The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1973

PUBLICATION OF THIS DOCUMENT APPROVED BY ALFRED C. HOLLAND, STATE PURCHASING AGENT.

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The Commonwealth of Massachusetts

Boston, December 5, 1973

To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1973.

Respectfully submitted,

Robert H. Quinn
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

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Assistant Attorneys General

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Thomas J. Crowley
John P. Davey
Samuel R. DeSimone
Dennis L. Ditelberg
Richard T. Dolan
Bernard F. Dwyer[2]
Stephen A. Ferguson
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Edward M. Mahoney[4]
Hugh Morgan
John H. O'Neil
Leo A. Reed
Paul E. Ryan
Herbert L. Schultz
Sidney Smookler
David S. Tobin
John J. Twomey

Assistant Attorneys General Assigned to Metropolitan District Commission

Roger L. Aube
John F. Houton
George Jacobs
James P. McAllister

Assistant Attorneys General Assigned to the Division of Employment Security

Joseph S. Ayoub
Hartley C. Cutter

Assistant Attorney General Assigned to the Veterans' Division

Harold J. Keohane

Chief Clerk

Russell F. Landrigan

Assitant Chief Clerk

Edward J. White

[1]Appointed July 1972
[2]Appointed August 1972
[3]Appointed September 1972
[4]Appointed October 1972
[5]Appointed November 1972
[6]Appointed February 1973
[7]Appointed March 1973
[8]Appointed June 1973
[9]Terminated July 1972
[10]Retired July 1972
[11]Terminated August 1972
[12]Terminated September 1972
[13]Terminated January 1973
[14]Terminated February 1973
[15]Terminated March 1973
[16]Terminated June 1973

STATEMENT OF APPROPRIATIONS AND EXPENDITURES
For The Period
July 1, 1972 — June 30, 1973

Appropriations

0810-0000	Administration	$3,124,885.62
0810-6610	Anti-Trust Settlement — Concrete Pipe Case	47,980.48
0810-6613	Consumer Protection Research and Pilot Program	99,437.59
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance Center	619.00
0810-6615	Organized Crime — Law Enforcement Training	32,478.21
0810-6616	Drug Training, Manual and Technical Assistance	41,705.00
0810-6617	Organized Crime Unit, Phase 2, Intelligence Retrieval and Dissemination System	7,412.50
0810-6618	Training and Reference Materials	48,500.00
0810-6619	Organized Crime Unit	82,708.00
0810-6620	Drug Intelligence Information	35,000.00
0810-6621	Criminal Appellate Program	40,000.00
0811-6614	Attorney General Trust Fund	219.30
0811-6615	Organized Crime Technical Assistance Center	4,184.56
0821-0100	Settlement of Claims	199,500.00
		$3,764,630.26

Expenditures

0810-0000	Administration	$2,711,360.01
0810-6610	Anti-Trust Settlement — Concrete Pipe Case	47,980.48
0810-6613	Consumer Protection Research and Pilot Program	92,002.80
0810-6614	Organized Crime Investigation Training and Preliminary Design of Technical Assistance Center	43.80
0810-6615	Organized Crime — Law Enforcement Training	32,432.18
0810-6616	Drug Training, Manual and Technical Assistance	29,515.12
0810-6617	Organized Crime Unit, Phase 2, Intelligence Retrieval and Dissemination System	7,373.05
0810-6618	Training and Reference Materials	19,134.92
0810-6619	Organized Crime Unit	48,113.76
0810-6620	Drug Intelligence Information	26,183.12
0810-6621	Criminal Appellate Program	30,216.46
0811-6614	Attorney General Trust Fund	—
0811-6615	Organized Crime Technical Assistance Center	4,184.56
0821-0100	Settlement of Claims	199,465.57
		$3,248,005.83

Income

0801-40-01-40	Fees — Filing Reports Charitable Organizations	$18,900.00
0801-40-02-40	Fees — Registration Charitable Organizations	5,847.00
0801-40-03-40	Fees — Professional Fund Raising Council or Solicitor	90.00
0801-69-99-40	Miscellaneous	6,832.30
		$31,669.30
	Reimbursement for Services:	
0801-62-02-40	Cost of Investigations	6,525.00
		$38,194.30

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Boston, December 5, 1973

To the Honorable Senate and House of Representatives:

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

INTRODUCTION

My fifth Annual Report as Attorney General of the Commonwealth of Massachusetts, as required by G. L. c. 30 and 32 encompasses the fiscal year from July 1, 1972 to June 30, 1973.

Of major significance during this reporting period was the enactment of St. 1972 c. 781, an act establishing the Division of Environmental Protection within the Department of the Attorney General. Although I have had this Division functioning effectively for some time, its formal creation will serve as notice of the seriousness with which my office plans to pursue environmental quality in the Commonwealth. (*See* the Division report *infra*.)

On other fronts, I have overseen a continuing effort to expand available services to Massachusetts citizens — from their roles as consumers to individuals faced with an often confusing and unresponsive bureaucracy. I have endeavored to call upon the dual resources of information programs and manpower to "spread the word" to our citizens that the office of the Attorney General will brook no unwarranted tampering with their rights, liberties, and privileges.

The ever-present drug problem faced by most communities today has also consumed much time and effort by my office. I believe that our first responsibility in this area is education — not only of potential victims of this particular scourge, but also of those whose duty it is to prevent its spread and cure its pernicious effects. Cooperation from the federal government, our sister states, and law enforcement agencies is beginning to realize gains in this sphere which I trust serves the public interest.

If any occupation has "glamorous" aspects, while they may profitably be singled out for their intrinsic worth, these aspects should never be allowed to over-shadow the great value of the day-to-day competent performances which I hope the public has learned to expect from the office of the Attorney General.

Administrative

During the fiscal year, the Division prepared fifty formal opinions for the signature of the Attorney General. In addition, eighty-six informal opinions were issued, signed by various assistant attorneys general. Six requests for legal opinions were withdrawn due to mootness. Fifteen

formal opinions under the conflict of interest law (c. 268A of the General Laws) were issued, and a number of other requests were disposed of informally by letter of conference.

While each of the opinions rendered was important, a few were of unusual interest. In two opinions (Nos. 11 and 32), the Attorney General advised that citizenship, residency and domicile requirements for public employment were unconstitutional. While such a holding had resulted in a lower federal court case in New York, the opinion was given in advance of a definitive decision by the Supreme Court of the United States. On June 23, 1973, the Supreme Court, in an 8 to 1 decision in the case of *Sugarman* v. *Dougall*, affirmed the lower court ruling and held that citizenship was an unconstitutional requirement for public employment.

In an opinion rendered early in the fiscal year (No. 2), the Attorney General ruled that the Trustees of the University of Massachusetts had the authority to enter into leases and tenancies at will without first obtaining the approval of certain legislative and executive officials as is required for most state leases and tenancies. The opinion was rejected by the Comptroller of the Commonwealth on the advice of his own legal counsel, and the Attorney General immediately authorized the Trustees to file suit against the Comptroller in the Supreme Judicial Court. In that suit, a justice of the court entered judgment for the Trustees, with the assent of the Attorney General, even through the Comptroller personally wished to defend the matter. Shortly afterwards, the Governor requested an advisory opinion of all the justices to determine whether the conclusions reached by the Attorney General were correct, and the justices rendered a unanimous, affirmative opinion on March 23, 1973.

In an opinion to the Acting Commissioner of Youth Services (No. 27), the Attorney General held that juveniles could not be committed to or held at the Charles Street Jail. In an opinion to the House of Representatives (No. 45), the Attorney General gave the first definitive construction of the constitutional amendment (Art. 97 of the Articles of Amendment) approved by the voters at the general election in November 1972 concerning the environment. In another opinion to the House (No. 47), the Attorney General determined that persons convicted of first degree murder could not be furloughed by the Department of Correction.

Pursuant to its mandate to provide advisory services, the Division continued to work during the fiscal year with various constitutional officers and state agencies to resolve legal problems before they reached the stage of a formal controversy and required resolution by a formal opinion or court litigation.

Litigation in which the Division was involved during the fiscal year increased at a startling rate. Files on three hundred thirty-three cases of a general nature were opened during the fiscal year, more than a fifty percent increase over the preceding fiscal year. The number of suits in-

volving welfare matters continued to increase at the same rate. At the present time, four assistant attorneys general devote practically one hundred percent of their time to the defense of welfare cases. Many of these suits result from poor administration in the Department of Public Welfare and an unwillingness on the part of officials and employees of the Department to carry out existing judicial decrees and orders.

Significant litigation in which the Division was involved included reorganization proceedings of both the Boston and Maine Railroad and the Penn Central Railroad, the former pending in the United States District Court for Massachusetts and the latter pending in the United States District Court for the Eastern District of Pennsylvania. Both cases are also before the Interstate Commerce Commission. One Assistant Attorney General was assigned practically full-time during the fiscal year to try, first, the suit against the Board of Education brought by the Boston School Committee involving the state racial imbalance law, and, second, the federal desegregation suit brought by parents of black school children in Boston against both the school committee and the state board. In the latter case, the state board supported the plaintiffs' position. The initial racial imbalance suit resulted in subsequent proceedings in the superior court, three appeals to the Supreme Judicial Court and several requests for advisory opinions of the justices of the Supreme Judicial Court. The Division participated fully in all of these cases and proceedings.

