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## Chapter 29: State and Municipal Government

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## C H A P T E R 2 9

# State and Municipal Government

JOSEPH C. DUGGAN

### A. STATE GOVERNMENT

**§29.1. The Boston Common Garage Authority.** The lack of parking facilities in Boston prompted the General Court to enact Acts of 1957, c. 701, providing for construction and operation of a garage for the parking of motor vehicles under Boston Common and the creation of a public instrumentality to be known as the Boston Common Garage Authority. The primary function of the authority is to construct and operate, without cost to the city, a garage for the parking and servicing of motor vehicles under Boston Common.

Seven men, consisting of the Commissioner of Parks of the city, the Commissioner of Real Property of the city, and the chairman of the Boston Traffic Commission, and four other members appointed by the mayor will constitute the authority, and will serve without compensation. The authority, in addition to being authorized to adopt by-laws, to establish rules and regulations for the use of the garage, etc., is also empowered to acquire and hold such interest in the lands constituting Boston Common and in Charles Street as it may deem necessary. The cost of the garage will be paid by the issuance of revenue bonds of the authority, which will have all the qualities and incidents of negotiable instruments, and the proceeds of which are to be used solely for the payment of the cost of the garage.

This act, similar to the one establishing the Massachusetts Port Authority,<sup>1</sup> is subject to the same principal criticism. The purchasers of these bonds have very little security other than the provision that while any bonds remain outstanding, the powers, duties or existence of the authority will not be impaired in any way that will affect adversely the interests and rights of the holders. The only other security afforded the investing public is that the authority may secure the bonds by a trust agreement which can allow the authority to pledge

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§29.1. <sup>1</sup> Acts of 1956, c. 465, discussed in 1956 Ann. Surv. Mass. Law §18.1.

or assign its revenues but not to convey or mortgage the garage, its extensions or any of its parts. As in the Port Authority bill, the revenue bonds are not deemed to constitute a debt of the Commonwealth and are therefore payable solely from revenues. The only attractive feature of these bonds is that income from them is free from taxation by the Commonwealth.

When all bonds issued under this act are paid or a sufficient amount for the payment thereof has been set aside, the garage and other facilities will become the property of the city of Boston and the authority will be dissolved.

**§29.2. Public school teachers: Salaries and inspection of records.** During the SURVEY year several changes to G.L., c. 71 were enacted. The first sentence of §40 was amended to provide that the compensation of teachers employed in public day schools will be at a rate of not less than \$3300 for the school year;<sup>1</sup> §42B was amended by inserting §42C permitting teachers in cities or town where school officials keep records of teachers' work to inspect these records.<sup>2</sup>

**§29.3. Removal of vehicles from state highways.** General Laws, c. 85, §2A has provided that the Department of Public Works may remove to the nearest convenient place any vehicle interfering with snow and ice removal operations. The scope of the section was considerably broadened by Acts of 1957, c. 338 to give the Department the power to remove cars interfering with the free flow of traffic on state highways.

**§29.4. Renewal and redevelopment projects.** G.L., c. 121, dealing with low-rent housing projects and redevelopment authorities, underwent a series of changes during the SURVEY year. A change made to §26CC<sup>1</sup> increased the total amount of indebtedness that a city or town may incur for federally aided housing projects or renewal or redevelopment projects, from an amount not to exceed 1 percent of the average of the assessors' valuations of its taxable property for the three preceding years to an amount not to exceed 2 percent of this average.

Section 26QQ, prior to the 1957 change,<sup>2</sup> created in each city and town in the Commonwealth, except Boston, a public instrumentality to be known as the "Redevelopment Authority." The amendment provided for the establishment of such an authority in the city of Boston. The new amendment also made it unnecessary for the "Redevelopment Authority" to get the consent of the housing authority prior to the transaction of any business; a certificate of organization from the State Secretary is all that is now necessary.

The term "blighted open area" in the statute was redefined by 1957

§29.2. <sup>1</sup> Acts of 1957, c. 447.

