To: Andrew Brennan
Environmental Affairs

From: Gerald K. Kelly
First Deputy General Counsel

Date: July 26, 2012

Re: Law Department Opinion on Applicability of Local Bylaws

In response to your question regarding the applicability of local municipal bylaws and regulations to MBTA projects occurring on MBTA property, the Law Department researched the statutes, guidelines, and relevant case law. As described in Massachusetts' Attorney General Opinion No. 00/01, the Commonwealth and its agencies are generally immune from municipal bylaw regulations absent an explicit legislative directive to the contrary. 2000-01 Mass. Op. Att'y Gen. 1 (2000). (attached hereto as Exhibit A) In order for this exemption to apply, the entity or agency must be involved in "performing an essential government function" as described in the entity's enabling act. *County Commrs. of Bristol v. Conservation Comm'n of Dartmouth,* 380 Mass. 706, 710 (1980) (attached hereto as Exhibit B) The MBTA's essential functions are described in the enabling statute M.G.L. c. 161A. MBTA's most basic function is to provide mass transportation services. *MBTA v. City of Somerville,* 451 Mass. 80, 86 (2008) citing M.G.L. c. 161A, §3. (attached hereto as Exhibit C).

The individual enabling acts of state authorities should be reviewed to determine whether or not a municipal bylaw regulation is applicable to a particular authority. 2000-01 Mass. Op. Att'y Gen. 1 (2000). The MBTA's enabling act contains certain provisions that exempt it from municipal bylaw regulation. M.G.L. c. 161A, §§3(i), 24. First, section 3(i) states that the "board

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shall determine the character and extent of the services and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control, or direction of any state, municipal or other department, board, or commission..." This language suggests that the MBTA is not subject to local bylaw regulation when determining the character of its facilities.

Second, in general, the MBTA is exempt from paying municipal taxes and fees. M.G.L. c. 161A, §24. Section 24 states that "the authority shall not be required to pay any tax, excise or assessment to or for the commonwealth or any of its political subdivisions; nor shall the authority be required to pay any fee or charge for any permit or license, nor any compliance fee, issued to it by the commonwealth, by any department, board or officer thereof, or by any political subdivision of the commonwealth, or by any department, board or officer of such political subdivision, or by any department..." As this statutory language strongly suggests, the MBTA is not required to pay permit, license, or compliance fees imposed by any department or political subdivision of the commonwealth; which includes those imposed by municipality bylaw regulations.[i] Attempts to impose local fees or regulations on the MBTA will generally fail because these fees divert funding and resources from the authority's legislatively mandated function of providing mass transportation to the citizens of Massachusetts.

While the MBTA's immunity from municipal bylaws is firmly established in Attorney General Opinion No. 00/01 and its own enabling act (M.G.L. c. 161A, §§3(i), 24), this exemption is not absolute. A municipal bylaw regulation can apply to an exempt entity in the very limited circumstances where that regulation serves an important purpose and either would have no effect at all or a merely negligible effect on the entity's ability to fulfill its essential government function or an action "reasonably related" to its ability to fulfill that function.

Somerville, 451 Mass. at 85-86. In *Somerville*, the court ruled that a zoning ordinance restricting the MBTA's use of advertising signs did not apply to the MBTA because it would have more than a negligible effect on the MBTA's ability to raise revenue; an action reasonably related to fulfilling its essential government function. *Id.* at 86. This "negligible effect" test was reaffirmed in *Town of Boxford v. Mass. Highway Dept., et al.*, 458 Mass. 596, 602 (2010). (attached hereto as Exhibit D) In *Boxford*, the court also clarified that the town, not the state entity, has the burden of showing that enforcement of local regulations will not unduly interfere with the entity's essential statutory mandate. *Id.* at 605.

Based on the foregoing, it is the Law Department's opinion that the MBTA is exempt from paying local fees and immune from municipal bylaw regulations on its property except in the very limited occasions[ii] when the local bylaw does not have more than a negligible effect on the MBTA's ability to perform its function of providing mass transportation or an action reasonably related to that function. *Somerville*, 451 Mass. at 85-86.

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[i] In a 1978 opinion, the Attorney General of Massachusetts stated that the term "political subdivision" or "local government" means a local unit of government, including specifically a county, municipality, city, town, township, or a school or other special district created by or pursuant to State law. 1978-79 Mass. Op. Att'y Gen. 93 (1978) (attached hereto as Exhibit E). Also, M.G.L. c. 12, §5A defines a "political subdivision" as "any city, town, county, or other governmental entity authorized or created by state law, including public corporations and authorities."

[ii] In *Greater Lawrence Sanitary Dist. v. Town of North Andover*, 439 Mass. 16, 22 (2003) (attached hereto as Exhibit F) the SJC affirmed the "negligible effect" test but ruled that the legislatively created Sanitary District was potentially subject to North Andover's local antinuisance conditions that only had a negligible effect on GLSD's ability to perform its essential governmental purpose. The SJC remanded the case to resolve the factual question of whether these conditions would interfere with GLSD's ability to fulfill its legislative mandate. *Id.* The parties eventually settled in 2005. Also, in *Village on the Hill, Inc. v. Massachusetts Tpk. Auth.*, 348 Mass. 107, 118 (1964) (attached hereto as Exhibit G) the SJC ruled that the Turnpike Authority was not exempt from local zoning provisions pertaining to land owned by the Authority which had become wholly excess to the authority's essential turnpike function. As such, the SJC ruled that after the Authority conveyed in fee excess land to a private citizen, such land does not remain exempt from zoning provisions and the new owner now had to comply with local zoning laws. *Id.* at 119.

Exhibit A

2000-01 Mass. Op. Atty. Gen. 1 (Mass.A.G.), 2000 WL 1692752 (Mass.A.G.)
Office of the Attorney General
Commonwealth of Massachuetts
Opinion No. 00/01-1

Jane Perlov
Secretary
Executive Office of Public Safety
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Perlov:

You have requested my opinion on the scope of enforcement authority vested in the Office of the State Fire Marshal under the Commonwealth's comprehensive fire safety code as pertaining to state-owned and state authority-owned buildings. Specifically, you have asked whether the provisions of G.L. c. 148 and 527 C.M.R. §§ 1.00 *et seq.* apply to state-owned or state authority-owned buildings and, if so, whether the Marshal is responsible for enforcing the fire safety code in such buildings. You also pose a related third question of whether, if the provisions do so apply, and if the Marshal is responsible for enforcement thereof, the Marshal may delegate responsibility for such enforcement to local fire chiefs. Consistent with the unequivocal conclusion reached by former Attorney General George Fingold in a May 25, 1955, opinion given to the then Commissioner of Public Safety, 1955 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 100 (1955), and for the reasons discussed below, it is my opinion that the Commonwealth is not bound by the relevant statutes and regulations and that, therefore, such provisions cannot be enforced as against the Commonwealth. The question of state authorities is not susceptible to a categorical answer, as discussed further below.

Under G.L. c. 22D, § 4, as well as various provisions contained in G.L. c. 148, including §§ 9, 10 and 28, the Board of Fire Prevention Regulations (the "Board") is authorized to enact regulations relative to fire prevention. Pursuant to that authority, the Board has enacted a comprehensive set of regulations codified in 527 C.M.R. §§ 1.00 *et seq.*, and commonly referred to as the State Fire Code (the "Fire Code"). These authorizing statutes, unlike some other regulatory authorizations such as G.L. c. 143, §§ 2A, 3A, 93, 94, and 95 (authorizing the establishment of a state-wide building code and discussed in greater detail below), do not specifically indicate that regulations promulgated thereunder may be made applicable to state-owned buildings. Under G.L. c. 148, § 4, the Marshal, local fire chiefs, and their designees have the authority to enter "any building or other premises" in the performance of the duties imposed by the Fire Code or in furtherance of the purpose of any provision of the Code or statutes relating to fire prevention.

A long line of opinions issued by my predecessors has taken the position that, absent an explicit legislative directive to the contrary, the Commonwealth and its agencies are immune from proscriptions set forth in statutes enacted by the Legislature in the exercise of its police powers. 1941 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 118 (1941) (regulations pertaining to safety devices for hot water tanks do "not apply to buildings owned and used by the Commonwealth"); see also 1942 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 88 (1942) (statute authorizing land takings by county commissioners cannot be used to take land held by the Commonwealth as a state forest); 1935 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 38 (1935)

(state-owned buildings not subject to general laws relating to the licensing of plumbers); 1933 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 38 (1933) (no state license required in order for a prisoner to operate a steam shovel at a state prison colony); 1932 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 86 (1932) (statute requiring local plumbing and wiring licenses does not pertain to work done on state-owned buildings). This rule is closely related to the rule that the Commonwealth cannot be sued in its own courts except in strict accordance with statute. In that context also, "[t] he rules of construction governing statutory waivers of sovereign immunity are stringent .... Consent to suit must be expressed by the terms of a statute, or appear by necessary implication from them." Woodbridge v. Worcester State Hospital, 384 Mass. 38, 42 (1981). Accord C & M Construction Co. v. Commonwealth, 396 Mass. 390, 392 (1985). Under G.L. c. 148, § 30, which authorizes judicial enforcement of the Fire Code, there is no express or implied waiver of the Commonwealth's immunity to suit.[1]

Moreover, I note that many sections of G.L. c. 148 refer to "persons" being subject thereto. See e.g., G.L. c. 148, § 9 ("Such rules and regulations shall require persons keeping, storing, using ... explosives to make reports to the department ...."); G.L. c. 148, § 31 ("Any person aggrieved by an act, rule, order or decision of the head of a fire department ... may appeal to the marshal, who shall make all necessary and proper orders thereon ...."). The Commonwealth and its agencies are not usually deemed to be encompassed by general terms such as "person." Sarvis v. Boston Safe Deposit & Trust Co., 47 Mass. App. Ct. 86, 96 n. 10 (1999). For this reason, statutes applying to "persons" do not subject government entities to liability. See, e.g., Perez v. Boston Housing Authority, 368 Mass. 333, 339 (1975) (enforcement action under the state sanitary code could not be maintained against the Commonwealth and its Commissioner of Community Affairs because the Commonwealth is not an "individual, trust or corporation, partnership, association, or other person" under the provisions of G.L. c. 111, § 127N); Fran's Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663, 665 (1998) (local police and ABCC were not "persons" within the meaning of statute criminalizing minor's purchase of alcohol for use of another "person"; minor's participation in police/ABCC sting operation thus did not violate law); Kilbane v. Secretary of Human Services, 14 Mass. App. Ct. 286, 287-88 (1982) (affirming dismissal of action against Secretary of Human Services because Commonwealth is not a "person" within the meaning of G.L. c. 266, § 91, which deals with false advertising).

Absent express statutory language, there is also a well established presumption against interpreting a statute in a manner that delegates to municipalities any authority to regulate the Commonwealth. This presumption is traced back to the seminal case of Teasdale v. Newell & Snowling Construction Co., 192 Mass. 440 (1906). In that case, the City of Quincy Board of Health attempted to bar a state contractor from establishing a temporary stable to be used during its work on a project to create park land because the contractor had not obtained a stable license from the Board as required by statute.[2] The effort failed because "[i]t is not to be presumed that the Legislature intended to give to the local licensing board the authority to thwart the reasonably necessary efforts of the park commissioners to perform their duty as agents of the State." Id. at 443.

Later, in Medford v. Marinucci Bros., 344 Mass. 50, 54 (1962), the City sought "to use its delegated powers," i.e., its zoning by-laws and building code, to block a contractor and railroad from transporting fill to land owned by the Commonwealth (there to be stored temporarily for use in building a bridge across the Mystic River), alleging violations of its zoning

ordinances and its building code. Following Teasdale, opinions of the Attorney General,[3] and the rule generally followed in other jurisdictions, the Court concluded that "[t]he [local] ordinance could not control action by the Commonwealth or by its agents ...." 344 Mass. at 54;[4] see also 1980/81 Op. Atty. Gen. No. 16, Rep. A.G., P.D. No. 12 at 143 (1981) (Department of Environmental Management was not authorized to enter into contract to acquire land from Mashpee, under which the Department would agree that rules governing use of land would conform to town's present and future rules, regulations and by-laws, because Department could not know whether future rules of the town would be consistent with Department's mandate). Although the Legislature may elect to waive the Commonwealth's exemption from regulation in particular instances, such a waiver is not to be presumed or inferred, but must be made explicit. In Inspector of Buildings of Salem v. Salem State College, 28 Mass. App. Ct. 92 (1989), for example, the Appeals Court concluded that a provision of G.L. c. 40A, § 3, by which religious or educational uses on public land are subject to bulk and height restrictions imposed by zoning ordinances, applies to private religious or educational uses on public land, and not to public buildings, such as those of the state college. Referring to prior Supreme Judicial Court decisions such as Teasdale and Medford v. Marinucci Bros., the Court said: "All those cases assert the supremacy of the State over local land use regulation in connection with State construction projects, unless the Legislature has made express provision to the contrary." Id. at 97. The Court concluded that, measured against this standard, "[c]ertainly the language of § 3 does not amount to the express and unmistakable suspension of the usual State supremacy which the Teasdale, Marinucci, and County Commissioners[5] cases require." Id.

An example of the Legislature's explicit waiver of the Commonwealth's exemption from regulation is found in G.L. c. 143, the statute that authorizes the promulgation and enforcement of a state-wide building code. Section 2A of G.L. c. 143 indicates that "[t]he provisions of [G.L. c. 143] relative to the safety of persons in buildings shall apply to buildings and structures, other than the state house, owned, operated or controlled by the commonwealth, and to buildings and structures owned, operated or controlled by any department, board or commission of the commonwealth, or by any of its political subdivisions, in the same manner and to the same extent as such provisions apply to privately owned or controlled buildings occupied, used or maintained for similar purposes." Chapter 143 further vests inspectors in the Division of Inspections of the Department of Public Safety with authority to enforce the state building code as to buildings "owned by the commonwealth or any departments, commissions, agencies or authorities of the commonwealth." G.L. c. 143, § 3A. Similarly, in the context of the state-wide regulation of the siting of solid waste disposal facilities, the Legislature chose to use explicit language to indicate that the procedures regarding the Department of Environmental Protection's oversight of the location and operation of such facilities are applicable to facilities "owned or operated by an agency of the commonwealth." G.L. c. 111, § 150A; see also G.L. c. 22, § 13A (subjecting "public buildings," defined to include buildings constructed by the Commonwealth, to regulations of the Architectural Access Board).

Furthermore, even in the fire prevention arena, the Legislature has taken great care to be explicit in subjecting state-owned buildings to statutory requirements and proscriptions. In particular, the Legislature adopted a special provision to make G.L. c. 148, § 26A½, regarding the retrofitting of existing buildings for sprinklers, applicable to buildings and structures owned by the Commonwealth. St. 1993, c. 151, § 124 ("Notwithstanding the provisions of any general or special law to the contrary, the entire gross square footage of any building or structure owned by the commonwealth and subject to the provisions of section twenty-six A½ of chapter one

hundred and forty-eight of the General Laws shall comply with the provisions of said section twenty-six A½ not later than March thirtieth, nineteen hundred and ninety-seven."). A time-tested maxim of statutory construction is that "[a] statutory expression of one thing is an implied exclusion of other things omitted from the statute." Glorioso v. Retirement Board of Wellesley, 401 Mass. 648, 650 (1988). In other words, if the Legislature intends to make the Commonwealth subject to any provision contained in G.L. c. 148, it knows exactly how to accomplish this result. See Commonwealth v. Dodge, 428 Mass. 860, 865 (1999)("[W]here the Legislature has employed specific language in one [[[[section of an act], but not in another, the language should not be implied where it is not present.") (internal quotation omitted). Each of the factors stated above supports the conclusion that the provisions of the Fire Code do not apply to state-owned buildings.

You have also asked whether the provisions of the Fire Code apply to "state authority-owned buildings." With respect to the term "state authority," I understand you to mean "authorities established to perform vital government functions for usually large geographical areas," such as the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority, and the Massachusetts Port Authority, as opposed to the "category of authorities" consisting "of those which are directly established by local governing bodies or officers pursuant to enabling legislation," such as local housing authorities and local redevelopment authorities. See 1978/79 Op. Att'y Gen. No. 30, Rep. A.G., P.D. No. 12 at 164 (1979), at 165-166. Authorities which "by definition" have "expansive geographical jurisdiction or scope of functions, or both," and "whose services and functions are of vital interest to the Commonwealth as a whole," Id. at 166, are often considered to be public agencies, at least for purpose of construing and applying particular statutes. See e.g., Department of Community Affairs v. Massachusetts State College Building Authority, 378 Mass. 418, 426 (1979)(public character of college building authority require it to be included within the definition of public agency as the term appears in G.L. c. 79A); Massachusetts Turnpike Authority v. Commonwealth, 347 Mass. 524, 529 (1964)(statute relieving Commonwealth from payment of damages for taking public land for highway purpose applies to land owned by Turnpike Authority).

Notwithstanding this general proposition, state authorities are creatures of individual legislative enactments and, accordingly, the specific organic statute should be reviewed to determine whether or not the Code may be applicable to a particular authority. See e.g., G.L. c. 81A, § 1 (Massachusetts Turnpike Authority "shall not be subject to the supervision and regulation of [the Executive Office of Transportation and Construction] or any other department, commission, board, bureau or agency except as specifically provided in any general or special law to the contrary."); G.L. c. 161A, § 3(1)(exempting the Massachusetts Bay Transportation Authority, in providing mass transportation service, from jurisdiction and control of the Department of Public Utilities except as to safety of equipment and operations); St. 1956, c. 465, § 2 (Massachusetts Port Authority not subject to supervision or regulation of any state agency except as expressly provided in act creating the Authority).

Finally, you have asked whether, if the provisions of the Fire Code do apply to buildings owned by the Commonwealth or state authorities, the Marshal is responsible for enforcing the Code on those buildings and, if so, may such enforcement authority be delegated to local fire chiefs. Because I have opined that the Fire Code does not apply to state-owned buildings, this question does not require an answer as to such buildings. With respect to buildings owned by

state authorities, the answer may once again turn on the wording of the provisions of a particular authority's organic statute, and, therefore, I can offer no categorical answer here.

