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Chapter 15: Land Use Planning Law

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C H A P T E R 1 5

Land Use Planning Law

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

A. ZONING

§15.1. **Educational uses.** In an appeal from a petition in the Land Court¹ for a ruling on the validity of a Cambridge zoning by-law as it applied to the petitioner, the Supreme Judicial Court in *Radcliffe College v. City of Cambridge*² had an opportunity to review and discuss the exemption from zoning by-laws afforded to *public* educational institutions. General Laws, Chapter 40A, Section 2, provides “. . . that no ordinance or by-law which prohibits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid.” There was no dispute that Radcliffe College is a public educational institution and that its new library will be used for educational purposes. At issue was whether the ordinance, which requires for off-street parking one car space for each 1000 feet of gross floor area, is valid as applied to the college. Stated more generally, the question was whether the broad language of General Laws, Chapter 40A, Section 2, barred the imposition in a zoning ordinance of the parking requirement, however appropriate and desirable it might be. The Court found the ordinance valid, holding that it did not prohibit the use of the land for educational purposes because the provision of parking spaces, similar to the provision of room and board for students, instructors and maintenance personnel, was a secondary function incidental to the main educational purpose. The Court, recognizing the limited space available to the college in Cambridge, suggested that as other college land is developed in this particular area and the space available for parking is used for building, the City of Cambridge may amend its zoning ordinance to authorize the college to use its land for its primary educational function. Even if no change in the ordinance is adopted in the future the situation may develop over a period of time in such a way that no direct confrontation between the Cambridge ordinance and General Laws, Chapter 40A, Section 2, may ever occur.

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Mr. D'Agostine wrote Sections 15.1 through 15.24 of the chapter, the balance being written by Mr. Huber.

§15.1. ¹ Pursuant to G.L., c. 185, §1(j ½); c. 240, §14A.

² 1966 Mass. Adv. Sh. 661, 215 N.E.2d 829.

§15.2. **Trailers.** In *Lupo v. Town of Stow*¹ the Supreme Judicial Court upheld a ruling of the Land Court in a proceeding under General Laws, Chapter 240, Section 14A, that campers, travel trailers, mobile camp units and the like used by campers for sleeping quarters, eating and cooking on petitioner's public camp ground were in violation of the local by-law. The law provided: "No trailer shall be moved onto any lot within the town for use as a dwelling." The conclusion necessarily followed even though the facilities were not permanent. The Court also noted: "No question has been presented as to the validity of this exercise of the zoning power . . .," which leaves open the question of the right of the towns to prohibit the parking of the ever increasing influx of campers and travel trailers in vacation areas.

§15.3. **Interpretation of zoning laws.** In *Harrison v. Building Inspector of Braintree*,¹ in a petition for mandamus to enforce a zoning by-law, the Supreme Judicial Court held that the owner of land in an industrial district adjacent to a residential district may not use land in the adjacent residential zone as access roadways for its industrial plant. The petitioners argued that, when the rear of their land was rezoned industrial, the only access to it being through residential land, there was a rezoning by implication of the residential land. Then they argued that the zoning must include industrial access to the rear land, as any other interpretation would mean that their rear land would not be accessible for the present industrial use of a factory that had been built and was in operation, employing several hundred employees. The Court held: "There is no basis in the statute or in the nature of zoning for adding uses by implication to one zone to make reasonable the classification of another zone."² The Court, recognizing the problem caused by its decision, suspended the effective date of its decision for three months to allow "orderly municipal action" to provide legal access. This presumably would mean a rezoning, at least in part, of the front land. This case points up the need for a detailed and exhaustive study of the zoning laws before commercial property is developed. The courts can hardly be expected to exceed their remedial jurisdiction and thus in benevolence to rectify one's folly.

The Court was again faced with the interpretation of a zoning by-law in the case of *Beechwood Acres, Inc. v. Town of Hamilton*,³ in which the zoning by-law established zone boundaries by referring solely to the zoning map. The Court held that although a zoning by-law should define zone boundaries by metes and bounds, a mere reference to a zoning map was adequate in this case since the zoning map was sufficiently specific as to scale and fixed points to permit ascertainment with certainty of the location of the zoning boundaries. It is important that the Court upheld a zoning law establishing zoning boundaries by

§15.2. ¹ 1966 Mass. Adv. Sh. 429, 215 N.E.2d 88.

§15.3. ¹ 1966 Mass. Adv. Sh. 597, 215 N.E.2d 773.

² 1966 Mass. Adv. Sh. at 600, 215 N.E.2d at 775.

³ 1966 Mass. Adv. Sh. 715, 216 N.E.2d 94. See also §15.15 *infra*.

reference to a zoning map, this being historically a common practice of a considerable number of cities and towns.

§15.4. **Spot zoning.** In the case of *Fiorenza v. Town of Arlington*¹ the Supreme Judicial Court was faced with an amendment that changed the zoning of 12,000 square feet of land from "Residence B" to "Residence C." The amendment presumably would authorize the construction of an apartment house on the tract. The Court easily upheld the lower court's decision that the amendment was clearly spot zoning and invalid.

In *Mahoney v. Commissioner of Public Works of Lowell*² the Court, again faced with a zoning amendment changing the classification of a small one-owner locus from residential to industrial, affirmed an order that upheld its validity. The Court found as a fact that the locus had taken on substantially the same characteristics as the non-residence districts surrounding it even though nominally the locus was in a residence district. In issue was the legality of a zoning amendment which affected only the property of VFW Post 662; the amendment rezoned the premises from general residential use to industrial use. The Court stated that, although the zoning of a particular parcel owned by a single individual or entity might at first glance be spot zoning, other considerations were pertinent. For example, the property was at the edge of a general residence district and was bounded on the remaining three sides by business and industrial districts. Furthermore, the Court found that the local legislature could properly determine that the property had taken on a non-residential character by virtue of its surroundings and could be fairly incorporated into one of the adjacent non-residential zones. This case is a good example of the necessity in zoning amendment cases of presenting a detailed description not only of the locus but of all the surrounding land. Failure to do so may cause the apparent creation of an "island" zone which the courts will necessarily find to be spot zoning.

§15.5. **Variances.** In *Aronson v. Board of Appeals of Stoneham*¹ the Supreme Judicial Court overturned the grant of a variance by the Board of Appeals, after the grant was upheld by the Superior Court. This case is an excellent example of how the Court will review the facts and draw from them all reasonable conclusions necessary to determine whether all the statutory prerequisites for the granting of a variance have been met. The property owner applied for a variance from the side-yard restriction in order to build a porch for an invalid child, contending that the proposed location was the only feasible one. He also proved that his house was constructed by a prior owner in violation of the side-yard requirements but that this violation was not brought to his attention until sometime after he purchased the property. The Court, notwithstanding the Board's findings that all the

§15.4. ¹ 349 Mass. 771, 211 N.E.2d 342 (1965).

² 1966 Mass. Adv. Sh. 994, 218 N.E.2d 122.

§15.5. ¹ 349 Mass. 539, 211 N.E.2d 228 (1965).

necessary statutory elements for a variance existed, held that the evidence did not support these findings and thus the grant of the variance. The existing zoning violation, even though not attributable to the present owner, was not a condition "especially affecting such parcel, but not affecting generally the zoning district in which it is located;" a zoning violation cannot be made the basis upon which this variance requirement can be met. The Court also found that the Superior Court, although it made a general finding of hardship, did not make a specific finding to this effect. Even if it had done so, however, the evidence as to an invalid child was insufficient to establish the type of hardship contemplated by the statute. In any event, the Court finally held, when a proposed variance would extend an existing violation on a lot, a determination may not be made under the statute that "relief may be granted without nullifying or substantially derogating from the intent or purpose of such by-law."

§15.6. Public utilities: Exemption. In *Town of Framingham v. Department of Public Utilities*¹ the Supreme Judicial Court was again confronted with the exemption of the New York Central Railroad from the zoning laws of the town of Framingham. This exemption had originally been denied in *New York Central R.R. v. Department of Public Utilities*² because inadequate findings of public necessity were made by the Department of Public Utilities. In the present case the Court upheld a decision of the Department exempting land owned by the New York Central Railroad from operation of the Framingham zoning by-law, thus permitting its use as a terminal freight yard. The Court held that sufficient findings of fact had been made.

The Court set forth the factors to be considered in determining whether said land "is reasonably necessary for the convenience or welfare of the public"³ as follows: (a) the extent of the usefulness of the proposed facility to shippers, manufacturers, motor vehicle distributors and consumers; (b) the suitability of the locus for the proposed facility and for the other uses; (c) the probable effect of the facility upon the gross and net revenues of the railroad, and upon the railroad's ability to continue to perform its intrastate and interstate public functions; (d) the effect of the facility upon highway congestion; (e) the possibility that injury to abutting owners can be minimized by proper screening by trees and otherwise; and (f) the relative advantages and disadvantages from the standpoint of public welfare and convenience.

§15.7. Special permits. In *Slater v. Board of Appeals of Brookline*¹ the Supreme Judicial Court upheld with modification an order of the Superior Court, which had annulled the decision of the Board of

¹ 1966 Mass. Adv. Sh. 989, 218 N.E.2d 89.

² 347 Mass. 586, 205 N.E.2d 3 (1964), noted in 1964 Ann. Surv. Mass. Law §§13.8, 14.10, 16.3.

³ As required by G.L., c. 40A, §10.

¹ 350 Mass. 70, 213 N.E.2d 394 (1966).

Appeals denying a special permit. The by-law gave the Board authority to issue special permits for residential parking areas on lots that were located within 400 feet of and within the same zoning district as the lots whose residents were to be served. The conditions to be met under the by-law were in substance that (1) the location be appropriate, (2) the parking use not adversely affect the neighborhood, (3) it not constitute a nuisance or serious hazard, and (4) adequate and appropriate facilities be provided for proper operation of the facility. The applicant in the present case not only owned the lot upon which the apartment building was located, but also owned two other lots which were both suitable for parking. He applied for a special permit for parking on one of these lots. The Board denied the permit, even though it found that the premises described in the application met the requirements for a special permit under the by-law, on the ground that the applicant had other land, the second lot, which was more appropriately located for parking in relation to the apartment building to be served. The Court held that the refusal to issue the permit was improper since all requirements were met. A Board of Appeals may not refuse to issue a permit for reasons unrelated to the standards of the by-law.²

The Court modified the lower court's decree so as to permit the Board to make certain factual determinations as of the first instance, rather than have the court do so.

In *Medeiros v. Board of Aldermen of Woburn*³ the ordinance of the city of Woburn, enacted under the enabling provision of General Laws, Chapter 40A, Section 4, required, prior to the erection of a motor vehicle station, a special permit from the Board of Aldermen. The ordinance further provided that any such special permit issued must contain a set of conditions covering specifically, among other things, the hours of operation and mode of lighting. The Court sustained the lower court's decree which had held that the issuance of the special permit was invalid. The Board of Aldermen had not only failed to comply with the ordinance's requirement for setting out conditions for the permit but also had not complied with General Laws, Chapter 40A, Section 4,⁴ which requires the giving of notice to the planning board of Woburn prior to the hearing on the permit. This case reminds us forcefully that a petitioner must not only be concerned with his own statutory compliance but also he will be selfishly as well as unselfishly wise to become "his brother's keeper," in assuring that the Board strictly adheres to the law, both procedural and substantive, state and local.

§15.8. Amendments: Hearing procedure. In *Woods v. City of Newton*¹ the Supreme Judicial Court was confronted with the validity

² *Mahoney v. Board of Appeals of Winchester*, 344 Mass. 598, 183 N.E.2d 850 (1962), noted in 1963 Ann. Surv. Mass. Law §13.6.

³ 1966 Mass. Adv. Sh. 281, 213 N.E.2d 921.

⁴ G.L., c. 40A, § 4, incorporates c. 40A, §17.

§15.8. ¹ 1966 Mass. Adv. Sh. 957, 217 N.E.2d 728.

of a zoning amendment of the city of Newton. When this amendment was first before the Court,² the case was remanded on procedural grounds. After a hearing in Superior Court the case again came before the Supreme Judicial Court for consideration on various issues, one of them being the propriety of the adoption of an amendment to the zoning ordinance whereby certain land was rezoned from Residence C to Business AA. Under General Laws, Chapter 40A, Section 6, no zoning ordinance or by-law, including both original zoning and later amendments thereto, can be adopted by the local legislature, which in this case was the Board of Aldermen, until a public hearing thereon has been held by the Planning Board. The statute further provides that not only must a duly advertised public hearing be held by the Planning Board, but also that such a duly advertised public hearing has to be held before the local legislature or a committee thereof. The commonly accepted belief was that this required separate hearings, the first to be before the Planning Board. In the present case both the Planning Board and Aldermanic committee held a joint public hearing at the same time and place. The Court held that this procedure complied with the notice provision under General Laws, Chapter 40A, Section 6, since nothing in the statute prohibits joint meetings. The Court further stated that in some instances, as in the case in question, public convenience may be best served by joint meetings rather than the customary independent meetings of the respective boards.

