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Chapter 13: Land Use and Planning Law

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CHAPTER 13

Land Use and Planning Law

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A. ZONING

§13.1. Adoption and amendment of local zoning. The constant battle in zoning between the need for administrative flexibility and the necessity of guarding against administrative arbitrariness resulted, during the 1962 SURVEY year, in an opinion and a statute both of considerable importance. Acts of 1962, c. 327, amended G.L., c. 40A, §6, by adding the following brief sentence: "No provision of a zoning ordinance or by-laws shall be valid which sets apart zoning districts or zones by establishing between them a boundary line which may subsequently be changed without the adoption of an amendment to a zoning ordinance or by-law so changing such line." The wisdom of this amendment depends upon the confidence one wishes to place in local governing bodies. The trend in zoning generally has been to give local agencies greater flexibility in applying standards and requirements. Thus, for example, some states permit "floating zones," which are zones not assigned to any specific physical area but which, when the requirements are met, local authorities may assign to specific property upon application. "Shifting zones" permit the local authorities to change land assigned from one zone to another, when the applicant and the land meet specific requirements. Other such flexible devices, as "cluster zoning," permit local authorities to change specific regulations within zones when certain conditions are met. All of these flexible devices are designed to alleviate the rigidity of the zoning envelope; zoning as generally set up fails to consider variations in local needs, in patterns of development, and population trends, as well as developments like highways which cut through and change the land use pattern of a municipality without its consent or concurrence. The amending procedure is available but cumbersome and almost always subject to criticism, often accepted by the courts, as spot zoning. A completely new system of regulation could be adopted but, beyond

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2 Cluster zoning is represented in Massachusetts by the New Seabury development in Mashpee, on Cape Cod.
its cumbersome nature, it is not appropriate when all that is sought to be changed is the zoning of a relatively small area.

Opposing flexibility, of course, is the entirely reasonable fear of administrative license. One need not be particularly sophisticated to realize that local zoning changes are often ill-advised and perhaps even unworthily motivated. The present legislation expresses this fear by its total prohibition of at least "shifting zones" and similar zone boundary change, and its inferences against flexible zoning as a device for remedying zoning conflicts and unreasonableness. Local authorities thus must use the cumbersome amending procedure or local boards of appeals can continue to grant variances, as some do, freely and easily; enough grants are not appealed so that a large number of improperly granted variances are created, which in some municipalities has in part destroyed the integrity of the zoning plan.

The Commonwealth needs seriously, perhaps even desperately, to rethink its zoning and related land use legislation. Piecemeal legislation like the present statute, probably designed to strike down regulations in only a few municipalities, may require no thinking — always a restful approach to legislative policy — but hardly represents any sensible solution to the problem of flexibility. The variance procedure — the major device to obtain flexibility under the present enabling act — has been tried for many years, and its results have been erratic, often nonsensical, sometimes even tragic, and certainly most productive of litigation. A state as densely populated as is much of Massachusetts, with competing demands upon its land resources, can hardly be happy with the present situation, if its results are once seriously considered.

More happily, the Supreme Judicial Court, although not without dissent, upheld what is often denominated "contract zoning" in *Sylvania Electric Products Inc. v. City of Newton.* The city amended its zoning ordinance to rezone certain land from a single residence to a light manufacturing district. The Court sustained the change against the usual spot zoning argument largely because of the physical characteristics of the land and the substantial changes in adjoining land use.

More importantly, however, the Court sustained the amendment against the contention that restrictions imposed by covenants in a deed attached to an option given by Sylvania to the city were, if not conditions imposed by the city, a substantial inducement to its adoption of the rezoning. The restrictions in the covenants limited the land use considerably beyond the normal restrictions applicable to a light manufacturing district. The Court in effect held that the deed covenants were not zoning restrictions in themselves; the city merely determined that the tract of land, as voluntarily subjected to the option restrictions, was appropriate for reclassification for light manufacturing. This was "an appropriate and untainted exercise of the zoning power." The Court found that the city's activities in promoting the adoption of the option restrictions were "all extrastatutory but

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nevertheless, proper activity, precedent to the exercise of the zoning power, not the exercise thereof."

The dissent of Mr. Justice Kirk emphasized that the imposition of the covenant restrictions could not be separated from the exercise of the zoning power — that the two actions were an inseparable unit. Thus, since all restrictions are thus zoning restrictions, they have to be imposed under Chapter 40A procedure, which was not followed. The logic of the dissent is probably more attractive than that of the majority opinion, since it does not have to deal with the close distinctions necessary to support the majority thesis. But the result reached by the majority does obtain a desirable flexibility without interference with any strong public policy. It is true, as the dissent notes, that somewhat more complete notice of the extent and particulars of the total changes could have been given to interested parties but, as a public hearing was held, the question is properly one of degree rather than of any violation of statutory policy. The history of the Newton-Sylvania arrangement does, in fact, offer an excellent example of an intelligent flexible solution to a difficult problem. Both Sylvania and the city attained their particular goals; adjoining landowners and residents were effectively protected, although perhaps not to the maximum extent they might have desired. Full publicity was in fact given to the arrangement, but Mr. Justice Kirk's admonition that procedural requirements should have been followed deserves attention. Full disclosure and proper notice could readily be required without in any way entailing any prohibition of so-called contract zoning.

Other legislation relating to the adoption and amendment of zoning ordinances was largely designed to require full disclosure and proper notice. Acts of 1962, c. 201, amended Section 6 of Chapter 40A. The required date for the first notice of the various hearings was reduced from twenty-one to fourteen days before the hearing. In addition the notice must henceforth include the "subject matter, sufficient for identification."