In sum, based upon my review of the relevant provisions of G.L. c. 148, I conclude that the provisions of the State Fire Code are not applicable to buildings owned by the Commonwealth, and that such provisions may or may not be applicable to buildings owned by particular state authorities, depending upon the specific organic statute. I recognize, of course, the critical importance of ensuring that such buildings are safe both for employees and members of the public. Nothing in my opinion bars the officials controlling those buildings from voluntary compliance with the Fire Code. You and the Marshal may also wish to consider whether to propose legislation making the Code apply to such buildings and giving enforcement authority to the Marshal.

Sincerely,

Thomas F. Reilly

Footnotes

1

It is unsettled in the Commonwealth whether sovereign immunity would apply when one state entity sought to bring enforcement proceedings against another. Accordingly, I do not base my conclusions on the doctrine of sovereign immunity per se but on an examination of the relevant statutes to see if they authorize application of the Fire Code to the Commonwealth with the clarity that one would expect had the Legislature intended such a result.

2

The statute, R.L. c. 102, § 69, read: "No person shall erect, occupy or use for a stable any building in a city whose population exceeds twenty-five thousand unless such use is licensed by the board of health of said city, and, in such case, only to the extent so licensed."

3

The Court cited the following opinions: 1958 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 60 (1958) (Boston's superintendent of wires does not have jurisdiction over wiring in state armory); 1958 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 65 (1958) (municipal inspector of wiring does not have jurisdiction over installation of wiring in and on property of the Commonwealth); 1949 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 29 (1949) (Public Works may erect building for storage of road equipment notwithstanding town's zoning by-laws); 1942 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 73 (1942) (Department of Conservation not bound to comply with local ordinances in operation of parks and forests).

4

Indeed, the Court thought the principle so firm that it held inapplicable a provision of the contract between the Commonwealth and the contractor requiring compliance with municipal ordinances.

5

Referring to County Commissioners of Bristol v. Conservation Commission of Dartmouth, 380 Mass. 706 (1980), in which the Supreme Judicial Court held that a proposal to build a new Bristol County jail was not subject to the Town of Dartmouth's zoning by-laws.

Exhibit B

COUNTY COMMISSIONERS OF BRISTOL vs. CONSERVATION COMMISSION OF DARTMOUTH & another.

380 Mass. 706

March 4, 1980 - May 21, 1980

Bristol County

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & WILKINS, JJ.

Land on which county commissioners sought to have a new jail constructed and any structures to be erected thereon, were not subject to a municipal zoning by-law. [708] WILKINS, J., dissenting.

CIVIL ACTION commenced in the Superior Court on January 4, 1979.

The case was heard by Garrity, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

James M. Cronin (Leonard E. Perry with him) for the defendants.

William F. Long, Jr., for the plaintiffs.

HENNESSEY, C.J. In 1973 the Legislature authorized the county commissioners of Bristol County to construct a new jail and to acquire the necessary land by purchase or eminent domain. See St. 1973, c. 412. [Note 1] As a result of this legislative

mandate and after appropriate study and investigation, the county commissioners devised a plan to build the jail within the confines of the town of Dartmouth in an area of the town zoned for limited industrial use. [Note 2] The county commissioners applied, in compliance with the requirements of G. L. c. 131, Section 40, to the conservation commission of the town of Dartmouth for a determination of what conditions, if any, were to be applied to the construction of the proposed new jail in order to respond to specified environmental considerations. The conservation commission determined that the proposed site fell within the scope of G. L. c. 131, Section 40, and that the county commissioners were therefore required to file with the conservation commission a notice of intent to engage in construction activity on the land.

The notice of intent was submitted in the recommended form, including complete environmental data along with the $25 filing fee. General Laws c. 131, Section 40, as amended provides that "[n]o such notice shall be sent before all ...

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variances ... required by local by-law with respect to the proposed activity, which are obtainable at the time of such notice, have been obtained, except that such notice may be sent, at the option of the applicant, after the filing of an application for said ... variances ...." The conservation commission notified the county commissioners that their notice could not be accepted until an application had been made for a zoning variance from the Dartmouth zoning board of appeals.

The plaintiff county commissioners of Bristol then filed this action seeking a declaratory judgment that the proposed county use gave the land in question immunity from the Dartmouth zoning by-law. After a hearing, the Superior Court issued a declaratory judgment that the land and any structures to be erected thereon by the county are not subject to the municipal zoning by-law of the town of Dartmouth. The defendant conservation commission of Dartmouth filed a motion to alter or amend judgment under Mass. R. Civ. P. 59, 365 Mass. 827 (1974), claiming that a presumption of county immunity from municipal zoning asserted as the basis of decision contravened the Home Rule Amendment. [Note 3] The Superior Court denied this motion without a hearing. The defendants appealed.

There is no error. We therefore sustain the order, ruling and judgment of the Superior Court that the land in Dartmouth in which the plaintiff county commissioners seek to have a new jail constructed, and any structures to be erected thereon, are not subject to the municipal zoning by-law of the town of Dartmouth.

The general rule in this and other jurisdictions is that "a State is immune from municipal zoning regulations, absent statutory provision to the contrary." Medford v. Marinucci Bros., 344 Mass. 50 , 56 (1962), and cases cited. This rule has its origins in Teasdale v. Newell & Snowling Constr. Co., 192 Mass. 440 (1906). In that case the metropolitan

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park commissioners had made a contract with the defendant contractor for grading and other work on land in Quincy which they had taken for park purposes. The commissioners authorized the defendant to build a temporary stable on the property to accommodate the large number of horses used in the project. The health laws of the municipality prohibited such a stable. We held the health laws inapplicable under the circumstances, reasoning that a "general law made for the regulation of citizens must be held subordinate to this special statute regulating the use of the property of the State unless there is express provision to the contrary. It is not to be presumed that the Legislature intended to give to the local licensing board the authority to thwart the reasonably necessary efforts of the park commissioners to perform their duty as agents of the State." Id. at 443.

The same reasoning which was applied to exempt the metropolitan park commissioners from the Quincy health laws in Teasdale was applied to exempt the commissioners of public works from a Medford zoning ordinance in Medford v. Marinucci Bros., 344 Mass. 50 (1962). In that

case, the Department of Public Works had made a contract with the defendant contractor for building a section of an interstate highway. The defendant received permission from the chief engineer of the Department of Public Works to construct a railroad loading area at a particular location in the city of Medford which was zoned for single residences. The city sued to enjoin this use of the land under the authority of its zoning ordinance. In ruling against the city we stated that "[w]e cannot conclude that by enacting the Zoning Enabling Act the Legislature intended to authorize a municipality to thwart the Commonwealth in carrying out the functions of government." Id. at 57.

We reached the same conclusion in Village on the Hill, Inc. v. Massachusetts Turnpike Auth., 348 Mass. 107 (1964). In that case the Massachusetts Turnpike Authority had taken land by eminent domain from a private corporation, Rivett Lathe & Grinder, Inc. (Rivett), in connection with extending the Massachusetts Turnpike. The authority

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then agreed to sell to Rivett another lot on which Rivett could relocate its plant. In accordance with its purchase and sale agreement with the authority, Rivett entered the property and began construction of its new plant before title had been conveyed from the authority to Rivett. The plaintiff petitioned for a writ of mandamus to compel the building commissioner of Boston to enforce the Boston zoning law, which placed part of the land upon which the factory building was being constructed in a general residence district.

At the time of the trial legal title to the premises, including the building being constructed there by Rivett, remained in the authority. In concluding that this property was not subject to the Boston zoning regulation we reasoned as follows: "Although the property held by the authority is eventually to belong to the Commonwealth (see St. 1952, c. 354, Section 17), it is not now owned by the Commonwealth. Nevertheless, the Legislature ... made the authority sufficiently governmental in character so that the actual construction and operation of the turnpike, its essential `government function,' and action reasonably related to that function, should not be prevented by a zoning statute applicable to one municipality or by a local zoning ordinance or by-law." Village on the Hill, Inc. v. Massachusetts Turnpike Auth., supra at 118.

As these cases demonstrate, an entity or agency created by the Massachusetts Legislature is immune from municipal zoning regulations (absent statutory provision to the contrary) at least in so far as that entity or agency is performing an essential governmental function. [Note 4] It is clear that a county

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stands in the same position as the other legislatively created entities discussed above for purposes of applying this rule. Like the Massachusetts Turnpike Authority, which we described in Massachusetts Turnpike Auth. v. Commonwealth, 347 Mass. 524 , 525 (1964), as "a body politic and corporate ... and ... a public instrumentality performing an essential governmental function," counties also are "organized by the General Court for the convenient administration of some parts of government. They are bodies politic and corporate. They exist solely for the public welfare." County of Middlesex v. Waltham, 278 Mass. 514 , 516 (1932). "They may be changed at the will of the Legislature, and the character and extent of the sovereign powers to be exercised through them are subject to modification in like manner, according to legislative

judgment of the requirement of the interests of the public." [Note 5] Boston v. Chelsea, 212 Mass. 127 , 129 (1912). See also G. L. c. 34, Section 1. What the plaintiff county commissioners seek to accomplish here is clearly the execution of an essential governmental function. General Laws c. 34, Section 3, as amended through St. 1978, c. 478, Section 17, provides in part specifically that "[e]ach county shall provide suitable jails, houses of correction, fireproof offices and other public buildings necessary for its use." Therefore, our reading of Massachusetts case law leads to the conclusion that the Dartmouth zoning by-law is inapplicable in this circumstance.

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The defendant nevertheless argues that a proper reading of the pertinent sections of The Zoning Act (G. L. c. 40A) leads to the contrary conclusion. The defendant directs us to Section 3 of G. L. c. 40A (inserted by St. 1975, c. 808, and amended by St. 1977, c. 860) which provides in part that, "[n]o zoning ordinance or by-law shall ... prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements ...." The defendant argues that Section 3's explicit exemption for land or structures used for religious or educational purposes, and the absence of any such exemption for other essential governmental purposes, indicates an intent that land or structures devoted to such other purposes should not be exempt from municipal zoning regulation.

We do not agree with the defendant's proffered interpretation. [Note 6] The defendant has failed to read the statute as a whole and to interpret Section 3 in light of the statutory purposes. See Massachusetts Comm'n Against Discrimination v. Liberty Mut. Ins. Co., 371 Mass. 186 , 190 (1976); Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth., 352 Mass. 617 , 618 (1967). Section 2A of

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St. 1975, c. 808, states the purposes for which zoning ordinances are authorized in the following terms. "This act is designed to provide standardized procedures for the administration and promulgation of municipal zoning laws. This section is designed to suggest objectives for which zoning might be established which include, but are not limited to, the following: -- ... to facilitate the adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements." To say that Section 3 exempts only religious and educational institutions from municipal zoning regulations is inimical to the purpose of the act to facilitate the provision of public requirements. Such an interpretation of Section 3 would subject most public buildings to municipal zoning regulations and would give a municipality the power effectively to preempt the construction of facilities at the State or county level.

Properly construed, Section 3 does not allow municipal zoning regulation of land or structures owned or leased by the Commonwealth or by its bodies politic and devoted to an essential governmental function. Instead, Section 3 merely permits formerly exempt land or structures devoted to religious or educational purposes to be subjected to reasonable municipal zoning dimensional, but not use, requirements.

Our interpretation of Section 3 is bolstered by the fact that when the Legislature has intended to confer a "municipal veto" upon action taken by an entity or agency performing an essential governmental function it has done so in unmistakable terms. See Medford v. Marinucci Bros., 344 Mass. 50 , 56 (1962). This legislative practice is clearly exemplified by G. L. c. 34, Section 25, as amended through St. 1977, c. 350, which authorized county commissioners to acquire "such real property within their respective counties as may be necessary to maintain, improve, protect, limit the future use of or otherwise conserve and properly utilize open spaces, and may control and manage the same; *provided that such acquisition has been approved* by the department of environmental management and the conservation committee of the city or town within which the land lies, or if

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such city or town has no conservation committee, by a two thirds vote of the city council in the case of a city and by a two thirds vote of the board of selectmen in the case of a town ..." (emphasis supplied). By contrast, such terms conferring priority on municipalities over the proposed actions of the plaintiff county commissioners appear neither in Section 3 of G. L. c. 40A nor in St. 1973, c. 412.

The defendant argues finally that the result reached by the Superior Court is contrary to the spirit and letter of art. 2 of the Amendments to the Massachusetts Constitution, as appearing in art. 89 of the Amendments (Home Rule Amendment). The Home Rule Amendment has provided a direct constitutional grant of certain powers to municipalities. This grant of power is embodied in Section 6 of art. 2 which reads, in part, as follows: "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight ...." Section eight reads in pertinent part as follows: "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, and by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of

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cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters."

Under the terms of Section 6, a municipal by-law is valid in so far as it is not inconsistent with the laws enacted by the Legislature in conformity with its reserved powers. "In determining whether a local ordinance or by-law is `not inconsistent' with any general law within the meaning of those words in Section 6 of the Home Rule Amendment ... the same process of ascertaining

legislative intent must be performed as has been performed in the Federal preemption cases and in our own cases involving `inconsistent' ... local ordinances or by-laws.... If the Legislature has made no explicit indication of its intention in this respect, a legislative intention to bar local ordinances and by-laws purporting to exercise a power or function on the same subject as State legislation may nevertheless be inferred in all the circumstances.... If the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject, the local ordinance or by-law is not inconsistent with the State legislation ...." Bloom v. Worcester, 363 Mass. 136 , 155-156 (1973).

The purpose of St. 1973, c. 412, [Note 7] is clear on its face -- to empower the commissioners of Bristol County to construct a jail, house of correction and sheriff's quarters within the county and to acquire any land and buildings that may be necessary for this construction. The municipal ordinance of the town of Dartmouth is therefore inconsistent with St. 1973, c. 412, in so far as it impedes the county commissioners from performing their statutory task of selecting the jail site, acquiring the land and erecting the required structures.

The only question which remains under the Home Rule Amendment is whether St. 1973, c. 412, conforms with the precepts of Section 8. Several of our recent cases have clarified the requirements of this section. For example, in Del Duca

v. Town Adm'r of Methuen, 368 Mass. 1 (1975), a municipality had established a planning board in conformity with G. L. c. 41, Section 81A. [Note 8] The municipality later adopted a home rule charter creating a town council which adopted an ordinance creating a new planning board with a partially different membership. In rejecting the contention that the town had been granted the power to do this by Section 6 of the Home Rule Amendment, we reasoned as follows: "The powers reserved to the general court by Section 8 include `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.' ... It is plain that G. L. c. 41, Section 81A, is a general law that in its mandatory aspect applies alike to a class of not fewer than two cities (all cities except Boston) and alike to a class of not fewer than two towns (all towns having populations of 10,000 or more). Thus, there can be no question that G. L. c. 41, Section 81A, remains effective as to both of those classes, notwithstanding the Home Rule Amendment" (citations omitted). Del Duca v. Town Adm'r of Methuen, supra at 8-9. See also Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769 , 773-774 (1976) (arbitration provision in statute which provided for wages and benefits for police officers and firefighters valid under Home Rule Amendment since it applies generally to all municipalities in conformity with Section 8); New England LNG Co. v. Fall River, 368 Mass. 259 , 267 (1975) (statute vesting authority in Department of Public Utilities to control storage of natural gas takes precedence over local zoning law because statute is of general application in compliance with Section 8); Doris v. Police Comm'r of Boston, 374 Mass. 443 , 443-447 (1978) (statutory residency requirement for police officers valid despite

local nature of subject because there is no restriction in Section 8 on subject matter of statute of general applicability).

The special legislation in question in the instant case, St. 1973, c. 412, states as its purpose the construction of a new jail in Bristol County. Since Bristol County represents a class of two or more cities and towns, this section complies with Section 8. Section 2 of the statute provides that the county commissioners may take by eminent domain or acquire by purchase "any land and buildings that may be necessary for said purposes." This provision is also valid under Section 8 since it does not specify the land of any city or town in particular. Thus, the statute satisfies the requirements of Section 8 and is valid under the Home Rule Amendment.

In summary, it is instructive to bear in mind that this is neither a "town's right's case, nor a "county's rights" case, but rather a question of legislative intent. Our reading of The Zoning Act convinces us that the Legislature did not intend by this act to subject essential public buildings of the Commonwealth to municipal zoning regulations. Not only is this conclusion consistent with prior case law but it is also mandated by the language of The Zoning Act itself. Moreover, we are averse to rule that the Legislature can override local zoning only by explicit statutory language lest we cause undue confusion in a host of other situations in which the Legislature did not intend to yield to local regulations but did not specifically refer to them in the statute. Finally, our reading of Sections 6 and 8 of the Home Rule Amendment does not alter our conclusion that the land in Dartmouth on which the county commissioners seek to have a new jail constructed and any structures to be erected thereon are not subject to the municipal zoning by-law of the town of Dartmouth.

Judgment affirmed.

WILKINS, J. (dissenting). The only issue of any substance in this case is whether the local zoning by-law (which, under the Home Rule Amendment, may be regarded as having the force of a statute) is to be treated as overriden by a statute that is silent on the right of the county commissioners to disregard local zoning restrictions. I think the court does a disservice not only to the spirit but also to the provisions of the Home Rule Amendment by relying on pre-Home Rule Amendment decisions to attribute to the Legislature an intention to override local legislation by a statute that is entirely silent on the question. I have no doubt that, under the Home Rule Amendment, the Legislature could properly have authorized the county commissioners to proceed in disregard of local zoning regulations.

Is it as clear as the court's opinion suggests that the Legislature intended by implication to authorize the county commissioners to place the new county jail in any residential neighborhood of their choice in the county? The county commissioners happened to select a site in which the proposed use may not be substantially incompatible with other uses authorized under the town's zoning by-law. However, the principle established by the court's decision is that every grant of the power of eminent domain to a State entity or agency (at least if enacted after the Home Rule Amendment) contains an implied right to disregard explicit, lawful, local restrictions. The inference that the Legislature intended to bar the application of local zoning regulations is not warranted in all the circumstances. Particularly, there has been no showing that the county commissioners cannot achieve their objectives without acting contrary to local zoning regulations. It would be wiser under home rule principles to require the Legislature in cases such as this to be explicit on the subject of overriding local regulations.

FOOTNOTES

[Note 1] Statute 1973, c. 412, provides in relevant part the following: "Section 1. For the purpose of constructing a new jail, house of correction and sheriff's quarters in Bristol County, the county commissioners of said county may erect on land acquired for such purpose, a suitable building or buildings, and may originally equip and furnish the same.

