Chapter 13: Administrative Law

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CHAPTER 13

Administrative Law

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§13.1. The State Administrative Procedure Act. On July 1, 1955, the State Administrative Procedure Act, governing procedures on regulation-making, adjudicatory proceedings, and judicial review in the state departments and other agencies went into effect. The act was examined at length in the 1954 SURVEY by its draftsmen, Professors Sacks and Curran. There was a year's delay between its passage and its going into effect, to enable the state agencies to adopt their practices to the provisions of the act. The act went into effect without amendments by the 1955 General Court. During this session, the Joint Judiciary Committee had before it for further study provisions of the original draft of the Administrative Procedure Act relative to reforms in the extraordinary remedies. The Committee made no recommendations for legislation in this area and none was passed.

The only legislation passed during 1955 which is of concern in regard to the State Administrative Procedure Act was Chapter 285 of the Acts of 1955, which repealed the specific authority of the Department of Public Utilities to adopt procedural rules in regard to hearings and orders "so that state agencies may be governed in a uniform manner with reference to administrative procedure as required by Chapter thirty A." This statute is discussed in another chapter.

§13.2. Judicial review procedures on zoning appeals. The Supreme Judicial Court has had three occasions to apply its decision in Pendergast v. Board of Appeals of Barnstable, which was reviewed at length in the 1954 SURVEY.

It will be recalled that in that case the Court was called upon to

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§13.1. 1 G.L., c. 30A.
4 Amending G.L., c. 25, §4.
5 See §15.17 infra.

§13.2 ADMINISTRATIVE LAW

construe G.L., c. 40, §30, which provides that, on appeal to the Superior Court from a decision of a local board of appeals, the court "shall hear all pertinent evidence and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of such board, or make such other decree as justice and equity may require." The Court there held that this required a hearing de novo and a finding of facts by the court, whereupon the function of the court was confined to applying the law to the facts so established, and that it had no authority to exercise the administrative function of granting variances. The Court therefore reversed the Superior Court's decree granting a variance and ordered a decree to be entered stating that the decision of the board which denied the variance did not exceed the board's authority and that no modification of its decision was required.

In Cefalo v. Board of Appeal of Boston the board of appeal under the zoning law of Boston denied the plaintiff a variance to permit a "mortician's home" in a single residence district, finding that the plaintiff "did not advance sufficient reasons to cause the Board to come to the conclusion that this was a specific case where a literal enforcement of the Act involved a substantial hardship upon the appellant, nor where desirable relief might be granted without substantially derogating from the intent and purpose of the Act." The Superior Court heard the case de novo, made findings contrary to those of the board, and ordered the board to grant a variance. The board appealed.

The Court held that the zoning law of Boston was to receive the same construction as the general zoning law considered in the Pendergast case, and that "For reasons fully explained in the Pendergast case a judge can seldom, if ever, grant a variance which has been refused by a board of appeals" which reasons "rest upon necessary considerations of constitutional law" which "need not be explained again here." The Court reversed the decree of the Superior Court and ordered entry of a decree stating "that the decision of the board did not exceed its authority; [and] that no modification of its decision is required . . . ."

The Court in the same case passed on two other questions, holding (1) that the board of appeal, having been made defendant, had the right to appeal from the Superior to the Supreme Judicial Court; and (2) that the board had satisfied the requirements of the statute in that it set forth the reasons for its decision denying a variance:

The plaintiff suggests that the decision of the board is invalid because the board did not set forth the reasons for its decision as

