

## SOVEREIGNTY AND THE CONTROL OF WATER POLLUTION

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The persistent and adamant refusal of Grafton, Massachusetts to heed state directives requiring the construction of a municipal sewage treatment facility has threatened the enforcement of all state environmental legislation. In examining the Grafton dilemma, this article explores the problems inherent in the administrative and judicial imposition of obligations on an unwilling community, and the nature of the sovereign's role in the protection of its resources.

Grafton, a town with a population of twelve thousand persons on the Blackstone River, pours its refuse untreated into that river. During the period 1943 to 1971 efforts by local officials to fund pollution abatement programs for the Town's use of this river were rejected by the townspeople.<sup>1</sup> Similarly, the townspeople failed to respond to a 1967 deadline set by the State Division of Water Pollution Control for approval of a sewage plan.

Continued noncompliance with that order caused the Division to bring suit against the town in March 1970 for polluting the Blackstone River in violation of the Massachusetts Clean Waters Act of 1966. A final decree was entered by the Massachusetts Superior Court in Equity the following October, stipulating that a town meeting should be held in order to allocate funds for the construction of a sewage system. Approval of the funding, however, was denied at three consecutive town meetings.

Within eighteen days of the last rejection, a petition from the State Attorney General's office was filed to show cause why the town should not be held in contempt. The Massachusetts Superior Court then found Grafton in contempt on two counts of willful failure to comply with the final decree. It imposed a fine of two thousand dollars on the town and required compliance with the

original order. In addition, the court deemed it "appropriate to call to the attention of the special town meeting . . . what the law of this Commonwealth is if the town meeting should continue to defy the Commonwealth and this court."<sup>2</sup> The opinion quoted at length from the 1943 case of *Commonwealth v. Hudson*,<sup>3</sup> which detailed the subordinate role of municipalities in relation to the state's legislative and judicial functions and advanced potential sanctions against the disobedient municipal corporation.

The town, however, failed to allocate funds for a sewage plan at two subsequent meetings. Selectmen cited the cost of the project (\$10 million, of which the town's share would be \$5.8 million, necessitating a \$24.00 per thousand tax hike), the intended location in a residential neighborhood, and the proposed exclusion from the system of several existing homes as the substantive reasons for the project's continued defeat.<sup>4</sup>

As a result of this violation of the contempt order, a petition was filed in June, 1971 demanding that the town be held in contempt for a second time. The Superior Court again found Grafton in contempt, but was reluctant to "use its powers of contempt to compel voters to vote in a particular manner,"<sup>5</sup> or to impose an additional fine. The court expressed doubt that the legislature ever envisaged "a situation such as happened here, where a Town is adamant, or, a portion of the voters of the Town are adamant and refuse to obey a Mandate of the Legislature."<sup>6</sup>

The Court's concern about its role has left unresolved the issue of enforcing environmental legislation upon a recalcitrant municipality. If Grafton is successful, the result may well render the state incapable of protecting the health of its citizens through environmental control legislation. The potentiality of Grafton-like municipal responses in any state makes imperative an awareness of the difficulties that may be encountered when a municipality opposes legislatively sanctioned orders. It necessitates a review of the established interest of the sovereign in the condition of its waters, the state's authority to compel a recalcitrant municipality to make ecological improvements despite the recorded opposition of the inhabitants, and finally, the procedure by which the state may exact funds sufficient to effect its purposes.

#### POLICE POWER

The authority of a state legislature to deal with pollution rests in the police power. The police power is inherent to every sov-

foreign state.<sup>7</sup> It is intrinsically regulative, employed to prevent activities by individuals harmful to the state, and to promote the general safety.<sup>8</sup> "It includes anything which is reasonable and necessary to secure the peace, safety, health, morals, and best interests of the public."<sup>9</sup> As long as the power is not exercised in an arbitrary or capricious manner, or so as to contravene the Constitution of the United States, it is considered a proper and essential function of the legislature.<sup>10</sup>

The protection of health is indisputably within the scope of the police power. In no field is the authority of the state greater.<sup>11</sup> The effects of water pollution on the populace is included in the definition of what may be protected in the interests of public health.

In *State Board of Health v. City of Greenville*,<sup>12</sup> an act of the Ohio General Assembly authorizing the State Board of Health to "require the purification of sewage, public water supplies and protect streams against pollution"<sup>13</sup> was found to be a "valid and constitutional exercise of the police power of the state."<sup>14</sup> The court elaborated:

Cities are no longer enclosed by stone walls and separate and apart from the balance of the state. The sanitary condition existing in any one city of the state is of vast importance to all the people of the state, for, if one city is permitted to maintain unsanitary conditions that will breed contagious and infectious diseases, its business and social relation with other parts of the state will necessarily expose other citizens to the same diseases.<sup>15</sup>

Clearly pollution of water may affect health. Since water pollution is not restricted to a single municipality,<sup>16</sup> the powers of the state in such matters should be supreme. "That the preservation of the water of the state from pollution, involving danger to health, is a proper subject for the exercise of police power cannot be seriously questioned."<sup>17</sup> Therefore the issue becomes whether there has been a legitimate delegation of powers to a state division of water pollution. This determination is necessary if the orders of that agency are to have the force capable of overcoming the recorded opposition of a municipality.

The general rule is that the legislature, in order to accomplish a specific result, has the right to delegate authority to an existing board or commission or to create an agency and to endow it with the necessary power.<sup>18</sup> The Wisconsin Supreme Court was confronted with this issue in *State ex rel. Martin Attorney General v.*

*City of Juneau*,<sup>19</sup> where the facts were quite similar to those which surround *Grafton*. The Wisconsin State Board of Health and the State Committee on Water Pollution found that the discharge of inadequately treated sewage from the City of Juneau into a drainage ditch had caused contamination of the ditch. The directives by the Board and Commission to the City to correct the situation were rejected by the City as being beyond the delegated authority of the agencies. The Court held that the directives were a legitimate function of the state agencies and as such the City was compelled to comply.

