Chapter 16: State and Local Government

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Recommended Citation
§16.1. Introduction. During the 1972 Survey year state and local government witnessed the reaffirmation of settled doctrines by the Supreme Judicial Court, modest initiatives by the Legislature, and a major innovation in federal-state and federal-local relations in the form or revenue sharing. Tax reform and civil service reform, the two most pressing needs of local governments in Massachusetts, were again deferred or ignored, although it became evident that the federal courts may require action in the civil service area. A presidential election year, 1972 witnessed major enfranchisement of persons who had previously been denied the right to vote either because of age or because of recent interstate or intrastate movement. This chapter will treat in detail recent changes in the election laws and the revenue sharing program; other noteworthy developments will be more briefly discussed.

A. Voting and Elections

§16.2. Student voting. On July 5, 1971, the Twenty-sixth Amendment to the Constitution of the United States was ratified, granting the right to vote to all citizens who are 18 years of age or older. This ratification raised an urgent question in certain Massachusetts municipalities where newly enfranchised university students constituted a significant fraction, if not a majority, of the local population. The question was whether these students should be allowed to register and vote in the communities where they resided during the school year.

As might be expected, the question arose early in Cambridge: the Cambridge Board of Election Commissioners denied registration to 24

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§16.1. 1 For example, see Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971), aff’d in part and rev’d in part 459 F.2d 725 (1st Cir. 1972). Under attack in this case were various tests compiled by the Civil Service Commission (under G.L., c. 31, §10), to be given to applicants for jobs with police departments. Plaintiffs claimed that these tests unconstitutionally discriminated against Spanish-surnamed and black applicants. The district court agreed that an intelligence test so discriminated since it appeared that 65% of the white applicants taking the last test had passed, while only 25% of the black applicants and 10% of the Spanish-surnamed applicants had passed. On appeal the circuit court upheld the district court’s decision on that point.
students for the November 2, 1971 municipal election and they sought injunctive and declaratory relief in the federal courts. The students contended that the Board denied them due process and equal protection of the laws by imposing on them a special registration procedure, and by asking them special questions not asked of the general populace to determine their status as residents of Cambridge. The district court approved a memorandum filed by a magistrate after a hearing on the plaintiffs' motion for a preliminary injunction and ordered the provisional registration of all but three of the students. These three appealed the denial of the preliminary injunction as to them, but the election occurred before their appeal could be heard. The United States Court of Appeals for the First Circuit therefore declined to reach the merits of the appeal: since the preliminary injunction sought concerned only the November 2 election, and since the votes of the three students would not have affected the outcome of that election, their appeal was moot. However the complaint also sought declaratory relief on Cambridge’s registration procedures. As that question was not mooted by the election, the Court did comment on the students' claim that the Board’s registration process constituted a denial of equal protection and due process of law. This claim raised questions of Massachusetts law on which there were no clear precedents. Accordingly, the circuit court directed the district court to abstain on the request for a declaratory judgment, and to retain jurisdiction in the event that relief was not afforded in the state courts.

In ordering this abstention, the circuit court seems to have been unnecessarily cautious. On July 21, 1971, the Attorney General of the Commonwealth had issued an opinion that was directly on point. The Attorney General first stated that "for purposes of registering to vote, a minor . . . over the age of eighteen years has the right to establish his own domicile with or without the consent of his parents or guardian." The opinion then stated:

The fact that he is a student, residing in the town for the purpose of pursuing a course of studies for a number of years, should place on him no greater burden of proving his domiciliary intent. Whether

§16.2. 1 Amendment XXVI, §1 provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

2 Reed v. Board of Election Commissioners of the City of Cambridge, 459 F.2d 121, 122-124 (1st Cir. 1972).

3 "[W]e have found no case which would guide a federal court in determining what tests and/or presumptions a local election board may adopt under present Massachusetts election laws . . . in deciding whether to register individual students." Id. at 124.

4 Id.


6 Id. at 5-6.
he prefers or is required to reside in a college dormitory rather than in privately purchased or leased premises is of no real utility in determining his intent.7

In this respect the Attorney General was certainly right. His opinion is supported by clear precedents, both state and federal. In Massachusetts, a person's right to vote stems from Article III of the Amendments to the Constitution of the Commonwealth8 which, as amended,9 now provides that:

Every citizen of nineteen years of age and upwards . . . [with exceptions not here relevant] who shall have resided within . . . the town or district in which he may claim a right to vote . . . six calendar months next preceding . . . [any state, city or town election] shall have a right to vote in such election . . . ; and no other person shall be entitled to vote in such election.

Under this constitutional provision a person who is not expressly excluded has the right to vote in an election in any municipality if he or she (1) is a citizen, (2) is eighteen10 years of age or older, and (3) has resided in that municipality for six months next prior to the election.11 In administering these three prerequisites to the right to vote, municipalities must not deny registrants the equal protection of the laws which is guaranteed by the Fourteenth Amendment.12 If an individual is a bona fide resident, it matters not that he may be a student13 or a person in the military service.14 Registrars may not differentiate between individuals who are between 18 and 21 years of age and those who are over 21,15 and students may no longer be required to satisfy a burden of proof regarding change in domicile that is heavier than the burden on one who simply moves from one town to another for the ordinary purposes of life.16

The test for determining whether one is a "resident" under Article

7 Id. at 6.
8 Adopted by the people on April 9, 1821.
9 Const. Amend. Arts. XXXII, XI, XXX. LXVIII, XXIII, XXVI, and XCLV.
10 The twenty-sixth amendment to the U. S. Constitution (see note 1, supra) by its own force struck from this provision the word "nineteen" and substituted therefore the word "eighteen." See Opinion of the Justices, 240 Mass. 601, 605, 135 N.E. 173, 174 (1922). Acts of 1972, c. 28 provides for voter registration at age eighteen.
11 Dunn v. Blumstein, 405 U. S. 330 (1972), invalidated Tennessee's one-year durational residency requirement for registration. For a discussion of the effect of this case on Massachusetts law, see §16.3., infra.
III of the Amendments to the Constitution of the Commonwealth is quite clear under Massachusetts law. In an early Opinion of the Justices it is said that the word “resided” in Article III is “equivalent to the familiar term domicile, and therefore the right of voting is confined to the place where one has his domicile, his home or place of abode.” Accordingly, if a person actually lives in a city or town with the intent to make that city or town his home, he is entitled to be registered to vote. He need not have an intention of staying forever as long as he has no present intent to leave. A problem of determining the residence of students arises when a student resides at his college address nine months of the year, and elsewhere for the other three. Such temporary absence, however, should not disqualify the student from being considered a “resident” of his college town for voter registration purposes. Certain maxims set forth in Opinion of the Justices are relevant. Every person has a domicile somewhere, but cannot have more than one domicile at the same time, for one and the same purpose; a person retains a domicile until he changes it by acquiring another. In other words, once a student establishes a resident at his college address by actually living there with the intent to make it his home, his college town residence continues until he establishes a residence in another municipality by actually living there with the intent to make that municipality his home. Temporary absence from the college address will not terminate or interrupt residence for voter registration purposes.

Thus under Massachusetts law the tests to be used to determine residence are quite clear. Also clear is the federal constitutional doctrine that students, as a class, should not be required to pass more stringent tests as to residency than are established for the population at large.