Several cases of less importance involving the adoption and amendment of zoning regulations were also decided during the 1962 Survey year. Kitty v. City of Springfield decided that an amendment of the Springfield zoning ordinance had been improperly adopted. Local custom that permitted the reviewing of defeated legislation was not permitted to override G.L., c. 40A, §§6, 7 and 8, requiring a moratorium on adoption of a defeated zoning amendment for two years unless the adoption is recommended by the local planning board. Atherton v. Building Inspector of Bourne is the latest judicial tribute to the persistence of those favoring and opposing the use of certain land for shipyard purposes. Upon failure of a variance and two amendments to

the zoning by-law, the present case involved a change incidental to a comprehensive rezoning of the town. No changes having occurred in the condition of the area in the past years, the rezoning of the tract involved to a general use district was held still invalid despite its being done as part of a general revision of the entire zoning by-law. In Town of Tewksbury v. Thuillier7 the Court upheld, as valid public notice of adoption of a zoning by-law, under G.L., c. 40, §32, posting of attested copies of the by-law as approved by the Attorney General.

§13.2. Variances. One hitherto unresolved problem concerning the grant of a variance was settled in Dion v. Board of Appeals of Waltham.1 In the course of the Superior Court hearing, the judge denied a request that the risk of non-production of evidence was upon the board of appeals, in showing that the prerequisites of G.L., c. 40A, §15(3), were met. While not necessary to the decision of this case, the Supreme Judicial Court stated that the lower court had ruled incorrectly and that the risk of non-production was upon the person seeking the variance and the board of appeals ordering the variance. The decision does not, as the Court noted, settle the question of the ultimate burden of proof in the sense of the risk of non-persuasion.2 The Court's determination that the risk of non-production rests upon those asserting that a variance was properly granted is completely logical under its restrictive interpretation of the power to grant variances. If variances are to be granted only upon findings that Section 15(3) requirements are fully met, those who wish to establish these findings should be required to introduce the necessary evidence.

The Dion case also settled the interpretation of the phrase in G.L., c. 40A, §15(3), authorizing the board of appeals to grant a variance "upon appeal, or upon petition in cases where a particular use is sought for which no permit is required." The Court refused to limit the language to require that a permit be sought in cases in which it is obvious that the zoning law does not permit the desired use. In this situation direct petition to the board was held to be authorized.

Procedural matters concerning the granting of variances were of importance both in legislation and judicial decision during the 1962 Survey year. Acts of 1962, c. 201, amended Section 17 of G.L., c. 40A, to alter the initial notice of a petition for variance, as also other appeals, before a board of appeals from twenty-one to fourteen days prior to the hearing. The notice henceforth must include a description of the subject matter of the hearing, in sufficient detail to identify it.

§§14.2, 14.5. A third case was decided in the Superior Court without an appeal being taken.


§15.2. 1 1962 Mass. Adv. Sh. 1085, 185 N.E.2d 479, also noted in §12.7 supra.

2 The Court noted the case of Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555, 120 N.E.2d 916 (1954), on the point. The Dion case has been held to require a rehearing in the later case of Sullivan v. Board of Appeals of Canton, 1962 Mass. Adv. Sh. 1409, 185 N.E.2d 756, because very little evidence was introduced.
Section 18 of Chapter 40A was twice amended. Acts of 1962, c. 203, inserted a requirement that the board of appeals’ rules for conducting its business henceforth be filed with the city or town clerk. Acts of 1962, c. 387, imposes an obligation upon the board to make its decision within ninety days after the date of filing of an appeal, application or petition.

The necessity of stating as findings that each of the separate prerequisites of G.L., c. 40A, §15(3), exists was again reiterated by the Supreme Judicial Court during the 1962 survey year. In Barnhart v. Board of Appeals of Scituate the Court found that the lack of a board finding of substantial hardship to the applicant should have resulted in a Superior Court decision that the grant of the variance was invalid. The Court also noted that the Superior Court's failure to find that all prerequisites existed prevented support of its decree that the variance had been properly granted. The same lack of proper findings resulted in the determination that the decree granting a variance was invalid in Coolidge v. Zoning Board of Appeals of Framingham.

The Dion case also involved the issue of stating the findings necessary for the grant of a variance in a somewhat different aspect. The original decision of May 3rd did not set forth all necessary findings. The board of appeals, on May 20th, in executive session, amended its decision to include all necessary findings and ratified this action in public meeting on May 24th. The Court held it was within the board’s inherent administrative power to amend its decision within a reasonable time, which extended at least for the twenty-day appeal period.

The Pendergast doctrine was again determinative in the case of Bruzzese v. Board of Appeals of Hingham. The Superior Court had ruled that the board of appeals was arbitrary and unreasonable in denying a zoning variance. The Supreme Judicial Court reversed, finding neither unreasonableness nor arbitrariness, and finding no denial of the variance by the board upon a legally untenable ground. These two grounds are the only ones upon which a court can reverse the denial of a variance by a local board. Since a variance need not be granted by a local board even if all the prerequisites are satisfied, a finding that the decision of a board denying a variance is arbitrary and unreasonable can seldom be sustained.


c. 212, amended the section to shift the responsibility for recording from the city or town clerk to the landowner.

The new Boston and Cambridge zoning ordinances include provisions for lot-area, floor-area ratios, i.e., that the floor area of structures built upon land so zoned is not to exceed a certain ratio of the lot or tract area. These provisions require that some public record be maintained of building permits that affect floor areas of buildings, so that conveyancers can assure their clients that the lot or tract complies with the zoning laws. Legislation has been proposed to require recording of building permits in the registries of deeds, similar to the provisions governing conditional variances. These bills were submitted to the Judicial Council by Resolves of 1961, c. 4. The Council considered other proposals as well as those submitted to it, and retained the matter for further study.

