Chapter 18: State and Municipal Government

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In the 1954 Survey there were separate chapters on the subjects of state government and municipal government. Because there were less significant developments in the state government field this year, and because of the difficulty of separate treatment in any case, the chapters are combined in this year's Survey.

Though they are not what may be called actual "developments" in the field, and consequently are not treated at length in this volume, attention is called to two important intergovernmental studies, one completed and the other initiated during the 1955 Survey year.

The completed study is on the federal level, the final report of the Commission on Intergovernmental Relations. It represents, according to the Commission, the first official body since the founding of the republic formally to make a study of the functional relationships between the local, state, and federal governments. The second study, on the state level, is the establishment of the Special Commission on State and Local Relations which is to report to the legislature in 1956. The Commission is authorized to study and make recommendations in the fields indicated in its title. In the main, it is expected to consider problems of "home rule" for local government which have received a great deal of attention in recent years in this state. It will be recalled that some

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1 Final Report to the President, June 20, 1955, Chairman Meyer Kestnbaum. The separate reports of the Study Committees appointed by the Commission are also recommended for a more detailed examination of the matters in the final report. For an examination of the highlights of the report, see 28 State Govt., No. 8, pp. 170-200 (1955).

2 Resolves of 1955, c. 86.
attempts at change in this area were defeated by the 1954 legislature. We will await with interest the report of the new study group.

A. State Government

§18.1. The four-year term. A proposed amendment to the state Constitution to provide four-year terms for the Governor, Lieutenant Governor, State Secretary, Treasurer and Receiver General, Attorney General, and Auditor was adopted by the General Court in 1954. In order to be placed on the popular ballot for ratification, the amendment must be adopted again by the General Court during the 1956 session. On May 16, 1955, the amendment was approved by the legislature in Constitutional Convention. However, the Democratic floor leader of the House, Representative Thompson of Ludlow, moved reconsideration of the vote, and the Convention adjourned without taking action on his motion. If the action of approval stands, the amendment will go on the 1956 ballot; if not, the 1956 session of the General Court must approve it and it cannot go on the ballot until 1957. It is reported that an advisory opinion will be asked of the Supreme Judicial Court to settle the question. Of course, behind all of the parliamentary maneuvering is the fact that the Democratic Party favors placing the state election of four-year-term officers in the presidential election year while the Republican Party favors the state officer elections in the mid-term of presidential elections.

§18.2. State government structural changes. Since the state's "Baby Hoover Commission" has finished its reporting, this was the first legislative session in recent years which did not see radical changes enacted in regard to state agency structure. However, there were a number of significant new agencies created and administrative changes worthy of notation.

A new board of registration was established to regulate the licensing of dispensing opticians. The board, which becomes the nineteenth board under the Division of Registration, will be composed of five members appointed by the Governor and Council. Four of the members must have been practicing dispensing opticians for at least ten years prior to the enactment of the legislation.

By 1955 legislation a criminal information bureau has been established in the Department of Public Safety. The new bureau will work with local police departments on common problems and will itself conduct various types of criminal investigational activities. The new bureau is discussed at greater length in Section 14.20 supra.

The five-year experiment with an autonomous outdoor advertising


§18.2. 1 Acts of 1955, c. 688.
2 Id., c. 761.
authority has ended with 1955 legislation. The agency is transferred back to the Department of Public Works and again becomes a functional division of that department as it was before 1947. In that year it was made an independent agency under the Governor and Council with the hope that the autonomy would aid in carrying out its given tasks in the control of outdoor advertising, mostly highway billboards, throughout the state. It was found, however, in loss of the services of the Department's Highway Division skilled workers, such as engineers and surveyors, that the administrative difficulties of separateness were greater than the new freedom was worth.