Following a decision by the United States District Court for Massachusetts invalidating the police patrolman's entrance examination administered by the Division of Civil Service, several suits were brought in both federal and state courts concerning issues arising from the decision. Those suits required immediate attention from the Division's staff, and all were concluded successfully.

Early in the fiscal year, the Division defended a suit brought in the Supreme Judicial Court against the Secretary of the Commonwealth involving the constitutionality of the statute which accords first place on an election ballot to incumbents. The suit was concluded by an opinion of the full court which left the statutory preference intact. Several federal suits involving the same question are now pending. The Division also defended an action brought in the United States District Court for Massachusetts to require the Governor and the General Court to increase the number of judges and provide new court-related facilities. An appeal from a dismissal of that action is pending in the United States Court of Appeals for the First Circuit.

In other federal litigation, the Division represented the Commissioner of Correction in a suit challenging conditions at the Charles Street Jail (the court ordered the jail closed by June 30, 1976), and the staff initiated or participated in several civil actions in the United States District Court for the District of Columbia seeking release of impounded federal funds. In the latter cases, preliminary injunctions were granted ordering release of the funds.

The Division appeared in all of the courts of the Commonwealth during the fiscal year, representing the Commonwealth and its agencies in a broad spectrum of matters from appeals from the Appellate Tax Board in the Supreme Judicial Court to appeals from the Civil Service Commission in the state district courts. It is note-worthy that the latter category of cases had increased in number over the previous fiscal year, apparently as a result of the new review statute which permits review on the basis of the record made before the Commission. The Division also handled a greater than usual number of certiorari, mandamus and declaratory judgment actions in both the Supreme Judicial and Superior Courts.

Citizens Aid Bureau

The Citizens' Aid Bureau continues to assist people throughout the Commonwealth who have problems of one kind or another. All too often citizens are shuffled through the red tape of state government and become increasingly frustrated. The Bureau functions as an information center while at the same time it tries to assist individuals with their particular problems and make them aware of their rights. It is gratifying to many to know that a Bureau exists in state government which is not only effective in handling technical aspects of a problem but also one which is responsive in listening to matters of a more personal nature.

It is often an individual's misconception that the Attorney General or one of his assistants should serve as his private attorney. Since the Attorney General is prohibited by statute from doing this, the Bureau must often refer individuals to a private attorney, the referral service of the Bar Association, or their local legal aid society. Copies of particular laws are furnished upon request. Complaints or inquiries range from welfare rights, rights of minors, and erroneous parking tickets, to landlord-tenant situations and the problems of handicapped individuals.

The Bureau continues to maintain an excellent working rapport with almost all agencies in state government. In this way, the Bureau can deliver the best services to the people of the Commonwealth. Recently, the Bureau has developed a close working liaison with the Office for Children in order to guarantee the rights of children. Additionally, the Chief has continued to work with other agencies on a computerized state-wide information and referral system with regional terminals. New legislation to this end is being drafted, the effects of which are known to those who have problems and who work with problems.

The work of our Spanish speaking liaison remains an important part of the Bureau especially since the self-awareness of the Spanish speaking community is daily increasing. Additionally, the student volunteer program with the Harvard Divinity School and other colleges in the greater Boston area as well as several high schools remains an integral part of the Bureau. Many students from past years have gone on to social service careers.

Making government more responsive to the needs of the citizens of the Commonwealth remains the emphasis of the Bureau.

Civil Rights And Liberties

One of the primary duties of the Civil Rights and Liberties Division is to insure that the public is adequately informed with respect to its rights and liberties under our system of government. In keeping with this responsibility, the Division was pleased to distribute 96,000 copies of the first printing of the pamphlet "The Citizen and His Policeman — Reciprocal Rights and Duties At Times of Arrest," which the Division had drafted with the assistance of other divisions within the department. Among the distributees were high schools, colleges, state legislators, law enforcement officials and agencies, members of the media, and private citizens. The pamphlet has received widespread praise as a useful publication for the benefit of both citizen and policeman alike.

The Division cooperated with the Massachusetts Bar Association in the drafting of its pamphlet "Rights of the Arrested." The MBA, in in its pamphlet, reprinted in part excerpts from the Attorney General's pamphlet.

Following the police/minority community confrontations in New Bedford in the summer of 1970, the Division, in conjunction with the Attorney General's Advisory Committee on Civil Rights, and in consultation with the Massachusetts Chiefs of Police Association, drafted a standard procedure for the regulation of citizen complaints against policemen to be implemented on a statewide basis. The Boston Police Department, operating under a procedure similar to that drafted by this Division, has done much to repair damaged relations between the minority communities and the local police department. The Division's police grievance procedure has met with varying degrees of success in those communities which have implemented it. Citizens are using the procedure to a considerable extent which may account for the sharp statewide increase in the number of police "brutality" complaints processed by this Division. Attorneys General from other states have consulted with this Division for assistance in establishing a system similar to ours for the redress of such complaints in their states.

The continuing problem of police/minority community relations in several cities of Massachusetts necessitated the dispatch of members of the Division to troubled cities to lend assistance and advice in order to keep those problems below the boiling point. In most cases, it was the physical presence of this Division which kept the lines of communication open between the community and the police.

One of the Division's major responsibilities continues to be the legal representation of the Massachusetts Commission Against Discrimination (MCAD), the agency charged with the enforcement of the state's anti-discrimination statutes. During the period covered by this report, the Division made numerous court appearances on behalf of the MCAD in cases involving, for the most part, discrimination based on race, sex, religion, and national ancestry, and in the area of housing, employment, and public accommodation.

An interesting MCAD case handled by the Division is the case of *MCAD vs. East Chop Tennis Club, Inc.* That case is currently on the docket of the Supreme Judicial Court and the decision in that case will have far reaching effect upon the ability of the Commission to enforce the anti-discrimination laws of this Commonwealth. This Division, in representing the MCAD on appeal, contends that the Commission must be permitted to determine the limits of its own jurisdiction and that a respondent charged with violation of the state's public accommodations statute must first exhaust its administrative remedies before the Commission prior to seeking judicial review of its claim to private club status, which status is exempt from the provisions of the statute. Further, the case may well lead to a new legal definition of public accommodations within the scope of the Commonwealth's anti-discrimination statutes.

Inasmuch as the Division has the continuing responsibility to ensure that the civil rights and liberties guaranteed by our state and federal law are vigorously and equitably enforced, it is constantly called upon by citizens and public officials alike to deal with serious matters with respect to those rights. Following are some of the matters in which the Division became involved.

Throughout the year, there were increased requests for assistance from married women who systematically had been denied the right to vote using their maiden names by local election officials. It was the contention of this Division that the present Massachusetts statutes permit married women to vote using their maiden names. This contention was submitted by way of an informal opinion to various local election officials. In many such cases, local election officials reversed their opinions and permitted married women to vote using their maiden names when desired.

Because of the ambiguity in our law in this respect, the Division drafted and submitted legislation which would clearly define married women's rights in this area. It is our understanding, at this writing, that our bill or one similar to it is still under the consideration of the General Court.

Despite the Attorney General's opinion of July 21, 1971 to the Secretary of State in which it was stated as a general principle that a student over eighteen years of age, whether emancipated or unemancipated, had a right to choose his own domicile for voting purposes, one of our major metropolitan cities continues to block the attempts of students to register for voting. The gravity of such an infringement of fundamental rights requires continued involvement of this Division to the degree necessary to ensure the free exercise of individual rights.

On May 2, 1973, the Attorney General, in response to a request from the Chairman of the MCAD, rendered an opinion upholding the constitutionality of Chapter 786 of the Acts of 1972, the so-called "anti-blockbusting" statute. The Division assisted in the drafting of this important opinion.

The Division also filed its perennial legislation seeking to prohibit drive-in movie theaters from portraying certain sexual conduct in such a manner that its exhibition would be easily visible from public ways or places of public accommodation. The bill met its usual fate, dying in committee. Hopefully, however, in view of recent Supreme Court decisions with respect to obscenity and pornography, the bill might receive reconsideration.

On June 21, 1973, the United States Supreme Court in the landmark case of *Miller v. California*, 413 U.S. 15 (1973), established a new tripartite test for the trier of facts in obscenity cases. In departing from the test established in the case of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the court said that in determining whether objectionable material is obscene and, therefore, is not to be afforded constitutional protection, the trier of facts must establish the existance of the following three elements:

1. whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in sex;
2. whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

It is interesting to note with regard to these new guidelines that the contemporary community standards to be applied may now be those of the forum state and not some "non-existent" national standard as before. Moreover, the earlier element of "utterly without redeeming social value" articulated in *Memoirs* is now rejected as a constitutional standard.