"Section 2. For the purposes of section one, the county commissioners of Bristol county may take by eminent domain, after a public hearing, or acquire by purchase or otherwise any land and buildings that may be necessary for said purpose."

[Note 2] The proposed locus is within a district covered by Section 5C of the Dartmouth zoning by-law which reads as follows: "SECTION 5C. LIMITED INDUSTRIAL DISTRICTS. Within any Limited Industrial District, as indicated on the Zoning Map, no building or premises shall be used and no building or structure shall be erected which is intended or designed to be used, in whole or in part, for other than one or more of the following specified purposes....

(1) Wholesale warehouse, including office and showroom facility.

(2) Light industrial uses, including manufacturing, storage, processing, fabrication, packaging, assembly, printing or reproduction, research, experimentation and testing.

(3) Store or service establishment for retail or wholesale trade display or service of products manufactured on the same site or at other sites of the same company or corporation. Such store or service establishment shall be clearly incidental to the primary industrial use.

...

(4) Commercial kennel or hobby kennel, subject to the following conditions:

(a) That the Board determine that such use is not injurious to the district.

(b) That the lot on which the kennel is to be maintained have a minimum area of one acre.

(c) That the Board may impose other conditions it deems appropriate."

[Note 3] Article 2 of the Articles of Amendment of the Massachusetts Constitution as appearing in art. 89 of the Articles of Amendment.

[Note 4] The Attorney General addressed a question similar to the one at bar in Rep. A.G., nub. Doc. No. 12, 197, 198 (1967), in which an airport commission, a creature of the State Legislature, was refused a zoning exemption by a municipality to build an airport facility. The Attorney General wrote as follows: "It is well settled that local zoning by-laws do not apply to the Commonwealth, or instrumentalities of the Commonwealth, when acting in pursuance of a public function on land of the Commonwealth. Teasdale v. Newell & Snowling Construction Co., 192 Mass. 440 [1906]."

"Medford v. Marinucci Bros., 344 Mass. 50 [1962], the most recent case on this point, held that a highway contractor was not required to comply with local zoning by-laws in carrying out a construction contract for a state highway, even though his contract required him to comply with local by-laws. This principle is not confined to instances where the land is directly owned by the Commonwealth, but extends to instrumentalities of the state when engaged in their public function unless the Legislature has indicated a different intention."

[Note 5] A variant of this general principle has been applied to counties in County of Middlesex v. Waltham, 278 Mass. 514 , 516 (1932), wherein we ruled that "[l]and held by counties actually devoted, or designed to be devoted within a reasonable time, to public uses is exempt from taxation [by the town in which it is situated] *unless there is special statutory provision to the contrary*" (emphasis supplied).

[Note 6] The defendant relies in making this argument on the familiar doctrine of statutory interpretation that express reference in a statute to one matter excludes by implication other similar matters not mentioned. While this doctrine can be of help in certain situations, see General Elec. Co. v. Commonwealth. 329 Mass. 661 , 664 (1953), we do not apply it blindly when the results would be illogical or contrary to sound precedent. For example, in Medford v. Marinucci Bros., 344 Mass. 50 , 56 (1962), we held that the absence of any language in the old Zoning Enabling Act exempting property owned by the Commonwealth from municipal zoning could not be construed as indicating a legislative intent that the act apply to such land.

[Note 7] For the text of this statute see note 1, supra.

[Note 8] General Laws c. 41, Section 81A, as amended through St. 1961, c. 276, Section 2, provides in part: "Any city except Boston, and, except as hereinafter provided, any town may at any time establish a planning board hereunder. Every town not having any planning board shall, upon attaining a population of ten thousand, so establish a planning board under this section."

Exhibit C

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & others vs. CITY OF SOMERVILLE & another [Note 1] (and two companion cases [Note 2]).

451 Mass. 80

February 7, 2008 - April 4, 2008

Suffolk County

Present: GREANEY, IRELAND, SPINA, COWIN, CORDY, & BOTSFORD, JJ.

Massachusetts Bay Transportation Authority. Zoning, Billboards. Billboard. Advertising. Outdoor Advertising Board. Governmental Immunity.

In civil actions arising from the erection by the Massachusetts Bay Transportation Authority (MBTA) of outdoor advertisements on its facilities in one city, and its plan to erect other advertisements on its facilities in another city, the judge, acting on a motion for a case stated and motions for summary judgment, properly concluded that the advertisements were not subject to the cities' zoning ordinances, where the MBTA's enabling statute, G. L. c. 161A, grants the MBTA's board of directors exclusive authority to determine the character and extent of its facilities, including whether and what type of advertisements to erect on its facilities, and where the zoning ordinances would have more than a negligible effect on action reasonably related to the MBTA's ability to fulfil its essential function. [84-88]

In civil actions arising, inter alia, from the erection by the Massachusetts Bay Transportation Authority (MBTA) of outdoor advertisements on its facilities in a city, there was no merit to the claim that the Outdoor Advertising Board (board) (which may adopt regulations for control of advertisements on common carriers) should exercise jurisdiction over those advertisements, where the MBTA could not be considered a common carrier [88-89]; likewise, that the board had not issued a permit for those advertisements did not give it jurisdiction in the matter, where the board itself had concluded that the MBTA's property was neither a public way nor a private facility and that the board therefore had no authority to regulate those advertisements [89].

In civil actions arising, inter alia, from the plan of the Massachusetts Bay Transportation Authority (MBTA) to erect outdoor advertisements on its facilities in a city, the Outdoor Advertising Board did not err by issuing permits that allegedly did not comply with the city's zoning ordinances, where the MBTA's enabling statute, G. L. c. 161A, exempted the MBTA from those ordinances. [89]

CIVIL ACTION commenced in the Superior Court Department on November 3, 2006.

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CIVIL ACTION commenced in the Superior Court Department on November 6, 2006.

CIVIL ACTION commenced in the Superior Court Department on November 30, 2006.

After consolidation, the case was heard by Allan van Gestel, J., on motions for summary judgment and a motion for judgment on a case stated.

The Supreme Judicial Court granted an application for direct appellate review.

David P. Shapiro, Assistant City Solicitor, for city of Somerville.

David R. Lucas for city of Melrose.

Brian A. Davis (Jean-Paul Jaillet with him) for Massachusetts Bay Transportation Authority.

Iraida J. Alvarez, Assistant Attorney General, for Outdoor Advertising Board.

George A. Berman, for Clear Channel Outdoor, Inc., was present but did not argue.

SPINA, J. In these consolidated cases, we consider whether the cities of Melrose and Somerville (cities) may regulate through their zoning ordinances billboards and signs for commercial advertising in and on the facilities of the Massachusetts Bay Transit Authority (MBTA). The MBTA filed an action in the Superior Court in Suffolk County seeking a judgment declaring that the MBTA's commercial advertising in and on its facilities is immune from local zoning regulation. The cities subsequently filed an action in the Superior Court in Middlesex County regarding the applicability of local zoning ordinances to MBTA property and regarding the jurisdiction and authority of the Outdoor Advertising Board (board) to issue permits for the advertisements in question. Clear Channel Outdoor, Inc. (Clear Channel), later was allowed to intervene as a plaintiff in the case brought by the MBTA. The actions were consolidated in the business litigation session of the Superior Court in Suffolk County. On a motion for judgment on a case stated and on cross motions for summary judgment, a judge concluded that the advertisements in question were not subject to the cities' zoning regulations. The cities appealed, and we granted the MBTA's application for direct appellate review. We affirm.

Background. We summarize the facts agreed on by the parties. The MBTA is a political subdivision of the Commonwealth and a body politic and corporate. G. L. c. 161A, § 2. It has the power to provide mass transportation services and to operate and manage facilities used in connection with those services. G. L. c. 161A, §§ 1, 3 (c) & (i). The MBTA has erected outdoor advertisements on its facilities in Melrose, and seeks to erect others on its facilities in Somerville. To erect these advertisements, the MBTA has worked with Clear Channel and Titan Outdoor LLC (Titan), two outdoor advertising companies.

In Somerville, Clear Channel (with the MBTA's knowledge and permission) applied to the board for permission to erect advertisements on certain MBTA facilities, and the board issued permits therefor. [Note 3] Neither the MBTA nor Clear Channel sought permission from any Somerville board or agency. The parties agree that the advertisements, if they are subject to Somerville's zoning ordinances, would not comply with them. [Note 4] The parties agree, in addition, that "Somerville's attempt to compel compliance with [its zoning ordinance] and the likely issuance of a cease and desist order by Somerville and the possible imposition of fines and penalties if Clear Channel and/or the MBTA proceed with the erection of the Somerville Signs are adversely affecting and frustrating the MBTA's and Clear Channel's ability to generate revenue from those signs."

In Melrose, Titan (with the knowledge and approval of the MBTA) already has erected advertisements on MBTA property. Neither the MBTA nor any other entity applied to the board or

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to Melrose for permits to erect these advertisements. [Note 5] The city solicitor of Melrose requested that the board order the MBTA either to apply for permits pursuant to G. L. c. 93, §§ 29-33, or to remove its advertisements. The board concluded that it did not have jurisdiction over the advertisements. The Melrose building commissioner and zoning enforcement officer later informed the MBTA that they believed two of the advertisements on MBTA facilities violated the Melrose zoning ordinance and ordered the MBTA immediately to cease and desist the use of such advertisements. The MBTA refused. The parties agree that the advertisements, if they are subject to Melrose's zoning regulations, would not comply with them. [Note 6], [Note 7] The parties agree, in addition, that the

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"enforcement of the Cease and Desist Order issued to the MBTA by Melrose with respect to the Melrose Signs, and the possible imposition of fines and penalties if the MBTA does not comply with that Order, would adversely affect and frustrate the MBTA's ability to generate revenue from those signs."

Discussion. Where a statement of agreed facts contains all the material facts on which the rights of the parties are to be determined in accordance with law, it constitutes a "case stated." Caissie v. Cambridge, 317 Mass. 346 , 347 (1944). As such, "[t]he inferences drawn by the trial judge from the facts stated are not binding upon us, and questions of fact as well as questions of law are open for review upon these appeals." Id.

"The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117 , 120 (1991). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." Commonwealth v. One 1987 Mercury Cougar Auto., 413 Mass. 534 , 536 (1992). In the present case, there are no material facts in dispute, and we have viewed all facts in the light most favorable to the cities.

The cities argue that the judge erred in concluding that the advertisements in or on MBTA facilities are not subject to their local zoning ordinances. Although the parties agree that the advertisements are located on MBTA facilities, the cities argue that under the MBTA's enabling statute, G. L. c. 161A, only

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services, equipment, and facilities are exempt from local regulation and that the advertisements in question are not services, equipment, or facilities.

The MBTA enabling statute, in an exemption clause, provides that the MBTA board of directors, except as otherwise provided in G. L. c. 161A, has the duty to "determine the character and extent of the services and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any state, municipal or other department, board or commission except the [MBTA's] advisory board." G. L. c. 161A, § 3 (i). The statute defines mass transportation "facilities" as "all real property, including land, improvements, terminals, stations, garages, yards, shops and structures appurtenant thereto . . . used in connection with the mass movement of persons." G. L. c. 161A, § 1.

The cities concede that the advertisements are located on MBTA facilities. The exemption clause in G. L. c. 161A, § 3 (i), gives the MBTA board exclusive authority to determine the character and extent of its facilities. It thus would appear that, on the face of the statute, the determination by the MBTA board whether and what type of advertisements to erect on its facilities is a determination as to the character of its facilities. As such, it is included within the exclusive authority of the MBTA board, and therefore the MBTA is exempt from local zoning regulations with respect to advertisements erected on its facilities.

The cities nevertheless argue that, with respect to the advertisements at issue here, the MBTA should not be exempt from the cities' zoning ordinances because those ordinances will not interfere with the essential government function of the MBTA, namely, mass transportation, or with an action reasonably related to that function.

Where an enabling statute creates an exemption from regulation, a statutorily created entity is not necessarily exempt from all regulation. See, e.g., Boston v. Massachusetts Port Auth., 364 Mass. 639 , 653, 655, 658 (1974); Village on the Hill, Inc. v. Massachusetts Turnpike Auth., 348 Mass. 107 , 118 (1964), cert. denied, 380 U.S. 955 (1965). A regulation generally will apply to an exempt entity where that regulation serves an important

purpose and either would have no effect at all or a merely negligible effect on the entity's ability to fulfil its essential government function or an action "reasonably related" to its ability to fulfil that function. [Note 8] See Greater Lawrence Sanitary Dist. v. North Andover, 439 Mass. 16 , 22 (2003); Bourne v. Plante, 429 Mass. 329 , 332 (1999).

In the present case, the zoning ordinances will have more than a negligible effect on action reasonably related to the MBTA's ability to fulfil its essential function. The MBTA's essential function is to provide mass transportation services. See G. L. c. 161A, § 3. The parties agree that "[i]ncome that the MBTA generates, directly or indirectly, from commercial advertising in and on MBTA facilities and properties -- including the advertising revenue received from Clear Channel and Titan -- is used by the MBTA to help defray the costs of its transportation operations."

Furthermore, the statutory scheme creating the MBTA creates a direct relation between the MBTA's provision of mass transportation services and the revenues that it must raise from nontransportation sources. The Legislature specifically has authorized the MBTA to raise revenues through commercial advertising and has required the MBTA to maximize revenues from all nontransportational revenue sources. G. L. c. 161A, §§ 3 (n), [Note 9] 11. [Note 10] Accordingly, the MBTA is required by statute to maximize its

revenues from commercial advertising. Such revenues affect the operations of the MBTA. These revenues also affect the fares charged by the MBTA, for the MBTA is generally to take "all necessary steps to maximize nontransportation revenues . . . before implementing fare increases." G. L. c. 161A, § 11. The MBTA is required annually to balance its anticipated operating and debt expenses with its anticipated revenue sources. See G. L. c. 161A, § 20. [Note 11] Revenue raised through advertisements is statutorily integrated with the MBTA's ability to provide mass transportation services, its essential function. Interfering with its ability to raise revenue, as the zoning ordinances would, would interfere with action that is related to the MBTA's essential function.

This interference would have more than a negligible effect. The parties have agreed that, despite its best efforts, the MBTA incurred a deficit of $7.2 million in fiscal year 2006 and expects to incur a deficit of $4.7 million in fiscal year 2007. Meanwhile, the parties also agree that "Somerville's attempt to compel compliance with [its zoning regulations] and the likely issuance of a cease and desist order by Somerville and the possible imposition of fines and penalties if Clear Channel and/or the MBTA proceed with the erection of the Somerville Signs are . . . frustrating the MBTA's . . . ability to generate revenue from those signs." The parties further agree that the "enforcement of the Cease and Desist Order issued to the MBTA by Melrose with respect to the Melrose Signs, and the possible imposition of fines and penalties if the MBTA does not comply with that Order, would . . . frustrate the MBTA's ability to generate revenue from those signs." The Somerville signs, once erected and operating, are expected to generate at least $132,500 in revenue for the MBTA each year. The parties did not state how much the advertisements in Melrose are expected to generate,

but the MBTA's agreement with Titan for advertising in and on MBTA facilities -- an agreement encompassing the Melrose advertisements -- currently generates over $750,000 per year in revenue for the MBTA. In light of the undisputed facts, we cannot conclude that the effects of the zoning regulations in this case are so small as to be negligible. [Note 12]

For these reasons, we conclude that, because the regulation of commercial advertising in or on MBTA facilities through municipal zoning ordinances would have more than a negligible effect on actions reasonably related to the MBTA's ability to carry out its essential government function, the MBTA is exempt from such regulation. [Note 13] Because of the conclusion we reach, there is no need to decide the question of preemption. Boston Gas Co. v. Newton, 425 Mass. 697 , 699 (1997).

There is no merit to the cities' claim that the board should exercise jurisdiction over the Melrose advertisements on the grounds that the board may adopt regulations for control of advertisements on common carriers and the MBTA allegedly is a common carrier. See G. L. c. 93, §§ 29-32. The statutory definition of "common carrier" typically applies "only to private or moneyed corporations and not to public or municipal corporations or quasi corporations." New Bedford v. New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Auth., 329 Mass. 243 , 250 (1952), quoting O'Donnell v. North Attleborough, 212 Mass. 243 , 245-246 (1912). The MBTA, as a public corporation, generally is not considered a "common carrier." One

exception to this general rule is that the MBTA is treated as a common carrier for purposes of tort liability because its

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enabling statute expressly provides that the MBTA "shall be liable . . . for personal injury and for death and for damages to property in the same manner as though it were a street railway company." G. L. c. 161A, § 38. See, e.g., Magaw v. Massachusetts Bay Transp. Auth., 21 Mass. App. Ct. 129 , 131 (1985). The issue in this case is not a tort as envisioned in G. L. c. 161A, § 38, and the general rule therefore will apply. The MBTA is not here considered a common carrier.

Melrose next argues that the board has jurisdiction over the advertisements because the board's regulations provide that no authority, agency, or governmental unit shall erect or maintain a sign unless the board has issued a permit. 711 Code Mass. Regs. §§ 3.01-3.02 (2006). General Laws c. 93, § 29, empowers the board to enact rules and regulations. 711 Code Mass. Regs. §§ 3.00 (2006). That statute authorizes the board to make rules and regulations over advertisements that are "on public ways or on private property." G. L. c. 93, § 29. The board itself has concluded that the MBTA property in Melrose is neither a public way nor a private facility and the board therefore does not have authority to regulate the advertisements on this property. See White Dove, Inc. v. Director of the Div. of Marine Fisheries, 380 Mass. 471 , 477 (1980) ("there is a presumption that the regulation does not exceed the statute which is as strong as the presumption that a statute squares with the Constitution"). We agree.

Somerville contends that the board is authorized only to issue permits in accordance with local zoning regulations and that the board therefore should not have issued a permit that allegedly did not comply with those regulations. In its argument, Somerville relies on G. L. c. 93D, § 3, and G. L. c. 93, § 29. Our analysis of the MBTA's exemption from local zoning regulation applies equally to G. L. c. 93, § 29, which provides that cities may create zoning regulations. Furthermore, the board is authorized to issue permits for advertisements that "comply with *applicable* ordinances and by-laws" (emphasis added). G. L. c. 93D, § 3. The local zoning ordinances are not "applicable" because the MBTA's enabling statute exempts the MBTA from those ordinances. Where the MBTA is exempt from local zoning ordinances, the board did not err by issuing permits that did not comply with those ordinances.