By Chapter 677 of the Acts of 1955 the duties and functions of the Commissioner and Associate Commissioners in the Department of Public Works were redefined. The associate commissionerships were specifically made full-time positions with each required to place a bond with the state Treasurer for faithful performance of duties. The legislation also sets up a rational scheme for distribution of duties between the three top officials of the Department. Formerly, a majority vote of the three was required by law for "every official act of department." Also, the Commissioner was not authorized to delegate any of his own duties to his subordinates. Under the new act, executive and administrative authority is vested in the Commissioner with the majority-vote rule applying only to "all contracts made by the department." The Commissioner is authorized to assign such duties to the Associate Commissioners as he designates and he may delegate to them to exercise in his name any power or duty assigned to the Commissioner by law. The new legislation should aid the Department considerably in establishing a more effective administrative organization.

§18.3. Separation of powers: Duties of the Attorney General in regard to public charities. In one of the best-written decisions of the year, *Ames v. Attorney General,* the Court through Chief Justice Qua refused to review the action of the Attorney General in denying the petitioners' request to institute court action for a declaratory decree concerning the actions of the trustees of a public charitable trust. Put more precisely, the petitioners requested the Supreme Judicial Court to order the Attorney General to give them a hearing on the issue of whether or not the petitioners had presented a "question fit for judicial inquiry." They asserted that this was the only question which should be decided at that point by the Attorney General, and if such a question was presented, the latter must then bring the appropriate action in court. The petitioners admitted that they had had a conference with the Attorney General and that he had determined no breach of trust had been made by the trustees. The petitioners claimed that the Attorney General cannot make such a determination

3 Id., c. 584.

where disputed issues of fact are involved.\textsuperscript{2} The petitioners claimed further that he had made errors of law in concluding there was no breach of trust in the case. The petitioners thus concluded that the decision of the Attorney General was an abuse of discretion.

Chief Justice Qua sustained a demurrer to the petition holding that the decision of the Attorney General is a matter of “purely executive decision which is not reviewable in a court of justice.”\textsuperscript{3} The Court was quite aware of the fact that the petitioners were requesting a hearing before the Attorney General rather than a complete reversal of his decision on the merits. Chief Justice Qua referred to this as a “flank attack.” He asserted that the petitioners admitted that the Attorney General had exercised his discretion, though, they claimed, erroneously. Justice Qua replied:

We are not convinced that the petitioners, who have no interest other than that of the general public, have any legal right to demand a decision of the court in advance before action is brought, and when action may never be brought, in a matter ultimately resting in the executive discretion of the Attorney General, and when the court in the last analysis can only advise and cannot command. See Denby \textit{v.} Berry, 263 U.S. 29, 36. We are appalled at the prospect that the multitude of executive and administrative decisions which must be made daily are subject to attack in court by self appointed members of the public without private interest, who may proceed to catechize the officer concerned as to what views of the law he had entertained, what arguments he had listened to and by which ones he had been influenced. It seems to us that a practice of this kind would constitute an intolerable interference by the judiciary in the executive department of the government and would be in violation of art. 30 of the Declaration of Rights. \textit{Stretch \textit{v.} Timilty}, 309 Mass. 267, and cases cited. \textit{Attorney General \textit{v.} Trustees of Boston Elevated Railway}, 319 Mass. 642, 656-657. We have been unable to discover any principle by which the case now before us can be differentiated from a great number of cases that might be instituted from all sorts of motives. Not only would charitable trusts be exposed to attack from all sides, the prevention of which is one of the reasons for leaving the matter of bringing suit in the sole discretion of one officer, but, for aught we can see, other decisions in the administrative field having nothing to do with trusts would be laid open to similar assault.\textsuperscript{4}

The Court held that this matter is similar to many others in the area of administrative discretion, such as the decision of Attorneys General or

\textsuperscript{2} Petitioner’s Brief, p. 77.
\textsuperscript{3} 1955 Mass. Adv. Sh. at 114, 124 N.E.2d at 518.
District Attorneys not to prosecute in a criminal matter,5 or to bring other civil actions.6 The state's newly enacted Administrative Procedure Act also excludes matters such as this from coverage under the act.7 The petitioners were able to cite the policy of previous Massachusetts Attorneys General of bringing these matters to court as long as there was a disputed issue of fact, but they admitted very little decisional authority for this viewpoint.