By this opinion, it is apparent that the court is in fact inviting the states to enact new statutes which would be more specific in nature than those formerly used to regulate obscene materials. In this connection, the Division is, at this writing, drafting revisions of our state obscenity statutes to bring them within the purview of the *Miller* opinion.

Consumer Protection

The Consumer Protection Division continues to expand operationally. Between July 1, 1972 and June 30, 1973, the total number of consumer complaints placed under investigation by the Division, — which includes the Volunteer Division — totalled 12,805. During this period 7,523 complaints were recorded and investigated by Division branch offices in seven locations throughout the state. Savings and refunds from these cases totalled $876,606.00

Incoming telephone calls to the Division have averaged approximately 500-600 daily, with a constant flow of "walk-ins" seeking advice and consultation, and registering complaints. New office procedures have been implemented in various areas to economize on time, upgrade effi-

ciency and provide an even greater service to the consuming public.

The umbrella of consumer protection in Massachusetts continues to increase in coverage. In addition to the Consumer Protection Division and branch offices, consumer groups on the local level have been formed under the guidance and direction of staff members from the Attorney General's office. In Hyannis, for example, the Cape Cod Chapter of the American Association of Retired Persons organized a consumer desk at the Merchants Bank and Trust. The Consumer Assistance Desk, as it is known, comprises approximately forty volunteers who process and investigate consumer complaints from Cape Cod residents. This group, which has completed its first year of operation, is considered a model group and has achieved remarkable results. In Fall River, local groups banded together to form a Consumer Affairs Office under the guidance of the Attorney General and sponsored by the Mayor of Fall River, local city officials and concerned citizens. This office is now working in direct conjunction with the Attorney General's New Bedford office. This is the beginning of local community participation in the field of consumer protection and consumer advisory services and assistance in Massachusetts. As more offices develop and are properly established, Massachusetts will have a network of consumer protection.

Education is a prime factor in the Attorney General's approach to helping the Massachusetts consumer. Radio, TV and public speaking engagements are used to reach the public. News items, press releases and consumer news columns appear constantly, and consumer information leaflets and copies of consumer laws are distributed by the thousands to the public. Developments continue on the high school level, and staff member visits to student groups are on the increase.

Meetings between the business community and staff members of the Division are frequently scheduled for the purpose of discussing advertising, consumer laws, customer complaint areas and customer relations. New procedures are hammered out in connection with "in store" operations and new approaches to customer problems. These meetings have been well received, productive, and have clearly demonstrated the need for upgrading and making new changes in the store structure.

While the Division continued to involve itself in resolving a growing volume of complaints from individual citizens, it also initiated a policy of challenging rate increase requests made by the Commonwealth's utility companies before the Department of Public Utilities. The involvement of the Division in these cases resulted in the saving of millions of dollars by Massachusetts' consumers.

The Division opposed the forty-two million dollar increase requested by the Boston Edison Company. Months of preparation went into the twenty-eight days of trial before the Department of Public Utilities with the result of a saving of thirty-four million dollars for affected consumers. The Division appealed the eighteen million dollar increase allowed by the D.P.U. to the Supreme Judicial Court.

The next utility company to feel the Division's muscle was the New England Telephone and Telegraph Company which requested a rate increase of 122 million dollars. Because of the Division's intervention before the D.P.U., this request was limited to 66 million dollars. Other utility companies which were requesting rate increase from the D.P.U. and which became subject to the scrutiny and intervention of the Division were Boston Gas Co., Western Massachusetts Electric Co., Brockton Edison Co., Fall River Gas Co., Lowell Gas Co., New Bedford Gas and Electric Co., Cape Cod Gas Company, Brockton Taunton Gas Co., and Springfield Gas and Electric Co.

The Division continued to achieve noteworthy results under the Consumer Protection Act, G. L. c. 93A. A significant development was the decision handed down in the case of *Commonwealth* v. *Decotis*. The court held that the respondent was violating the Consumer Protection Act by collecting fees from tenants in their mobile home park when the tenants sold a mobile home located on real estate leased from the respondent. As a follow-up to this case, the Division filed a bill of rights for mobile home owners with the legislature. This legislation is designed to protect residents of mobile home parks so as to permit them to sell their mobile home without having to pay a resale fee, to have free choice in selecting the dealer from whom they would purchase fuel, gas and other accessories, and to prohibit eviction except for just causes.

Numerous other court actions were pursued under G. L. c. 93A. These cases involved a company distributing milk in shortweight throughout the Commonwealth, an individual who advertised that he would award a free gift without disclosing that the delivery and retention of the gift was contingent upon certain conditions, the failure of certain companies to have a three day rescission clause in certain contracts, the use of bait and switch advertising, and the practice of certain automobile dealers who were turning back odometers or selling motor vehicles which had been used as rental vehicles without disclosing the prior use.

The Division took criminal action when necessary. In one case an automobile dealer was fined five thousand dollars for the sale of rental vehicles to ten consumers without proper disclosure. Other criminal cases involved contractors who failed to include the three day rescission statement in their contracts, a seller of automotive lubricating oil which did not conform with the viscosity classification marked on the container, automobile dealers who turned back odometers, and a travel agency which took money from consumers under the false pretense of obtaining airline tickets. In the latter case the court continued the case for disposition on the condition that the defendant would make restitution. Over three thousand dollars was returned to consumers in this fashion.

Contracts

The work of the Contracts Division includes the preparation and trial of highway and building construction cases before auditors, justices of the superior court, and the Supreme Judicial Court. The staff members

of the Division appear on motions and depositions incident to these cases, in addition to prosecuting appeals in public contract matters. All public contracts, bonds and leases are reviewed by the Division for correctness of legal form. Conferences with officials from more than 80 state agencies are frequently scheduled to deal with questions relative to state contracts. In addition to litigation, the Division has attended conferences with various department heads and officials, investigated the factual background of several contract disputes, and researches statute and case law. The following is a summary of the case load during fiscal year 1973.

Period	*Received*	*Approved*	*Rejected*	*Bonds*
July 1-July 31, 1972	313	306	7	
August 1-September 26, 1972	674	632	42	
September 26-Dec. 5, 1972	651	641	10	
December 6-January 30, 1973	453	440	13	
January 31-May 5,19733	611	610		1
May 5-June 1, 1973	1340	1286	54	
June 2-June 30, 1973	624	624		
TOTALS:	4,666	4,539	126	1

Cases on hand July 1, 1972:		730	
Employer tax cases:	421		
Employee overpayment fraud cases:	309		
Supreme Judicial Court Cases —			
On appeal from Board/Review decision):	0		
Additional Referrals:		457	
Employer tax cases:	267		
Employee overpayment fraud cases:	189		
Supreme Judicial Court Cases —			
(On appeal from Board/Review decision):	1		
Total Cases During Fiscal Year:			*1187*
Cases Closed:		171	
Employer tax cases:			
1. Paid in full	66		
2. Uncollectible	9		
3. Partial Payment, Balance uncollectible	11		
4. Actions transferred to Bankruptcy	7		
	93		
Employee overpayment fraud cases:			
1. Paid in full	74		
2. Returned to Claims Investigation Department for further Administrative action	4		
	78		
Cases Remaining on hand June 30, 1973:		1,016	
Employer tax cases:	595		
Employee overpayment fraud cases:	420		
Supreme Judicial Court Cases —			
(On appeal from Board/Review decision):	1		
			$470,488.61

Total Monies Collected:
From Employers — $364,435.41
From Employees — $106,053.20

Criminal Complaints Brought:

Larceny Cases: *37* Complaints, involving *516* Counts against *37* employees re fraudulent benefits totaling *$33,953.00.*

Tax Cases: *40* Complaints, involving *262* Counts against *35* employers re delinquent taxes totaling *$90,636.03.*

Criminal

The Criminal Division continued to operate on three levels of specialization: Trials, Appeals, and the Organized Crime Section.

The Trial Section, whose primary function is directed toward the investigation and prosecution of criminal activities within the Commonwealth, instituted a number of inquiries into matters of wide-spread concern among law enforcement authorities. Attention was focused upon certain fraudulent practices engaged in by agents selling automobile insurance to victims classified as "assigned risks." Not only would the creditors receive unwarranted insurance coverage in addition to their mandatory policies, the agents would include "roll-on" subscriptions to automobile clubs at exhorbitant rates. On many occasions, the transactions would not be disclosed to the client and the premiums never paid to the insurer. Indictments have been returned in many of these cases, and the matters are pending trial.

The financial community was subjected to a probe by state detectives and investigative accountants assigned to the Division to examine irregularities in certain banking institutions. As a result of this inquiry, an embezzlement scheme was uncovered which disclosed that millions of dollars had been syphoned off from accounts at a Brighton savings bank.

The Attorney General, acting in his capacity as Chief Law Enforcement Officer of the Commonwealth, coordinated efforts among the district attorneys and prosecutors from neighboring states in an attempt to solve a series of murders of young women. After a clearing house for relevant information had been established, a cooperative effort resulted in additional leads and finally culminated in three indictments brought against one individual charging him with the killing of three of the victims. The trial is presently pending.