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6 Ibid.
required by §19, as amended. In Prusik v. Board of Appeal of Boston, 262 Mass. 451, 457-458, this court said that the requirement that the board set forth its reasons is not satisfied by a mere repetition of the statutory words, and that, while minute recitals may not be necessary, there must be definite statement of rational causes and motives. Reference was made to the Prusik case in Real Properties, Inc. v. Board of Appeal of Boston, 319 Mass. 380, 381-382. But in all three of these cases the board had acted affirmatively by granting a variance. It would have been easy to make an adequate statement of the reasons that led to that action. In the present case the board refused a variance. It would have been a matter of considerable difficulty, especially for laymen, to state in detail all possible factors the nonexistence of which resulted in the denial of the application. In a case like this we are of opinion that the statement the board made of the statutory requirements for a variance that it found lacking was sufficient to comply with §19, as amended. See Adams v. Adams, 331 Mass. 354, 358. In Sheehan v. Board of Appeals of Saugus the town board of appeals had denied a variance to enable the plaintiff to operate a kennel for the keeping of greyhounds. The Superior Court entered a decree granting the variance. On appeal by the board and the superintendent of buildings the decision of the Superior Court was reversed on the ground that there was nothing in the court's findings to show that the board was under any "legal compulsion" to grant the variance. Again the Court referred to the Pendergast case, saying: "It is there pointed out that no one has a legal right to a variance, that the paragraph numbered 3 gives a person on certain conditions an opportunity to go before the board of appeals, and that if the board decides adversely to him he commonly has no right enforceable in court . . ." However, in Devine v. Zoning Board of Appeals of Lynn, one of the most significant cases of the year in this field, the situation was reversed. There the board of appeals had granted the applicant a variance to permit him to construct and occupy an addition to the rear of his grocery and provision store, which was a nonconforming use in a residential district at the time of the enactment of the zoning ordinance. The judge in the Superior Court adopted the findings of the board "as the facts in this finding" and held that the board of appeals did not exceed its authority in granting the variance. The court therefore affirmed the decision of the board.

On appeal this decree was reversed on the ground that the trial

7 Ibid.
judge had no right to adopt as his findings the findings of the appeal board *not supported by evidence heard by him at the trial de novo.*

The Court referred to its *Pendergast* decision and said:

It is now plain that it is the duty of the judge to determine the facts for himself upon the evidence introduced before him and then to apply the governing principles of law and, having settled the facts and the law, to inspect the decision of the board and enter such decree as justice and equity may require in accordance with his determination of the law and facts. The decision of the board is no more than the report of an administrative body and on appeal has no evidentiary weight. In the Superior Court, the appeal is heard de novo. The decision of the board cannot be treated as the report of an auditor, a master, a commissioner, an assessor, or some other judicial officer made in the usual course of judicial proceedings . . .

The problem in the instant case arises from the fact that the judge does not appear to have followed the principles just mentioned. His adoption of the findings made by the board indicates that he accepted as facts statements contained in its decision. A judge frequently and properly adopts the findings of an auditor whose findings of fact are not final. This connotes that upon all the evidence he agrees with the findings made by the auditor. A judge, however, as already pointed out, has no authority so to consider the findings of a board of appeals . . .

The decision of the *Devine* case is a logical sequence of the *Pendergast* decision. Having once held that the Superior Court upon such appeals was confined to judicial functions—in a word, to act as a court and not as a licensing board—it was to be expected that, acting as a court, it must follow the procedures and rules of evidence which pertain to the courts. And one of the most fundamental of these is that at a trial of the facts there must be competent evidence to support the court's findings. Findings of an administrative agency are obviously not competent evidence.

There are two passages in the opinions of the two cases which, read out of context, might seem inconsistent. In the *Pendergast* case the Court said: "The board of appeals is a local board familiar with local conditions. It can deal understandingly with questions of variance. A judge of a state-wide court, perhaps spending only a few days or weeks in a particular locality, is hardly a suitable tribunal for such purposes." In the *Devine* case the Court said: "The decision of the board is no more than the report of an administrative body and on appeal has no evidentiary weight." 13

It must be borne in mind, however, that the *Pendergast* decision

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does not rest upon the desirability of local control, but upon the constitutional separation of powers. The Court stated: "It is the usual function of the courts to secure and defend legal rights. The exercise by a court of licensing powers apart from questions of legal right would involve grave constitutional doubts. The statute should be construed, if reasonably possible, as to avoid such doubts." 14

Having stated that proposition, the Court went on to inquire whether it was "reasonably possible" so to construe the statute. And in the course of that inquiry the fact that zoning had always been treated as a local matter, and could best be so treated, was a persuasive factor in enabling the Court to hold that it was "reasonably possible" to construe the statute as it did.

In the Devine case the Court does not retract or impugn that statement. It does not even hold that the Superior Court may not give weight to the local board's conclusions, though that may logically follow. But since the legislature has required a trial de novo, the court must perforce require competent proof of all the facts upon which it relies, and not rely upon the local board's findings to supply those facts.

While, therefore, the two cases are clearly consistent, they do present a certain anomaly, which, however, must be for the legislature, not the courts, to resolve. If the traditional local administration is desirable, subject only to a review of the legality of local action, the requirement of a trial de novo by the court should be repealed.