The Court found that the petitioners here had no private standing to attack the actions of the trustees of the charity, though they did have some interest. The trust concerned action of the President and Fellows of Harvard College as trustees of the Arnold Arboretum. All but two of the petitioners were members of the visiting committee appointed by the Harvard Board of Overseers. The Court asserted that the petitioners had no standing "different from that of other members of the public." It would seem, therefore, that merely "interested persons" cannot obtain a judicial hearing on matters in this area.

The policy of administrative discretion in cases of this type has been subjected to some criticism.8 It has been suggested that some independent private right to take action where a person has some determinable interest is advisable. A procedure for private persons to initiate actions has been in use in Britain for some years in criminal matters.9

Of course, the petitioners' argument for restricting the Attorney General's function to determining whether a "justiciable question" is presented can still be made to the legislature.10

§18.4. State personnel system. The extensive revision of the state government personnel system enacted in 1954 as a result of the recommendations of the state's "Baby Hoover Commission" were examined in the 1954 Survey.1 By Chapter 643 of the Acts of 1955 further comprehensive changes recommended by that Commission were adopted. The 1955 changes concern mainly the establishment of a more effective

6 State v. Jones, 252 Ala. 479, 41 So.2d 280 (1947); Boyle v. Ryan, 100 Cal. 265, 34 Pac. 707 (1893); Lewright v. Bell, 94 Tex. 556, 63 S.W. 623 (1901).
7 G.L., c. 30A, §11(1)(a).
10 Space limitations preclude the discussion here of difficulties of legislative action in this area. Some of the problems involved, even if legislation were adopted, may emerge from a reading of the recent Pendergast v. Board of Appeals of Barnstable, 331 Mass. 555, 120 N.E.2d 916 (1954); see 1954 Ann. Surv. Mass. Law §14.25. See also §18.2 supra.

administration of the personnel system by concentrating greater responsibility in the Division of Personnel and Standardization. The legislation is intended to produce greater uniformity in the manner of appointing, promoting, and classifying state employees for salary purposes.

Under the previous law, recommendations for step increases in salary originated with the heads of the various agencies. Hereafter, all step increases will originate in the centralized agency, the Division of Personnel and Standardization, on an automatic basis as the time in grade for the step increase is reached with the individual employee.

Under the new legislation supervisory power and rule-making authority in regard to hours of work, tours of duty, and overtime are transferred from the Commission on Administration and Finance to the Division of Personnel and Standardization. Section 10 of the new legislation provides for more uniform classification and specification for all state personnel by requiring that classes and grades for positions under the authority of the Civil Service Commission be made “consistent, so far as practicable,” with specifications for appointive positions as defined by the Division of Personnel and Standardization under G.L., c. 30, §45.

Changes were also enacted in regard to teachers and supervisors in the schools and colleges, placing them on a more equitable basis in regard to other state employees, allowing them to retain credit for years of service for salary purposes when they are transferred to positions requiring twelve months service instead of nine.

Extensive changes were made in regard to personnel in the Commonwealth’s hospitals and penal institutions, giving permanent employees with over six months of service the same job protection in relation to such things as discharge, removal, transfer, or lowering in rank or salary except for reasons of “just cause” as under the Civil Service laws.

An important change was made in the method of appointing and promoting employees within the Civil Service. Previously, if an employee whose name appeared lower than others on the Civil Service list was appointed or promoted, the officer was required to give written reasons for not appointing those higher on the list. Now, the officer need only give his reason for appointing or promoting the employee he did recommend for the position. This method tends to make for a more positive approach to appointment and promotion and eliminates the requirement of expressing detrimental matter in regard to those passed over.

B. Municipal Government

In the average year there are many developments in this field which are of primary interest to lawyers representing municipalities, with a
more limited number of developments of interest to lawyers in general practice and to the public generally. The 1955 Survey year followed this same pattern. No attempt is made herein to cover the many decisions or new statutes on highly specialized subjects of limited interest. The one phase of municipal law which seems to have had the greatest impact on the general public — to judge in part from the number of court decisions produced — is that of zoning. There is a continuing contest between the individual and the municipality over municipal attempts to control or limit the private individual in the uses which he may make of his property. Certain aspects of the subject will be discussed here, while others will be treated elsewhere in the Survey. For an examination of certain substantive law phases of the zoning cases, see Section 1.2 supra; for a discussion of some very significant cases on the procedures for judicial review of decisions of local zoning boards of appeals, see Section 13.2 supra.