§15.9. Procedure: Adoption of amendment. In *Longo v. City of Malden*¹ the Supreme Judicial Court upheld the validity of a 1946 zoning amendment placing the plaintiff's property in a residence zone. The report of the planning board described the area to be rezoned as an "industrial and apartment house district," when in fact it was a business district. In addition the board's "recommendation," pursuant to General Laws, Chapter 40A, Section 6, was merely a vote "to approve the request for rezoning." The Court noted that the statute only requires the planning board to consider a proposed rezoning and recommend approval or disapproval. The petitioner was not prejudiced by the inaccurate report, since his property can be used now as in the past as a valid nonconforming use. This case again demonstrates the Court's wisdom in looking to substance rather than form.

§15.10. Building permit and subsequent zoning change: Necessity of proceeding with construction. In *Papalia v. Inspector of Buildings of Watertown*¹ the Supreme Judicial Court was confronted with the continued validity of a building permit issued prior to a zoning amendment. General Laws, Chapter 40A, Section 11, provides:

No zoning by-law or amendment thereof shall affect any permit issued or any building or structure lawfully begun before notice of hearing before the planning board . . . has first been given or

² 349 Mass. 373, 208 N.E.2d 508 (1965), noted in 1965 Ann. Surv. Mass. Law §14.13.

§15.9. ¹ 1965 Mass. Adv. Sh. 1523, 213 N.E.2d 387.

§15.10. ¹ 1966 Mass. Adv. Sh. 1043, 217 N.E.2d 911.

before the issuance of the warrant for the town meeting at which such by-law or amendment is adopted, whichever comes first; provided, that construction work under such a permit is commenced within six months after its issue, and the work, whether under such permit or otherwise lawfully begun, proceeds in good faith continuously to completion so far as is reasonably practicable under the circumstances.

On February 28, 1964, the plaintiff was issued permits for the construction of an apartment house on his premises and the razing of the residence presently thereon. The permits were issued prior to notice of a hearing on a proposed zoning change, which as adopted precluded the erection of the proposed apartment house. Domestic difficulties kept the plaintiff from razing the house, as his wife would not leave. In August, 1964, the lines of the new apartment house were laid out and the excavation for the footings was begun. Part of the footings was eventually poured but nothing further was done. The plaintiff's problems were further complicated by health difficulties which necessitated his hospitalization. In January, 1965, the Probate Court ordered that his wife was to have the use of the home. The plaintiff tried constantly to find a new house for his wife and children, but nothing pleased her. Finally she moved out. While the plaintiff was arranging to have the house razed, he received a letter from the building inspector dated April 20, 1965, notifying him that his permit was void. The plaintiff argued that at all times and in good faith he acted so as to complete the work permitted as rapidly as was reasonable. The Supreme Judicial Court held that the "circumstances" referred to in the statute² concern incidents of the construction process and not the domestic or personal difficulties of the permit holder, saying: "We do not believe that the Legislature intended the courts in a case involving a zoning by-law to hear evidence relating to marital problems."

§15.11. **Building permit: Improper suspension.** In *Alexander v. Building Inspector of Provincetown*,¹ a case involving an unusual fact situation, the Supreme Judicial Court held that the failure of an owner to apply for a new building permit after his original permit had been suspended improperly and subsequently reinstated did not result in his losing rights under the permit for zoning amendment exemption. The letter of the Town Counsel to the building inspector ruling that the permit had been improperly suspended was sent one day before the publication by the planning board of a notice of a zoning change which would prohibit the construction covered by the permit. The Supreme Judicial Court held that the owner was not deprived of the protection afforded by General Laws, Chapter 40A, Section 11, requiring that work under the permit be commenced within six months after permit issue and that work proceeds in good faith continually to

² G.L., c. 40A, §11.

§15.11. ¹ 350 Mass. 370, 214 N.E.2d 876 (1966).

completion. The owner failed to apply for a new permit in reliance on a statement of a town official that a new application was not necessary, the original permit being reinstated. The Court held that the six month's period would run from January 21, 1965, the date of reinstatement. On the issue of reliance upon an opinion of the municipality's attorney, this case must be distinguished from the case of *Building Inspector of Malden v. Werlin Realty, Inc.*² Had the owner in the present case applied for a new permit he would have been entitled to its issuance, whereas in the *Werlin* case the applicant, notwithstanding the written opinion of the city solicitor, was never entitled to the relief requested.

§15.12. Procedure: Notice of appeal. In *Greeley v. Zoning Board of Appeals of Framingham*¹ the Supreme Judicial Court held that the Board was without jurisdiction to review a decision of the building inspector when the appeal had been filed with counsel for the Board, rather than with the City Clerk,² even though notice of the appeal was given to all parties. A subsequent filing with the Clerk after the 30-day statutory period was likewise held not to confer jurisdiction.

The Court also held that the appeal from the decision of the Board of Appeals to the Superior Court under General Laws, Chapter 40A, Section 21, was not invalid because of the plaintiff's failure to attach a certified copy of the Board's decision to its bill of complaint, since the required copies were subsequently attached on motion, made and allowed within the 20-day filing period required under the statute. In essence, the Court's decision allowed the building permit to stand but did suggest that the abutters could file a petition for writ of mandamus to enforce the zoning ordinance. This case should be distinguished from the cases of *Bearce v. Zoning Board of Appeals of Brockton*³ and *Simeone Stone Corp. v. Oliva*.⁴ In those cases the notices filed by the appellant were both timely and proper, and the defect was in the subsequent pleadings. In the *Greeley* case notice was first improperly served and then was not timely, thereby initially and permanently depriving the Board of Appeals of jurisdiction.

§15.13. Appeal: Reference to master; authority of board of appeals. In *Garelick v. Board of Appeals of Franklin*¹ the Supreme Judicial Court considered the propriety of referring a zoning appeal brought in the Superior Court pursuant to General Laws, Chapter 40A, Section 21, to a master. It found that although a judge sitting in equity has the inherent power to refer the matter to a master, "the purposes sought to be achieved will best be accomplished and the procedure be more consonant with the legislative intent if the evidence is heard

² 349 Mass. 623, 211 N.E.2d 338 (1965), noted in §15.19 *infra*.

§15.12. ¹ 1966 Mass. Adv. Sh. 587, 215 N.E.2d 791.

² As specifically required by G.L., c. 40A, §16.

³ 1966 Mass. Adv. Sh. 1213, 219 N.E.2d 15, noted in §15.16 *infra*.

⁴ 350 Mass. 31, 213 N.E.2d 230 (1965), noted in §15.17 *infra*.

§15.13. ¹ 1966 Mass. Adv. Sh. 283, 214 N.E.2d 60.

and the facts determined by a judge on an appeal under that statute."²

On the substantive issue, the Court found that the Board of Appeals had exceeded its authority in refusing to hear an appeal until the applicant submitted plans for the construction of four apartments of three rooms each, when the applicant had appealed from a denial of his application for a permit to construct five apartments. This case is similar to *Slater v. Board of Appeals of Brookline*,³ in that in both cases the Board's decision was not responsive to the petition of the applicant.

§15.14. **Jurisdiction of Superior Court.** In *Sandberg v. Board of Appeals of Taunton*,¹ the city's superintendent of buildings refused to issue a building permit on the grounds that the building would violate the zoning ordinance. An appeal from his decision was heard by a Board of Appeals established under the city's building code, rather than by a zoning Board of Appeals, as no such board had been established by the city. The Superior Court was without jurisdiction to consider an appeal brought pursuant to General Laws, Chapter 40A, Section 21, since this section is confined to appeals under the zoning enabling act. The Supreme Judicial Court in this case did not take the opportunity to decide whether the failure to establish a zoning Board of Appeals, a requirement of General Laws, Chapter 40A, Section 14, invalidates the entire zoning by-law, even though this question was raised.

§15.15. **Procedure: Appeal at law or in equity.** In *Beechwood Acres, Inc. v. Town of Hamilton*¹ the petitioner sought a determination of the validity of the Hamilton by-law, relying specifically on both General Laws, Chapter 185, Section 1(j $\frac{1}{2}$), and Chapter 240, Section 14A, for authority to bring its petition in the Land Court. The town contended that Beechwood's appeal was filed too late because it was not claimed within 20 days of the judge's decision, as required in a proceeding on the law side of the Land Court.² The petition, although entitled Bill of Complaint, alleged that there was no adequate relief at law and facts to show the existence of a controversy. But it made no explicit reference to declaratory relief under General Laws, Chapter 231A, and gave no clear or adequate indication that it sought relief in equity. The Supreme Judicial Court held the petition under Section 1(j $\frac{1}{2}$) to be an action on the law side of the Land Court and ruled that the appeal was thus filed too late. To avoid further litigation, since all issues had been briefed and argued, the Court ruled on the merits, but this certainly is no guarantee that it would do so in every case. Appellate procedures in zoning matters, whether from decisions

² Id. at 283, 214 N.E.2d at 61.

³ 1966 Mass. Adv. Sh. 27, 213 N.E.2d 393, noted in §15.7 *supra*.

§15.14. 1349 Mass. 769, 211 N.E.2d 341 (1965).

§15.15. 1966 Mass. Adv. Sh. 715, 216 N.E.2d 94, also noted in §15.3 *supra*.

² This provision applies because of cross reference in the Land Court procedure to that employed in the Superior Court. G.L., c. 185, §15; c. 231, §96.

of building inspectors, Boards of Appeals, the Land Court or the Superior Court are governed by the type of relief sought. It is stating an obvious but not always followed rule that care must be taken to avoid procedural pitfalls such as those presented in the present case.

§15.16. Jurisdiction of board of appeals: Authority and notice. In *Bearce v. Zoning Board of Appeals of Brockton*¹ the Board revoked a building permit on the ground that the zoning amendments upon which the superintendent of buildings had relied were improper and illegal. The Supreme Judicial Court held that the powers of the Board² do not include the power to nullify acts of the local legislative body, which is empowered to adopt and amend zoning by-laws.³ On a procedural issue the Court held that the failure of the plaintiff's affidavit to indicate service of the bill on the City Clerk, as required by General Laws, Chapter 40A, Section 21, did not deprive the Superior Court of jurisdiction if, in fact, notice was given. "Jurisdiction depends on the fact of the notice, not on whether it was pleaded. If given . . . but not set out in the pleadings . . . through inadvertence, manifestly an appropriate occasion would be presented for allowance of an amendment of the bill. . . ."⁴

§15.17. Procedure: Contents of notice. In *Simeone Stone Corp. v. Oliva*¹ the Supreme Judicial Court held that a decision of a zoning board of appeals based on a reason not specified in the notice of appeal or in the notices of hearing served by the board on the petitioner did not deprive the board of jurisdiction. In the present case testimony on all issues raised by the appeal was presented to the board so that the failure of the board to decide upon the reasons specified in the notice of appeal was not prejudicial; the landowner clearly had adequate notice of what charges he had to meet and equally clearly his testimony sought to meet these arguments.

§15.18. Nonconforming use: Change of use. In *Building Inspector of Malden v. Werlin Realty, Inc.*¹ the Supreme Judicial Court examined the specific use made of the premises prior to the enactment of a zoning ordinance, rather than the degree of objectionability of uses, to determine the validity of a nonconforming use. Prior to the enactment of the zoning ordinance the locus had been used for the manufacture and storage of oxygen products. From that time (1928) to the date of the zoning ordinance placing the locus in a general residential zone (1963), the locus was used for the manufacture and storage of hospital equipment and the cleaning of rugs. Subsequent to the enactment of the 1963 zoning ordinance, the locus was purchased and used

¹ 1966 Mass. Adv. Sh. 1213, 219 N.E.2d 15.

² Set out in G.L., c. 40A, §§13, 15.

³ Id. §6.

⁴ Quoting from *Carey v. Planning Board of Revere*, 335 Mass. 740, 745, 139 N.E.2d 920, 924 (1957), at 1966 Mass. Adv. Sh. 1213, 1217, 219 N.E.2d 15, 18.

¹ 350 Mass. 31, 213 N.E.2d 230 (1965).