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For the foregoing reasons, we conclude that the judgment should be affirmed.

So ordered.

FOOTNOTES

[Note 1] City of Melrose.

[Note 2] City of Melrose vs. Massachusetts Bay Transportation Authority & others. City of Somerville & another vs. Massachusetts Bay Transportation Authority & others.

[Note 3] The parties have agreed that "Clear Channel and the MBTA understood that prior approval of the Somerville Signs by the [b]oard was necessary because the proposed signs would be located within 660 feet of the nearest edge of [Interstate 93 (I-93)], would be visible from the main traveled way of I-93, and, therefore, would be subject to the provisions of the federal Highway Beautification Act of 1965 (23 U.S.C. § 131), as administered in the Commonwealth of Massachusetts by the [b]oard pursuant to G. L. c. 93D, §§ 1-7."

[Note 4] The statement of agreed facts is silent as to the precise reasons for noncompliance. The record appendix indicates that permits approved by the board were for double-sided billboard-type signs whose dimensions were forty-eight by fourteen feet. That is, each advertisement had an area of 672 square feet. Somerville claims that the MBTA's signs are not in compliance with art. 12.4 of its zoning ordinance, a provision that permits a free-standing sign to have, at most, an area of 250 square feet. In addition, there may be noncompliance based on the height of the advertisements.

[Note 5] The parties have agreed that "Titan and the MBTA did not seek prior approval of the Melrose Signs by the [board] because, inter alia, they believe that the proposed signs are on public property and, thus, (a) are not located 'on public ways or on *private property* within public view of any highway, public park or reservation' for purposes of G. L. c. 93, § 29, and (b) are not located within 660 feet from the nearest edge of an interstate or federal primary highway, and are not visible from the main traveled way of an interstate or federal primary highway, and, therefore, are not subject to the provisions of the federal Highway Beautification Act of 1965, as administered in the Commonwealth of Massachusetts by the [board] pursuant to G. L. c. 93D, §§ 1-7" (emphasis in original).

The parties agree that the "Melrose Signs are freestanding, double-sided signs supported by vertical poles affixed to the MBTA's property. Each sign is approximately 46 inches in height by 120 inches in length, stands approximately two feet off of the ground, and measures approximately forty (40) square feet in area. Altogether, the Melrose Signs typically contain twelve (12) separate advertisements."

[Note 6] The parties agree that the signs fail to comply with art. VII of the Melrose zoning ordinance which, in part, states:

"Signs permitted in any business district.

". . .

"Business signs shall be permitted as follows:

". . .

"(2) One pole sign for each street frontage of a drive-in establishment, including automobile service stations, provided that it shall not exceed 40 square feet in surface area, no portion of it shall be set back less than 10 feet from any street lot line, it shall not be erected so that any portion of it is over 15 feet above the ground or sidewalk, and, if lighted, it shall be illuminated internally by white light only."

[Note 7] The parties agree that Titan (with the knowledge and approval of the MBTA) erected three commercial advertising signs on or near the train platform at the Cedar Park Station. The parties further agree that these three signs are freestanding, double-sided signs supported by vertical poles and that, for the purposes of art. VII of the Melrose zoning ordinance, the station where these advertisements are located is in a "BC" local business district.

Sections 235-26 and 235-27 (E) of art. VII provide that no signs shall be permitted "except in accordance with the following regulations" and that "[n]o more than two signs shall be allowed for any one business or industrial establishment" in the business and industrial districts.

Although the parties do not state in the agreed facts exactly how the signs fail to comply with the Melrose zoning ordinances, we can reasonably infer from the facts above that the MBTA, if subject to art. VII, would have to take down at least one of its three signs.

[Note 8] The Legislature almost certainly would not intend to exempt an entity from a regulation where the statute authorizing the regulation expressly applies to the type of entity in question. See Department of Community Affairs v. Massachusetts State College Bldg. Auth., 378 Mass. 418 , 432 (1979) ("The Legislature cannot reasonably be expected to amend every general or special law creating a semiautonomous authority whenever it enacts legislation obviously aimed at all such authorities"). See also Boston v. Massachusetts Port Auth., 364 Mass. 639 , 653, 658 (1974). The cities do not argue that the zoning statutes expressly apply to authorities such as the MBTA.

[Note 9] General Laws c. 161A, § 3, provides in relevant part: "In addition to all powers otherwise granted to the authority by law, the authority shall have the following powers . . . (n) [t]o sell, lease or otherwise contract for advertising in or on the facilities of the authority." This broad grant of authority does not limit the MBTA to self-advertising, but rather authorizes the MBTA to engage in commercial advertising for third parties as an independent source of revenue.

[Note 10] General Laws c. 161A, § 11, provides in relevant part: "The board shall establish and implement policies that provide for the maximization of nontransportation revenues from all sources."

[Note 11] General Laws c. 161A, § 20, provides in relevant part:

"If, during the fiscal year, the authority projects that total revenues for the fiscal year will be insufficient to meet total expenses, the authority shall take immediate steps to increase revenues or decrease expenses, other than debt service payments or other payments due under such financing obligations, such that a deficit will not occur in the following fiscal year . . . ."

[Note 12] To comply with the zoning ordinances, the MBTA would have to eliminate signs or substantially reduce their sizes, see notes 4 & 6, supra, requirements that necessarily would have a negative impact on its advertising revenues.

[Note 13] Somerville expresses concern that our decision today effectively will grant immunity to all State agencies for any of their revenue raising activities. Our opinion, however, does not reach so far.

First, the MBTA is not necessarily exempt from all regulation. See, e.g., Boston v. Massachusetts Port Auth., supra at 653, 658. Second, our decision addresses only revenue from advertising on MBTA facilities, an activity that the Legislature expressly has authorized. See G. L. c. 161A, § 3 (n). Third, there is a reasonable relation between advertising revenue and the MBTA's essential functions based in part on specific terms of the statutory scheme under which the MBTA operates. G. L. c. 161A, § 20.

Exhibit D

458 Mass. 596

Supreme Judicial Court of Massachusetts,

Essex.

TOWN OF BOXFORD

v.

MASSACHUSETTS HIGHWAY DEPARTMENT & another1 (and a companion case2).

SJC–10721.

Argued Oct. 4, 2010. Decided Dec. 28, 2010.

Attorneys and Law Firms

**406 Katherine A. Watras, Assistant Attorney General, for Massachusetts Highway Department & another.

Gregg J. Corbo, Boston, for town of Boxford.

Present: MARSHALL, C.J., IRELAND, SPINA, CORDY, BOTSFORD, & GANTS, JJ.3

Opinion

.....

BOTSFORD, J.

*597 We consider here the Commonwealth's interlocutory appeal, brought under the doctrine of present execution, from the denial of its motion to dismiss. The principal issue raised is the scope of a town's authority to regulate the operations of a State agency, and in particular a town's ability to seek judicial enforcement of its regulatory determination vis-à-vis the agency. The case concerns a conflict between the town of Boxford (town) and the Massachusetts Highway Department (highway department) arising from the highway department's operation of a salt storage facility (facility, or salt shed) located in the town.4 The town brought suit in the Superior Court principally to enjoin the operation of the facility and certain other activities of the highway department, on the ground that the agency was in violation of the regulations of the town's board of health (board) adopted under the authority of G.L. c. 111, §§ 31 and 122.

Citing principles of sovereign immunity, the highway department and the Department of Environmental Protection5 (DEP; collectively, Commonwealth) moved to dismiss the town's complaint. We conclude that the highway department is not immune from all municipal

regulation or from suit in relation to its operation of the facility, although as a factual matter, the *598 doctrine of essential government functions ultimately may bar the town's claim for relief in this case. Sovereign immunity principles likewise do not prevent the town from seeking to enforce its regulations requiring permits for the installation of private drinking wells. Because they are before us, we have considered the Commonwealth's additional arguments as to the court's power to enjoin the highway department from causing damage to the **407 environment and to enter an order in the nature of mandamus against the DEP. With respect to those arguments, we conclude that the judge correctly denied the motion to dismiss the town's claim under G.L. c. 214, § 7A, but erred in deciding to permit the town's mandamus claim to continue. We affirm in part and reverse in part the judge's denial of the Commonwealth's motion to dismiss.

Background. In reviewing the sufficiency of a complaint, the court accepts as true the factual allegations of the complaint, and supporting inferences that may be drawn from those alleged facts. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 625 n. 7, 888 N.E.2d 879 (2008). Accordingly, we summarize the pertinent facts alleged in the town's complaint. On Topsfield Road in the town, the highway department owns and operates a salt shed in which it stores salt and other chemicals used in the removal of snow and ice from Interstate 95, State Highway Route 97, and the staging area around exit 53 of Interstate 95. The highway department has acknowledged that its release of salt has contaminated private drinking water wells in the town. The town's board of selectmen asked the highway department to relocate the salt shed to an area not in the vicinity of private drinking water wells, but the highway department has refused to do so. In 2005 and 2006, the town asked the DEP to take enforcement action against the highway department under G.L. c. 85, § 7A, on account of its storage of deicing chemicals in a manner that risked contamination of a water or groundwater supply in violation of that statute; the DEP declined to do so.

By February, 2006, the highway department began work to install replacement wells at affected private residences. In undertaking these well installations, the highway department refused to comply with the town's private water supply regulations, as set forth in the Board of Health Regulations of the Code of Boxford § 202–3 (2007) (Code § 202–3), and therefore did not apply to *599 the town's board of health (board) for well permits. The "shallow wells" that the highway department drilled are prohibited under Code § 202–3(E)(1) and, even with a permit, may only be installed with a variance granted by the board. The drilling for replacement wells caused "extensive environmental damage."

On November 21, 2008, relying on its authority under G.L. c. 111, § 122, to order abatement of nuisances, the board ordered the highway department to cease and desist all operations at the salt shed within seven days. The highway department notified the board that it did not intend to comply with the order. On December 3, 2008, the town filed the present action in the Superior Court seeking injunctive relief against the highway department and relief in the nature of mandamus against the DEP.6

The town's complaint includes four counts. In count I, the town alleges that **408 the salt shed operations constitute a public health nuisance in violation of G.L. c. 111, § 122,7 and seeks a preliminary injunction pursuant to G.L. c. 111, § 130,8 ordering the highway department to cease and desist all salt shed *600 operations and abate the damage. In count II, the town alleges that the highway department is causing or is about to cause substantial harm to the environment and seeks a preliminary injunction pursuant to G.L. c. 214, § 7A,9 again ordering the highway department to cease all salt shed operations and to abate the resulting damage. In count III, the town seeks an injunction ordering the highway department to apply for permits from the board for all replacement wells, in compliance with Code § 202–3, adopted pursuant to G.L. c. 111, § 31.10 Finally, in count IV, the town seeks mandamus relief pursuant to G.L. c. 249, § 5,11 requiring the DEP to institute an enforcement action against the highway department for violations of G.L. c. 85, § 7A.12

On February 2, 2009, the Commonwealth filed its motion to dismiss the town's complaint for lack of subject matter jurisdiction, claiming sovereign immunity, and for failure to state a claim on which relief can be granted. See Mass. R. Civ. P. 12(b)(1) and 12(b)(6), 365 Mass. 754 (1974). On September 1, 2009, a Superior Court judge denied the motion. The Commonwealth *601 appealed, and we transferred that appeal to this court on our own motion.

Discussion. Ordinarily, interlocutory rulings are not appealable until the final disposition of the case because they are not "final orders." Brum v. Dartmouth, **409 428 Mass. 684, 687, 704 N.E.2d 1147 (1999). However, an order denying a motion to dismiss based on immunity from suit may be the subject of an interlocutory appeal under the doctrine of present execution. Kent v. Commonwealth, 437 Mass. 312, 315 n. 6, 771 N.E.2d 770 (2002). As stated, the Commonwealth brings the present appeal under that rule, and the town does not dispute the rule's application. The Commonwealth's appeal is properly before us.13

1. Lack of jurisdiction: sovereign immunity. The highway department claims that sovereign immunity insulates it from suits brought under G.L. c. 111, §§ 31 and 122, and Code § 202–3.14 We disagree.

In general, the Commonwealth or one of its agencies "cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed [by] statute." DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 12, 848 N.E.2d 1197 (2006), quoting General Elec. Co. v. Commonwealth, 329 Mass. 661, 664, 110 N.E.2d 101 (1953). Sovereign immunity applies both to money judgments and more generally to "interference by the court at the behest of litigants," except when and as authorized by the Legislature. New Hampshire Ins. Guar. Ass'n v. Markem Corp., 424 Mass. 344, 351, 676 N.E.2d 809 (1997). At the same time, however, "a statutorily created entity is not necessarily exempt from all [municipal] *602 regulation." Massachusetts Bay Transp. Auth. v. Somerville, 451 Mass. 80, 85, 883 N.E.2d 933 (2008) (Somerville). Instead, a legislatively created entity, including a State agency, is subject to local regulations to

the extent that those regulations "do not interfere with its ability to fulfill its essential governmental purposes and have only a negligible effect on its operations." Greater Lawrence Sanitary Dist. v. North Andover, 439 Mass. 16, 22, 785 N.E.2d 337 (2003) (Greater Lawrence Sanitary Dist.), citing Village on the Hill, Inc. v. Massachusetts Turnpike Auth., 348 Mass. 107, 118, 202 N.E.2d 602 (1964), cert. denied, 380 U.S. 955, 85 S.Ct. 1089, 13 L.Ed.2d 971 (1965). See Somerville, supra at 85–86, 883 N.E.2d 933. See also Bourne v. Plante, 429 Mass. 329, 332, 708 N.E.2d 103 (1999).15

The Legislature has granted to local boards of health the power to "make reasonable health regulations." **410 G.L. c. 111, § 31. The town alleges in its complaint, and we accept as true, that the town, acting through the board, has adopted Code § 202–3 under this statutory authority; and that pursuant to Code § 202–3, the town regulates the placement and construction of private wells. The Legislature also has given local boards of health an express grant of power to regulate nuisances. See G.L. c. 111, § 122 (local "board of health shall examine into all nuisances ... within its town ... and shall make regulations for the public health and safety relative thereto").

The power to enforce local health and environmental laws is integral to the power to regulate. Although certain procedures contemplated by the Legislature for ordering the abatement of local nuisances apply specifically to private premises,16 the power of the Superior Court to enjoin the maintenance of a nuisance affecting the public health is not similarly limited. See G.L. c. 111, § 130 (authorizing Superior Court to enjoin maintenance *603 of "common nuisance affecting the public health" while action to prosecute nuisance is pending); note 8, supra. A regulation under G.L. c. 111, § 31 or § 122, also may be enforced by a municipality in equity under G.L. c. 111, § 187.17 See Board of Health of Woburn v. Sousa, 338 Mass. 547, 550–552, 156 N.E.2d 52 (1959) (where nuisance regulation could properly have been adopted under G.L. c. 111, §§ 31 and 122, board of health could enforce it in equity under G.L. c. 111, § 187).

Whether a specific regulation would have a "merely negligible effect" on a State-created entity's ability to fulfil an essential governmental function generally requires consideration of the specific facts of the case. Somerville, 451 Mass. at 86, 883 N.E.2d 933. See, e.g., Greater Lawrence Sanitary Dist., 439 Mass. at 22, 785 N.E.2d 337. Anything more than a negligible effect on a State agency's ability to perform an essential governmental function will cause the court to decide in the State agency's favor. See Somerville, supra. Nonetheless, where a town has alleged sufficient facts to "raise a right to relief above the speculative level," its complaint survives a motion to dismiss. Iannacchino v. Ford Motor Co., 451 Mass. at 636, 888 N.E.2d 879, quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The factual allegations of the town's complaint concerning the relationship between the town's antinuisance and private well regulations and the legislatively mandated functions of the highway department meet that test.18 Within the limits of the essential **411 governmental function doctrine, the highway department is potentially subject to judicial enforcement of town regulations, and the Commonwealth's motion to *604 dismiss was properly denied with respect to counts I and III of the town's complaint.

2. Failure to state a claim. a. Damage to the environment. In count II of its complaint, the town alleges that the highway department is causing or about to cause substantial harm to the environment and seeks a preliminary injunction pursuant to G.L. c. 214, § 7A. Section 7A authorizes the Superior Court to restrain any "person" causing or about to cause damage to the environment, and defines "person" to include "the commonwealth or any political subdivision thereof, [or] any administrative agency, public or quasi-public corporation or body." G.L. c. 214, § 7A, second par.19 Section 7A applies only when "the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." G.L. c. 214, § 7A, third par. See Wellfleet v. Glaze, 403 Mass. 79, 82–83, 525 N.E.2d 1298 (1988). See also Sierra Club v. Commissioner of the Dep't of Envtl. Mgt., 439 Mass. 738, 739 n. 3, 791 N.E.2d 325 (2003) (jurisdiction under G.L. c. 214, § 7A, to hear action alleging "actual imminent damage to the environment" due to failure to comply with G.L. c. 30, § 61).

The Commonwealth does not challenge the sufficiency of the town's allegation of damage to the environment in count II. Rather, its motion to dismiss rests on the premise that the town failed to show that the highway department violated any statute, ordinance, bylaw, or regulation. The town responds by pointing to G.L. c. 111, § 122. In particular, the town contends that § 122 authorizes a board of health to issue orders requiring property owners to abate nuisances; that the board in this case did issue a cease and desist order under § 122; and that the highway department violated the order. The town reasons that by violating the order issued pursuant to § 122, the highway department violated the statute itself.

