensation by the Commonwealth to towns in lieu of tax revenue lost through state use of land for public institutions within the towns. Two provisions control such compensation. General Laws, c. 58, §17, authorizes such payments by the Commonwealth.

[9] Proprietors of Mount Hope Cemetery v. Boston, 158 Mass. 509, 511, 519, 33 N.E. 695, 698-699 (1893).

[10] See, e.g., Green v. West Springfield, 323 Mass. 335, 81 N.E.2d 819 (1948) (maintenance of sewer system); Harvard Furniture Co. v. Cambridge, 320 Mass. 227, 68 N.E.2d 684 (1946) (construction and repair of water supply system); Galluzzi v. Beverly, 309 Mass. 135, 34 N.E.2d 492 (1941) (sewer construction); Sloper v. Quincy, 301 Mass. 20, 16 N.E.2d 14 (1938) (maintenance of water system).

[11] See, e.g., Hennessy v. Boston, 265 Mass. 559, 164 N.E. 470 (1929) (playground maintenance); Benton v. Trustees of Boston City Hosp., 140 Mass. 13, 1 N.E. 836 (1885) (maintenance of hospital premises); Tainter v. Worcester, 123 Mass. 311 (1877) (hydrant maintenance); Hill v. Boston, 122 Mass. 344 (1877) (maintenance of school premises).

[12] The Court cited the administration of the general welfare law, G.L., c. 117, prior to July 1, 1968, and especially G.L., c. 117 and c. 47, permitting a municipality to own and operate infirmaries to keep and care for persons entitled to such assistance. Despite the presence of some small income, it was consistently held that the operation of such infirmaries was a governmental function. See cases collected in 1970 Mass. Adv. Sh. 423, 427, 257 N.E.2d 782, 786.

"The treasurer in every year . . . shall reimburse each town in which the commonwealth owns land for the purposes named in section thirteen an amount in lieu of taxes upon the value of such land as reported to him by the commissioner . . . ."

Section 13 provides that the State Tax Commissioner in every fifth year beginning from 1957 "shall . . . determine . . . the *fair cash value* of all land in every town owned by the commonwealth and used for the purposes of . . . [public institutions including] the University of Massachusetts . . . ." (Emphasis added.)[1] In the light of the distribution of such public institutions across the Commonwealth, these provisions have potentially broad application to the towns, and the decision of *Board of Assessors of Amherst v. State Tax Commission*[2] constitutes a significant affirmation of local tax interests.

In this controversy the State Tax Commission had determined that the "fair cash value" of all land owned by the Commonwealth in the town of Amherst and used by the University of Massachusetts as of January 1, 1967, was $792,800. On the other hand, the Board of Assessors of Amherst had assessed the value of the university land, exclusive of buildings, at $9,868,200, and had applied to the Appellate Tax Board for a correction of the commission's determination. The board revised the fair cash value of the land to $1,342,610. The town assessors then appealed to the Supreme Judicial Court.[3]

To construe the term *fair cash value of all land* under Section 13, the Court scrutinized two conclusions drawn by the board. First, the board had treated that phrase to mean the *assessed value* rather than the *market value* of the land in question.[4] Second, it treated *land* as land in its original condition, exclusive of buildings and of improvements of any kind, such as grading and drainage.

The Court observed first that both interpretations clearly varied from "the common and approved usage of the language." In the assessors' view, *fair cash value* could mean only the highest price which a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market.[5] And *land* could only mean land

§24.4. [1] Other purposes include wildlife preservations, soldiers' homes, state forests, public institutions under the Departments of Correction, Education, Mental Health, Public Health, Public Welfare and Youth Services. Other land includes that under the care and control of the Department of Natural Resources or the Division of Public Beaches in the Department of Public Works and used for recreational or conservation purposes; and all land held by county commissioners for hospital purposes, as well as all land held by the Department of Public Works for use as solid waste disposal facilities. G.L., c. 58, §13.

[2] 1970 Mass. Adv. Sh. 781, 258 N.E.2d 539.

[3] G.L., c. 58A, §13.

[4] Authority at odds with this view includes Beal v. Boston, 166 Mass. 53, 56, 43 N.E. 1029, 1030 (1896); Vineyard Grove Co. v. Oak Bluffs, 265 Mass. 270, 277, 163 N.E. 888, 890 (1928). See also G.L., c. 59, §3.

[5] See Epstein v. Boston Housing Authority, 317 Mass. 297, 299, 58 N.E.2d 135, 137 (1944); Commissioner of Corps. & Taxation v. Worcester County Trust Co., 305 Mass. 460, 462, 26 N.E.2d 305, 307 (1940).

in its condition on the date of valuation, inclusive of all improvements, but exclusive of all buildings. Since these interpretations constituted "common and approved usage," the burden rested upon the board to show a contrary or varying legislative intent.[6]

The board sought such justification in the legislative history of Section 13. In equating *fair cash value* with *assessed valuation,* it relied on a report made by the tax commissioner and attached to the bill which became the antecedent 1910 statute for the provisions in question.[7] The commissioner's report committed the responsibility for valuation to the commissioner out of the fear that town assessments would produce self-serving disparities between the assessments of state and private land. From this recommendation, the board had inferred that the substitution of the commissioner for the local assessors imported the substitution of *fair cash value* by *assessed valuation.* In any event, manipulated disparities between these terms were expressly prohibited by the Court in *Bettigole v. Assessors of Springfield,*[8] holding that all land must be assessed at full, fair cash value.

Similarly, the Court rejected the board's second determination, that *land* here did not include improvements made upon it, but only unimproved land. Again the board argued from the 1910 commissioner's report excluding buildings and furnishings from valuation for state compensation since they were already provided by the state itself or, in other words, were a product of the state's use of the land. The board would have extended this principle to include improvements as well as buildings. However, the Court rejected such an extension because, even though "logically consistent," it conflicts with the statutory policy of reimbursement for lost taxes.

> The Legislature, in excluding buildings from the commissioner's valuation, has made a policy decision that the reimbursement shall not be fully compensatory. But we think that, within the limits of reimbursement set by the exclusion of buildings, the statutory purpose is best fulfilled by making that reimbursement compensatory so far as possible. It follows that "land" must be interpreted to include improvements.[9]

§24.5. Officers, agents and employees. During the 1970 SURVEY year the Supreme Judicial Court wrote two decisions disposing of petitions for mandamus brought by would-be local officials to compel their own appointment.

In the first, *Montanari v. Director of Civil Service,*[1] the Court ex-

6 G.L., c. 4, §6, (Third Rule).
7 1970 Mass. Adv. Sh. 781, 783-785, 258 N.E.2d 539, 541-543.
8 343 Mass. 223, 178 N.E.2d 10 (1961).
9 1970 Mass. Adv. Sh. 781, 786, 258 N.E.2d 539, 543.

§24.5. 1 356 Mass. 514, 254 N.E.2d 255 (1969).

amined the application of civil service regulations to high-ranking municipal appointees. The petitioner sought to compel the respondent director to authorize the appointment or employment of the petitioner as personnel director of the city of Springfield and to authorize his compensation.[2] The petition was dismissed in Superior Court.

The petitioner had been appointed personnel director by the mayor in 1964. In 1965 the director of civil service notified the city of his opinion that petitioner's appointment violated G.L., c. 31, §5, and the civil service rules, exempting specific enumerated positions from Civil Service Commission rules and including within that exemption "heads of municipal departments" not expressly subjected to civil service rules by statute. The petitioner claimed exemption from civil service rules by reason of inclusion in Section 5 as a "head of a principal department of the city."

To determine the personnel director's status, the Court examined the city's Revised Ordinances allocating powers and duties within the personnel department between the personnel director and the Personnel Policy Board. The ordinances committed policy-making authority to the board, and administrative and supervisory functions to the director as a subordinate arm of the board. Consequently the director could not qualify as a departmental "head" exempt from the operation of the civil service laws. Still, the ambiguity of that statutory term seems likely to generate continued litigation in analogous municipal bureaucracies.

The more substantial case involving municipal officers was *Starr v. Board of Health of Clinton*,[3] in which the Supreme Judicial Court confirmed the town health board's wariness of a conflict-of-interest violation lurking in the appointment of one of its own members to a local inspector's post. Again by mandamus, the petitioner sought to compel the Board of Health "to appoint and certify . . . [the] petitioner to the office of Plumbing Inspector of the Town of Clinton." The petition was dismissed in the Superior Court. The decision of the Supreme Judicial Court confirms an earlier interpretation of the conflict-of-interest statute and strikes tangentially upon local discretion to override the veterans preference policies of civil service regulations.

While still a member of the Board of Health, the petitioner took the civil service qualifying examination for the position of plumbing

[2] Petitioner sought mandamus under G.L., c. 31, §39: "Any person found by the director to be illegally appointed or employed may file a petition for a writ of mandamus in the supreme judicial or superior court to compel the director to authorize such appointment or employment, and the payment of compensation or salary therefor. At any time after the petition is filed the court, if of opinion that there is reasonable doubt whether the appointment or employment of such person is in violation of the civil service law or rules, may order that the compensation accruing to such person for services actually rendered shall be paid to him until otherwise ordered by said court."

[3] 1969 Mass. Adv. Sh. 1309, 252 N.E.2d 893.

inspector. He passed and was placed number one on the civil service list because of his status as a disabled veteran. At subsequent meetings of the board, he moved that it appoint a plumbing inspector. Other members of the board sought the opinion of town counsel on the possibility of conflict of interest in the appointment of the petitioner. Town counsel viewed both petitioner's membership on the board and his ownership of a retail plumbing supply business as conflicts of interest barring his appointment.[4]

Nevertheless the petitioner's zeal for public service continued unabated. In an effort to eliminate his disqualifications he first sold his plumbing supply business to his brother for the nominal sum of one dollar, and ultimately tendered his resignation from the board. Still wary, the board continued to demur to his appointment.

Affirming the dismissal of the petition, the Supreme Judicial Court drew three conclusions. First, so long as the petitioner had remained a board member he could not, under the controlling statute, be appointed plumbing inspector.[5]

Second, in response to the contention that petitioner's plumbing supply business did not create a conflict because "[t]he appointed job deals with inspecting plumbers' work . . . [and the] supply business deals with the public on retail sales," the Court reiterated its forceful construction of the conflict-of-interest statute as intended "as much to prevent giving the appearance of conflict as to suppress all tendency of wrongdoing."[6] The petitioner's thinly veiled interest in a plumbing supply business during his service as a plumbing inspector would obviously have created a prohibited "appearance" of conflict of interest.

Third, and finally, the Court defined generously the discretionary power of a local appointing authority to subordinate the veterans preference policy embodied in G.L., c. 31, §23, to the public interest in qualified appointments.

> . . . [U]nder §23 an appointing authority has the power and duty to protect the public interest in having only public officers and employees of good character and integrity and may refrain from appointing a disabled veteran in preference to others where there are reasonable grounds to regard that veteran's character or past conduct as rendering him unfit and unsuitable to perform the duties of office.[7]

4 Several specific statutory provisions support this view. Under G.L., c. 41, §4A, a town board is authorized to appoint one of its own members to another town position only by an express statutory provision or a "vote of the town." Also, G.L., c. 268A, §21A (enacted after the events of the main case), similarly prohibits such appointments without prior approval at an annual town meeting.

5 G.L., c. 41, §4A.

6 Board of Selectmen of Avon v. Linder, 352 Mass. 581, 583, 227 N.E.2d 359, 360 (1967). The Starr Court viewed G.L., c. 268A, broadly as "the conflict of interest law." 1969 Mass. Adv. Sh. 1309, 1311 n.3, 252 N.E.2d 893, 895 n.3.

7 1969 Mass. Adv. Sh. 1309, 1313, 252 N.E.2d 893, 896. This language appeared

This reaffirmed language would now seem available to local appointing bodies as a valuable authorization at least to avoid demonstrably inferior appointments formerly thought inevitable under the veterans preference rule.

§24.6. Collective bargaining. In *Chief of Police v. Town of Dracut*,[1] the year's major decision involving municipal collective bargaining power, the Court, through Justice Quirico, sought to delineate statutory distributions of administrative power and collective bargaining authority between the municipal chief of police and the board of selectmen, respectively. The chief had brought a suit in equity to have his proper powers declared after the board had, in his view, collectively bargained away as "wages, hours and other conditions of employment" the departmental regulatory powers reserved to him as chief of police.

The conflicting sources of statutory authority required close reading. In 1955 the town of Dracut had accepted G.L., c. 41, §97A,[2] providing for the appointment by the selectmen of a chief of police empowered "from time to time [to] make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; [but] . . . effective without such approval upon the failure of the selectmen to take action thereon within thirty days of their submission by the chief of police." Moreover, "[t]he chief of police . . . shall be in immediate control . . . of the police officers, whom he shall assign to their respective duties and who shall obey his orders."

Meanwhile the collective bargaining power of the board of select-

originally in Commissioner of the Metropolitan Dist. Commn. v. Director of Civil Serv., 348 Mass. 184, 193, 203 N.E.2d 95, 101 (1964).

§24.6. [1] 1970 Mass. Adv. Sh. 769, 258 N.E.2d 531.

[2] In full, Section 97A provides as follows: "In any town which accepts this section there shall be a police department established by the selectmen, and such department shall be under the supervision of an officer to be known as the chief of police. The selectmen of any such town shall appoint a chief of police and such other officers as they deem necessary, and fix their compensation, not exceeding, in the aggregate, the annual appropriation therefor. In any such town in which such appointments are not subject to chapter thirty-one, they shall be made annually and the selectmen may remove such chief or other officers for cause at any time after a hearing. The chief of police in any such town shall from time to time make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; provided, that such regulations shall become effective without such approval upon the failure of the selectmen to take action thereon within thirty days after they have been submitted to them by the chief of police. The chief of police in any such town shall be in immediate control of all town property used by the department, and of the police officers, whom he shall assign to their respective duties and who shall obey his orders. Section ninety-seven shall not apply in any town which accepts the provisions of this section. Acceptance of the provisions of this section shall be by a vote at an annual town meeting."

A preliminary issue resolved by the Court was the board's contention that Section 97A had been repealed by the town's proper exercise of home rule power. See §24.8 *infra*.

ment derived from G.L., c. 149, §§178G-178N, under which they alone, acting as the "chief executive officer[s]" of the municipal employer are empowered to conduct collective bargaining negotiations with town employees, including members of the police department, with regard to *"wages, hours and other conditions of employment."* (Emphasis added.)[3] The selectmen alone had authority to "execute a written contract incorporating any agreement reached." Section 178I, conferring this authority, provides that in the event "that any part or provision of any such agreement is in conflict with any law, ordinance or by-law, such law, ordinance or by-law shall prevail so long as such conflict remains."

The Court noted that since the trial of the *Dracut* case, Section 178I had been amended by the insertion of language providing that "the provisions of any such agreement shall prevail over any regulation made by a chief of police"[4] pursuant to Section 97A of Chapter 41. However, observed the Court in a footnote,[5] this amendment did not affect the present case "because the record does not show that there are any regulations made by the chief of police pursuant to §97A now in effect. It does not appear whether the chief has ever made any such regulations, nor does it appear whether regulations, if any, made by him have been disapproved by the selectmen." Thus no concrete conflict between the selectmen's collective bargaining agreement and any specific regulation of the chief had arisen. Still the chief's power to make such regulations remained at issue, and a declaration of that power required a definition of the board's proper range of collective bargaining authority.

An accommodation of the two enabling statutes and a consistent distribution of authority between the chief and selectmen turned on the language of Section 178I, authorizing the board to negotiate and contract on the subject matter of "wages, hours and other conditions of employment." In this instance the Court ruled that the board's contract had exceeded this subject matter and infringed on the departmental powers of the chief.

Especially with regard to the assignment of police personnel, the Court sought to carve out a sphere of administrative discretion for the chief. "Most of the disputed articles require that the chief give *exclusive* consideration to the individual requests, personal preference, seniority and rank of a police officer in determining assignment of duties, shifts, vacations and leaves of absence." (Emphasis added.)[6] The Court continued:

> The paramount concern of the chief in assigning his officers to

[3] G.L., c. 149, §178I.
[4] Acts of 1969, c. 341.
[5] 1970 Mass. Adv. Sh. 769, 774 n.3, 258 N.E.2d 531, 535 n.3.
[6] Id. at 776, 258 N.E.2d at 536. See id. n.4 for the text of these articles. These provisions appear to hamstring the chief in an intricate seniority tangle.

> their respective duties must be the interest and safety of the public, and, to some degree, the safety of the officers themselves, not the personal preference of each officer. In making assignments the chief must exercise his own discretion and judgment as to the number, qualifications and identity of officers needed for particular situations at any given time. He clearly has been given that authority by §97A, and we cannot believe that the Legislature, in enacting provisions for collective bargaining by municipal employees, meant to take that authority away from the chief and permit the selectmen to bargain it away under the guise of negotiations on "wages, hours and other conditions of employment." To deprive the chief of his authority to assign his officers to their respective duties and to substitute therefor the disputed provisions of the agreement would be totally subversive of the discipline and efficiency which is indispensable to a public law enforcement agency.[7]

Thus certain articles of the contract fell because the selectmen had acted beyond the scope of "wages, hours and other conditions of employment."

Still other provisions of the agreement were held void because they conflicted with provisions of the General Laws and had to yield under Section 178I. These included an article calling for the rules and regulations of the chief to be approved by the board apparently in every instance, and therefore in violation of Section 97A's permissive effectuation of the chief's rules in certain instances without the board's approval. Also void was an article compelling the inclusion of weapons as a part of a uniform requirement and therefore violating a separate statutory assignment of weapons carriage decisions to the chief's judgment.

