CHAPTER 20

Municipal Government

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A. ZONING

§20.1. Judicial review: Effect of local ordinances and special acts. While the general system of appeals is established by statute, recent decisions emphasize that the local ordinance involved must be read with care, since it may control the scope of the appeal in important respects. Thus the ordinance may, though it need not, give a right of appeal to the local board to a person objecting to the grant of a permit,[1] as well as to a person denied a permit. It was held in *Massachusetts Leather Co. v. Aldermen of Chelsea* [2] that the appeal is the exclusive remedy. The Court held that the ordinance may be so drawn as to give to a local board established under General Laws, Chapter 40, Section 30, exclusive jurisdiction over appeals under the building law as well as under the zoning law, thus ousting a previous board of jurisdiction.

In another case decided during the survey year, *Fairman v. Board of Appeal of Melrose*,[3] the local board of appeal was established by special act with no such review provisions contained therein as in the general act referred to above. The Court therefore asserted that the only form of judicial review was by petition for writ of certiorari.

§20.2. Judicial review: Denial of a variance. The statutory provision governing appeals to the Superior Court from decisions of local boards has given rise to much litigation. The appeal is by bill in equity brought by "Any person aggrieved . . . whether or not previously a party . . ." and the court is required to "hear all pertinent evidence and determine the facts, and upon the facts 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." [1] In *Bicknell Realty Co. v. Board of Appeal of Boston*,[2] in dealing with the scope of review

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§20.1. [1] G.L., c. 40, §30, sixth paragraph. See now G.L., c. 40A, §13.
[2] 1954 Mass. Adv. Sh. 599, 120 N.E.2d 766.
[3] 1954 Mass. Adv. Sh. 173, 117 N.E.2d 829.

§20.2. [1] G.L., c. 40, §30. Section 21 of the new Chapter 40A, inserted by Acts of 1954, c. 368, §2, contains an identical provision.
[2] 330 Mass. 676, 679, 116 N.E.2d 570, 573 (1954).

under this statute, the Court said, ". . . the matter is heard de novo and the judge makes his own findings of fact, independent of any findings of the board, and determines the legal validity of the decision of the board upon the facts found by the court, or if the decision of the board is invalid in whole or in part, the Court determines what decision the law requires upon the facts found."

Further questions arise in applying the rule just stated. Suppose a person applies to the building inspector for a permit knowing that he is bound to deny it, and then appeals to the local board seeking a variance or special permit. It may happen that the board grants a variance, and that on appeal the facts found by the Superior Court justify its action. Or the facts there found may show that the action of the board was wrong as a matter of law. In either case the "decision the law requires upon the facts found" is clear. But suppose the facts found in the Superior Court would require affirmance of the action of the board had it granted the variance, whereas in fact the board has denied it. What decree is to be entered? The contention that in such a case the Superior Court may grant a variance was rejected in the very significant case of *Pendergast v. Board of Appeals of Barnstable.*[3] The Supreme Judicial Court held that the statutory authority to "make such other decree as justice and equity may require" did not give to the Superior Court the same power to grant variances that the local board possesses, intimating that the grant of such a power to the court would involve grave constitutional doubts.[4] The court's duty is to apply the law to the facts found by it, and while the law may *permit,* it does not *compel,* the grant of a variance. No one is entitled to a variance as of right. The Court stated that the same rule applied to a special permit or special exception, since the local board also had discretion in granting those. The Court, however, left open the case where the denial of a variance is capricious or arbitrary, "if such a case can arise." [5]

§20.3. Zoning Enabling Act. Chapter 368 of the Acts of 1954 strikes out Sections 25 to 30B inclusive of Chapter 40 of the General Laws, and inserts a new Chapter 40A, to be known as "The Zoning Enabling Act." For the most part, the new chapter consists of a rearrangement, without substantial change, of the provisions stricken out, and it is provided that the new chapter, so far as it contains the same provisions as General Laws, Chapter 40, Sections 25 to 30B inclusive, is to be construed as a continuation of those provisions, and that the new

[3] 1954 Mass. Adv. Sh. 633, 120 N.E.2d 916. In several previous cases involving an appeal from the denial of a variance the Supreme Judicial Court merely held, on the facts found by the Superior Court, that the local board had committed no error, without adverting to the present question. Vetter v. Zoning Board of Appeal of Attleboro, 330 Mass. 628, 116 N.E.2d 277 (1953); Raimondo v. Board of Appeal of Bedford, 1954 Mass. Adv. Sh. 271, 118 N.E.2d 740 (denial of special permit).

[4] 1954 Mass. Adv. Sh. 633, 634, 120 N.E.2d 916, 917. The doubts referred to by the Court apparently would arise under the provision of the Massachusetts Constitution prohibiting the exercise of executive or legislative powers by the judiciary. Mass. Const., Declaration of Rights, Pt. I, Art. XXX.