In *Grafton* the legitimacy of the orders of the Division of Water Pollution Control is substantiated by the Division's enacting legislation. Specifically, the State Division of Water Pollution Control was established with one of its basic purposes being to "encourage the adoption and execution by cities and towns . . . of plans for the prevention, control, and abatement of water pollution."<sup>20</sup> The division is empowered to "require by order a city, town, person or any other entity maintaining a sewerage system or water pollution abatement facility to provide and operate such facility in such a manner as is in its opinion necessary to insure adequate treatment prior to discharge into the waters of the Commonwealth."<sup>21</sup>

This enactment evidences the legislature's commitment to exercise the police power, through the State Division of Water Pollution Control, in order to provide for the public health and safety as it is affected by water pollution.

#### EXTENT OF STATE AUTHORITY

The state, by virtue of the police power, has a vested interest in the condition of its waters. The critical issue is the degree to which its authority may be imposed upon municipalities. The citizens of *Grafton* may argue that as they are the citizens most directly affected, they should determine the method of *Grafton's* waste disposal.

However, due to *Grafton's* inaction, Massachusetts has assumed a controlling role in the town's pollution abatement activities. This position results from the following three policy considerations: first, that the state as guardian of the public good is unfettered by political subdivisions; second, that the inhabitants of *Grafton* are first of all citizens of the state; and third, that the town itself may not exercise its powers in contest with the state.<sup>22</sup>

The court in *Greenville*, having reviewed the statutes establishing a state board of health, held that provisions for the preservation of the life and health of the people of the state were no more suspended within a municipality than are the criminal laws of the state. It asserted that it would be "folly" for a state to delegate complete control of public health matters to any municipality.<sup>23</sup> The *Greenville* court continued that, "A municipality might in the preservation of sanitary conditions in its own territory work incalculable mischief to the health and comfort of people living in adjacent territory. To prevent this being done, it is primarily necessary that there should be one central authority clothed with the power of affording equal protection to all."<sup>24</sup>

This issue of state authority over a municipality was first intensively examined in Delaware in 1884. The facts and opinion of *Coyle v. Gray*<sup>25</sup> are markedly pertinent to the circumstances of *Grafton*. The Delaware General Assembly, in a statute establishing a board of water commissioners for the City of Wilmington, appointed three residents to its governing board. The new commission attempted to remove one Coyle, who had been the chief engineer of the Wilmington waterworks. In refusing to surrender his position, however, Coyle charged that the act of the legislature was void as an unconstitutional deprivation of property without due process of law. A municipal corporation, he argued, is of a dual character, and although in performing public functions it is conceded subject to the absolute control of the legislature, there is another sphere in which it acts solely as an agent of the inhabitants. As such it enjoys privileges that inure to a private corporation, such as having its property, here the city waterworks, protected by those constitutional guarantees afforded to all persons, i.e., against any regulation or control by the state.

The court, however, distinguished between private corporations and "corporations intended to assist in the conduct of local self-government."<sup>26</sup> The former are created for private purposes; corporations chartered for the governing of a town or city, however, are created for public advantage. "It [a public corporation] has no vested powers or franchises. Its charter or act of right to incorporation is in no sense a contract with the state. It is subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, and may change or modify its internal arrangement, or destroy its very existence, at discretion."<sup>27</sup>

In Massachusetts, the General Court has specified that in order

for the Commonwealth to exercise control over a municipality the action must satisfy two criteria: first, the act must be designed for the good and welfare of the Commonwealth; second, it must be administered by a public agency, and for public uses exclusively.<sup>28</sup>

These standards were met by the Division of Water Pollution Control's order to the Town of Grafton. First, the Massachusetts Clean water Act of 1966 has as its purpose protecting citizens' welfare by forbidding the pollution of state waters and second, the act is administered by a public agency (the Division of Water Pollution Control) and for a public use (here, sewage treatment). Consequently, Grafton retains only minimal control over measures taken by the state in the interest of the health of its citizens:

It has been settled that the legislature may authorize and require a town to appropriate money for any public use within its boundaries.<sup>29</sup> What the Grafton case puts in question is the implementation of legislative or judicial will over the express, contrary results of a town meeting.<sup>30</sup>

The Grafton court, recognizing the mechanics of raising the funds in issue, ordered on two occasions that a town meeting be convened and that the townspeople vote the appropriations for a sewage plant. Not until the third hearing did the court express doubts as to its part in directing residents' votes.

Although the court was apparently reluctant to employ the full extent of its power, previous Massachusetts decisions imply that it was not always so apprehensive. In *Commonwealth v. Hudson*, the Town of Hudson was ordered by the Department of Public Health to chlorinate its water supply and thereby prevent pollution from wartime sabotage. The counsel for the defendant town contended:

that the power to appropriate money of a defendant town is vested exclusively in voters at a town meeting; that they have a right to act according to their untrammelled judgment, and may refuse to appropriate money even to discharge adjudicated duties or obligations of the town; that the Commonwealth and its courts are powerless unless the voters of the town in the town meeting give their approval and concurrence; that when unquestioned obedience is imposed upon the people, even upon the people of a subordinate governmental unit like a town, and even obedience to an order of the legislative branch of the State government adjudged valid by the judicial branch, then "democracy is dead"; and consequently, since a decree would be futile and unenforceable, that this court should order none.<sup>31</sup>

The court, however, disagreed:

That argument is so full of dangerous errors, and if relied on by the town and its officers and inhabitants might lead to such serious consequences to them, that we are unwilling by silence to permit counsel or his clients to remain under the delusion that a town may thus safely defy the Commonwealth and its courts.<sup>32</sup>

It went on to explain that although town meetings are a recognized form of carrying out municipal affairs in the Commonwealth, the "powers of a town and of its town meeting, and the very existence of the town, are subject to the will of the Legislature."<sup>33</sup> Moreover, the court recognized that powers exercised by the voters may be taken away and vested in officers appointed by the Governor<sup>34</sup> or in a state board.<sup>35</sup>

The Court, citing the United States Supreme Court in *Wilson v. United States*,<sup>36</sup> declared that the town voters, having a duty to make appropriations, stood no differently from officers of a corporation under edict from the government. In *Wilson*, a private corporate officer in possession of a corporate record containing incriminating evidence against him was compelled to produce the record for judicial inspection. A command to the corporation was deemed tantamount to a command to those responsible for the conduct of corporate affairs. If such individuals neglected to take action, they, no less than the corporation, would be liable to punishment for contempt.