<sup>2</sup> Id., c. 195.

§29.4. <sup>1</sup> Acts of 1957, c. 613. This section had been previously amended by Acts of 1957, c. 106, striking the words "one half of" before the words "one per cent."

<sup>2</sup> Id., c. 150.

legislation<sup>3</sup> to include "any predominantly open area which is . . . unduly costly to develop . . . soundly through the ordinary operations of private enterprise and which is to be developed for residential, recreational, commercial or industrial purposes. . . ." The definition as it stood prior to the amendment did not include areas which were to be developed for recreational, commercial or industrial purposes and was limited solely to areas with "predominantly residential purposes."

§29.5. **Award of contracts for public buildings.** Acts of 1957, c. 590 amended G.L., c. 149, §44A to provide that every contract for the construction, alteration, repair, etc. of any public building, estimated to cost more than \$5000 in the case of the Commonwealth or more than \$2000 in the case of any other governmental unit will be awarded to the lowest responsible and eligible general bidder within a period of thirty days, Saturdays, Sundays and legal holidays excluded, after approval by the federal government if it is a contract requiring this approval. The award period, therefore, was shortened from thirty-five days to the present thirty days exclusive of Saturdays, Sundays and holidays.

General Laws, c. 149, §§44K and 44C were amended by the same act. Section 44K is the enforcement section whereby the Department of Labor and Industries is given the necessary powers to require compliance with the statute, including the power to institute and prosecute proceedings in the Superior Court. The amendment provides that the Department is not required to pay any entry fee in connection with the institution of enforcement proceedings. Section 44C was amended to require that a subcontractor install materials to be furnished by him except those which are not customary for him to install under his current trade practices and the installation of which is required by another section of the specifications.

## B. MUNICIPAL GOVERNMENT

§29.6. **Zoning by-laws: Jurisdiction.** Whether the board of aldermen had jurisdiction to grant a variance under a city ordinance purporting to give the board that power was the controlling issue presented in *Colabufalo v. Board of Appeal of the City of Newton*.<sup>1</sup> The land in question was in a private residence district in which the building described in the building permit issued by the board of aldermen was not permitted. Prior to the issuance of the permit, the board of aldermen purported to grant a variance for the construction of the building. Previously, in *Massachusetts Feather Co. v. Aldermen of Chelsea*,<sup>2</sup> the Supreme Court determined that an appeal to the board of aldermen was invalid and consequently their action was without jurisdiction and a nullity. The Court in the instant case ruled that

<sup>3</sup> *Id.*, c. 613.

§29.6. <sup>1</sup> 1957 Mass. Adv. Sh. 861, 143 N.E.2d 536.

<sup>2</sup> 331 Mass. 527, 529-530, 120 N.E.2d 766, 767-768 (1954).

the board of aldermen had no power to grant variances and that the provision of the ordinance which purported to give the board that power conflicted with the enabling statute; furthermore, statutory provisions for granting of variances by the boards of appeal are precise, complete<sup>3</sup> and occupy the field.<sup>4</sup>

In the case of *Town of Concord v. Attorney General*<sup>5</sup> petitions for writs of mandamus and certiorari were brought praying that the order of the Attorney General, disapproving a purported amendment to a provision of the zoning by-law of the town, "be revoked ab initio, quashed and expunged." The Court, in dismissing the petition for a writ of certiorari, quoted from *Attorney General v. Suffolk County Apportionment Commissioners*<sup>6</sup> in which it was said that "Mandamus affords the appropriate form of relief. It is the remedy to which resort usually is had to set aside the illegal performance of duty and to compel the performance of duty according to law..."<sup>7</sup> The Attorney General's contention in this case was that G.L., c. 40, § 32, reading "[b]efore a by-law takes effect it shall be approved by the attorney general..." gave him the power of approval, the exercise of which was final and beyond judicial review. The Court disposed of this contention by saying that the acts are not within an area of unreviewable discretion<sup>8</sup> and that if the power to nullify a by-law ever resided in the Attorney General the power did not survive the enactment of Acts of 1952, c. 337.