§16.3. Durational residence requirements. In Dunn v. Blumstein the United States Supreme Court held that Tennessee’s one-year durational residence requirement was an unconstitutional restriction on the right to vote. The invalidated provision had required residence in the state for one year and in the country for three months as prerequisite to registration. A three-judge federal district court held that the durational residence requirement impermissibly interfered with the right to vote and created a “suspect” classification which penalized some Tennessee residents because of recent interstate movement. The test announced by the Supreme Court when it affirmed that decision was “whether the exclusions are necessary to promote a compelling state

17 46 Mass. (5 Metc.) 587 (1843).
18 Id. at 588.
19 Id. at 587.
20 Id. at 589.

§16.3. 1 405 U.S. 330 (1972).
2 The panel was convened pursuant to 28 U.S.C. §§2281, 2284 (1970).
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interest.' Since Tennessee could not show a compelling state interest in its one-year residency requirement, that requirement was held to be invalid under the equal protection clause.

The Massachusetts Constitution conditions the right to vote on a six-month residency requirement similar in effect to the requirement invalidated in *Dunn v. Blumstein*. In April, 1972, the Attorney General of the Commonwealth consented to a court order declaring that the six-month residency requirement was invalid, and later the legislature rendered it nugatory by enacting a statute which provides that any registrant otherwise qualified need be a resident of the city or town only as of the date of registration. The six-month durational residence requirement is thus, for all practical purposes, eliminated.

§16.4. Initiative and referendum. The so-called "plan" charters contained in Chapter 43 of the General Laws contain models for city government that are available to any city choosing to adopt them. Prior to enactment of the Home Rule Amendment to the Massachusetts Constitution in 1966, these "plan" charters (Plans A-F) were the only charters that could be adopted by cities without special enabling legislation. The general provisions of Chapter 43 relating to all "plan" charters, first enacted in 1915, contain a number of features that reflect ideas about city government that were then in vogue, such as the provisions for initiative and referendum. These provisions were the subject of one statute and two cases during the 1972 Survey year.

In 1972 the legislature reduced the number of signatures necessary to propose an initiative petition from twenty per cent of the whole number of registered voters to fifteen percent of the whole number of registered voters. Since this legislation amended only Chapter 43, it applies only to those cities having "plan" charters, and does not modify any initiative provisions that may exist in other charters adopted under special enabling legislation.

The initiative and referendum provisions of the charter of the City of Peabody were the subject of litigation in the case of *Saraceno v. Peabody*. At issue was the number of votes required for the passage of an

5 Id. at 360.

§16.4. 1 The manner of adoption is specified in G.L., c. 43, §§7-11.
2 Mass. Const. amend. art. LXXXIX.
4 G.L., c. 43, §§39-44.
initiative provision and for the passage of a referendum. Briefly, the Court determined from its reading of the Peabody charter that, while an initiative petition must receive both a majority of all the votes cast thereon and also a minimum number of votes equal to one third of the whole number of registered voters, a question submitted to referendum need receive only a majority of all the votes cast.

Peabody's charter was adopted under special enabling legislation; therefore the holding in Saraceno technically applies only to Peabody's charter. However, that charter is contemporaneous with the original "plan" charters, and its provisions regarding initiative and referendum parallel the analogous provisions in "plan" charters. Therefore the holding of Saraceno should apply to all cities operating under "plan" charters.

The case of Fantini v. School Committee of Cambridge concerned the recurring problem of determining what matters are proper subjects for a referendum election. On January 18, 1972 the Cambridge School Committee voted not to reappoint the school superintendent for the forthcoming school year. A referendum petition meeting all formal requirements was filed, but the City Council declined to submit the matter to the voters. This refusal resulted in the present case.

Since Cambridge operates under a "plan" charter, Chapter 43 governed the question of whether the School Committee vote was a proper subject for a referendum election. According to Section 42 of Chapter 43, a referendum is in order after the "final passage" of "any measure." Further, Section 37 defines "measure" as "an ordinance, resolution, order or vote passed by a city council, or a resolution, order or vote passed by

8 Section 48 of the Peabody charter provides that a measure concerning which a referendum petition has been filed "...shall forthwith become null and void unless a majority of the qualified voters voting on the same at such election shall vote in favor thereof." Id. at 907 n.2, 282 N.E.2d at 391 n.2. Section 52 provides that "...no measure shall go into effect unless it receives the affirmative votes of at least a third of the whole number of registered voters." (Emphasis added by the Court). Id. at 907 n.4, 282 N.E.2d at 391 n.4.
10 Acts of 1916, c. 300 (a special act).
11 For example, compare Acts of 1916, c. 300, §§46, 47 and 48 with G.L., c. 43, §§39, 40, and 42, respectively; also compare Acts of 1916, c. 300, §52 with G.L., c. 43, §§40 and 41.
13 G.L., c. 43, §42 provides that "[I]f, within twenty days after the final passage of any measure, except a revenue loan order, by the city council or by the school committee, a petition signed by registered voters of the city, equal in number to at least twelve percent of the total number of registered voters...protesting against such measure or any part thereof taking effect, is filed with the city clerk, the same shall thereupon and thereby be suspended from taking effect; and the city council or school committee, as the case may be, shall immediately reconsider such measure or part thereof; and if such measure or part thereof is not entirely rescinded, the city council shall submit the same, by the method herein provided, to a vote of the registered voters of the city."
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a school committee. . . ."14 The Supreme Judicial Court, however, has declined to give the word "measure" as used in Section 42 the full sweep suggested by Section 37. The Court has held that orders granting across-the-board salary increases to teachers are "measures" subject to referendum,15 and that an ordinance increasing municipal employee salaries is likewise a "measure."16 On the other hand, a municipal appropriation order for a city's annual budget is not a "measure" that can be protested by referendum.17 Referenda have also been held invalid where they pertained to more than one "measure" or parts thereof,18 or to an action not within the powers vested by law in a city council or board of aldermen.19

Early cases on the distinction between measures subject to a referendum and other acts suggest a reliance on the conventional distinction between "legislative" acts, which may be the subject of a referendum, and "executive" acts, which may not.20 The Supreme Judicial Court has not definitively adopted this analysis, which amounts to little more than another way of framing the question. Nevertheless, in the Fantini case the superior court ruled that the vote of the School Committee was an "executive" act rather than a "legislative measure," hence it was not a proper subject for referendum.21 Affirming that decision, the Supreme Judicial Court declined to rationalize the case as one involving executive as opposed to legislative action. Rather, the Court described the vote of the school committee as a negative act; it did not discharge the superintendent, but simply allowed his appointment to expire with the school year in the absence of action to reappoint him. The Court then held that a negative vote could not be considered the "final passage" of a "measure."22

The decision reaffirmed the principle that "any measure," as used in G.L., c. 43, §42, does not mean "any vote on any subject." Although

14 Section 37 also makes its definition of "measure" applicable to the word as used in Section 42.
17 Gilet v. City Clerk of Lowell, 306 Mass. 170, 27 N.E.2d 748 (1940). The Court's holding was based on the conclusion that the legislature could not have intended the mischief that a contrary holding would work on the operation of the Municipal Finance Act (Acts of 1913, c. 719, now principally codified as G.L., c. 44). Thus arguably individual items in an appropriation order could be protested by referendum. Gilet v. City Clerk of Lowell, 306 Mass. 170, 175-176, 27 N.E.2d 748, 750-751 (1940).
22 Id. at 1440, 285 N.E.2d at 435. The Court also noted that "... an attempt to enact a measure over the opposition of a legislative body sounds more like 'initiative' than 'referendum.'" Id.
the opinion stopped short of declaring that a vote by a school committee to appoint or remove particular individuals could never be subject to initiative or referendum, it expressed "serious doubt" that such might ever be the case.23 Taken, however, with Thomas v. Municipal Council of Lowell,24 the case supports the proposition that appointments or removals of particular individuals can be neither protested by referendum nor compelled by initiative. Fantini also supports the position that a negative vote—that is, one rejecting a measure—cannot be protested by referendum, although an initiative petition could be launched to enact the same proposal if its subject matter were otherwise proper for an initiative.