The Commonwealth's motion to dismiss was properly denied. The Commonwealth is correct that as an agency of the Commonwealth, it cannot be made subject to a fine under the final *605 sentence of G.L. c. 111, § 122.20 See Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Falmouth, 74 Mass.App.Ct. 444, 446–447, 907 N.E.2d 1124 (2009) (as general rule, word "whoever" when used in General Laws does not encompass governmental agencies or municipalities). But it does not follow that the highway department is also exempt from an order of injunctive relief issued pursuant to § 122. The Commonwealth's suggestion that the town has no recourse to the courts to enforce its regulations adopted under § 122 amounts to a repetition of its claim that the highway department is immune from regulations adopted pursuant to § 122. For the reasons we have previously discussed, that claim is without merit. See Somerville, 451 Mass. at 85–86, 883 N.E.2d 933; Greater Lawrence Sanitary Dist., 439 Mass. at 22, 785 N.E.2d 337. At trial, the town must establish that enforcement of **412 its public health regulations in relation to the salt shed will not unduly interfere with the highway department's ability to perform its essential statutory mandate. If the town does so, it may also seek to establish that it is entitled to injunctive relief pursuant to G.L. c. 214, § 7A.21

b. Mandamus. Finally, the Commonwealth argues that count IV of the town's complaint, which seeks relief in the nature of *606 mandamus against the DEP, must be dismissed because mandamus is not available to compel the performance of discretionary acts. We agree. Relief in

the nature of mandamus is not appropriate where the acts in question are discretionary rather than ministerial. See Murray v. Commonwealth, 447 Mass. 1010, 1010, 852 N.E.2d 66 (2006). The writ of mandamus "will not issue unless the respondent is under a legal duty to perform some particular act or acts the performance of which the court can order in definite terms and enforce if necessary." Angelico v. Commissioner of Ins., 357 Mass. 407, 411, 258 N.E.2d 299 (1970). See Channel Fish Co. v. Boston Fish Market Corp., 359 Mass. 185, 187, 268 N.E.2d 683 (1971).

The DEP's duties under G.L. c. 85, § 7A, clearly involve discretion and judgment. It "may issue [general] regulations" concerning the "place or manner of storage of" road salts and other chemicals, and "may, by specific order, in a particular case regulate the place where [road salts] may be used" (emphasis added). G.L. c. 85, § 7A, as amended through St. 2009, c. 25, § 76. The town asserts that while the DEP may choose either to regulate in general or to do so on a case-by-case basis, it must do one or the other. Nothing in the language of the statute supports such a reading. Rather, the statute plainly vests broad discretion in the DEP to act through regulations, through specific orders, or not to act at all—as the DEP sees fit.22 Count IV of the town's complaint must be dismissed.

3. Conclusion. The order denying the Commonwealth's motion to dismiss is affirmed with respect to counts I, II, and III **413 of the town's complaint, and reversed with respect to count IV. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

Parallel Citations

940 N.E.2d 404

Footnotes

1. Department of Environmental Protection.

2. Massachusetts Highway Department vs. Town of Boxford (town). See note 6, infra.

3 .Chief Justice Marshall participated in the deliberation on this case prior to her retirement.

4 .In 2009, the functions of the Massachusetts Highway Department were merged into the newly created Department of Transportation (department). See St. 2009, c. 25. The parties continue to refer to the Massachusetts Highway Department (highway department), and we do the same. See Mass. R. Civ. P. 25(c), 365 Mass. 771 (1974). The Commonwealth asserts that the issue of sovereign immunity it has raised in this case is unaffected by the change. See G.L. c. 6C, § 18, as amended by St. 2009, c. 120, § 5.

5. The Department of Environmental Protection (DEP) is a defendant in this action because the town seeks an order in the nature of mandamus directing the DEP to take enforcement action against the highway department for allegedly improper road salt storage. See G.L. c. 85, § 7A, as amended through St. 2009, c. 25, § 76.

6. We learn from the record that on December 3, 2008, the town physically blocked the entrance to the salt shed. In response, the highway department filed its own complaint in the Superior Court seeking a declaratory judgment that the town lacks the authority to regulate the highway department's functions and also injunctive relief barring the town from interfering with the operation of the salt shed. After a hearing, a judge in the Superior Court consolidated the two cases and, on December 24, 2008, issued an order enjoining (1) the town from attempting to exert any authority over the highway department's operation and use of the salt shed through the 2008–2009 winter season; and (2) the highway department from drilling wells without local permits and, as of June 30, 2009, from storing salt at the salt shed. The highway department's action is not directly at issue in this appeal.

7 . General Laws c. 111, § 122, provides, in relevant part: "The board of health shall examine into all nuisances, sources of filth and causes of sickness within its town ... which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto and to articles capable of containing or conveying infection or contagion or of creating sickness brought into or conveyed from the town.... Whoever violates any such regulation shall forfeit not more than one thousand dollars."

8 .General Laws c. 111, § 130, provides: "The superior court, either before or pending a prosecution for a common nuisance affecting the public health, may enjoin the maintenance of such nuisance until the matter is decided or the injunction dissolved."

9 .General Laws c. 214, § 7A, third par., provides, in part:

"The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought ... by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment."

10 .General Laws c. 111, § 31, provides, in part: "Boards of health may make reasonable health regulations."

11 .General Laws c. 249, § 5, provides, in part: "A civil action to obtain relief formerly available by writ of mandamus may be brought in the ... superior court...."

12 .General Laws c. 85, § 7A, states, in part: "No person shall store sodium chloride, calcium chloride or chemically treated abrasives or other chemicals used for the removal of snow or ice on roads in such a manner or place as to subject a water supply or groundwater supply to the risk of contamination...." The section states the DEP "may issue regulations" as to storage of such chemicals and further states that "[a]ny violation of this section or any regulation ... issued hereunder shall be punished by a fine not to exceed fifty dollars per day." Id.

13 .On appeal, the Commonwealth expressly advances a defense of sovereign immunity only with respect to counts I and III of the town's complaint. That it asserts sovereign immunity only as to some of the counts of the complaint does not bar interlocutory review. Kent v. Commonwealth, 437 Mass. 312, 316, 771 N.E.2d 770 (2002). We reach the Commonwealth's arguments relating to counts II and IV in this opinion because, even if the Commonwealth lacks a right at this stage to appeal from the denial of its motion to dismiss those counts, the matter is fully briefed and resolving it would be in the public interest. See Wellesley College v. Attorney Gen., 313 Mass. 722, 731, 49 N.E.2d 220 (1943).

14 .The Commonwealth also asserts sovereign immunity with respect to a claim for public nuisance. The town does not assert an independent public nuisance claim in its complaint or on appeal, and we agree that all the town's claims are statutory.

15 .The Commonwealth stated in its oral argument to this court that the town cannot regulate the operation of the salt shed without explicit statutory authorization. As the cases just cited in the text indicate, the Commonwealth's position is incorrect. The relevant inquiry is not whether there is express authorization for a municipality to apply its regulation to a State agency, but rather whether such application will impede or limit in some way the agency's ability to fulfil its legislative mandate. See Greater Lawrence Sanitary Dist. v. North Andover, 439 Mass. 16, 21–22, 785 N.E.2d 337 (2003).

16 .See G.L. c. 111, § 123 (board of health shall order owner or occupant of private premises to remove nuisances); § 124 (notice provisions for private premises nuisance removal order); and § 125 (authority of board to remove nuisance at private premises where owner or occupant fails to do so).

17 .General Laws c. 111, § 187, provides in pertinent part: "The supreme judicial or superior court, upon the application of the board of health of a town, may enforce the orders of said board relative to public health. Sections eleven and twelve of chapter two hundred and fourteen shall apply to such cases...."

18 .We assume without deciding that "deicing" roads is an essential governmental function performed by the highway department; the question is only whether local regulations would have more than a "merely negligible effect" on the highway department's ability to fulfil that function. Massachusetts Bay Transp. Auth. v. Somerville, 451 Mass. 80, 86, 883 N.E.2d 933 (2008). See G.L. c. 6C, § 2 (a) (exercise of department powers conferred by c. 6C "shall be considered to be

the performance of an essential governmental function"); G.L. c. 6C, § 3(13) (department granted the power to "maintain ... the state highway system").

19 .Given this definition, the Commonwealth cannot and does not assert a defense of sovereign immunity with respect to the town's claim under G.L. c. 214, § 7A.

20 .The last sentence of G.L. c. 111, § 122, provides: "Whoever violates any such regulation [i.e., any antinuisance regulation adopted by a municipal board of health] shall forfeit not more than one thousand dollars." See note 7, supra.

21 .In its reply brief, the Commonwealth argues that G.L. c. 111, § 122, cannot form the basis for injunctive relief under G.L. c. 214, § 7A, because § 122 is not a statute the major purpose of which is to prevent or minimize damage to the environment. The Commonwealth's argument comes too late to be considered on this appeal. See Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd., 457 Mass. 663, 688, 932 N.E.2d 787 (2010) (claim deemed waived when raised for first time in reply brief). The Commonwealth may pursue the point on remand.

We note that the town asserts in its complaint that the highway department has violated both G.L. c. 111, § 122, and G.L. c. 85, § 7A. A major purpose of c. 85, § 7A, which prohibits the storage of road salts and other chemicals in a manner that risks contamination of a water or groundwater supply (see note 12, supra), would appear to be the prevention or minimization of environmental damage. Chapter 85, § 7A, defines "person" to include "the chief engineer of the state department of highways" and "the chief engineer of the Massachusetts Department of Transportation." Id. The facts alleged in the town's complaint arguably may be read to support a claim for relief under G.L. c. 214, § 7A, based on the highway department's alleged violation of G.L. c. 85, § 7A. We express no view on the merits of any such claim.

22 . General Laws c. 85, § 7A, contains a provision requiring that "[a]ny person who uses more than one ton of such chemicals in any calendar year shall report" to the DEP the amount of chemicals used and stored (emphasis added). G.L. c. 85, § 7A. When "shall" and "may" are used within the same section of a statute, there is a presumption that the Legislature understood the difference. See Commonwealth v. Gagnon, 439 Mass. 826, 832, 792 N.E.2d 119 (2003). This distinction further demonstrates that the Legislature intended the DEP's functions at issue here to be discretionary.

Exhibit E

1978-79 Mass. Op. Atty. Gen. No. 2 (Mass.A.G.), 1978-79 Mass. Op. Atty. Gen. 93 (Mass.A.G.), 1978 WL 34098 (Mass.A.G.)
Office of the Attorney General
Commonwealth of Massachusetts
Opinion No. 2
July 24, 1978

Frederick P. Savucci
Secretary of Transportation
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Salvucci:

You have requested my opinion whether the Massachusetts Bay Transportation Authority (MBTA) and various regional transit authorities (RTAs), are agencies or instrumentalities of the Commonwealth within the meaning of the federal Intergovernmental Cooperation Act of 1968, Pub. L. 90-577, 42 U.S.C. §§ 4201 *et seq.* (1970) (the Act).[1] The question arises because under this Act, transit authorities which quality as state "agencies" or "instrumentalities" may retain interest on federal grant funds, while authorities classified as "political subdivisions" may not. For the reasons set forth below, it is my opinion that the MBTA and the RTAs are agencies or instrumentalities of the Commonwealth for purposes of the Act. They therefore may retain interest earned on grant-in-aid funds disbursed to them by the federal Department of Transportation.

For the reasons set forth below, it is my opinion that the MBTA and the RTAs are agencies or instrumentalities of the Commonwealth for purposes of the Act. They therefore may retain interest earned on grant-in-aid funds disbursed to them by the federal Department of Transportation.

The background of your opinion request is the following. The United States Department of Transportation, through its Urban Mass Transit Administration (UMTA), oversees a variety of federal transit programs. UMTA's responsibilities include the awarding of federal funds to regional transit authorities to assist in the development of improved mass transportation. *See* 49 U.S.C. §§ 1601-1613. UMTA notified its grantees in July, 1977, that a ruling of the United States Comptroller General permitted transit authorities to retain interest on federal funds if the authorities were defined under state law as "instrumentalities" of the state, but not if state law defined them as "political subdivisions." The Comptroller General's ruling was based on his interpretation of two sections of the Act: 42 U.S.C. § 4213, governing the scheduling of all federal grants-in-aid to states,[2] and § 4201. This latter section contains the definitions which apply to all provisions of the Act, including § 4213. Its critical definitions, for purposes of this opinion, are those of the terms "State" and "political subdivision." They read as follows:

. . . (2) The term "State" means any of the several states of the United States . . . or any *agency* or *instrumentality* of a State, but does not include the governments of the *political subdivisions* of the States.

(3) The term "political subdivision" or "local government" means a local unit of government, including specifically a county, municipality, city, town, township, or a school or other special district created by or pursuant to State law . [Emphasis supplied].[3]

*2 Accepting, for this opinion, the Comptroller General's reading of 42 U.S.C. §§ 4213 and 4201, I am asked to resolve the issue whether, under Massachusetts law, the MBTA and the RTAs fit within the definition of "State" set forin in 42 U.S.C. § 4201 (2), and thus become entitled to retain interest on federal grants pursuant to § 4213.[4] I will consider the issue in relation to the MBTA and the RTAs separately.

The MBTA was established pursuant to St. 1964, c. 563, § 18, enacting G.L. c. 161A. General Laws, c. 161A, § 2, provides in part as follows:

> The territory within and the inhabitants of the fourteen cities and towns and the sixty four cities and towns are hereby made a body politic and corporate and a political subdivision of the Commonwealth under the name of Massachusetts Transportation Authority.[5]

This section shows that, in contrast to the transportation authority described in the Comptroller General's opinion, the MBTA is specifically defined as a "political subdivision of the commonwealth."[6] Nevertheless, I do not read that opinion as intending to limit the scope of my inquiry to the description of the MBTA contained on the face of its enabling statute.[7] An examination of other statutes defining the MBTA's relationship to the Commonwealth, as well as any decisions of the state courts in which the nature of the MBTA has been discussed, should also be undertaken in determining the authority's status. In the case of the MBTA such an analysis leads me to conclude that the language of G.L.c. 161A, § 2 should not be read to establish the MBTA as a "political subdivision" within the meaning of 42 U.S.C. § 4201(3).

First, it has been recognized that the term "political subdivision" may connote both a unit of local government and an instrumentality of the state.[8] In *Commissioner of Internal Revenue* v. *Shamberg's Estate,* 144 F. 2d 998 (2d Cir. 1944), *cert. denied,* 323 U.S. 792 (1945), the court stated:

> The term "political subdivision" may be used in statutes in more than one sense. It may designate a true governmental subdivision such as a county, town, etc., or, it may have a broader meaning, denoting any subdivision of a state created for a public purpose although authorized to exercise a portion of the sovereign power of the State only to a limited degree. *See Boston Elevated Ry. Co.* v. *Welsh,* 25 F. Supp. 809, 810 (D. Mass. 1939) (considering whether transit company was "political subdivision" or private corporation under Social Security Act).

No decisions of the Commonwealth's appellate courts have construed the term "political subdivision" as it appears in G.L. c. 161A, § 2.[9] Nevertheless, a review of the statutes defining the purposes and responsibilities of the MBTA clearly shows that the MBTA is a political subdivision in the second sense described in the *Shamberg's Estate* case, *viz.,* a governmental entity of the state.

The MBTA is an agency included generally within the Executive Office of Transportation and Construction, G.L. c. 6A, § 19 its capital investment program and mass transportation plans are prepared specifically under that Office's "direction, control and supervision. . . ." G.L. c. 161A § 5(g); and the State Auditor annually audits the MBTA's accounts, *id.*, § 17. In addition, the Commonwealth is obligated to fund annually any cost of service deficit the MBTA may experience as well as deficits in operating revenues, and may pledge its credit to meet these financial obligations, *id.*, §§ 12, 13; *see also id.*, §§ 28, 28A. I note further that the Governor appoints and may remove the authority's board of directors, *id.*, § 6;[10] and he has specific statutory authority in an emergency to take over and operate the MBTA through any department or agency of the Commonwealth, *id.*, § 20.[11]

*3 These statutes manifest a high degree of direct state involvement with the operations of the MBTA and with its financial operations in particular.[12] Viewing the MBTA against this statutory framework, I believe it clear that the authority should not be classified as a "political subdivision," as that term is defined in 42 U.S.C. § 4201(3). The MBTA does not fit within the explicit provisions of the definition since it is not a "county, municipality, city, town, township, or a school or other special district . . . ." *Cf. Massachusetts Bay Trans. Authority* v. *Labor Relations Comm'n*, 356 Mass. 563, 566 (1970). Nor does it appear to come within the definition's implicit scope as suggested by the entities enumerated in the statute. I conclude, therefore, that for purposes of 42 U.S.C. §§ 4201 and 4213 (and the Comptroller General's ruling), the MBTA is properly defined as a "state instrumentality."

The provisions of G.L. c. 161A, § 29, lend support to this conclusion. Section 29 reads in part:

> It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, overrule any inconsistent provisions of this chapter.

This statutory language is significant, for it shows a legislative intent that the statutory label given the MBTA's structure not hinder its ability to maximize the receipt of available federal funds. Interest earned on federal grants-in-aid can provide a significant source of funds to the MBTA, as you suggest in your opinion request. Section 29 in effect overrides any inference that the MBTA's designation as a "political subdivision" in G.L. c. 161A, § 2 should control the authority's classification for purposes of 42 U.S.C. §§ 4201 and 4213, and thereby render it unable to retain the interest on federal funds to which it might otherwise be entitled.[13]

I now turn to the question whether the RTAs are state agencies or instrumentalities. The RTAs' statutory structure strongly resembles that of the MBTA: each RTA is a "body politic and corporate and political subdivision of the commonwealth," G.L. c. 161B, § 2; all RTAs are within the Executive Office of Transportation and Construction, G.L. c. 6A, § 19; RTAs are required to prepare and annually revise their public mass transportation programs in consultation with the Office, G.L.c. 161B, § 8(f);[14] the Commonwealth is obligated to fund in the first instance any deficits in the RTAs' cost of service and any inability of the RTAs' to meet their current obligations, and may pledge its credit for these purposes, *id.*, §§ 10, 11 (see also *id.*, § 23); and the RTAs are subject to audit by the State Auditor on an annual basis, *id.*, § 12. In

3 .In light of its central importance to the questions you raise, the Comptroller General's opinion at issue here, No. B-180617, 56 Comp. Gen. 353 (1977), requires further discussion. It was issued in response to a request by UMTA to clarify the proper meaning of 42 U.S.C. §§ 4201 (3) and 4313, in order to resolve a dispute between UMTA and a Pennsylvania regional transit authority. UMTA had determined that the transit authority was a "political subdivision" and therefore not entitled to retain interest on federal grants under § 4213. Its decision was based on the Bureau of Census' classification of the authority as a "special district." *See* U.S. Bureau of the Census, *Census of Governments, 1972,* Vol. 1 at 437 (1973). In UMTA's view of the legislative history of §§ 4201 and 4213, the Census classification in and of itself established the Pennsylvania authority's status as a "political subdivision" for purposes of §§ 4201 and 4213. The transit authority's challenge to this ruling focused on its state enabling statute, describing the authority as "a separate body corporate and politic which '. .. shall exercise the public powers of the Commonwealth as an agency and instrumentality thereof.'" 56 Comp. Gen. at 355. Additionally, the authority relied on decisions of the Pennsylvania courts which defined it as a state agency.
The Comptroller General accepted the Pennsylvania transit authority's argument. He ruled that neither the Act nor its legislative history required the Bureau of Census classification of an entity to be dispositive of the question whether it was a state "agency or instrumentality," or a "political subdivision." 56 Comp. Gen. at 356-357. Rather, for purposes of the Act, a federal grantor age ncy

. . . is bound by the classification of the entity in State law. Only in the absence of a clear indication of the status of the entity in State law may [the grantor agency] make its own determination based on reasonable standards, including resort to the Bureau of the Census' classification. It would not be unreasonable . . . for UMTA to require a transit authority to get an opinion for the State Attorney General as to whether such authority is a State agency or instrumentality ... . *Id.* at 357.