Zoning has created serious problems for conveyancers, who often have no means of determining if land complies with zoning regulations. Ideally, purchasers of property should be able to obtain, at reasonable cost, an opinion that no infractions of zoning regulations exist or a listing of the infractions. No present system of recording exists in which it is possible to gain this information. The 1960 act, by throwing the burden of recording upon the registries for the one small type of zoning limitation covered, may well have made an undesirable policy decision. This becomes obvious when one considers the burden upon the registries — and conveyancers — if building permits are also to be recorded in the registries. The 1960 act was also subject to criticism in failing to define the term “limited and conditional variances.” What are they? There is no statutory definition or even language of aid. Most variances are by their very terms “limited” since few, if any, permit any and all use of the land involved. Does this mean all variances should be recorded? A number of conveyancers have sufficient doubt so that they feel that the only safe policy at least is to record all variances.

The problems presented by this small piece of legislation again point out the necessity for a rethink of the zoning enabling act and related legislation. The recording and title registration acts made possible the shift of the land law from the era of family property to that in which land is treated as an article of commerce. But the advent of zoning and other restrictions upon land use has added another factor to the equation. No longer can land be treated like automobiles or shares of stock. The regulation of land consists of a continuing series of restrictions. The owner or occupant must comply with these ever-present regulations. The recording acts and the recording provisions of other laws fail to give him a ready source of information upon which to determine if his land complies with at least the more sophisticated types of land use regulation. We thus have an area of increasing importance to purchasers and owners of land for


which we have made no adequate informational provisions. Any revision of land regulation law in the Commonwealth must consider this information—or lack of information—problem as of primary importance.

§13.4. Nonconforming uses. Section 5 of G.L., c. 40A, governs the regulation by cities and towns of nonconforming uses. The non-use of nonconforming buildings can be regulated so as not to prolong the life of the use, but the terminating time limit for non-use as it relates to agriculture, horticulture and floriculture has been statutorily set at no less than five years. Acts of 1962, c. 340, amended the section to provide further benefits for nonconforming agricultural, horticultural and floricultural uses. Except for greenhouses within residential areas, local regulations can no longer affect the alteration, rebuilding or expansion of nonconforming buildings used for these purposes, as long as setback requirements are met, and cannot limit the expansion of the amount of the land used for these purposes.

The rather peculiar and certainly generally inoffensive nature of these particular uses may appropriately be considered in limiting local regulation of nonconforming uses. As a policy, however, local authority should be given considerable power to force removal of nonconforming uses. When a flexible zoning system is intelligently used, there seems no reason to assume, for example, that residential and certain types of commercial and industrial uses cannot sensibly and desirably be located adjoining each other. But some nonconforming uses, particularly if not sufficiently insulated from adjoining property, should be removable by local authorities. Mixed uses are either objectionable or not dependent upon circumstances. If objectionable, by objective standards, the less desirable of two mixed uses should be subject to removal under reasonable limitations. It would ordinarily be true that the particular uses covered by the present amendment are of the type that would not be ordinarily objectionable. But one can envisage situations in which the devotion of large amounts of land within a community to these uses might disrupt its master plan for services, facilities, schools and similar functions. Perhaps some leeway, subject to strict standards, should be given to local authorities.

Chilson v. Zoning Board of Appeal of Attleboro decided several important aspects of nonconforming use law in the Commonwealth. An application to change an old cement-block building to a new, larger, masonry gasoline service station was granted by the defendant board. The history of the nonconforming service station use revealed that, at the time of the adoption of the zoning ordinance, the service station and pumps were located in front of a grocery store building adjoining the cement-block building, both buildings then being under single ownership. The cement-block building was being used for an electric foaming or plating business at this time. In 1946 the street facing the buildings was relocated, and the land upon which the pumps

stood in front of the store was taken. The pumps were then moved to a location in front of the cement-block building. The change in pump location was approved by the city building inspector. The lot came under divided ownership in 1950, when the grocery store—old service station building—was sold. The cement-block building was sold to the present owners in 1952. The Supreme Judicial Court found difficulty in determining, under the local zoning ordinance, any authorization to change the location of the nonconforming use from one to the other building, but the Court felt it unnecessary to reach that issue. Since the move of the nonconforming use from one building to the other was colorably within the ordinance provisions, and the property had, after the building inspector had consented to the move, been sold to new owners, the Court felt it would be unreasonable and unjust to upset the decision of the building inspector. Since this suit was brought by adjoining landowners, the rule that a municipality cannot be barred by estoppel or laches was not applicable. The Court thus decided that it had to determine this case as one to change and enlarge a valid nonconforming use.

The issue then before the Court was whether the city had the authority to grant the requested permit. The board had properly granted the permit under the local ordinance provisions, requiring findings of unnecessary hardship and lack of injury to the neighborhood and the value of nearby property. Thus the Court had to determine to what extent a zoning ordinance could make special provision for property that has been a nonconforming use. General Laws, c. 40A, §5, merely requires that, when changes occur that destroy the nonconforming use exemption, the property shall then be subject to the normal zoning rules for the particular district. The Court found that the requirement in general zoning law for uniformity of classification did not require property subject to a nonconforming use to be treated the same as other property within the district. A change in the type and extent of use from the nonconforming use raises special classification issues. Thus a change from one nonconforming use to another no less detrimental to the area is permissible because of the special classification of nonconforming property. While an exact line cannot be drawn, certainly a local board cannot be given unfettered discretion. But, in the present case, the proposed alteration and building were a change in use that is permitted as a reasonable substitution of facilities.