§16.5. Religious restriction on candidacy for election as trustee of public charitable trust. Many cities and towns in Massachusetts have, at some time in the past, been named the beneficiaries of private charitable trusts. Such trusts occasionally name the holder of some local public office or a resident who is specially elected to serve as trustee of a trust for the benefit of residents of that city or town.1 In such cases, the character of the trusteeship lies close to the uncertain boundary between private and governmental activity. A constitutional question arises when the donor has also imposed a religious qualification on the candidacy of one aspiring to be elected to such a position. This question was presented to the Supreme Judicial Court in the 1972 Survey year in Milliken v. Town of Littleton.2

The books of Littleton's public library had been modestly endowed in 1885 by a benefactor who directed that the endowment be under the charge of seven trustees, including the pastors of three named local churches, one layman from each of the churches, and a selectman. The town customarily elected one of the three laymen annually for a three-year term, with the qualification that any candidate be a member of one

23 Id. at 1439, 285 N.E.2d at 435.
24 227 Mass. 116, 116 N.E. 497 (1917). In this case the Court held that a vote removing an administrative officer is not a "measure" for the purposes of a charter provision that provided that "measures" become effective ten days after passage.

§16.5. 1 A notable historical example is the Franklin Foundation, created under the will of Benjamin Franklin. The Foundation was originally composed of a fund to be managed by the selectmen of the town of Boston and the ministers of the oldest Episcopal, Congregational and Presbyterian churches in the town. For litigation involving the Franklin Foundation, see Boston v. Doyle, 184 Mass. 373, 68 N.E. 851 (1903); Boston v. Curley, 276 Mass. 549, 177 N.E. 557 (1931); Franklin Foundation v. Boston, 336 Mass. 39, 142 N.E.2d 367 (1957) and Franklin Foundation v. Attorney General, 340 Mass. 197, 163 N.E.2d 662 (1960). For legislation effecting the Foundation, see Acts of 1905, c. 448; Acts of 1908, c. 569; Acts of 1927, c. 40; Acts of 1941, c. 212; Acts of 1953, c. 77; and Acts of 1957, c. 119.
of the three specified churches. Then in 1895 the benefactor's children gave Littleton an additional sum to erect a library building, expressing in their gift instrument the "desire" that the seven trustees chosen under the first gift instrument should be the trustees of the library building as well. Over the years these seven trustees continued to manage the town library; however, the amount of public support from appropriated funds continually grew, until by 1971 the public support greatly exceeded the trust income.

In 1971 the layman from the Baptist church was to be elected. Milliken, not being a member of the Baptist church, presented his nomination papers to the registrar of voters, who refused them. Plaintiff then brought an action for declaratory and equitable relief alleging that he had been deprived of his right to run for public office guaranteed by the federal and state constitutions. A judge of the superior court reported the case without decision. The Supreme Judicial Court avoided a decision on the constitutional issues presented by concentrating instead on the legal significance of the second gift instrument. The Court determined that the town was not under an inflexible command to follow the administrative provisions of the original trust in electing trustees of the library. Since the second instrument only expressed a "desire" that the original trustees also manage the library building, its language was only precatory. Compliance with that request was "at least inappropriate" since most of the library's support was now provided from public funds. The Court declared that henceforth the town should select the library building trustees according to those provisions of the General Laws which relate to selection of library trustees, and not according to the administrative provisions of the gift instrument. The Court held that Milliken's nomination papers had been improperly refused and remanded the matter to the superior court for the framing of an appropriate decree.

While Milliken was decided by reference to the terms of particular trust instruments, several general principles are expressed in Justice

3 The Court's opinion implies that the election by the town of the three layman trustees was required under the gift instrument. Id. at 755, 281 N.E.2d at 288.
4 Milliken relied on the equal protection clause of the U.S. Constitution and on Mass. Const. pt. 1, art. 9, which provides that "[a]ll elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."
6 G.L., c. 78, §10.
7 The Court's holding thus did not deal explicitly with the selection of trustees for the book endowment fund, which was still providing some income for the purchase of books. However, the Court did recognize that its principle holding would require the Littleton library to be run by two boards of trustees: one to manage the library itself, to be chosen in accordance with G.L., c. 78, §10, and one to manage the book fund, to be chosen in accordance with the terms of the gift instrument. After noting that this separation of functions could prove to be "administratively impossible or burdensome," 1972 Mass. Adv. Sh. 751, 755 n.7, 281 N.E.2d 285, 288, n.7, the Court authorized the superior court to include
Cutter's opinion. For example, the Court "assumed" that a religious restriction, as such, may not be imposed as a prerequisite to holding "public" office and found the trustees of the Littleton library to be public officers. However, the trustees were public officers not because they were elected by the town, or because the trust beneficiaries were "the public." Rather, the preponderance of public funds over trust funds in the library budget imposed public responsibilities on what had been primarily a private charitable trusteeship. The opinion reaffirmed the principle that public charitable trusts, given and accepted in such a manner as to create binding legal obligations, should be administered in accordance with their terms. *Millsiken*, therefore, appears to stand for the principle that religious affiliation as a qualification for trusteeship will not be viewed as impermissible by the Court, so long as a preponderance of the trust funds are private as opposed to public monies.

**B. Revenue Sharing**

§16.6. State and Local Fiscal Assistance Act of 1972. Surely the most dramatic event of the 1972 Survey year in federal, state and local relations was the passage by Congress of the State and Local Fiscal Assistance Act of 1972, which enacted the program commonly called "revenue sharing." The "block grant" approach of this program appeals to persons who are exhausted by the intricacy and number of federal categorical assistance programs; however the total amount of funds that will be distributed under the program is small by comparison with existing mechanisms. For example, Boston received about $200 million in categorical grants from the federal government in 1972, but its share for that year under revenue sharing was just under $18 million. Should existing categorical programs be substantially reduced, the total amount of federal aid distributed will diminish. Revenue sharing could therefore be used as a political screen while such a reduction is carried out. It should also be noted that "revenue sharing" is a misnomer; the program

within its decree "... suitable authorization for a deviation from the administrative provisions of the ... [first gift instrument] or relief cy pres with respect to that trust." Id. at 756, 281 N.E.2d at 288.


3 Richard Wall, Director of Fiscal Affairs, City of Boston.

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has a set dollar maximum, and states and municipalities acquire no rights to a percentage of the revenues of the United States.