¹ 349 Mass. 623, 211 N.E.2d 338 (1965).

by the defendant for the storage of ice cream cones and straws. The Court held that, although the present use was less objectionable than prior uses, this was not the issue in determining if the present use could continue. The different quality of the new use made it invalid. This conclusion restates the accepted rule in the Commonwealth.²

In *Superintendent and Inspector of Buildings of Cambridge v. Villari*³ the Court upheld the validity of an extension of a nonconforming use. The premises from 1935 to 1947 were used as a "volume gas station" but minor automobile repairs were not performed on the locus until after 1947, some 23 years after the zoning ordinance was adopted. The Court held, however, that the making of minor repairs was incidental to the operation of a service station and was part of its original nature and purpose, even though the power to make such repairs was not exercised at all times, when the general use was nonconforming under the ordinance.

In another nonconforming use case, *Town of Bridgewater v. Chuckeran*,⁴ the Court took the opportunity to summarize the three major standards used for determining whether a current use fits within the exemption granted to the nonconforming uses: (1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning by-law took effect;⁵ (2) whether there is a difference in the quality or character as well as the degree of use;⁶ (3) whether current use is "different in kind in its effect on the neighborhood."⁷ Applying these standards the Court held that a change in use from the storage of building materials and maintenance of a small concrete mixer with a capacity of four cubic yards, to the establishment of a business, the major enterprise of which was to supply concrete to others, together with an increase in concrete mixing capacity to 35 cubic yards, was an invalid extension of a nonconforming use.

§15.19. Opinion of city solicitor: Reliance. In *Building Inspector of Malden v. Werlin Realty, Inc.*¹ the Supreme Judicial Court held that the reliance by the owner of the locus on the written opinion of the city solicitor, given prior to the purchase of the property, that the

² The Court cited numerous relevant cases for its conclusion.

³ 350 Mass. 176, 213 N.E.2d 861 (1966).

⁴ 1966 Mass. Adv. Sh. 867, 217 N.E.2d 726.

⁵ Citing *Superintendent and Inspector of Buildings of Cambridge v. Villari*, 1966 Mass. Adv. Sh. 143, 213 N.E.2d 861, discussed in text supported by note 3 *supra*; *Massachusetts Broken Stone Co. v. Town of Weston*, 346 Mass. 657, 195 N.E.2d 522 (1964), noted in 1964 Ann. Surv. Mass. Law §14.7.

⁶ Citing *Building Inspector of Malden v. Werlin Realty, Inc.*, 1965 Mass. Adv. Sh. 289, 211 N.E.2d 338, discussed in text supported by notes 1 and 2 *supra*; *Brady v. Board of Appeals of Westport*, 348 Mass. 515, 204 N.E.2d 513 (1965), noted in 1965 Ann. Surv. Mass. Law §14.15.

⁷ Citing *City of Medford v. Marinucci Brothers & Co.*, 344 Mass. 50, 181 N.E.2d 584 (1962), noted in 1962 Ann. Surv. Mass. Law §§13.4, 13.5, 18.20, and cases cited therein.

§15.19. 1 349 Mass. 623, 211 N.E.2d 338 (1965), also noted in §15.18 *supra*. See also §15.11 *supra*.

proposed use of the owner would be a valid nonconforming use, did not give the owner the right to violate the zoning ordinance.²

§15.20. Exemption from zoning regulations: Retroactive application. In *Doliner v. Planning Board of Millis*,¹ the Supreme Judicial Court had for its consideration a further stage of two previous cases, *Doliner v. Planning Board of Millis*,² and *Doliner v. Town Clerk of Millis*.³ The sequence of events is crucial and will be briefly stated. On March 9, 1959, the town voted to repeal an existing by-law setting forth building lot size, and enacted in its place a new by-law increasing lot size, which was to take effect after approval by the Attorney General. On April 1, 1959, the Town Clerk transmitted the new by-law to the Attorney General, who approved it on June 9, 1959. In the interim, the subdivider filed with the Planning Board a definitive subdivision plan, the lot sizes of which complied with the prior zoning by-law. Under the new by-law then awaiting the Attorney General's approval, however, the said lots were inadequate in size. The subdivision plan was disapproved by the Planning Board on May 26, 1959, without a public hearing being held, on the grounds that the lots shown on the plan did not comply with the size requirements to the new zoning by-law. The case was subsequently appealed to the Supreme Judicial Court, and the Court annulled the decision of the Planning Board and remanded the plan to them for further consideration and a public hearing. On April 24, 1962, the Planning Board held a public hearing on the original definitive plan, and disapproved it on May 7, 1962, on the stated ground that it did not comply with the new zoning by-law, which was the same reason given in the original disapproval. The Supreme Judicial Court upheld disapproval of the plan in the present case. The subdivider was subject to the zoning by-law increasing lot size, which was adopted on March 9, 1959, and he was not entitled, under General Laws, Chapter 40A, Section 7A, to the benefit of the previously existing zoning by-law authorizing the smaller lots as shown on the subdivision plan.

The Court also held that the 1961 amendment to General Laws, Chapter 40A, Section 7A,⁴ did not apply to this plan, since the Planning Board's original disapproval preceded the effective date of this amendment. The amendment was designed to afford the protection of the statute to definitive plans against changes in zoning made from the date of their being filed; Section 7A prior to this date gave protection only to definitive plans approved by the local Planning Board. Furthermore, the Court found that in cases in which only a definitive subdivision was submitted, until the adoption of the 1961 amendment

² The Court distinguished *Chilson v. Zoning Board of Appeal of Attleboro*, 344 Mass. 406, 182 N.E.2d 535 (1962).

§15.20. ¹ 349 Mass. 691, 212 N.E.2d 460 (1965).

² 343 Mass. 1, 175 N.E.2d 919 (1961), noted in 1961 Ann. Surv. Mass. Law §§12.10, 12.13, 12.15, 18.32; see also 1963 Ann. Surv. Mass. Law §18.3.

³ 343 Mass. 10, 175 N.E.2d 925 (1961). See note 2 *supra*.

⁴ Acts of 1961, c. 435, §2.

which was not applicable here, no protection was afforded such plans during the processing period until they were approved. The Court found that the 1961 amendment operated prospectively and not retroactively, citing *Building Inspector of Acton v. Board of Appeals of Acton*.⁵

The remaining question left for the Court was the effect of Acts of 1965, Chapter 366,⁶ which amended Section 7A of Chapter 40A by increasing the period from five to seven years and, more importantly, provided that the "provisions of this act shall apply to plans submitted to planning boards prior to its effective date." The Court held that the 1965 amendment was not sufficiently explicit so as to be interpreted to apply retroactively to the changes adopted by the 1961 statute. In effect, the Court held that, at least in the case of a non-approved subdivision that had been filed prior to the 1961 amendment, the 1965 amendment did not apply retroactively. It noted the legislative right to provide for such relief if it wished. It stated, however, that the retroactive effect sought would have to be expressed explicitly, it being so unusual as not to permit relying upon inference.

The Court was not about to give a retroactive interpretation of the statute, especially in this case where the town had already voted to change the by-law increasing the lot size, and the definitive subdivision plan was submitted subsequent to the vote, during the period the town was awaiting approval from the Attorney General.

This decision, by implication at least, gives retroactive interpretation to the provisions of Section 7A in cases in which a definitive subdivision was approved, either prior or subsequent to the 1961 amendment, by a planning board, especially in cases in which the zoning change in question was adopted after the date of the approval of the subdivision plan. Left unanswered is the question of the possible retroactivity of Section 7A in cases in which a preliminary plan or the definitive plan was submitted to a planning board subsequent to the 1961 amendment and, during the period the plan was being processed, the zoning by-law was changed by the municipality.

§15.21. Legislation. General Laws, Chapter 40A, Section 4, was amended by Acts of 1966, Chapters 26 and 199. The amendments changed the quorum and voting requirements of a City Council designated by a zoning ordinance to hear and consider applications for special permits. Under the prior statute, the entire City Council or a proper quorum was required to sit at the hearing and if the Council consisted of four or fewer members a unanimous vote was necessary for effective action. If the Council consists of more than four members, all but one of the members had to concur for effective action. Under the new statute, a City Council of more than five members (originally 15, but reduced to five by Chapter 199) designated to hear and consider special permits, may appoint a committee of its members to hear the

⁵ 348 Mass. 453, 204 N.E.2d 296 (1964), noted in 1964 Ann. Surv. Mass. Law §14.12.

⁶ See 1964 Ann. Surv. Mass. Law §14.19.

matter, but in any event two thirds of all the members of the City Council, and not two thirds of the committee, must concur for effective action.

B. SUBDIVISION CONTROL

§15.22. Notice of final action: Sixty-day period. In *Pinecrest, Inc. v. Planning Board of Billerica*¹ the Board disapproved a subdivision after a public hearing duly advertised, and within the 60-day period in which the Board must act, and filed a "Certificate of Final Action" with the Town Clerk which merely stated, "Disapproved — Improper Drainage." The Board, however, failed to give notice of its action to the developer as required by General Laws, Chapter 41, Section 81U. The developer, although it did not receive notice, was able, however, to file its appeal under General Laws, Chapter 41, Section 81BB, within the 20-day period. Section 81U provides in part:

Failure of the planning board either to take final action or to file with the city or town clerk a certificate of such action regarding a plan submitted by an applicant within sixty days after such submission, or such further time as may be agreed upon at the written request of the applicant, shall be deemed to be an approval thereof. Notice of such extension of time shall be filed forthwith by the planning board with the city or town clerk.

The Court held that notwithstanding the slipshod procedure of the Board and its violations not only of the statute but also of its own rules and regulations, its action was sufficient to prevent its blundering into a constructive approval of the plan under Section 81U. Still to be decided in an appropriate case is whether the Court would reach a similar decision if the developer had failed to file a timely appeal under Section 81BB because of its failure to receive the statutory notice from the Board.²

§15.23. Certificate of Town Clerk: Failure of board to act. In *Waldor Realty Corp. v. Town Clerk of Bellingham*¹ the Supreme Judicial Court upheld the dismissal of writ of mandamus to order the Town Clerk to execute a certificate that no notice of final action had been filed in the Town Clerk's office and that no notice of appeal had been received by him, as provided by Chapter 41, Section 81V. The developer in this case submitted a plan to the Planning Board for approval as a subdivision and a public hearing was held. Sixty days elapsed from the date of the submission and the Board not only failed to give notice of final action within this 60-day period but also failed to take any action whatsoever on the plan. The developer, proceeding

¹ §15.22. 1 350 Mass. 336, 214 N.E.2d 868 (1966).

² Relevant would be the case of Pieper v. Planning Board of Southborough, 340 Mass. 157, 163 N.E.2d 14 (1959), noted in 1960 Ann. Surv. Mass. Law §§12.7, 13.7, 13.11, and briefly discussed at 1966 Mass. Adv. Sh. 341, 343, 214 N.E.2d 868, 869.

¹ §15.23. 1 1966 Mass. Adv. Sh. 739, 216 N.E.2d 453.

under the provisions of General Laws, Chapter 41, Section 81V, requested the Town Clerk to execute a certificate which would have indicated that, "according to the records of his office, there was submitted to the planning board for its approval a definitive plan dated August 4, 1960, of a subdivision of land owned by Lee Realty Trust; that no notice of final action by the board under G. L. c. 41, §81U . . . was received by the clerk before October 7, 1960; and that no notice of appeal was received by him before October 27, 1960, in accordance with G. L. c. 41, §81BB. . . ." General Laws, Chapter 41 Section 81V, provides in part:

In case of the approval of a plan by reason of the failure of the planning board to act within the time prescribed, the city or town clerk shall, after the expiration of twenty days without notice of appeal to the superior court, or, if appeal has been taken, after receipt of certified records of the superior court indicating that such approval has become final, issue a certificate stating the date of the submission of the plan for approval, the fact that the planning board failed to take final action and that the approval resulting from such failure has become final. The . . . plan and such certificate, as the case may be, shall be delivered by the planning board, or in the case of the certificate, by the city or town clerk, to the person who submitted such plan.

The Court held that the certificate requested of the Town Clerk was deficient since it failed to set forth certain necessary facts, among which were that the Planning Board failed to take final action and that the approval resulting from this failure had become final.² The Court, although admitting that the petition for writ of mandamus inferentially alleged that the Board failed to take action, held that the allegations set forth were not clear, direct and unequivocal and therefore properly subject to demurrer. This case clearly demonstrates the necessity of following to the letter the statutory requirements when proceeding in cases in which relief sought is solely statutory. One may compare the Court's relaxed attitude as to statutory prerequisites in the case of *Pinecrest, Inc. v. Planning Board of Billerica*,³ although that case involved solely subdivision control policies, not the complexities and technicalities of the writ of mandamus and demurrers thereto.

§15.24. Legislation. General Laws, Chapter 41, Section 81X, was amended by Acts of 1966, Chapter 380, by adding a provision which now permits a Registrar of Deeds to accept for recording, and the Land Court to accept with a petition for registration or confirmation of title, subdivision plans that do not have the previously required appropriate planning board endorsement. The new exception is limited to plans drawn by a registered land surveyor, and which bear

² The Court also noted that there was no allegation of the expiration of the 20-day appeal period or none of the date upon which the plan was originally submitted.