[5] 1954 Mass. Adv. Sh. at 637, 120 N.E.2d at 920.

enactment shall not affect the validity of any action lawfully taken under the old.[1] General Laws, Chapter 40A, Section 2 provides that an ordinance or by-law may regulate "the location and use of buildings, structures and land for trade, industry, agriculture, residence or other purposes," the word "agriculture" being added to the former provisions. Section 2 also authorizes local regulations providing that "lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof."

Section 3 of the new chapter provides that local regulations may be designed to conserve "the value of land and buildings," the word "land" being new in this context.

Section 4 regulates more comprehensively than the former statute the power to provide by local ordinance or by-law for the granting by the board of appeal of "exceptions." Provision may be made for exceptions which (1) ". . . shall be applicable to all of the districts of a particular class and of a character set forth in such ordinance or by-law"; and (2) ". . . shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained." Exceptions are to be made available by "special permits." Local regulation may provide for the granting of such special permits by the city council or selectmen, as well as by the board of appeal. No public hearing is required, unless the ordinance so provides, where the permit is to be granted by the city council or selectmen, but apparently a hearing is still required by the statute where the permit is to be granted by the board of appeal.[2]

Section 11 slightly alters the status of permits issued or work commenced before notice of a hearing with respect to a proposed zoning change, by providing that the work shall not be immune to the zoning change unless begun within six months from the issuance of the permit and unless continuously prosecuted to completion in good faith so far as is reasonably practicable. Permits issued or work begun after notice of a proposed change are subject to the change when adopted if the adoption takes place in the usual sequence of steps without unreasonable delay.

Section 12 continues the former provision prohibiting the grant of permits for buildings and uses in violation of the local regulation, and further authorizes a town having no municipal building law to provide by by-law that ". . . no building shall be erected, externally altered or changed in use . . . without a permit from the selectmen," who are

§20.3. [1] Acts of 1954, c. 368, §3.

[2] The precise language is, "Before granting such a special permit the board of appeals, or the city council or the selectmen if the ordinance or by-law so provides, shall hold a public hearing . . ." The punctuation seems to indicate that the phrase "if the ordinance or by-law so provides" is intended to apply to action by the city council or selectmen, not to action of the board of appeal. Further, G.L., c. 40A, §15 continues in identical words the former provision of G.L., c. 40, §30, giving to the board of appeal the "power" (duty?) ". . . to *hear* and decide applications for special permits . . ." (Emphasis supplied.)

prohibited by the statute from issuing a permit for any construction or use not in conformity with the zoning by-law.

Section 15 changes the provision with respect to variances, so that a variance may now be granted not only with respect to a particular parcel of land but also with respect to an "existing building" thereon, where conditions exist especially affecting such building.

Section 17, in continuing the former provision with respect to notice of hearings to be given by the board of appeal, requires in addition that notice be sent to the planning board. By the terms of Section 18, notice of the board's decision must be sent to the planning board and to any person present at the hearing who so requests and gives an address to which notice may be sent. It will be observed that neither provision seems to apply to the granting of "special permits" in cases where the local regulation provides for such grant by the city council or selectmen and does not require a hearing (General Laws, Chapter 40A, Section 4, discussed *supra*).

B. Municipal Employees

§20.4. Time for appeal to Civil Service Commission. By a familiar rule of construction, when the time limited by statute for the performance of an act is less than seven days, Sunday is to be excluded from the computation. The Supreme Judicial Court refused to apply the rule in *Iannelle v. Fire Commissioners of Boston*,[1] involving an appeal to the Civil Service Commission from an order discharging an employee. The appeal was filed on the sixth day, the second being a Sunday, whereas General Laws, Chapter 31, Section 43(b) allows five days. The Court pointed out that other time limitations of less than one week contained in Section 43 are expressly qualified by the words "exclusive of Sundays and holidays," and concludes that no such qualification was intended in the five-day appeal provision.

§20.5. Overtime. A recent case, *City of Boston v. Cosgrove*,[1] involves the provision of General Laws, Chapter 149, Section 33B, that authorized service by an employee in excess of forty hours in one week "shall be compensated for as overtime." The Court decided that the granting of "compensatory time off" did not satisfy the statute, and that the legislature intended that monetary compensation be given.

§20.6. Back pay. Pay increases retroactive for short periods are not infrequently granted to municipal employees. Some doubt appears at first sight to be cast upon this practice by the decision in *Eisenstadt v. County of Suffolk*,[1] holding that the legislature exceeded its power in granting a retroactive pay increase to a special judge of a District Court. Both the original and the increased compensation, however, were per diem, and the Court points out that the statute involved validly fixed

§20.4. [1] 1954 Mass. Adv. Sh. 277, 118 N.E.2d 757.

§20.5. [1] 1954 Mass. Adv. Sh. 721, 121 N.E.2d 719.

§20.6. [1] 1954 Mass. Adv. Sh. 651, 120 N.E.2d 924.

the yearly compensation of the judge of the court as of a date prior to its passage. It would seem that the retroactive fixing of yearly salaries of municipal employees is not per se invalid though it involves, in one sense, additional payment for services already rendered and paid for. In an instructive case of this type, *Gediman v. Commissioner of Public Works of Boston*,[2] the plaintiff recovered back pay from April 2, 1952, under a municipal compensation plan approved on December 3, 1952, funds for payment having been appropriated on November 13, 1952.