The block grant alternative to categorical programs swathed in elaborate standards and procedures has been seriously advocated for a decade. During that period, rising costs increased the need of all state and local governments for more financial assistance from higher levels of government. Many local governments wanted federal help but did not want to comply with the conditions attached to special-purpose grants, such as the limitation of patients per room in a federally assisted hospital, or the racial integration of a public housing project. Other revenue-sharing supporters needed federal aid, but were no longer able to meet the "matching fund" requirements attached to most categorical programs; still others were more interested in using federal funds to pay for the necessities of life than in funding "new" programs.4 A special committee of the U.S. Conference of Mayors focused these concerns and staged, under the chairmanship of John V. Lindsay of New York, what became known as the Mayors' travelling road show. On this rising tide, and with support from President Nixon and Chairman Mills of the House Ways and Means Committee, revenue sharing began to float.

The support for revenue sharing was not, of course, unanimous. Seven members of the House Ways and Means Committee signed a minority report which began:

Let no one be deceived: This is historic legislation. For the first time in our history, state and local governments would become dependent on federal assistance to meet their general governmental responsibilities. The assistance is not related to a carefully defined problem involving a federal interest. This is an entirely new road, fraught with peril, with no end in sight. The one certainty is that the program will be permanent and ever rising in its costs.5

However the opponents' hyperboles did not stop the legislation. On June 22, 1972, the House of Representatives passed a bill that provided for the distribution of $5.3 billion to state and local governments according to a formula based on population, urbanized population, relative per capita income, state income tax collection and state and local revenue efforts.6 The Senate adopted its Finance Committee's recommendations by proposing the distribution of $5.3 billion and the elimination of the "urbanized area" and "income tax" elements of the distribution formula.7

The Senate-House Conference then agreed on a compromise which would use whichever formula produced the highest result for each state

7 S. Rep. No. 92-1050, 1972 U.S. Code Cong. and Adm. News 3874, 3874-75. The elimination of the two elements from the distribution formula would increase the amount of funds received by rural areas at the expense of cities.
and its localities. The grand total authorized came to $5.821 billion, but the Conference decided that for 1972 the amount should be limited to $5.3 billion; therefore each 1972 grant was scaled back by nine percent. The Conference Report was accepted on October 12 by the House and on October 13 by the Senate. President Nixon signed the legislation on October 20.

Monies distributed to local governments under the revenue sharing program may be used either for maintenance and operating expenses or for capital expenditures. No restrictions are placed on capital expenditures, other than that they be authorized by law. However, funds used for maintenance and operating expenses may only be used in the following areas: (a) public safety (including law enforcement, fire protection, and building code enforcement); (b) environmental protection (including sewage disposal, garbage collection and pollution abatement); (c) public transportation (including transit systems and streets); (d) health; (e) recreation; (f) social services for the poor and aged; (g) financial administration; and (h) libraries.

Revenue sharing receipts may not be used by states or localities for matching funds under other federal programs. Nor may the states use their revenue sharing receipts to reduce the amount of aid that they now provide to municipalities from their own revenues. There is, however, no such “maintenance of effort” provision for the localities; thus the localities can use federal revenue sharing funds in place of funds presently raised by local taxation.

The Secretary of the Treasury is responsible for making revenue sharing fund payments to both the states and the localities. The amount to be received by each state and locality is determined according to statutory formulae, which are quite complicated. The amount allocable to each state is determined by one of two alternative formulae depending on which would produce the most funds for each state. One third of each state’s total allocation is then distributed to the state government, with the remainder to be reserved for the localities, which include county, municipal and township governments. Allocation of these remaining funds among counties will be made according to a formula whereby each county’s population is multiplied by its “tax effort” and its “rela-

8 In 1973 the federal government will distribute the full $5.821 billion authorized, plus an annual “growth factor” of $150 million, which will be added annually through 1976. The total amount of funds authorized to be distributed is, therefore approximately $30 billion over the next five years; such funds will actually be distributed only if they are also appropriated.

10 Id. at §103(a)(1).
11 Id. §104.
12 Id. §107(b)(1).
13 Id. §102.
14 Id. §106(b).
15 Id. §107(a).
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tive income." Once each county's total allocation has been so determined, the county government will receive that portion of such allocation which is equal to the ratio of the county government's tax collections to the tax collections of all units of government within that county. Finally the remaining funds will be distributed to each municipality within that county according to a formula in which its population is multiplied by its tax effort and its relative income.

Thus the distribution of funds to state and local governments under the revenue sharing program is specifically controlled by the statute. However, a state may vary the allocation formulae applicable to county and municipal governments after 1973. A state may "by law" provide that such funds be allocated either on the basis of (1) population multiplied by tax effort or (2) population multiplied by relative income.

The entire benefit of revenue sharing can, of course, be eliminated if the federal government reduces its contributions through other grant-in-aid programs, or through ongoing federal programs that incidentally benefit the cities. An example of a reduction in the latter type of aid was the subject of litigation between Boston and the Post Office Department during the 1972 Survey year. In 1967 Boston granted certain zoning variances to a private developer to enable him to construct a $30 million addition to the central postal facility. The variance provided that the property would remain in private ownership and that the owner "must" continue to pay taxes, even though the property was leased to the Post Office Department. However on December 30, 1971, the United States, acting for the Post Office Department, entered an order in federal court taking the land and the buildings by eminent domain, thereby removing the property from the tax polls as of January 1. As a result the City will lose approximately $750,000 per year in property taxes.

§16.7. Other developments. During 1972 the Commonwealth declined to increase its assistance to cities and towns. Bills which would have required the Commonwealth to assume county costs or the costs of local transportation systems were defeated in the Legislature, and

16 Id. §108(a). A county's "tax effort" is the ratio of the county's and each included locality's adjusted tax collections to the total income of the county's residents. Id. §109(d). A county's "relative income" is the ratio of the per capita income of the state to the per capita income of the county. Id. §109(f) (2).
17 Id. §108(b) (1).
18 Id. §108(b) (2). A municipality's tax efforts is the ratio of its tax collections to its total income. Id. §109(e). A municipality's relative income is the ratio of the per capita income of the county in which the municipality is located to the per capita income of the municipality. Id. §109(f) (3).
19 Id. §108(c).
20 The Post Office Department signed a written agreement with the City to the same effect.
21 C.A. no. 71-3158-c (D. Mass.).
22 The district court's allowance of the federal government's motion to dismiss the city's objections to the taking has been appealed. C.A. no. 73-1033 (1st Cir.).

§16.7. 1 House Bill No. 667, 1972.
the Governor "pocket vetoed" a bill which would have required the state to assume court costs.\(^2\) The state also reduced its contribution to various local aid programs by \$66,000,000, and, through inadvertence (so it is said) funds were not appropriated to pay medical assistance costs between January 1, 1972, and June 30, 1972, in the amount of \$77,000,000. The effect of this "inadvertence" on municipalities rendering health care is severe. For example the state was delinquent in paying funds to the Boston City Hospital in the amount of \$9,700,000. Even if this delinquency is corrected, the interest which the City has had to pay for substitute funds amounts to some \$200,000.\(^3\)

C. MISCELLANEOUS CASES

\textbf{§16.8. Power of local governing bodies to summon witnesses.} In \textit{County Commissioners of Middlesex County v. Sheriff of Middlesex County}\(^1\) the Supreme Judicial Court reaffirmed the principal that local governing bodies may summon witnesses to attend and testify before them, but may not themselves \textit{compel} the witnesses to attend or give testimony. Pursuant to their authority to "examine on oath . . . any officer, keeper or other person relative to the affairs or management of any prison,"\(^2\) the County Commissioners sought a writ of mandamus to compel the Sheriff to appear before them for examination. A superior court judge sustained a demurrer to the petition, and the Commissioners appealed.