³ 350 Mass. 336, 214 N.E.2d 868 (1966), noted in §15.22 *supra*.

his certificate that property lines, street lines and ways shown on the plans are existing boundary and street lines and that no new lines for division of existing ownership or for new ways are shown. This amendment is apparently limited from a practical standpoint to the recording of "subdivision approval not required"-type plans, without this endorsement being placed on the plans by the planning board. A careful examination should be made, prior to any recording, in order to ascertain whether a particular plan qualifies for this exemption. One may question whether a plan recorded under this amendment, without the endorsement of the planning board, is afforded the benefits of the exemption from zoning changes provided under General Laws, Chapter 40A, Section 5A, in cases in which the owner does not hold the land shown on the plan separate and apart from adjoining land.

C. EMINENT DOMAIN

§15.25. **Damages: Interest from time of taking.** *Town of Swampscott v. Remis*¹ is unique as the first case decided under Chapter 80A of the General Laws. Chapter 80A governs a particular type of taking by judicial proceedings as opposed to the administrative procedure under Chapter 79, and has been but seldom used in the Commonwealth since its adoption in 1929.² The actual issue of the case was a very narrow one, i.e., whether the failure to grant interest upon the damages awarded for the period prior to the date of the entry of judgment was an unconstitutional failure to give adequate compensation.

The land, fronting on the Atlantic, was the subject of a 1961 town meeting vote to take for swimming and other recreational purposes. The order of intention to take, required by Section 2 of General Laws, Chapter 80A, was adopted by the selectmen on February 6, 1964. The landowners remained in possession up to the time of this suit, which was the town's petition to establish its right to take the property as well as to determine damages. Section 12 of Chapter 80A makes the entry of the judgment of condemnation the time of the taking, with interest payable only from that date.

The respondent landowners claimed that, as their land became unmarketable upon the commencement of the town's proceedings in 1961, they should be given interest for loss of use and reduction in value for the period prior to the actual taking by court judgment. The Supreme Judicial Court rejected the contention, citing ample authority from Massachusetts, federal and other state decisions. It was clear enough from the facts that the land was still usable by the owners, although the Court indicated that a reduction in value occurred with the adoption of the order of intention to take, if not earlier. In the conventional language of eminent domain precedents, the Court noted that fluctuations of value caused by the potential exercise of the gov-

§15.25. 1 350 Mass. 523, 215 N.E.2d 777 (1966).

2 G.L., c. 80A, adopted by Acts of 1929, c. 380, §1.

ernmental power of eminent domain are mere incidents of ownership to which essentially all property in the Commonwealth is subject. The Court did recognize that this may not result in a perfectly fair measure of damages, but suggested that the remedy should come from the legislature. On the constitutional plane, however, the Court was unwilling to overturn long-established precedents supported by the statutory language. Such reticence was proper and probably wise. But the constitutional doctrines surrounding just compensation were developed in a society facing altogether different problems from those faced today. The limitations of the constitutional formula have been recognized by the adoption of many statutes that remedy grossly inadequate damages awards.³ The solution may properly be one to be left to the legislature rather than to be developed by a change of constitutional doctrine,⁴ but failure of the legislature to act may create the necessity for constitutional change. The present case, however, involved no major economic loss and certainly is not the case that would tempt a court to expand the narrow constitutional limitations laid down by the long-established and often-followed precedents.

§15.26. **Damages: Admissible evidence.** When dealing with the question of the admissibility of opinion evidence on the amount of damages resulting from a taking by eminent domain, the Supreme Judicial Court was correctly more concerned with the witness' personal contact with the property than with his self-characterization as "broker," "owner" or "expert appraiser."¹ In the rescript opinion of *Gazianis v. Town of Clinton*² testimony of value was admitted not because the witness was "part owner" but because he had shown "sufficient familiarity with the whole property to give an opinion of its value." The lower court in *Root v. Commonwealth*³ was equally satisfied that the "daughter and manager of the affairs" of the owner possessed this familiarity. In *Zambarano v. Massachusetts Turnpike Authority*⁴ the Supreme Judicial Court found no error in the trial court's sequestration of two expert witnesses. One was not allowed to give testimony in the presence of the other in order that the court could be assured that each expert opinion was based upon an independent analysis of the land.

³ See Huber, *Legal Rights of Persons Whose Businesses Are Displaced* (June 1962). See also 1965 Ann. Surv. Mass. Law §14.30. The losses often sustained but not constitutionally reimbursed include relocation costs and loss of profit and good will, among others.

⁴ The relocation statutes adopted by both the federal and Massachusetts legislatures are examples of legislative recognition of the inadequacy of the constitutional measure of damages in that such legislation attempts to provide compensation for some of the items which the present case held to be noncompensable. See §15.30 *infra*.

§15.26. ¹ *Burchell v. Commonwealth*, 1966 Mass. Adv. Sh. 515, 517, 215 N.E.2d 649, 651.

² 1965 Mass. Adv. Sh. 1519, 212 N.E.2d 854.

³ 1966 Mass. Adv. Sh. 85, 213 N.E.2d 474.

⁴ 350 Mass. 485, 215 N.E.2d 652 (1966).

However, even though a witness had demonstrated a personal knowledge of the land, his opinion was excluded when his method of evaluation was erroneous. In *Gazianis v. Town of Clinton*⁵ the trial court refused to allow the witness to value a 24 room tenement by estimating the value of one room and multiplying it by 24. In the more complex and significant opinion of *H. E. Fletcher Co. v. Commonwealth*⁶ the Supreme Judicial Court had before it the problems raised by a method of providing compensation for the taking of 17.4 acres of the petitioner's 1050 acres of granite belt located in Chelmsford and Westford. Less than one-half acre of the land taken was in Westford, the remainder being in Chelmsford. At the time of taking, this 17.4 acres "was wild land, traversed only by hunters;"⁷ but a new quarry could have been opened there. The latter possibility was disclosed in 1960 when the petitioner caused a study to be made of his inactive land. This study took place about a year after the taking. One of the expert witnesses for the petitioner, Alexander, testified that the entire Fletcher property was worth \$12 million before the taking and \$8 million after the taking. The bases of his opinion were "the ease of extraction, the quality and multiplicity of uses of the stone, its marketability in different sizes, the availability of labor and the favorable tax situation. . . ."⁸ He was not allowed to evaluate the quarry property by estimating the yearly profit resulting from a calculation of how many cubic feet of stone a year could be produced over a 40-year period. However, the director of the quarry was permitted to make the same evaluation which was excluded from Alexander's testimony. Yet when the director sought to give a more comprehensive presentation of this "method of computation," it was excluded "as a matter of law," "as being too speculative."⁹ The Supreme Judicial Court sustained these exclusions. Since the petitioner's objections to the exclusions at trial were general, the Court "assumed that the [lower court's] ruling was based upon the right ground."¹⁰ The Court held that the method of evaluation was too speculative, that the entire line of evidence on future profits could have been excluded in the discretion of the judge since "the offered evidence did not relate to the value of the land as such"¹¹ and that the land taken was wild land on which there was no "project definitely in the process of achievement at the time of the taking."¹² The result which the Court reached was supported by two additional facts: most of the land taken was in Chelmsford which had a zoning ordinance that prohibited quarrying; and, just a few weeks before the taking the petitioner paid only \$1400

⁵ 1965 Mass. Adv. Sh. 1519, 212 N.E.2d 854.

⁶ 1966 Mass. Adv. Sh. 317, 214 N.E.2d 721.

⁷ Id. at 318, 214 N.E.2d at 722.

⁸ Id. at 319, 214 N.E.2d at 723.

⁹ Id. at 321, 214 N.E.2d at 724.

¹⁰ Id. at 323, 214 N.E.2d at 725.

¹¹ Id. at 324, 214 N.E.2d at 725.

¹² Id. at 325, 214 N.E.2d at 726.

for 18 acres of land, half of which was included within the 17.4 acres taken by the Commonwealth. However, the reasoning of the Court may be open to question.

First of all, although it is true that much of what was excluded from Alexander's testimony came in during the director's testimony, the petitioner was deprived of the opportunity to have the fact finder hear one of his primary expert witnesses give his own calculations. The director was allowed to give a total future profit estimation but was forbidden to testify to the additional factors of the current market price of a cubic foot of granite and the projection of that price over a period of 40 years. It is not clear why the Court should use as one of the reasons for sustaining this exclusion the fact that the trial judge could have excluded evidence on projected profits from mineral deposits. It has been frequently held that in evaluating land, profits from minerals cannot be considered independently; such profits are relevant only insofar as they reflect the value of the land itself.¹³ However, in the present case the trial judge did allow the director to give a total figure representing anticipated profits. The Supreme Judicial Court said that it assumed that the trial court's rulings on admissibility were correct, therefore why not assume that the trial court admitted the total profit figure as an index to the value of the land itself and not as an independent item of damages. If we make this assumption then the fact that the trial court could have excluded the testimony of profits altogether should not affect the question of whether the witness should have been permitted to describe his "method of computation."

A similar issue was discussed in *Bachelor Truck Sales, Inc. v. Commonwealth*.¹⁴ A parcel of land was taken on which there were five oil storage tanks and associated pipes. The trial judge admitted testimony on the depreciated reproduction cost at the date of taking of the tanks and pipes. It was contended that such cost had a relation to the fair market value of the land. The Supreme Judicial Court held, apparently as a matter of law, that the motion to strike this testimony should have been granted since on the facts of the case, the reproduction cost "was not applicable to the land taken."¹⁵ This result was correct since it appeared that the equipment was in great part either not on the land taken or of little or no value. Although the *Fletcher* case was admittedly more complex, the handling of this issue in the *Bachelor* case is far less confusing than *Fletcher* where the Court said that the trial court was using its discretion in excluding evidence which "did not relate to the value of the land as such" even though the trial court said that its exclusion was made "as a matter of law."

Another basis on which the *Fletcher* case¹⁶ sustained the exclusion

¹³ *Manning v. City of Lowell*, 173 Mass. 100, 103, 53 N.E. 160, 161 (1899); 4 Nichols, *Eminent Domain* §13.22, at 413-414 (3d ed. 1962).

¹⁴ 1966 Mass. Adv. Sh. 257, 214 N.E.2d 36.

¹⁵ 1966 Mass. Adv. Sh. at 260, 214 N.E.2d at 38.

¹⁶ *H. E. Fletcher Co. v. Commonwealth*, 1966 Mass. Adv. Sh. 317, 214 N.E.2d 721.

was the fact that the petitioner did not make the topological study of the land taken until after the taking, at which time there was no project in the process of achievement on the land. It is questionable whether this reasoning was correct since it was quite reasonable to assume that the land taken would become a future quarrying project in view of the surrounding use of the land.¹⁷ In the *Bachelder* case, the Court held that it was proper to appraise a parcel of land in view of its potential future use with another parcel of land as an oil storage plant even though neither parcel had ever been used together. The position of the Court in *Bachelder* on the issue of future use of the land as an element of value is preferable to the position of the *Fletcher* case which seemed to demand a partially completed project before it would consider future uses. To be sure, the ordinance in Chelmsford prohibiting quarrying would be an obstacle to the potential use of the land taken as a source of granite; yet there was testimony on the probability of overcoming this zoning hindrance.¹⁸ Also, the fact that the petitioner made his scientific study of the land taken after the taking should not go to the question of the inherent value of the land as a possible future quarrying site. The more relevant issue was whether the value of the land as a quarrying site was not essentially the value to the owner, not fair market value.

An issue which constantly arises in cases wherein the measure of damages is in issue is whether subsequent or prior sales of comparable land were too remote in time to be an accurate reflection of the fair market value of the land taken. *Zambrano v. Massachusetts Turnpike Authority*¹⁹ held that a sale 15 months after the taking was not too remote. *H. E. Fletcher Co. v. Commonwealth*²⁰ admitted evidence of a sale some five years before the taking. *Burchell v. Commonwealth*²¹ tried to lay this issue to rest by reaffirming the position of *Roberts v. City of Boston*,²² which held that the "mere lapse of time after the taking did not render the evidence of the sales incompetent."²³ The discretion of the trial judge is to be given great weight.

A more troublesome question concerns the nature of the prior or subsequent sales. In *H. E. Fletcher Co. v. Commonwealth*²⁴ the state took 17.4 acres of "wild" land. The Court sustained the admission of evidence of prior sales of land in the surrounding area. Although there may have been error in that one prior sale listed did not state the size of the tract sold and another listing did not state the price per acre, the Court found no prejudicial error since there was an "abundance" of other evidence on prior sales of "wild" land. Nor was there error

17 4 Nichols, Eminent Domain §13.22[2] at 422-423 (3d ed. 1962).