The Court stressed that the tests of unnecessary hardship and of lack of injury to the neighborhood and adjoining property values, which were the tests of the local ordinance, were not the only conditions that had to be met to validate a change in nonconforming use. It is also essential that there be established a reasonable relation to the prior nonconforming use in the environs of the zone in which it is located. This latter aspect of the opinion is particularly important. Section 5

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§13.5 LIMITS CHANGES IN NONCONFORMING USES SO SLIGHTLY THAT LOCAL AUTHORITIES CAN BE EXCUSED FOR FORGETTING THAT THE GENERAL FUNCTION OF ZONING ITSELF IS ALSO A FACTOR IN DETERMINING THE VALIDITY OF A PROPOSED ALTERATION OR ADDITION TO A NONCONFORMING USE. THE OPINION IS A WELCOME REMINDER THAT LOCAL AUTHORITY IN THIS AREA IS NOT AS BROAD AS IT MAY AT FIRST BLUSH SEEM.

City of Medford v. Marinucci Bros. & Co. dealt with, among other problems, the issues of abandonment and enlargement of a nonconforming use. The Court found neither upon the special facts which involved a railroad right of way and dumping operations upon land owned by the Commonwealth for highway purposes. The railroad had not sought nor obtained a certificate of abandonment from the Interstate Commerce Commission, and this was held determinative of the abandonment issue. The enlargement of use argument was considered ineffective since the dumping operations complained of took place upon state land, which is not subject to local zoning. Any enlargement of the use outside of state land fell into the acceptable category of increase in the amount of business and not into the unacceptable category of those uses which are different in kind in its effect upon the neighborhood.

§13.5. LOCAL ZONING VS. STATE PROPERTY AND FUNCTIONS. The main issue in City of Medford v. Marinucci Bros. & Co. was the power of the city to subject state land and state highway construction by a private contractor to local zoning and building codes. The Court rejected the city's contentions. It considered that Teasdale v. Newell & Snowling Construction Co. was determinative; that case had held that the state may exercise its control over its property to carry out its functions, unfettered by any local regulation not specifically authorized by the General Court to cover these state properties and functions. Thus the state is, unless the enabling act would specifically so indicate, exempt from municipal zoning and building codes. The defendant contractor is, while building the highway, carrying out a state function and his use of the land is covered by the state exemption; he is the Commonwealth's agent.

The contract between the state and the defendant contractor called for compliance by the contractor with all municipal ordinances. The Court ignored the third-party beneficiary aspects of the city's suit insofar as it interpreted this provision to require compliance with only those ordinances that did not frustrate or even hinder contract performance. The language relieving the contractor from local regulation that only hinders his performance could give rise to a number of interesting arguments. It should not be interpreted to relieve the contractor from minor inconvenience; certainly compliance with local
traffic rules may in a sense occasionally hinder construction, but
exemption could hardly be granted. The solution may well lie fairly
in a balancing of the hindrance of the contractor's function with the
importance of the public policy the local ordinance seeks to enforce.
On any scale, a city's interest in a temporary use of land for non-
residential purposes during the building of a highway, the land to be
used after construction for highway purposes anyway, does not rank
high. The safety of persons and property enforced by traffic laws, on
the other hand, is a public function of such importance that overriding
these laws would probably require specific legislative authorization
or an emergency, neither of which is likely to occur in highway con-
struction.

§13.6. Special permits. Mahoney v. Board of Appeals of Winches-
ter\(^1\) presents the strange picture of the Supreme Judicial Court declaring
that the local board and the Superior Court had been too strict in
denying the plaintiff a special permit for an exception. While
agreeing that the board could impose reasonable restrictions upon the
use of the proposed greenhouse, possibly even as to the duration of
its use, the Court found the absolute denial of the permit to be arbi-
trary. It thus brought the facts within the Pendergast doctrine\(^2\) by
finding this was one of the exceptional cases which, under that doc-
trine, permitted reversal of the local board. There is a serious ques-
tion whether the local board was arbitrary in its decision even if it
was very restrictive. But this involves a matter of judgment on the
facts of the particular case. It may properly be noted, however, that
the determination of arbitrariness is somewhat unexpected from the
same Court that decided Bruzzese v. Board of Appeals of Hingham.\(^3\)
The Bruzzese case, however, involved a variance, which need not be
granted even when all of the statutory prerequisites are met. In
Mahoney the Court was considering a special permit, which presum-
tively must be granted if it can be shown that all of the conditions
imposed by statutes and the local zoning law have been met. Thus,
de spite the fact that in form local zoning law generally refers to grants of
permits as involving discretion in the local granting authority, the
difference in theory between variances and permits warrants the dif-
ference in decision in these two cases.

§13.7. Construction problems. Several cases decided during the
1962 SURVEY year involved construction of local ordinances or by-laws
but, either because the questioned terminology is fairly general in zon-
ing regulations or because it has importance in general zoning law, the
cases should be briefly noted. Van Arsdale v. Town of Provincetown\(^1\)
decided that a structure consisting of two wings, each with two apart-
ments, with each wing separated from the other by a dividing wall,

\(^2\) Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555, 120 N.E.2d 916
\(^3\) 343 Mass. 421, 179 N.E.2d 269 (1962), noted in §13.2 supra.
was still a single dwelling and thus violated the zoning restrictions to single or two-family dwellings. Recognizing certain similarities to separate business buildings that have a common party wall, the Supreme Judicial Court felt constrained to interpret the by-law provision to exclude the joinder of two two-family dwellings. The Court also ruled that a deck attached to a dwelling was exempt from setback requirements, being an accessory use. Under the by-law they were held not to be part of the adjacent buildings, although under a differently worded by-law they could have been.

