Chapter 13: Administrative Law

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CHAPTER 13

Administrative Law

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§13.1. State Administrative Procedure Act. Since the adoption of the State Administrative Procedure Act in 1954 and its effective date, July 1, 1955, no case has reached the Supreme Judicial Court involving its interpretation. No amendments have been made in the act itself by the 1956 legislature. The legislature has, however, refused additional funds to state agencies requested by the agencies to allow them to prepare transcripts and records of adjudicatory proceedings as required under the act.

A matter of interest in the further development of the legislative process since adoption of the administrative procedure act will be the practices of the General Court in passing new legislation providing for various types of administrative procedures and judicial review. Will the legislature continue to add new and independent procedures and thus increase the confusion, or will it take advantage of the existence of the Administrative Procedure Act and key new legislation to it?

There is limited evidence as yet from the activities of the General Court during the two recent sessions to give any strong indications as to its future course. Some legislation has been passed without regard to the Administrative Procedure Act, some has made direct reference to it. It would seem advisable that greater care be taken by the draftsmen and by the legal counsels of the General Court to assure that the greatest advantage be taken of the uniform provisions in the Administrative Procedure Act.

§13.2. Judicial review in zoning. It will be recalled by readers of the previous volumes of the Annual Survey that cases concerning

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The author wishes to acknowledge the aid of Thomas F. Murphy of the Board of Student Editors in the preparation of §13.2.

  2 G.L., c. 30A.
  3 Id. §11(6).
  5 Acts of 1955, c. 344.

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judicial review of zoning variance decisions by local zoning boards of appeals have been among the most important administrative law developments in each of these years. The 1956 Survey year continues this trend.

The Supreme Judicial Court is still very much involved in filling out and clarifying the content of its rulings in the field, particularly since Pendergast v. Board of Appeals of Barnstable,\(^2\) decided in 1954. In that case, the Court held that where a municipal board of appeals denies a variance, the Superior Court’s authority to review that decision and grant a variance is limited. Under the statute,\(^8\) the Superior Court must hear the evidence de novo and determine the facts independently. It must then apply the law to the facts and, in the words of the statute, “make such other decree as justice and equity may require.” The latter sentences are, at least, what the Supreme Judicial Court this year asserts the rule of the Pendergast case to be. This may be found expressed in the 1956 Survey year case of Blackman v. Board of Appeals of Barnstable\(^4\) and its companion case, Atherton v. Board of Appeals of Bourne.\(^5\)

The most significant difficulties created for the Superior Court justices by the Pendergast case were in two areas: (1) what is their function in hearing evidence and making findings of fact after such findings have been made by the board of appeals; and (2) what weight should be given to the decision of the board?

The 1955 Survey year case of Devine v. Board of Appeals of Lynn\(^6\) held on the first point above that, in affirming the decision of the board in granting a variance, the Superior Court was in error in merely adopting the findings of the board as its own findings. The Court asserted that the Superior Court must make its own findings supported by evidence produced at its own trial de novo.

On the second point above, the Pendergast and Devine cases have left some confusion. In Pendergast the Court said: “The board of appeals is a local board familiar with local conditions. It can deal understandingly with questions of variance. A judge of a state-wide court, perhaps spending only a few days or weeks in a particular locality, is hardly a suitable tribunal for such purposes.”\(^7\)

In Devine, on the other hand, the Court asserted: “The decision of the board is no more than the report of an administrative body and on appeal has no evidentiary weight.”\(^8\)

Also, in Pendergast, it was indicated that to reverse a decision of the board denying a variance, the reviewing court must find that the board exceeded its authority or acted arbitrarily and unreasonably.

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\(^3\) G.L., c. 40, §30, now G.L., c. 40A, §21.
\(^7\) 331 Mass. at 557, 120 N.E.2d at 918.
\(^8\) 332 Mass. at 321, 125 N.E.2d at 133.
In Cefalo v. Board of Appeal of Boston\(^9\) and Sheehan v. Board of Appeals of Saugus\(^10\) the latter ruling was reaffirmed. In these cases, the Superior Court had made findings of fact in accord with G.L., c. 40A, §15 on "substantial hardship" and reversed the board of appeals' denial of a variance. The Supreme Judicial Court asserted that the Superior Court could grant a variance only where the board's denial was an error of law in exceeding its authority, or where the board's decision to deny was arbitrary and unreasonable. This then was the pattern of the decisions up to the 1956 Survey year.