18 1966 Mass. Adv. Sh. 317, 319-320, 214 N.E.2d 721, 723; Petitioner's Amended Bill of Exceptions, Record, p. 36.

19 1966 Mass. Adv. Sh. 511, 512, 215 N.E.2d 652, 653.

20 1966 Mass. Adv. Sh. 317, 325, 214 N.E.2d 721, 726.

21 1966 Mass. Adv. Sh. 515, 517, 215, N.E.2d 649, 651.

22 149 Mass. 346, 354, 21 N.E. 668, 669 (1889).

23 *Ibid.*, cited at 1966 Mass. Adv. Sh. 515, 517, 215 N.E.2d 649, 651.

24 1966 Mass. Adv. Sh. 317, 326, 214 N.E.2d 721, 727.

in the admission into evidence of a sale of property zoned for residential uses, in which zone no quarrying was permitted. The Court apparently felt that such a sale could be of assistance in evaluating the land taken from petitioner, even though the evidence tended to indicate that the primary value of the latter land was its use as a future quarry.

A federal case focusing on the issue of compensation, *A. G. Davis Ice Co. v. United States*,²⁵ upheld the District Court's exclusion of evidence of profits to be made under a sublease existing on the property. The property was leased to one Fawcett who in turn subleased it to an oil company for storage of heating oil, which lease had been returning a very substantial profit. The court noted, however, that the lease was subject to cancellation before the end of the term. Although the oil storage use was a nonconforming one under the local zoning ordinance, other locations were available for this use in the community. Therefore the rule of *City of Revere v. Revere Construction Co.*,²⁶ that profits made at the given location are admissible on the issue of compensation, was not applicable. The particular rule depends upon the character of the property taken as being peculiarly suitable for a certain business; the profits obtained are, therefore, totally independent of the abilities or knowledge of the owner. In the present case the sublease profits depended upon the gallonage run through the tanks and there was no guarantee of or commitment to any amount. Thus the court upheld the lower court's discretion in rejecting evidence of compensation based upon profits as speculative and collateral.

Subsidiary issues were also discussed. One involving the adequacy of the representation of the lessee at the trial was quickly rejected, since the lessee was actually represented by counsel throughout the case. Condemnation by the government was also correctly made of the fee estate as a unit, and not of separate interests so as to permit Fawcett's lease to be considered separately from the reversion of the landowner. The court quoted the established rule that subsidiary interests in a fee cannot add to its value for compensation purposes.²⁷ The application of this rule in the present case, as in the vast majority of condemnations, produces full compensation with sufficient accuracy. In some cases, however, the rule is economically if not necessarily constitutionally false,²⁸ but the present case does not come within these exemptions.

§15.27. Damages: Entitlement and time of taking. In *Bachelder Truck Sales v. Commonwealth*,¹ the state took two parcels of land, one of which had not been registered at the time of taking. The state argued that damages for the taking of the two parcels should be considered separately since the failure to register one of the parcels meant

²⁵ 362 F.2d 934 (1st Cir. 1966).

²⁶ 285 Mass. 243, 189 N.E. 73 (1934). See also 1965 Ann. Surv. Mass. Law §14.26.

²⁷ *Eagle Lake Improvement Co. v. United States*, 160 F.2d 182 (5th Cir. 1947).

²⁸ See *Riley v. District of Columbia Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957), in which the sums of mortgages owed by the landowner exceeded the fair market value of the property taken.

§15.27. 1 1966 Mass. Adv. Sh. 257, 214 N.E.2d 36.

that under General Laws, Chapter 185, Section 57, it had not been effectively conveyed. The Supreme Judicial Court disagreed, holding that although only the act of registration operated as the conveyance, the petitioner was the equitable owner of the land by virtue of his contract for sale. Since "the highest and best use" of the two parcels was their use together, it was proper to consider the value of both parcels under a common ownership in petitioner.

In the case of *Spadea v. Stewart*² the Court held that even though land which is the subject of a contract for sale is taken by eminent domain, the vendee's equitable interest in the land makes him a party in interest in the vendor's petition for damages for the taking.³ However, as a condition to the vendee's participation in that damage action, the vendee must assure the full payment of the purchase price to the vendor.

In *Bachelor Truck Sales v. Commonwealth*⁴ the state argued that the court below had erroneously determined the time of taking. The statute, General Laws, Chapter 79, Section 12, provides that "damages . . . be fixed at the value . . . before the taking." The state took the position that "before the taking" means before the entire public work was begun and that since the state had taken a parcel of land in the same area in 1959, just two years before the taking of the two parcels now in question, it could be inferred that all of the takings were part of the same public project. The Court in rejecting this contention, reached a completely contrary inference that "a further taking in 1961 by the Commonwealth in the same general location as the 1959 taking suggests a new plan."⁵ Hence damages for the taking of the petitioner's two parcels were not to be calculated as of the time of the earlier taking.

In *Alden v. Commonwealth*⁶ the Commonwealth took about a fourth of the petitioner's 200 acres for purposes of Interstate Route 495 and its interchange with Route 9. The major issue was whether there was competent evidence of the value of the land prior to the taking. The trial judge admitted into evidence the purchase price of land adjacent to the petitioner's land but excluded testimony that the "dominant factor" which led to this purchase was the land's proximity to the proposed highway project. The Supreme Judicial Court held the exclusion to be prejudicial error since such a reason for the purchase was evidence that the project had enhanced the value of the land and in the absence of "careful instructions,"⁷ "evidence of sales that reflect an enhanced value resulting from the project should not be admitted as evidence of prior value."⁸

² 1966 Mass. Adv. Sh. 199, 214 N.E.2d 72.

³ G.L., c. 79, §§27, 29.

⁴ 1966 Mass. Adv. Sh. 257, 214 N.E.2d 36.

⁵ Id. at 260, 214 N.E.2d at 38.

⁶ 1966 Mass. Adv. Sh. 937, 217 N.E.2d 743.

⁷ Id. at 941, 217 N.E.2d at 746.

⁸ Id. at 939, 217 N.E.2d at 745.

§15.28. Damages: Computation of interest. The case of *Shelist v. Boston Redevelopment Authority*¹ involved the question of the time when the new 6 per cent interest rate in eminent domain cases became effective. The petitioner's land was taken on October 25, 1961, and a verdict was entered on June 9, 1965. At the time of the taking and of a pro tanto payment by respondent, the interest rate was 4 per cent.² In 1963 the rate was increased to 6 per cent but was not to apply to "takings" made before November 6, 1963.³ Minor changes in the interest statute were made in 1964, but the 6 per cent rate was not changed.⁴ These changes were stated in the act as not to apply to interest on "judgments" entered prior to January 1, 1965.⁵ The Court held that the 1964 act did not repeal by implication the provision of the 1963 amendment that interest on takings made before the effective date of the act continued at 4 per cent. It noted that this would change substantive rights retroactively. Retroactive change must be clearly spelled out in legislation and is not to be left to implication.⁶

The 1964 amendment presented difficulties because it stated that the amendment would apply to "judgments" entered after January 1, 1965. The petitioner therefore argued that the 6 per cent rate which the 1964 amendment provides would apply to a case in which the "taking" occurred before January 1, 1965, (the 1964 act's effective date), so long as the "judgment" was entered after such date. The Court, however, determined that the use of the word "judgments" in the 1964 act referred to interest on judgments from the date the judgment became effective. No interest on damages is, under either act, awarded from the time of taking to the time of judgment, so the use of the word "judgments" could not mean that the statute would authorize 6 per cent interest on takings made prior to the effective date of the 1964 act.

There seems little question but that the Court reached the correct result in this case, to the extent that the foggy nature of the legislative language reveals the intent of the 1964 amendment and its effect on the 1963 legislation. The case reveals a rather typical failure to articulate legislative intent in a situation in which it was not the complexity of the policy involved but sloppy draftsmanship that resulted in another case unnecessarily clogging the court calendar.

§15.29. Damages: Incidental and consequential. In *R. J. Widen Co. v. United States*¹ the United States Court of Claims reaffirmed the position of both the federal and Massachusetts courts that the computation of damages for the taking of interests in real estate does not

§15.28. ¹ 1966 Mass. Adv. Sh. 565, 215 N.E.2d 748.

² G.L., c. 79, §37, as last amended by Acts of 1960, c. 298, §1.

³ Acts of 1963, c. 793, §§1, 3.

⁴ Acts of 1964, c. 548, §2.

⁵ Id. §5.

⁶ The Court cited, among other cases, *Doliner v. Planning Board of Millis*, 349 Mass. 691, 212 N.E.2d 460 (1965), noted in §15.20 *supra*.

§15.29. ¹ 357 F.2d 988 (Ct. Cl. 1966).

include loss of personal property and loss of profits. The Federal Government under the Flood Control Act² began a project in North Adams after receiving a statutorily required agreement from Massachusetts to save the United States free from damages caused by the construction work. The contractor went on the land in March 1957 but the formal taking by Massachusetts was made on July 2, 1957. The Massachusetts court awarded compensation, in pursuance of the state's agreement as of the date of formal taking. The award did not include payment for damage to the plaintiff's personal property or its loss of profits. The Court of Claims in the present action held that the plaintiff's attempt to be compensated for these items in the federal court must fail for the same reason the Massachusetts court would deny recovery for them: they are traditionally not part of a damage award for a taking unless specific enabling legislation makes them compensable. General Laws, Chapter 79, Section 10, was interpreted by the Court of Claims as follows: "[T]he section merely provides the procedure for recovering such damages when that right is given by some other provision of law. In this case there is no such provision."³

This section of the opinion restates the general as well as Massachusetts law concerning consequential and incidental damages. The court noted the numerous recent cases that have dealt with this rather thorny subject, when the compensation granted on a taking is constitutionally *just* even though one with interests in the land does not recover a portion of his actual business and personal property losses. The emphasis in just compensation concepts remains on the interference with physical dominion over the property taken and compensation is not given for any other losses suffered.⁴ In the Massachusetts decision awarding the plaintiff damages for the taking, the parties stipulated that the dam and water rights of the plaintiff were intact on July 2, 1957, the date of the formal taking. This stipulation was contrary to actual fact since the Federal Government's contractor had destroyed the dam and water supply in March.⁵ Yet the stipulation controlled in the Massachusetts case and the plaintiff received no compensation for loss of the use of its land from March to July. The

² Pub. L. 738, 74th Cong., 49 Stat. 1570 (1936), as amended by Pub. L. 228, 77th Cong., 55 Stat. 638 (1941).

³ 357 F.2d 988, 995 n.12 (Ct. Cl. 1966) (following Massachusetts decisions on point).

⁴ The theories justifying this result are multitudinous and logically convincing, but modern conditions have at least created a political if not constitutional problem in areas such as urban renewal and highway development in urban areas. See Huber, *Legal Rights of Persons Whose Businesses Are Displaced* (1962). See also *A. G. Davis Ice Co. v. United States*, 362 F.2d 934 (1st Cir. 1966), noted in §15.26 *supra* on the related point of loss of profits as evidence of market value.

⁵ Massachusetts refused responsibility for damage caused prior to the formal taking in July and the United States could not be joined in the state court action. In the state action, the first two days of trial largely involved the exclusion of testimony of damages occurring prior to the formal taking. It was at this point that the parties agreed to the stipulation that all the petitioner's rights were intact up to the point of taking. 357 F.2d 988, 991, n.4 (Ct. Cl. 1966).

plaintiff sought in the present proceeding the rental value of the land taken to the period from the actual March taking to the formal July taking. The court held that the stipulation was not intended to cover the use of the land prior to July 2, 1957. Therefore, in addition to the compensation which Massachusetts granted for a permanent taking of the fee, the plaintiff was also entitled to recover from the United States compensation for the temporary taking by the Federal Government during the three months preceding the formal taking.

Senior Judge Whitaker, in dissent, pointed out that the plaintiff was entitled to the full value of the land taken at the time of actual taking, neither more nor less. He found no proof that this full value differed from the value determined in the state court proceeding as of July 2, 1957. He disagreed with the majority's view that the March taking was a temporary one, holding instead that the only taking was the permanent one that occurred as a matter of fact in March. Thus the plaintiff in his view had failed to establish any damages for which it had not been compensated in the state action.

On balance, the dissent is more persuasive on the facts of the case, since the majority relied upon highly technical, not to say artificial, distinctions between actual and formal takings. On the other hand, if a taking agency delayed formal taking an unreasonable period, the requirement for rent payment damages for the time between an actual taking and the completion of procedural formalities may be necessary to protect an owner of land. Certainly this rule will ordinarily encourage a taking agency to speed up the period between the two dates so as to avoid the increased liability.