The Court deemed other contested articles of agreement to be within the legitimate collective bargaining power of the selectmen, including (a) a provision for personnel time-keeping records to be kept and made available to the officers' association by the chief; (b) provisions controlling leaves of absence without pay, their length and frequency; (c) and provisions for grievance procedures for complaints arising out of the collective bargaining agreement itself, but not for grievances arising from any exercise of discretionary authority by the chief under Section 97A.

§24.7. By-laws and ordinances. The 1970 SURVEY year produced two decisions worth mention in the area of municipal by-laws and ordinances.

The first of these deals with the attorney general's power of approval over local by-laws and ordinances[1] and the proper use of man-

[7] Id. at 777, 258 N.E.2d at 537.

§24.7. [1] G.L., c. 40, §32.

damus by local authorities to controvert a decision of disapproval. *Senkarik v. Attorney General*[2] grew out of the attempt of the town of Uxbridge to adopt an amendment to its zoning by-law to authorize the zoning board of appeals to grant a permit for construction of apartment houses anywhere in town. The board was to be required merely to consider the effects of a permit on the neighborhood and town at large.

The attorney general subsequently disapproved the amendment as an authorization of spot zoning in violation of statutory[3] and decisional law.[4] The petitioner, a taxpayer and landowner of the town, brought a petition for a writ of mandamus against the attorney general on the ground that his disapproval was unreasonable, arbitrary and capricious, and prayed that the disapproval be quashed.

The Court affirmed the denial of this petition in the Superior Court, and reaffirmed the rule, equally forceful in the setting of municipal by-laws, that mandamus cannot be used to review a purely legal determination thought to be erroneous.[5] Mandamus would have been appropriate only for the contention that the attorney general had failed to carry out a statutory duty by failure to act on the town's request for approval.[6] Instead, the "argument is that the Attorney General has acted but did so incorrectly, and he seeks in substance a review of the decision."[7] For this reason alone the petition was correctly denied, and the petitioner not entitled to relief by mandamus.

As a proper use of mandamus to rectify an unauthorized disapproval of an amendment of a zoning by-law by the attorney general, the Court adverted to the continuing vitality of *Concord v. Attorney General*,[8] where the attorney general's disapproval had not been based on legal grounds.[9]

The year's other notable decision involving municipal authority to enact by-laws also originated with a petition for a writ of mandamus, brought by a group of residents of the town of Hopkinton against its board of selectmen and a local sand and stone company. In *Goodwin v. Board of Selectmen of Hopkinton*[10] the petitioning residents

2 1970 Mass. Adv. Sh. 457, 257 N.E.2d 470.

3 G.L., c. 40A, §2.

4 Smith v. Board of Appeals of Fall River, 319 Mass. 341, 65 N.E.2d 547 (1946) (invalidating spot zoning).

5 Ames v. Attorney General, 332 Mass. 246, 124 N.E.2d 511 (1955); Howe v. Attorney General, 325 Mass. 268, 90 N.E.2d 316 (1950).

6 As the Court noted, this event would be unlikely since, under G.L., c. 40, §32, a by-law may become effective if the attorney general fails to act reasonably on a request for approval.

7 1970 Mass. Adv. Sh. 457, 458, 257 N.E.2d 470, 471.

8 336 Mass. 17, 142 N.E.2d 360 (1957). In that case the attorney general failed to perform a statutory duty to attach reasons for his disapproval of a zoning by-law.

9 The Court noted, gratuitously, that the attorney general's disapproval in the instant case was correct in law since the contested by-law did contravene the decision of Smith v. Fall River, note 4 *supra*.

10 1970 Mass. Adv. Sh. 1277, 261 N.E.2d 60.

sought a writ ordering the selectmen to revoke an earth removal permit which they had issued to the company. The petition was dismissed in the Superior Court.

The Supreme Judicial Court affirmed the dismissal. The significance of the decision lies in Justice Quirico's instructive discussion of the relationship of the two statutes enabling local by-laws in regulation of earth removal.

First, under the zoning enabling statute, Chapter 40A of the General Laws, municipalities may, by zoning by-laws or ordinances, regulate the use of land and thereby control or prohibit the sale of loam, sand, gravel, stone or other "component parts" of land.[11] At first this statute was the only source of municipal authority to regulate the removal of material from land. Only a zoning ordinance or by-law could achieve the desired regulation.[12]

An alternate source of local regulatory power arose in 1949 with G.L., c. 40, §21, cl. 17. In pertinent part, it authorized a municipality to adopt a by-law or ordinance "[f]or prohibiting or regulating the removal of soil, loam, sand or gravel from land not in public use in the whole or in specified districts of the [city or] town." Municipalities now have the option to proceed under the Zoning Enabling Act or under Clause 17.

In practice the two statutes are not necessarily redundant. The Court has previously pointed out that "[t]he purpose of the 1949 amendment to the statute was to enable municipalities to regulate [earth removal] without setting up any zoning system."[13] Nor is a municipality limited exclusively to one type of ordinance or by-law. It may regulate the removal of materials from land by both a zoning ordinance or by-law and a separate ordinance or by-law derived from Clause 17 to accomplish its legitimate desire, as noted in *Goodwin,* "to avoid the involved and strict procedural requirements for adopting or amending zoning ordinances and by-laws."[14] Thus Clause 17 is available equally to municipalities with and without zoning ordinances and by-laws.

By this statutory analysis the Court disentangled the Hopkinton dispute arising from the town's simultaneous adoption of a zoning by-law and an independent earth removal by-law. The sand and stone company had received its permit under, and was conducting its removal operations in accordance with, the earth removal by-law. The petitioning residents contended that the removal operations violated the zoning by-laws. The earth removal by-law included language dis-

11 See, e.g., Raimondo v. Board of Appeals of Bedford, 331 Mass. 228, 230, 118 N.E.2d 67, 68 (1954); Seekonk v. John J. McHale & Sons, Inc., 325 Mass. 271, 274, 90 N.E.2d 325, 327 (1950); Billerica v. Quinn, 320 Mass. 687, 690, 71 N.E.2d 235, 236 (1947).

12 North Reading v. Drinkwater, 309 Mass. 200, 34 N.E.2d 631 (1941).

13 Butler v. East Bridgewater, 330 Mass. 33, 36, 110 N.E.2d 922, 924 (1953).

14 1970 Mass. Adv. Sh. 1277, 1282-1283, 261 N.E.2d 60, 64. The requirements justifying avoidance arise from G.L., c. 39, §15, id. c. 40A, §§6-7, and id. c. 43, §18.

avowing any effect "to amend, repeal or supersede the Zoning By-Laws." Nevertheless, reading the by-laws as a consistent scheme adopted at the same town meeting, the Court found ample language for the conclusion that the Clause 17 by-law was intended to occupy the field of earth removal to the exclusion of the zoning provisions.

More significantly, the separate and controlling force of specific earth removal by-laws over general zoning ordinances seems more firmly established in light of the former's independent source under Clause 17. Ambiguity in interlocking zoning and removal by-laws seems likely to be resolved in favor of Clause 17. And, most significantly, towns intending a clear and independent earth removal by-law seem well advised to act expressly under the authorization of Clause 17 and, so far as possible, to steer clear of entanglement with zoning ordinances.

§24.8. Home Rule Amendment. Interpretation of the municipal lawmaking power conferred by the Home Rule Amendment[1] proved crucial in two significant decisions during the 1970 SURVEY year: one in the context of municipal collective bargaining power and the other in a test of a local rent control power.

In the instance of municipal collective bargaining, *Chief of Police v. Town of Dracut*,[2] statutes enabling the town selectmen to perform collective bargaining and the chief of police to administer the department came into conflict.[3] Under G.L., c. 41, §97A, Dracut accepted the provisions of that statute by vote at an annual town meeting in 1955. At a town meeting in 1967 it was voted that the town rescind the provisions of Section 97A and substitute those of Section 97 of the same chapter, under which regulation of the department and its officers was committed to the selectmen and not to the police chief. This adoption, coming during collective bargaining negotiations by the selectmen, was apparently intended to obviate the alleged infringement by that bargain upon the regulatory discretion of the chief.

The town claimed authority for such rescission and substitution under the Home Rule Amendment. Prior to the amendment, the controlling law had been stated in the 1959 decision of *Brucato v. Lawrence:*

> . . . In the absence . . . of some indication in the language, the form, or the subject matter of a particular statute enacted subject to local acceptance, that an acceptance once given may be revoked, the effect of a valid acceptance by a city or town is to make the statute operative in that community until the statute is repealed

§24.8. 1 Mass. Const. amend. art. 89.

2 1970 Mass. Adv. Sh. 769, 258 N.E.2d 531. For the collective bargaining significance of this case see §24.6 *supra*. See also the student comment on the interpretation of the Home Rule Amendment in the Dracut case, §24.20 *infra*.

3 G.L., c. 149, §§178G-178N, inserted by Acts of 1965, c. 763, §2, and amended through Acts of 1969, c. 341; and G.L., cc. 41, 97A, amended by Acts of 1948, c. 595.

or amended. Once the condition precedent stipulated by the Legislature to the taking effect of the statute in the community is satisfied, it becomes applicable statute law, subject to change, as in the case of other statutes, only by subsequent action of the Legislature.[4]

The issue for the Court in the *Dracut* case was whether the Home Rule Amendment had overridden the rule of *Brucato v. Lawrence.* Section 8 of the amendment provides that "[t]he general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two . . . ." Crucial language appears in Section 6 of the Home Rule Amendment, providing in part:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws exercise any power or function which the general court has power to confer upon it, *which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight* . . . . [Emphasis added.]

The Home Rule Procedures Act, passed to implement the amendment, amplifies this language. Section 13 of the act repeats the language of Section 6 of the amendment, and provides additionally that:

> Nothing in this section shall be construed to permit any city or town, by ordinance or by-law, to exercise any power or function which is inconsistent with any general law enacted by the general court before [the ratification of the amendment] which applies alike to all cities, or to all towns, or to all cities and towns, or to a class not fewer than two.[5]

The Court held Section 97A, vesting departmental authority in the police chief, to be such a general law. The fact that a town has the original option whether or not to adopt a statute does not change its character as a general law once adopted. Section 97A therefore fell within the powers reserved to the General Court by the Home Rule Amendment and by the Home Rule Procedures Act. The latter includes no grant of authority to municipalities to rescind by unilateral action their prior acceptance of any provision of the General Laws. To the Court that omission may well reflect "the Legislature's concern that if municipalities had unbridled authority to rescind prior acceptance of basic provisions of the General Laws by unilateral action, there might result frequent and precipitous changes in the administration of municipal affairs which might produce chaos, all contrary to

[4] 338 Mass. 612, 615-616, 156 N.E.2d 676, 679 (1959).
[5] G.L., c. 43B, §13.

the public interest."[6] Consequently the rule of *Brucato v. Lawrence* remains intact. A town vote to rescind a previous acceptance of a general law is a nullity.

Perhaps the year's most significant municipal law decision was the Court's invalidation of the Brookline rent control by-law as exceeding the local legislative power conferred by the Home Rule Amendment. The decision turned on the Court's construction of Article 89, Section 7(5), as applied to rent regulation. Section 7(5) declares that no provision of the amendment authorizes any town ". . . (5) to enact private or civil law governing civil relationships except as incident to an exercise of an independent municipal power." The Court held rent control to constitute such a private or civil law *not* clearly incident to an exercise of independent municipal power. In the course of the opinion, it grappled at length with the language of Subsection (5) before it applied a restrictive interpretation and invited clarification by an *express* legislative delegation of the power to enact rent control. The legislature was quick to accept this invitation in the case of Brookline.[7]

The Court's holding in *Marshal House, Inc. v. Rent Review & Grievance Board of Brookline*[8] foreclosed the Home Rule Amendment as a source of local rent control enactments and spurred enabling legislation on rent control in lieu of the amendment. The plaintiff, owner of more than ten housing units in Brookline, sought declaratory relief against the Rent Review Board and the town itself from Article XXV of the town by-laws.[9] The controversy arose specifically from the information requirement provision of Section 3(f) of the by-law, authorizing the board to require of landlords, no more than once a year, a detailed account of their rental activity.[10]

6 1970 Mass. Adv. Sh. 769, 773, 258 N.E.2d 531, 534.

7 Chapter 843 of the Acts of 1970 authorizes Brookline to adopt rent control; Chapter 863 similarly authorizes Boston; and Chapter 842 provides a general enabling act. These statutes are outlined in §24.18 *infra*.

8 1970 Mass. Adv. Sh. 1031, 260 N.E.2d 200.

9 "Unfair and Unreasonable Rental Practices in Housing Accommodations." The by-law declared the existence of public emergency in housing because of insufficient low and moderate income rental housing accommodations, and established a rent review and grievance board empowered to investigate complaints of unfair rental practices and to order their cessation, to issue other just and proper orders, including the order that the landlord not receive rent in excess of an amount determined by the board to be "fair and reasonable under the circumstances." The board possessed the adjudicative power to receive complaints and review proposed rent increases.

10 All landlords holding more than 10 housing units were required to file a form showing (1) the rent for each unit, (2) the number of rooms per unit, and (3) whether each tenancy was held by written lease. Also, a form to be filed under penalty of perjury required the address of each building, its date of construction or last substantial renovation, its date of acquisition, the number of floors and rentable units, the utilities supplied without charge; and, for each apartment, its number, size, monthly rent, lease expiration date, term of lease, existence of tax clause, parking provided, and type of occupancy.

The town and the board, joined by the attorney general, grounded the by-law on the Home Rule Amendment and contended specifically: (1) that art. 89, Section 6 conferred broad legislative power on the town, subject only to the legislature's power to supersede local legislation by general laws; (2) that the powers flowing from Section 6 alone included the power to adopt a rent control by-law; and (3) that Section 7(5) did not limit the power granted to the town by Section 6.

On its face, Section 6 does grant ample powers to cities and towns:

> Any . . . town may, by the adoption . . . of local . . . by-laws, exercise any power . . . which the general court has power to confer upon it, *which is not inconsistent with the constitution* or laws enacted by the general court in conformity with the powers reserved to the general court by section eight [defining certain powers reserved exclusively to the legislature] and which is not denied . . . to . . . the town by its charter . . . . [Emphasis added.]

Section 7 follows quickly to limit much of the generosity of Section 6. Most of the former section's restricting subsections cover relatively specific matters,[11] but Subsection (5) contrasts in its generality forbidding municipalities "to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power."

The Court sought in vain for authoritative clarification of Subsection (5) both in its legislative history[12] and in municipal law commentary.[13] It did not doubt the legislature's police power to regulate rents directly or the authority of the legislature to make an express delegation of such power to the municipalities. However, municipal rent control on the authority of the Home Rule Amendment fell within neither class of power, and it remained for the Court to deter-

[11] E.g., a town's power (1) to regulate elections, (2) to levy taxes, (3) to borrow money or pledge the town's credit, (4) to dispose of parkland and (5) to enact criminal law.

[12] 1965 Senate Doc. No. 950, at 9, 21, 114, 131; 1966 Senate Doc. No. 846, at 20.

[13] American Municipal Assn., Model Constitutional Provisions for Municipal Home Rule (1953); Fordham, Home Rule — AMA Model, 44 Natl. Municipal Rev. 137, 142 (1955); Gere and Curran, Home Rule pt. II, c. IV, The Constitutional Grant of Home Rule 33 (1969); Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643, 674-679 (1964).

The Court adverted especially to the views of Prof. Sandalow and observed by footnote that the commentator construed the language to require both the *existence* and *exercise* of an independent municipal power, with emphasis on the independence of the municipal power from any control over purely civil or private relationships. The power itself must be of an independently public character, and its private extenuations merely and genuinely incidental. In this light, the Court noted the tendency of the town to characterize rent regulation as an independent municipal power per se. But the definitional problem remains, "because whatever policy the town has attempted to carry out is (under the by-law) to be executed by the direct regulation of the civil relationship between landlord and tenant." 1970 Mass. Adv. Sh. 1031, 1035 n.4, 260 N.E.2d 200, 204 n.4.

mine whether such rent regulation could stand as a private law "incident to an exercise of an independent municipal power."[14] While the Court conceded the obvious broad *public* welfare *purpose* of rent control, it distinguished rent regulation as less than the necessary *independent municipal power*. Rent control was simply too direct an intervention in the continuing private landlord–tenant relationship. Its public *purpose* did not of itself create an independent public *power*. It remained an essentially civil law, remaking the parties' private contract of tenancy.

Nor could the Court accommodate rent control as an exercise of traditionally recognized local police powers. The phrase "independent municipal power" implied to the Court various separate component powers constituting the entire local police power. It required that such a specific discreet component, such as traffic control or fire protection, be identified as the necessary independent power. The amorphous entirety of local police powers could not itself constitute the required independent power, or else that requirement could be met so easily as to be meaningless.

The Court concluded that Section 7(5) prevents the adoption of local rent control by-laws in the absence of an explicit legislative delegation of the rent control power to the municipalities. The legislature has now delegated that power to specific municipalities[15] and, more generally, under Chapter 842 of the Acts of 1970, to any city or town with a population of 50,000 or more adopting the provisions of that statute. Coming challenges to local rent control will undoubtedly shift the attack to this enabling legislation and to the impact of particular local enactments.