The use of ambiguous terminology in zoning by-laws and statutes has given rise to considerable litigation. In *City of Worcester v. New England Institute*<sup>9</sup> the statute in issue was G.L., c. 40A, § 2, which provided "that no ordinance or by-law which prohibits . . . the use of land . . . for any educational purpose . . . [which is] public . . . shall be valid." The city zoning ordinance read in part as follows: "In any residence 'A' district no building structure or lot shall be used . . . in any part except for one or more of the following specified purposes: . . . (6) Schools, . . ." The question was raised if this ordinance exemption for schools should be confined solely to publicly supported institutions, in view of G.L., c. 40A, § 2. Thus the Court had to decide if the General Court intended to limit the exemption to only those educational institutions for which public funds are spent. The Court held that since the promotion of education by non-profit institutions not maintained at public expense has been often asserted or recognized as a public purpose, it can be said that the New England Institute school

<sup>3</sup> *Turner v. Board of Appeals of Milton*, 305 Mass. 189, 192, 25 N.E.2d 203, 204 (1940).

<sup>4</sup> G.L., c. 40A, § 15.

<sup>5</sup> 1957 Mass. Adv. Sh. 641, 142 N.E.2d 360.

<sup>6</sup> 224 Mass. 598, 113 N.E. 581 (1916).

<sup>7</sup> 224 Mass. at 609, 113 N.E. at 587.

<sup>8</sup> *Ames v. Attorney General*, 332 Mass. 246, 124 N.E.2d 511 (1955); *Howe v. Attorney General*, 325 Mass. 268, 90 N.E.2d 316 (1950).

<sup>9</sup> 335 Mass. 486, 140 N.E.2d 470 (1957).

serves an educational purpose which is "public" within the meaning of the statute.

The petitioner in *Robinson v. Commonwealth*,<sup>10</sup> at a trial for the assessment of damages arising out of a taking by the Commonwealth, tried to establish that the zoning ordinances as applied to his land were invalid. The Court decided that attacks on the validity of the zoning by-laws should have been asserted by the petitioner in the Land Court under G.L., c. 240, §14A or by suit for declaratory relief in the Superior Court under G.L., c. 231A. Thus, in petitions for land damages against the Commonwealth, zoning ordinances cannot be attacked.<sup>11</sup>

**§29.7. Eminent domain: Injury to property without taking and right to damages.** Two interesting eminent domain cases were heard this year, *Webster Thomas Co. v. Commonwealth*,<sup>1</sup> and *Sullivan v. Commonwealth*,<sup>2</sup> in both of which the Court reiterated the principle that there can be no recovery under G.L., c. 79 for injuries caused to property not taken unless the statute authorizing the particular injury provides that the owner may recover the amount of the damage.

In the *Sullivan* case, a petition for the assessment of damages under G.L., c. 79 was brought by petitioners for injuries caused to their house by rock blasting in the course of construction of an aqueduct. Although it is an almost invariable practice for the General Court, whenever it authorizes the infliction of damage to private property by a public improvement, to provide that the owner may recover the amount of the damage, not only was this practice not followed in the statute under which the aqueduct was built but the authorizing words went further and limited the application of Chapter 79 to "All takings under this act and all proceedings in relation to or growing out of same..." Since the petition was neither in relation to nor growing out of a taking, there could not be any implication in the reference to Chapter 79 of an intention to authorize the recovery of damages for injuries to land not taken. The right to recover damages for injury to land not taken is not given expressly or by necessary implication in G.L., c. 79, §9,<sup>3</sup> for it provides merely a procedure for these cases; it does not in itself create a liability for damages; that is left to the statute authorizing the injury. The case of *Wine v. Commonwealth*<sup>4</sup> can be distinguished from the *Sullivan* case since the authorizing statute provided for damages on account of any taking of or injury to land.