Two cases, *Town of Manchester v. Phillips* and *Town of Brewster v. Sherman,* determined that a mobile home, even with its wheels removed and permanently affixed to the land, does not fit into the category of a detached one-family dwelling. Both cases depend upon interpretation of local by-laws but stress that the common understanding of a one-family dwelling does not include mobile homes no matter what their permanence. Municipalities, if any, that wish to authorize such homes in residence districts will have to do so by specific language.4

§13.8. Unconstitutionally vague zoning regulations. The first, if not always necessarily the most important, element in any law is that it be understandable. If it is so vague or ambiguous that its meaning is undeterminable, the law deprives those affected of due process of law. In *O'Connell v. City of Brockton Board of Appeals* the Supreme Judicial Court found that setback requirements of the Brockton zoning ordinance failed to meet due process standards. The offending section read as follows: "Where in a residence district . . . at least one-half of the buildings situated on either side of a street between two intersecting streets conform to a minimum setback line, no new building shall be erected . . . to project beyond such setback line."2

The Court first found it impossible to determine if "either" referred to only one side or to both sides of the street. Even more confusing was the attempt to determine what distance was intended by the 50 percent minimum setback line. The Court by example found eight possible solutions plus the possibility that, on the facts of the hypothetical, no setback line to which an owner can conform could be found. Any ordinance this indefinite is unconstitutionally vague.

The Court also had difficulty with the height requirements of the zoning law. One possible construction, as applied to apartment

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4 Building Inspector of Chelmsford v. Buxton, 343 Mass. 489, 179 N.E.2d 229 (1962), involved the determination if sand and gravel were being removed from land lawfully in connection with construction thereon or whether they were being removed unlawfully for commercial purposes. The main importance of the case lies in its distinguishing of Cities Service Oil Co. v. Board of Appeals of Bedford, 358 Mass. 719, 157 N.E.2d 225 (1959), noted in 1959 Ann. Surv. Mass. Law §12.4.

2 Revised Ordinances of Brockton, c. 26, §11 (1949).
houses, would have limited their height more extensively than single-family residences. The Court noted that this construction would raise constitutional doubts and thus interpreted the provisions to permit the same heights for residences and apartments.

The two provisions of the Brockton ordinance discussed by the Court constitute almost a parody of a zoning law. Zoning regulations, it is true, are often insufficiently complex to take care of the multitude of personal and property problems that can arise in a municipality. But a call for more extensive legislation is not a call for length without sense. These provisions have an Alice in Wonderland quality—charmingly confusing and devoid of a really logical approach to problems as they actually exist. When a law is meant to give a landowner a solution to a problem facing him, he should be able to find the solution. Indefiniteness and vagueness give too much discretion to those administering the law, discretion the worse for any real failure to set necessary standards. The administrator, in effect, becomes an unconstitutional legislator.

§13.9. Zoning and home rule. The continuing pattern of legislative curtailment of local discretion in zoning matters is revealed in nearly every amendment to G.L., c. 40A, adopted by the General Court since the enabling act became law in 1954. Typical is Acts of 1962, c. 350, which exempts a family-unit fallout shelter from all provisions of local zoning laws and also all non-administrative provisions of local building codes. This law may well, of itself, be sound in its substantive rules, but it takes away from municipalities another area of regulation. Municipalities in the Commonwealth have resisted for some years the creation of effective regional agencies in the land use area. To get necessary uniformity, therefore, the General Court has established many limitations. A regional organization would probably devise more effective zoning, and thus avoid the real or fancied necessity of continual state interference. While blocking the front doors against regional agencies in the name of home rule, the back door is left open for the state to reduce actual home rule in this field.

§13.10. Zoning procedure: Review. Natick had, at the time Church v. Building Inspector of Natick1 arose, a single code entitled "The Building Code and Zoning By-Laws." The petitioner sought a writ of mandamus to command the respondent to issue a permit denied because the proposed building did not have sufficient frontage on a street. The Supreme Judicial Court noted the zoning enabling act provision for appeals to local boards of appeals upon denial of a permit,2 and that Natick provides for such an appeal in its code. It held frontage requirements to be in the nature of zoning rather than building regulation, and that the zoning procedure therefore applied. The Court distinguished Rice v. Board of Appeals of Dennis,3 which had held that the zoning enabling act procedure was not to be followed

§13.10. 1 345 Mass. 266, 178 N.E.2d 272 (1961), also noted in §12.6 supra.
when the denial sought to be appealed was made under provisions of the local building code rather than the local zoning by-law. Despite the joinder of building and zoning regulations under one municipal code, the provisions here involved plainly relate to zoning.

B. SUBDIVISION CONTROL

§13.11. Planning board disapproval: Necessity for regulations. The Supreme Judicial Court has interpreted G.L., c. 41, §81Q, to be a directive that local planning boards must adopt their own rules and regulations before subjecting property to requirements under subdivision control. In *Castle Estates, Inc. v. Park and Planning Board of Medfield* the board approved a plan subject to three conditions, including the following: (1) installation of a suitable water distribution system connected with the public water supply system, and (2) purchase of a drainage easement over adjoining land. The Court agreed with the subdivider that the state enabling act and the local subdivision control regulations did not authorize these two specific conditions. A subdivider should know in advance the requirements for street construction and public utilities. The statute includes no requirements of the type the board sought to impose, and the very general language of the local regulations gives a subdivider no precise information on requirements. The Court further noted:

The planning board . . . cannot impose conditions of this type upon its approval of subdivisions, where it has not included . . . in its regulations provisions defining (a) what ways and utilities are or may be required in connection with subdivision plans; (b) what standards are to be applied by the board exercising any powers given to it by the regulations to withhold approval and to impose conditions; and (c) what those powers are.

The opinion constitutes another but even clearer notice that planning boards cannot proceed in the subdivision control area without having furnished ample directions to subdividers. This interpretation of G.L., c. 41, §81Q, removes some areas of administrative discretion but no areas that should fairly be within planning board authority. Some board members have tended to assert authority much beyond that permitted to them; the requirements of detailed rules and regulations remove in large part this area of administrative license without in any way undermining the valid purposes of the subdivision control law.