The Supreme Judicial Court affirmed, relying on the maxim that mandamus does not lie where another effective remedy exists.\(^3\) The Court merely pointed the Commissioners to G.L., c. 233, §10, under which they could apply to a judge of a superior court or the Supreme Judicial Court for an order compelling a summoned person to appear and give testimony. It should be noted, however, that the issuance of such an order is discretionary with the judge to whom application is made;\(^4\) it is, therefore, open to question whether the alternate remedy was in fact an effective one.

\textit{County Commissioners of Middlesex County v. Sheriff of Middlesex County} is the latest in a series of cases that have arisen when local

\(^2\) Senate Bill No. 1302, 1972. In a press statement, the Governor explained his veto by saying that the state should assume the costs of county government "only when county government reform is included." Governor's Press Office, Release No. 2/JY/38.

\(^3\) Richard Wall, Director of Fiscal Affairs, City of Boston.

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governing bodies and other boards and commissions have attempted to compel the attendance of witnesses or the answering of questions. One of the first of such cases arose in 1876 when the Common Council of the City of Boston summoned one Ephriam D. Whitcomb to appear before it. Upon Whitcomb’s refusal to answer a certain question, the Common Council voted to commit him to the county jail for twelve days or until he should purge himself of his contempt. Whitcomb brought a petition for a writ of habeas corpus, alleging that he was unlawfully imprisoned. With this contention the Supreme Judicial Court agreed, holding that insofar as the statute under which the Common Council acted purported to authorize municipal bodies to commit for contempt, it was unconstitutional: “[T]he legislature cannot delegate to or confer upon municipal boards or officers, that are not courts of justice, and whose proceedings are not an exercise of judicial power, the authority to imprison and punish, without right of appeal or trial by jury.”

Presumably in response to Whitcomb’s Case, the legislature in 1883 enacted G.L., c. 233, §10, which permits any tribunal that is authorized to summon witnesses, but not to compel attendance, to apply for a judicial order of compliance. Upon the issuance of such an order the judge would have the authority to punish the contumacious witness. The net effect of Section 10 is explained in Sheridan v. Gardner:

Failures to respond to a summons or to testify, in themselves, are not offenses which, without more, make a witness subject to penalties. Such failures merely make him subject to a court order compelling attendance and the giving of testimony.

The Sheridan case suggests that the issuance of a summons under G.L., c. 233, §8, and the failure of the witness to respond thereto, are conditions precedent to an application for a judicial order under G.L., c. 233, §10. Other cases have elucidated additional requirements on both the issuance of summonses and the application for a judicial order to compliance. For example the authority to summon witnesses under Section 8 is not unlimited; it exists only as to matters within the jurisdiction of the body seeking attendance. Thus a summons cannot be used to inquire into “private affairs unrelated to a valid legislative purpose.”

5 Whitcomb’s Case, 120 Mass. 118 (1876).
6 G.L., c. 233, §8, enacted by Acts of 1863, c. 158, §1, which gives local governing bodies and other boards and commissions the power to summon witnesses.
7 120 Mass. 118, 124 (1876).
10 Except for fulfilling this condition precedent, the issuance of a summons under G.L., c. 233, §8, has only an in terrorem effect on the witness.
practical matter this means that the summoning power may be used only in relation to a proposal which, if passed, would lie within the legislative powers of the summoning body. Further, the board or commission must formally vote to issue the summons and also to apply for the judicial order of compliance.\textsuperscript{12} As noted above, the issuance of an order of judicial compliance is within the discretion of the judge to whom the application is made.\textsuperscript{13} Finally, \textit{County Commissioners of Middlesex County v. Middlesex County}\textsuperscript{14} suggests that an application for a judicial order of compliance is the \textit{exclusive} remedy when a witness ignores a summons issued under G.L., c. 233, \textsection 8.

\textsection 16.9. Public records. Any person having custody of "public records" is obliged to permit them to be examined upon request by any member of the public.\textsuperscript{1} Although the term "public records" is defined by statute,\textsuperscript{2} its applicability to any particular document can be a subject of controversy. In two cases decided during the 1972 Survey year the Supreme Judicial Court was asked to apply the definition of "public records" to documents in the hands of local officials.

In \textit{Town Crier, Inc. v. Chief of Police of Weston}\textsuperscript{3} the petitioner, a corporation publishing a weekly newspaper with circulation in Weston, sought a writ of mandamus to compel the respondent Chief of Police to make available for inspection the arrest register and daily log kept in the headquarters of the Weston Police Department. A superior court judge reported the case without decision. The sole issue before the Supreme Judicial Court was whether the requested documents were "public records;" the Court held that they were not.\textsuperscript{4}

The petitioner argued that the statutory definition of "public records" included two distinct categories: (a) those records in which entries of

\footnotesize{\textsuperscript{12} Damon v. Selectmen of Framingham, 195 Mass. 72, 78, 80 N.E. 644, 645 (1907), and cases cited therein.  
\textsuperscript{13} Note 4, \textit{supra}. For example, an order was rightly refused where the person summoned was a defendant in an action brought by the summoning city. Osborne, petitioner, 141 Mass. 307, 4 N.E. 618 (1886).  
\textsuperscript{14} 1972 Mass. Adv. Sh. 219, 278 N.E.2d 751.}

\footnotesize{\textsection 16.9. 1 G.L., c. 66, \textsection 10. Any such custodian is also obliged to furnish copies of the public records upon payment of a reasonable fee. The fee for town documents is one dollar per page. G.L., c. 262, \textsection 34(65). Cities may set their own fees.  
2 G.L., c. 4, \textsection 7(26): "'Public records' shall mean any written or printed book or paper, any map or plan of the commonwealth, or of any county, district, city, town or authority established by the general court to serve a public purpose, which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the commonwealth or of a county, district, city, town or such authority has received or is required to receive for filing, any official correspondence of any officer or employee of the commonwealth or of a county, district, city, town or such authority, and any book, paper, record or copy mentioned in [certain other statutes], including public records made by photographic process."  
4 Id. at 893-897, 282 N.E.2d at 381-384.}
any description whatsoever have been made, and (b) those records which the law requires to be made. This contention, however, would subject governmental records of every nature and description to public scrutiny, and the Court was convinced that such was not the legislature’s intent. Rather, after considering the legislative history of the definition, the Court stated:

The proper construction . . . in our view is that the two categories of records encompassed by the definitions are (a) those in which “any entry has been made . . . [pursuant to a legal requirement]” and (b) those in which “any entry . . . is required to be made by law,” even though such entry may not in fact have been made as required. 5

Since the petitioner could show no statute or by-law requiring the compilation of either the arrest register or the daily log, the Court found them to be clearly outside the purview of the statute. 6 Nor was it enough that such records were the basis for reports to the state Commissioner of Corrections and to the selectmen of the town, which were assumed arguendo to be required by law. The inclusion in these reports of information from the arrest register and the daily station-house log did not transform these “subsidiary records” into public records. 7