In a continuing effort to combat welfare frauds, the Division was responsible for the indictment of the Director of the Revere Welfare Office. A Suffolk County jury found him guilty of illegally issuing authorization for the expenditure of funds designated for welfare purposes.

In the first state income tax evasion prosecution ever brought in the Commonwealth, a North Shore bookie was sentenced to prison and ordered to pay state income taxes on the money he obtained from illegal wagering.

An employee of the Department of Mental Health was convicted of larceny of $26,000 from that state agency. The disposition of the case resulted in the immediate recovery of $10,000, the remainder to be repaid by the thief over a three-year period.

Realizing that transactions involving stolen securities constitute a lucrative business for the underworld, investigators from the Division secured evidence which resulted in conspiracy indictments involving bond frauds. A number of individuals pled guilty in this $80,000 scheme designed to defraud the public.

This year the Appellate Section had its case load tremendously escalated as a consequence of court decisions which expanded previous constitutional interpretations of prisoner's rights. In addition to the liberalization by the judiciary of procedural and substantive rules regarding prison operations, a series of large-scale disruptions in the state's prison system resulted in an unprecedented increase in the number of extraordinary writs litigated in both state and federal courts. Prison civil rights actions customarily seeking both injunctive relief and actual monetary damages against correction officials measured in the millions of dollars. Most cases were terminated before the trial stage, and no monetary charges have been awarded to any prisoner.

Division attorneys rendered legal advice to the Departments of Mental Health, Corrections, the Massachusetts Parole Board and other state agencies, and assisted them in constructing operational rules and regulations that would conform to recent constitutional mandates promulgated by the United States Supreme Court.

The nation's highest tribunal twice granted certiorari upon the Commonwealth's petition in two cases decided adversely to the Division's position by the First Circuit Court of Appeals. The United States Supreme Court scheduled a hearing in the fall to determine whether a Massachusetts statute demanding that the flag be treated with respect is unconstitutionally vague and overbroad. The Supreme Court will also determine the validity of a murder conviction where both the victim and the accused were members of an organized crime syndicate. The Court refused to grant a defendant's petition for certiorari wherein he sought to challenge the constitutionality of the Massachusetts Statutory Rape Law.

In addition to the prosecution of criminal matters and the work of the Appellate Section, the Division also engages in high level administrative duties. Staff attorneys were responsible for the annual compilation of changes in the criminal law, which when printed, are distributed to all police departments throughout the Commonwealth. Assistants reviewed the legal adequacy of both demands for the extradition of fugitives from other jurisdictions and the Commonwealth's rendition requests to return those to justice who had fled Massachusetts.

This agency continued in its effort to maintain a close relationship with the public by sending speakers to educational institutions, service clubs, citizens groups, police gatherings and civic organizations in order to create an awareness about recent developments in the area of criminal law.

Drug Abuse

The Drug Abuse Division was established by Attorney General Robert H. Quinn in 1969 in order to devise more effective methods for combating the problems of drug abuse and to help overcome the misconceptions and ignorance which lead to drug abuse.

Since March 1970, the Attorney General has operated a comprehensive drug abuse education school which deals with all aspects of the drug problem. The two-week school was established in accordance with a mandate of Chapter 889 of the Acts of 1969, the "Drug Rehabilitation Act" sponsored by Attorney General Quinn. Originally designed for the training of state and local law enforcement officers, the course has been expanded to include probation officers, corrections officers, nurses, school administrators, and members of other related disciplines. To date there have been over 1500 graduates from throughout the state.

The Basic School includes lectures and discussions on the psychological, pharmacological, and sociological aspects of drug abuse; federal and state laws and current legislation; organized crime involvement; and treatment and rehabilitation of drug dependent persons. An Advanced School is available for police officials to train them in informant development and advanced search and seizure techniques.

Graduates of the Drug Abuse Education School receive three hours of academic credit for successful completion of the course. Fourteen colleges throughout the Commonwealth have granted college credit for the course.

Special emphasis was given to field testing and evaluation of controlled substances. Each police department represented received a special drug testing kit. Distribution of these kits was made possible through a Law Enforcement Assistance Administration (LEAA) grant obtained by the Drug Abuse Division. The opportunity for chemically analyzing suspected substances at the local level, immediately following confiscation, is viewed as a significant breakthrough in criminal law enforcement technique.

In fiscal 1972-73, the Drug Abuse Division was awarded an LEAA grant to study the feasibility of setting up a statewide drug intelligence system. After interviews with state and local law enforcement personnel, computer experts, and other people knowledgeable in the intelligence field, the study concluded that a need does exist in Massachusetts to create an intelligence sharing network. Therefore, a new Drug Intelligence Unit is presently being established in the office of the Attorney General. The staff has already received the cooperation and enthusiasm of police departments throughout the Commonwealth.

Another LEAA grant is funding the preparation of a police training manual for use during the drug school and as a reference source for police officials during drug-related activities.

In April 1973, the Division conducted a three day conference on drugs in cooperation with the Massachusetts Narcotic Enforcement Officers

Association. Three hundred people attended the conference, including law enforcement officials, teachers, legislators, and mental health personnel.

The Division also has a statewide education program for school and community groups. The staff participates in an active speaking program whereby members conduct lectures and discussion groups at meetings of civic and community groups, professional organizations, and school assemblies.

To assist in its efforts to educate the public, the Division publishes two pamphlets: "Massachusetts Drug Laws" and the "Drug Abuse Reference Chart." In addition, a newsletter, "Tracks: Directions In The Field Of Drug Abuse" is distributed to doctors, pharmacists, police officials and interested citizens throughout the Commonwealth.

In November 1971, the Governor signed the Massachusetts Controlled Substances Act, a comprehensive reform of drug laws, effective July 1, 1972. Members of the Drug Abuse Division actively participated in the drafting of the bill. The new law for the first time classifies drugs according to their relative harmfulness and brings state drug abuse laws into conformity with federal drug laws.

Eminent Domain

The Eminent Domain Division is responsible for handling all litigation involving land to which the Commonwealth is a party. The Division acts as legal counsel to all agencies of the Commonwealth in: (1) the acquisition of land, whether the transfer is voluntary or involuntary; (2) the disposal of land by the Commonwealth; and (3) all matters before the land court to which the Commonwealth is a party. In addition, the Division is responsible for the processing and disposing of all land damage actions filed against the Commonwealth under Chapter 79 of the General Laws. The Division has the added responsibility of handling cases arising out of the application of Chapter 130 of the General Laws, and other statutes related to conservation and water pollution wherein the Commonwealth claims damages.

Under the above-mentioned chapters, the Division acts as attorney for state agencies, such as the Department of Public Works, the Metropolitan District Commission, the Board of Trustees of State Colleges, the University of Massachusetts, Southeastern Massachusetts University, the Department of Natural Resources, the Water Resources Commission, and community colleges in connection with matters relating to real estate.

The bulk of the Division's efforts are devoted to land damage actions resulting from the exercise of the Commonwealth's power of eminent

domain. This power is initiated when it becomes necessary to take private property to complete a public purpose project. There are many phases to the proper exercise of this power, but the Division becomes involved only when the former landowner in the proceeding is not satisfied with the offer made by the taking agency and files a petition in the appropriate superior court. At this point the Attorney General's Office takes full control and responsibility.

The Division's governing directive is to achieve a just and reasonable solution to a dispute, in the shortest period of time, while, at the same time, making a conscious effort not to sacrifice competence for speed. The philosophy behind the approach is to avoid undue delay which leads to inconvenience and aggravation. To this end, procedures have been formulated within the Division to insure that all cases are thoroughly analyzed, prepared and ready for trial at the earliest possible moment.

Fiscal year 1973 began with 1,173 cases pending. During the year, 193 new petitions were filed, which brought the total case load to 1,366. Of the 1,366 cases, 179 have been disposed of by settlement or trial leaving 1,187 cases pending.

At the present time, the Division is handling one case of major importance in the United States Supreme Court, *United States v. Maine, et al.* The United States brought suit in 1968 against the states of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida, which was later severed, claiming that the federal government rather than the states held ownership of the Outer Continental Shelf and its resources. Last March, hearings before the Special Master, the Honorable Albert Branson Maris, Senior United States Circuit Judge, were concluded. Briefs have been recently filed by all parties and a decision by the Special Master on the facts of the case is expected some time in mid-1974. The Supreme Court should make a final ruling on the case in the October Term, 1974.

In May this office filed a motion for a preliminary injunction against the United States and the Geological Survey, to prevent core drilling off the coast of Massachusetts. In a memorandum decision, the Supreme Court turned down the request for the injunction. However, the request was mooted by the action of the United States in cancelling all plans to make core drillings before the Court had an opportunity to rule on the motion.

Employment Security

The Employment Security Division works closely with the Massachusetts Division of Employment Security. It prosecutes employers who are delinquent in paying employment security taxes and employees who file and collect on fraudulent claims for unemployment benefits. The vigorous prosecutions made by this Division have resulted in the recovery of substantial sums of money for the Commonwealth.