§15.30. Relocation assistance. The well-known need for an adequate relocation program was substantially met during the 1966 SURVEY year.¹ The Department of Commerce and Development was assigned the basic function of assuring adequate housing, particularly for persons displaced by public action.² The Commissioner is directed to establish a Bureau of Relocation which will carry out functions prescribed by the new Chapter 79A of the General Laws entitled "Relocation Assistance." This new chapter will apply to any acquisition of properties made after February 28, 1966, which will involve the displacement of occupants of six or more dwelling units or six or more business units. For each such acquisition, the Bureau of Relocation shall qualify a "relocation agency" under standards set out in the chapter,³ which agency will have the obligation to prepare a relocation plan. This plan must be submitted to the Bureau at least one month

§15.30. ¹ Acts of 1965, c. 790, creating a new Chapter 79A, entitled "Relocation Assistance," in the General Laws. The Act also amended Chapter 23A of the General Laws.

See 1965 Ann. Surv. Mass. Law §14.30; 1964 Ann. Surv. Mass. Law §14.28; 1963 Ann. Surv. Mass. Laws §13.13 for earlier comments on relocation problems within the Commonwealth.

² G.L., c. 23A, §2(a $\frac{1}{2}$), as inserted by Acts of 1965, c. 790, §1.

³ G.L., c. 79A, §2.

prior to the date of the acquisition of the properties involved. The plan must contain the following: (1) the number of individuals, families, and business concerns being displaced; (2) the date displacement will begin; (3) the need of those displaced for relocation assistance; (4) the availability of suitable quarters within the means of those displaced; (5) the relocation program; and (6) clear indication that the relocation agency has co-ordinated its plan with other acquisitions, planned or prepared, within the community in which the present acquisitions are being made.⁴

Relocation programs in which the Federal Government makes reimbursement in whole or in part and which federal agencies must approve, are submitted to the Bureau for informational purposes. If, however, the provisions of Chapter 79A require more extensive assistance than the particular federal program prescribed, the taking agency must also furnish this added assistance under a Bureau-approved relocation plan.⁵

The new chapter prescribes a system to reimburse occupants for moving costs.⁶ The procedure to be followed makes the system of payment as simple as possible for both the taking agency and the person or business entitled to moving costs. Not later than one day before he is required to move, the occupant receives the choice of either the minimum relocation payment of \$25 or a certificate, redeemable by the movers for actual moving costs up to the authorized maximum amount.⁷ If he receives the minimum he also gets written notice of his rights to reimbursement for costs over the minimum, and the procedure to be followed in making his claim. A three-months statute of limitations terminates any right to additional moving costs. Appeal by a person aggrieved by the action of the relocation or taking agency in denying a moving-cost claim may be taken to the Bureau.

The chapter also provides for continuing supervision of the relocation agency and its plan by the Bureau. In certain cases of disapproval or suspension of a plan, an "emergency project" designation will permit a particular project to proceed despite a lack of adequate relocation housing.⁸

The Bureau may agree to waive as to a particular acquisition any provision of the chapter that would prevent otherwise obtainable federal reimbursement.⁹ A grandfather clause is inserted to provide

⁴ Id. §4.

⁵ Id. §5.

⁶ Id. §7. Moving costs are payable to all displaced, even if not covered by a relocation plan, i.e., even if five or less units are being acquired.

⁷ Id. §1 sets \$200 at the maximum for individuals and families and \$3000 as the maximum for displaced businesses.

⁸ Id. §10. A request for such designation is made by the taking agency and approval is given by the Bureau if it is satisfied that the public interest demands that the project proceed even absent adequate housing and also if all other aspects of the relocation plan meet Bureau standards. This provision provides a safety valve but care must be taken to assure it does not become a hole in the boiler!

⁹ Id. §12.

that any taking agency qualified by the Federal Government to perform relocation assistance under a program involving partial or complete federal reimbursement, will be a qualified agency under Chapter 79A until July 1, 1967.¹⁰ More significantly, the Bureau is authorized to issue regulations to carry out the provisions of the chapter.

It is, of course, easy to establish that persons or businesses displaced by eminent domain often do not receive full reimbursement for their losses. In an era when most government acquisition involves land already developed, simple justice and political wisdom combine to demand that these displaced individuals and businesses attain more complete reimbursement than the constitutional concept of just compensation requires.¹¹ Certain losses, such as those for lost profits or reduction in good will, will tend to be thought of by most legislators as well as courts as speculative and may never be reimbursed in any but unusual situations.¹² But many costs such as those for redecoration, machinery installation, finder's fees and many other costs, are readily ascertainable, represent established losses, and present no real problem of proof.

Even more important than the payments for moving costs authorized by Chapter 79A is the provision of relocation advisory assistance therein required. The economic losses are often considerably less crucial or paralyzing to those forced to leave an area than are the social and psychological problems that relocation highlights or creates. The physical help furnished by locating adequate business and dwelling units and by assisting those dislocated to move to such units is a vital step in relieving some of the social costs of relocation. It is, however, only the first of several desirable steps to help those displaced. Today many of those being relocated are particularly vulnerable to the buffeting of society, and ideally, extensive social and psychological counseling in such problem areas as family living, delinquency, and adjustment to a neighborhood and an urban society generally, should be routinely given at this time of great strain upon them. Business movers, in addition, often need extensive business counseling service. The language of the statute, however, does not seem to cover more than the physical requirements of those displaced.¹³ Thus the next

¹⁰ Acts of 1965, c. 790, §6.

¹¹ Massachusetts provides historically interesting evidence of a recognition of the inadequacy of just compensation in certain cases, with its detailed and generous provisions for reimbursement in the water reservoir takings. Acts of 1895, c. 488, §14; Acts of 1896, c. 450, §1; Acts of 1898, c. 551; Acts of 1926, c. 375; Acts of 1927, c. 321.

¹² See note 11 *supra*, for a type of the unusual situation in which these factors, despite their possibly speculative nature, are likely to be made reimbursable.

¹³ G.L., c. 79A, §1, which reads: "Relocation advisory assistance, advice relating to available housing resources or business premises, and such other advice and assistance as the bureau may require," might be interpreted broadly to cover social and psychological counseling. But *id.* §4 sets out relocation plan requirements that do not cover more than the physical needs of those displaced and §5 indicates that plans meeting the requirements of §4 must be approved.

step in an adequate relocation program should involve the requirement of adequate counseling to those being displaced so that the social and psychological costs of public projects involving relocation are as routinely obligations of government as are the economic costs.

§15.31. Other relocation legislation. In addition to the provisions of the general state program of relocation assistance described above,¹ the legislature adapted other relocation legislation during the 1966 SURVEY year. Acts of 1966, Chapter 646, amended Section 7J of General Laws, Chapter 81. The section governs the Department of Public Works' payment of moving expenses for which the federal government provides partial reimbursement. The amendment provides that persons who voluntarily vacate property at Department request because of a proposed acquisition are eligible for moving costs to the same extent as are those who move at later stages of the acquisition process. This state statute was necessary if the Commonwealth was to take advantage of the recently amended moving-costs section of the federal highway act, which reimburses a portion of all such state-incurred costs.²

Relocation expenses of business concerns often exceed the maximum compensation permitted under federal and state law. Act of 1966, Chapter 619, is designed to permit cities and towns to contribute funds to redevelopment or housing authorities to be used to make relocation payments for those expenses not reimbursable from these sources. General Laws, Chapter 121, Section 26J, was modified by the addition of a new definition of "Relocation payments." Those payments are now defined in terms of reasonable moving expenses and actual direct loss of property (except for good will or profits) caused by rehabilitation and conservation as well as conventional redevelopment projects. Cities and towns are authorized to make these expenditures³ but are controlled in the amount of indebtedness they can incur for these purposes. The bill as originally submitted included provisions that would have added the amounts of these relocation grants to the sums for which the Commonwealth is at present authorized to bear a share of the cost, but this feature of the bill was lost.⁴

The amount of relocation housing available is very limited in many urban areas. Public housing constitutes a large stock of housing, probably the largest amount in many communities, meeting the strict standards required of this housing. It has not always been available to those displaced by public projects, however, since many housing

§15.31. ¹ See §15.30 *supra*.

² House No. 91, par. 7 (1966), Report of the Department of Public Works.

³ The act amends G.L., c. 121, §26CC, which governs municipal expenditures for urban renewal projects.

⁴ Senate No. 232, §§4-6 (1966). The Department of Commerce and Development had included a recommendation for partial state reimbursement in its report. House No. 13 (1966).

The bill as enacted had a somewhat similar predecessor in Acts of 1965, c. 728, which authorized the city of Cambridge to contribute funds to the Cambridge Redevelopment Authority for relocation payments.

authorities impose local residence restrictions on those applying for public housing under their jurisdiction. Acts of 1965, Chapter 740, amended General Laws, Chapter 121, Section 26FF, to forbid an authority from requiring that applicants who have been displaced by public action be residents of the municipality in which the project causing their displacement is located. Six months residence in the Commonwealth may, however, be required of such displaced applicants.

Businesses displaced by public action often find relocation very difficult but the problem is compounded for those businesses who depend upon an alcoholic beverages license for survival. The difficulties are compounded in Boston by the existence of a substantially greater number of outstanding licenses than are now the maximum allowable, because of the decrease in population and statutory changes. Acts of 1966, Chapter 657, amended Acts of 1965, Chapter 804, to authorize a substantial payment for retirement of their licenses to those licensees whose premises were taken by public action and who have not relocated.

§15.32. **Taking of public land: Highway purposes.** In *Revere Housing Authority v. Commonwealth*¹ the Metropolitan District Commission took land owned by the Authority for the purpose of constructing and maintaining a public parking area. The Authority contended that it was entitled to payment under Acts of 1955, Chapter 693, as amended by Acts of 1957, Chapter 657. Under these acts, the taking authority is directed to pay to the public agency whose land is taken for highway improvements an amount upon which the two bodies mutually agree or, upon failure to agree, the amount determined by the real estate review board in the Department of Public Works. The Supreme Judicial Court first determined that the case, a declaratory judgment action against the Commonwealth, was properly before the courts. Although the Commonwealth cannot without its consent be sued or impleaded in its own courts,² consent to a suit can be given not only explicitly but also implicitly when the purpose of particular legislation indicates that the General Court must have contemplated that the Commonwealth could be made a party to any action involving the statute.³ The Court analyzed the present statute and found that, if actions similar to the present one were not allowed, the remedy given by the pertinent acts of the legislature would have been only illusory.

The Court also decided that land taken for public parking was taken "for highway improvements" within the intendment of the basic

15.32. ¹ 1966 Mass. Adv. Sh. 1047, 218 N.E.2d 94.

² *Demetropolis v. Commonwealth*, 342 Mass. 658, 175 N.E.2d 259 (1961); *Executive Air Service, Inc. v. Division of Fisheries and Game*, 342 Mass. 356, 173 N.E.2d 614 (1961).

³ *Franklin Foundation v. Attorney General*, 340 Mass. 197, 163 N.E.2d 662 (1960). One can note that the Franklin case does not involve such a truly implicit rather than explicit consent to be sued and the present case can be interpreted as indicating a willingness on the part of the Court to erode, where reasonably feasible, the sovereign immunity doctrine.

legislative acts. This determination, based upon closely analogous precedents,⁴ might be somewhat questionable if the parking area, for example, was being used not in connection with any highways of the taking agency but as part of a swimming reservation. But even in such a case, the likelihood of fairly extensive highway traffic to the reservation should sustain a finding that a parking lot was for a highway purpose.

§15.33. Eminent domain study commission. Numerous eminent domain bills were filed during the 1966 legislative session, reflecting the ever increasing importance and extensive impingement of the governmental power upon the public. By Resolves of 1965, Chapter 141, a special commission to study eminent domain within the Commonwealth was authorized and apparently has been set up. By Resolves of 1966, Chapter 27, the scope of the commission's inquiry was increased to include a study of the time when value is to be determined upon a taking.¹ Certainly the conventional determination that just compensation is fair market value at the time of taking will not stand close scrutiny in the many situations in which land values have changed extensively after announcement or even rumors of a public project in the area.