If the residents of Grafton may be likened to the officers of a corporation, it follows that the citizens' rights may be curtailed when exercised in conflict with legitimate state interests. When acting as the controlling body of a municipality, town voters possess no greater immunity from state orders than do the decision-makers of a private corporation.<sup>37</sup> The language of *Kroese v. General Steel Castings Corporation*<sup>38</sup> is perhaps the most applicable to the dilemma faced by the Massachusetts court regarding a municipal vote on a court order. In *Kroese*, a suit was brought by a preferred stockholder of a private corporation to compel a declaration of dividends by the board of directors. The court excused its interference with the management of private business by saying:

. . . when a court steps in and orders the payment of a dividend, the corporate affairs have reached the point where the judgment of the directors is no longer controlling . . . the court substitutes its judgment, based on a rule of law, for the ordinary business judgment of those in charge of the business enterprise. The court says, in effect,

to the directors, "You have abused your office. You have withheld earnings of this enterprise from those who, by the rules of law governing it, are entitled to be paid those earnings. You go ahead and pay them."<sup>39</sup>

Analogizing the Town of Grafton to a private corporation, the above language might become directly applicable to the situation in Grafton:

... when a court steps in and orders an appropriation of money, the *town's* affairs have reached the point where the judgment of the *town meeting* is no longer controlling . . . the court substitutes its judgment, based on a rule of law, for the ordinary *fiscal* judgment of the *citizens in town meeting assembled*. The court says, in effect to the *citizens*, "You have abused your *powers*. You have *failed to appropriate money despite valid administrative and judicial orders to do so, for the benefit of the public at large*. You have no choice but to make the necessary appropriation."<sup>40</sup>

The interests of the state override those of a town when they concern powers reasonably exercised in the protection of the health, safety and general welfare of the populace. To hold differently would contravene the grant of authority in the Massachusetts Clean Waters Act of 1966 and negate the findings of contempt and the orders issued by the Superior Court. If, in fact, the lawmakers did not "envision a situation such as has happened here, where a Town is adamant or a portion of the voters of the Town are adamant and refuse to obey a mandate of the Legislature," there is yet no reason to believe that they intended to allow a single uncooperative community to render the mandate nugatory.

#### EXISTING JUDICIAL AND LEGISLATIVE REMEDIES

The state, having established that its interest in water pollution abatement is superior to that of a municipal corporation, is still faced with the dilemma of practicable enforcement. The Town's rejection of sewage proposals in the face of Division and court orders necessitates an examination of the alternatives available to the state.

#### *Civil Contempt*

Civil contempt results from a failure to comply with a court order. It is a remedial holding designed to protect and further the interests of the complaining party.<sup>41</sup> The Grafton court might



continue to hold the town in civil contempt and thus impose on it a fine for each day of noncompliance. Such a procedure was employed in *Department of Health of New Jersey v. Borough of Ft. Lee*<sup>42</sup> in 1931 when, despite a final court decree enjoining the Borough from befouling certain waters, the Borough continued its pollution. The Borough's noncompliance was strenuously denounced by the court. "No attention, regard, or obedience has been paid by this borough to the directions of the Legislature, the acts of the administrative department of health, nor the process and decrees of this court. . . . No more flagrant or reprehensible course of conduct by a municipal corporation, or by the individuals responsible for the administration of its affairs can well be imagined."<sup>43</sup> Although the usual method for compelling compliance with a court decree is imprisonment of the contemnor until performance, such a recourse is impossible with respect to a municipality. The New Jersey court instead imposed a per diem fine on the Borough in order to coerce it into submission.<sup>44</sup>

The imposition of a similar fine by the Massachusetts Superior Court upon the town of Grafton has proved fruitless. Grafton has been subject to a final decree, two citations for contempt, and a fine of two thousand dollars, yet it has continued to defy the state. It has shown that the remedy of civil contempt has no effect upon a determined municipality.

In order to overcome this sort of impasse, several New England states subscribe to the doctrine of *Commonwealth v. Hudson*: "For the satisfaction of a judgment or decree for payment of money by a town, the property of any inhabitant may be taken."<sup>45</sup> Such a drastic remedy, however, has not been adopted in any other region of the United States. In those New England states where it survives, the action is usually made unnecessary by the existence of a high level of municipal credit.<sup>46</sup>

### *Criminal Contempt*

Grafton's continued refusal to comply with the Court's orders might also be treated as criminal contempt. Acts that obstruct the administration of justice by offending the dignity of the court or tending to bring the court into disrepute, may be deemed criminal.<sup>47</sup> Unlike its civil counterpart, the primary purpose of criminal contempt is the vindication of public authority. It can be used to punish the contemnor for disobedience of court orders.