4 .It bears mention at the outset that I only treat here the proper classification of the authorities as "state instrumentalities" or "political subdivisions" for purposes of the two pertinent federal statutes. It may be that under other federal or state statutes using these terms the authorities would be differently classified; I do not consider such questions.

5 .The statutory distinction between the 14 cities and towns and the 64 cities and towns and the 64 cities and towns relates to differences in the manner in which a particular city or town is assessed a percentage of the annual deficit of the Authority, if any *See* G.L. c. 161A, §§ 9-12.

6 .However, the MBTA, like the Pennsylvania Authority, is classified by the Bureau of Census as a "special district." Under the prior UMTA practice, therefore, it was not permitted to retain interest earned on federal funds.

7. I hold the same view with respect to the RTAs, discussed below.

8 .Because 42 U.S.C. § 4201(2) makes the terms "state" (including "agency or instrumentality of a state") and "political subdivision" mutually exclusive, I am required in this instance to define the MBTA as either one *or* the other.

9 .Nor did research uncover any Massachusetts decisions which interpret the term as used in other state statutes, or elsewhere. Accordingly, judicial guidance on this issue is lacking with respect to both the MBTA and the RTAs.

10 .Moreover, the directors and employees of the MBTA are considered "state employees" for purposes of the Commonwealth's conflict of interest statute, G.L. c. 268A. *See, e.g.,* Conf. Op. Atty Gen. Nos. 823, 795.

11. I note as well that in a previous opinion, I ruled that the MBTA qualifies as a "purchasing agency" under a program established by St. 1976, c. 484 [G.L. c. 7 App. §§ 2-1 *et seq.*]. 1976-77 Op. Atty. Gen. No. 25. The purchasing program statute specifically defines "purchasing agency" as "any agency, department, board, commission, office of authority of the commonwealth." St. 1976, c. 484, § 2(4) [G.L. c. 7 App., § 2-2(4)].

12 .Given the subject matter of the federal statutes under review here—the handling of federal grants-in-aid—the degree of state participation in the MBTA's financial and fiscal operations would seem to be one of the most significant factors in determining whether it is a state instrumentality.

13 .I recognize that G.L. c. 161A, § 29 has limits; it cannot be relied upon to transform automatically every governmental entity into a "state instrumentality" for the purpose of increasing available federal funds. In the case of the MBTA, however, I believe there are sufficient indicators of its status as a state instrumentality independent of § 29 I cite § 29 only insofar as it reinforces this judgment. I reach the same conclusion with respect to the RTAs, discussed below.

14 .Moreover, the RTAs must annually report on their operations and mass transit programs to the Governor, to you as Secretary of Transportation and Construction, and to the Legislature, G.L. c. 161B, § 8(g).

addition, every RTA must obtain prior approval from you in order to issue bonds, and as Secretary of Transportation and Construction you are required to establish guidelines for allocating and distributing the principal of such bonds among the RTA's, *id.*, § 17. Finally, the statute creating RTAs, St. 1973, c. 1141, contains a section substantively identical to the portion of G.L. c. 161A, § 29, quoted above, which provides that:

> *4 . . . any federal law, administrative regulation or practice governing federal assistance for the purpose of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of . . . this act . . . . St. 1973, c. 1141, § 10.

In my view, the characteristics of RTAs enumerated here are sufficient to qualify them as state agencies or instrumentalities within the meaning of 42 U.S.C. §§ 4201 and 4213.
In reaching this result, I recognize that the RTAs present a closer case than the MBTA. For example, while G.L. c. 161B, § 2 provides for the creation of certain RTAs, other cities and towns, either singly or in combination, may form an additional RTA, subject to your approval. G.L. c. 161B, § 3. There is no comparable provision applicable to the MBTA. Additionally, every RTA is managed by an administrator appointed by an advisory board composed of municipal officials, *id.*, §§ 4,5. As noted above, the MBTA is managed by a board of directors appointed by the Governor, *see* G.L. c. 161A, § 6. Nevertheless, although there is greater municipal involvement in the management of the RTAs than is true of the MBTA, I do not believe the differences between the two types of authorities require that RTAs be classified as "political subdivision[s]" as defined in 42 U.S.C. § 4201(3). The RTAs' financial relationship with the Commonwealth is substantially the same as that of the MBTA, and in any event is a very close one. As I have indicated, I consider the financial aspects of both types of authorities' operations to be the most critical for purposes of determining whether they qualify as state agencies or instrumentalities under 42 U.S.C. §§ 4201 and 4213. See n 12, *supra.* I therefore conclude that the RTAs as well as the MBTA do so qualify, and both may retain interest on federal grants-in-aid.

Very truly yours,

Francis X. Bellotti
Attorney General

Footnotes

1. Both the MBTA and the RTAs are under the jurisdiction of the Executive Office of Transportation and Construction, G.L. c. 6A, § 19. Questions relating directly to their activities, therefore, are of concern to you as Secretary of Transportation and Construction.

2 .Section 4213 provides:
Heads of Federal departments and agencies responsible for administering grant-in-aid programs shall schedule the transfer of grant-in-aid funds consistent with program purposes and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by a State . . . . *States shall not be held accountable for interest earned on grant-in-aid funds, pending their disbursement for program purposes.* [Emphasis supplied.]

Exhibit F

GREATER LAWRENCE SANITARY DISTRICT vs. TOWN OF NORTH ANDOVER & others. [Note 1]

439 Mass. 16

January 7, 2003 - March 20, 2003

Essex County

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

Greater Lawrence Sanitary District. Practice, Civil, Summary judgment. Municipal Corporations, Regulations, Sewers, By-laws and ordinances. Zoning, Public authority, By-law, Building permit. Sewage Disposal. Nuisance.

This court concluded that the doctrines of essential governmental functions and preemption did not prevent a town from imposing antinuisance conditions on the operation of a sludge treatment facility operated by a regional sanitary district if the conditions did not interfere with or burden the district's performance of its legislatively mandated waste water treatment function and did not conflict with the regulatory authority granted the Department of Environmental Protection; however, where factual questions, such as whether the particular existing conditions would interfere with the district authority's legislative mandate, could not be decided on the present record, the court remanded the case for further proceedings. [20-26]

This court concluded that a town had the authority to issue building permits for a proposed sludge treatment facility operated by a regional sanitary district, where nothing in the district authority's enabling statute or in the building code suggested that the district authority was not subject to regulation by the local building inspector, and where obtaining the permits did not interfere with the authority's ability to fulfil its essential governmental function; however, where the question whether the town was contractually obligated to refund the building permit fees under a previously executed memorandum of understanding could not be decided on the present record, the court remanded the case for further proceedings. [26-27]

CIVIL ACTIONS commenced in the Superior Court Department on July 26, 2000.

The cases were heard by Isaac Borenstein, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Kenneth L. Kimmell (Elizabeth M. Heller with him) for Town of North Andover.

William H. DiAdamo for Greater Lawrence Sanitary District.

The following submitted briefs for amici curiae:

Thomas F. Reilly, Attorney General, & Kirsten H. Engel, Assistant Attorney General, for Department of Environmental Protection.

Thomas P. Crotty for Carver Marion Wareham Regional Refuse Disposal District.

IRELAND, J. The plaintiff, Greater Lawrence Sanitary District (GLSD), and the defendants, the town of North Andover, its board of health, and its board of selectmen (town), appeal from a Superior Court judge's award of summary judgment ordering, inter alia, (1) that the town does not have authority to impose any conditions on GLSD's sludge treatment facilities; and (2) that a permanent injunction issue, restraining the town from interfering with or attempting to exert authority over GLSD. The town claims that the judge erred in concluding that it did not have authority to impose antinuisance conditions on the operation of the sludge treatment facilities. GLSD also appeals, contending that it is entitled to a refund of the building permit fee. We granted the parties' applications for direct appellate review. Because we conclude that the doctrines of essential governmental functions and preemption limit, but do not completely prohibit, the town from imposing antinuisance conditions, we vacate the judgment of the Superior Court and remand the case for further proceedings consistent with this opinion. In addition, we reject GLSD's claim for a refund to the extent that it is based on the premise that the town lacks authority to issue a building permit. However, the record is inadequate to decide whether GLSD is contractually entitled to such a refund.

I. Background.

We take our facts from the judge's memorandum of decision, supplemented by undisputed facts in the record. GLSD,

established by the Legislature in 1968, is a body politic and corporate responsible for planning, building, and operating facilities to treat wastewater of its member communities. St. 1968, c. 750, §§ 2, 3, 5. The district is comprised of the city of Lawrence, the towns of Methuen, Andover, North Andover, and (by contract) Salem, New Hampshire. St. 1968, c. 750, as amended by St. 1982, c. 387. In 1977, GLSD began receiving wastewater, and disposed of the resulting sludge through the use of on-site incinerators. [Note 2] Eleven years later, the Commonwealth shut down the sludge incinerators because of odor and water pollution problems, and the Attorney General filed suit against GLSD under the Massachusetts Clean Waters and Clean Air Acts. As a result, the parties entered into an agreement that required GLSD to update and improve its facilities to meet Federal and State requirements.

Since 1988, GLSD has employed various short-term remedies for the transportation and disposal of wastewater sludge, none of which is appropriate as a permanent solution. The Legislature, in 1997, authorized GLSD to enter into contracts for the design, construction, and operation "of an on site biosolids processing facility," and the "disposal and beneficial use of sludge related thereto." St. 1997, c. 213, § 1. By 1998, GLSD developed a plan for the construction and operation of facilities to improve sludge thickening and dewatering, reduce disease-causing organisms in the sludge (referred to as pathogens), and control odors (contract I facility). The report also suggested the use of a thermal drying facility for the treated sludge

(contract II facility), which would produce an end product that would be sold as fertilizer pellets. In February, 1999, GLSD awarded the contract II facility to the New England Fertilizer Company (NEFCO). Both the contract I and II facilities have been approved by the Department of Environmental Protection (department), the town's conservation commission, and the Federal Aviation Administration. [Note 3]

During the planning and development of the facilities, the

town requested, among other things, that GLSD apply for a site assignment pursuant to G. L. c. 111, § 143, [Note 4] and that it pay a $200,000 building permit application fee. In an effort to resolve the intense disagreement over the town's authority to regulate the projects, GLSD and the town executed a memorandum of understanding (initial MOU) in March of 2000. Although the initial MOU acknowledged the parties' opposing positions with respect to the town's authority to regulate the proposed facilities, it provided a process for the town and its board of health (board) to review the environmental, public health, and safety impacts of the facilities.

By June 18, 2000, the town issued building permits for the contract I and II facilities. However, both permits contained statements that the board might still disapprove the facilities, or impose conditions on the construction or operation of the facilities. On June 19, 2000, the board voted to approve the contract I facility but not the contract II facility.

GLSD commenced this action in July, 2000, seeking declaratory and injunctive relief. In essence, the seven-count complaint sought a determination that the town violated the initial MOU, and that GLSD is immune from all town regulation concerning the contract I and II facilities, including site assignment, building permits, and any conditions regarding the construction or operation of the facilities. GLSD filed a motion for summary judgment in September, 2000, and a hearing on the motion was scheduled for that same month.

According to the parties, the board rescinded its vote disapproving the contract II facility shortly after the summary judgment hearing. The parties further allege that the board issued an order in November, 2000, which it called "the final MOU," imposing numerous conditions with respect to air quality, odors, noise, and traffic generated by the operation of the contract I and II facilities. Although the judge issued his memorandum of decision more than one year after hearing the motion for summary

judgment, that decision did not reference that the board had rescinded its vote to deny the site assignment and had instead ordered numerous conditions on the facilities' operation. [Note 5] In holding that the department had sole authority to issue site assignments, the judge broadly concluded that GLSD was immune from all local regulation. The judge ordered the building inspector to issue another building permit for the contract II facility "without any conditions," and ordered that a permanent injunction issue restraining the town from "interfering with or attempting to exert authority over GLSD." The town appeals from the broad ruling that the town does not have authority to impose any conditions on the facilities. [Note 6] GLSD argues that because the judge held that GLSD is immune from local regulation, he should have concluded that GLSD did not need a building permit and should have ordered the town to refund the permit

fee. GLSD further contends that it is entitled to a refund of the building permit fee under the terms of the initial MOU.

II. Discussion.

"The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the

nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117 , 120 (1991), citing Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). "An order granting or denying summary judgment will be upheld if the trial judge ruled on undisputed material facts and his ruling was correct as a matter of law." Commonwealth v. One 1987 Mercury Cougar Auto., 413 Mass. 534 , 536 (1992), citing Community Nat'l Bank v. Dawes, 369 Mass. 550 , 556 (1976). Because we conclude that the Superior Court judge erred as a matter of law in ruling that the town does not have authority to impose conditions on the proposed wastewater facilities, we vacate the grant of summary judgment.

A. The town's authority to impose conditions. The antinuisance conditions that the board seeks to impose relate to dust control and blasting, odor, noise, traffic, and miscellaneous other aspects of the facilities' operation. [Note 7] The judge concluded that the town did not have authority to impose any conditions on the contract I and contract II facilities because (1) the department has plenary authority over the granting of site assignments for wastewater treatment facilities, and (2) GLSD is a legislatively created body performing an essential government function and therefore is immune from municipal regulation. The town contends that the judge erred in concluding that the doctrines of preemption and immunity constitute an absolute prohibition on the town's ability to impose conditions on the facilities to prevent nuisance conditions. We agree.

The doctrine of essential governmental functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose, absent statutory provisions to the contrary. See Bourne v. Plante, 429 Mass. 329 , 332 (1999), quoting County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, 380 Mass. 706 , 710 (1980). "The scope of the immunity

is broad and [extends] to leased property and facilities." Id. at 713. It also applies to entity actions that are "reasonably related" to fulfilling the entity's essential governmental function. Bourne v. Plante, supra, citing Village on the Hill, Inc. v. Massachusetts Turnpike Auth., 348 Mass. 107 , 118 (1964), cert. denied, 380 U.S. 955 (1965).

The judge correctly noted that GLSD's legislative mandate involves "planning, building and operating facilities for the treatment and disposal of the wastewater generated by the designated towns." See St. 1968, c. 750, §§ 2, 5 (establishing GLSD as "a body politic and corporate" and delineating its authority); St. 1997, c. 213, § 1 (authorizing GLSD to contract for the "design, build, or operation[] . . . of an on site biosolids processing facility . . . and the

transportation, marketing, disposal and beneficial use of sludge related thereto"). As the judge concluded, such activities are "vital to the health and welfare of the population of the member towns," and GLSD performs an essential governmental function. Furthermore, the GLSD statutes do not include anything that suggests that the Legislature intended "to confer a 'municipal veto' " over GLSD's operation of its facilities. See County Comm'rs of Bristol v. Conservation Comm'n of Dartmouth, supra at 713. GLSD is therefore immune from municipal regulation that has the effect of interfering with the construction and operation of the contract I and II facilities or otherwise hinders the accomplishment of its statutory mandate. This does not mean, however, that the legislatively created entity has absolute immunity from all local regulation. It remains subject to regulations, including antinuisance regulations, that do not interfere with its ability to fulfil its essential governmental purposes and have only a negligible effect on its operations. See, e.g., Village on the Hill, Inc. v. Massachusetts Turnpike Auth., supra at 118 ("That the turnpike operations of the authority are exempt from local zoning provisions does not mean that local zoning provisions are not applicable to land owned by the authority which has become wholly excess to the authority's essential turnpike function"). Whether the conditions in this case will interfere with GLSD's ability to fulfil its legislative mandate is a question of fact to be resolved on remand.

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We now turn to the question whether the conditions ordered by the town are expressly or impliedly preempted by the department's regulatory authority. It is well settled that "[m]unicipalities may not adopt by-laws or ordinances that are inconsistent with State laws." Boston Gas Co. v. Somerville, 420 Mass. 702 , 703-704 (1995), and cases cited (analyzing express and implied preemption). The judge correctly identified the department's broad statutory scheme to regulate water and air pollution in general and GLSD's facility in particular. For example, the Clean Waters Act, G. L. c. 21, §§ 26-53, charges the department's division of water pollution control (division) with the prevention, control, and abatement of water pollution. See G. L. c. 21, §§ 27, 53. The general mandate of the act also includes provisions specifically related to wastewater facilities. [Note 8] In addition, the department must approve proposed sewerage systems before they can be established, G. L. c. 111, § 17, and must approve a town's acquisition of land "for the treatment, purification and disposal of sewage." G. L. c. 83, § 6. The department is also authorized to require operators of sewage treatment works to improve their facilities as necessary to prevent and abate nuisances. G. L. c. 83, § 7.

The department also has broad power to regulate air pollution. See G. L. c. 111, § 142A (authorizing department to adopt regulations "to prevent pollution or contamination of the atmosphere"). Pursuant to its authority, the department has promulgated general standards that prohibit emissions "which cause or contribute to a condition of air pollution," 310 Code Mass. Regs. § 7.09(4) (1994), in addition to regulations

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concerning the emission of dust, odor, and noise. See, e.g., 310 Code Mass. Regs. §§ 7.09(1), 7.10 (1994).