§13.12. Zoning regulations: Time of compliance. While a pro-

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posed subdivision must comply with local zoning, a past tendency of many municipalities has been to change zoning to prohibit or limit the proposed development. Acts of 1959, c. 221, amended Section 7A of G.L., c. 40A, so that the zoning regulations are frozen, as to a particular developer, as of the date of submission of his preliminary plan. Ward & Johnson, Inc. v. Planning Board of Whitman\(^1\) involved exactly the sequence of zoning amendments after plan submission that Section 7A was designed to make ineffective, and the Court so held.

§13.13. Legislation. Three relatively minor changes in the subdivision control law were adopted during the 1962 Survey year. The most important was Acts of 1962, c. 313, amending Section 81X of Chapter 41. Section 81X governs registration of the plan, and requires that no plan is to be recorded unless it contains one of several indorsements on attached certificates. The new amendment prescribes that these indorsements and certificates are to be final and conclusive upon all parties. An exception to the conclusiveness is made, however, as it is subjected to the provisions of Section 81W, which governs the limited powers of the board to modify, amend or rescind its approval of a plan.

Acts of 1962, c. 207, amends Section 81T relative to notice of the hearing on the plan. Notice must specifically include the time and place of the hearing and enough indication of the subject matter so that it can be identified. The provision that notice costs should be borne by the applicant was deleted. Fourteen instead of ten days' notice prior to hearing, plus two publications, are now required. The act also amended Section 81AA, governing hearings before the board of appeals, to add the requirement of identification of the subject matter and the fourteen-day notice period.

The problem will sometimes occur that the ways and municipal services that are required by the local subdivision control regulations may be inadequate because of other municipal needs. Thus it would be desirable that a subdivider be required to build in accordance with municipal needs, but obvious problems of taking of property exist. Acts of 1962, c. 570, solves this problem sensibly for the town of Lexington by authorizing it to reimburse subdividers for “part of the costs of constructing ways or installing municipal services . . . of a greater width or size than would be required to serve the subdivision alone.” Certain problems of language exist. Need reimbursement equal the increased costs? What of the value of any additional land required for the ways? The language may be sufficiently flexible to meet possible constitutional arguments, but more precision might be expected.

C. Urban Renewal

§13.14. Prudential project. What is to be the last opinion of the Supreme Judicial Court on the questions involved in the Prudential

Center development in Boston was decided during the 1962 Survey year. In *Dodge v. Prudential Insurance Co. of America*, the Court upheld the amendments to Chapter 121A of the General Laws enacted by Acts of 1960, c. 652. The substance of these amendments was considered constitutional in an earlier advisory opinion of the Court, and the Court accepted its earlier views as correctly stating the law in respect to the statute and the contract entered into between the city and Prudential.

Several points covered in the opinion perhaps deserve brief comment. The Court reiterated its earlier determination that the elimination of a blighted open area is a public purpose. Thus an urban redevelopment corporation, carrying out a public purpose, can be given favored tax treatment. The history of the public purpose doctrine in Massachusetts is an interesting study in change of result without rejection of earlier developed theory. The Court has been unwilling to accept a concept of public benefit as being adequate to meet public purpose requirements. But the Court seems to flirt with the doctrine in its fairly persistent citation of *Berman v. Parker*, which accepted the public benefit theory as constitutional under federal standards. In the *Dodge* case, the *Berman* case is cited to establish the constitutionality of the project as against federal constitutional objections, and "its reasoning is decisive under our Constitution as to contentions respecting the instrumentalities which have been chosen by the legislature." The Court thus accepts the *Berman* rationale to the extent that, once public purpose has been established, the choice of means is up to the legislature and the judiciary has no review function. This constant flirting with *Berman*, even while distinguishing it, suggests the correctness of a statement made by the most experienced urban renewal lawyer in the Commonwealth, that the Court will accept *Berman* when it is faced with facts on which the older "public purpose" doctrine gives an obviously socially undesirable result.

§13.15. Contract with developer: Conditions for effectiveness. *Town of Brookline v. Brookline Redevelopment Authority* considered the necessary preliminary conditions that must be met before a valid contract between a redevelopment authority and a redeveloper comes into existence. The authority had negotiated a contract with the


redeveloper, the form and content of which were approved by the Housing and Home Finance Agency. In its approval the H.H.F.A. reminded the authority it had to comply with two L.P.A. letters before it could execute the contract. These letters set out requirements designed to prevent improvident awarding of negotiated redevelopment contracts.

Upon receipt of the approval the authority adopted resolutions designed to initiate compliance with the L.P.A. letters. It also adopted a resolution which in part was as follows:

The Land Disposition Contract . . . heretofore negotiated by the Authority and the redeveloper . . . is hereby approved, confirmed and ratified, and upon completion of the requirements of [the L.P.A. letters and certain federal statutes] the Executive Director of this authority or any member thereof . . . is authorized and directed to execute said contract. . . .

The redeveloper argued that this resolution constituted a present agreement by the authority to be bound by the contract, subject only to compliance with the L.P.A. letters. The Supreme Judicial Court rejected this argument. The terms of the L.P.A. letters obviously require compliance before a contract is to be entered into, since they govern public disclosures and hearings among other requirements. If an authority could bind itself before complying with the letters, the whole purpose of the letter requirements would be subverted.

§13.16. Legislation. Governor Volpe's proposal for a reorganization of the various departments and divisions concerned with redevelopment, renewal and housing was not adopted, but some other statutory changes in the urban renewal laws were enacted. Acts of 1960, c. 776, added certain new provisions to the General Laws, relating to state financial assistance to the various urban renewal projects. Acts of 1962, c. 643, amended several provisions of the relevant sections. Section 26FFF of Chapter 121, covering payment of the grants, was amended to redefine the formula as it relates to those projects in which the municipality pays planning and administrative expenses; the state share is to be limited to one sixth of the net project cost. Payment of the grant was changed from a five- to twenty-year period of equal annual payments, subject to adjustment of the amounts by the Division of Urban and Industrial Renewal as the final costs of the project are determined. Section 26HHH of Chapter 121, concerning state grants to nonfederally aided commercial or industrial projects, was extensively revised to assure that the state grant will be one half of the project cost, to aid local agencies with the financing of their plans for a project of this type, and to provide for twenty equal annual payments.