§24.9. Counties. The least visible unit of local government made two noteworthy appearances in the pages of the 1970 SURVEY year's reports. In one case county residents sought to compel an improvement in county facilities; in the other they sought a redistribution of county taxation; in both instances they failed.

McIntyre v. County Commissioners of Bristol[1] originated with the

[14] The town pressed strenuously, but unsuccessfully, for this view. "In this case, of course, the 'independent municipal power' which the town is exercising is a portion of the police power — namely the power to regulate rent levels in the public interest. [Citing Russell v. Treasurer and Receiver General, 331 Mass. 501, 507, 120 N.E.2d 388, 391-392 (1954)]. This power is conferred on the town by virtue of section 6 of the Home Rule Amendment. It can be taken away from the town by general law, but unless it is, it is an 'independent municipal power.' 'As an incident' to the exercise of this independent municipal power the town may enact private or civil law." (Footnote omitted.) Brief for Respondents at 43-44.

[15] To Brookline by Chapter 843 of the Acts of 1970; to Boston by Chapter 863. As of this writing, Cambridge and Somerville have adopted rent control, and other municipalities are expected to follow suit under the broad authorization of Chapter 842. Chapters 842, 843 and 863 are outlined in §24.18 *infra*.

§24.9. [1] 1969 Mass. Adv. Sh. 1429, 254 N.E.2d 242.

petition of 20 resident attorneys for a writ of mandamus to compel the county commissioners to select a new courthouse site, to have plans and specifications prepared, and to take other steps to "provide adequate and suitable facilities and accommodations" in that county for the Superior Court. The petitioners alleged the inadequacy of the existing courthouse facilities and contended that the commissioners were charged by statute[2] with a duty to provide suitable courthouses, and that they had failed to exercise other statutory authority to remedy existing courthouse inadequacies.[3]

Twelve attorneys intervened to oppose the petition. Several filed demurrers on the ground that the petitioning attorneys sought to require the commissioners to perform a discretionary act.

The Superior Court judge overruled the demurrers, heard evidence, took judicial notice of specified facts, received certain stipulations of fact, and made detailed findings. His order for judgment directed the commissioners "with all practicable speed . . . to take all steps and measures which are lawfully available to them to provide court house facilities for [the] Superior Court and [the] Probate Court which are suitable in all necessary characteristics, including but not limited to" 16 types of facilities.[4]

The petitioners invoked several statutes. Under Chapter 393 of the Acts of 1966 the commissioners "were given permission and authority to construct a new court house for the Superior and Probate Courts." Petitioners argued that this "legislative recognition" of inadequate facilities had not moved the commissioners to carry out the legislative authorization. In fact, in 1967 they had voted against the construction of a new centralized courthouse. However, the Supreme Judicial Court found that the trial judge had ruled correctly that Chapter 393 was merely permissive and imposed no legal duty on the commissioners.

Instead, the trial court had relied on G.L., c. 34, §3, providing in part that "[e]ach county shall provide suitable court houses . . . and other public buildings necessary for its use. . . ." It found that this mandatory language did impose the requisite legal duty upon the commissioners.

Though in sympathy with the trial judge's findings of fact, the Supreme Judicial Court held that the demurrers should have been sustained. The acts sought of the commissioners were not sufficiently

[2] G.L., c. 34, §§3, 14. Section 3 provides that "[e]ach county shall provide suitable court houses. . . ." Section 14 provides that "the commissioners *may* provide for erecting and repairing court houses. . . ." (Emphasis added.)

[3] Acts of 1966, c. 393, "An Act *authorizing* the county commissioners of Bristol County to construct a new building for the courts and various departments of said county." (Emphasis added.)

[4] The facilities included adequate courtrooms, judges' lobbies, jury rooms, custodial quarters, grand jury facilities, conference rooms, hearing rooms for masters and auditors, stenographers' rooms, county legal officers' quarters, waiting rooms and lavatories, parking spaces, and a library.

specific in the petition or in the lower order for judgment. The Court could discover no failure to perform a *specific* public trust or duty, but merely the direction to perform general statutory duties. The statutes involved provided only a wide range of permissible and largely discretionary action for improvement of existing facilities.

In dicta the Court suggested that the commissioners, with the assistance of the local bar, examine and undertake the variety of measures available for improvement. While feasible expense would have to be weighed, the lower court's findings provided a starting point for renovation. At the same time the Court reminded the commissioners of their duty under G.L., c. 34, §3, at least "promptly to consider and decide" remedies, and for this purpose offered the assistance of the executive secretary of the Supreme Judicial Court.

Thus the Court substituted its administrative exhortation for the compulsion of mandamus. The genuine lawmaking case, involving the Court's powers of judicial administration, might still arise if, as the Court speculates in conclusion, "the county commissioners fail to take appropriate and adequate action within a reasonable time."[5]

The year's other significant decision, *Thompson v. City of Chelsea*,[6] originated from a broadsided bill for declaratory relief[7] brought by 17 taxable inhabitants of Boston against (1) the cities of Boston, Chelsea, Revere, and the town of Winthrop; (2) Suffolk County; (3) the individuals in Boston (the mayor and city council), Chelsea (the aldermen), Revere (the city council) and Winthrop (the selectmen) who serve as county commissioners of Suffolk County in their respective communities;[8] and (4) the Collector–Treasurer of Boston and Suffolk County.[9]

Since the enactment of Chapter 109 of the Acts of 1821, the costs of administering the county government of Suffolk County have been carried entirely by Boston. The provision currently governing taxes for Suffolk County is Section 52, Chapter 490 of the Acts of 1909:

> In . . . Boston all taxes assessed for county or city purposes may be assessed separately as county taxes and as city taxes, or under the name of city taxes only, as the city council shall direct. The city of Chelsea and the towns of Revere and Winthrop shall not be taxed for county purposes.

Unhappy with the bare conclusory allegations of unconstitutionality of the taxing scheme under the Massachusetts Constitution[10] and the Fourteenth Amendment of the Federal Constitution, the Court read the bill to allege in substance (a) that the taxes of the individual plain-

5 1969 Mass. Adv. Sh. 1429, 1435, 254 N.E.2d 242, 246.
6 1970 Mass. Adv. Sh. 1087, 260 N.E.2d 699.
7 The bill was brought also under G.L., c. 40, §53.
8 See G.L., c. 34, §4.
9 The Superior Court judge sustained demurrers and reported the case to the Supreme Judicial Court.
10 Part II, c. 1, §1, art. 4, and arts. 1, 10-12 and 29 of the Declaration of Rights.

tiffs as resident taxpayers of Boston would be increased by the continued operation of the 1909 statutory exemption of Chelsea, Revere and Winthrop from county taxes, and (b) that Boston would be forced to pay substantial county expenses otherwise borne in large part by the other three communities.

The Court framed the issue at hand as the validity of the 1909 statute viewed in light of the original 1821 statutory "arrangement"[11] between the then newly incorporated city of Boston and the old town of Chelsea as municipal antecedent of the three modern communities. In addition to the 1821 statute, the Court deemed certain intervening legislation crucially relevant, especially Chapter 65 of the Acts of 1831, which, inter alia, transferred ownership of all county property in old Chelsea to Boston.[12]

Within this statutory matrix the Court, through Justice Cutter, found abundant, if occasionally speculative, justification for the continuing constitutionality of the present taxing arrangement. The justification reduces to two theories. The first is an implied or quasi-contractual characterization of the still binding 1821 statutory scheme. The second is a more conventional application of the doctrine of the presumptive constitutionality of a statute whenever a rational basis for it is perceptible.

The Court's notion of an implied statutory contract importing an 1821 quid pro quo of governmental power and responsibility between Boston and old Chelsea serves as its first suggested reasonable basis for the statute:

> By requesting the enactment of St. 1821, c. 109 Boston sought (a) to obtain sole and complete control of various aspects of the Suffolk County government, (b) to have certain county legislative powers placed in the new Boston city government (§11), (c) to have the treasurer of Boston serve as county treasurer (§12), and (d) to give to the new Boston city government the sole power to assess county taxes (§13). The consideration for this exclusion of Chelsea from any significant share in county government was the exemption of Chelsea by §1 of St. 1821, c. 109, from all county taxes.[13]

The 1821 statute conditioned this scheme upon acceptance by the voters of Boston of companion legislation making Boston a city.[14]

Further reading of the 1821 and 1831 statutes suggested to the Court additional support for the notion of an implied contractual arrangement. The legislature may reasonably have thought that the largest community in the state should be a city, that it should control the county facilities largely within its borders, and adapt them to its

11 See 1970 Mass. Adv. Sh. 1087 n.1, 260 N.E.2d 699, 700 n.1.
12 See id. at 1088 n.3, 260 N.E.2d at 700-701 n.3.
13 Id. at 1091, 260 N.E.2d at 702.
14 St. 1821, c. 110, §31.

needs; that it should pay as the price for complete control the expense of county facilities largely in Boston and likely to increase the value of neighboring Boston property. Facilities in Boston would naturally be much more convenient to the Bostonians. And, of course, the exemption may have resulted from legislative recognition of old Chelsea's dependence on Boston for the nature and extent of county expenditures. The 1831 statute, under which old Chelsea was to transfer ownership and care of its county property to Boston, would seem to strengthen the contract theory.

Entirely apart from notions of an implied exchange of county powers and duties as a reasonable basis for the statute, the Court deemed it impossible to say that the legislature lacked a rational basis for the tax exemptions of 1821 and 1909. Certain settled legislative powers required consideration, including the power to deal with county property, to alter county government and its apportionment of county expense, to grant tax exemptions in execution of proper public purposes, to provide by special statutes for the peculiar needs of Boston, and, finally, to make special assessments in a specified area for particular projects for the benefit of that area.

Consequently the Court could not characterize the 1909 statute and its predecessors as an arbitrary or capricious allocation of county costs. The legislature allowed for the original consent of the communities. No facts alleged presented any question that the legislature lacked reasonable grounds originally or that, by lapse of time and change, the statutory arrangement had become unconstitutional. No facts alleged, if proved, would establish a denial of equal protection of law by unreasonable classification of communities to bear county expenses.

Such a skillful and exhaustive tour of legislative history almost beguiles one from the inevitable question of whether the statute is reasonably based *today*, a question to which the Court devotes comparatively little direct attention. Although the Court posed the question of the tax arrangement's *present* constitutionality, the thrust of its holding is that *as originally enacted* it was clearly reasonable and that the plaintiffs failed to allege facts to show its invalidity now. The gravamen of the discussion is that the county tax arrangement is constitutional now because it always has been so. But such points as that the Bostonians of 1821 consented to the statutory arrangement as a reasonable contract should be worth little in an assessment of the *present* constitutionality of the legislation. If the Court feels, as it apparently does, that the Suffolk County taxing scheme is constitutionally sound today because Boston exercises exclusive power of control over the county facilities and should therefore bear the corresponding burden of expense, a more direct statement of this precise rationale might better have served its stated purpose of "terminating this litigation."[15]

[15] 1970 Mass. Adv. Sh. 1087, 1090, 260 N.E.2d 699, 702.

§24.10. Reapportionment. Massachusetts senatorial districts underwent summer reapportionment during the 1970 SURVEY year as a result of the Supreme Judicial Court's order in the decision of *Walsh v. Secretary of the Commonwealth.*[1] The decision, rendered on June 3, ordered the legislature to reapportion the districts in preparation for the 1970 election of state senators. On June 30 the legislature enacted a redistricting statute over the veto of the governor.[2]

The suit arose as a bill for declaratory relief in equity in the Supreme Judicial Court, and was reserved and reported by the single Justice to the entire Court. The decision is a terse and forthright adoption of the petitioners' arguments. In brief, stipulations and exhibits established that the existing apportionment of seats in the state senate[3] no longer reflected, on the basis of the 1965 census, a distribution of seats proportional to the population of the respective senatorial districts. In 1965, the population of the largest district (Middlesex-Worcester) was 211,265, or 59.58 percent above the 1965 population of Massachusetts divided by the number of senate seats (40).[4] The smallest district (3rd Suffolk) contained 84,366 persons, 36.28 percent below the 1965 norm.

For the Court, the recent United States Supreme Court decision of *Kirkpatrick v. Preisler*[5] was dispositive. There the Supreme Court had held that a total spread of 5.96 percent of the district norm between districts having the highest and the lowest populations was unconstitutional. In light of *Kirkpatrick,* the Massachusetts Court surmised that

> . . . [i]t is highly unlikely that, if tested in the Federal courts, any distribution of seats in a Statewide legislative body, having any avoidable disparity between the district with the highest population and that with the lowest, will be found to satisfy Federal constitutional requirements, at least in the absence of special circumstances not suggested on this record. Cf. *Swann v. Adams,* 385 U.S. 440, 442-445 [1967].[6]

For redress, the Court much preferred self-correction by the legislature and declined the invitation to undertake a reapportionment scheme itself.[7] The Court's approach to judicial intervention showed

§24.10. [1] 1970 Mass. Adv. Sh. 853, 259 N.E.2d 768.
[2] Acts of 1970, c. 498.
[3] The existing districts had been created by Acts of 1960, c. 432, §2.
[4] This arithmetical norm would be 132,382.
[5] 394 U.S. 526, 528-529, 531, 533-536 (1969), *rehearing denied,* 395 U.S. 917 (1969).
[6] 1970 Mass. Adv. Sh. 853, 854, 259 N.E.2d 768, 769.
[7] The Court was nonetheless aware of instances of judicial intervention. It noted Scott v. Germano, 381 U.S. 407, 409 (1965), in which the Supreme Court approved of the possible participation of the Illinois Supreme Court in state senatorial redistricting, and Maryland Committee for Fair Representation v. Tawes, 377 U.S.

a residual adherence to the views articulated by Justice Frankfurter in his epic dissent in *Baker v. Carr*.[8] The Supreme Judicial Court felt that

> . . . [i]ntervention in matters of reapportionment, even on matters of constitutionality, by any court is undesirable and to be avoided except as a last resort (and then only to satisfy constitutional mandates). . . . We decline to take such action and do not pass upon its propriety in any event. The Legislature is still in session, and it remains possible that the Legislature itself will exercise that function, by enacting a Senate reapportionment plan.[9]

§24.11. Federal–municipal relations. In the area of federal and local governmental relations, the 1970 SURVEY year's major decision, *Commissioner of Labor & Industries v. Lawrence Housing Authority*,[1] cleared the way for local housing authorities to engage with HUD in federally assisted "turnkey housing" projects. The Court expressly exempted those building projects from the minimum wage provisions of G.L., c. 149, §§26-27D[2] and from the competitive bidding requirements of Sections 44A-44L of the same chapter.[3] The enforcement of these provisions rested with the Commissioner of Labor and Industries.

At the outset, Justice Kirk compactly outlined the process of "turnkey" low-rent public housing development. Typically, the federal Department of Housing and Urban Development and the local housing authority entered a contract under the following plan:

> . . . [A] developer who owns or has an option on an appropriate

656, 676 (1964), in which the Court approved action by the Maryland courts if the state legislature failed to perform a timely reapportionment.

During the course of oral argument before the Supreme Judicial Court, counsel mentioned several new techniques of redistricting, including the use of computers and of a panel of local law school deans. These novel proposals, of course, gave way to the traditional art of the gerrymander.

8 369 U.S. 186, 266-330 (1962).

9 1970 Mass. Adv. Sh. 853, 854, 259 N.E.2d 768, 769. The Court argued the present decision in Opinion of the Justices, 353 Mass. 790, 230 N.E.2d 801 (1967), where it indicated that Article 21 of the Amendments to the Massachusetts Constitution, insofar as it required an apportionment of representatives on the basis of "legal voters" instead of population, appeared to violate the equal protection clause of the Fourteenth Amendment.

§24.11. 1 1970 Mass. Adv. Sh. 1323, 261 N.E.2d 331.

2 G.L., c. 121B, §§12, 29 (inserted by Acts of 1969, c. 751, §1, and formerly contained in G.L., c. 121, §26T), directs the commissioner to set wage rates in accordance with G.L., c. 149, §§26-27, of the several classifications of persons, including architects and laborers, employed in "the development or administration of a project."

3 Section 44K directs the commissioner to enforce the provisions of Sections 44A-44L, requiring competitive bidding for contracts to be awarded by governmental bodies "for the construction, reconstruction, alteration, remodeling, repair or demolition of any public building."

site retains his own architect to draw preliminary plans and specifications for the construction or rehabilitation of housing units. The plans are submitted to the local housing authority. If the proposal is acceptable to the housing authority and to HUD, the housing authority and the developer will execute a "letter of intent," which sets forth the plans and a cost estimate. If the parties agree on a price, the developer retains a registered architect to prepare detailed "working" plans and specifications. When these have been approved by HUD, the developer and the housing authority execute a contract of sale which contains provisions as to materials and the completion date, and in which the housing authority agrees to purchase the completed housing. HUD assures the availability of the purchase money upon completion of the project, and assures the developer that, if the housing authority should fail to carry out its contract obligations, HUD will assume the rights and obligations of the housing authority under the contract. The housing authority pays the developer upon completion of construction and the "turning over of the keys."[4]

In the present case the Lawrence Housing Authority, under its contributions contract with HUD, executed a letter of intent with the private developer who agreed to construct housing units on property owned or to be acquired by the developer and approved by the local housing authority and HUD. The authority agreed to purchase the completed project if it complied with the approved plans and specifications.

The commissioner brought a bill in equity, seeking injunctive and declaratory relief against the authority and developer, to restrain them from making or receiving any payments for work performed in the construction of the contemplated housing project, and to have a declaration that the letter of intent and contract of sale for the project violated the competitive bidding laws.