The court in *Commonwealth v. Hudson* considered the threat of criminal contempt an effective way to induce compliance:

Of course the fear of such punishment, like the fear of punishment for a crime in general may have a coercive effect. It may induce compliance with the decree. Where the duty to perform the decree continues, and performance remains possible, it is hard to see why repeated penalties may not be imposed for failure to obey during successive periods of time.<sup>48</sup>

But the same obstacles arise here that occur in a civil contempt proceeding involving a municipality. The impossibility of imprisoning a municipality necessarily leaves a fine as the only punitive measure available to the courts. There is no reason to suppose that the Town of Grafton would be any more inclined to pay a fine that represented a criminal penalty than a fine that constituted a remedial solution. It is true that town officers may be held liable for the town's failure to respond to a court order, but the selectmen of Grafton apparently acted in good faith throughout the entire affair; moreover, in light of the history of the case, it is doubtful that such a recourse would bring about any substantial change.

### *Mandamus*

The court might issue a writ of mandamus directing the town to finance the construction of the sewage plant. Mandamus is "a writ directed to a person, officer, corporation, or inferior court commanding the performance of a particular duty that results from the official status of the one to whom it is directed or from operation of law."<sup>49</sup> It is an extraordinary remedy to be used in civil cases where usual forms of procedure are powerless to afford relief.<sup>50</sup>

Civic improvements, however, are not generally controllable by a writ of mandamus. A court cannot require a municipal corporation to construct a sewer irrespective of the discretion vested by law in the local authorities.<sup>51</sup> Mandamus will only lie to compel the performance of a nondiscretionary duty. Again, the court is faced with the peculiar circumstances of Grafton's noncompliance. Whether the appropriation by town meeting of funds for a required sewage facility is such a nondiscretionary act as to be susceptible to mandamus is highly speculative. A city or town has dominion over public places within its bounds, and it is said to be the "province of the corporation and not a judicial tribunal to

determine what improvements shall be made in the streets and canals of the city.”<sup>52</sup>

### *Criminal Prosecution*

In Massachusetts, the pollution of the waters of the Commonwealth is an offense punishable by a fine of not more than one thousand dollars. Each day that such discharge continues constitutes a separate offense and is likewise punishable by fine.<sup>53</sup>

In assessing the utility of this expedient to prevail upon the Town of Grafton, it need only be recognized that the device by which the state's aim is implemented is a fine. Hence, the likelihood of its success is no greater than any other sanction imposing the identical penalty.

### *Extreme Emergency*

The Commonwealth may in an emergency circumvent the usual town meeting requirements for authorization of appropriations. Massachusetts law provides that for “cases of extreme emergency involving the health or safety of persons or property”<sup>54</sup> two-thirds of the town selectmen may authorize the incurring of liability on behalf of a town. The townspeople's right to vote on the specific issue is taken away and entrusted to the town officers.

This theory's application was discussed in *Commonwealth v. Hudson*, which involved chlorination of a town water supply. The court there said:

We are not at all convinced that a refusal of the voters to appropriate money for compliance with the legislative order and the decree of the court in this case would not create such an emergency and give the commissioners of public works and the selectmen a right and a duty to act.<sup>55</sup>

It is probably noteworthy that *Commonwealth v. Hudson* was a 1943 case, and the chlorination order was predicated on a desire to protect the water from wartime sabotage. It does not seem that the less extreme circumstances surrounding Grafton constitute an “extreme emergency.” For example, in *Constitutional Construction Company v. Lawrence*,<sup>56</sup> the court rejected a unanimously passed declaration of the city council of Lawrence, Massachusetts, that an unusually large amount of snow constituted an extreme emergency as to the people's health and safety. Specifically, the court said that “the failure of a town . . . to appropriate a reason-

able sum for board of health work does not constitute an 'emergency' within the meaning of this section."<sup>57</sup>

Although what constitutes an extreme emergency is largely undetermined, it is difficult to envision the Grafton episode as qualifying as an extreme emergency. The emergency provision seems to provide for only an impending catastrophe or a very pressing need.

### *Appointment of a Board of Finance*

There have been at least three occasions in Massachusetts when the financial affairs of a city have been taken away from its voters and officers and entrusted to a state board. An explanation of this resort was made in *Broadhurst v. Fall River*,<sup>58</sup> where an act creating such a board of finance was upheld.

The several towns and cities are instrumentalities of government largely under the control of the General Court. Their powers and duties may be changed and may be vested in officers appointed by the Governor instead of those selected by the people or by other municipal authorities, provided the Legislature deems in its wisdom that the public welfare requires it. Financial affairs constitute fundamental and underlying aspects of the administration of municipalities. There is no sound reason to doubt the power of the General Court to segregate that part of the government of a city from its other affairs and place its management exclusively in a board created and appointed as that established [for Fall River].<sup>59</sup>

In Massachusetts the towns of Millville, Mashpee, and Fall River have all been the subjects of acts appointing boards of finance. Only the last of these bills was ruled upon by a court. But the cause of action in *Broadhurst v. Fall River*, accrued *after* the effective date of the bill creating the board, and the court's ruling was therefore not made, as the situation in Grafton would demand, in response to any analogous delinquency on the part of the town. Precedent thus does not appear to support the use of a board of finance to solve the singular problem presented by the town of Grafton.

## SUGGESTED JUDICIAL AND LEGISLATIVE REMEDIES

### *Town as Judgment Debtor*

In certain instances a creditor of a municipality may reduce his claim to a judgment, secure execution thereon and levy on the

corporation's property. The Town of Grafton might be viewed as a judgment-debtor owing restitution to the state for the pollution of the waters of the Commonwealth.<sup>60</sup> It would then be susceptible to all the devices available for the collection of claims against a municipality that neglects or refuses to honor its obligations.<sup>61</sup>

In Grafton, the town's obligation to raise and expend money for a public improvement has already been reduced to judgment. That the damages have been borne diffusely by the state's citizens rather than an individual creditor should make no difference in holding the town responsible for the results of its pollution.<sup>62</sup>

### *Mandamus*

If Grafton is to be treated as a judgment-debtor, then mandamus will lie to compel a municipal corporation to exercise the taxing power for its payment.<sup>63</sup> In *United States v. New Orleans*,<sup>64</sup> the petitioner sought a writ of mandamus for the payment of judgments out of town proceeds or, in the alternative, the collection of a special tax. The expenditure had been for the construction of a public project and the court ruled that when the authority to borrow money or incur an obligation for a public purpose has been granted, the power to levy a tax for its payment accompanies it.