The Blackman decision in 1956 is actually a continuation of Pendergast since it involves the same piece of land. In the Pendergast case the board had denied a variance to Pendergast for the erection of a bathhouse on Craigville Beach, otherwise zoned for residential purposes. In the Blackman case, the same board reversed itself and granted the variance. Blackman and two other owners of nearby residential property brought the present appeal.

The Superior Court affirmed the decision. It made a "Finding, Ruling, and Order for Decree" as follows: "I find and rule that the board of appeals of the town of Barnstable acted in good faith within its statutory powers and that its decision was not arbitrary, inconsistent or unreasonable."\(^{11}\)

The Supreme Judicial Court again reversed the Superior Court. Justice Spalding for the Court asserted that the above findings provide no basis for the decree. It was held that the Superior Court must make findings of fact in accord with the statutory grounds for granting variances in G.L., c. 40A, §15.

In the Atherton case, the Superior Court judge made similar findings as did the judge in Blackman. Justice Spalding again for the Court found this to be error.

It seems obvious that the Superior Court justice in each of these cases misunderstood Pendergast and the Cefalo and Sheehan cases. Each thought that these cases applied to review of the board's granting of a variance just as much as to review of the board's denial. With the Blackman and Atherton cases, the Supreme Judicial Court corrects this misunderstanding.

In both of this year's cases, the Supreme Judicial Court went on to reverse the decision of the board of appeals in granting the variances. Based on the evidence produced in the Superior Court, the Supreme Judicial Court found the statutory requirements were not satisfied. In Blackman the Court was not satisfied that the financial gain to Pendergast outweighed the detriment to the other property owners. It asserted that the power of variance should be sparingly exercised and only under exceptional circumstances. In Atherton the Court was not satisfied with the evidence that the granting of the variance would not derogate from the purpose of the zoning by-law.

It can be seen, therefore, that where the Superior Court is not “granting” a variance, its role as a reviewing court is quite strong. The Supreme Judicial Court’s reversals in these cases certainly indicate this. Nothing was here said about zoning being a matter peculiarly the subject of a “local board familiar with local conditions” as was said in Pendergast. This seems to reinforce the opinion that the Pendergast decision is much more founded on the Court’s questioning of the constitutional grounds for allowing the Superior Court to grant variances than on considerations of reluctance to overturn local decisions on local questions. Any reliance in the future on this “localism” language in the Pendergast decision would seem ill advised.

It would appear proper then to attempt to restate the general law on the subject of judicial review of zoning board of appeals decisions on variances. The 1933 legislation establishing the statutory review in G.L., c. 40, §30, now G.L., c. 40A, §21, would seem to have been intended to broaden the previously limited judicial review of variance decisions under the extraordinary remedies. Under certiorari, the court review was limited to questions of law and arbitrary action. No review of findings of fact would be made. Under the new statutory review, the Superior Court is required to hear the case de novo, determine the facts, and “annul such decision if found to exceed the authority of the board, or make such other decree as justice and equity may require.” The statute makes no distinction between decrees granting and decrees denying variances. Pendergast and the subsequent decisions, for constitutional reasons, engraft on the statute this distinction and limit the review of a board decision denying a variance to a hearing of the evidence, finding of facts, and a determination of whether the board exceeded its authority or acted arbitrarily and unreasonably. Where the local board granted the variance, on the other hand, the statute’s broad language applies and the reviewing court must scrutinize the decision very closely and allow variances sparingly.

§13.3. Standing to appeal: Municipal officials. The literature of administrative law devotes much space to the subject of standing to seek judicial review of administrative action. Two decisions have been made by the Supreme Judicial Court in this area during the 1956 Survey year. In Planning Board of Reading v. Board of Appeals of Reading it was indicated that the language of G.L., c. 40, §30, “any person aggrieved by the decision of the board . . . or any municipal officer or boards may appeal . . .” though broad in scope, is limited as regards municipal officers or

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12 See note 7 supra.

§13.3. 1 See Davis, Administrative Law §202 (1951).
boards to those having duties relating to zoning, building, or housing. Thus a town planning board was held to have standing to seek review.

In *Carr v. Board of Appeals of Medford* the Court had the question of the standing of a member of a city council acting individually to appeal under the above statute. The Court assumed without deciding that the city council acting officially had standing to seek review since it performs duties relating to zoning ordinances and the building code. It did not, however, find such standing to exist in the council member acting as an individual. It also asserted that this would hold whether the member was acting alone or with other members of the council, as long as they acted as individuals and not as the council itself. Therefore, the term "any municipal officer" in the statute would seem to be limited to administrative officials whose duties relate directly to zoning, building, or housing. These persons have standing to appeal in their official capacities if the decision of the board of appeals affects matters within their administrative subject area.