During the fiscal year ending June 30, 1973, *1,187* cases were handled by this Division. *730* cases were on hand at the start of the year and *457* new cases were received during the year, of which *267* were employer tax cases, *189* were fraudulent claims cases, and *1* was an appeal to the Supreme Judicial Court.

171 cases were closed during the fiscal year, of which *93* were employer tax cases and *78* were fraudulent claims cases, leaving a balance of *1,016* cases on hand at the end of the fiscal year. Monies collected totaled *$364,435.41* from employer tax cases and *$106,053.20* from the fraudulent claims cases, making a total recovery of $470,488.61 for the Commonwealth.

The Division is charged with the duty of pursuing those individuals found not complying with the Employment Security Law. During this fiscal year the Division waged an energetic and forceful program in handling all cases referred to the Division for criminal prosecution. At the same time, the Attorney General's office has maintained a policy of giving the erring individual, corporation or business entity every opportunity to make settlement out of court. Concentrated office conferences were conducted with the principals involved to determine whether or not criminal proceedings should be initiated. Criminal prosecutions were taken against those failing to show cooperation with the terms of agreement made by this office, but only after they had received an opportunity to discuss the matter thoroughly. During this fiscal year the Division brought *40* complaints against thirty-five employers, involving *262* counts of tax evasion and totaling *$90,636.03* in monies due the Commonwealth. Complaints involving *516* counts of larceny were brought against thirty-seven individuals found collecting unemployment benefits under fraudulent claims totaling *$33,953.00* in monies taken from the Commonwealth.

At present and during the span of this fiscal year some *63* cases ripe for criminal prosecution have not been processed for lack of clerical help, and in some of these tax cases the statute of limitations is running. A likely group of the fraudulent claims cases also have become ripe for criminal prosecution this fiscal year and need to be processed for court action. Prosecution of these cases would result in several hundreds of thousands of dollars to the Commonwealth when concluded.

In addition, there is presently pending in the Supreme Judicial Court, a case in which the question raised is as to what constitutes voluntary leaving of work under Section 25 (e) (1) of Chapter 151A, General Laws. There is also pending, in the same court, an action brought by the Massachusetts Bar Association which raises questions such as what constitutes the practice of law, and to what extent persons representing claimants or employers under Chapter 151A should be required to be members of the bar. During this fiscal period, there were a number of cases brought in Federal District Court against the Director of the Massachusetts Divison of Employment Security, charging that the regulations established by the Department of Labor and followed by the state

division of Employment Security discriminated against women. The matters were adjusted to the satisfaction of the parties. At present, we have cases pending in the federal court which raise questions of due process in connection with Division procedures.

Investigations made by this Division have greatly increased and now include those conducted jointly with the Criminal Division of the Attorney General's office for the purpose of uncovering collusion and conspiracy to commit larceny by certain personnel of the state Division of Employment Security and claimants filing fraudulent claims at the employment offices located in Brockton and Hyannis. To date, the Brockton and Hyannis investigations have culminated in criminal action being initiated in the respective district courts having jurisdiction, and the Brockton matter has been disposed of to the satisfaction of the state Division of Employment Security. Due to inadequate service received on default warrants relating to criminal matters pending before various courts of the Commonwealth, a special police authority was requested and granted to our investigator. After undertaking necessary training, the investigator will be in a position to service the numerous default warrants and help expedite disposition of the criminal matters now pending such service.

It should be noted that due to increased programs, and more prosecutions resulting in more convictions, substantial sums of money were collected; employers and employees were made aware of the penalties and restrictions imposed by the courts; and a marked decrease in the number of overall violations has resulted in areas where the Division has prosecuted.

Environmental Protection

The fiscal year saw the enactment of a statute formally creating this Division and expanding and clarifying the authority of the Attorney General to protect the environment (St. 1972, c. 781, § 1, adding G. L. c. 12, § 11D). This legislation affirms the authority of the Attorney General to commence statutory enforcement actions on his own initiative just as he traditionally commenced public nuisance actions. In addition to this broadened power to enforce state statutes, the Attorney General is now given authority to enforce local by-laws and ordinances which protect against damage to the environment, and to investigate the administration of environmental laws by any state agency or political subdivision, making such recommendations as are appropriate to the Governor and the legislature.

With this added responsibility has come a greater opportunity to contribute to environmental quality. Accordingly, the year saw a substantial increase in environmental court enforcement, especially in the federal courts, and an increased advisory role in agency regulation-making and legislative enactments.

Suit was filed in the United States District Court for Massachusetts in November 1972 to compel the federal Environmental Protection Agency

(EPA) to issue its long-overdue aircraft emission standards. The action was taken under the "citizen suit" provision of the Clean Air Act allowing any person to file suit against the EPA administrator for failure to perform an official function. In this case an inexcusable delay of almost a full year jeopardized Massachusetts air pollution regulations limiting aircraft emissions from planes taking off and landing in the Commonwealth. A decree was obtained in May 1973 securing the relief requested, with the court retaining jurisdiction to scrutinize compliance.

Also in the federal courts, the Attorney General joined the Sierra Club and fifteen states as *amicus curiae* in the United States Supreme Court, challenging action of the Environmental Protection Agency permitting the degradation of clean air by lax enforcement regulations. Specifically, the EPA regulations would have permitted significant deterioration of air quality in relatively unpolluted areas by permitting the air to be polluted up to a certain air quality level. The Supreme Court decision in June vindicated the Massachusetts position, thus protecting the pristine air of the Berkshires and preventing industry forum-shopping for geographical jurisdictions offering lax air quality standards. Also in an *amicus curiae* role before the Supreme Court, the Attorney General joined Florida in successful defense of that state's "strict liability" oil spill statute. The Massachusetts brief sought to protect a similar regulatory scheme which forms part of the backbone of the Commonwealth's Clean Waters Act.

Another federal action, with the Attorney General as named plaintiff, seeks to protect the Great Cedar Swamp in Middleborough by challenging $1.7 million in mortgage loans from the federal Farm Credit Association (FCA) to Cumberland Farms of Connecticut, Inc. Although the monies loaned were not federal funds, it is alleged that, by its supervisory role over its local instrumentalities which gave the loans, the FCA was well-equipped to implement the National Environmental Policy Act (NEPA) and yet failed to do so. It is expected that legal defenses raised by the defendants will be resolved in the fall of 1973, with this NEPA case proceeding to trial later in the year. It is the position of the Attorney General that substantial loans to large agricultural enterprises in Massachusetts, through the active cooperation of federal agencies, should be accompanied by the vigorous environmental analysis mandated by NEPA.

On the legislative front the Division submitted six major bills for 1973. One bill was passed to secure speedy trials of pollution cases where court delay may make impossible to remedy a harm already done. A bill to subject all state agencies to state water pollution statutes was also passed. Legislation providing for the Commonwealth to guarantee loans made to private industry for pollution abatement measures became the nucleus of a larger bill, now pending, to aid industry through a Massachusetts Economic and Environmental Development Corporation. Bills to recodify the Commonwealth's air pollution statutes and to subject the Massachusetts Port Authority to all public health, safety and natural resource laws, where now exempt, are also still pending as of

this report. An innovative bill to create "civil forfeitures," flexible court-ordered money penalties for pollution violations, has enjoyed only a lukewarm response in the legislature, but is sorely needed to give the courts a non-criminal sanction, in addition to the civil injunction, in order to control environmental degradation. Efforts to enact this enforcement tool will continue throughout the year.

Article 97 of the Articles of Amendment to the state Constitution, establishing a right to a clean environment, was submitted to and approved by the voters on the November 1972 ballot. This article enables the legislature to enact measures to protect the "new" right and in addition mandates that lands and easements publicly taken or acquired in order to conserve, develop or utilize natural resources shall not be used for other purposes or disposed of without a two-thirds roll call vote of each legislative branch. The Attorney General's formal opinion on the latter provision is the first definitive interpretation of Article 97 and has served as a catalyst for all levels of government to tighten control over forest land, agricultural land, open space, parkland and recreation areas, and scenic and historic sites. It is apparent that Article 97 offers an innovative tool for the protection of such lands and that its influence has only begun to be felt.

During the year Attorney General Quinn's 1971 intervention in atomic energy licensing hearings came to fruition. Following more than 30 days of environmental and safety hearings on the Vermont Yankee Nuclear Power Plant, in which the Commonwealth was represented by this Division, the Atomic Energy Commission imposed strict conditions on plant operation. To protect the Connecticut River, the A.E.C. license requires "closed-cycle" operation, with only minimal discharge of water used to cool the plant, and with a special interstate advisory group, consisting of Vermont, New Hampshire and Massachusetts fishery and water resource experts, to monitor any damage that may occur to land or water ecosystems, and to evaluate and act upon company requests in the future to utilize (and then discharge) large volumes of river water for cooling. To protect Quabbin Reservoir in Massachusetts the plant license imposes tough radiation limitations, guaranteeing (1) Department of Public Health and Metropolitan District Commission access to records of radioactive discharges, and semi-annual reports of all discharges; (2) retention of radiation samples for analysis by Massachusetts officials; and (3) immediate notice to the Commonwealth of any radiation discharges into the Connecticut River in excess of A.E.C. regulations, with ample time to take precautions to protect Quabbin Reservoir. An emergency notification system is to be established and paid for by Vermont Yankee to give the Commonwealth prompt notice of plant accidents creating site and general emergencies, backed up by direct microwave communication with state police headquarters in the three states, at company expense. In addition, advance notice is required to Massachusetts of all shipments of nuclear fuel or wastes by rail or road through the state.