Moreover, the Legislature has specifically authorized the department to exercise control over GLSD. For example, GLSD's enabling statute required it to "present a plan for abatement of water pollution to the state division of water pollution control" (within the department). St. 1968,

c. 750, § 5. The statute also requires the division to "supervise the operation and maintenance of the facilities." Id. at § 7. In addition, the department was specifically authorized to "issue project approval certificates with respect to" the biosolids processing facilities. St. 1997, c. 213, § 12.

While this statutory scheme clearly limits the town's ability to regulate wastewater facilities and sewage disposal, it does not prevent the town from imposing limited antinuisance conditions. The proposed conditions in this case are not preempted based on any express or implied conflict with the department's statutory authority. [Note 9] We reject GLSD's argument that allowing the town to regulate nuisance conditions within the limitations set forth in this decision (i.e., conditions that do not prevent or interfere with GLSD's performance of its legislative mandate and that are not preempted by the department's regulatory authority), would subject it to "inconsistent regulation." Cf. Pereira v. New England LNG Co., 364 Mass. 109 , 113 (1973) (property owner not required to obtain municipal license after obtaining required approval from Department of Public Utilities). We also reject GLSD's argument that allowing the town to impose antinuisance conditions would give the town authority to bypass the courts and administrative agencies. Nothing in this opinion gives the town more authority than it currently has to regulate nuisance conditions.

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In its supplemental memorandum, and on appeal, the town argues that it has authority to impose antinuisance conditions under G. L. c. 111, § 31C, and G. L. c. 111, § 122. [Note 10] The department, in its amicus brief, further suggests that a town has authority to impose limited antinuisance conditions under certain regulations promulgated by the department. However, it appears that the board developed the final MOU, which contains the conditions the town seeks to enforce, based on the board's contractual authority under the initial MOU, not under the statutory authority it now cites. Indeed, the town and GLSD agreed in the initial MOU to "attempt in good faith to develop a mutually agreeable and legally binding memorandum of understanding (the 'Final Memorandum of Understanding') that addresses the environmental, and public health and safety impacts" of the facilities. The initial MOU further provided that the "voluntary process set forth" in the document was to be "a harmonization of and elaboration upon, and not in addition to, any other process potentially applicable under state or local law." Thus, we are presented with unique procedural circumstances, caused in large part because the town did not pursue its regulatory authority under State or local law, but instead relied on the contractually established procedure to impose conditions on the facilities' operations. As a result, the record contains inadequate information to determine whether the conditions were a proper exercise of the town's authority under State or local law in these circumstances. Moreover, this particular issue was not considered by the judge, given his conclusion that GLSD was immune to local regulation. To the extent that the parties continue to dispute the town's power to impose the antinuisance conditions, this issue will need to be resolved on remand.

Because we conclude that the Superior Court judge erred in holding that GLSD is completely immune from local regulation,

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we need not address the town's argument that the injunction was overbroad.

B. Building permit fee. In holding that the board did not have authority to grant or deny a site assignment, the judge concluded that the building permit would have been valid without the conditions, but for the fact that it expired in December, 2000. The judge therefore ordered the building inspector to issue another building permit without any conditions, and ruled that further "issues regarding the building permits are moot." Based on the judge's erroneous conclusion that GLSD is immune from town regulation, GLSD argues that the town does not have authority to issue a building permit, and therefore must refund the permit fee. [Note 11]

For the reasons stated above, the premise of GLSD's claim is erroneous. Moreover, implicit in the judge's ruling on the subject of the building permit is a conclusion that the GLSD facilities require a building permit. We agree. General Laws c. 143, § 3A, provides that "the local inspector shall enforce the state building code as to any building or structure within the city or town . . . including any building or structure owned by *any authority established by the legislature but not owned by the commonwealth*" (emphasis added). See 780 Code Mass. Regs. § 107.1 (1998). GLSD is an authority established by the Legislature and its facilities are not owned by the Commonwealth. There is nothing in GLSD's enabling statute or in the building code that suggests it is not subject to regulation by the local inspector. Moreover, obtaining a building permit does not interfere with GLSD's ability to fulfil its essential governmental function. Therefore, we conclude that GLSD is required to obtain a building permit, in compliance with the State building code, as enforced by the local inspector. GLSD's argument that Perini Corp. v. Building Inspector of N. Andover, 7 Mass. App. Ct. 72 (1979), suggests a contrary result is without merit. See id. at 74, 77 (expressly declining to "decide whether the State Building Code is applicable to" a GLSD facility or "whether a building permit is required").

GLSD, however, also argues that it is entitled to a refund of

the building permit under the contractual terms of the initial MOU. Whether the town is obligated to refund the building permit fees under the initial MOU is a question of fact to be resolved on remand.

III. Conclusion.

In summary, we conclude that the doctrines of preemption and essential governmental functions do not prevent the town from imposing antinuisance conditions that (1) do not interfere with or burden GLSD's performance of its legislative mandated wastewater treatment function, and (2) do not conflict with the department's regulatory authority. Similarly, we conclude that the town has authority to issue building permits for the proposed facilities. However, factual questions, such as whether these particular conditions will interfere with GLSD's legislative mandate, and whether the town is contractually obligated to refund the building permit fees, cannot be decided on the present record. Accordingly, we vacate the judgment of the Superior Court and remand the case for further proceedings consistent with this opinion.

So ordered.

FOOTNOTES

[Note 1] The board of health of North Andover and the board of selectmen of North Andover. The first amended verified complaint also named the Massachusetts Departments of Environmental Protection and Public Safety, and New England Fertilizer Company (NEFCO). The Superior Court judge granted the Commonwealth's motion to dismiss, which was not appealed. Because NEFCO joined the motion for summary judgment of the Greater Lawrence Sanitary District (GLSD), the Superior Court treated NEFCO as a plaintiff for purposes of the motion. NEFCO has not appealed from the judge's decision.

[Note 2] Sludge is made up of partially cleansed solids that have been removed from the wastewater. It is infectious and requires special handling.

[Note 3] Approval from the Federal Aviation Administration was required because the proposed contract II facility included a smokestack.

[Note 4] The town relied on the portion of G. L. c. 111, § 143, which states: "No trade or employment which may result in a nuisance or be harmful to the inhabitants, injurious to their estates, dangerous to the public health, or may be attended by noisome and injurious odors shall be established in a city or town except in such a location as may be assigned by the board of health . . . ."

[Note 5] The record includes two letters written by the town's attorney in October, 2000, informing the judge of the board's anticipated action and requesting that the court "refrain from ruling on the pending summary judgment motion." Such correspondence with the judge is inappropriate. A party requesting that the court take any action, including a request that it stay some action, is to be presented by motion, not by way of letter.

The record also includes supplemental memoranda, allegedly filed in the Superior Court in November, 2000, that delineate the parties' factual and legal arguments concerning the effect of the board's actions subsequent to the motion hearing. Despite a letter from the town's attorney stating that he would file the memoranda, the docket does not reflect that the papers were ever filed, and the judge's decision does not include any reference to the information contained in the memoranda. (The record also contains a request for oral argument on the issues raised by the parties' supplemental memoranda. Again, however, there is no indication that this request was filed with the court.) Whether the Superior Court actually received the supplemental memoranda does not affect our decision because GLSD's complaint asserted that the town was prohibited from imposing any conditions on the facilities, and the summary judgment decision gave GLSD relief in that comprehensive scope.

[Note 6] There is no longer a dispute that the town lacks authority to issue a site assignment for the wastewater treatment facilities. At oral argument the town conceded that it could not prohibit or veto a site assignment, or select an alternative site for these facilities.

[Note 7] The miscellaneous conditions include fire protection, town access to facilities, reimbursement for town services, and monitoring fees. The town's order also included ten conditions concerning air pollution. The town alleges, however, that the air pollution conditions were incorporated in a settlement agreement with the department, and therefore the town is no longer seeking to impose them.

[Note 8] The Clean Waters Act includes the following sections concerning wastewater treatment facilities: the department's division of water pollution control (division) is required to "[a]dopt

regulations requiring proper operation and maintenance of waste treatment facilities" (G. L. c. 21, § 27 [9]); the division may "propose water pollution abatement districts consisting of . . . cities or towns," and can order the "mandatory formation" of such districts (G. L. c. 21, § 28 [a] and [b]); the division "shall supervise the operation and maintenance of treatment works within the commonwealth" (G. L. c. 21, § 34); there is a "board of certification of operators of wastewater treatment facilities," charged with ensuring "the proper management, operation and maintenance of wastewater treatment systems and facilities" (G. L. c. 21, § 34A); a permit issued by the division is required for construction, installation, modification or operation of an outlet to discharge pollutants into waters of the Commonwealth (G. L. c. 21, § 43 [2]).

[Note 9] Notably, the amicus brief filed by the department "suggests that the Final MOU conditions that regulate GLSD facilities' dust, noise and odor regulations are not preempted by [the department's] plenary authority over pollution discharges from sewage treatment plants generally and GLSD's facilities in particular." The department also noted that the "traffic and miscellaneous provisions do not raise environmental concerns within [the department's] usual jurisdiction." GLSD has not argued that the conditions are preempted by any State entity other than the department.

[Note 10] The town also argued that it had the authority to assign a site for the facility under G. L. c. 111, § 143, and that the authority to so assign encompassed the authority to impose conditions. However, as previously noted, note 6, supra, the town is no longer pressing this claim. Moreover, the judge correctly concluded that the doctrines of essential governmental functions and preemption prohibit the town from issuing site assignments for the contract I and II facilities. General Laws c. 111, § 143, does not provide a basis for the town's authority to impose conditions.

[Note 11] Because GLSD requested the refund in its complaint, we reject the town's argument that this issue was waived.

Exhibit G

VILLAGE ON THE HILL, INC. vs. MASSACHUSETTS TURNPIKE AUTHORITY & another. SAME vs. BUILDING COMMISSIONER OF BOSTON.

348 Mass. 107

October 8, 1964 - November 12, 1964

Suffolk County

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Where it appeared that part of land taken from a landowner by the Massachusetts Turnpike Authority by eminent domain became, in the circumstances, with other land of the Authority, an excess area which the Authority contracted to sell to a private industrial concern displaced from the former site of its plant by the turnpike and on which the concern was permitted by the Authority to erect a new plant before conveyance to the concern, and that part of the land taken was used for relocation, over a reasonable route, of a way in order to furnish necessary access to such excess area from public ways, there was, on the facts, no merit in a contention that the taking was invalid on the ground that, although purportedly made for the purposes of the turnpike, in reality it was made to benefit the concern. [114-115]

Where the State Department of Public Works had approved a relocation of a public way by the Massachusetts Turnpike Authority but not an extension thereof for which the Authority made a taking of land by eminent domain in the name of the municipality, the establishment of the extension as a public way could be perfected either by obtaining approval of it by the Department of Public Works as part of the relocation of the existing public way or by municipal action to lay out the extension, and the taking was not beyond the power of the Authority under St. 1952, c. 354, Section 7, as amended by St. 1958, c. 384. [115-117]

Local zoning provisions were applicable to land of the Massachusetts Turnpike Authority which had become an excess area no longer needed in any way for the Authority's functions and which the Authority had contracted to sell to a private concern, even though the conveyance to the concern had not yet been made. [118-119]

In a mandamus case to compel a municipal building commissioner to enforce local zoning provisions as to residentially zoned land on which

an industrial building was erected, a denial of the writ on the erroneous ground that such land was not subject to the local zoning provisions was reversed by this court, but in the circumstances the case was remanded to the trial court for further proceedings, which might include a determination whether the zoning and other aspects of the situation had changed or were likely to change in the near future, and for exercise of discretion as to the time and terms of any relief then appearing to be appropriate. [119-120]

BILL IN EQUITY filed in the Superior Court on April 15, 1963.

PETITION for a writ of mandamus filed in the Superior Court on May 10, 1963.

The cases were heard by Brogna, J.

Joseph B. Abrams (Joseph Graglia & Robert T. Abrams with him) for Village on the Hill, Inc.

Lawrence J. Moore, Assistant Corporation Counsel, for the Building Commissioner of Boston.

John L. Murphy, Jr. (Arthur A. Karp with him) for Massachusetts Turnpike Authority.

Sumner H. Babcock (Francis S. Moulton, Jr., with him) for Rivett Lathe & Grinder, Inc.

CUTTER, J. These two cases grow out of the authority's eminent domain taking of land of the plaintiff (Village) in the Brighton district of Boston in connection with extending the Massachusetts turnpike to Boston. The first case, a bill primarily for declaratory relief, alleges that the takings were illegal and part of a plan by the authority and a defendant in the equity suit, Rivett Lathe & Grinder, Inc. (Rivett), to deprive Village of its property for the benefit of Rivett. The bill also seeks injunctive relief concerning the relocation (on or near Village's property) of a private way known as Newton Street and the construction, in part upon land taken from Village, of a factory building designed for Rivett's use. The second case is a petition by Village for a writ of mandamus to compel the building commissioner of Boston to enforce the Boston zoning law (St. 1924, c. 488, Section 18) which at the time of the filing of the petition (May 10, 1963) placed in a general residence district part of the land upon which the factory building was being constructed.

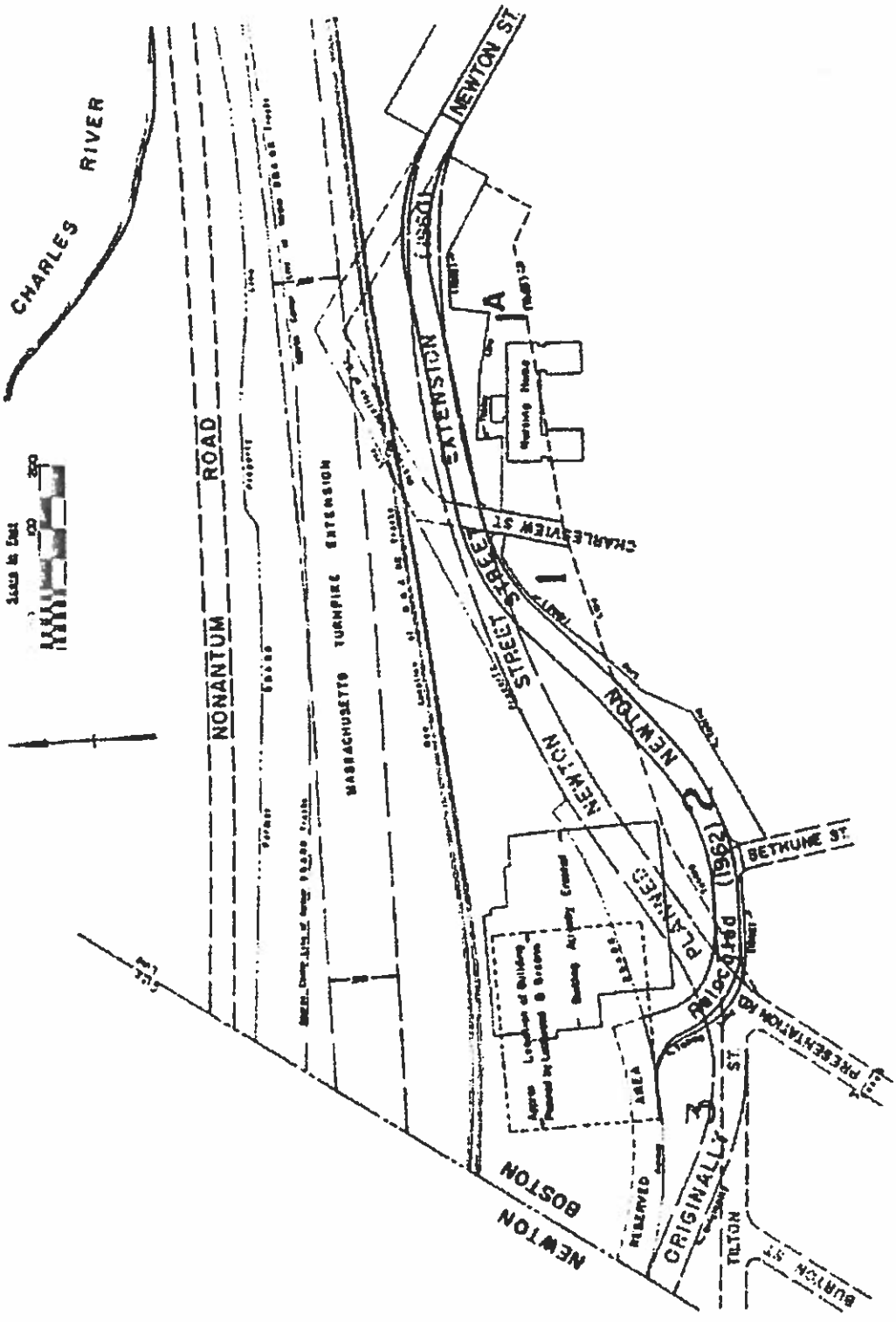
The facts are stated, except as otherwise indicated, upon the basis of the trial judge's findings in these cases. In the equity case, Village has appealed from a final decree that the authority's taking of Village's land "was a taking for a public purpose and not for the private need of Rivett." In the mandamus case, Village has appealed from an order that the petition be denied.

THE EQUITY SUIT.

Rivett owned a plant at a point somewhat east of the area with which the bill is concerned. In 1957, one Hunt, Rivett's president, learned from the authority's chairman that the Rivett plant would probably be taken for the turnpike extension. Hunt was advised to "take steps to relocate" the plant. In July, 1959, Hunt and his wife bought a parcel in Waltham and gave Rivett an option to purchase it at the price paid by the Hunts.

There was a delay for some time when plans for selling certain authority bonds were postponed, but in January or February, 1961, Hunt ascertained that the turnpike extension would go through his plant. In March, 1961, representatives of the authority told Hunt that there would be "extra land" in the Faneuil Dump area, near the Newton-Boston boundary, which might be suitable for Rivett's new plant. "This area consisted of land owned by the Boston & Albany Railroad which the . . . [a]uthority had a right to purchase." On July 16, 1962, Hunt received a plan from Rivett's engineers (Lockwood and Greene) indicating "a proposed plant within . . . the Faneuil Dump area previously owned by the . . . [r]ailroad."