§13.16. ¹ Senate No. 638 of 1961, designed to establish a Department of Economic Development and Community Renewal, as well as to recodify the state's urban renewal legislation.
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provisions for emergency finance board approval of housing board expenditures for redevelopment and land assembly projects.2

D. HOUSING

§13.17. Anti-discrimination law. In Massachusetts Commission Against Discrimination v. Colangelo1 the Supreme Judicial Court upheld the application of the state anti-discrimination law as it applies to all multiple housing. General Laws, c. 151B, §4(6), as adopted by amendment in 1959,2 requires owners (and others with authority) to rent or lease housing accommodations in “publicly assisted or multiple dwelling or contiguously located housing accommodations” without regard to “the race, creed, color or national origin” of the applicant. The opinion was decided basically upon constitutional grounds and is thus discussed elsewhere in this volume.3

The Court did, however, discuss several issues of considerable importance to the enforcement of its decree, in holding, over dissent, that the commission’s order was too broad in certain particulars. The commission ordered that the person denied accommodations be given substantially the same status as the “most favored tenant or tenants” in the apartments. The Court found this “most favored” phrase unnecessarily vague, not limited to accommodations of the type sought by the applicant, and it could thus lead to enforcement difficulties. Certain other provisions of the order were made by the commission without its having considered evidence on the issue, since the owner and his rental representatives relied solely upon constitutional grounds at the commission hearing. Because this hearing was the first of its type, the Court allowed the owner or his representatives to seek further proceedings before the commission upon the issues governed by those parts of the order upon which they had submitted no evidence. Failure to file such a request within seven days would result in a Court decree enforcing those additional parts of the commission order that govern the owner’s and rental agent’s general leasing policies rather than just the specific discriminatory act involved in this case.

§13.18. Housing authority: Employee’s power to alter contract orally. In Costonis v. Medford Housing Authority1 the Supreme Judicial Court found that the defendant’s director had the apparent authority to alter a building contract, and the contractor was thus permitted to recover for the additional work done under the direction of the apparent agent. The Costonis case recognized the limits of its doctrine — that the apparent agent must be in a position of responsi-

2 General Laws, c. 121, §26Q. was amended. The prior provision, inserted by Acts of 1962, c. 115, was an amendment to G.L., c. 121, §26P.

3 See §§10.1, 12.10 supra.

bility of the type wherein a contractor might reasonably assume the authority existed. This limitation was reiterated and emphasized in Savignano v. Gloucester Housing Authority,2 in which the Court held that oral changes in the building contract ordered by the housing authority's "clerk of works" were not binding upon the authority because of any apparent agency in the clerk. It was also clear that the clerk could not have any authority to waive the requirements of written change unless approved by the chairman of the State Housing Board. The Court also held that contractual provisions for a watchman "both day and night," being unambiguous, could not be altered by subsequent conduct of the parties.

§13.19. Legislation. Acts of 1962, c. 487, created a Mobile Homes Commission, designed to study the particular problems of such housing and to recommend legislation. The particular and unique problems of mobile housing, and its increasing use, make this commission desirable, as long as its studies do not result in legislation in the land use area which is overly specialized in nature. Land use problems should properly be solved by application of the broadest possible policies and not by deferment to any particular interests such as could be represented by this type of commission.

Acts of 1962, c. 784, amended G.L., c. 121, §26S, to include employees of housing authorities with five years of uninterrupted service within the tenure provisions up to this time applicable only to employees of the State Housing Board.

E. BUILDING CODES, SAFETY AND HEALTH

§13.20. Building permit: Permit from board of health as condition precedent. In Building Inspector of Wayland v. Ellen M. Gifford Sheltering Home Corp.,1 the petitioner sought to restrain erection of a building under a revoked building permit. The local town building code required that, before the building inspector could issue a building permit for a building from which sewage would issue, the local board of health must have issued its permit approving the sewage system. The respondent, planning construction of a cat shelter for fifty to one hundred cats, obtained a clearance from the health agent upon plans which included no toilet or sewage facilities. The agent testified it was his delegated duty to give such clearance when no sewage or toilet facilities were planned. In fact, of course, sewage disposal was required in a home for cats, and the building inspector revoked his earlier building permit upon his being informed by the board of health that a review of the plans showed that a sewage permit was required. The Supreme Judicial Court held that the illegally issued permit was revocable and affirmed the Superior Court decree restraining the respondent from continuing to construct the cat home.


§13.23 LAND USE AND PLANNING LAW

The case, being brought in the name of the building inspector, raised a possible estoppel issue, he having issued the invalid permit. The Court found that he sued in the name of the town and for its benefit, and thus no estoppel could run.

§13.21. Fire prevention. The great danger from fires caused by space heaters has finally resulted in legislation prohibiting their use. Acts of 1962, c. 688, adds new Sections 25A and 25B to G.L., c. 148. Section 25A makes it a criminal offense to sell or install the various types of dangerous space heaters for residential purposes. Section 25B, effective July 1, 1965, makes it a criminal offense to use or allow use of these heaters in any building which is used in whole or in part for human habitation. Acts of 1962, c. 636, immediately prohibits use of portable wick-type space heaters in residential buildings, by adding a new Section 5A to G.L., c. 148.