§18.5. Procedural requirements for enactment of zoning by-laws. It is a common practice for municipal legislative authorities to enact by-laws or ordinances which differ in some respects from the enactment or amendment covered by the original request or by the notice of the public hearing required to be held thereon. There is often a question whether a change subsequent to the required public hearing means that there must be another public hearing. The case of Morgan v. Banas makes it clear that a change along the way as the result of which only part of the tract originally described is rezoned does not require a new public hearing. This confirms what had been commonly assumed to be the law on this subject, but this precise point had not been decided in several previous decisions on similar or related questions.

The Morgan case held that the fact that due to an intervening election there had been changes in the members of the municipal legislative body between the date of the public hearing held by that body and the subsequent date on which it voted on the zoning amendment did not affect the validity of the amendment nor did it require a new hearing.

It is common practice for the owner of property who seeks an amendment of the zoning ordinances or by-laws affecting his property to inform the municipal legislative authorities of the use which he proposes to make of his property if the amendment which he seeks is adopted. Would the legality of such an amendment be affected if the applicant in fact intentionally misrepresented his intended use and thereby deceived the authorities? The Morgan case holds that this would not affect the validity of the amendment, saying that "courts cannot, for the purpose of determining the validity of legislation, re-

§18.5. 1 331 Mass. 694, 122 N.E.2d 369 (1954).
ceive evidence of the inducements and motives of the legislators in enacting it.”

§18.6. **Powers, duties, and jurisdiction of zoning board of appeals.**
The first level at which a property owner may become involved with the administrative procedures relating to the application of zoning laws is in the making of an application to the enforcing authority, usually the building inspector, for a building permit or for a permit to make a particular use of land. If the proposed building or use complies with the existing building code and zoning laws, he is entitled as of right to a permit for such building or use. In the case of **Fellsway Realty Corp. v. Building Commissioner of Medford,** the Court said that “the right to build would be utterly lacking in substance if its exercise could be prevented by the arbitrary and capricious refusal of a permit, or if the granting or denial of the permit rested in the discretion of some official or board.” In this case the building commissioner refrained from taking any action on the application for the building permit. Nevertheless, under the applicable statute, the applicant was as much entitled to appeal to the board of appeals as if the official had expressly denied his application.

For many years prior to 1955 the zoning statutes provided that “an appeal to the board of appeals . . . may be taken by any person aggrieved by reason of his inability to obtain a permit from any administrative official . . . .” In addition, the same statutes provided that the local zoning ordinances and by-laws “may provide that . . . appeals may be taken to the board of appeals by any officer or board of the city or town, or by any person aggrieved by any order or decision of the inspector of buildings or other administrative official in violation of . . . ” the zoning statutes or local zoning ordinances or by-laws.

By 1955 legislation this statute was amended to provide that “an appeal to the board of appeals . . . may be taken . . . .” in such cases. Therefore, it would seem that under the present law, regardless of whether or not the local zoning ordinance or by-law so provides, not only the applicant but also other aggrieved persons or officers or boards may appeal from the alleged wrongful action of the building inspector to the board of appeals. The new statute now provides that “a zoning ordinance or by-law may prescribe a reasonable time within which appeals under this section may be taken.” Perhaps very few municipalities have bothered to amend their zoning ordinances or by-laws to prescribe such time limit, with the result that some litigation is sure to arise on the question of the time for taking such appeals. A more difficult question which may arise, particularly as to

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4 G.L., c. 40A, §13, and, prior thereto, G.L., c. 40, §30(5).