In a companion case, 18 taxpayers of the city of Lawrence brought a bill in equity against the same defendants as well as against the city and its Redevelopment Authority. The taxpayers sought to enjoin the turnkey process at its various junctures. Their bill prayed to restrain the performance of a "Cooperation Agreement" between the city and Housing Authority, to restrain the city from expending any funds to carry out the project, and to restrain the Redevelopment Authority from conveying certain land to the developer.[5]

4 1970 Mass. Adv. Sh. 1323, 1324-1325, 261 N.E.2d 331, 332-333. See 42 U.S.C. §1410 (Supp. IV, 1965-1968).

5 The Superior Court judge entered a final decree dismissing the commissioner's bill and, on the defendants' counterclaim for declaratory relief, declaring the turnkey housing process *not* violative of the minimum wage and competitive bidding provisions of Chapter 149. Similarly, on the taxpayers' bill, he sustained the defendants' demurrer.

The commissioner's most specific contentions were that the authority's letter of intent and proposed contract with the developer amounted to a contract for *construction* of all buildings by a governmental unit within the meaning of Section 44A, and for *construction* of public works within the meaning of Sections 26 and 27 of Chapter 149; and that the *construction* constituted the "development" of a housing project within the meaning of Sections 12 and 29 of Chapter 121B.[6] Under these provisions, he argued, the contract should have been awarded in accordance with the competitive bidding laws of Sections 44A-44L, and the wages involved in construction should be determined by him under Sections 26 and 27 of Chapter 149.[7]

As a matter of statutory construction, the Court held the turnkey procedure to be exempt from the competitive bidding and minimum wage requirements of Chapter 149. Viewing its decision in *Commissioner of Labor & Industries v. Boston Housing Authority*[8] as controlling, the Court concluded that "the authorization given local housing authorities in present Chapter 121B (formerly Chapter 121) to cooperate with the federal government is sufficiently broad to encompass the use of the turnkey procedure," even though the turnkey procedure obviously could not have been known to the legislature when the antecedent Chapter 121 was enacted.

More specifically, Section 26P of former Chapter 121 (Acts of 1946, c. 574, §1) authorized local housing authorities "(a) . . . to receive loans, grants, and annual or other periodic contributions from the federal government," and "(b) . . . *to act as agent of,* or to cooperate with the federal government in any . . . housing project." (Emphasis by Court.) Substantially the same language is preserved in the present housing authority law of Chapter 121B.[9]

[6] These minimum wage provisions were formerly contained in G.L., c. 121, §26T.

[7] The authority countered this emphasis on the statutory term *construction* with the narrow contention that its agreement constituted a contract for *acquisition* by the authority of a completed project rather than for its construction. Thus it argued that, under the present housing authority law of Chapter 121B, acquisition contracts are differentiated from construction contracts so that the competitive bidding and minimum wage provisions of Chapter 149 do not apply to the turnkey transaction.

However, the Court preferred not to ground its decision on a narrow characterization of the turnkey arrangement as a contract for "construction" or for "acquisition" of a public building or public work. 1970 Mass. Adv. Sh. 1323, 1327, 261 N.E.2d 331, 334.

[8] 345 Mass. 406, 188 N.E.2d 150 (1963). In the Boston Housing Authority case the Court held that, under a "contribution contract" with the Federal Public Housing Administration prohibiting operating expenditures by the local authority in excess of the budget approved by the Housing Administration, the provisions of former Section 26 of Chapter 121, providing for wage rate determination by the Commissioner of Labor and Industries, did not require compliance where the determined wage rates caused a budgetary excess in violation of the "contributions contract" and federal policy furnishing low rent housing.

[9] See G.L., c. 121B, §§11(a)-(b), inserted by Acts of 1969, c. 751, §1; and see G.L., c. 121B, §11(k), preserving the language of former c. 121, §26Y.

For added emphasis, the Supreme Judicial Court stressed the concept of the local housing authority as an *agent* of HUD in the performance of a federal function under the authorization of former Chapter 121 and present Chapter 121B. "The Commissioner, therefore, has no more power to require the housing authority to comply with the competitive bidding and minimum wage laws than he would have were HUD itself contracting with [the developer]."[10]

In short, the Court gave full play to the continuing state legislative intent to realize fully the use of federal financial assistance by local governments. Its statutory construction accords fully with its own precedent, the spirit of the legislation, and certainly the felt municipal needs of the time.[11]

B. Legislation

§24.12. Collective bargaining. Chapter 340 of the Acts of 1970[1] provides that provisions of a collective bargaining agreement conflicting with any law, ordinance or by-law shall yield to the law, ordinance or by-law; but that the provisions "shall prevail over any regulation made by a chief of police pursuant to section ninety-seven A of chapter forty-one or by the chief or other head of a fire department under the provisions of chapter forty-eight."

It is important to read this provision in light of the first sentence of paragraph 2 of §178I (requiring bargaining in good faith with respect to *wages, hours and other conditions of employment)* to determine in the first instance the proper subject matter of a collective bargaining agreement. In the 1970 decision of *Chief of Police v. Town of Dracut,*[2] the Supreme Judicial Court required that a valid collective bargaining provision be reasonably related to wages, hours and other conditions of employment, and suggested that certain terms, such as the daily assignment of personnel by the police chief, were inherently *outside* the scope of negotiable wages, hours and other conditions of employment. These items, then, would *not* fall within the new provision and would *not* necessarily prevail over a conflicting regulation made by a department chief.

§24.13. Consumer protection: Local consumer advisory commissions. Chapter 153 of the Acts of 1970[1] authorizes a city by ordi-

10 1970 Mass. Adv. Sh. 1323, 1330, 261 N.E.2d 331, 336. And see Boston Housing Authority case, 345 Mass. 406, 415, 188 N.E.2d 150, 157 (1963).

11 The Court's survey of the welter of Massachusetts public housing provisions beginning in the late 1940s reflected full appreciation of the overriding "[l]egislative concern for assuring that all available Federal funds be made use of. . . ." 1970 Mass. Adv. Sh. 1323, 1330 n.11, 261 N.E.2d 331, 336 n.11.

§24.12. 1 G.L., c. 149, §1781.
2 1970 Mass. Adv. Sh. 769, 258 N.E.2d 531. See §24.6 *supra.*

§24.13. 1 G.L., c. 40, §8F.

nance and a town by by-law to establish a consumer advisory commission (1) to conduct investigation and research into "matters of consumer interest" and (2) to report the results of such investigations and research to "the general public" as well as "to local governmental authorities and law enforcement agencies." The commission is required to submit an annual report to the city or town and to send a copy thereof to the Consumers' Council of the Commonwealth.

§24.14. Education: Acquisition of parochial school facilities; state construction grants in depressed or redevelopment areas; voluntary school prayer. Chapter 87 of the Acts of 1970 authorizes the city of Gloucester to purchase, renovate and expand the facilities of the city's failing Catholic high school, and to appropriate a sum up to $5 million for this purpose. Such legislation is significant as one form of response by state and local government to the anticipated financial failure of the parochial school system in Massachusetts.[1]

Chapter 793 of the Acts of 1970[2] increases the rate of state school construction grants for regional school districts in which at least 60 percent of all the member cities and towns are in depressed or redeveloped areas within specified federal definitions.

Chapter 264 of the Acts of 1970[3] authorizes the school committee of any city or town to permit any child attending its public schools to participate in voluntary prayer with the approval of the child's parents. The prayer shall take place before the commencement of the daily school session. No city or town permitting school prayer shall be denied any Commonwealth funds for school purposes.

This statute, of course, suggests constitutional questions to be raised in light of the Supreme Court's 1962 decision of *Engel v. Vitale*.[4] The constitutionality of any particular school prayer program seems likely to turn on the actual details of its implementation.

§24.15. Environmental law:[1] Air pollution control by state and local governments: Regulation of refuse disposal sites. Chapter 838 of the Acts of 1970[2] declares that any department, agency, commission, authority or political subdivision of the Commonwealth having control or supervision of any "structure or property" shall cooperate with the Department of Public Health to prevent and control air pollution resulting from such "structure or property."

The same governmental units shall be subject to rules and regulations adopted by the Department of Public Health. The department is empowered to serve local governmental units with cease and desist orders for violation of the rules and regulations. An objecting unit is

§24.14. [1] See 1969 Ann. Surv. Mass. Law §18.1.
[2] Amending Special Acts of 1948, c. 645, §9.
[3] Amending G.L., c. 71, §37B.
[4] 370 U.S. 421 (1962).

§24.15. [1] See also Chapter 26 *infra*.
[2] G.L., c. 111, §142E.

entitled to a hearing before a person, designated by the commissioner, whose recommendations may be amended and adopted by the Department of Public Health as a final decision under G.L., c. 30A, §14, and thus subject to judicial review.

In the case of violations of departmental orders, the department may file a bill of complaint in the Superior Court to enjoin such violation (though such proceedings are strictly limited to the questions (a) whether the order was violated, and (b) whether the relief sought is appropriate).

Chapter 839 of the Acts of 1970[3] provides that the site of refuse facilities created by private persons or local governments must be assigned by the board of health for the appropriate city or town, after a public hearing subject to the provisions of any ordinance or by-law adopted under Chapter 40A or corresponding provisions of earlier laws, and after public notice of such assignment has been given by the board of health. The board of health may impose appropriate limitations with the assignment, and the local board may request the advice of the Department of Public Health prior to the assignment.

Persons aggrieved by the action of a board of health may include the selectmen of any town, or the city manager (in cities having a Plan D or Plan E charter), or the mayor. These, when authorized by a vote of the city council, may appeal to the department from the board's assignment of a refuse disposal site (within 60 days of the publication of notice of assignment). The department is given authority, after due notice and a public hearing, to rescind or suspend an assignment or impose conditions on it.

In every case the department must approve the design and use of a facility.

Every person or local government operating a refuse facility *shall* maintain it to prevent nuisance or danger to public health by various forms of air pollution (odors, dust, fire, smoke) and breeding of disease carriers (rodents, flies, vermin). In cases of violation, the local board, or the department, may rescind, suspend or modify an assignment after due notice and public hearing.

The department is authorized to promulgate rules and regulations, and the commissioner to issue orders to enforce this provision. Any person or local government violating this section or the pursuant rules, regulations, or orders shall be punished by fine of from $100 to $500 per day per violation.

The Superior Court is given jurisdiction in equity to enforce the provisions of this section upon petition of the department or of any aggrieved person.

§24.16. Metropolitan Area Planning Council. Chapter 849 of the

[3] Id. §150A.

Acts of 1970[1] further defines the composition and self-governing procedures of the council, defines the Metropolitan Planning District and authorizes it to make contracts and expenditures. This new legislation also encourages a maximum exchange of useful planning information with all other governmental units.

§24.17. Officers, agents and employees. Chapter 295 of the Acts of 1970[1] provides that no firefighter shall be required to carry firearms in the performance of his duty. Chapter 354 of the Acts of 1970[2] provides that no city or town shall require a permanent member of its fire department to perform the duties of a police officer during his tour of duty.

Chapter 628 of the Acts of 1970[3] provides that in any city adopting that section no uniformed police officer, and no other uniformed person empowered to make arrests, shall be required to wear a badge, tag or label of any kind identifying him by name, but any such officer or other person not wearing such a badge, tag or label *shall* wear a badge, tag or label identifying him by number.

Chapter 835 of the Acts of 1970[4] provides a career incentive pay program for regular full-time officers in the city and town police departments, and in the state, capitol and metropolitan district commission police. Base salary increases are geared to degree and semester-hour progress requirements. Any city or town accepting the provisions of this section and providing career incentive salary increases for police officers shall be reimbursed by the Commonwealth for one-half the cost of such payments upon certification by the board of higher education.

§24.18. Rent and eviction control. Chapter 842 of the Acts of 1970[1] creates a comprehensive scheme of rent and eviction control adoptable by cities, and by towns with a population of 50,000 or more.

The Act was passed in recognition of a housing emergency resulting in abnormally high rents, and in a substantial and increasing shortage of rental housing accommodations for families of low and moderate income. (Section 1.)

Administrative machinery consists of a bureau of rental housing within the Department of Community Affairs, which will provide receptive municipalities with data, advice and "other assistance," including the advice that the local execution "does not conform to the intent of this act." (Section 4.)

Actual rent setting, rent adjustment, and eviction control is to be

§24.16. [1] G.L., c. 40B, §§24-29. G.L., c. 6, §§109-114, are repealed.

§24.17. [1] G.L., c. 48, §89.
[2] Id. §88.
[3] G.L., c. 41, §98C.
[4] Id. §108L.

§24.18. [1] The act expires Apr. 1, 1975.

administered by local rent control boards or by a rent control administrator, determined and appointed by the mayor, city manager, or selectmen to serve "at the pleasure of the appointing authority." The board or the administrator will have investigatory and rule-making powers. (See Section 5.)

Generally, the maximum rent of a controlled rental unit shall be the rent charged the occupant for the month six months prior to the acceptance of this act by a municipality.

The board or the administrator shall require registration of all controlled rental units on forms to be authorized and provided by the board or administrator. (Section 6.)

The board or the administrator shall make such individual or general adjustments, either upward or downward, of the maximum rent established by Section 6 for any controlled rental unit or any class of controlled rental units as may be necessary to assure that controlled rents yield to landlords "a fair net operating income" for those units. Criteria for adjustment to a fair net operating income are itemized in terms of deterioration or improvement.

The board may remove maximum rental levels for any class of controlled units if it determines that the shortage of such units at those rental levels has ceased to exist. (Section 7.)

The board or administrator shall consider an adjustment of rent for an individual controlled rental unit upon receipt of a petition for adjustment filed by the landlord or tenant of such unit *or upon its own initiative.* (Section 8.)

Evictions of tenants from controlled rental units are prohibited except upon specific enumerated grounds including the failure to pay rent (Section 9(a)(1)) and "for any other just cause, provided that his [landlord's] purpose is not in conflict with the provisions and purposes of this act" (Section 9(a)(10)).

Judicial review of any action, regulation or order of a board or administrator is committed first to the appropriate local district court entrusted with exclusive original jurisdiction upon complaint of an aggrieved party. The decision of the district court may be appealed as if an ordinary civil action in that court. (Section 10.)

Civil remedies against landlords demanding, accepting, receiving or retaining excessive rent include liquidated damages of $100, or not more than treble the amount of the excess, whichever is greater; as well as reasonable attorney's fees and costs as determined by the court. However, if the defendant proves that the violation was neither willful nor the result of failure "to take practicable precautions against the occurrence of the violation," the amount of the liquidated damages shall be the amount of the excess.

If the aggrieved tenant fails to bring the action within 30 days of the violation, the board or the administrator may settle the claim or bring the action itself. (Section 11.)

Criminal penalties are to be imposed for excess rents, and for false testimony before the board or the administrator. Punishment shall be by fine of not more than $500 or by imprisonment for not more than 90 days, or both. Second or subsequent offenses permit fines up to $3000 or imprisonment for not more than a year, or both. (Section 12.)

In response to the Supreme Judicial Court's decision of *Marshal House, Inc. v. Rent Review & Grievance Board of Brookline*,[2] Chapter 843 of the Acts of 1970 provides specifically for the establishment and administration of rent regulation and eviction control in the town of Brookline. With minor variations, the act substantially parallels Chapter 842.

The declaration of public emergency includes special mention of the plight of the elderly on fixed incomes. (Section 1.)

The town is authorized to regulate rents by by-law and through a rent board. "The rent board shall have all powers necessary or convenient to perform its functions" of regulating rents and evictions, including rule-making, information-gathering and investigative powers. Violations of by-laws or of orders by the board shall be punishable by a fine of not more than $1000 for any one offense. (Section 2.)

The board has general and individual rent adjustment power under the standard of a "fair net operating income" for the landlord. (Section 3.)

The Administrative Procedure Act, G.L., c. 30A, is made applicable to the board. (Section 4.)

The Brookline Municipal Court is given original jurisdiction, along with the Superior Court, of all petitions for review brought pursuant to G.L., c. 30A, §14. The Superior Court is given jurisdiction in equity to enforce the provisions of this act, and any by-laws adopted, and may restrain violations by injunction. (Section 5.)

The town is empowered to regulate eviction by by-law, and the board may issue orders as a defense to an action of summary process for possession. (Section 6.)

Chapter 863[3] of the Acts of 1970 authorized the city of Boston to control rent by ordinance in structures of three or more dwelling units (exclusive of three-unit structures occupied by the owner in permanent residence), to establish a *board* to set the maximum rent (which is suggested to be that which was in effect on December 1, 1968), and to make individual and general equitable adjustments in maximum rents. The standard for adjustments is to be "a fair net operating income for the landlord" with due consideration for (a) local taxes; (b) operating expenses; (c) major capital improvements; (d) changes in living space, services, furniture, furnishings, equipment; and (e) substantial deterioration of the accommodations. (Section 2.)

Evictions are limited to specific enumerated grounds including, inter

[2] 1970 Mass. Adv. Sh. 1031, 260 N.E.2d 200. See §24.8 *supra*.
[3] Amending Acts of 1969, c. 797.

alia, (1) nonpayment of rent, and (2) any just cause, provided that the landlord's "purpose is not in conflict with the provision of this act." A landlord seeking repossession must apply to the board for a certificate of eviction. Eviction without a certificate shall be subject to criminal prosecution. A decision by the board on a certificate is appealable by either party to the appropriate district court. (See Section 3.)