§20.7. Pensions. *Lenox v. City of Medford* [1] involved the effect of a statute authorizing a city auditor to disallow a claim as "fraudulent, unlawful or excessive." The plaintiff, the widow of a police officer, sued in contract to collect an annuity granted after a finding by a medical panel that death was service-connected. It was held that disallowance by the auditor is no defense, as he has no power to revise the findings of other administrative officers. The express power to "disallow" conferred upon the auditor is probably justified by the fact that he may be absolutely liable on his bond for payments upon obligations which turn out to be "unlawful." Where there is any possible question of the legality of a payment, he should be entitled to have the claim passed upon by a court and reduced to judgment, since, short of this, he may be held liable for approving the payment.

§20.8. Classification. Unless positions are properly classified in accordance with the duties attached to them, difficulties arise in appointment and promotion and in the establishment of a rational scheme of compensation. When it is sought to classify for the first time a large number of municipal employees, two basic problems arise: (1) the establishment and definition of a system of positions which will adequately serve the needs of the municipality; and (2) the assignment of existing employees to positions so established. General Laws, Chapter 31, Section 2A(b) places both problems within the jurisdiction of the Civil Service Department of the Commonwealth, by the provision that the Director of Civil Service shall "*Establish,* with the approval of the commission, classification plans for positions in every city and town which are subject to any provision of this chapter," and the further provision that the Director shall, "Upon the *establishment* of such classification plan . . . *make* such plan *effective* . . ." (Emphasis supplied.) Within one year the municipality is required to establish a corresponding compensation plan.

In *Gediman v. Public Works Commissioner of Boston* [1] a classification plan was recommended by the Director on June 12, 1952, and "established" by vote of the Commission on July 22, 1952. The plan contained no names of employees, and provided for "allocation" by the Director of existing employees to the positions it listed, subject to appeal (to the Commission) in individual cases. On June 23, 1952, the

[2] 1954 Mass. Adv. Sh. 757, 121 N.E.2d 893.

§20.7. [1] 330 Mass. 593, 116 N.E.2d 663 (1953).

§20.8. [1] 1954 Mass. Adv. Sh. 757, 121 N.E.2d 893.

Director purported to allocate many employees, including Gediman, to positions under the plan.[2] Gediman asked for review by the Director (pursuant to a provision of the plan), and as a result, the Director on November 28, 1952, allocated him to the higher position of "head clerk." The respondent Commissioner's appeal to the Civil Service Commission was dismissed because it was taken too late.

It was held that a writ of mandamus should issue commanding the respondent to conform to the Director's order of November 28, 1952. The Court rejected the contention that the vote of July 22 establishing the plan was void in failing to assign existing employees to positions, holding that such assignment was to be accomplished by the Director in making the plan "effective." The Court thus distinguished sharply between the functions of Commission and Director, and recognized expressly that a classification plan cannot normally be "established" and made "effective" at a single instant of time, since assignment of individual employees in a city like Boston "would be a long and complicated process," [3] involving appeals to the Commission and possible judicial review by way of certiorari.

Further questions with respect to this difficult subject are suggested but not settled by the decision. Part of the difficulty in administration of the system arises from the reluctance of many employees to give up their existing titles, because they suppose that the new titles will render it less easy for them to transfer into other departments if they should desire to do so. Another source of trouble is the fact that many employees are found to be working "out of grade," i.e., doing work for which they have not previously been certified by Civil Service. In numerous cases the Boston plan provides for assignment to a new position only if the employee succeeds in a qualifying or competitive examination. In view of the *Gediman* decision, there seems to be little doubt that the power to classify implies a certain power to alter the duties of the employee as they appear on his previous civil service record in a proper case. But if the power be exercised it would seem that other employees whose *relative* grade is affected should have an opportunity to be heard.

Taxpayers' Proceedings

§20.9. Burden of proof. In addition to the familiar proceeding to enjoin illegal appropriations or expenditures,[1] a number of other statutory proceedings may be brought by "taxable inhabitants." [2] In a significant decision, *Howe v. Town of Ware*,[3] it was held that the petitioners in such a proceeding have the burden of showing that they live

[2] The Court apparently accepted, without comment, the petitioner's argument that the purported allocation of June 23 was void since the plan itself was not established until July 22.

[3] 1954 Mass. Adv. Sh. at 759, 121 N.E.2d at 895.

§20.9. [1] G.L., c. 40, §53.

[2] See, e.g., G.L., c. 35, §35; c. 44, §59; c. 45, §7; c. 71, §34; c. 164, §69; c. 214, §3(11).

[3] 330 Mass. 487, 115 N.E.2d 455 (1953). The case was brought under G.L., c. 71, §34.

within the territorial limits of the municipality and are subject to a local tax assessment. The testimony of the town clerk that the names of ten petitioners appeared on the tax lists of the assessors was held inadmissible, the lists being the best evidence, and it was pointed out that the lists themselves would not be evidence that the petitioners owned property or lived in the town.