5 Acts of 1955, c. 325.
appeals by anyone coming within the meaning of the words "any person aggrieved," and other than the applicant himself, will be whether the appealing party may be bound by the passage of any limited time if no procedure is set up for some kind of recording or publication of the action of the building inspector, from which act of recording or publication the limited period may run. Certainly such limited time should not start to run only when "a person aggrieved" actually learns of the administrative action from which he has the right to appeal. In the comparable statute providing appeals by such persons from action by the board of appeals the time limit of fifteen days runs from the time of the recording of the board's decision with the city or town clerk, which recording is required by law. There is no comparable requirement as to the action of building inspectors in granting building permits, nor is there any public hearing or notice or publication in connection with, or as a condition precedent to, the action of the building inspector.

§18.7. Vote required for action by board of appeals. The very first statute in Massachusetts to permit variances from the provisions of zoning ordinances or by-laws was enacted in 1924, and it provided that "no such variance shall be authorized except by the unanimous decision of the entire membership of the board . . . ." This requirement for a unanimous vote continued in successor statutes, the last provision thereon prior to 1955 being that "the concurring vote of all the members of a board of appeals shall be necessary to reverse any order or decision of any administrative official under this chapter, or to decide in favor of the applicant on any matter upon which it is required to pass under any zoning ordinance or by-law, or to effect any variance in the application of any such ordinance or by-law." This requirement of a unanimous vote often worked hardships by reason of a single dissenting vote against otherwise unanimous action of a board of appeals on an apparently deserving application. Many efforts have been made through the years to reduce the number of votes required to constitute favorable action by such boards. This was finally accomplished by the enactment of an amendment approved May 6, 1955, to the following effect:

The concurring vote of all the members of a board of appeals consisting of not more than four members, and the concurring

6 This, of course, is the general problem of standing to seek review of administrative action. The term "person aggrieved" is common statutory language in this regard. See Federal Administrative Procedure Act §10(a), 5 U.S.C. §1011(a) (1946); Massachusetts Administrative Procedure Act, G.L., c. 30A, §14; and see Davis, Administrative Law §202 (1951).
8 Ibid.

§18.7. 1 G.L., c. 40, §27A, as enacted by Acts of 1938, c. 133.
vote of all except one member of a board consisting of more than four members, shall be necessary to reverse any order or decision of any administrative official under this chapter, or to decide in favor of the applicant on any matter upon which it is required to pass under any zoning ordinance or by-law, or to effect any variance in the application of any such ordinance or by-law.

§18.8. Board of appeals: Power to allow special uses. The 1946 case of Smith v. Board of Appeals of Fall River\(^1\) cast a long and dark shadow on the validity of provisions of local zoning ordinances or by-laws purporting to authorize boards of appeals discretion to allow uses other than those expressly permitted in particular districts. In that case the Court struck down an ordinance which purported to authorize the board of appeals to permit alteration and use as a residence for not more than a specified number of families of any building in any district, with certain limitations as to changes in cubic content and as to outside enlargements. The Court said of the ordinance:

It opened the door to discrimination not based upon valid difference. It purported to delegate to the board of appeals power to bring about situations where the regulations and restrictions would not be "uniform for each class or kind of buildings, structures or land, and for each class or kind of use, throughout each district" . . . It attempted to override careful limitation upon the power to grant variances laid down by said section 30 [of G.L., c. 40] . . . It attempted to delegate to the board of appeals, apart from its power to authorize variances, a new power to alter the characteristics of zoning districts, a power conferred by said section 25 [of G.L., c. 40] only upon the legislative body of the city . . . and it attempted to do this without furnishing any principles or rules by which the board should be guided, leaving the board unlimited authority to indulge in "spot zoning" at its discretion or whim . . .\(^2\)

During the 1955 Survey year, on facts which are in some respects difficult to distinguish from those of the Smith case, the Court reached an opposite conclusion in the case of Burnham v. Board of Appeals of Gloucester.\(^3\) The Gloucester ordinance contained a provision permitting the board of appeals to permit the building of motels in single residence districts, provided certain building and land requirements were met, and provided that "no permit shall be granted . . . without considering the effects upon the neighborhood and the City at large."