A landlord charging excess rent shall be liable for civil damages to the tenant, or to the city, for reasonable attorney's fees plus liquidated damages of $100, or not more than three times the amount of excess, whichever is greater. However, if the landlord proves the violation to be neither willful nor the result of his failure to take practicable precautions against the violation, the amount shall be the overcharge itself.

If the tenant fails to prosecute a violation of the act or of any pursuant rule, regulation or ordinance within 30 days of its occurrence, the board may settle the claim or prosecute it for the same civil damages to which the tenant would be entitled. (Section 3.)

Criminal penalties for excess rent or other violations of the act, including false testimony before the board, shall include a fine of not more than $500 or imprisonment of not more than 90 days, or both; for second or subsequent offenses, a fine of not more than $3000 or imprisonment of not more than one year, or both.

The district court for the district of the accommodations shall have exclusive original jurisdiction over such actions and complaints. The Superior Court shall have jurisdiction in equity to restrain by injunction any violation of this act or pursuant ordinances or rules, regulations and orders of the board.

§24.19. Urban job incentive bureau. Chapter 848 of the Acts of 1970[1] creates an urban job incentive bureau in the Department of Community Affairs. The bureau shall develop and coordinate a statewide manpower employment assistance and training program, with special attention to "urban areas containing sections of substantial poverty." The act defines business facilities eligible for participation in the manpower program and grants specified corporation excise tax credits to business facilities.

C. Student Comments

§24.20. Acceptance statutes and the Home Rule Amendment: Chief of Police v. Town of Dracut.[1] The chief of police of Dracut, acting in his official capacity, brought this suit in equity against the town, its board of selectmen, and the Dracut Police Relief Association,

§24.19. [1] G.L., c. 23B, §§11-15; c. 63, §§38E-38F. The statutory purpose is "to develop manpower training and assistance programs, to neutralize urban tax barriers and to encourage industrial development and job potential in depressed areas."

§24.20. [1] 1970 Mass. Adv. Sh. 769, 258 N.E.2d 531.

Inc. He sought a declaratory judgment to determine the validity of a vote of a special town meeting of October 16, 1967, which purported to rescind the town's prior acceptance of G.L., c. 41, §97A, and substitute therefor Section 97 of Chapter 41; and to determine the relative rights of the selectmen and the chief in the governing of the town's police department. On March 7, 1955, the town validly accepted Section 97A, the provisions of which vest in the chief of police the exclusive authority (1) "to make suitable regulations governing the police department and the officers thereof [subject in certain cases to the approval of the selectmen]"; (2) to "control . . . all town property used by the department, and . . . [its] police officers"; and (3) to "assign [officers] to their respective duties." This section places authority in the selectmen, however, to establish a police department, to appoint the chief of police and such officers as they deem necessary and to fix their compensation. Subject to civil service requirements, moreover, the selectmen are authorized to remove the appointed chief and officers for cause after a hearing.[2]

It was the existence of this statutory framework which led to the controversy in this case. In May, 1967, the defendant association informed the selectmen that it had been properly designated the "exclusive collective bargaining agent" for the members of the town's police force, and requested recognition as such.[3] Subsequently, in July, the board of selectmen by unanimous vote granted the requested recognition and designated plaintiff as their representative for negotiations with the association. Despite this designation, the chief informed the selectmen that he would not serve in such a capacity, and on August 31, 1967, the selectmen informed the association that they would represent themselves in such negotiations.[4] Thereafter, negotiations were undertaken

2 G.L., c. 41, §97A provides: "In any town which accepts this section there shall be a police department established by the selectmen, and such department shall be under the supervision of an officer to be known as the chief of police. The selectmen of any such town shall appoint a chief of police and such other officers as they deem necessary, and fix their compensation, not exceeding, in the aggregate, the annual appropriation therefor. In any such town in which such appointments are not subject to chapter thirty-one, they shall be made annually and the selectmen may remove such chief or other officers for cause at any time after a hearing. The chief of police in any such town shall from time to time make suitable regulations governing the police department, and the officers thereof, subject to the approval of the selectmen; provided, that such regulations shall become effective without such approval upon the failure of the selectmen to take action thereon within thirty days after they have been submitted to them by the chief of police. The chief of police in any such town shall be in immediate control of all town property used by the department, and of the police officers, whom he shall assign to their respective duties and who shall obey his orders. Section ninety-seven shall not apply in any town which accepts the provisions of this section. Acceptance of the provisions of this section shall be by a vote at an annual town meeting."

3 Paquette v. Inhabitants of Dracut, Eq. No. 28519 (Super. Ct., Middlesex Co., Aug. 2, 1968) [hereinafter cited as Superior Ct. Opinion].

4 Ibid.

and completed prior to the special town meeting at which the vote attempting to rescind Section 97A was taken. On October 26, 1967, a collective bargaining agreement, incorporating the substance of those negotiations, was signed by the town, acting through its selectmen and the association.[5]

Under the terms of the agreement, the assignment of officers and the granting of leaves of absence and vacations were to be made in accordance with rank, seniority, and personal preference, *without* the approval of the chief. In addition, the agreement required that all rules and regulations of the police department be subject to the approval of the selectmen, and that a proper uniform requirement, to include weapons, be established.[6]

[5] Ibid. The collective bargaining process is governed by G.L., c. 149, §§178G-178N. It appears that even before they entered into that collective bargaining agreement, the selectmen and the association were doubtful of its validity in view of the operation of Section 97A vesting exclusive authority in the chief of police to make regulation governing the police department. Subsequently, the attempt was made to rescind that statute and to substitute in its place Section 97, which empowers the selectmen, and not the chief, to "make suitable regulations governing the police department and the officers thereof." G.L., c. 41, §97.

[6] The language of these disputed articles, or parts thereof, follows: "*Art. 4.* Each employee shall be granted special leave with pay for a day on which he is able to secure another employee to work in his place provided: (A) Such substitution does not impose any additional cost on the town. (B) The Chief of Police or his representative shall be notified on an appropriate form not less than one day prior to its becoming effective, except in the case of emergency, notification may be made by telephone. (C) Neither the Department nor the Town is held responsible for enforcing any agreements made between employees. (D) Officer in Charge of shifts approves the change.

"*Art. 7. Leave of Absence Without Pay:* One leave of absence for limited period not to exceed one (1) month shall be granted for any reasonable purposes, and such leaves shall be extended or renewed up to 90 days; the total to include first month. Only one leave every five (5) years except at discretion of employer. Number of men on leave at one time is to be at discretion of employer. Reasonable purpose in each case shall be agreed upon by the Association and the Employer.

"*Art. 11. Seniority:* . . . (2) Part Time Employees a. Must be worked according to seniority on rotating basis from top to bottom of list; on refusal by any member he shall return to the bottom of list. (3) Outside Details (Except Clubs and Organizations) a. To start by rank and seniority with the Captain through the Lieutenant, and the Sergeants to the Patrolmen through the intermittent list to the bottom and start all over again at the top; except on special request by Selectmen. b. If an employee wishes to waive his rights to details, he must sign a waiver to that effect and will not be asked until he wishes his name to be put back on the list, and he will not be called until they start at the top again. *Other Provisions:* (1) All shift assignments of regular employees shall be made in accordance with preference expressed in writing with respect to rank and seniority. (2) No employee shall be assigned to more than one shift, and employees shall not be required to work a shift other than the one which they are assigned, except in an emergency or as an overtime assignment. (3) All assignments to shifts shall be posted in the Police Station.

"*Art. 12. Vacations:* . . . Vacation shall be granted in accordance with the seniority provisions of this agreement. Each employee shall be permitted vacation leave at such times during the vacation year he may request. In instances where

The case was tried in the Superior Court of Middlesex County as a case stated.[7] Therein the plaintiff contended that the vote of the special town meeting purporting to rescind Section 97A was invalid and void, and that consequently the provisions of that statute had continued to remain in effect. He further contended that certain key articles of the collective bargaining agreement of October 26, 1967, were likewise null and void in that they conflicted with his exclusive authority under Section 97A, or in that they went beyond the scope of the selectmen's authority, which is limited to negotiating "with respect to wages, hours and other conditions of employment."[8] The defendants generally denied these contentions.[9] The trial judge, relying on the rule enunciated in *Brucato v. City of Lawrence*[10] relating to statutes such as Section 97A that are enacted subject to local acceptance, held that the attempted rescission of Section 97A was null and void, and that the provisions of that section were in effect in Dracut. In its determination, the court relied upon G.L., c. 149, §178H, which provides inter alia that where a collective bargaining agreement conflicts with any law, ordinance, or by-law, the law, ordinance, or by-law shall prevail. The court further held that the selectmen had no authority to

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an employee can not be granted vacation at the time he requests, he shall be given the reason(s) for denial in writing and shall have the right to use the grievance procedure if he is aggrieved. Vacations shall be picked by April 1st.

"*Art. 17. Personnel and Training:* 1. Establishment of the position of Personnel and Training Officer to be appointed by the Board of Selectmen and to be responsible for personnel files and a training program for all officers. This is in addition to regular duties. 2. The establishment of rules and regulations for all police officers of the Dracut Police Department, set up by the Chief and approved by the Board of Selectmen. 3. A program to be set up under the direction of the Personnel and Training Officer to send at least one officer per year to specialized school other than that which is required by statute. 4. Establishment of a proper uniform requirement which is to include weapons.

"*Art. 18. Extra Paid Details:* 1. Such assignments shall be made by the Chief or his representative by seniority as provided in the Seniority Section of this Contract. The Chief shall maintain a record of all such assignments, which may be examined at any time by a representative of the Association. No officer or other person shall accept any such assignment unless the same is made by the Chief or his representative. 2. No such assignment shall be made until the person or organization requesting services has agreed to pay a minimum of three (3) hours reporting time and at all times paying no less than $3.00 per hour.

"*Art. 19. Responsibility and Morale:* 1. That the keys to the files in the Police Department be held by the officer in charge of each shift and those keys to be given in hand to the relieving officer in charge of the next shift. 2. The establishment of an officer under the direction of the Chief in charge of property to be called the Personnel Officer. His responsibilities are as follows: a. Property found, recovered, stolen, lost or confiscated, etc. b. Keep the keys to the room set aside for same. c. Keep a log separate on same. d. Supervise the yearly auction, as required by statute. e. In charge of all outside work details. f. Responsible for the proper maintenance of vehicles and equipment."

7 Superior Ct. Opinion.

8 1970 Mass. Adv. Sh. 769, 771, 775, 258 N.E.2d 531, 533, 536.

9 Superior Ct. Opinion.

10 338 Mass. 612, 156 N.E.2d 676 (1959).

bargain collectively on matters dealing with the making of regulations for the governing of the police department, or with the assignment of police officers, the authority for both of which is placed by Section 97A exclusively in the chief of police. The court ruled in favor of the plaintiff as to all of the disputed articles of the agreement, all of which were held to be in conflict with the chief's authority.[11]

The Supreme Judicial Court affirmed the holding of the trial court relative to the attempted rescission of Section 97A, and in so doing addressed itself to the question of whether the rule of *Brucato* was still operative in view of the Home Rule Amendment of 1966.[12] The Court did, however, specifically find that certain provisions of the collective bargaining agreement were in conflict with no "law, ordinance or by-law,"[13] and as such were enforceable by the defendants.[14] The Court, therefore, affirmed with appropriate modifications the decree of the Superior Court.[15]

It is interesting to note that in the trial court the defendants made no attempt to overcome the rule laid down in *Brucato,* even though that rule, if still valid in Massachusetts, would have served to invalidate the attempted rescission of Section 97A which was so essential to their defense. Rather, they simply entered a denial that the attempted rescission was void.[16] Having suffered an adverse judgment, however, the defendants on appeal entered a further contention that the rule of *Brucato* was rendered void and obsolete by virtue of the Home Rule Amendment. Although there was no indication either in the pleadings or in the trial judge's opinion that the issue was open on the record, the Supreme Judicial Court nevertheless undertook its resolution.[17]

In *Brucato* the Court had recognized as a right the legislative practice of enacting statutes whose operation is made subject to the occurrence of some specified event or condition of action. In so doing, the Court made reference to statutes which become operative only upon acceptance by the municipalities for which they are enacted:

> It is not unusual for the Legislature to provide that a statute expressed in terms of general application shall take effect in each city and town only upon its acceptance by such city and town . . . .

11 Superior Ct. Opinion.

12 Mass. Const. amend. art. 89.

13 G.L., c. 149, §178I.

14 For example, the Court ruled that Article 5 of the agreement, which required the chief to "Maintain a complete record of all overtime and sick leave accumulation" and to make these records available to the association, was within the power of the selectmen to agree to and did not, as was held by the Superior Court, constitute an exercise of rule-making authority. 1970 Mass. Adv. Sh. 769, 779, 258 N.E.2d 531, 538.

15 Id. at 780, 258 N.E.2d at 539.

16 Superior Ct. Opinion.

17 1970 Mass. Adv. Sh. 769, 772-774, 258 N.E.2d 531, 534-535.

> The Legislature may provide that a city or town, which once accepts a statute . . . shall have the power to revoke its acceptance. . . . In the absence, however, of some indication in the language, the form, or the subject matter of a particular statute enacted subject to local acceptance, that an acceptance once given may be revoked, *the effect of a valid acceptance by a city or town is to make the statute operative in that community until the statute is repealed or amended* [*by the Legislature*].[18] [Emphasis added.]

The Court added that once the condition precedent stipulated by the legislature as necessary for the taking effect of the statute (in this case acceptance by the town) is satisfied, "it becomes applicable statute law, subject to change . . . only by subsequent action of the Legislature."[19]

This, then, constitutes the rule of *Brucato,* which both the Superior Court and the Supreme Judicial Court utilized in holding invalid the town of Dracut's attempt to rescind Section 97A, and which had been upheld in a number of subsequent decisions.[20] Clearly, if this rule had been valid when the vote of the special town meeting was taken, the defendant town had acted without authority. This fact, moreover, was conceded by the *Dracut* defendants.[21] Section 97A is without question the type of statute to which the rule applies. The statute can become operative only in a town which accepts its provisions "by a vote at an annual town meeting."[22] This was done in Dracut, and since the statute contains no indication in its language, form, or subject matter that, once accepted, it can be unilaterally revoked by the accepting municipality, it is clear that, in accordance with the rule of *Brucato,* it could be revoked only by the legislature. This Dracut failed to secure.[23]

The correctness of the decision in *Dracut* is, therefore, solely dependent upon two factors: (1) whether the premise, basic to the Court's rationale, that the town was without authority to rescind Section 97A, is an accurate statement of the law in the Commonwealth; and (2)

18 338 Mass. 612, 615-616, 156 N.E.2d 676, 678-679 (1959).

19 Ibid.

20 See, e.g., Donnelly v. Dover-Sherborn Regional School Dist., 341 Mass. 497, 500 n.1, 170 N.E.2d 694, 696 n.1 (1960); Oleksak v. City of Westfield, 342 Mass. 50, 52-53, 172 N.E.2d 85, 87 (1961); McDonough v. City of Lowell, 350 Mass. 214, 216, 214 N.E.2d 50, 51 (1966).

21 1970 Mass. Adv. Sh. 769, 772, 258 N.E.2d 531, 534.

22 G.L., c. 41, §97A.

23 After the trial of the case, an attempt was made to overcome the exclusive power of a chief of police to make regulations under Section 97A. G.L., c. 149, §178I was subsequently amended so that the provisions of a collective bargaining agreement would prevail over any regulation made by a chief of police pursuant to Section 97A. (Acts of 1969, c. 341.) This amendment, however, does not alter the exclusive authority of the chief to make suitable regulations, and subsequently did nothing to assist the defendants.

whether the Court's analysis of the disputed articles of the collective bargaining agreement, regarding their conflict with any law, ordinance, or by-law, is reasonable. With regard to the second factor, it need only be noted that in each case where the Court found the agreement to be invalid, there was sufficient basis for the conclusion reached, and clear statutory language in conflict with the provision of the agreement under discussion.[24]

It is the first of the above factors, however, which causes this case to be of interest, because it appears that the Court misapplied both the Home Rule Amendment and the Home Rule Procedures Act[25] in its zeal to ensure the continued vitality of the rule of *Brucato*.[26] After setting forth the latter principle, the Court referred to two sections of the Home Rule Amendment: (1) Section 8, which provides that "the general court shall have the power to act in relation to cities and towns but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two . . ."; and (2) Section 6, which provides that "[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight . . . ." The Court additionally referred to Section 13 of the Home Rule Procedures Act:

> . . . Section 13 of this act repeats substantially all the language of §6 of the Home Rule Amendment, and in addition thereto it provides in part that "[n]othing in this section shall be construed to permit any city or town, by ordinance or by-law, to exercise any power or function which is inconsistent with any general law enacted by the general court before November eighth, nineteen hundred and sixty-six which applies alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two."[27]

The Court then reasoned that Section 97A is such a general law, and "the fact that a town has an option whether or not to adopt it does not change its character."[28] As such, the Court concluded that the Home Rule Amendment did nothing to render inoperative the rule laid down in *Brucato,* and it reaffirmed its position that, absent some

[24] See, e.g., Article 4 of the agreement, note 6 *supra,* which clearly conflicts with the authority of the chief to assign officers to their respective duties.

[25] G.L., c. 43B, passed by the General Court in the extra session of 1966 "to facilitate the orderly implementation of [the Home Rule Amendment]."

[26] The untimely introduction of the home rule issue into the case, together with its undetailed discussion by the Court, could be indicative of an inadequate preparation and argument on the part of counsel.