The Massachusetts Environmental Policy Act (MEPA) became effective December 31, 1972. As of that date all state agencies are obligated to consider the environment in their decision making, and to minimize harm to the environment. Environmental impact reports, after July 1, 1973, will accompany all state works, projects and activities. So few agencies had prepared in advance to implement MEPA that the Attorney General in early January addressed a memorandum to all state agencies bringing to their attention MEPA's new obligations. One of the first agency reactions to MEPA, unfortunately, was for the state Division of Water Pollution Control to seek wholesale exemption from MEPA. This move was strongly opposed by the Attorney General and was eviscerated, with limited exceptions.

Several current civil lawsuits in the Massachusetts state courts stand out as noteworthy. Following the final date for compliance, December 31, 1972, this Division evaluated airline conformity with a 1971 decree entered in Suffolk Superior Court in settlement of Attorney General Quinn's "public nuisance" suit against the ten major airlines serving Boston. That decree required "retrofitting" each JT8D jet engine with "reduced-smoke combustor cans" to eliminate unnecessary smoke, especially on takeoff. A final report showing over 94% compliance by the airlines is substantiated by noticeably cleaner airplane exhaust at Logan Airport. Since certain airlines are unable to complete the retrofit schedule until 1973, and since the court decree secured by the Attorney General imposes pollution limitations on new wide-body aircraft and continuing requirements as to engine types other than JT8D, the case will not be dismissed as yet, so that monitoring of airline performance may be continued.

Dense, billowing smoke from the City of Lawrence dump, causing accidents on Route 495, led to immediate action against the city for failure to comply with state air pollution laws. Space limitations, lack of state funding and opposition from neighboring communities had prevented the city from finding alternate disposal methods. It is hoped that conferences scheduled with city officials, state administrators and the federal Environmental Protection Agency will locate both available land and financing for Lawrence's efforts. Attorney General Quinn is the only attorney general in the nation serving on the nine-member national Solid Waste Management Task Force, sponsored by the Council on State Government, and the Lawrence case typifies the constraints on finding solutions to our mounting solid waste problems which were pinpointed by the Task Force's report this year.

Contempt proceedings were initiated against the Town of Uxbridge for its failure to obey a court order requiring construction of a $5.9 million waste treatment facility, to be reimbursed 75% by federal and state funds. In a landmark decision in May 1972 the Supreme Judicial Court had upheld the authority of the state water pollution control agency to issue clean-up order to municipalities, but the Town's neglect thereafter to acquire a site, hire an engineer and prepare plans made the contempt action necessary.

The Attorney General's suit against the City of Boston and the Boston Housing Authority, charging the BHA with using incinerators incapable of reducing air pollution to an acceptable level in 26 housing projects, forced the federal Department of Housing and Urban Development to authorize a unique $2 million pilot program to improve solid waste disposal in those Boston projects which it funds. To date, however, the money committed to the environmental renovations has not materialized and, until promises become reality, the litigation will go forward.

Since the criminal law is an effective enforcement tool, the Attorney General took steps designating this Division coordinator of all civil and criminal environmental enforcement in the Commonwealth. All state pollution agencies were encouraged to utilize the resources of this Division to seek criminal remedies when appropriate. In addition, a meeting between Attorney General Quinn and the state District Attorneys in November examined the increased public awareness of environmental degradation and led to an agreement to share enforcement resources to improve environmental quality. Criminal actions prosecuted in the district courts by this Division led to the assessment of maximum fines under the air pollution laws for the sale and distribution of high-sulphur fuel oil by a North Shore company, and underwater pollution statutes for a massive fish kill by an electric generating plant on the Cape Cod Canal.

As this fiscal year draws to a close Attorney General Quinn plans to host the first semi-annual roundtable of state assistant attorneys general assigned to environmental protection in all the states, to share experience and research and to plan effectively for a united front in the federal courts when environmental litigation arises affecting several states. The Attorney General will appear at legislative hearings planned for the fall requiring the reorganization of state environmental line agencies under a single Executive Office of Environmental Affairs. The Secretary of Environmental Affairs currently has the responsibility for implementing the environmental impact report requirements of the state Environmental Policy Act and this Division will actively assist in drafting regulations to make MEPA effective.

The active case load of the Division, reflecting pending or prospective enforcement litigation, is as follows: forty-three air pollution cases (evenly divided between industrial and municipal sources); forty-nine water pollution cases (again, half against industry and half against cities and towns); forty-three coastal and inland wetland cases (largely against individuals or corporations; a few against municipalities); and twelve cases to enforce solid waste regulations or the State Sanitary Code (two-thirds against individuals, the remainder against cities, towns or businesses). Usually more complex than these state enforcement actions, there are fifteen federal and state court or administrative actions in which the Attorney General has intervened on his own initiative. These cases pertain to the licensing of nuclear power plants, public nuisances, aircraft smoke emissions, unlicensed filling in of tidewaters, automobile pollution, offshore oil development and highway projects.

In addition to this enforcement caseload the Division has been called upon in forty cases to defend the Department of Public Health, the Department of Natural Resources, and the Outdoor Advertising Board against legal challenges made in petitions for writs of mandamus, and in petitions for judicial review, declaratory judgment or annulment of environmental controls as being "takings without compensation." The total caseload of the Division, then, amounts to 202 pending cases. This number is exclusive of the more than sixty cases fully resolved during the year through final injunctions or criminal fines.

The Division is pleased that the Legislature has acknowledged the responsibility borne by the Attorney General in protecting the environment, by giving the Division of Environmental Protection a legislative mandate. The Division's workload has been immeasurably eased through the excellent cooperation of client agencies and rising public awareness and support of environmental enforcement.

Industrial Accidents

The Industrial Accidents Division serves as legal counsel to the Commonwealth in all workmen's compensation cases involving state employees. Pursuant to G. L. c. 152, § 69A, the Attorney General must approve all compensation benefits payments and disbursements for related medical and hospital expenses in compensable cases. In contested cases this Division represents the Commonwealth before the Industrial Accident Board and in appellate matters before the superior court and the Supreme Judicial Court.

In its capacity as custodian of the second injury funds under section 65 (General Fund) and section 65N (Veterans' Fund) of Chapter 152, the Division represents the Commonwealth before the Industrial Accident Board in petitions filed by insurers and self-insurers for reimbursement out of these funds. In accordance with the provisions of the statute, insurers and self-insurers are required to make payments into these accounts in fatal industrial injury cases. The Division has the responsibility for enforcing this obligation requiring the staff to appear before the Board in such cases and to meet with insurers' counsel to adjust payments, usually by negotiation, in cases where the issue of liability has been in question or compromised. At the end of this fiscal year the General Fund (section 65) showed an unencumbered balance of $113,826.91, with receipts of $8,590.00 and payments during the year totalling $1,652.74. The Veterans' Fund (section 65N) showed receipts of $186,373.73 and payments of $70,918.19 resulting in a balance of $677,014.10. It should be noted that, proper attention having been given to these accounts, securities have been purchased and the income from proper investment this year amounted to $17,627.54. Both funds are operating on a sound fiscal basis at no expense to the taxpayers.

During this fiscal year Attorney General Quinn introduced a bill which extends the "Second Injury Fund Law". The Attorney General had been fighting long and hard for legislation which would encourage

the employment and reemployment of injured workers and handicapped people in the Commonwealth. His bill provided for 50% reimbursement after the first 104 weeks of disability compensation payments by insurers and self-insurers, and additional reimbursement in cases involving injured workers who had a service-connected disability certified by the Veterans Administration. Very significant legislation for the Massachusetts worker, the Attorney General's bill was diligently guided to enactment in the 1973 legislative year.

During the past fiscal year 8,867 First Reports of Injury for state employees were filed with the Division. The Division reviewed and approved 1,434 new claims for compensation in lost-time disability cases, representing an increase of 143 over the previous year. The Division reviewed all claims for resumption of compensation, and 90 of these claims were verified and approved. In addition to the foregoing, the division worked on and disposed of 153 claims by lump sum agreements and payments without prejudice.

The Division appeared for the Commonwealth on 598 formal assignments at the Industrial Accidents Board and in the courts. The Division's staff members are frequently requested to appear and participate in a number of informal conferences and discussions relative to the many issues involved in these industrial accident cases at the Board, including the review of new cases for evaluation and approval by the Attorney General. It is also necessary to continually review the accepted cases and bring them up to date medically for further determination before a member of the Board.

Total disbursement by the Commonwealth for state employees' industrial accident claims, including accepted cases, board and court decisions, and lump sum settlements, for the fiscal year were as follows:

General Appropriation
(Appropriated to the Division of Industrial Accidents)

Incapacity Compensation	$2,424,008.46
Medical Expenses	880,778.86
Total Disbursements	$3,304,787.32

Metropolitan District Commission
(Appropriated to M.D.C.)