The Court used the following language in an attempt to distinguish the Gloucester case of 1955 from the Fall River case of 1946:

\(^1\)319 Mass. 341, 65 N.E.2d 547 (1946).
\(^2\)319 Mass. at 344, 65 N.E.2d at 549.
The ordinance in that case [Smith v. Board of Appeals of Fall River] was struck down as being an evasion of the strict requirements for variances and as giving to the board of appeals what was in effect a roving commission to engage in spot zoning. But we are of opinion that that case is not controlling. The amendment under consideration specifically authorizes motels to be constructed and operated in any district provided permission to do so is obtained from the board. Therefore the board by granting a permit is not engaged in rezoning an area to permit an excluded use. Nor is it engaged in varying the terms of the ordinance.4

The Gloucester case does not expressly overrule the Fall River case, but the Court's effort to distinguish between the apparently similar facts in the two cases is not uncommonly part of a prelude, sometimes of long duration, to the express overruling of a case. But for the more recent Gloucester case, there might be considerable doubt as to the validity of the provisions of many local zoning ordinances and by-laws which give boards of appeals discretionary power to permit buildings and uses where they are otherwise forbidden.

§18.9. School committee powers: Appointments, removals, and demotions. In the case of Povey v. School Committee of Medford,1 the Court sustained a demurrer to a bill of complaint which seemed to be a petition for a declaratory judgment under G.L., c. 231A, although it also had some of the attributes of a taxpayers' bill under G.L., c. 40, §53. The bill of complaint alleged that, although the superintendent of schools recommended one person for appointment as principal, the school committee ignored the recommendation and instead appointed another person who was a brother-in-law of one of the committee members, with a further allegation that a majority of the committee acted in bad faith. The Court in upholding the sustaining of the demurrer to the bill made the following points: (1) Taxpayers of a municipality cannot make themselves parties to the appointment of every officer or employee of the municipality and thus require the appointing officers to account for their acts to such taxpayers as may volunteer to bring suit. (2) The alleged bad faith of a majority of the school committee is no ground for relief. The Court cited the 1953 case of Kelley v. School Committee of Watertown2 where it had said that "there is, however, no general rule that a court can sit in judgment on the motives of administrative officers, acting in purely administrative matters, and overturn action found to have been taken in bad faith." (3) The recommendation of the superintendent of schools is advisory only, and it is in no way binding upon the school committee, citing the leading case of Russell v. Gannon3 on the point.

With the recent trend for the construction of new and in many cases consolidated schools, with the resulting abandonment or closing down of many older schools, school committees have been vexed with the problem of what to do about the principals of the closed schools. School principals are protected by statute against demotion except after notice and an opportunity for a hearing, and for certain causes stated in the statute, which makes no mention of the closing of schools. What may a school committee do with a principal when it has more principals than it has schools, or when it closes a school and no longer needs the principal in that position? This problem was involved in the case of Jantzen v. School Committee of Chelmsford. The Chelmsford school committee voted to close two old schools as the result of opening one new school. They voted to assign the principal of one of the closed schools to a teaching assignment at the new school, with no reduction in pay. They did this without giving the principal any notice or hearing. The principal sought a writ of mandamus to compel the school committee to grant her a hearing as required by the statute, and to recognize her as the principal of the new school. The Supreme Judicial Court denied her relief in language which reflects the necessity for the application of practical common sense and reasonableness to a situation which apparently had not been contemplated by the statute. The Court said:

She [petitioner] may have had a technical right to notice and a hearing but she had no right to be appointed principal of the new school. That was not the position she had previously held. . . . If the petitioner had had a hearing it would not have been upon the question whether she should be appointed to the new school or to any other particular school. . . . The school committee unquestionably had power to close the Princeton Street School. [Citations omitted.] The court cannot now order the school committee to install the petitioner as principal of some other school, even if one is available — a fact which does not appear.

The court will not issue its writ to require a hearing which it can see must be futile.