**§13.4. Preparation of the record in adjudicatory proceedings: Department of Public Utilities.** The Department of Public Utilities has again amended its general judicial review statute, G.L., c. 25, §5, in regard to procedures required under the State Administrative Procedure Act.

The Administrative Procedure Act requires the preparation of a record for judicial review of an adjudicatory proceeding. It leaves the mechanics of preparation of the record up to the agency. In the 1956 legislation the Department of Public Utilities spells out quite effectively the procedure for preparing and obtaining a record and for its presentation to the reviewing court.

It sets out that the record must contain a copy of the petition and of the decision, order, or ruling of the Department of Public Utilities. It then places responsibility upon the appellant to request the report of the proceedings, findings of fact, exhibits, and documents within twenty days after filing his appeal to the Court. The secretary of the commission must then prepare an estimate of the expense of such preparation of the record and give the appellant written notice of the estimate. Within twenty days of the receipt of the notice, the appellant must pay the estimated costs and such additional costs as are indicated by the secretary at the time he pays it. The secretary must then actually prepare the record "without delay" and notify the appellant when it is ready. Within five days the appellant must pay any additional costs at which time the secretary will then certify the record to the Supreme Judicial Court. The commission or the court is given the power to extend any of these time limits for cause shown.

The above amendment was added mainly to place the financial
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burden of preparation of the record upon the appellant rather than on the Department of Public Utilities as would have been the case had the State Administrative Procedure Act continued to cover the situation.\(^a\) The Administrative Procedure Act provision applies only if the particular statute for a particular agency is silent on this point as the Department of Public Utilities statute had been before this amendment.

§13.5. Alcoholic beverage licenses: Grounds for refusal to renew. The decisions of local boards and the state reviewing board on alcoholic beverage licenses continue to be fruitful sources of appeal to the Supreme Judicial Court.

During the 1956 Survey year *Piona v. Selectmen of Canton*\(^1\) came before the Supreme Judicial Court for the second time. The first time was in 1954,\(^2\) when the Court reversed the decision of the board of selectmen because they had given no notice or a hearing to the holder of the license prior to its cancellation. In the present case, the petitioner brought a writ of mandamus to order the issuance of a license for the year 1954. The selectmen had refused to issue the petitioner a renewal license on the grounds that he had not, in regard to his original license in 1953, given notice of his intentions to a church located within 500 feet of his establishment as was required by the statute. This was the same grounds under which the selectmen had revoked the 1953 license and which they were required to reinstate under the first *Piona* decision.

The Supreme Judicial Court held that the selectmen were within their powers in refusing to renew on this ground and were not bound by the fact that this failure of notice had been a violation in regard to the original license application. The Court asserted that this violation of the statutory requirement stands on the same grounds as obtaining a license by fraud and is enough to sustain the board in refusing to renew.

§13.6. Alcoholic beverage licenses: Refusal to accept original application. In *Ward v. Selectmen of Scituate*\(^1\) the petitioner on a writ of mandamus appealed from the decision of the board of selectmen which had refused to accept an application from the petitioner for a liquor license for his restaurant on the grounds that the petitioner had no zoning variance for selling liquor on his premises. The license could not be issued without such a variance having been granted.

The Superior Court affirmed the refusal of the board to receive the application, though it found that "While it seems that the selectmen should at least accept, for filing, the application . . . it seems to

\(^a\) G.L., c. 30A, §14.


² 332 Mass. 58, 123 N.E.2d 390.


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me, as the whole affair would end in a refusal to grant the license, that no action should be taken upon the pending petition.”

When the case reached the Supreme Judicial Court it was moot since the particular license period had run out. Nevertheless, the Court rendered an opinion on the merits, asserting that it did so since, on the yearly license basis, the petitioner might never get a decision otherwise. On the merits, the Court held that the Superior Court was correct in asserting that the license application should have been accepted, but was wrong in dismissing the appeal on the grounds that the application would be futile. Justice Wilkins asserted that the mere fact that the Superior Court assessed the petitioner's chances of success as "somewhat attenuated" did not remove his right to file an application. Otherwise the petitioner's actual right to a license would never be determined.