The particularly great risks from fire in nursing and convalescent homes and rest homes require close and continual supervision. Acts of 1962, c. 630, adds Section 3Q to G.L., c. 143, and gives the Department of Public Safety the right to promulgate rules and regulations for these homes. After hearing, the department may order installation of a sprinkler system in a home when it is necessary. In recognition, however, of the considerable costs involved in installing a sprinkler system, the department can require other methods of fire protection when a sprinkler system "would be unnecessary or impractical either as to location, size or construction of a home." Requirements for a sprinkler system in department rules and regulations are not to take effect until January 1, 1965.

Acts of 1962, c. 314, authorizes the city of Boston to enact a fire code and validates and confirms the Boston Fire Prevention Code. The city fire chief may make rules and regulations consistent with the code and, upon his application, the Superior Court has equity jurisdiction to enforce the ordinance.

Gas fitting and requirements for licensing of gas fitters were amended by Acts of 1962, cc. 488 and 623.

§13.22. Civil defense. Acts of 1962, c. 350, exempts family-unit fallout shelters from a number of requirements of local building codes. The shelters need not comply with the code provisions as to materials and methods of construction, but remain subject to the administrative provisions of the codes, including such items as application and issuance of permits, fees, inspections, penalties and enforcement. Local inspectors of buildings are authorized to waive requirements of construction by a licensed builder if satisfied that the unlicensed builder can construct the shelter without danger to himself or others. The Director of Civil Defense is to establish family-unit fallout shelter standards; he is also to establish standards for shelters other than those limited to family units.


authority to regulate the installation of cesspools. The Court found that the town regulations were as specific and detailed as the subject matter permitted, since location, land conditions and construction materials may all vary. The landowner had notice that a permit was required and that an inspection of the construction was required. "These are valid precautionary regulations to avoid future danger to health by improper methods of sewage disposal."

F. EMINENT DOMAIN

§13.24. Relocation assistance. In March, 1962, Governor Volpe proposed a system of relocation assistance to persons and firms displaced by eminent domain.¹ This bill failed of passage but, although more extensive and complete, is similar to other measures that were proposed and sent to the Judicial Council. In addition, the Legislative Research Council prepared a report on relocation assistance during the 1962 Survey year.² Other bills submitted to the Judicial Council covered matters of prompt payment and methods of determining damages.³ The Legislative Research Bureau prepared a report on the conflicts with local zoning created by partial taking under eminent domain.⁴ The recent enactment by the Federal Government of relocation legislation for the federal highway program,⁵ somewhat similar to that now authorized in urban renewal,⁶ insures that a large number of other similar bills will be proposed during the forthcoming legislative session.

The large amounts of land taking involved particularly in the urban renewal and highway programs have created some questions as to whether fair market value is truly a sound measure of just compensation. Much land now taken is already developed and in some sort of intense use; eminent domain no longer consists merely of a taking of routes for highways and railroads in areas used only for agricultural or forest purposes. Thus, no one would contend that the average homeowner, forced to buy a new home and move extensive belongings — or an average owner of a business — is fully reimbursed by a fair market value test. The question thus resolves itself into one of whether the person whose property is taken or the general public who are gaining the benefit of the public improvement should bear these costs. The trend, at least, is toward throwing these losses on the public. But, perhaps extraordinarily, early statutes regulating takings for water

² House No. 3495 of Jan. 8, 1962.
reservoir purposes go at least as far as any modern statute in permitting full recovery for all losses.\(^7\)

\section*{§13.25. Lease of space above municipal parking lots.} Acts of 1962, c. 796, authorizes the board or officer in charge of off-street parking areas or facilities to advertise for the leasing of air space above those facilities, for a term not exceeding ninety-nine years. The appropriate governing body or executive of the city or town may accept any proposal that is deemed most advantageous to the municipality. The lessee or his assigns are to pay taxes on an assessment base including the value of the underlying land.

The statute provides a very sensible solution to making desirable uses of parts of public property not needed for public purposes. The same solution is being used in Newton in connection with the Massachusetts Turnpike extension, a supermarket to be built over the right of way. A similar proposal relating to the turnpike and the city of Boston ran into a political windmill and was not authorized.

A constitutional problem could arise, however, in connection with these types of leases. Presumptively property taken by eminent domain can only be taken if it is to be used for public purposes. A lease of air space originally indicates that only the surface was required for the public purpose and thus the air space was unnecessary to the public project. Under even the restrictive public purpose doctrine followed in Massachusetts, however, the constitutional objections are not supportable. Assuming land is taken for a parking lot and on the same day advertisements for proposals for leases of the air space are issued, the facts still remain: (1) the city or town requires use of the entire surface in preparing the parking lot and may require considerable air space for heavy equipment; (2) the project above the parking space will require supports, the location of which must be controlled by the municipality to avoid conflict with the parking function. This analysis is supported by \textit{City of Boston v. Talbot},\(^1\) which held constitutional a taking of an entire building with the immediate lease of the portion thereof not needed for subway construction. The lease provisions constitute a private benefit merely incidental to the primary public purpose.\(^2\)

\section*{§13.26. Taking by another governmental unit: Use of proceeds.} General Laws, c. 44, §63, has provided that the proceeds of the sale of municipal real estate are to be used for certain purposes. Acts of 1962, c. 377, amended the section to include a provision that the prescribed uses are to apply to funds received from "other disposal of real estate, including the taking by eminent domain by another governmental unit."

\section*{§13.27. Assessment of damages: Petition.} Section 14 of G.L., c. 79, \hspace{1cm} 

\(^7\) Acts of 1895, c. 488; Acts of 1896, c. 450; Acts of 1898, c. 450.

Section 13.27 authorizes either a person suffering damages from a taking under eminent domain or the taking agency to file a petition for the assessment of these damages. Section 16 has up to this time set a one-year statute of limitations upon these petitions. Acts of 1962, c. 797, has changed this limitation period to two years. The limitation period is also made retroactive to include takings that occurred prior to the enactment of the statute.