§18.10. Liability for highway defects. The liability of a municipality for ordinary highway defects is of statutory origin, and the statute requires certain notices as conditions precedent to recovery. However, the case of Flynn v. Hurley is one of those rare reminders that there can be under some circumstances a municipal liability at common law for defective highways. Such liability may arise, for ex-

4 G.L., c. 71, §42A.

§18.10. 1 G.L., c. 84.
ample, by reason of negligence in making or filling excavations within highways for sewer or water installations, with reference to which installations municipalities do not enjoy immunity from liability for negligence, or it may arise in cases where a municipality owning or operating a gas or electric plant may be liable for negligence in connection therewith under our statutes. Furthermore, in such special cases, insofar as the injury involves a highway defect, the failure to give the statutory notice of defect does not bar recovery.

Although the statute imposing liability upon municipalities for defects in "ways" does not attempt to define what is meant by the word "way," a series of decisions going back at least to 1834 has operated to limit the liability principally to cases where the defects are in the traveled portion of the way, with no liability usually for conditions which might be defects but which are located outside of the traveled portion of the way although within the outside limits of the entire highway. However, the case of Brennan v. Cambridge may be an indication that the Court will not apply this limitation of liability as strictly as it has done in the past. In this case the plaintiff was injured by a fall caused by catching her foot on a tree root about six inches high, running parallel to a curb, but between the edge of the sidewalk and the curb. The plaintiff was crossing the street at this location which is not a crosswalk.

Perhaps this case does not detract from the weight to be given to earlier precedents, since the Court says: "We think it cannot be said that the place of the accident was 'not a part of the traveled path.' So far as appears a pedestrian was entitled to use it for travel, as the plaintiff did."— On the premise that the root may have been located in the "traveled path" the decision can be reconciled with the earlier decisions; otherwise it cannot. If the test of whether this was a part of the "traveled path" is whether "a pedestrian was entitled to use it for travel," we may be opening the door wide for the reason that a pedestrian probably is entitled to use any part of the area within the limits of a way for travel, whether or not such part be within the constructed or usually traveled portion of the way. The Court refers to one of the earlier precedents to the contrary, but does not attempt to distinguish the two cases other than by the language quoted above.

3 G.L., c. 164, §§64, 74.
4 G.L., c. 84, §18.
6 G.L., c. 84, §15.
10 Raymond v. Lowell, 6 Cush. 524, 530 (Mass. 1850).
§18.11. Liability for damages caused by sewers and drains. The rule that a municipality is not responsible for damages caused to individuals through any defect or inadequacy in the plan of its system of sewers, but is responsible for damages which accrue to individuals through negligence in the construction, maintenance, or operation of its system of sewers, a rule which has been stated and applied in many decisions, was again stated in the 1955 decision of *The Lobster Pot of Lowell, Inc. v. City of Lowell.*

The rule is probably well understood and followed by lawyers generally. However, the same cannot be said for the law applicable to the liability, if any, of municipalities for damages caused by waters overflowing from street storm or surface water drains and basins. All too often, no effort is made to distinguish between damages caused by the negligent operation or maintenance of sewers on the one hand and the alleged negligent operation or maintenance of street storm or surface water drains on the other. As to the latter there may be no liability, while as to the former there may be. This is well illustrated in the case of *Fulton v. Town of Belmont,* also decided during the 1955 *Survey* year, where the Court denied relief in a case involving street drains, and used the following language:

Here the town built in the limits of a street two catch basins interconnected but not tied in with a storm drain or sewer. It had a right to do this and it was not required to dispose of surface water if any was collected. If the town had allowed this surface water to seep and percolate out of the catch basins, thereby flooding abutting land, no action would lie . . . because the building of the catch basins would be designed to keep streets in repair and safe for travel.

If these catch basins were installed for these reasons, adjoining owners could erect structures on their lands up to the line of the highway to prevent surface water from flowing onto their land.

§18.12. Appropriations. General Laws, c. 40, §5 contains a long list of purposes for which municipalities may make appropriations. The following purposes were added in 1955, although many municipalities have been appropriating funds for such purposes for many years:

(I) Construction, maintenance, and operation of incinerators.