The commission itself is certainly needed, as is reflected by the numerous bills filed that tinker with inequities, real or imagined, in the basic legislation. While it is unknown what work has been done by the commission, the use of the common format of an unpaid commission, over half of whose members are legislators who have too much to do in carrying out their regular legislative functions, does not present much hope for a study in any depth. It is interesting, if also appalling, that the Commonwealth will spend millions each year on eminent domain takings but cannot apparently conceive of the expenditure of perhaps fifty thousand dollars to finance a complete study of the process by which money flows through its hands in large amounts. The overly familiar political slogan which espouses the use of business practices in government seems oddly to mean that expenditures that have no business equivalent are to be subjected to serious re-evaluation while expenditures, such as those under eminent domain to which some business management principles would seem to be directly and completely applicable, are seldom studied to determine if they are carried out with proper consideration of the interests of all persons who may be involved. Let us hope that our fears that this commission will do little are totally unfounded and that thus we will see proposals that reflect a complete re-evaluation of the entire eminent domain process.

⁴ See, e.g., *Tate v. City of Malden*, 334 Mass. 507, 136 N.E.2d 188 (1956).

§15.33. ¹The bill that was referred to the commission was submitted on petition of the Massachusetts Association of Real Estate Boards. House No. 1226 (1966).

§15.34. **Legislation.** Although a great amount of eminent domain legislation was proposed, relatively few new statutory measures were adopted. General Laws, Chapter 79, Section 8A, was revised so that the offer of settlement or payment pro tanto must be made prior to 60 days after the recording of the order of taking.¹ This change, however, merely corrected this section to conform to the recent changes in Chapter 79, that required payment of land damages within 60 days after taking.²

The perennial problem of the management and sale of property held by the Department of Public Works and not being used for a public project was involved in two statutory enactments. Acts of 1965, Chapter 755, amended General Laws, Chapter 81, Section 7E, to permit the Department to employ a desirably wide range of management and disposal techniques in handling excess property. Such land can be sold, transferred to another public body, or leased, and the statute gives desirable flexibility to the Department at least in the matter of sales. One may debate the necessity for gubernatorial concurrence in a transfer of such land to another public body and particularly in the lease of such land. More possible abuses could be conceived in the sale of excess land than in its lease or transfer.

Acts of 1966, c. 427, gives the Department of Public Works the authority to manage property acquired under the accelerated highway program from the time it is acquired until it is used for highway purposes. The act should produce certain beneficent results: federal reimbursement for interest payments on land damages awards; tax revenue to the municipalities in which the property is located; and protection of tenants who would otherwise have to move immediately upon the recording of the order of taking.³ The legislation is, of course, a very sensible approach to a problem that should not exist under adequate eminent domain practice. It is inconceivable today to imagine what real advantage is to be gained by requiring land to lie unused from the time of taking until the time of actual use on a public project.

The Department of Public Works has now joined those agencies who have been given the right to lease air rights over their properties, in this case, over state highways.⁴

D. HOUSING AND RENEWAL

§15.35. **Urban renewal: Legislation.** Of a large number of bills submitted in the urban renewal area, relatively few were adopted. Acts of 1966, Chapter 138, revised certain definitions in General Laws, Chapter 121, Section 26J, so that the "division of urban and industrial

§15.34. ¹ Acts of 1966, c. 530.

² See 1965 Ann. Surv. Mass. Law §14.27; 1964 Ann. Surv. Mass. Law §14.27.

³ See House No. 3079 (1966), the Governor's message submitting the legislation.

⁴ G.L., c. 81, §7L, added by Acts of 1966, c. 677.

renewal" and "housing board" are now defined as the Department of Commerce and Development.

Acts of 1966, Chapter 692, also amended Section 26J to add a definition of "Community renewal project." Section 26CC was modified to authorize a municipality to incur indebtedness for community renewal projects as well as other renewal and housing projects previously covered.

Two acts involved changes in those authorized to take advantage of Chapter 121A, the Urban Redevelopment Corporation Law. Acts of 1966, Chapter 421, authorizes charitable corporations to enter into the necessary agreements under this law, and the agreement constitutes a waiver by the charitable corporation of its real property tax exemption. A much more lengthy statute, Acts of 1965, Chapter 859, authorizes individuals, or a group thereof in other than corporate form, to undertake, acquire, or carry on urban redevelopment projects under Chapter 121A by adding a new Section 18C to the chapter and, for Boston, an amendment to Acts of 1960, Chapter 652, Section 13. These amendments hopefully will encourage more redevelopment projects that do not require public taking of property or any extensive direct expenditures of public funds.

Acts of 1966, Chapter 704, amended Sections 26K, 26YY and 26ZZ of Chapter 121 of the General Laws to authorize urban renewal for the purpose of preservation, restoration or relocation of historic buildings. In addition, notice of any public hearing involving urban renewal is to be given to the Massachusetts Historical Commission, and any historical district commission in the municipality in which the project is located.

§15.36. **Legislation rejected.** Legislation to recodify the housing and redevelopment laws of the Commonwealth was submitted by the Governor on the basis of the recommendations of the Governor's Advisory Committee on Housing and Urban Renewal.¹ Not surprisingly to one acquainted with the history of somewhat similar proposals in the past, the proposed legislation had the usual rather uneventful trip to legislative oblivion. The reasons for the reluctance to revise this complicated body of law are many but this writer is beginning to wonder, after the many rebuffs of similar legislation, if the main reason is that the General Court, or some of its influential members, finds a certain charm in section numbers such as 26GGG. At least, a revision retaining the old, rather fantastic section numbers could have no worse chance of adoption than the proposals that have failed of adoption to this time.

An important proposal to enlarge the exceptions to a 30-year limit on conditions and restrictions² was rejected by the House of Representatives.³ The proposed legislation would have prevented the 30-

§15.36. ¹ House No. 3327 (1966).

² G.L., c. 184, §23. See 1961 Ann. Surv. Mass. Law §12.4.

³ Senate No. 321 (1966).

year limit from applying to takings and purchases for public purposes, in addition to the present exemption for gifts or devises for public, charitable or religious purposes.

It seems fair to state that the 30-year limitation on conditions and restrictions serves the dual purpose of facilitating title search and preventing private control of property to extend for overly long periods. The latter problem is not involved in a public taking or purchase and a proper re-recording system could avoid any problem with the first.

In many situations involving urban renewal, conservation or other such programs dealing with projects thought of as involving controls over long periods of time, the public agency with an interest it wishes to enforce beyond the 30-year period may not comply with the statute's definition of those who can re-record or otherwise enforce conditions or restrictions. The legislature should give some consideration to these issues.

The joinder of renewal and planning functions in Boston, which is at least theoretically undesirable,⁴ was retained, by reference to the next annual session of the bills seeking to abolish the joinder.⁵

§15.37. **Low-income housing.** The final report of the Special Commission on Low-Income Housing,¹ noted in last year's ANNUAL SURVEY,² proposed a number of extensive legislative modifications of present law. Some of the proposed legislation was adopted during the 1966 SURVEY year. A number of the same bills were submitted by the Governor to the General Court by special message, which also proposed certain additional bills.³

§15.38. **Housing Finance Agency.** Acts of 1966, Chapter 708, established the Massachusetts Housing Finance Agency. The original bill had been determined in an *Opinion of the Justices*¹ to include expenditures which would not be for a public purpose, since the proposal included aid to projects which might have as many as 75 per cent of its tenants persons who were not of low income or otherwise in need of any type of housing subsidy. The bill as finally adopted lays substantially more stress on furnishing housing for persons of low income and less for persons of somewhat higher income but continues to stress the original objective of avoiding the segregation of persons of low income into separate housing. The original provision for state backing of the agency's bonds was removed, thus avoiding the problem of state expenditures for a private purpose. The modifications of the statute as adopted should meet the objections raised in the *Opinion of the Justices*, particularly since the opinion itself cer-

⁴ 1961 Ann. Surv. Mass. Law §12.5.

⁵ House Nos. 291, 1368 (1966).

§15.37. ¹ House No. 4040 (1965).

² 1965 Ann. Surv. Mass. Law §14.33.

³ House No. 3326 (1966).

§15.38. ¹ 1966 Mass. Adv. Sh. 1197, 219 N.E.2d 18.

tainly represents one of the narrowest readings of the public purpose doctrine in recent years.

The bill provides a means by which low interest loans will be made available for building or rehabilitating housing designed for a combination of low and moderate rentals. Rentals are defined in three separate categories: (1) market value rental; (2) below-market rate rental (market value rental less adjustment for the low interest mortgage from the Agency); (3) adjusted rental (the below-market rate rental less at least 10 per cent to reduce the rentals so that low income families can afford the housing at no more than 25 per cent of their income). At least 25 per cent of all units must be rented at the adjusted rental and the balance at no less than the below-market rate rental. Mortgage rates are set at no more than one quarter of 1 per cent more than the cost of the money to the Agency. Distributed profits of the mortgagor are limited to 6 per cent of the value of the mortgagor's equity, any undisturbed profits being used for adjustments of rents in the project.

§15.39. Rental assistance. Acts of 1966, Chapter 707, created a new rental assistance program for the Commonwealth.¹ The system as adopted permits local housing authorities to lease dwelling units that meet quality standards and in turn sublease them at reduced rentals to families of low income. These families will pay rent at a rate approximately 20 per cent of income, so that as income rises the amount of the subsidy will be reduced or eliminated. A family in a position to bear the entire rent can obtain an assignment of the housing authority's rights under the lease. Thus, a tenant will be able to remain in this type of housing even if he is no longer qualified for public housing.

§15.40. Service of process on owner or agent. One of the most obvious problems in enforcing housing and occupancy codes has been the difficulty or impossibility of locating the owner of the property involved. Acts of 1966, Chapter 707, in addition to creating the rental assistance program discussed above, also enacted provisions requiring the nonresident owner of tenements¹ to appoint an agent for service of process, the agent to reside in the community in which the property is located. Failure to file the name of such person will be deemed an appointment of the city or town clerk as agent. Upon the posting of a tenement for code violation, the owner is required to register his true name with the clerk.²

§15.41. Low-rent housing expansion. The need for additional low-rent housing was recognized by Acts of 1966, Chapter 705, which redefined "low-rent housing project" to include the purchase or acqui-

§15.39. ¹ G.L., c. 121, §§26KKK—26MMM.

§15.40. ¹ As defined in G.L., c. 144, §2.

² These provisions were adopted as amendments to G.L., c. 144, §§1, 94 and 95, and c. 145, §§1, 59, and 60, and added new §§95A through 95C to c. 144 and §§60A through 60C to c. 145.

sition of completed dwelling units that have been constructed or recently remodeled. This will permit local housing authorities to scatter public housing throughout a good portion of the community and, equally important, act much more quickly to develop any necessary public housing than would be possible if a large project had to be planned and constructed from the beginning.¹ The scheme adopted by this act is not limited to the purchase of detached dwelling units but applies also to purchase of some but not necessarily all dwelling units within a condominium, a large development, or a multi-family development. This will tend to foster the scattering of low-income families throughout a community and is thus a further application of the same policy found in the rental assistance program discussed above.

§15.42. Housing for the elderly. Acts of 1966, Chapter 626, amended Section 26VV of Chapter 121 of the General Laws to increase the Commonwealth's guarantee and its annual contributions to the housing of elderly persons. The elderly are one of the largest components of those eligible for low-income housing. Projects and programs that consider their special needs, without isolating them from the community, can be, under this new legislation, developed considerably more effectively than was formerly possible.

§15.43. Enforcement of state sanitary code. The provisions of the state sanitary code, setting forth minimum standards of fitness for human habitation, have always presented certain enforcement difficulties. Some of these were remedied with the adoption of Acts of 1965, Chapter 898, under which rent withholding and receivership were authorized under certain conditions.¹ To qualify for the extraordinary remedies involved, the state sanitary code and any additional local health regulations must be found to have been violated in one or more matters; the conditions involved must materially impair or endanger the health or well-being of any tenant therein; and the condition must not have been substantially caused by the tenant or any one acting under his control. The local board of health investigation must support the allegations. The district court can then order the tenant to pay his rent to the clerk of the court as it becomes due if the tenant is either not in arrears in his rent or is willing to pay any arrearage into court. The clerk may be directed by the court to use all or part of the rents for removing the unsafe or unhealthy conditions.

A petition based on similar allegations can alternatively be brought by a tenant in the Superior Court and, upon proper proof, the court can appoint a receiver if it wishes, order rent paid to the clerk, or give other appropriate relief.

¹§15.41. The numerous changes are made by amendments to G.L., c. 121, §§26J, 260, 26AA, 26FF, and 26NN.

¹§15.43. The act amends G.L., c. 111, §§5, 124, and adding new §§127A through 127J to the chapter. See an earlier discussion of the statute in its form prior to adoption in 1965 Ann. Surv. Mass. Law §14.34.

Acts of 1965, Chapter 888, added a new Section 8A to General Laws, Chapter 239, to permit the violation of standards of fitness for human habitation to be a defense in an action of summary process to recover possession of the premises. The standards can be those imposed by the state sanitary code or local supplementary regulations, and violation must affect the health or safety of the occupants. The tenant must also, when not in arrears on his rent, give the person to whom he customarily pays the rent notice that he is withholding rent because of the violation, which the local board of health has determined exists and may endanger or impair health and safety. He further must show that he or any one under his control did not cause the violation and that the condition can be remedied without vacating the premises.