[27] 1970 Mass. Adv. Sh. 769, 773, 258 N.E.2d 531, 534.

[28] Ibid.

grant by the legislature, a municipality has no authority to rescind, by unilateral action, its prior acceptance of a state statute.

Although the Court has on numerous occasions adhered to the principle of construction that any new enactment must be interpreted with a view towards its purpose, and only after an investigation of the "reason . . . leading to the legislation, . . . the supposed evil to be corrected, . . . [and] the objective sought to be attained,"[29] the Court in *Dracut* curiously neglected to utilize this technique. Although the Court was faced with an issue of first impression, the ramifications of which would be of substantial import to the future of home rule in the Commonwealth, it bypassed any discussion of the purpose and scope of the Home Rule Amendment in favor of a rather cursory application of two isolated provisions of that amendment and one provision of the subsequently enacted Home Rule Procedures Act. The Court, in fact, evidenced its satisfaction with its one-sentence analysis of the need to continue the prohibition of such unilateral activity on the part of cities and towns by its statement that the legislature may be concerned

> . . . that if municipalities had unbridled authority to rescind prior acceptance of basic provisions of the General Laws by unilateral action, there might result frequent and precipitous changes in the administration of municipal affairs which might produce chaos, all contrary to the public interest.[30]

The Court's reliance on this hypothesis appears to have been necessitated by its failure to adequately investigate the rationale underlying the constitutional grant of home rule; at the same time, this hypothesis forms the basic policy consideration for the Court's decision. A brief examination of the Home Rule Amendment and its application to a statute such as Section 97A will demonstrate that there is no such concern on the part of the legislature.

Prior to 1966, the power of the legislature to establish and regulate municipalities was governed by a state constitutional amendment adopted in 1821 (the predecessor to the Home Rule Amendment). It provided:

> The General Court . . . [has] full power and authority to erect and constitute municipal or city governments, . . . to grant to the inhabitants thereof such powers, privileges, and immunities . . . as the General Court . . . [deems] necessary or expedient for the regulation and government thereof and to prescribe the manner of calling and holding public meetings of the inhabitants . . . for the election of officers . . . . [In addition,] all bylaws made by such

[29] Mathewson v. Contributory Retirement Appeal Bd., 335 Mass. 610, 614-615, 141 N.E.2d 522, 525 (1957).
[30] 1970 Mass. Adv. Sh. 769, 773, 258 N.E.2d 531, 534.

> municipal or city government . . . [are] subject, at all times, to be annulled by the General Court.[31]

As early as 1861, the Supreme Judicial Court had interpreted this constitutional enactment as establishing the theory of state supremacy over municipal governments. In *Hood v. Lynn*[32] the Court stated:

> The general principle is well settled that municipal corporations like other corporations aggregate, can exercise no powers other than those which are conferred upon them by the act by which they are created, or such as are necessarily incident to the exercise of their corporate rights, the perfection of their corporate duties, and accomplishment of the purposes for which they were constituted.[33]

This view of the state–municipal relationship, moreover, still had vitality as recently as 1964, when the Court ruled that "the towns of the Commonwealth possess no inherent right to self-government."[34] These and similar decisions by the Court, spanning well over a century, clearly established in Massachusetts the so-called Dillon's Rule, which, in capsule form, states:

> . . . [A] municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation. . . . Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the corporation, and the power is denied.[35]

Being restricted in this manner, municipalities were forced to rely upon state statutes for authority to undertake local municipal activities. As such, the legislature was called upon to enact enabling statutes, special acts, and optional plans of government and administration for the cities and towns of the Commonwealth. As was noted by the Court in *Dracut,* these laws could only be altered, repealed, or amended by a subsequent act of the legislature.

With the advent of the Home Rule Amendment, however, cities and towns were granted the right, previously denied, to self-government in local matters.[36] Section 2 of the amendment provides that "[a]ny city or town shall have the power to adopt or revise a charter or to amend its existing charter," provided that "any adopted charter or revised

31 Mass. Const. amend. art. 2.
32 83 Mass. 1 (1 Allen) 103 (1861).
33 Id. at 104.
34 Paddock v. Town of Brookline, 347 Mass. 230, 238, 197 N.E.2d 321, 326 (1964).
35 1 Dillon, Municipal Corporations §237 (5th ed. 1911).
36 Mass. Const. amend. art. 89, §1.

charter or any charter amendment shall not be inconsistent with the constitution or any laws enacted by the general court in conformity with the power reserved to the general court by section eight."[37] Under this section, then, municipalities which wish to change or modify their existing governmental structures can do so without either petitioning the legislature or applying some pre-existing authorizing statute.

Section 6, moreover, authorizes any city or town, by the adoption, amendment, or repeal of local ordinances or by-laws, to "exercise any power or function which the general court has power to confer upon it, which is [likewise] not inconsistent with the constitution and laws enacted by the general court in conformity with . . . section eight, and which is not denied . . . to the city or town by its charter."[38] This provision contains the basic grant of the Home Rule Amendment, the devolution of powers upon municipalities. Because of this grant, "local governments are free to engage in any activity that is not reserved to the state by the Constitution or pre-empted by state legislation."[39] As such, cities and towns, instead of searching for statutes authorizing municipal action, "need only be concerned about constitutional or statutory provisions forbidding local action or establishing standards for particular actions."[40] The rule enunciated by Judge Dillon, therefore, is effectively reversed.[41]

Section 8 of the amendment serves to preserve to some degree the legislature's control over local municipal activity while ensuring that the spirit and intent of independent self-government is carried out. Under this section, although the General Court retains the power to act in relation to cities and towns, this power is clearly limited to the enactment of

> . . . general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and . . . special laws [in certain well-defined situations] . . . .[42]

The legislature is additionally empowered to "provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election."[43] The legislature, then, although it retains its authority to pre-empt by general

37 Id. §2.

38 Id. §8.

39 Gere and Curran, Home Rule pt. II, c. IV, The Constitutional Grant of Home Rule 33 (1969).

40 Mass. Legislative Research Council, Report Relative to Municipal Home Rule, Senate No. 950, at 123 (1965).

41 Mariner, This Is Your Massachusetts Government 39 (6th ed. 1970): "No more complete and far reaching, no more absolute reversal of the direction of governmental authority has ever occurred in an American state."

42 Mass. Const. amend. art. 89, §8.

43 Ibid.

law any municipal power or function, no longer is able to act with the unbridled freedom it enjoyed prior to the amendment.[44]

Under the Home Rule Amendment, it is clear that the respective roles of municipal governments and the General Court have been substantially altered since *Brucato*. An examination of these roles as they now exist, and their application to the force and effect of acceptance statutes, such as Section 97A, will reveal the error of the Court in *Dracut*.

Section 2 of the amendment establishes the right of a town to adopt a charter, provided that its provisions are not inconsistent with the Constitution and laws enacted by the General Court. The establishment of a police department, however, is basic to the structure and organization of local governments, and as such must be considered a proper item for inclusion in a charter. This fact has on numerous occasions been recognized by the legislature, which in enacting special acts providing for the appointment of a town manager has placed the operation of the police department under his supervision and direction.[45] It cannot be doubted, then, that should a town which has validly accepted G.L., c. 41, §97A vote to adopt a charter, it should be allowed to include therein a provision which would bring about a revision or modification of the workings of Section 97A absent, of course, any inconsistency with the laws enacted by the General Court. Would there be any "inconsistency," however, if the town adopted such a revision or modification? In 1968, the then Attorney General Richardson set forth the position of his office on questions of "inconsistency":

> I approach these questions of possible conflict with a view towards promoting the basic purposes of the [Home Rule Amendment] to foster responsible, independent local government, but also to respect the [amendment's] limitations on these purposes . . . .[46]

Since that time the Office of the Attorney General, in reviewing the preliminary reports of charter commissions,[47] has upheld as consistent with state laws the provisions of a proposed charter which, although in conflict with a previously accepted section of the General Laws, corresponded to provisions which the legislature by either special act or acceptance statute had specifically allowed in other cities or towns.[48]

[44] These restrictions on the power of the General Court "apply to every city or town whether or not it has adopted a charter . . . ." Ibid.

[45] See, e.g., Acts of 1949, c. 13, §13, a special act establishing a town manager form of government for the town of Danvers.

[46] Letter from Eliot L. Richardson to Raymond McLarin, Chairman, Burlington Charter Commission, Dec. 27, 1968.

[47] Required by G.L., c. 43B, §9.

[48] See, e.g., Final Report of the Milford Charter Commission (Jan. 2, 1971), which placed the appointment of a chief of police, and the supervision of the

In such cases, where there is no contrary overriding policy of the legislature, and where there are alternative provisions contained in the overall body of laws enacted by the General Court, it is reasonable, especially in view of the scope of the Home Rule Amendment, to conclude that any one of these provisions might be included in a municipal charter without running afoul of the amendment's Section 2 restriction relative to "inconsistency."

General Laws, c. 41, §97A, deals with the establishment and operation of police departments, as do Sections 96 and 97. Moreover, in communities which operate under special acts providing for a professional town administrator, alternative modes of police department organization and supervision are authorized.[49] Their existence as provisions of laws enacted by the General Court must be viewed as eliminating any possible inconsistency between them and those laws of which they are a part. As such, the dictum in *Dracut* indicating that a town, once having accepted Section 97A, cannot by unilateral action amend, alter, or rescind it clearly conflicts with the Home Rule Amendment, and therefore constitutes an inaccurate statement of the law.

Apart from these considerations, however, it appears that Section 97A is not a General Law within the meaning of Section 8 of the amendment, and as such does not come within the restrictions of either Section 2 or Section 6. As has been stated, the legislature now has the power to act in relation to cities and towns *only* by General Laws which "apply alike . . . to all towns . . . or to a class of not fewer than two."[50] It is apparent that statutes such as Section 97A, the operation of which is subject to local acceptance, and which constitute one of several alternate schemes, cannot be said to "apply alike . . . to all towns." To conclude otherwise would amount to a denial of the existence of Sections 96 and 97 and the provisions of the special acts mentioned above. Nor can it be accurately stated that Section 97A is a General Law which applies alike to a class of towns no fewer than two. Although the amendment does not define the meaning which shall be given to the term *class,* it is obvious that Section 97A contains nothing in its language or form which would indicate that it should be applied only to towns with certain common characteristics. In other states, where home rule has had a longer existence, classification has been predicated on such bases as population, geography, types of government, assessed valuation, and so on.[51] No such basis is pro-

day-to-day administration of the town (including the police department), within the authority of the town administrator. Nevertheless, Atty. Gen. Robert Quinn, in a letter to Milford Charter Commission Chairman David Hayes, noted no inconsistency between this provision and the fact that Milford had previously accepted Section 97A.

49 See note 5 *supra.*

50 Mass. Const. amend. art. 89, §8.

51 Michelman and Sandalow, Government in Urban Areas 346 (1970).

vided for in Section 97A. In addition, since the statute is subject to local acceptance, there must have been a time when it applied only to one community, that is, the first town which accepted it, and therefore it could not have applied alike to a class of not fewer than two. Section 97A, then, is not a General Law either within the meaning of the Home Rule Amendment or Section 13 of the Home Rule Procedures Act. By holding that it is, the Court in *Dracut* must have concluded that a *class,* as used in the amendment, could be construed to include such dissimilar communities as the town of Brookline, with nearly 60,000 inhabitants, and the town of Brookfield, with just over 2000 inhabitants. Not only does such reasoning conflict with the ordinary meaning of the word, it also tends to ignore the intent of the amendment to promote independent local self-government.

In its discussion of Section 97A, the Court in *Dracut* noted that "a town has the option whether or not to adopt it."[52] This admission by the Court, when coupled with the fact that other optional plans for the organization of a police department are contained in Chapter 41 of the General Laws,[53] should have led the Court to categorize Section 97A as an optional plan of government for towns rather than as a General Law. By so doing, the Court would have been able to utilize the provision in the second paragraph of Section 8 of the amendment, which specifically empowers the legislature to provide optional plans of town organization and government "which may be adopted or abandoned by a majority vote of the voters of the . . . town voting thereon at . . . town election."[54] Section 97A is such a plan. As was noted above, the organization of a police department is basic to the government of any community. Therefore, such a statute may be considered an optional plan of city or town government that is within the authority of the legislature to enact. Such a plan, however, must be such as can be adopted or abandoned by a referendum procedure. Moreover, it is clear from the Home Rule Amendment that any optional plan is to be established as a two-way street, that is, capable of abandonment by the city or town as well as acceptance by a majority vote at a municipal election. Section 97A, therefore, once determined to fall within this provision of Section 8, must be viewed as being capable of rescission by any town which had previously accepted it.

In *Dracut,* the Court undoubtedly was correct in holding that the attempted rescission of Section 97A by the vote of the special town meeting was invalid and void. That statute had been validly adopted by the town, and under the terms of the Home Rule Amendment, it could be rescinded only by a referendum procedure or a charter adoption procedure, both of which are provided for in the amendment. This, of course, the town failed to do. To say, however, that the town

52 1970 Mass. Adv. Sh. 769, 773, 258 N.E.2d 531, 534.
53 G.L., c. 41, §§96, 97.
54 Mass. Const. amend. art. 89, §8.

has no authority to unilaterally rescind its prior acceptance under any conditions (the rule of *Brucato*) is demonstrably erroneous.

The Home Rule Amendment has offered the cities and towns of Massachusetts a degree of freedom never before available to them. The ramifications of this freedom have yet to be fully litigated in the courts of the Commonwealth. For these reasons, absent some clear indication from the legislature that it acted so as to pre-empt municipal initiative and thereby deny cities and towns all authority to resolve their problems at the local level, courts must construe local legislative enactments as valid. If this is not done, the difficulties encountered in *Dracut* may well be repeated and the future of home rule in Massachusetts will unquestionably suffer.

P. EDWARD DOHERTY*

§24.21. Municipal corporations: Inadequate supply of water to extinguish fire: Reynolds Boat Co. v. City of Haverhill.[1] Petitioners' real and personal property was destroyed in a fire on its premises in the city of Haverhill. This loss resulted from an inadequacy in the waterworks system that supplied water to the city's fire hydrants. It was this inadequacy which prevented the fire department from extinguishing the fire. The petitioners brought an action in tort alleging negligence on the part of the city by reason of the following: that the city had promised and undertaken to provide water for the petitioner's use, and an adequate supply thereof to service hydrants in the area for whatever use they should be put; that the city knew that the water service was in some way inadequate to provide the petitioners with fire protection; and that the city failed to properly maintain the system or to correct the defects in the water pressure or in the system running to the hydrant nearest the plaintiffs' property. The defendant's demurrer to the petitioners' declaration stated that the allegations set forth no action upon which relief could be granted; that a municipal corporation cannot be sued in tort for the acts of its employees; and that a municipal corporation cannot be held liable for damage by a fire (which it did not set) to property within its limits because of the failure of the municipality to provide or maintain an adequate supply of water or of water pressure to extinguish the fire. The demurrer was sustained by the Superior Court, and the petitioners appealed.

In affirming the order sustaining defendant's demurrer, the Supreme Judicial Court HELD: In the absence of a specific contract with owners of property, a municipality is not liable for damage by fire resulting from the city's negligent maintenance of its water supply

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§24.21. [1] 1970 Mass. Adv. Sh. 985, 260 N.E.2d 176.

system.[2] The Court reasoned that the city makes no promise or contract with property owners to furnish water for the extinguishment of fires, and that a waterworks system, when used to protect against fires, operates for the public benefit without profit. Since fire protection is a governmental rather than a proprietary or commercial duty, the city may invoke the doctrine of municipal tort immunity as a defense to such an action. Finally, the Court indicated that it is the duty of the legislature, not the judiciary, to change the existing law.

There is some authority in Massachusetts for the application of the doctrine of municipal tort immunity in cases concerning the city's failure to supply an adequate amount of water to extinguish fires. In *Tainter v. City of Worcester*,[3] relied upon by the Court in *Reynolds*, the plaintiff's mill was destroyed by fire because the hydrant nearest his property had been shut off by the city due to plaintiff's failure to pay his water bills. However, the plaintiff in *Tainter* contended that to prevent water from flowing to his mill it was not necessary for the city to close the hydrant also, thereby endangering other surrounding property. The Court found that even when a municipality was negligent in shutting off a hydrant, where the waterworks system was used for the purpose of fire protection for public benefit and no pecuniary compensation was received, the city was immune from tort liability.

Other Massachusetts decisions relied upon by the Court in *Reynolds* related to the liability of a municipal corporation while performing in its commercial capacity for profit. These cases involved water damage through the city's waterworks system,[4] damage or personal injuries from the negligent repair of a municipal waterworks or sewer system,[5] and injuries caused by the negligent operation of a sanitation truck.[6] No liability was found for the tortious acts of a transit department employee in deceiving a private construction company.[7] In addition to *Tainter*, only *Boston Safe-Deposit & Trust Co. v. Salem Water Co.*[8] involved damage by fire because of an inadequate supply of water. However, there the action by the plaintiff was against a private water company which had contracted with the municipality to supply water for domestic purposes and the extinguishment of fires, the payment for which would be made through taxes levied on the citizens of the city. The court found the defendant water company not liable for the reason that no privity of contract existed between the company and

2 Id. at 986, 260 N.E.2d at 177.

3 123 Mass. 311, 24 Am. R. 90 (1877).