<sup>10</sup> 335 Mass. 630, 141 N.E.2d 727 (1957).

<sup>11</sup> *Long Beach City High School District v. Steward*, 30 Cal. 2d 763, 185 P.2d 585 (1947).

§29.7. <sup>1</sup> 1957 Mass. Adv. Sh. 761, 143 N.E.2d 216.

<sup>2</sup> 335 Mass. 619, 142 N.E.2d 347 (1957).

<sup>3</sup> G.L., c. 79, §9 provides: "When injury has been caused to the real estate of any person by... construction... of a public improvement which does not involve the taking of private property, ... damages shall be awarded..."

<sup>4</sup> 301 Mass. 451, 17 N.E.2d 545 (1938).

The *Webster* case also involved injury to property without taking. The injury was caused by the construction of a portion of the Boston Central Artery. The Commonwealth, in the demolition of the structures which it had taken, exposed the interior brick boundary walls of the petitioners' building; these walls would have buckled outward, unless tied in, because of the removal of the adjacent buildings. The Court permitted the petitioners to recover although the statute authorizing this public improvement, as in the *Sullivan* case, did not provide for recovery except where there was a taking. At first blush, it might appear that the Court arrived at opposite conclusions in these two cases — the facts of which were somewhat similar — but this is not the case. The Court did not ground recovery upon G.L., c. 79 since it does not purport to create a right to damages but merely defines the "measure" thereof. Recovery was permitted in the *Webster* case because the injury was caused by the laying out of a state highway. Therefore, the general statutory provision, G.L., c. 81, §7, permitted recovery; under §§7 and 7C of the chapter, the procedure of Chapter 79 for the assessment of damages is made available.

**§29.8. Licenses: Sufficiency of notice.** A notice reading: "You are herewith advised that under Chapter 140, Sec. 30 of the Gen. Laws of Massachusetts, a hearing will be held... on complaints received by the Board [of Selectmen] as regards your operation of the premises known as 'Nantucket New Ocean House'" was alleged to be insufficient as a matter of law to support an action under the statute in the case of *Manchester v. Selectmen of Nantucket*.<sup>1</sup> A license of the type here involved can be revoked or suspended by the licensing authorities only after notice and hearing. The purpose of the notice is to inform the license holder with reasonable particularity of the charges that he will be called upon to meet at the hearing so that he can properly prepare his defense.<sup>2</sup> The Court was of the opinion that the notice sent by the selectmen in the present case failed to inform the petitioner properly, and while these notices are not to be tested by the standards applicable to criminal pleading, fairness requires more than was contained in this notice.

**§29.9. Town finance: Necessity of appropriation before expenditure.** In *Jenny v. Town of Mattapoisett*,<sup>1</sup> legal services were rendered to the finance committee. General Laws, c. 40, §5 authorizes appropriations "...for all other necessary charges arising in such town." The Court held that, after the services were rendered to the finance committee, the town could not raise and appropriate money to reimburse the committee for expenses they had incurred; even an attorney engaged by a board or officer authorized to engage one could

§29.8. 1 335 Mass. 156, 138 N.E.2d 766 (1956).

<sup>2</sup> See *Higgins v. License Commissioners of Quincy*, 308 Mass. 142, 145-146, 31 N.E.2d 526, 529 (1941), and the cases cited therein.

§29.9. 1 335 Mass. 673, 141 N.E.2d 517 (1957).

not acquire a right to payment in the absence of an appropriation made before the employment or the doing of the work.<sup>2</sup>

§29.10. **Charitable trusts: Construction.** The determination of the nature of the town's title in the town hall premises was involved in *Town of Wakefield v. Attorney General*.<sup>1</sup> The preamble in the deed stated that the grantor was turning the realty over to the town with the desire and intent that it be devoted to certain public purposes which were enumerated, but the preamble concluded by stating in the same sentence: "I desire to present the said land and building as a free and unrestricted gift to said Town." The Court ruled that the town did not take the conveyance subject to any trust or restriction since the deed did not contain any of the words usually associated with a condition or a restriction.<sup>2</sup> The grantor in his deed merely named the uses that he desired or intended should be made of the premises but these words were neither apt nor appropriate to create a trust.