The Court’s conclusion on this latter point governed its later decision in Dunn v. Board of Assessors of Sterling, 8 also a petition for a writ of mandamus. The petitioner, a taxpayer of the Town of Sterling, sought to compel the respondents to open for inspection so-called “field record cards” which had been prepared by a private consulting firm for the use of the town assessor. A superior court judge directed that the writ issue, and the assessors appealed. The Supreme Judicial Court reversed and ordered the petition dismissed. In the absence of a statute requiring the board of assessors to keep such field record cards, the Court held that they were not “public records.” 9 Further, the result was not changed by the fact that the field record cards were to be used by the assessor in compiling public records; “a record containing information which later becomes part of the public record is not a public record merely by virtue of such relation but must itself satisfy the statutory definition in all respects.” 10

The Court’s conclusions in both Town Crier, Inc. and Dunn have the merit of simplifying the determination of what is a “public record.” The cases simply require that there be a precise statutory requirement for the making or keeping of a particular record before the maker or keeper can be required to produce it for public inspection. Such statutory re-

5 Id. at 895, 282 N.E.2d at 383.
6 Id. at 897, 282 N.E.2d at 384.
7 Id.
9 Id. at 904, 282 N.E.2d at 388.
10 Id. at 903, 282 N.E.2d at 387.
quirements do in fact exist in great numbers, and the records kept there-
under will satisfy the needs of the inquiring citizen in most cases. As a
matter of statutory construction the Court’s conclusion seems unassailable:
the Court declined to go further than the legislature had already gone.
Rather, the Court stated in *Town Crier, Inc.*, “further extension of the
definition [of public records] to additional classes of governmental records
is clearly a legislative function.”

It is worth noting that public policy considerations played no part in
either decision. The Court declined to enunciate a doctrine of the citizen’s
right to know,12 nor did it consider the public’s interest in open govern-
ment. On the other hand, the Court did not consider the interest of
government officials in the confidentiality of their “trade secrets,” and
it specifically declined to consider the possibility that citizens whose
activities are chronicled in public records, such as a police arrest register,
might have a constitutional right to privacy that would preclude dis-
closure.13 Finally, in *Town Crier*, however, the Court carefully limited
its holding so as not to preclude (1) the making of an appropriate town
by-law requiring disclosure of the police records, (2) the voluntary and
nondiscriminatory disclosure of police records by the town or its officials
“subject to the rights and privileges of persons named therein,” or (3)
the summoning of such records before a proper tribunal in accordance
with established rules of law.14

§16.10. Review of town by-laws by the Attorney General. Before a
by-law adopted by a Massachusetts town can take effect, it must be
approved by the Attorney General of the Commonwealth.1 Correlatively,
the Attorney General may disapprove any town by-law by issuing a de-
cision stating the reasons for the disapproval.2 The procedure for securing
judicial review of a decision disapproving a by-law was the subject of
*Town of Reading v. Attorney General*,3 decided by the Supreme Judicial
Court during the 1972 Survey year.

The Town of Reading had adopted a by-law that established a munici-

897, 282 N.E.2d 379, 384.
12 The right to know, at least so far as it implies free access to governmental
records, is thus apparently a creature of statute and subject to the control of the
legislature.
14 Id. at 899, 282 N.E.2d at 385.

§16.10. 1 G.L., c. 40, §32: “Before a by-law takes effect it shall be approved
by the attorney general or ninety days shall have elapsed without action by the
attorney general after the clerk in the town in which a by-law has been adopted
has submitted to the attorney general a certified copy of such by-law with a
request for its approval, together with adequate proof that all of the procedural
requirements for the adoption of such by-law have been complied with.”
2 “If the attorney general disapproves a by-law he shall give notice to the town
clerk . . . with his reasons therefor.” Id.
pal liquor agency with authority to obtain a license to operate a retail liquor store. The Attorney General disapproved the by-law because he believed it was not within the powers granted to the town by the Massachusetts Home Rule Amendment; since the regulation of alcoholic beverage sales is pre-empted by the state under G.L., c. 138, and since that statute does not permit a municipal agency to become a liquor store licensee, the Attorney General concluded that the by-law was inconsistent with the General Laws. The town sought a writ of mandamus ordering the Attorney General to revoke his disapproval, and the Attorney General demurred. A single justice of the Supreme Judicial Court reserved and reported the demurrer, which raised only the question of whether mandamus was the proper vehicle for obtaining a review of the Attorney General's decision.

In arguing that mandamus was its proper remedy, the town relied upon Town of Concord v. Attorney General in which the Court held that mandamus would lie "where the reason given [by the Attorney General] for disapproval amounted to 'an expression of ... [the Attorney General's] individual [personal] judgment' ... rather than his considered legal opinion." However the Court in Town of Reading characterized that earlier approach to mandamus as "novel" and declined to extend it any further, holding instead that certiorari would be the proper course of action for the town. The difference in result was justified on the basis of the approach used by the Attorney General in disapproving each by-law. In the Concord case the Court first held that an exercise of the power to disapprove by-laws could only be based on a ruling of law. Next it determined that the Attorney General had not made a ruling of law when he disapproved the by-law, but had simply substituted his own judgment as to the legislative wisdom of the by-law. Thus, since he had acted illegally, mandamus was the proper remedy, since its function is to "set aside the illegal performance of duty." However in Reading it was alleged not that the Attorney General had acted illegally, but merely that his legal conclusions in disapproving the by-law were wrong. Therefore, mandamus not being applicable, certiorari was the proper method of judicial review.

Thus Town of Reading instructs town counsel seeking to review an

4 Mass. Const. amend. art. LXXXIX. Section 6 of the amendment grants to cities and towns the authority to "... exercise any power or function ... which is not inconsistent with the constitution or laws enacted by the general court."


9 Id. at 24, 142 N.E.2d 360, 364.


adverse decision by the Attorney General that, if the Attorney General's determination is believed to be "not supported by the law," certiorari should be sought, but if the Attorney General's determination is believed to be an expression of that officer’s personal opinion on the legislative wisdom of a by-law, then mandamus should be sought. Recognizing that this distinction might force town counsel to a premature election of a theory of proceeding, and yield yet more wasteful litigation involving only the question of the choice of remedy, the Court suggested that a litigant who has elected the wrong course of action might amend his petition accordingly.\textsuperscript{12} Alternatively the Court suggested that the litigant might couch his petition as a declaratory judgment action under the "more comprehensive provisions of G.L., c. 231, s. 51."\textsuperscript{13} The opinion in \textit{Town of Reading}, however, can scarcely be said to have clarified the distinction between mandamus and certiorari, a distinction that has troubled the Court upon other occasions.\textsuperscript{14} Town counsel seeking a review of adverse rulings by the Attorney General will doubtless sympathize with Chief Justice Tauro’s observation that "[a]n exclusive mode of judicial review for administrative action perhaps should be established as some authorities suggest."\textsuperscript{15}

Apparently not raised by the town in the \textit{Reading} case is the question of whether the Attorney General's statutory power of disapproval over town by-laws can any longer be considered constitutional in the light of the Home Rule Amendment to the Massachusetts constitution.\textsuperscript{16} That amendment was intended to reverse the axiom known as Dillon's Rule which, as firmly embedded in the jurisprudence of the Commonwealth and often recited in the opinions of the Supreme Judicial Court, provided that a municipality "is merely a subordinate agency of State government created for convenient administration and has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges."\textsuperscript{17} The Home Rule Amendment was framed to give the cities and towns of the Commonwealth the authority to exercise not only such powers as the legislature might choose to delegate, but all lawful powers of government, within certain limitations. To this end the following "devolution of powers" section was enacted:

\textit{Governmental Powers of Cities and Towns.} Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-

\begin{itemize}
  \item \textsuperscript{12} Id. at 1367-68, 285 N.E.2d at 432. Such amendment is governed by G.L., c. 213, §1C, and is at the discretion of the trial judge.
  \item \textsuperscript{14} For example, see Scudder v. Selectmen of Sandwich, 309 Mass. 373, 34 N.E.2d 708 (1941).
  \item \textsuperscript{16} Mass. Const. amend. art. LXXXIX.
  \item \textsuperscript{17} Atherton v. Selectmen of Bourne, 337 Mass. 250, 255-256, 149 N.E.2d 232, 235 (1958), and cases cited.
\end{itemize}
§16.10

STATE AND LOCAL GOVERNMENT

laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with . . . [powers elsewhere reserved to the general court], and which is not denied, either expressly or by clear implication, to the city or town by its charter.18

This section does not recite that a town may exercise its powers subject to the approval of the Attorney General; indeed, imposing the requirement that by-laws enacted pursuant to Section 6 be approved by any officer of the Commonwealth before taking effect is out of harmony with the spirit of the entire Home Rule Amendment. Certainly under Dillon's Rule the Legislature could impose a "condition subsequent" upon the exercise of municipal power. However the Amendment does not admit of any such power in the state, and, as a part of the Constitution of the Commonwealth, it cannot be subject to any state legislation in its meaning or effect.19

It could be argued that since the Home Rule Amendment empowers towns to enact "lawful" by-laws only, the Attorney General's power of approval is not unconstitutional, since it is limited to a determination of whether a particular by-law is "lawful." The trouble with such an argument is that the Attorney General's review of the legality of town by-laws is not carried out within a factual context of an "actual controversy." He can do no more than examine a writing containing the text of the by-law submitted for review. In the Concord case the Supreme Judicial Court implied that the Attorney General's review of town by-laws should be governed by settled principles of judicial review.20 One such principle is that courts should decline to speculate about abstract questions of law where no facts exist to provide a context for review.21 In light of this principle, it is suggested that the determination of the validity of town by-laws ought to be the responsibility of the courts in

18 Mass. Const. amend. art. LXXXIX, §6. The power to legislate in certain specified areas, such as taxation, is reserved to the state in section 7 of the amendment.

19 "To . . . [the Constitution's] provisions the conduct of all governmental affairs must conform. From its terms there is no appeal. Such a great charter cannot itself in the nature of things be made subject in its "meaning or effect" to another instrument. In that event it is not final and that other instrument becomes paramount." Loring v. Young, 239 Mass. 349, 377, 132 N.E. 65, 75 (1921).

20 "It is significant that the duty of approval always has reposed in a court of law or in the Attorney General rather than in some policy making body or officer. While there was no right of appeal from the disapproval of a by-law by a court, certain well settled principles served as a judicial restraint." Town of Concord v. Attorney General, 336 Mass. 17, 25, 142 N.E.2d 360, 365 (1957).

§16.11. Municipal liability for contracts and torts. Many cases decided during the 1972 Survey year involved issues of the liability of municipalities for contracts and torts. In *Lynn Redevelopment Authority v. City of Lynn*¹ the Supreme Judicial Court held that cities and towns might incur obligations to their redevelopment authorities in excess of presently available appropriations. The Mayor of Lynn, as authorized by a vote of the City Council, executed a contract on behalf of the city with the Lynn Redevelopment Authority whereby the city agreed to pay the authority approximately four million dollars. Upon timely demand the city declined to pay, asserting that the contract was invalid under G.L., c. 44, §31² for want of an appropriation at the time the contract was made. The Court held that Section 31 does not apply to a contract made by a city council acting in concert with the city's mayor.³ Furthermore it seemed clear to the Court that the scheme of the state redevelopment law⁴ was designed to allow a municipality to do exactly what the City of Lynn had done—that is, to agree to finance a redevelopment project with money to be raised in the future by borrowing.⁵

A statute somewhat similar to G.L., c. 44, §31 restricts counties from incurring liabilities in excess of legislatively authorized amounts.⁶ However the federal Court of Appeals for the First Circuit held that this statute does not preclude a county from being compelled to submit to arbitration pursuant to an arbitration clause in a contract for construction of a new county building, even though such arbitration might in due course yield an award in excess of the county's power of expenditure.⁷

In another area the Supreme Judicial Court reaffirmed the principle that the legislature may by statute impose burdens on cities and towns without making available any additional funds or enacting any legislation authorizing the financing of such burdens other than by local taxation. *National Shawmut Bank of Boston v. Woods Hole, Martha's Vineyard*

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² “No department financed by municipal revenue, or in whole or in part by taxation, of any city or town, except Boston, shall incur a liability in excess of the appropriation made for the use of such department.”
³ “We think that the term 'department' as used in §31 does not include within its scope a city 'council.'” 1971 Mass. Adv. Sh. 1669, 1670, 275 N.E.2d 491, 492.
⁴ G.L., c. 121B.
⁵ 1971 Mass. Adv. Sh. 1669, 1672, 275 N.E.2d 491, 493. On this point the Court cited G.L., c. 121, §26BBB (recodified as G.L., c. 121B, §20 by Acts of 1969, c. 751), which authorizes municipalities to “... agree with ... [a redevelopment authority] ... to raise and appropriate or to borrow in aid of such agency, such sums as may be necessary for ... defraying ... the ... costs of a ... project.”
⁶ G.L., c. 35, §32.
⁷ County of Middlesex v. Gevyn Construction Corp., 450 F.2d 53 (1st Cir. (1971).
and Nantucket Steamship Authority\(^8\) turned on a narrow question of statutory interpretation involving variances between the 1948 statute which set up a predecessor to the steamship authority\(^9\) and the 1960 statute under which the present authority was organized.\(^10\) Both statutes provided in essence that the towns served by the authority were to make up any annual deficits incurred. Both also provided that any surpluses were to be distributed to the towns, after other priority distributions had been made; however the 1960 statute lowered the priority of these town distributions. As a result, although there were surpluses from 1963 through 1966, they were completely absorbed by priority distributions higher than the towns. The Court rejected the contention that towns obliged to pay the authority’s annual operating deficit had secured any rights under the earlier statute that the later statute could not take away. “The towns . . . are neither private parties nor bondholders; they are instrumentalities of the State obligated by statute to make payments when the authority incurs a deficit. They have no contractual rights to be impaired by the 1960 act.”\(^11\)

An equally antique doctrine was endorsed in Desmarais v. Wachusetts Regional School District,\(^12\) where once again the issue of municipal tort immunity was raised. The plaintiff student was injured when his experiment exploded during a laboratory session, and suit was brought against both the school district and his teacher, who had not required the plaintiff to wear safety glasses. In sustaining the school district’s demurrer, the Supreme Judicial Court showed no inclination to reject the doctrine of municipal tort immunity, or to abolish it prospectively, as it had done with charitable immunity in 1969.\(^13\) The Court also sustained the teacher’s demurrer by invoking the settled doctrine that a public officer might be personally liable for misfeasance, but not for nonfeasance.\(^14\) Thus the mere omission to do an act which a public officer ought to do creates no liability; liability arises only when he performs his duty improperly.\(^15\)