Having the power to levy a tax for the payment of . . . judgments . . . it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a *mandamus* should have been issued to enforce its performance.<sup>65</sup>

The writ of mandamus is not unknown in Massachusetts<sup>66</sup> where statute<sup>67</sup> provides for the payment of final judgments against a municipality and for the employment of its property tax as a means of financing them.

Defenses are available, however, that will defeat an application for a writ of mandamus. The actual lack of funds where no tax has been imposed has always been a good defense to the writ,<sup>68</sup> and mandamus will not lie where no funds are available and funds for other purposes could not be diverted to pay the judgment.<sup>69</sup>

A writ to compel the levy of sufficient taxes for the desired appropriation is also possible. But even if collected, the exhaustion of available funds or their diversion into improper uses will render the writ futile and constitute a successful defense.<sup>70</sup> It is further-

more rare that such a tax ever nets the full revenues for which it is designed. Statutory tax limitations and unavoidable delinquencies combine to keep the tax far below the theoretical maximum. Decreased property values or reduced incomes resulting from periods of economic depression may do the same.<sup>71</sup>

Where the amount in question is so large as to endanger the town's internal functioning, it could be spread over a number of years. Grafton would not be required to provide the full amount immediately; only that amount necessary for that year would be due at a time. With the cooperation of local officials the diversion of those revenues might be forestalled.<sup>72</sup>

Unlikely as this possibility is in light of the defenses that may be raised, it deserves attention. It suggests, as does the language of *Commonwealth v. Borough of Confluence* that it is the claim of lack of funds which should give way where the public interest is so conclusively at stake:

If we were to hold that financial inability is a defense to an action in mandamus [for the construction of a sewage system], it would put our Court in the anomalous position of rendering "futile and effectual" a clearly defined public policy as enumerated by the legislature. . . Furthermore, such a result would render the courts of Pennsylvania powerless to implement this legislative determination and in effect would sanction the harmful discharge of sewage into the waters of the Commonwealth.<sup>73</sup>

### *Sequestration*

Sequestration is used to enforce equitable decrees and punish contemnors. It is the authorized taking of the real or personal property of a defendant. The property may be held until compliance with the court order, or dealt with otherwise as the court directs.<sup>74</sup> Monies subject to sequestration might be any funds that the town may have on hand or whatever state funds might be slated for Grafton.

Such an action, however, is without precedent in Massachusetts.<sup>75</sup> It violates a well-accepted theory that there supposedly exists with respect to sequestration a "fixed principal of absolute immunity extended by the law in order to protect the essential functions of municipal corporations from the disruptions which might be incident to this remedial process."<sup>76</sup>

It is similar reasoning that governed the Illinois Supreme Court in *City of Chicago v. Hasley*.

They [municipal corporations] cannot be said to possess property liable to execution, in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property, and removing it, would work the most serious injury in any city.<sup>77</sup>

The position is a logical one, as the possibility exists that withholding monies might indeed work irreparable injury to municipal functions.

In rebuttal, it may be contended that "[the] logical extension of this same argument . . . would lead to the absurd conclusion that payment of accrued claims against a municipality should never be enforced when all revenues received by the municipality could be used to furnish public services more necessary and beneficial than those which gave rise to the accrued claim."<sup>78</sup> Clearly, there are few more essential, beneficial, or purely governmental exercises than the maintenance of an adequate sewage facility.

Ultimately, however, sequestration is susceptible to many of the same factors that would work to defeat mandamus. The total real and personal property available may not equal the price of the expenditure. In addition it seems unlikely that the voters would voluntarily make any necessary further appropriations.

Such are the variables that tend to weaken the analogy of the municipality as a judgment-debtor. Available defenses to mandamus and sequestration actions are implicit in the theories of municipal government. Consequently, the methods and possibilities of obtaining sufficient funds are both undesirable and remote.

### *Legislation*

The existing alternatives for enforcement of a state order are restricted by difficulties of execution. Examination of these alternatives leads to the conclusion that the state is without a genuinely acceptable course of action in compelling Grafton to accede to its demands. Therefore, it is submitted that the state should refrain from attempting to force the defiant municipal corporation into compliance. Instead, the state should play a contributory role in the resolution of this problem. The basis for this suggestion is that the state has an interest in its waters, and should share in the burden of correcting abuses. The legislature might establish an autonomous sewer authority of limited duration for the purpose of constructing a sewage disposal facility.<sup>79</sup>

The sewer authority could be in the nature of a self-liquidating improvement and thus relieve the municipality and the state from the necessity of producing the requisite funds or credit. The burden of cost would fall evenly upon the users of the system on the basis of payment for services rendered. For example, collection from persons paying rents would be a more successful method of funding given the various collection procedures available against individual debtors. Moreover, the act would indicate legislative recognition that the state must actively share with municipalities the task of protecting water resources.

Precedent for this exists in the New York court decision in *Robertson v. Zimmermann*<sup>80</sup> in 1935. There the State of New York, discerning the financial inability of the City of Buffalo to construct a sewage facility, created the Buffalo Sewer Authority. The Authority was vested with complete control over the construction of a new plant. Funds were to be obtained through bond issues payable exclusively from its own funds and "sewer rents" to be collected on all real property served by its facilities. Neither the city's credit nor that of the state could be pledged, and there was to be no diversion of existing city funds. After five years the Authority would pass to the City of Buffalo.