It is the opinion of the present writer that the requirement should be repealed and the remedy of certiorari be restored or some equivalent remedy authorized. Upon a petition for certiorari the evidence before the board might now be certified to the court, whereupon the court would decide whether the board's decision was unwarranted in law upon the evidence reported, or disclosed other error of law. 15

This method would conform to the provisions of the Administrative Procedure Act, 16 which, in Section 14(6), provides that judicial review of state administrative agencies "shall be confined to the record, except that in case of alleged irregularity in procedure before the agency, not shown in the record, testimony thereon may be taken in the court."

§13.3. Jurisdiction and authority of local zoning boards of appeal.

Two important statutes were enacted relative to the jurisdiction and authority of local zoning boards of appeal.

General Laws, c. 40A, §13 (as enacted by Acts of 1954, c. 368, §2) had provided that an appeal to the local board of appeals might be taken by any person aggrieved by reason of his inability to obtain a permit from any administrative official under provisions of the chapter. It was left optional whether the cities and towns should, in addition, provide for appeals to the board by other aggrieved persons.

15 G.L., c. 249, §4, as amended by Acts of 1943, c. 374; Superior Court Rule 119.
In cases, therefore, where a city or town failed to provide for such appeals, the only remedy was by direct application to the courts. For example, a building inspector might grant a permit to a property owner to erect a building which violated the town's zoning ordinance, but an abutting property owner, whose property was vitally affected by the decision, had no right of appeal to the local board. His sole remedy was to go direct to the courts with a petition for mandamus or other appropriate remedy. This anomaly was cured by Acts of 1955, c. 325, which grants a right of appeal to the local board of appeal to "any person aggrieved by any order or decision of the inspector of buildings or other administrative officer in violation of any provisions of this chapter [40A], or any ordinance or by-law adopted thereunder." (Emphasis supplied.) A zoning ordinance or by-law may prescribe a reasonable time within which such appeals may be taken.

General Laws, c. 40A, §19 (as enacted by Acts of 1954, c. 368, §2) had provided that the concurring votes of all members of a board of appeals are necessary to reverse any order or decision of an administrative official under the chapter, or to decide in favor of any applicant on any matter upon which the board is required to pass under any zoning ordinance or by-law or to effect a variance. This provision was struck from the statute by Chapter 349 of the Acts of 1955, and a provision was substituted requiring a concurring vote of all members if the board has not more than four members, but all but one, if the board has over four members.

§13.4. Taxes upon property of public utilities: Procedure before the Appellate Tax Board. The Court has again had occasion to affirm previous decisions to the effect that an administrative tribunal cannot render a decision based on "hearsay exclusively" in a decision which revealed such a maze of procedural complexities that it resulted in prompt legislative relief.

The decision in State Tax Commission v. Assessors of Springfield 1 was directed to a determination by the Appellate Tax Board of the valuation of the "machinery, poles, wires and underground conduits, wires and pipes" located in Springfield belonging to three public utility companies on January 1, 1954, under G.L., c. 58A, §6, as amended. The facts were these: The Tax Commission certified to the assessors the valuations as of January 1, 1954, pursuant to G.L., c. 59, §39, as enacted by Acts of 1953, c. 654, §32. The assessors appealed to the Appellate Tax Board, which conducted a hearing. The only witness to value was an expert offered by the assessors. The valuations to which he testified were accepted by the board on all items of property. The Tax Commission appealed to the Supreme Judicial Court under G.L., c. 58A, §13, as amended. 2 The Tax Com-

2 The statute then provided that "an appeal as to matters of law" might be taken to the Supreme Judicial Court. This provision has since been changed by Acts of 1954, c. 681, §5, which provides that "The decision of the board shall be reviewed
mission contended that the Appellate Tax Board in the hearings before it was not permitted to determine values in the usual way, but that the assessors had the burden of proving that the original determination of value by the Tax Commission was “in error, unfair, unreasonable, arbitrary or capricious.” This contention the Court rejected. The Commission’s contention was based on the following argument:

General Laws, c. 59, §39 (as enacted by Acts of 1953, c. 654, §32) provides that the valuation at which property such as that here involved shall be assessed by the assessors shall be determined annually by the State Tax Commission subject to appeal to the Appellate Tax Board. The Tax Commission by March 15 must certify the value to the assessors, who, if aggrieved by a valuation made by the Commission, may “apply” (that is, appeal) to the Appellate Tax Board. The “board shall hear and decide the subject matter of such appeal . . . and its decision as to the valuation of the property shall be final and conclusive, except as provided in section 73, relative to abatements.” The assessors shall assess the property at the value determined by the State Tax Commission or by the Appellate Tax Board.