At meetings in September, 1962, attended by Hunt and representatives of the authority, Rivett's damages for the taking of its old plant were determined and Rivett (subject to the approval of its directors) agreed to buy part of the dump area for $100,000 "if access and utilities were" available. Hunt, instead of moving to Waltham or elsewhere, "preferred to relocate . . . in the Brighton area" where most of Rivett's employees lived. Consultations with the mayor and the city's assessing commissioner resulted in assurances


CHARLES RIVER
NONANTUM ROAD
MASSACHUSETTS TURNPIKE EXTENSION
NEWTON ST
EXTENSION
STREET
CHARLESVIEW ST
NEWTON
BETHUNE ST
PLAINFIELD
PRESENTATION RD
ORIGINALLY
TILTON
BURTON ST
NEWTON
BOSTON
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AREA
1
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(apparently designed to retain Rivett's properties, business, and jobs in Boston) concerning 1963, 1964, and 1965 assessments on the land to be purchased and the building to be constructed by Rivett.

The exhibits show that the proposed turnpike extension in this dump area in general followed the then existing line of the Boston & Albany Railroad. This necessitated moving the railroad tracks to the south and away from the Charles River. There would be no access over the tracks to the proposed turnpike from the dump area. Although the record is not very clear on this point, various exhibits strongly indicate that there would have been no access (except over intervening private land) from any public way to so much of the former railroad dump land as was not needed for the relocated railroad or the turnpike, if the authority had not arranged some extension and relocation of private ways and "paper" streets to the south and east of the dump area.

The attached sketch plan shows the principal features of the Faneuil Dump area and its surroundings. [Note 1] Apart from a strip at the northern edge of the plan, the land immediately east of the Newton-Boston boundary and north of the more southerly line marked "Former B. & A.R.R. Property Line" had been owned by the railroad prior to the turnpike construction. There seems to be no doubt that the authority owned, or had the right to acquire, the railroad land, within which the original Lockwood and Greene plan indicated most of Rivett's new plant could be built (see dotted lines on sketch plan showing approximate location). The authority's 1960 plans showed a projected extension of Newton Street (see fn. 1) "through the former [r]ailroad

property . . . westward into Newton" (see the dotted lines marked "originally planned Newton Street Extension"). In mid-September, 1962, Hunt was told by the authority's chairman "that the proposed relocation of Newton Street would not continue as previously planned to the Newton [c]ity line but would stop somewhere in the Faneuil Dump area and that a reserve[d] . . . [area, marked on the sketch plan] would have to be retained for the future extension of this road into Newton." This change appears to have developed in the manner described in the margin. [Note 2]

This 1962 change in the location of Newton Street to the route marked on the sketch plan, "Relocated (1962) Newton Street Extension," made it "impossible to locate the Rivett . . . plant wholly on former railroad land . . .. The relocation . . . deprived Rivett . . . of some 44,000 square feet of relatively level land," and changed the shape of the lot available for sale. As a consequence, the authority reduced the price to Rivett from $100,000 to $80,000.

A purchase and sale agreement, dated January 17, 1963, described the revised area as including land "between the southerly border of the former Boston & Albany land and the northerly side of relocated Newton Street." See the sketch plan. The agreement, among other things, provided that Rivett "at its own risk and expense, may enter upon the property for . . . construction of its new plant as soon

as the [a]uthority obtains title to . . . premises . . . not then owned by" it.

On October 18, 1962, the authority took some of Village's land. This land lay (see sketch plan) [Note 3] largely south and east of the former railroad land. The order recited, among other things, that the taking was for the turnpike extension and "for the purpose of relocating and constructing a portion of a private way (Newton Street)." Village's land was taken (as the evidence shows, in January, 1963) for "the [c]ity of Boston and the [c]ity approved the location of Newton Street extended and the plans for the utilities therein." The Department of Public Works "approved the relocation of that part of old Newton St[reet] which was a public way but has never been requested to approve the relocation . . . of that part . . . which was a private way."

Prior to the date of the judge's findings (September 4, 1963) there had been no conveyance from the authority to Rivett. Legal title to the premises, including the building being constructed there by Rivett, remained in the authority. The judge found, however, that it was "the present intention of the parties to . . . fulfill the terms of the purchase and sale agreement." Rivett started site clearing on November 14, 1962, and at the time of the trial (in late June, 1963) construction of the building was nearly completed. [Note 4]

With respect to the relocation of Newton Street, west of Charlesview Street, the judge made findings. "When Newton Street was relocated farther north [Note 5] to avoid the nursing

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home, the grade of Newton Street up to its connection with Charlesview Street was increased so that its high point was at" that connection. "Once this was done, from an engineering standpoint, it was also necessary to bring the Newton Street extension toward Presentation Road in order to avoid excessive fill and excessive grade down" from the high land (see fn. 2) near Charlesview Street "into the former railroad property and also to provide for a more level connection with Presentation Road and Tilton Street, when and if they are extended to meet Newton Street as relocated."

The judge reached the following principal conclusions: (1) The DeLeuw firm (see fn. 2) acted in good faith and in accordance with sound engineering principles in relocating Newton Street and not in an attempt to assist Rivett. (2) The "[a]uthority did not take . . . [Village's] land for the purpose of sale or lease . . . to Rivett . . . [or] under the guise of public need with a design of depriving . . . [Village] of its property for the private need of Rivett."

1. The case was heard upon evidence consisting of numerous exhibits and voluminous oral testimony. The ultimate conclusions of fact of the trial judge are supported by his subsidiary findings and are not shown by the reported evidence to be plainly wrong in any material respect. See Spiegel v. Beacon Participations, Inc. 297 Mass. 398 , 407-408; Lima v. Avery, 343 Mass. 179 , 180. The judge was justified by the evidence in finding that the relatively minor

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1962 adjustments of the authority's original plans (which had been made as early as 1960) for relocating and extending Newton Street, were based upon sound engineering judgment rather than upon the desire to help Rivett.

The authority had ample power to make reasonable provision for access to the Faneuil Dump land which otherwise would have no direct access to highways after the turnpike construction. See Luke v. Massachusetts Turnpike Authy. 337 Mass. 304 , 306, 309-310. When the dump area was merely vacant land used in connection with the railroad, it probably needed no greater possibility of access than was afforded by the private, unconstructed portion of Newton Street. After the dump land was acquired by the authority, was reduced in size by the turnpike and relocated rails, and became in part excess to the authority's needs, it was appropriate for the authority (see St. 1952, c. 354, Sections 5 [j], 7) to sell that excess land. Before doing so, it was reasonable for the authority to provide that substantial excess parcel with highway access over a substitute for the originally planned (but unsuitable) 1960 extension of Newton Street. See Wright v. Mayor & City Council of Cambridge, 238 Mass. 439 , 440-441. It was within the power of the authority to take this action as a proper "by-product" of the public purpose involved in the construction of the turnpike extension. See the Luke case, 337 Mass. 304 , 309. See also Robie v. Massachusetts Turnpike Authy. 347 Mass. 715 , 725-729.

2. It is argued that the authority had no power under St. 1952, c. 354, Section 7 (as amended by St. 1958, c. 384) [Note 6] to take land in the name of the city unless it did so in order to relocate

a public way. In a sense the whole relocation and extension of Newton Street may be viewed as a relocation of the former public way known as Newton Street east of Charlesview Street. If this was the theory on which the authority made the taking, it should have obtained at some time the approval of the whole relocation by the State Department of Public Works, although nothing in Section 7 makes such approval a condition precedent to the validity of the taking. [Note 7] If obtaining such approval has been omitted by inadvertence, it may be accomplished now.

The old "paper" Newton Street west of Charlesview Street, however, was a private way where it abutted on Village's land. The authority may well have proceeded on the basis that it was only relocating a private way. On this view of the facts, the department's approval was not required, for Section 7 does not in express terms require such approval of the relocation of a private way. The question remains, nevertheless, whether the taking in such a case could be made in the name of the city.

The authority had broad authority, under principles discussed above and in the Luke case, 337 Mass. 304 , 309-310, to take property in its own name to provide access to the Faneuil Dump area. See St. 1952, c. 354, Section 5 (j), (k), (p). After such a taking, the authority, as a reasonable method of providing such access, could have transferred the westerly part of Newton Street to the city so that it could take action to lay it out as a public way (see St. 1906, c. 393, Sections 1, 2, as amended respectively through Sp. St. 1917, c. 318, and St. 1957, c. 20). What the authority has in effect done is to do in one step, by a taking in the name of the city, what it could have done by a taking in its own name followed by other action.

Where the taking of the western end of the street was so closely related to the duly approved relocation of the former

public portion of Newton Street, we hold that it was authorized by Section 7. The creation of the extension of Newton Street as a public way may now be perfected either by obtaining the department's approval of the whole relocation or by city action to lay out the western end of the street as a public way.

Decree affirmed.

THE MANDAMUS CASE.

In the mandamus case, the building commissioner admitted in his answer, among other things, (1) that Village prior to November 7, 1962 (the date of recording the takings), owned land in the vicinity of Newton Street, a substantial part of which was taken, and (2) that on November 9, 1962, Rivett applied for a building permit, which was issued to Rivett on December 28, 1962. The trial judge made findings which incorporated the findings in the equity case "by reference insofar as they may be relevant to . . . [the] petition for mandamus." He also found (1) that the authority owned (at the time of the findings, September 4, 1963) "the land upon which the building is being constructed by Rivett"; (2) that the time for performance under the purchase and sale agreement between Rivett and the authority "has passed and has not been extended"; (3) that "although the expressed intention of the parties is to carry out the . . . agreement . . . legal title . . . has not yet passed from the . . . [a]uthority; and (4) that "a substantial portion of [the] land upon which a manufacturing building is being built by Rivett . . . is in a [g]eneral [r]esidence [d]istrict (R40), under the . . . zoning regulations of . . . Boston and that the erection of a manufacturing building is prohibited in such a . . . [d]istrict." The judge went on to say, "I cannot find as a fact that title will pass out of the . . . [a]uthority. I cannot overlook the possibility that some condition (such as inability to pay for land) may crop up . . . and that therefore title may never pass from the . . . [a]uthority." He ruled that the property "owned by the . . . [a]uthority is not subject to the zoning regulation of . . . Boston."

Statute 1952, c. 354, Section 3, created the authority. It provides that it "shall not be subject to the supervision and regulation of the department of public works or of any other department . . . or agency of the commonwealth except to the extent and in the manner provided in this act. The [a]uthority is hereby constituted a public instrumentality, and the exercise by the [a]uthority of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed . . . to be the performance of an essential governmental function." The nature of the authority has been recently discussed. See Massachusetts Turnpike Authy. v. Commonwealth, 347 Mass. 524 , 527-528; Gardner v. Massachusetts Turnpike Authy. 347 Mass. 552 , 556, 562. The Boston zoning statute (see St. 1924, c. 488, Section 22, as amended by St. 1928, c. 70) does not "apply to buildings or land belonging to and occupied by the . . . commonwealth." Although the property held by the authority is eventually to belong to the Commonwealth (see St. 1952, c. 354, Section 17), it is not now owned by the Commonwealth. Nevertheless, the Legislature, by St. 1952, c. 354, as amended, made the authority sufficiently governmental in character so that the actual construction and operation of the turnpike, its essential "government function," and action reasonably related to that function, should not be prevented by a zoning statute applicable to one municipality or by a local zoning ordinance or by-law. See, e.g. c. 354, Sections 1, 5 (j).

That the turnpike operations of the authority are exempt from local zoning provisions does not mean that local zoning provisions are not applicable to land owned by the authority which has

become wholly excess to the authority's essential turnpike function. We would be slow to conclude that the Legislature intended any such extraordinary result. See Massachusetts Turnpike Authy. v. Commonwealth, 347 Mass. 524 , 527-528. Certainly, after the authority has conveyed in fee to private persons excess land formerly owned by it, such land does not remain exempt from zoning provisions because once owned by the authority.

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Upon the facts found by the judge, it seems clear that the authority had no longer, for its turnpike operations, any remaining need whatsoever for, or interest in, the area which it had agreed to sell to Rivett. After the contract of purchase and sale had been made, the building commissioner should properly have denied Rivett's application when it requested a permit to erect a building for its own private uses in violation of the zoning statute. See Smith v. Zoning Bd. of Appeals of Scituate, 347 Mass. 755 , 759. The trial judge, subject only to the considerations mentioned below, should have ordered that the commissioner enforce the zoning provisions.

Mandamus is in some degree a discretionary remedy. Massachusetts Soc. of Graduate Physical Therapists, Inc. v. Board of Registration in Medicine, 330 Mass. 601 , 605-606. See Nichols v. Dacey, 329 Mass. 598 , 600; MacNeil v. Superior Court, 339 Mass. 774 . The trial judge, in determining whether to grant immediate relief, was properly entitled to take into account the situation existing at the time of the trial. The turnpike extension had not been completed. When completed, it might well turn out to affect materially the character of the neighborhood. Most of the land north of the relocated Newton Street, near the Faneuil Dump area, was zoned for industrial use. Only a small segment was in a residential zone. The judge, as matter of discretion, might properly have delayed relief by mandamus for a reasonable time (see Nickols v. Commissioners of Middlesex County, 341 Mass. 13 , 26-27, and analogy of Chesarone v. Pinewood Builders, Inc. 345 Mass. 236 , 242-243) sufficient to permit application for a change in zoning or for a variance, or for other proper reasons in the interest of justice. [Note 8]

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Apart from such an exercise of discretion, relief should have been granted.

The order for judgment is reversed. The case is remanded to the Superior Court for further proceedings consistent with this opinion, which may include, among other things, (1) taking further evidence to determine whether the zoning and other aspects of the situation have changed or are likely to change in the near future, and (2) the exercise of reasonable discretion as to the time and terms of whatever relief may then appear to be appropriate.

So ordered.

FOOTNOTES

[Note 1] The sketch plan is a simplification of various exhibits. The portions of Newton Street, Bethune Street, Presentation Road, and Burton Street in the immediate neighborhood of the

dump area were shown as private ways on 1960 Land Court plans of Village's land. The trial judge found (apparently, in part, on the basis of a relocation plan approved by the Department of Public Works) that "Newton Street was a public way . . . [coming from the east, only] to approximately the point where it joined with Charlesview Street. From this point . . . in a westerly direction . . . a private way called Newton Street . . . [led] to the [railroad] property . . .. This . . . was a paper street only and had never been developed."

[Note 2] Under date of June 11, 1962, engineers acting for the authority instructed another engineering firm, DeLeuw, Cather & Co., to make studies and submit "recommendations as to a revised location" of Newton Street. The DeLeuw firm was told that "the portion of Newton Street in Newton will not be constructed," and that it had been suggested "in order to avoid the possibility of affecting . . . [a] nursing home" (see lower right part of sketch plan) that Newton Street be constructed further to the north than had previously been proposed. On July 26, 1962, this firm brought forward a "plan in which the Newton Street extension was made to swing in a southerly direction," which would necessitate taking some of Village's land. The evidence (including a contour plan) indicates (1) that the elevation of the proposed relocation of Newton Street at its junction with Charlesview Street was about eighty-five feet, and (2) that near where the 1960 planned extension of Newton Street approached the former railroad land the elevation was around thirty-five to forty feet. The distance between the railroad land and the intersection of Newton Street and Charlesview Street (scaled from a map in evidence) is about 480 feet. The 1960 route would thus have dropped about forty-five to fifty feet in 500 feet, a ten percent grade or a little less. The 1962 route made approximately the same descent in 1,040 feet, an average grade of about five percent.

[Note 3] All of the area taken except the area marked "2" would have been taken under the 1960 plan. The areas marked "1," "1A," and "3" would apparently have been taken under the 1960 plan, but were not taken in 1962.

[Note 4] Rivett had agreed that it would be out of its old plant within six months after construction started on the new plant. Because of the need for speed, the use of prefabricated materials was investigated and Rivett signed a construction contract on January 2, 1963. Rivett's contractor applied for a building permit in Rivett's name, because "not aware of the legal niceties of the situation in which title had not yet passed to Rivett."

[Note 5] The evidence does not show that, near the nursing home east of Charlesview Street, Newton Street (as distinguished from the taking line, see sketch plan) was in 1962 moved north from its 1960 planned location. There was evidence, however, that this part of Newton Street was raised in elevation so that "less space for slopes" was required; and that in 1960, when this area was vacant land, the "plans were laid out on the basis of no [retaining] walls" while the "1962 plans . . . [provided] bin-type retaining walls to avoid the taking of new buildings." Apparently these engineering adjustments permitted less of a cut into the hill and thus avoided damage to the nursing home (under construction in 1962). The trial judge's reference to moving Newton Street north in this area probably is to the change in the taking line. His discussion of the 1962 action east of Charlesview Street appears immaterial because the crucial factors in relocating Newton Street west of Charlesview Street were the elevations (see fn. 2) of the planned intersection of these streets (not changed between 1960 and 1962) and the former railroad land. The evidence (engineers' testimony and exhibits) about the topography of the area west of the intersection, by itself, justifies the significant finding in effect that, to obtain a proper grade from the intersection to the railroad land, it was good engineering to adopt the 1962 curved relocation of the extension.

[Note 6] Statute 1952, c. 354, Section 7 (as amended by St. 1958, c. 384), provides in part: "If the [a]uthority shall find it necessary to change the location of any portion of *any public highway*, it shall reconstruct the same at such location as the [a]uthority shall deem most favorable, with the approval of the state department of public works, and of substantially the same type and in as good condition as the original highway. The cost of such reconstruction and any damage incurred in changing the location of any such highway shall be ascertained and paid by the [a]uthority as a part of the cost of the turnpike. In exercising the power herein granted, the [a]uthority may take private property *in the name of a city or town* by exercise of the power of eminent domain . . ." (emphasis supplied).

[Note 7] We see no reason why the authority may not proceed reasonably with its eminent domain program, once it has obtained approval by the Department of Public Works of the general turnpike route, without settling the details of each appropriate relocation of local public ways, private ways, and rights of access. See St. 1952, c. 354, Section 1, as amended through St. 1955, c. 47; Robie v. Massachusetts Turnpike Authy. 347 Mass. 715 , 719-721.

[Note 8] It was suggested at the arguments that there had been changes of the zoning of the portion of the dump area which were in a residential area at the time of the trial. The record reveals nothing about this, and thus we do not now consider whether any such change, or a variance, would have been proper in view of the changes in the dump area caused by the turnpike extension, the moving of the railroad tracks, the relocation and extension of Newton Street, and related matters. Any changes of zoning, of course, may be shown in the Superior Court in the further proceedings now ordered and may affect the judgment there to be entered.