§18.11. 1 See, for example, Anglim v. Brockton, 278 Mass. 90, 179 N.E. 289 (1932); Pevear v. Lynn, 249 Mass. 486, 144 N.E. 379 (1924).

2 1955 Mass. Adv. Sh. 769, 127 N.E.2d 659. The decision is examined in §3.8 *supra.*


§18.16 STATE AND MUNICIPAL GOVERNMENT

(2) Construction, maintenance, and operation of outdoor artificial ice-skating rinks.\(^2\)

The same new statutes also amend G.L., c. 44, §7, listing the purposes for which municipalities may borrow money.

§18.13. “Lame duck” salary increases. Heretofore G.L., c. 44, §33A provided that no ordinance providing for an increase in municipal salaries or wages should be enacted unless it was to be operative for more than three months during the financial year in which it was passed. This applied to both election and non-election years. By the Acts of 1955, c. 358, this has been changed as to the non-election years only to permit ordinances to be passed in December of such years increasing municipal salaries or wages as of the next January 1st. The prohibition still stands as to election years.

§18.14. Betterment assessments for water pipes. By virtue of the Acts of 1955, c. 332, our General Laws now contain express authority for municipalities accepting such legislation to levy betterment assessment for water pipes laid in public and private ways. The method of assessment is very much like that applicable to sewers under G.L., c. 83.

§18.15. Traffic control on private ways and private parking areas. Heretofore municipalities have been handicapped by the lack of express authority to regulate the parking or movement of vehicles on private ways, the express authority being limited to that found in G.L., c. 40, §21(14), relating to ways furnishing means of access for fire apparatus to tenement houses or apartment houses. There was no express authority over private parking areas, except such as might result from the licensing powers under G.L., c. 148, §56. By Acts of 1955, c. 135, it is now provided that upon written application and consent of the owner or person in control of a private way or parking area a municipality may “make special regulations as to the speed of motor vehicles and as to the use of said vehicles upon the particular private way or parking area.” Such special regulations are effective for not more than one year, but they may be extended for additional periods of one year each upon new written application.

§18.16. Building codes: State and local powers. In a particularly significant piece of legislation, Acts of 1955, c. 617, the General Court amended G.L., c. 143, §3J in such a manner that a local building inspector is now required to issue a building permit to an applicant whose plans and specifications do not comply with the local building code, provided they do comply with the alternative requirements specified in rules and regulations made by the Board of Standards in the Massachusetts Department of Public Safety, which board is required to file a copy of such rules and regulations with the state Secretary, whereupon they shall have the force of law. Formerly the law provided that “an inspector of buildings may issue a permit or certificate for such construction . . . if said plans and specifications comply with the al-

\(^2\) Id., c. 716.
alternatives set forth in the regulations . . . and he is of the opinion that said alternatives provide adequate performance for the purposes for which their use is intended . . . and they are reasonable, sound and accurate and would not tend or be injurious or detrimental to the character of the neighborhood or to other property therein.” By contrast, the law as amended now provides that “no permit or certificate shall be refused or denied on the grounds that such plans and specifications fail to comply with the provisions of any ordinance, by-law, rule or regulation, or any special law applicable to any particular city or town . . . if said plans and specifications comply with the alternatives . . . in the regulations . . . [of the Board of Standards].” This may result in local building codes being superseded to a great extent by the rules and regulations of the Massachusetts Board of Standards.

§18.17. Regional planning boards. By the Acts of 1955, c. 374, cities and towns are now authorized to establish regional or metropolitan planning boards to consider planning problems on an area-wide basis. Under the enabling act, municipalities may organize regional or metropolitan planning districts coterminous with the area of the towns which compose the district. The district organizations cannot be formed without the approval of the State Planning Board in the Department of Commerce on a determination “that such group of cities and towns will constitute an effective region for planning purposes.”

In each district so formed there will be a district Planning Commission composed of one member from each local planning board. The Commission will consider problems of a regional nature and prepare comprehensive plans for the district and “make recommendations for the physical, social and economic improvement of the district.” The plans and recommendation will be advisory only and will have no force unless adopted in the normal course by the municipal planning boards.