In upholding the legality of the Authority, the court stated:

since the city itself cannot meet the requirements of the situation, the only alternative is for the state, in the exercise of its police power, to provide a method of constructing the improvements and of financing their cost.<sup>81</sup>

### Special or Local Law

The establishment of a distinctly "Buffalo" sewer authority in the *Robertson* case raised issues relevant to any similar Massachusetts legislation. The act was attacked as being a "special" or "local" law of the type prohibited by New York statute. Since the very terms of the act stated its limitation to a single city, it was difficult to argue that it governed the activities of any other municipality, and was hence "special" or "local" on its face.

The *Robertson* court, however, saw the act as an attempt to remedy a general condition affecting the citizens of the State. It looked beyond the "terms" of the act to its "effect," and found that the effect was more than local. The act had not been designed for the sole protection of the inhabitants of Buffalo, but also for the other communities using the same water source. The *Robert-*



son court applied the test that if the subject of such a statute was "in a substantial degree a matter of State concern, the Legislature might act though intermingled with it are concerns of the locality."<sup>82</sup>

Special or local legislation in Massachusetts is prohibited by a constitutional provision, the Home Rule amendment, which states that "the general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. . . ."<sup>83</sup> The critical question arises of whether the Massachusetts courts will be as willing as the New York court was to look at the "effect" of such a bill.

A 1969 Opinion of the Justices of the Supreme Judicial Court of Massachusetts concerned a proposed statute for the creation of a stadium authority to oversee the financing and construction of a large multi-purpose stadium, vehicular tunnel and toll road in the City of Boston.<sup>84</sup> The Justices found that the "Stadium Bill" was designed for the general benefit of several communities and that construction of the stadium would contribute to the "prosperity, health, culture and welfare"<sup>85</sup> of the state's citizens.

We do not interpret the words "to act in relation to cities and towns" as precluding the Legislature from acting on matters of State, regional, or general concern, even though such action may have special effect upon one or more individual cities or towns. If the predominant purposes of a bill are to achieve State, regional, or general objectives, we think that, as heretofore, the Legislature possesses legislative power, unaffected by the restrictions in art. 89 §8 [Home Rule].<sup>86</sup>

A second Opinion of the Justices<sup>87</sup> concerned the passage of legislation providing for the acquisition by West Springfield of land in the town of Southwick for the purpose of gaining an additional water supply. Although the bill would have affected only the activities of a single town, the court found that water resources were a matter of State concern. Consequently, the court characterized the bill as a "general law."

The approach taken in these Massachusetts opinions resembles that of the New York Court of Appeals in *Robertson v. Zimmermann*. Therefore, it would seem reasonable to assume that the Massachusetts courts would look favorably upon the creation of a Grafton sewer authority.

### General Law

An alternative to legislation applicable to a single community might be the enactment of a general law applicable to any community which failed to comply with a state administrative agency's order to abate pollution. The Home Rule Amendment in Massachusetts validates "general laws which apply alike to all cities or to all towns, or to all cities and towns. . ."

Hence the passage of a bill providing for the creation of sewer authorities as a continuing means of enforcement would appear judicially acceptable. It would "apply alike" to every city or town of the state capable of water pollution activities. It would constitute a power to which any municipality violating water pollution standards would be subject.

Massachusetts law provides precedent for this type of legislation. The statute that created the Division of Water Pollution, and granted to it the authority to issue orders such as the one in Grafton, is an example of such general legislation. The Division exists for the purpose of overseeing the condition of state waters and, at times, acts to regulate the activities of a single municipality.

Ideally, the statute authorizing the creation of a sewer authority would be an amendment to the "powers and duties of division [of water pollution control]." <sup>88</sup> Specifically it might provide that: *For any city or town of the state, under an order of the Massachusetts Division of Water Pollution Control to construct an adequate sewage treatment facility, which does not do so within [a specified amount of time] the division may establish a sewer authority with the following powers. . .* Couched in sufficiently broad terms the proposed general law would withstand assertions that it constituted *de facto* special legislation, and would provide a valuable weapon in the state's arsenal for the enforcement of administrative orders.

### CONCLUSION

Once the nexus between waste disposal and the health, safety, or general welfare of the populace has been established, the predominance of state authority under the police power is established. Orders issued under this authority may be judicially enforced against an uncooperative municipality despite a majority vote of the town meeting.

However, the traditional methods of securing compliance with court decrees do not easily lend themselves to the situation wherein

a single town adamantly refuses to heed a state directive. The peculiar nature of the offender makes it immune from imprisonment and therefore able to ignore the imposition of any number of fines where incarceration constitutes the sole recourse for non-payment. Actions such as the declaration of an extreme emergency or the appointment of boards of finance lack the precedent to make them truly effective tools of legislative coercion. Similarly there is little to indicate that a court would treat a municipality as an ordinary judgment-debtor.

It is submitted that only by assuming a more activist stance than has been exhibited in the Grafton controversy can a state exercise thorough and effective prevention of water pollution. Passage of a general law providing for the creation of autonomous sewer authorities whenever municipalities do not comply with state orders requiring the abatement of water pollution would provide the kind of solution that satisfies the purpose of the order without intensifying possible state-local antipathies. Pollution control is best seen as a statewide concern beyond the competing interests of political subdivisions.



## FOOTNOTES

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<sup>1</sup> Various sewage proposals have been rejected on at least eight occasions since 1943. *Boston Sunday Globe*, June 27, 1971, at 46, col. 1.

<sup>2</sup> *McMahon v. Town of Grafton, Findings of Fact on Petition for Contempt and Order for Decree* at 2 (Suffolk Super. Ct. in Equity No. 91356, April 30, 1971).

<sup>3</sup> *Commonwealth v. Town of Hudson*, 315 Mass. 335, 52 N.E.2d 566 (1943).

<sup>4</sup> *The Evening Gazette*, Worcester, April 26, 1971, at 18, col. 1.

<sup>5</sup> *McMahon v. Town of Grafton, Order: In Re: Contempt* at 1 (Suffolk Super. Ct. in Equity No. 91356, July 13, 1971).