Incapacity Compensation	$263,119.85
Medical Expenses	111,775.11
	$374,894.96

Pursuant to section 11A (Acts of 1950, c. 639, as amended), the Chief of this Division represents the Attorney General as a sitting member of the Civil Defense Claims Board. During the fiscal year over 20 such claims were acted upon, awarding compensation to unpaid civil defense volunteers who were injured in the course of their volunteer duties.

Public Charities

The Public Charities Division is staffed by four attorneys and four clerks and, as has been the tendency in recent years, both the volume and importance of the matters handled showed an increase.

The staff of the Division reviewed the following matters relating to trusts and estates in which there are charitable interests.

Trustee's accounts	2071
Petitions for Probate of Wills	692
Executor's accounts	598
Administrator w.w.a. and Miscellaneous	349

There were 534 new petitions for Public Administration. During the fiscal year 276 such estates were closed and 54 other petitions relating to such estates were approved. In addition, there were 16 absentee matters.

A total of $284,959.39 was paid into the state treasury as escheats from public administration and other estates. 3036 annual financial reports by charitable corporations, trusts, etc. under G. L., c. 12, § 8F were recorded and filed in the period and 472 applications for Certificates of Registration to Solicit Contributions from the Public were processed. The division received a large number of filings of Federal Form 990 AR by Massachusetts private foundations.

In many court cases the Attorney General was cited as a party and the Division filed appearances and answers and took part in hearings.

A large volume of accounts of trustees and others, and petitions for probate of wills were handled. There are thousands of these accounts and wills involving very substantial amounts of money.

The Division also had a great number of petitions for reformation or for instructions relating to charitable trusts under wills. This was due primarily to the continuing impact of the Federal Tax Reform Act upon charitable foundations, requiring them to distribute a portion of their adjusted net income for the specified trust purposes or, in the alternative, taxing them 15% of the first year's undistributed income and 100% of each succeeding year's undistributed income. Trust u w o ARTHUR ASHWORTH, Trust u w o B. PARKER BABBIDGE (for educational scholarships for students in the area of commercial education) and Trust u w o GRACE TOWNS BLANCHARD (for the benefit of needy students at Harvard and Radcliffe) were cases in which the court entered decrees permitting distribution of all income and such amounts of principal as to minimize taxation under the Tax Reform Act. In the Trust u w o CHARLES J. PAINE for the benefit of two worthy male students of Weston through the payment of tuition and traveling expenses while attending Harvard or M.I.T., the Division assented to the entry of a decree allowing beneficiaries and expense of room and board to be added to the Trust purposes. In this way all the net income and so much of principal as is necessary to minimize taxation under the Tax Reform Act may be used.

There were many dissolutions of charitable corporations during the period. *Stowe Kindergarten, Inc.* was dissolved by decree of the Supreme Judicial Court and its funds transferred to the Town of Stowe for the purchase of recreational equipment for kindergarten children. *Bay State Medical Rehabilitation* was dissolved and its funds transferred to the Peter Bent Brigham Hospital for the same charitable purposes. *Para Tours, Inc.*, a charity which furnished transportation or shut-ins and others, was dissolved and its assets distributed to charities concerned with the physical and mental well-being of handicapped and needy persons.

We approved the distribution by the trustee u/w/o *HELEN I. DOBLE* of the trust fund to Phillips Exeter Academy. The income from the small trust was to be used to provide scholarships for worthy students at the Academy and the distribution was made subject to the restrictions of the Trust.

In the trust u/w/o *ALICE L. MACDOUGALL*, for the benefit of graduates of Memorial High School of Middleborough who had completed two years of study in a college or university, the Division assented to a decree distributing all income and only so much of principal in the form of grants rather than loans so as to avoid tax liability.

A notable case before the Supreme Judicial Court during the fiscal year was the Selfridge case (*New England Merchants National Bank of Boston* v. *Josephine Stanley Kahn and others*). The Bank, as Trustee, u/w/o *Annie F. Selfridge* filed an equity petition for modification of the trust by increasing the annuity and distributing excess net income to the named charities. However, the three charities filed a counterclaim seeking distribution of the entire trust in excess of the amount required to support the annuity without any increase in the annuity. The Attorney General took the position that the trust should not be partially terminated as requested by the charities and that no part of the principal should be distributed until the death of the annuitant. The Court dismissed the petition and counterclaim.

The Division obtained a restraining order against the Greater Boston Public Affairs Bureau to prevent that organization from soliciting funds in the name of charity. Criminal proceedings were brought against Saggittarios Corporation for illegal charitable solicitation. Restraining orders were also obtained against Mertz-Ufland, a publishing company, and Massachusetts Children's Fund to prevent their charitable solicitation. In these and other cases the Division has given close scrutiny and has not hesitated to seek legal remedies against off-color charities and solicitors.

The Division staff followed up on House Bill 6215, a bill co-sponsored by the Attorney General, in its passage as Chapter 479, Acts of 1973. The bill's enactment insured welcome relief to charities from burdensome local taxes.

The Division continues to move in the direction set by its former Director, James J. Kelleher, who retired shortly before this period began

and who, because of his kindliness, interest, and excellence as a lawyer, left a marked imprint upon future work and decisions of the Public Charities Division.

Springfield Office

The Springfield office handles matters of concern to the Attorney General in three Western Counties: Hampden, Hampshire and Franklin. The primary function of the office has been to handle all division references, including Eminent Domain, Workmen's Compensation, Tort, Welfare, Contracts, Environmental Control and Welfare Fraud. The office also handles references from the Massachusetts Discrimination Board, Judicial Reviews, Extradition and Criminal proceedings. Only Consumer Protection matters originate in the Springfield office.

The office supplies personnel to the Board of Insurance Cancellation and the License Board of Appeals for monthly sittings which consider approximately forty cases per sitting.

There are presently 61 pending Eminent Domain cases — 37 in Hampden, 20 in Hampshire and 9 in Franklin. From July 1, 1972 to June 30, 1973, 11 cases in Hampden were settled; 1 *pro barre* hearing was held; 4 trials were conducted and 1 case was discontinued. In Hampshire, 2 cases were settled and 1 trial was conducted, while in Franklin there were 3 cases settled and 2 trials were conducted.

Listed below are other cases which have been worked on in the Springfield office.

HEW CASES
3 cases were completed
9 cases pending

PUBLIC CHARITIES
3 cases pending

VICTIM OF VIOLENT CRIMES CASES
5 cases pending

COLLECTION CASES
1 case completed
39 cases pending

TORT CASES
2 cases were completed
8 cases pending

ENVIRONMENTAL CASES
2 cases pending

WELFARE FRAUD CASES
54 cases worked on and completed

The Trooper in the Criminal Division is constantly investigating criminal offenses and cooperates with all law enforcement agencies in the area.

In the field of consumer protection, the following cases were dealt with by this office covering the period of July 1, 1972 to June 30, 1973.

OPENED	*CLOSED*	*PENDING*	*SAVINGS*
1397	1381	222	$150,971.60

(The closed and pending figures include cases carried over from the previous year.)

The staff also fulfills speaking engagements concerning consumer protection.

The office gives legal assistance to various state agencies upon request.

Our total correspondence on various matters other than consumer complaints averages over 125 letters per month and ranges from explaining uniform support, birth control, abortion, pornography, and civil liberties, to housing, rights of privacy, conflict of interest and zoning problems.

The staff consists of three Assistant Attorneys General, one Deputy Assistant Attorney General, three Special Assistant Attorneys General, one investigator in Consumer Protection, one State Trooper in the Criminal Division and two secretaries.

Torts, Claims and Collections

The Tort Division represents officers and employees of the Commonwealth against whom claims are made for tortious acts arising within the scope of their employment.

These cases run the gamut of the law. The Division has defended employees charged with such offenses as assault, battery, false imprisonment, malicious prosecution, illegal commitments to mental institutions, libel, slander, conversion and destruction of personal property, failure to pay debts, pollution of streams and sources of drinking water, wrongful suspension of a driver's license, violation of rights secured by the Constitution of the United States, claims of death and injury resulting from medical malpractice, and many cases of claims of death, injury and property damage resulting from improperly maintained state highways and negligently operated state motor vehicles.

The bulk of the Division's cases involved motor vehicle accidents. During fiscal 1973, 157 cases were tried or settled and $172,567.75 was paid to claimants as compared to 159 cases tried or settled with $86,264.07 paid in fiscal 1972.

136 highway defect claims and "moral claims" were disposed of in the fiscal year for an expenditure of $13,358.13 as compared to 104 such cases and the expenditure of $12,854.47 in fiscal 1972.

The Collection Section during Attorney General Quinn's administration has collected over $409,000.00 annually, as compared to the previous decade in which $267,000.00 was collected annually.

From January 1969, until June 30, 1973, the Section has collected $2,631,389.48. This is approximately equal to the amount collected in the previous eleven years.