4 Gordon v. City of Medford, 331 Mass. 119, 117 N.E.2d 284 (1954); Cole Drug Co. v. City of Boston, 326 Mass. 199, 93 N.E.2d 556 (1950).

5 Harvard Furniture Co. v. City of Cambridge, 320 Mass. 227, 68 N.E.2d 684 (1946); Galluzzi v. City of Beverly, 309 Mass. 135, 34 N.E.2d 492 (1941); Sloper v. City of Quincy, 301 Mass. 20, 16 N.E.2d 14 (1938).

6 Baumgardner v. City of Boston, 304 Mass. 100, 23 N.E.2d 121 (1939).

7 Galassi Mosaic & Tile Co. v. City of Boston, 295 Mass. 544, 4 N.E.2d 291 (1936).

8 94 F. 238 (C.C.N.D. Ohio 1899).

the plaintiff. The decision in *Boston Safe-Deposit* was based upon a contractual relationship existing between the city and a private water company, where no duty was owed to an individual citizen, and not on the city's tort immunity from negligent acts committed during the performance of a governmental function. Consequently, the Supreme Judicial Court, in deciding *Reynolds,* appears to have relied substantially upon *Tainter* as Massachusetts precedent involving a similar factual situation, apparently ignoring the economic and social changes of nearly a century that separated the two cases. However, decisions in other jurisdictions support *Reynolds* as a majority approach.[9] Only a handful of cases have denied municipal tort immunity to a city where negligence in the maintenance of its waterworks system, that is, an inadequate supply of water, was the proximate cause of loss by fire.[10] Confronted with arguments that the passage of time had undermined the rationale of the *Tainter* ruling, the *Reynolds* Court was content with a restatement of that ruling and an acknowledgment that "[t]he same general principle continues to be observed elsewhere."[11]

Before examining the application of municipal tort immunity in *Reynolds,* a preliminary inquiry into the underlying theories and evolution of the doctrine of municipal tort immunity is warranted. The municipal corporation is an artificial creation of the sovereign. It is subordinate to the state and derives from it the authority to act for the public benefit.[12] Prior to the sixteenth century, sovereign immunity was considered a personal right of the king. He could not be sued without his consent. Consequently there developed the common law doctrine that "the king can do no wrong" and, thus, that no legal right exists against the authority that creates the law by which the people are governed. This practice was extended throughout feudal England, where the lord of the manor was not subject to suit in his own courts. Since the municipal corporation is an outgrowth of the sovereign power, the courts logically extended the protection of sovereign immunity to the municipality where it acts as an agent of the state

9 Heieck v. City of Modesto, 64 Cal. 2d 229, 411 P.2d 105, 49 Cal. Rptr. 377 (1966); Stang v. City of Mill Valley, 38 Cal. 2d 486, 240 P.2d 980 (1952); City of Columbus v. McIlwain, 205 Miss. 473, 38 So. 2d 921 (1949); Miralago Corp. v. Village of Kenilworth, 290 Ill. App. 230, 7 N.E.2d 602 (1937); Yowell v. Lebanon Waterworks Co., 254 Ky. 345, 71 S.W.2d 658 (1934); Stevens v. Manchester, 81 N.H. 369, 127 A. 873 (1924); Trustees of Jennie DePauw Memorial Methodist Episcopal Church v. New Albany Waterworks, 193 Ind. 368, 140 N.E. 540 (1923); Wallace v. Mayor and City Council of Baltimore, 123 Md. 638, 91 A. 687 (1914); Butterworth v. City of Henrietta, 25 Tex. Civ. App. 467, 61 S.W. 975 (1901); Miller v. City of Minneapolis, 75 Minn. 131, 77 N.W. 788 (1898); Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 148 N.Y. 42, 42 N.E. 405 (1895).

10 Hall v. City of Youngstown, 15 Ohio St. 2d 160, 239 N.E.2d 57 (1968); Malter v. South Pittsburgh Water Co., 414 Pa. 231, 198 A.2d 850 (1964); Lenzen v. City of New Braunfels, 13 Tex. Civ. App. 335, 35 S.W. 341 (1896).

11 1970 Mass. Adv. Sh. 985, 986, 260 N.E.2d 176, 177.

12 18 McQuillan, Municipal Corporations §§53.01, 53.01a, at 104-105 (3d ed. 1963) [hereinafter cited as McQuillan].

or local community for public benefit. The reason usually propounded for such an extension is one of public policy for the protection of public funds and public property.[13] The premise was apparently that the individual himself, rather than the public at large, should suffer the loss, and the administration of public affairs must not be hindered by an unforeseeable drain on the public treasury at the discretion of the courts.

Because of the inequities of allowing the municipality to be completely immune from tort liability, there developed the widely approved distinction that the municipal corporation acts both as an agent of the state in performing those duties of general concern owed by the state to all persons within its boundaries, and as a local government obligated to provide its own community with municipal needs and conveniences.[14] Thus the city has dual obligations, and its liability depends upon a characterization of the function which the municipality is performing at the time the negligent act occurs. When claims are made against the city for damages caused while acting in its governmental capacity for citizens of the state, the municipal corporation is entitled to the same immunity as the sovereign.[15] However, the city is held liable for its tortious conduct occurring while in the performance of services which could have been provided by a private corporation, for the benefit of persons within its corporate boundaries. While acting in this proprietary capacity, some municipalities have been subjected to suit in the same manner as a private corporation or individual citizen.[16]

The courts have characterized certain functions as governmental in nature, including police and fire protection, public health, education, and care of the poor.[17] The city cannot be held liable for its negligent conduct while performing these duties, in the absence of constitutional or statutory alterations, because the city is performing activities provided by the state in the public interest.

However, when the municipality engages in activities not of a governmental character but,

> . . . voluntarily assumed — powers intended for the private advantage and benefit of the locality and its inhabitants — there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an

[13] Id. §53.24, at 172-173. See also Lawyer, Birth and Death of Governmental Immunity, 15 Clev.-Mar. L. Rev. 529 (1966).

[14] McQuillan §53.01a, at 104-105.

[15] Id. §53.24, at 167-181. See also cases cited therein.

[16] Id. §53.23, at 160-167. See also cases cited therein.

[17] Gillies v. City of Minneapolis, 66 F. Supp. 467 (D. Minn. 1946); Stang v. City of Mill Valley, 38 Cal. 2d 486, 240 P.2d 980 (1952); Powell v. Village of Fenton, 240 Mich. 94, 214 N.W. 968 (1927).

individual or private corporation exercising the same powers for a purpose essentially private would be liable.[18]

Included in those functions found to be proprietary in nature are the construction and maintenance of municipal water[19] and light plants, garages, and parking facilities, and the general management of municipal property. While performing in its proprietary capacity, a city has been held liable in tort for the failure of its employees or agents to exercise ordinary care.[20]

A related approach to the governmental–proprietary distinction is one which distinguishes between legislative, judicial, or discretionary duties and ministerial functions. No tort liability is incurred by the municipality because of its failure to perform, or negligent performance of, those legislative and judicial functions which are inherently discretionary, such as the failure to make and enforce appropriate laws and regulations or errors by courts in rendering their judgments.[21] However, where the city acts in its ministerial capacity, by making improvements and maintaining normal operations, there is no special discretion or judgment to be exercised but only a mere obedience by the city in performing defined duties for the local community, and therefore the municipality is liable for its negligent acts and omissions.[22] Moreover, although a municipality's duty may be legislative or judicial before it begins performance, once the city undertakes the execution of such duty, jurisdictions have frequently determined that it becomes absolute, and the municipality, having no further discretion, acts ministerially.[23]

The initial step taken by the courts in extending the doctrine of sovereign immunity to political subdivisions occurred in England in *Russell v. Men of Devon*.[24] Here the population of an unincorporated county was held to be immune from suit for damages caused by a defective bridge. The principal ground for decision was the lack of corporate funds from which satisfaction could be obtained, and the court would not allow the inhabitants of an entire county to be held liable.

Acceptance of the doctrine expressed in *Russell* and its application to incorporated cities was adopted in the United States, but develop-

18 Galveston v. Posnainsky, 62 Tex. 118, 127 (1884). See also McQuillan §53.23, at 164-165.

19 United States v. City of Minneapolis, 68 F. Supp. 585 (D. Minn. 1946); Helz v. City of Pittsburgh, 387 Pa. 169, 127 A.2d 89 (1956); Gordon v. City of Medford, 331 Mass. 119, 117 N.E.2d 284 (1954); Cole Drug Co. v. City of Boston, 326 Mass. 199, 93 N.E.2d 556 (1950); Oakes Mfg. Co. v. City of New York, 206 N.Y. 221, 99 N.E. 540 (1912).

20 City of Phoenix v. Anderson, 65 Ariz. 311, 180 P.2d 219 (1947).

21 McQuillan §§53.33, 53.34, at 205-207. See also cases cited therein.

22 Id. §53.33, at 204-205.

23 Ibid.

24 100 Eng. Rep. 359 (1788).

ment of the governmental – proprietary distinction did not occur until later.[25] During the first half of the nineteenth century in this country, judicial opinions in cases concerning tort actions against municipalities relied upon basic tort law as to whether a duty was owed by the city to the aggrieved individual.[26] These decisions did not follow the distinctions between governmental and proprietary functions which had begun to develop with *Bailey v. Mayor of New York*.[27] With the advent of the industrial revolution and the increasing concentration of urban populations, the fear of municipal irresponsibility and an increased financial burden from suits against the city for its tortious conduct influenced the courts to apply the doctrine of municipal tort immunity, in the absence of legislative restriction, and adopt the previously ignored distinctions.

It is submitted that, in applying the doctrine of municipal tort immunity to the facts of *Reynolds*, the Supreme Judicial Court should have given more attention to reconciling the governmental function of providing fire protection with the proprietary duty of establishing a waterworks system. Instead of finding that the city was not liable merely because the intended use of the water was for a governmental purpose, the Court should have placed more emphasis upon the location of the defect and the capacity in which the city was functioning at the time of its tortious conduct. Some of the decisions relied upon in *Reynolds* involved situations in which water damage occurred through negligent repair or maintenance of the city's waterworks system.[28] Hence the city has been held liable on the ground that, in supplying water for local domestic purposes for profit, the city was performing a proprietary, or commercial, function. One of these situations necessitated joint consideration of governmental and proprietary functions, that is, situations in which water is supplied for use by the community both for private consumption and public fire protection. Only in *Cole Drug Co. v. City of Boston*[28a] did the need for such a consideration arise. In that case, the Court found the city liable for water damage occurring after the city had reasonable time in which to shut off the flow of water from a lateral pipe supplying a fire hydrant used exclusively to extinguish fires. Water was supplied through the waterworks system for both domestic use and for the extinguishment of fires, and the hydrant and lateral pipe were installed and maintained through the city's taxing power. The Court reasoned that since the city's negligence was related to the maintenance of the

[25] Note, Municipal Liability for Torts of Firemen, 31 Albany L. Rev. 256, 257 (1967).

[26] Hutson v. Mayor of New York, 9 N.Y. 163 (1853); Mayor of Albany v. Cunliff, 2 N.Y. 165 (1849); Martin v. Mayor of Brooklyn, 1 Hill 545 (N.Y. 1841).

[27] 3 Hill 531 (N.Y. 1842).

[28] Gordon v. City of Medford, 311 Mass. 119, 117 N.E.2d 284 (1954); Cole Drug Co. v. City of Boston, 326 Mass. 199, 93 N.E.2d 556 (1950).

[28a] 326 Mass. 199, 93 N.E.2d 556 (1950).

waterworks system not being used to extinguish a fire, the municipality was liable. The Court thus inferred that no liability would befall the city, had the need for the water been to extinguish a fire.

The immunity from tort liability conferred upon the city for the negligent acts of its agents or employees while engaged in providing fire protection is one of the most generally accepted areas to which the doctrine of municipal tort immunity is applied.[29] The courts are reluctant to limit the use of the doctrine where an obvious governmental duty to the public exists. Nevertheless, even in the areas of fire and police protection, the courts and the legislatures have found it necessary to restrict the doctrine's application.[30] Moreover, in admiralty law, the courts have consistently refused to invoke the doctrine of tort immunity even where the negligence of the municipality occurs while performing its governmental function of providing fire protection.[31] It can be seen then that the city is not absolutely immune from liability for any tortious conduct connected either directly or indirectly with fire protection.

The Court, relying strongly on *Tainter* for its determination of *Reynolds,* emphasized that fire protection is a governmental function. Apparently the Court did not recognize the full significance of the fact that the damage occurring in *Reynolds,* as in *Tainter,* did not result from the tortious acts of the firemen in performing the public duty of attempting to extinguish the conflagration, but rather from the negligence of the city, in its corporate capacity, to maintain its waterworks system. The negligent act had already occurred before the firemen arrived on the scene, and it manifested itself only when an attempt was made to extinguish the fire.

In considering the establishment and maintenance by a municipality of a waterworks system, it is generally accepted that the city acts in its proprietary capacity by benefitting the local community and performs ministerial duties in operating the system.[32] Even where the initial capacity of the city in accepting plans for the establishment of such a

29 Thon v. City of Los Angeles, 203 Cal. App. 2d 186, 21 Cal. Rptr. 398 (1962); Delaware Liquor Store v. Mayor and Council of Wilmington, 45 Del. 461, 75 A.2d 272 (1950); King v. City of San Angelo, 66 S.W.2d 418 (Tex. Civ. App. 1933); Abihider v. City of Springfield, 277 Mass. 125, 177 N.E. 818 (1931); Frederick v. City of Columbus, 58 Ohio St. 538, 51 N.E. 35 (1898); Wilcox v. City of Chicago, 107 Ill. 334 (1883); Robinson v. City of Evansville, 87 Ind. 334 (1882); Wheeler v. City of Cincinnati, 19 Ohio St. 19 (1869).

30 Ragans v. City of Jacksonville, 106 So. 2d 860 (Fla. 1965); City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962); Matlock v. New York Hyde Park Fire District, 16 App. Div. 2d 831, 228 N.Y.S.2d 894 (1962); Mich. Stat. Ann. §3.996(105) (1969); N.Y. Gen. Munic. Law §50-c (McKinney 1965); Pa. Stat. Ann. tit. 75, §623 (Purdon 1960).

31 Workman v. New York City, 179 U.S. 552 (1900).

32 City of Waco v. Busby, 396 S.W.2d 469 (Tex. Civ. App. 1965); Gordon v. City of Medford, 331 Mass. 119, 117 N.E.2d 284 (1954); Cole Drug Co. v. City of Boston, 326 Mass. 119, 93 N.E.2d 556 (1950). See also McQuillan §53.09, at 129.

public benefit is considered discretionary, when the municipality enters into this area it acts ministerially while operating and maintaining the waterworks system and is liable if it does so negligently.[33]

Where water damage has occurred from defects in a waterworks system providing water for both community benefit and prevention of fires, courts have usually found the municipality liable, even where, as in *Cole Drug,* the defect was connected with fire hydrants used exclusively for fire purposes.[34] On the other hand, courts have applied municipal tort immunity where damage is caused by a fire which the city cannot extinguish due to an inadequate supply of water, though the defects causing the lack of water are also inherent in the same waterworks system.[35] As in *Reynolds,* the courts emphasize fire protection where the facts are not related to the negligence of firemen in performing their duties or in utilizing fire fighting apparatus for the maintenance of which they are solely responsible. Rather, the facts concern the negligence of the city in failing to adequately maintain its waterworks system and fire hydrants. Any subsequent damage occurring as a result of this negligence is irrelevant.

In *City of Richmond v. Virginia Bonded Warehouse Corp.,*[36] the court considered the capacity in which the city was performing at the time of its negligent conduct and not the purpose for which the water was used. There, the municipality was held liable for the flooding of plaintiff's warehouse due to the negligence of a municipal employee in failing to shut off water leading to plaintiff's sprinkler system. The court stated that the public could benefit from the use of sprinkler systems and that there was no charge for the water used. Nevertheless, the court went on to explain that since the operation of a water department is a private, or proprietary, right, although water may be utilized also to extinguish fires, the city is responsible for the negligent acts, not of its firemen, but of its employees of the water department.[37]

The previously noted distinction drawn in most jurisdictions concerning either the purposes for which the water was intended or the form of the subsequent damage (the governmental – ministerial distinction) is susceptible to attack when the damage results solely from negligent operation of the system. In *Stang v. City of Mill Valley,*[38] the

33 McQuillan §53.38, at 218.

34 Cole Drug Co. v. City of Boston, 326 Mass. 119, 93 N.E.2d 556 (1950); Boyle v. City of Pittsburgh, 145 Pa. Super. 325, 21 A.2d 243 (1941); Lober v. Kansas City, 74 S.W.2d 815 (Mo. 1934), *aff'd,* 339 Mo. 1087, 100 S.W.2d 267 (1936); City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927); Aschoff v. City of Evansville, 34 Ind. App. 25, 72 N.E. 279 (1904); Dunstan v. City of New York, 91 App. Div. 355, 86 N.Y.S. 562 (1904); City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N.E. 386 (1903).

35 See note 9 *supra.*

36 148 Va. 60, 138 S.E. 503 (1927).