Up to this point the taxpayer is not a party to the proceedings. But by G.L., c. 59, §73, any company aggrieved by the taxes so assessed may on or before December 1 apply to the Commission for an abatement, and if the Commission finds that the company is taxed more than its just proportion, or upon an assessment of any of its property in excess of its fair cash value, the Commission may make a reasonable abatement. The assessors may be heard on the matter of abatement but only the taxpayer may appeal. The Appellate Tax Board is given jurisdiction to decide appeals under both Sections 39 and 73 and its decision “shall be final as to findings of fact.” From any decision of the Board upon an appeal of a decision or determination of the Commission or of a board of assessors, an appeal as to matters of law may be taken to the Supreme Judicial Court.

The Tax Commission, in support of its contention that the Appellate Tax Board lacked power in an appeal under Section 39 to determine the fact of value in the manner usual to proceedings before that Board, advanced considerations designed to make the procedure under Sections 39 and 73 reasonably workable. The Commission pointed out the lack of any provision for admitting the taxpayer before the Board at the hearing of an appeal by assessors pursuant to Section 39, and the anomaly of excluding from participation the one whose property is to be valued for the assessment of a tax to be paid by him.

Another objection urged by the Commission was that to permit the Board to determine value in the usual way would defeat the legislative purpose, which was to secure uniformity of valuation among cit-

in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A [the State Administrative Procedure Act].”
ies and towns; that such uniformity cannot be attained if the Board is free to conduct hearings and render decisions upon the opinion evidence of whatever witnesses happen to be called by the assessors.

The Court conceded that the scheme of the two sections was "undoubtedly anomalous"; that it does not insure uniformity, and may waste time, but held that since the procedure was "prescribed in unmistakable statutory detail," it was not for the Court to decide whether an end should be put to it.

The Court therefore rejected the Tax Commission's contention on this issue.

The legislature was quickly responsive to the Court's criticism of the procedure, which the Commission had described as a "merry-go-round," by enacting remedial legislation striking out Section 73 entirely and substituting a new Section 39. Under this section the State Tax Commission by March 15 must determine the value of the property in question and certify it to the owner as well as to the local assessors. Then the owner, as well as the board of assessors, may, on or before April 15, appeal to the Appellate Tax Board. Such appeal shall relate to the valuation of the property of only one owner in one city or town, and shall join as appellees the State Tax Commission and all others to whom the valuation was required to be certified. The burden of proof of a valuation other than that certified is on the appellant. The Appellate Tax Board's decision is reviewable in the Supreme Judicial Court under the Administrative Procedure Act.

An attempt to obtain consistency in valuations of property of the same owner, as well as economy of time, is made by providing that the Appellate Tax Board shall consolidate for hearing and decision all appeals of the same owner in the same city or town, and may in its discretion consolidate any or all appeals relating to the property of the same owner in more than one city or town.

The board of assessors is required to assess the property at the value certified by the Tax Commission, but if a different value is established upon appeal the assessors are required to grant an abatement, or assess and commit to the collector with their warrant for collection an additional tax, in conformity to the final decision.

The Commission in the Springfield case was more successful in its second contention, that the Board erred in accepting the testimony of value of an expert witness called by the assessors, who, though obviously qualified to give an opinion as to the value of the plant, could not testify to the value where there was only hearsay evidence as to what the property was.

The case points up the difficulty confronted by a party seeking to establish the value of underground facilities. While the expert had adequate ocular evidence of the properties aboveground, for the underground facilities he relied upon inventories reported by the com-

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3 Acts of 1955, c. 344.
4 G.L., c. 30A, §7.

http://lawdigitalcommons.bc.edu/asml/vol1955/iss1/17
pany in earlier years to the Tax Commissioner, and the company's "conduit prints [which] it supplied to the city engineer, which are kept in the latter's office," upon the basis of which he estimated that the underground cable was 75 percent of the priced cost of the underground conduit; that, so far as he knew, the inventory of underground plant is always made from company records and prints, the locations being checked in the field, as he did. Commenting on the insufficiency of this evidence, the Court said:

The amount and detail of the underground plant were not presented at first hand or adequately described. The sole foundation for the opinion as to the value of property which the expert did not see and could not see were inventories reported "in earlier years" to "the tax commissioner" and conduit prints in the city engineer's office. The inventories and prints, according to the witness, were made by the taxpayer, which, as has been observed, was not a party to the proceedings. These vaguely identified documents were not offered in evidence, for what reason does not appear. Their contents are not known in this proceeding.