<sup>6</sup> *Id.*

<sup>7</sup> 16 AM. JUR. 2d *Constitutional Law* §260 (1964).

<sup>8</sup> Delogu, "Legal Aspects of Air Pollution Control and Proposed State Legislation for Such Control," 1969 WIS. L. REV. 884, 890.

<sup>9</sup> *State Board of Health v. City of Greenville*, 86 Ohio St. 1, 21, 98 N.E. 1019, 1021 (1912).

<sup>10</sup> *Id.* at 21, 98 N.E. 1021.

<sup>11</sup> *State v. City of Juneau*, 238 Wis. 564, 300 N.W. 187 (1941).

<sup>12</sup> *State Board of Health v. City of Greenville, supra.*

<sup>13</sup> *Id.* at 3, 98 N.E. at 1020.

<sup>14</sup> *Id.* at 1, 98 N.E. at 1019.

<sup>15</sup> *Id.* at 30, 98 N.E. at 1024.

<sup>16</sup> *City of Huntington v. State Water Commission*, 137 W. Va. 786, 73 S.E.2d 833 (1953).

<sup>17</sup> *Commonwealth v. Emmers*, 221 Pa. 298, 306 (1908).

<sup>18</sup> 16 AM. JUR. 2d *Constitutional Law* §275 (1964).

<sup>19</sup> *State v. City of Juneau*, *supra*.

<sup>20</sup> Massachusetts Clean Waters Act, MASS. GEN. LAWS ch. 21, §27 (1966).

<sup>21</sup> *Id.* at §45.

<sup>22</sup> "A town is not an independent sovereignty. It is merely a subordinate agency of State government. It is a creature of the Commonwealth from which are derived all its powers and those of its voters and officers." The number, nature, and duration of those powers rests on absolute discretion of the state. *Commonwealth v. Town of Hudson*, *supra* at 344, 52 N.E.2d at 572.

<sup>23</sup> *State Board of Health v. City of Greenville*, *supra* at 25, 98 N.E. at 1023.

<sup>24</sup> *Id.* at 26, 98 N.E. at 1023.

<sup>25</sup> *Coyle v. Gray*, 7 Houst. (Del.) 44, 30 A. 728 (1884).

<sup>26</sup> *Id.* at 89, 30 A. at 730.

<sup>27</sup> *Id.* at 91, 30 A. at 731. A municipality may, however, in fact enjoy immunity upon property held in a purely proprietary capacity, and in *MCR Company v. City of New Orleans*, 26 La. Ann. 478 (1874), where public property, held and owned by a municipality was taken for a private railroad, the land was deemed "private" and could not be taken without just compensation.

<sup>28</sup> *Paddock v. Town of Brookline*, 347 Mass. 230, 239, 197 N.E.2d 321, 327 (1964).

<sup>29</sup> *Agawam v. Hampton*, 130 Mass. 528, 536 (1881).

<sup>30</sup> Previous Massachusetts decisions however, imply that the court may have underestimated how very expansive the State's powers are. The State, at its pleasure, may for example, increase or contract municipal territory, unite the whole or part of it with another corporation, or repeal the charter and destroy the corporation. "All this may be done, conditionally or unconditionally, with or without the consent of the citizens or even against their protest." *State v. Zilisch*, 197 Wis. 284, 221 N.W. 860 (1928). In *Chandler v. City of Boston*, 112 Mass. 200 (1873), it was held that the rights and franchises of municipal corporations are granted only incidentally to the supreme power of the State, and that they may be modified as public convenience and necessity require. "The inhabitants do not derive private or personal rights under the act of incorporation, they acquire no vested right in those forms of

municipal government which exist under general laws in towns, [town meeting] as distinguished from those by which the affairs of cities are regulated. If injuriously affected by legislative action upon these political relations, within constitutional limits, the courts can afford no remedy (at 204)." In the *Greenville* case, *supra*, the city argued against the creation of a state board of health. It contended that founding the board was unconstitutional in that it would tend to coerce city officials to comply with state mandates and control their discretion. But State authority was discovered to outweigh the "privileges and immunities" of municipal deputies acting in their official capacity. "The state," said the court, "does not seek to control the discretion of the municipal authorities in this matter, but, on the contrary, refuses to commit to them *any* discretion touching the particular matters committed to the care and control of the State Board of Health (at 27, 98 N.E. at 1023)." The distinction avoids the issue so critical to the Grafton case. The Massachusetts court did not take an approach that would altogether negate the role of the municipality, rather it recognized the place of the town meeting in the appropriation of funds, and sought to control its workings.

<sup>31</sup> *Commonwealth v. Town of Hudson*, *supra* at 343, 52 N.E.2d at 572.

<sup>32</sup> *Id.* at 344, 52 N.E.2d at 572.

<sup>33</sup> *Id.* at 345, 52 N.E.2d at 573.

<sup>34</sup> *Commonwealth v. Plaisted*, 148 Mass. 375, 19 N.E. 224 (1889).

<sup>35</sup> *Broadhurst v. City of Fall River*, 278 Mass. 167, 179 N.E. 586 (1932).

<sup>36</sup> *Wilson v. United States*, 221 U.S. 361 (1911).

<sup>37</sup> The opinion in *Wilson* cited as authority, another Supreme Court decision, *Commissioners v. Sellow*, 99 U.S. 624 (1878). There, a peremptory mandamus was directed against a municipal board. In holding that the individual board members might be liable for contempt, the Court, through Chief Justice Waite reasoned that . . . "As a corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required (at 627)."

<sup>38</sup> *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d. Cir. 1950), *cert. denied*, 339 U.S. 983 (1950).

<sup>39</sup> *Id.* at 763.

<sup>40</sup> This language and approach is the product of research conducted by Mr. Edward Selig, Research Fellow in Law and Social Sciences, Harvard University.

<sup>41</sup> 17 C.J.S. *Contempt* §13 (1963).