37 Id. at 72-73, 138 S.E. at 507.

38 38 Cal. 2d 486, 240 P.2d 980 (1952).

plaintiff's house was partially destroyed by a fire due to the failure of the city to maintain its waterworks system. The fire hydrant adjacent to plaintiff's property became clogged with refuse, and it was impossible for the fire department to obtain a sufficient quantity of water from the hydrant to extinguish the fire. The plaintiff brought his action under the Public Liability Act,[39] which established the liability of municipalities for certain misconduct in the performance of governmental functions. The majority of the court reasoned that the statute applied only to situations where the damages were caused through the *use* of the defective property which proximately caused the damage.[40] The court, in denying relief, restricted itself to the governmental duty to provide fire protection and reasoned that where mere nonfeasance occurs, no liability attaches to the city. However, the negligence which proximately caused the loss was not related to the equipment maintained solely by the fire department, but to maintenance of the city's waterworks system. The damage was caused not by the nonfeasance of the firemen, but by the misfeasance of the municipality while acting in its proprietary capacity. Therefore, it is submitted that the city should not have been immune from liability.

Another distinction drawn by many courts is that a private water company supplying the city with water for both domestic use and the extinguishment of fires is not liable to a private citizen whose property is destroyed by fire due to the water company's negligence in not providing an adequate amount of water.[41] The rationale is that a duty to supply water is owed only to the city and not to the private citizen, and if such a duty does exist, the water company is immune from liability where the damage occurs while it was performing a governmental function of the city. However, in a minority of cases finding the water company liable to a private citizen, the courts emphasize that the water company obtains payment by the city through taxes levied upon its inhabitants, and the water company has use of the streets and hydrants for its own purposes. The company thereby assumes a duty to individual taxpayers to supply water for the extinguishment of fires, and will be held liable for the breach of that duty.[42] The latter view seems more equitable since the protection of the taxpayer is the purpose for the contract between the city and the water company, and any injury to this taxpayer through the negligence of a

39 Cal. Stats. 1923, c. 328, §2. Stats. 1949, c. 81, §1, relating to liability of local agencies for injuries from dangerous or defective conditions of public property, was derived from Stats. 1923, c. 328, §2, and was repealed by Stats. 1963, c. 1681, §18. For present statute, see Cal. Govt. Code §§835 et seq. (West 1966).

40 38 Cal. 2d 486, 489, 240 P.2d 980, 982 (1952).

41 Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Trustees of Jennie DePauw Memorial Methodist Episcopal Church v. New Albany Waterworks, 193 Ind. 368, 140 N.E. 540 (1923).

42 Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d 875 (1964); Mugge v. Tampa Waterworks Co., 52 Fla. 371, 42 So. 81 (1906); Fisher v. Greensboro Water Supply Co., 128 N.C. 375, 38 S.E. 912 (1901).

private water company should be actionable. Where the negligence occurs in the water company's duty to supply water, for which it is paid irrespective of its intended use, governmental immunity should not be extended to protect the private company. Moreover, in those minority decisions which do find the private water company liable to the individual citizen for an inadequate supply of water, even where no privity of contract exists, liability is based upon a duty owed each citizen to perform non-negligently. Hence no reason is apparent as to why the city should not also be held liable when it performs the same duty itself.

The opinion of Justice Musmanno in *Malter v. South Pittsburgh Water Co.*[43] seems to present a reasonable approach in reconciling the conflict between the governmental function of fire protection and the proprietary duty of operating a waterworks system. The case involved an action against a water company and a borough, or municipal corporation, for loss of plaintiffs' home by fire when the city's fire hydrant became rusted, decayed and clogged, preventing an adequate supply of water to extinguish the fire. Justice Musmanno held that the homeowners' complaint stated a sufficient cause of action on the theory of the borough's negligence in failing to discharge its proprietary duty to supply sufficient water. Therefore, the borough could also be held liable, along with the water company, for the latter's negligence in operating its waterworks system. He explained that

> [t]he test to be applied is not the form of the damage but the processes of the negligence which led to the damage. Did the act of negligence occur during the performance of a governmental or proprietary function? Once it is determined that the negligence occurred while the municipality was engaged in a proprietary function, liability inevitably attaches. To hold otherwise would lead to the incongruous result that liability would attach in every case where the negligence involved the maintenance of fire hydrants except where fire follows the negligence.[44]

Justice Musmanno refused to draw any distinctions which would apply municipal tort immunity, but rather he examined the location and time at which the negligent act occurred and found that the city had acted in its proprietary capacity. Subsequent damage was not determinative of the municipality's liability. In concluding, he stated that

> . . . [t]he allegations support a finding that the defendants had breached a duty owed to the plaintiffs to use reasonable care in the operation and maintenance of the water system which they erected and that the breach of that duty was the proximate cause of the plaintiffs' loss.[45]

[43] 414 Pa. 231, 198 A.2d 850 (1964).
[44] Id. at 237, 198 A.2d at 853.
[45] Id. at 238, 198 A.2d at 853.

The opinion in *Malter* was followed by the Supreme Court of Ohio in *Hall v. City of Youngstown,*[46] involving the death of the plaintiff's child in a fire which destroyed his home. The firemen were impeded in their attempts to put out the blaze because the nearest fire hydrant was inoperative due to the negligent failure of the city to maintain that hydrant in good operating condition. The court held that if the negligence of the municipality was the proximate cause of the child's death, it could not escape liability through the defense of immunity. After citing *Malter* and refusing to follow past decisions finding no liability,[47] the court stated that

> [i]t is a rather elemental conclusion that the utility of a hydrant stems from its connection with a water supply system. Its primary use is to make immediately available a supply of water for the extinguishment of fires. That supply is accessible only because piped to the hydrant area through water mains. The problem in this case, as we see it, is the question of where water supply (proprietary in nature) ends, and fire fighting (governmental in nature) begins. We believe it to be at the end of the hydrant nozzle.[48]

In examining the specific factual situations, both the Pennsylvania (*Malter*) and Ohio (*Hall*) Supreme Courts, unlike the Supreme Judicial Court of Massachusetts in *Reynolds,* realized that the negligence involved did not originate with the city's duty to provide fire protection but rather in the maintenance of its waterworks system, a proprietary function to which the doctrine of municipal tort immunity does not apply. The distinctions made by many courts, and by the Supreme Judicial Court in *Reynolds,* among the uses for which the water was intended seem arbitrary. Where the negligence proximately causing the damage occurs in the maintenance and operation of a city's waterworks system, municipal tort immunity should not be allowed, irrespective of the form of the resulting damage. If the municipality is held liable for water damage caused by tortious conduct related to its waterworks system, reason dictates that it should be liable for damage by fire that is the direct result of such conduct.

The rationale proffered by the courts in *Malter* and *Hall* had already been applied almost seventy-five years ago in *Lenzen v. New Braunfels,*[49] although it has not been followed in later Texas decisions.[50] There the city negligently permitted its waterworks system to fall into disrepair and allowed water in a standpipe to become so low as to afford insufficient pressure to supply water. The city of New Braunfels voluntarily maintained a system of waterworks for its own advantage

46 15 Ohio St. 2d 160, 239 N.E.2d 57 (1968).
47 Id. at 164-165, 239 N.E.2d at 60.
48 Id. at 165, 239 N.E.2d at 60.
49 13 Tex. Civ. App. 335, 35 S.W. 341 (1896).
50 See, e.g., Butterworth v. City of Henrietta, 25 Tex. Civ. App. 467, 61 S.W. 975 (1901).

and profit, which system supplied water for the extinguishment of fires. The Court of Civil Appeals held the city liable to an inhabitant, who with his taxes had paid for the use and benefit of said waterworks, for the consequent destruction of his property. The court reasoned that the operation of the waterworks was not a governmental function, but rather was performed by the city in its corporate capacity for the benefit of itself and its inhabitants. After an exhaustive discussion, the court queried that

> . . . [i]f municipal liability is admitted, which undoubtedly it is in cases of damages sustained by reason of negligence in the control and management of streets, sewers, drains, docks, bridges, gas and electric works, and other corporate property used for the local advantage of the city, what reasoning upon principle may be advanced that will distinguish these cases which so establish liability upon principles of common law, from the case at bar?[51]

It would seem that the Supreme Judicial Court in *Reynolds* should have taken notice of the trend in many states to abrogate, or at least restrict, the doctrine of municipal tort immunity as part of a continuing movement to do away with sovereign immunity.[52] The Supreme Court of Florida, in *Hargrove v. Town of Cocoa Beach,* stated:

> . . . The modern city is in a substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism.[53]

Accepting this view, the Florida court, along with other jurisdictions, has recognized the necessity of modifying the prevailing doctrine of municipal tort immunity as applied to actions for negligence in the performance of public functions.

The arguments for retention of the doctrine, though apparently

[51] 13 Tex. Civ. App. 335, 339-340, 35 S.W. 341, 342 (1896).

[52] Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Stone v. State Highway Commn., 93 Ariz. 384, 381 P.2d 107 (1963); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Spanel v. Moundview School Dist., 118 N.W.2d 795 (Minn. 1962); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Molitor v. Kaneland Community Unit Dist. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Kamau v. Hawaii County, 41 Hawaii 527 (1957); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957). See also Note, Governmental Immunity from Tort Liability: Pennsylvania's Trend Toward Abolition, 4 Duquesne U.L. Rev. 441 (1966); Note, Torts — Sovereign Immunity — Effect of Insurance, 43 Ore. L. Rev. 267 (1964); McQuillan §§53.03, 53.24a, at 111, 179.

[53] 96 So. 2d 130, 133 (Fla. 1957).

compelling to many courts, are open to criticism. The strongest argument involves the nature and scope of a municipality's functions. Public agencies engage in activities far beyond those of private agencies, affecting a much larger segment of the public. These agencies are not free to discontinue operations due to high costs or the prohibitively high risk of liability. Hence, the individual, rather than the public, should arguably bear the burden of loss. Such an argument had a sound basis in the past when cities and towns obtained little money through taxes, could not withstand heavy claims, and were unincorporated and susceptible to unlimited liability. However, although cities remain financially unstable, their losses through tort claims for their negligence can now be passed on to the private citizen in the form of taxes, or be covered by liability insurance. In many cases the risk of loss should not be borne by an innocent individual, such as the Reynolds Boat Company, who suffers extreme hardship because of the city's negligence. That segment of society which benefits from the activity that produces the injury is, firstly, in a better financial position to bear the loss; secondly, since the municipal corporation is merely a manifestation of the local community, every inhabitant should contribute toward reimbursing another citizen who is injured through the city's negligence. Perhaps legislative action could provide payment to an injured party. Such provisions could statutorily limit the amount collectible from the city to prevent an undue drain on the municipality's treasury. If a greater likelihood of injuries exists because of the extensive activities of government, then, where possible, compensation of tort victims should be a justifiable and expected cost of government. The probability of increased governmental expenditures might serve as an incentive in improving responsibility and efficiency of city officials and employees.

A municipality that is subject to liability for its tortious acts can minimize any consequent loss through insurance. Accompanying the restriction of municipal tort immunity by some courts has been, alternatively, the establishment by several legislatures of provisions enabling municipalities to obtain liability insurance.[54] Where such insurance is made available, courts have held the municipality liable on the basis that the procurement of insurance is a waiver of governmental immunity.[55] Even where liability insurance is not provided by the legislature, the courts, in restricting certain areas of immunity,

[54] Fla. Stat. Ann. §240.28 (1961); Mich. Stat. Ann. §3.996(109); Wyo. Stat. §§15.1-15.4 (1965). Massachusetts does not as yet have provisions for liability insurance to protect municipal corporations for negligence while performing governmental functions; it presently has G.L., c. 40, §5(1), which allows municipalities to purchase liability insurance to indemnify their employees who are liable in tort actions.

[55] Bailey v. City of Knoxville, 113 F. Supp. 3 (E.D. Tenn. 1953), *aff'd*, 222 F.2d 520 (6th Cir. 1955); Marshall v. City of Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963); Beach v. City of Springfield, 32 Ill. App. 2d 256, 177 N.E.2d 436 (1961).

could supply the necessary impetus to obtain the passage of these laws.

Some might retort that it is the individual's duty to protect himself through his own insurance. However, insurance is sometimes difficult to obtain in certain high risk situations. A person unable to obtain fire insurance on his property must either suffer total loss or close down his business. Where the city is attempting to rebuild its impoverished areas, insurance protection provided to owners of property would encourage them to remain and contribute to such redevelopment.

With the increased use of liability insurance there has developed a general acceptance both of the social and economic advantages of risk-spreading and

> . . . of the concept that economic loss due to accidental injury should be distributed over large groups rather than falling catastrophically upon the individual. Then again, the whole thrust of this century's social, economic, and political philosophy has been toward the development and protection of individual security.[56]

Supporting this trend, the Appellate Court of Illinois, in *Thomas v. Broadlands Community Consolidated School District 201,* stated:

> The whole doctrine of governmental immunity from liability for torts rests on a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic the medieval absolutism supposed to be implicit in the maxim, "the king can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.[57]

In fact, in *Williams v. City of Detroit,*[58] Justice Edwards, favoring reversal of the lower court's dismissal of the action on the grounds of sovereign immunity, acknowledged that the Michigan courts had taken judicial notice of the protection available to the municipality by means

56 Lloyd, The Rising Tide of Liability, 17 Syracuse L. Rev. 127 (1965).

57 348 Ill. App. 567, 574, 109 N.E.2d 636, 640 (1952).

58 364 Mich. 231, 111 N.W.2d (1961). The Supreme Court of Michigan affirmed, by an equally divided court, the Michigan Circuit Court's granting of a motion to dismiss the suit. Four justices favored reversal of the lower court on the basis that sovereign immunity should be abolished prospectively and for the instant case. Three affirming justices voted to follow stare decisis and retain the doctrine. Justice Black, the fourth affirming justice, voted to abrogate the doctrine only prospectively and limited his decision to the question of municipal immunity, not sovereign immunity in general, stating that "like causes of action arising hereafter will, unless and until the legislature rises and ordains otherwise, be treated in the courts of Michigan as typical negligence cases." Id. at 287, 111 N.W.2d at 18.

of liability insurance. He took exception to the approach of the affirming justices, who applied sovereign immunity to the case while stating that the doctrine should be abrogated.[59]

Another argument, which was also mentioned by the Supreme Judicial Court in *Reynolds,* is that any action to be undertaken in restricting municipal tort immunity must be accomplished by the legislative, not the judicial, branch.[60] However, the decisions in *Russell v. Men of Devon*[61] and in subsequent cases establishing municipal tort immunity have been based upon court-made law. It is submitted that, since the doctrine is of judicial origin, legislative action to change it is not mandatory. Courts have on numerous occasions announced their right to abrogate or modify municipal tort immunity. They have rejected arguments that the doctrine, although of judicial origin, has become so firmly entrenched in our public policy that only the legislature can change it.[62] If a court is hesitant to abolish municipal tort immunity, it could, by exercise of its equity power, restrict the scope of the doctrine. This may lead to a re-examination of the doctrine by the legislative branch, and, as has been the case in several jurisdictions, result in passage of provisions for comprehensive liability insurance.[63] Such initiative by the courts in Massachusetts could well lead to the expansion of the existing liability insurance statutes.

Even where it is accepted that the courts have the power to restrict the application of municipal tort immunity, the argument that precedent must control is urged. However, courts have justified their decisions not to apply municipal tort immunity by noting the continual sociological and economic changes which invariably alter our system of priorities and necessitate modification of past rules of law. Hence Justice Edwards' statement in *Williams:*

> But stare decisis in its most rigorous form does not prevent the courts from correcting their own errors, or from establishing new

59 Id. at 259, 111 N.W.2d at 24.

60 1970 Mass. Adv. Sh. 985, 987, 260 N.E.2d 176, 178. This view has also been taken by courts of other jurisdictions. See, e.g., Fette v. City of St. Louis, 366 S.W.2d 446 (Mo. 1963); Kirksey v. City of Fort Smith, 227 Ark. 630, 300 S.W.2d 257 (1957).

61 100 Eng. Rep. 359 (1788).

62 Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Molitor v. Kaneland Community Unit Dist. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). See also Note, Governmental Immunity from Tort Liability: Pennsylvania's Trend Toward Abolition, 4 Duquesne U.L. Rev. 441 (1966).

63 Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457 (1961); Molitor v. Kaneland Community Unit Dist. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). See also Vanlandingham, Local Governmental Immunity Re-examined, 61 Nw. U.L. Rev. 237 (1966); Note, Illinois Tort Claims Act: A New Approach to Municipal Tort Immunity in Illinois, 61 Nw. U.L. Rev. 265 (1966); Note, Sovereign Immunity: Will Ohio Follow Michigan's Lead?, 31 U. Cin. L. Rev. 307 (1962).

> rules of case law when facts and circumstances of modern life have rendered an old rule unworkable and unjust.[64]

Moreover, Justice Musmanno, indicating his approval of departing from stare decisis to attain an equitable result, explained:

> A rule that has become insolvent has no place in the active market of current enterprise. When a rule offends against reason, when it is at odds with every precept of natural justice, and when it cannot be defended on its own merits, but has to defend alone on a discredited genealogy, courts not only possess the inherent power to repudiate, but, indeed, it is required by the very nature of judicial function, to abolish such a rule.[65]

It seems evident that the Supreme Judicial Court in *Reynolds* could have taken several other approaches than it did in deciding whether the doctrine of municipal tort immunity applies where the city is negligent in failing to supply an adequate amount of water to extinguish a fire. It is submitted that had the Court remanded the case for trial by denying municipal immunity to the city on the basis either that the negligence occurred while the municipality was performing a proprietary function, or that the doctrine itself ought to be re-examined, an inequitable outcome might have been avoided and a step forward taken toward abolition of an outdated doctrine.

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[64] 364 Mich. 231, 256, 111 N.W.2d 1, 23 (1961).
[65] Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 513, 208 A.2d 193, 206 (1965).