§29.11. **Police officers and firefighters: "Leave without loss of pay."** A police officer in *Votour v. City of Medford*<sup>1</sup> brought an action under G.L., c. 41, §111F<sup>2</sup> to recover wages due him while he was incapacitated for work on account of injuries sustained in the performance of his duty. The chief of police having testified that he could prepare a program of work which this plaintiff-officer could do, the city requested a ruling that the plaintiff should not be permitted to recover because his incapacity was only partial and not total. The Court disposed of the requested ruling by stating that the statute makes no distinction between total and partial incapacity. The city apparently relied upon *Amello's Case*<sup>3</sup> where the distinction between partial and total incapacity was made. However, the *Amello* case arose under the Workmen's Compensation Act<sup>4</sup> wherein a difference between total and partial incapacity is expressed and different compensation for each is provided. But the present statute provides only that if a police officer is incapacitated for duty he shall be granted leave without loss of pay for the period of incapacity.

§29.12. **Privilege not to incriminate oneself before Special Commission.** The petitioner in *Corcoran v. Commonwealth*,<sup>1</sup> having been

<sup>2</sup> G.L., c. 44, §31; *Lavelle v. Beverly*, 330 Mass. 72, 73, 111 N.E.2d 687, 688 (1953).

§29.10. <sup>1</sup> 334 Mass. 632, 138 N.E.2d 197 (1956).

<sup>2</sup> *Loomis v. City of Boston*, 331 Mass. 129, 117 N.E.2d 539 (1954); *Barker v. Barrows*, 138 Mass. 578 (1885); *Rawson v. School District in Uxbridge*, 7 Allen 125 (Mass. 1863).

§29.11. <sup>1</sup> 335 Mass. 403, 140 N.E.2d 177 (1957).

<sup>2</sup> General Laws, c. 41, §111F provides: "Whenever a police officer...is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, he shall be granted leave without loss of pay for the period of such incapacity;..."

<sup>3</sup> 320 Mass. 347, 69 N.E.2d 453 (1946).

<sup>4</sup> G.L., c. 152, §§34, 34A, 35.

§29.12. <sup>1</sup> 335 Mass. 29, 138 N.E.2d 348 (1956).



found guilty of three separate contempts of court, brought a writ of error seeking to quash the three jail sentences imposed by the judge of the Superior Court. The judgments of contempt were made in a hearing upon an application to compel testimony filed by the Commission in the Superior Court. At the court hearing, a stenographic transcript of the hearing before the Commission was introduced and showed that after the petitioner was sworn, he was asked questions by the Commission, and to each question the petitioner invoked the privilege under Article XII of the Declaration of Rights of the Massachusetts Constitution and the Fifth and Fourteenth Amendments of the federal Constitution. The first conviction for contempt, which arose out of proceedings before the Commission at which the petitioner claimed the privilege, was quashed since, after invoking the privilege, the petitioner was not ordered by the Commission to answer any questions. The second conviction arose from petitioner's failure to answer the same questions that were earlier asked by the Commission and now asked by the judge of the Superior Court. This contempt conviction was also quashed since Resolves of 1954, c. 80 provides that "any justice of the superior court may . . . compel . . . the giving of testimony before said commission. . . ." This language manifestly did not embrace compelling the giving of testimony anywhere except before the Commission. The third contempt conviction was based upon the petitioner's refusal to comply with the order of the Superior Court that he answer certain questions at a meeting of the Special Commission to be convened. Quite obviously this order sounded in futuro and was tantamount to an order to comply before compliance was possible. Therefore, this conviction was also not upheld.<sup>2</sup>

<sup>2</sup> See *Crystal, Petitioner*, 330 Mass. 583, 116 N.E.2d 255 (1953).