<sup>42</sup> Department of Health of New Jersey v. Borough of Ft. Lee, 108 N.J.Eq. 139, 154 A. 319 (1931).

<sup>43</sup> *Id.* at 142, 154 A. at 320.

<sup>44</sup> Department of Health of New Jersey v. Borough of Ft. Lee, *supra*.

<sup>45</sup> Commonwealth v. Town of Hudson, *supra* at 347, 52 N.E.2d at 574.

<sup>46</sup> Coffin, "Enforcement of Judgements Against Municipal Corporations," 17 CHI.-KENT L. REV. 226 (1938) [hereinafter cited as Coffin].

<sup>47</sup> Bountiful City v. Granato, 77 Utah 133, 292 P. 205 (1930).

<sup>48</sup> Commonwealth v. Town of Hudson, *supra* at 347, 52 N.E.2d at 574.

<sup>49</sup> 55 C.J.S. *Mandamus* §15 (1963).

<sup>50</sup> 55 C.J.S. *Mandamus* §19 (1963). A state may maintain the proceeding to enforce rights which affect it in its sovereign capacity.

<sup>51</sup> Vicksburg v. Vicksburg Waterworks Company, 202 U.S. 453 (1906).

<sup>52</sup> State v. Sewage and Water Board of New Orleans, 108 So. 2d 277, 280 (1959).

<sup>53</sup> Massachusetts Clean Waters Act, MASS. GEN. LAWS ch. 21, §42 (1966).

<sup>54</sup> MASS. GEN. LAWS ch. 44, §31 (1966).

<sup>55</sup> Commonwealth v. Town of Hudson, *supra* at 348, 52 N.E.2d at 575.

<sup>56</sup> Continental Construction Company v. Lawrence, 297 Mass. 513, 9 N.E.2d 550 (1937).

<sup>57</sup> 6 OP. ATT'Y. GEN. 572 (1922).

<sup>58</sup> Broadhurst v. City of Fall River, *supra*. The board of finance constitutes a division of the government of the city. Its duties are public. The statute makes a change in forms and methods of municipal administration. It does not deprive the city of its private property, nor does it constitute a delegation of power reserved to the General Court.

<sup>59</sup> *Id.* at 170, 179 N.E. at 588.

<sup>60</sup> Commonwealth v. Borough of Confluence, 427 Pa. 540, 234 A.2d 852 (1967). The Borough alleged that it was not financially feasible for it to construct a sewer works in accordance with a sanitary water board order.

<sup>61</sup> Coffin, *supra*.

<sup>62</sup> *Id.*

<sup>63</sup> 17 McQUILLAN, MUNICIPAL CORPORATIONS §1519 (1911).

<sup>64</sup> United States v. New Orleans, 98 U.S. 381 (1878).

<sup>65</sup> *Id.* at 397.

<sup>66</sup> Harrington v. Berkshire County Commissioners 22 Pick 263, 39 Mass. 263 (1839). Porter v. City Council of Malden, 346 Mass. 368, 191 N.E.2d 694 (1963).

<sup>67</sup> MASS. ANN. LAWS ch. 44, §31 (1966).

<sup>68</sup> Coffin, *supra* note 35, at 241.

<sup>69</sup> *People v. Chicago*, 292 Ill. App. 186, 10 N.E.2d 832 (1937).

<sup>70</sup> Coffin, *supra* note 35, at 241.

<sup>71</sup> *Id.* at 243.

<sup>72</sup> *Id.* Local officials in some states made a practice of resigning in the face of mandamus orders necessitating the enactment of special legislation to correct that abuse.

<sup>73</sup> *Commonwealth v. Borough of Confluence*, *supra* note 4, at 544, 234 A.2d note 4, at 854.

<sup>74</sup> 79 C.J.S. *Sequestration* § 1045 (1963).

<sup>75</sup> *But see McMahon v. Town of Blackstone* (Suffolk Super. Ct. in Equity No. 91357, 1972). In this recent Massachusetts decision, the Town of Blackstone which was also under orders of the Division of Water Pollution Control to construct a sewer facility, was found in contempt and fined \$500 per day for each day of noncompliance. If the money is not forthcoming from the town, it may be withheld from state funds slated for the town.

<sup>76</sup> Coffin, *supra* n.35, at 227.

<sup>77</sup> *Chicago v. Hasley*, 25 Ill. 485, 487 (1861).

<sup>78</sup> Coffin, *supra* at 229.

<sup>79</sup> Legislation calling for the mandatory formation of municipal sewerage districts was drafted by the Division of Water Pollution Control and submitted to the Massachusetts General Court during the 1971 Session (where it died in committee). Since then the provisions of this bill have been revised by the Division staff and are to be submitted to the 1972 Session as part of the Governor's Environmental Message.

<sup>80</sup> *Robertson v. Zimmermann*, 268 N.Y. 52, 196 N.E. 740 (1935).

<sup>81</sup> *Id.* at 65, 196 N.E. 745.

<sup>82</sup> *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705 (1929). The New York court upheld a multiple dwelling law which by its terms was applicable to New York City alone. "The police power of the State has never been questioned when it dealt directly with hygienic conditions of a community. Unless the intent is clear or reasonably certain it should not now be limited or whittled away by the reform known as Home Rule for cities (at 478, 167 N.E. at 709)."

<sup>83</sup> MASS. CONST. art. 89, §8.

<sup>84</sup> *Opinion of the Justices*, 356 Mass. 775, 250 N.E.2d 547 (1969).

<sup>85</sup> *Id.* at 780, 250 N.E.2d at 550.

<sup>86</sup> *Id.* at 787, 250 N.E.2d at 554.

<sup>87</sup> *Opinion of the Justices*, 357 Mass. (Mass. Adv. Sh. 1307, 1311, 1971), 258 N.E.2d 731 (1970).

<sup>88</sup> MASS. GEN. LAWS ch. 21, §27.