Further defenses to an action of summary process when a violation of the standards for human habitation have been violated were given in Acts of 1965, Chapter 898, Section 4. Under this statute, the action of summary process for non-payment of rent is denied not only while rent is being paid into court but also for nine months subsequent to the revocation or termination of the order.

§15.44. Miscellaneous low-income housing matters. Tenant selection in public housing was the subject of two legislative acts. General Laws, Chapter 121, Sections 26NN and 26UU, were amended by Acts of 1965, Chapter 899, to require that the division of housing in the Department of Commerce and Development promulgate regulations governing the order of priority of selection of tenants, these regulations to be binding upon local housing authorities. Section 26NN was further amended by Acts of 1966, Chapter 28, to make certain that totally handicapped or blind persons of low income would have a priority in obtaining public housing, without regard to their family status.

Acts of 1966, Chapter 78, amended Section 127B of General Laws, Chapter 111, and created a lien in favor of a city or town for expenses incurred in cleaning dwellings that have been found to violate public health laws and regulations.

Two resolves setting up special commissions also will deal with problems that tend to affect the availability and conditions of low-income housing in the private sector. Resolves of 1965, Chapter 137, authorizes a study of the problems of obtaining fire insurance, particularly in certain areas of the larger urban centers in the state. Resolves of 1966, Chapter 24, authorizes a study of the minimum standards for human habitation set out in the state sanitary code and the effects of these standards on property owners. The emphasis in the language of the latter resolve unfortunately suggests an orientation toward the owner as opposed to the tenant. But certainly the problems of property owners cannot be minimized and, in fact, various low-income housing programs adopted this year and noted above will tend to give landowners help in meeting standards that might otherwise prove economically burdensome if not impossible for them. But, clearly, the

reduction of the standards to a level below what should be minimal is not a solution for this vexing problem.

E. MISCELLANEOUS MATTERS

§15.45. Industrial development. In the competition for industry with other states, the Commonwealth and its communities have often been at a disadvantage. They could not match the lures offered by others, often in the form of tax exemptions or even outright contributions through rent-free occupancy of publicly built plants, as well as somewhat more restrained but still attractive gimmicks. In last year's election, Amendment Article LXXXVIII of the Massachusetts Constitution was approved by the voters, which states in part: "The industrial development of cities and towns is a public function . . ." This amendment presumably will permit the Commonwealth to meet fire with fire, if it so wishes, as it removes doubts as to the public purpose of this type of expenditure.

One might well be happier with somewhat less vague language. What is—or is not—included as "the industrial development of cities and towns?" It is not difficult to imagine arguments favoring the building of homes for the executives and workers of a given business enterprise and this might well be, in a broad sense, for the industrial development of the community.

One may also ask if industrial development excludes commercial development of the type not thought of generally as industrial. If so, presumably help to encourage an insurance company to settle in a locality would not be included. Nor would the phrase, it appears, include help to many of the establishments that might be very useful in developing tourism within a community, unless tourism is called, as it sometimes is, an industry rather than commerce.

The General Court, in the late special session, enacted Acts of 1966, Chapter 730, which prohibits municipalities from taking action under the amendment until enabling legislation is adopted. Such restraint is wise; when action is taken, the General Court will need all of the common sense and wisdom it can bring to bear on this subject. Certainly a clarifying amendment to the new amendment might well be considered.

§15.46. Regional planning. No legislation of major importance to regional planning was adopted during the 1966 SURVEY year. Federal grant-in-aid programs are, however, tending more and more to stress regional considerations and are doing this not only by the development of regional programs in areas such as air and water pollution control, but also by consideration of requirements that local communities engage in regional planning as a price for certification for various programs. We can thus expect a major emphasis on this area within the next several years.

In the meantime, during the 1966 SURVEY year, Acts of 1966, Chapter 588, amended General Laws, Chapter 6, Section 111, to include

additional communities within the Metropolitan Area Planning District. The count of communities within the district is now 82, which is more than one fourth of the state's cities and towns. Acts of 1965, Chapter 737, amended Section 113 of General Laws, Chapter 6, to give the executive committee of the Metropolitan Area Planning Council somewhat greater control over the financial affairs of the council.

§15.47. **Water and air pollution and waste disposal.** Senator Clark of Pennsylvania has recently stated that any politician cannot fail to win strong voter approval if he gets on the anti-pollution handwagon. Perhaps the conventional politicians' creed of "God, Mother and Country" will include the addition of "Clean Air and Water." The problem is, however, much too serious, not to say desperate in some areas, to be the subject of light-hearted jest. Many things must be done and done soon if we are to preserve our national health and if the fantastic costs pollution is imposing upon the country are to be reduced to sensible levels.

The legislature has in recent years been giving considerable attention to these problems. During the 1966 SURVEY year, Acts of 1966, Chapter 685, established a water pollution control division in the Department of Natural Resources;¹ the legislation is denominated the Massachusetts Clean Waters Act. The purposes of the act are too detailed to be discussed here but it should give the state a good start on an adequate water pollution program.

The legislature at the same time, in Acts of 1966, Chapter 687, authorized the new division to expend up to \$150 million on aid to municipalities in developing facilities to insure cleaner waters, including sewage and industrial waste disposal plants. The division will also operate so as to take advantage of the federal programs in this area.²

Industrial wastes are probably the major source of water pollution but the costs of adequate abatement or preventive equipment are very high. Recognizing the desirability of the carrot as well as the stick approach, the General Court gave water pollution abatement facilities an exemption from local property taxes under certain conditions,³ and also provided for an elective deduction or exemption under the corporate excise for the construction or improvement of industrial waste disposal facilities.⁴

Acts of 1965, Chapter 748, substituted new Sections 44A through 44K in General Laws, Chapter 40, which is the enabling act for regional refuse disposal districts. The changes in the act were numerous but the same general concept of a voluntary district was retained. Acts of 1966, Chapter 202, made alterations in the procedure used by

§15.47. ¹ New §§26 through 50 were added to G.L., c. 21.

² See House No. 3426 (1966), a message of the Governor to the General Court on the issues of water pollution, for a brief outline of the federal programs.

³ Acts of 1966, c. 700, adding new clause forty-fourth to §5 of G.L., c. 59.

⁴ Acts of 1966, c. 701, adding §38D to G.L., c. 63.

cities and towns in contracting for the disposal of refuse by composting, sanitary land fill or other sanitary manners approved by the Department of Public Health.⁵

The problem of refuse and waste disposal is generating some litigation, which is probably merely a forecast of things to come. *Duane v. City of Quincy*⁶ held that a dispute between the city and inhabitants living near the location of an incinerator, authorized by act of the General Court, was not an actual controversy ripe for decision in a declaratory judgment action.

In *Commissioner of Public Health v. Board of Health of Tewksbury*⁷ the Department of Public Health, after hearing, had ordered the town to operate its dump by the sanitary land fill method or terminate its use. General Laws, Chapter 111, Section 150A, gives the Department power to modify the assignment of any place as a dumping ground on the basis of its constituting a public nuisance and a danger to public health. The Court found this provision authorized the order of the Department in this case and that it could be enforced under the provision in Section 150A giving a person aggrieved the right to bring an action to enforce a Department order.

*Board of Health of Holbrook v. Nelson*⁸ involved the same Section 150A of General Laws, Chapter 111. The local board sought to enjoin the defendants from using certain land as a dumping ground. The Supreme Judicial Court agreed with the board that debris, mainly timber, from demolition of buildings is "rubbish or other refuse" under the statute and that, therefore, the dumping could be terminated for failure to obtain the board's permission.

§15.48. Conservation, open space, and recreation. The need for the preservation of land from the encroachments of complete urbanization, so that it will be available for recreation, conservation, and open space uses, has generated, locally as well as nationally, considerable legislation and many proposals for solutions. Acts of 1965, Chapter 768, provides a system for the protection of the coastal wetlands of the Commonwealth.¹ The Commissioner of Natural Resources can, after giving notice and holding a public hearing, make and modify orders relating to use of coastal wetlands. Orders are recorded and copies are sent to owners of record. The legislation also provides for an action for compensation by those claiming the orders amount to a taking of their land by restricting all practical use thereof.

Resolves of 1965, Chapter 110, created a special commission to study the taxation of forest, farm, or open space land, particularly a proposal to defer taxes on such land until the use is changed. Resolves of 1966, Chapter 4, requested the Judicial Council to study the prob-

⁵ The act amended G.L., c. 40, §4.

⁶ 350 Mass. 59, 213 N.E.2d 250 (1966).

⁷ 1966 Mass. Adv. Sh. 535, 215 N.E.2d 745.

⁸ 1966 Mass. Adv. Sh. 863, 217 N.E.2d 777.

§15.48. ¹ The act adds new §105 to G.L., c. 130, and amends §8C of G.L., c. 40.

lems involved in the public acquisition of conservation easements over land in private ownership. A bill to encourage landowners to make their land and water areas available for public use by limiting their liability² was referred to the Legislative Research Council for study.

A very interesting and somewhat questionable decision, *Gould v. Greylock Reservation Commission*,³ became quickly historical with the adoption of Acts of 1966, Chapter 694, abolishing the Mount Graylock Tramway Authority. In this case the Authority was held to have exceeded its powers in taking too much land in the park for its resort purposes. Its contract with a resort management company was also held to be beyond its powers. Perhaps as a result of this litigation the Greylock Reservation Commission was also abolished by Acts of 1966, Chapter 444, and its powers transferred to the Department of Natural Resources.

Acts of 1966, Chapter 648, authorized expenditures of \$5 million by the Department of Natural Resources for outdoor recreation areas, and \$1 million by the Department of Public Works for ocean beach recreational facilities. Acts of 1966, Chapter 470, directs the Department of Public Works to provide for the protection of water resources, fish and wildlife, and recreational values in all advance planning for highway purposes. A special commission set up by Resolves of 1966, Chapter 35, is to make an investigation of recreation areas within the metropolitan district.

§15.49. Historic preservation. The Legislative Research Council published during the 1966 SURVEY year its report on an historic preservation program for cities and towns.¹ The proposal examined would authorize state aid up to 75 per cent of project costs to local historical commissions which acquired historically significant buildings, somewhat similar to procedures established in California and Pennsylvania. No bill involving this proposal was enacted, however, during the 1966 SURVEY year.

Acts of 1965, Chapter 707, changed the procedure for certifying historic landmarks by the Massachusetts Historical Commission.² Consent to the designation is to be given by the owner of such property if privately owned, by the Governor for state-owned property, and by specified local officials if owned by a municipality.

Several acts concerning local historic districts were enacted. Acts of 1966, Chapter 579, increased the size of the existing Lexington historic district and established an additional historic district. By Acts of 1966, Chapter 211, an historic district commission was established in the town of Petersham.

In Acts of 1966, Chapter 625, the Back Bay Residential District was

² House Nos. 2337, 3320 (1966).

³ 350 Mass. 410, 215 N.E.2d 114 (1966).

§15.49. ¹ Senate No. 691 (1966).

² Amending G.L., c. 9, §27.

created and a Back Bay Architectural Commission was set up in the Boston Redevelopment Authority. The commission is not to be subject to the supervision and control of the Authority, which acts as the planning board for the city, although communications of the commission to the mayor, and its annual report, will be submitted through the Authority. The commission will have extensive power to preserve the exterior architectural features of the Back Bay area which has traditionally been considered one of the few architecturally great residential areas in the United States.

§15.50. **Transportation.** Legislation relative to transportation policy was relatively minor this year. Acts of 1966, Chapter 595, authorized the Massachusetts Turnpike Authority to conduct studies relative to the construction of a north-south toll turnpike through Worcester county. The Massachusetts Bay Transportation Authority was forbidden by Acts of 1966, Chapter 628, from disposing of its power plants and substations by sale or lease and was directed to continue to operate them. At least those legislators in the MBTA area who vote for legislation such as this cannot complain of the size of the MBTA deficit. Presumably, disposal of these plants would only be contemplated if it would reduce the system's costs or otherwise was considered to interfere with its most efficient operation.

One case decided during the 1966 SURVEY year, *Eastern Massachusetts Street Railway Co. v. Massachusetts Bay Transportation Authority*,¹ involved the Authority's power to contract to furnish mass transportation services to communities that were also served by the petitioner railway company. The Supreme Judicial Court upheld the Superior Court's determination that the contracts involved were within the scope of the powers given to the Authority by the General Court.

§15.50. ¹ 350 Mass. 340, 214 N.E.2d 889 (1966).