A local governing body can, of course, be subject to tort liability where a statute expressly provides for such liability. Some such statutes predicate liability on negligence;\(^16\) others, however, impose liability in the form

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\(^15\) The United States Court of Appeals for the First Circuit also declined to expand the orthodox bounds of municipal liability by holding that the Worcester Police Department and the City of Worcester could not be sued under the Civil Rights Act of 1871 (42 U.S.C. §1983 (1970)). Henschel v. Worcester Police Dept., 445 F.2d 624 (1st Cir. 1971); see also Munroe v. Pape, 365 U.S. 167 (1961).
\(^16\) For example, see G.L., c. 84, §15, which imposes liability for negligence in the maintenance and repair of public ways.
of an obligation to indemnify against certain kinds of injury, whether or not there has been negligence on the part of the locality. An example of the latter type of statute is G.L., c. 140, §161, under which owners of livestock kept as a means of livelihood are entitled to recover damages from county commissioners for the "worrying, maiming or killing" of their livestock by dogs. 17 It is hard to rationalize this statute upon conventional tort principles. Since the county commissioners are not the owners of the dogs causing injury, their liability can scarcely be based upon negligence. The county commissioners do, however, receive income from dog license fees, 18 and it is out of this income that damage claims are paid. 19 The statute is perhaps best understood as an attempt to insure farmers against what once must have been a significant peril, and to pass the expense of such insurance on to dog owners.

§16.12. Standards of conduct for public officers. Two matters before the Supreme Judicial Court during the 1972 Survey year yielded refinements of the standards of conduct to be expected of judges and public officers. 1 In Matter of DeSaulnier the Court disbarred a judge of the superior court and ordered, "as a matter of judicial administration," that he refrain from exercising the powers and duties of his office until further order of the Court. 2 In the course of its findings and rulings the Court discussed at some length the ethical standards appropriate for a judge, relying in part upon the 1924 Canons of Judicial Ethics of the American Bar Association. Significant, however, was the Court's reliance on the new Canons proposed by a committee of the A.B.A. headed by former Chief Justice Roger J. Traynor of the Supreme Court of California, which indicated to the Court "the strong consensus within the legal profession that, for the future, judges should be held to more definite and high standards of judicial conduct and private behavior and

17 This statute was the subject of litigation in the case of Southwick Birds and Animals, Inc. v. County Commissioners of Worcester County, 1971 Mass. Adv. Sh. 1287, 273 N.E.2d 581. At issue was the interpretation of G.L., c. 140, §161A, which conditions recovery under §161 for damage to certain types of animals on a showing that the damaged animals were kept "in suitable enclosed yards." Briefly, the Court held that Section 161A conditions recovery for damage only to the wild animals listed in that section. 1971 Mass. Adv. Sh. 1287, 1290, 273 N.E.2d 581, 584.

18 G.L., c. 140, §147.

19 G.L., c. 140, §161. Upon such payment the county commissioners may sue the owner of the dog that caused the damage for reimbursement. G.L., c. 140, §171.


2 1972 Mass. Adv. Sh. 65, 89, 279 N.E.2d 296, 310-311. In an earlier decision in the same case, the Court had affirmed its jurisdiction to discipline a member of the bar who was also a judge; its power to do so was found in its inherent and statutory powers of supervision over both the judicial system and the bar and its members. 1971 Mass. Adv. Sh. 1345, 1347, 274 N.E.2d 454, 456.
practices than in the past." The Court singled out proposed Canon 4, which imposes definite restrictions against judges holding offices in business organizations and taking an active roll in business management, as constituting "a proper guide henceforth for full time judges."

*Bunte v. Mayor of Boston* presented the Court with an occasion for construing the words "misconduct in office" when applied to a public officer. Members of municipal housing and redevelopment authorities may be removed, after notice and hearing, for "inefficiency, neglect of duty or misconduct in office." The petitioner, having been removed from office as a member of the Boston Housing Authority, sought reinstatement by way of a petition for a writ of certiorari. From an order of reinstatement by a superior court judge the respondent appealed. The Supreme Judicial Court affirmed, finding that the behavior complained of had not constituted "misconduct in office" according to a definition which the Court was, for the first time, at some pains to expound.

The Court first held that intentional wrongdoing or moral turpitude was not a necessary element of misconduct in office. This holding was based on broad public policy grounds. The contrary rule would place upon the removing official a burden in some respects equal to that of a prosecutor in a criminal case. Removal proceedings, however, are not criminal, and the public is entitled to expect more from public officers than that they should refrain from criminal acts while in office.

The Court then arrived at a working definition of "misconduct in office:"

... it is sufficient to prove that the public officer has become unfit for office by reason of his intentional violation of a known and significant rule or duty inherent in the obligations of his office. . . . [W]e are not . . . establishing that it must be shown that the office

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4 Id. at 88, 279 N.E.2d at 310.
6 G.L., c. 121B, §6.
7 1972 Mass. Adv. Sh. 199, 204, 278 N.E.2d 709, 713. Bunte had been removed from office on three charges of misconduct: (1) as an occupant of public housing, Bunte's 1970 income was in excess (by approximately $13,000) of the maximum set for her housing unit; (2) Bunte did not file a Tenant Status Review Form that accurately reflected her 1970 income; and, (3) in her requests for compensation for services rendered to the Boston Housing Authority in 1970, Bunte did not specify the dates on which such services were rendered. Applying its definition of "misconduct in office" (see infra) to these charges, the Court found that there was insufficient evidence to warrant a finding that the conduct alleged in charges one and three was in violation of a known duty or rule, and that there was insufficient evidence to warrant a finding that the conduct alleged in charge two represented a breach of duty. Id. at 204-208, 278 N.E.2d at 713, 716.
8 "We conclude . . . that misconduct in office can be found to exist even in the absence of evil motives, moral turpitude, corrupt or criminal conduct, or intentional wrong doing." Id. at 201, 278 N.E.2d at 711.
holder had actual knowledge. It is enough to show that the duty or rule was sufficiently well established so that it ought to have been known to the officer.\(^9\)

This definition follows a trend in the Court's own decisions\(^10\) and conforms to the majority rule of other jurisdictions.\(^11\) In a leading Maine case it is said that "[m]isconduct does not necessarily imply corruption or criminal intention. We think that the legislature used the word in its more extended and liberal sense. The statute is not, strictly speaking, a penal statute, but rather remedial and protective."\(^12\) Similarly, in a New York case, it is said that the object of removal statutes is "not to punish the offender, but to improve the public service."\(^13\)

The Court went on to further discuss standard of conduct of a public officer. Above all, it is not enough to accept a standard adhered to by others who hold or have held the same office. Where the acts of a public officer are challenged, evidence of similar acts on the part of others, or of a uniform and long-continued practice on the part of the agency itself, is not evidence of the validity of such acts.\(^14\) Therefore, if the cause for removal is legally sufficient, the fact that similar practices have prevailed in the past does not permit an officer to excuse his own misconduct.\(^15\) Mere errors in judgment in the performance of official duties, however, do not constitute misconduct warranting removal from office.\(^16\)

\(^9\) Id. at 202-203, 278 N.E.2d at 712.
\(^12\) State v. Leach, 60 Me. 58, 67 (1872).