The witness here was admittedly an expert qualified to give an opinion as to the value of the plant of a telephone company, but his experience did not enable him to provide by hearsay the only evidence of what the property was . . .

Presumably in a case to which the taxpayer is a party, the taxpayer's reported inventories and prints, if presented in evidence, would be admissible as admissions by the taxpayer and a proper basis for an opinion.

Since Section 14 of the Administrative Procedure Act provides that the Supreme Judicial Court on an appeal shall consider whether the administrative board's decision is "unsupported by substantial evidence," the problem of proof by other than pure hearsay, exemplified in State Tax Commission v. Assessors of Springfield, remains unchanged.

In Assessors of Haverhill v. New England Telephone & Telegraph Co., where the local assessors refused to assess the machinery, poles, wires and underground conduits, wires and pipes of telephone and telegraph companies at the value determined by the Commissioner of Corporations and Taxation and certified by him to the assessors, and they appealed from a decision of the Appellate Tax Board ruling that their assessment was invalid, the Court held that an underlying reason for dismissing their appeal was that no personal or property rights of the assessors were involved, and that "an administrative officer cannot refuse to proceed in accordance with statutes because he believes them

6 G.L., c. 30A.
§13.5. Powers of the Alcoholic Beverages Control Commission. An interesting example of the way the legislative pendulum may swing appears in Chapter 461 of the Acts of 1955 “Relative to Appeals to the Alcoholic Beverages Control Commission from the Action of Local Licensing Authorities.”

Under the original statute of 1933 setting up the licensing system to follow the repeal of national prohibition, the Alcoholic Beverages Control Commission’s decision on appeal from action of the local licensing authorities in refusing to grant a license, or in modifying, suspending, canceling, revoking, or declaring forfeited a license, was final. And if the local licensing authorities failed to issue a license, or to perform any other act when lawfully ordered to do so by the Commission, the Commission itself was empowered to issue the license or perform such act.

Unfavorable public reaction to the frequency with which the Commission overruled the local authorities led to the passage of Chapter 672 of the Acts of 1953, amended by Chapter 574 of the Acts of 1954, curbing the Commission’s powers. Under these acts, which substituted a new Section 67 of Chapter 138 of the General Laws, if the Commission wished to overrule the local authorities, the only action which it could take was to advise the local authorities in writing of the reasons for its decision and “remand the matter to the said local authorities for further action.” The Commission was forbidden in any event to order a license to be issued to any applicant unless it had first been granted by the local authorities. If the local authorities failed to act as ordered by the Commission, the Commission might itself “revoke such license or perform such act ... but no license shall be issued by the commission except in ratification of a prior issuance to the same party by the local authorities.” (Emphasis supplied.)

Now, following unfavorable public reaction to what was regarded as arbitrary action by certain local authorities in refusing to renew three package goods licenses, the legislative pendulum swung back. By Chapter 461 of the Acts of 1955 it is provided that, after receipt by the local licensing authorities of the Commission’s decision, “any applicant for renewal of a license or any applicant who is aggrieved by the action of the local licensing authorities modifying, canceling, revoking or declaring forfeited a license or failing to issue a license, which would in effect renew for one year a license held during the previous year,” if the local authorities fail within five days to take the action recommended by the Commission, may reappeal to the Commission, setting forth all the material facts. Upon this reappeal the Commission’s decision “shall be final,” the only limitation on the Commission’s authority being that it shall not order a license to issue “to an applicant

§13.5. 1 Amending G.L., c. 138, §§67.
not a party to the appeal." If the local authorities again fail to respond, the Commission is reinvested with authority, within the limitations stated, to issue the license or perform such act itself.

The new statute leaves this hiatus on new licenses: The Commission can prevent the local authorities from granting a license to A, but cannot grant the license to B if it does not approve of the grant to A. In such event there is left a vacancy in the quota of licenses.