The type of cases handled by the Section include care and support claims against patients of state hospitals, damage to state property, claims for tuition at state colleges and universities, and subrogation claims arising out of workmen's compensation benefits paid to state employees.

The following is a survey of cases involved in this phase of the Division's work:

Department Involved	*Amount Received*	*No. of Claims*
Department of Mental Health	$193,369.58	54
Department of Public Health	50,070.04	111
Department of Public Works	118,535.45	241
Metropolitan District Commission	17,338.83	58
Education	5,599.43	88
State Colleges	3,234.04	34
Welfare	837.69	18
Industrial Accidents Division	22,274.44	11
Office of the Secretary	694.25	17
Department of Correction	292.08	4
Corporations & Taxations	43,970.82	1
Public Utilities	20.00	3
Parole Board	675.00	1
Public Safety	3,000.00	2
Waterways Division	4,213.13	2
Board of Retirement	904.04	1
Natural Resources	592.00	5
Administration & Finance	650.14	5
Milk Control Commission	122.29	2
Division of Employment Security	144.50	1
Youth Services	775.00	1
Aeronautics Commission	6,393.20	1
TOTAL	$473,705.95	661

By virtue of General Laws Chapter 258A, an act providing for the compensation of victims of violent crimes, the Attorney General has the responsibility of investigating and reporting such claims to the district courts of the Commonwealth. All claims are based on a victim's out-of-pocket losses.

In 1968, the first year c. 258A went into effect, the Division received fifty-five petitions from victims and nine claims were adjudicated with total awards amounting to $4,498.58. Since 1968 the number of these claims has drastically increased. Presently the Division receives thirty petitions per month. In fiscal 1973 alone, 60 claims were completed with awards totaling over $150,000.00

In a case of first impression under the Violent Crime Statute, the Supreme Judicial Court in *Gurley* v. *Commonwealth*, 1973 Mass. ADV. SH. 769, virtually assured that the dependents of a victim of violent crime, who dies as a result thereof, would recover the maximum award of $10,000.00.

Under the authority of Mass. General Laws, c. 168 § 31, Attorney General Quinn has recovered over three quarters of a million dollars in unclaimed bank deposits standing in the name of the First Judge of Probate for each county for the benefit of beneficiaries who could not be located.

Fiscal 1973 was the first time that a complete search for such unclaimed deposits was made in every probate court in the Commonwealth. Some bank books have been on file for 100 years. In Worcester, a $3.00 deposit made in 1870 had grown, with interest, to $93.00.

The state treasurer has received the following amounts as a result of the Attorney General's efforts:

County	*Amount*
Norfolk	$64,436.82
Bristol	18,603.63
Essex	38,970.91
Dukes	4,127.96
Worcester	183,089.32
Barnstable	1,001.39
Suffolk	126,688.15
Hampshire	13,973.61
Nantucket	1,867.46
Berkshire	54,274.94
Franklin	29,027.51
Plymouth	12,047.12
Middlesex	101,232.24
Springfield, Hampden	137,609.68
TOTAL	$786,950.74

Veterans

The Veterans' Division has continued to assist the veterans of the Commonwealth to locate and secure benefits available to them from various local, state and federal agencies involved in veterans' services.

The Division advises all veterans and veterans' groups of their legal rights and obligations.

APPENDIX

Bills proposed by the Attorney General and Enacted by the 1973 Legislature:

—Chapter 141 AN ACT REQUIRING WRITTEN DISCLOSURE ON BILLS OF SALE THAT MOTOR VEHICLES WERE USED AS LEASE VEHICLES.

—Chapter 162 AN ACT PROVIDING THAT FAILURE TO NOTIFY THE ATTORNEY GENERAL OF CERTAIN ENVIRONMENTAL ADJUDICATORY PROCEEDINGS SHALL NOT INVALIDATE THE SAME.

—Chapter 283 AN ACT PROVIDING FOR THE PRIORITY ON CIVIL TRIAL LISTS OF CERTAIN ACTIONS OR SUITS BROUGHT BY THE ATTORNEY GENERAL FOR ALLEGED DAMAGE TO THE ENVIRONMENT.

—Chapter 300 AN ACT FURTHER REGULATING THE INVESTMENTS OF CERTAIN RETIREMENT SYSTEMS.

—Chapter 378 AN ACT FURTHER REGULATING THE CANCELLATION OF CERTAIN FIRE INSURANCE POLICIES AND CONTRACTS AND REQUIRING NOTICE OF THE NON-RENEWAL THEREOF.

—Chapter 456 AN ACT PROVIDING A CIVIL REMEDY FOR PERSONS DEFRAUDED BY THE TAMPERING WITH AUTOMOBILE ODOMETERS, AND INCREASING THE CRIMINAL PENALTY FOR SUCH TAMPERING.

—Chapter 475 AN ACT EXTENDING CERTAIN CRIMINAL PENALTIES TO FRAUDULENT WELFARE CLAIMS.

—Chapter 479 AN ACT PROVIDING FOR THE ELIGIBILITY OF CERTAIN CHARITABLE CORPORATIONS AND TRUSTS FOR PROPERTY TAX EXEMPTIONS AND APPLICATIONS FOR ABATEMENT OF TAXES ASSESSED OR PAID FOR THE TAXABLE YEARS NINETEEN HUNDRED AND SEVENTY-THREE.

—Chapter 533 AN ACT RELATIVE TO THE SEALING OF PUBLIC RECORDS OF CERTAIN OFFENSES.

—Chapter 546 AN ACT FURTHER REGULATING THE ADMINISTRATION OF THE MASSACHUSETTS CLEAN WATERS ACT.

—Chapter 551 AN ACT RESTRICTING THE RIGHT OF INSURANCE COMPANIES TO CANCEL OR REFUSE TO ISSUE AUTOMOBILE INSURANCE POLICIES AND ESTABLISHING A PLAN OF REINSURANCE AMONG THE COMPANIES.

—Chapter 567 AN ACT PROVIDING THAT CORPORATIONS AND CERTAIN OTHER LEGAL ENTITIES SHALL BE SUBJECT TO SUPPLEMENTARY PROCESS AND PROCEEDINGS IN CIVIL ACTIONS IN THE DISTRICT COURT.

—Chapter 720 AN ACT PROVIDING FOR COLLECTIVE PURCHASES BY POLITICAL SUBDIVISIONS OF THE COMMONWEALTH.

—Chapter 748 AN ACT CHANGING THE SMALL CLAIMS PROCEDURE IN THE DISTRICT COURTS.

—Chapter 816 AN ACT REQUIRING THE DEPARTMENT OF PUBLIC UTILITIES TO NOTIFY THE ATTORNEY GENERAL AND TO CONDUCT A PUBLIC HEARING BEFORE MAKING CERTAIN RATE SCHEDULE CHANGES.

—Chapter 855 AN ACT FACILITATING THE EMPLOYMENT OR REEMPLOYMENT OF DISABLED WORKERS BY EXPANDING THE FUNCTIONS OF THE SECOND INJURY FUND.

—Chapter 874 AN ACT REGULATING THE SALE OF THEMES, TERM PAPERS, THESES OR RESEARCH PAPERS INTENDED TO BE USED FOR ACADEMIC CREDIT, AND PROHIBITING THE TAKING OF EXAMINATIONS FOR ANOTHER AT EDUCATIONAL INSTITUTIONS.

—Chapter 1007 AN ACT FURTHER REGULATING THE OPERATION OF MOBILE HOME PARKS.

—Chapter 1021 AN ACT RENAMING THE COMMITTEE ON LAW ENFORCEMENT AND THE ADMINISTRATION OF CRIMINAL JUSTICE AS THE COMMITTEE ON CRIMINAL JUSTICE AND PROVIDING FOR ITS ADMINISTRATION OF CERTAIN FEDERAL ACTS.

—Chapter 1167 AN ACT ESTABLISHING A DIAGNOSTIC, EVALUATION AND TREATMENT CENTER FOR EMPHYSEMA AT THE LEMUEL SHATTUCK HOSPITAL.

—Chapter 1224 AN ACT PROVIDING FOR THE PAYMENT OF CERTAIN EXPENSES OF THE ATTORNEY GENERAL AND THE DEPARTMENT OF PUBLIC UTILITIES.

Number 1 July 7, 1972

William J. Bicknell, M.D.
Commissioner
Department of Public Health
600 Washington Street
Boston, Massachusetts 02111

Dear Dr. Bicknell:

This is in response to your question whether student nurses are precluded from administering certain medication because of the enactment of Chapter 1071 of the Acts of 1971 which became effective July 1, 1972. I answer your question in the negative. Section 9 of the Act authorizes a physician to "administer controlled substances, or he may cause the same to be administered under his direction by a registered nurse or licensed practical nurse." The word "administer" is defined in Section 1 as follows: "the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by . . . (b) a registered nurse or licensed practical nurse at the direction of a practitioner in the course of his professional practice . . ." "practical nurse" and "registered nurse" are defined in Section 1 of the Act as nurses licensed under the provisions of Sections 74A and 74, respectively, of Chapter 112 of the General Laws.

The Act must be read with the provisions of Chapter 112 of the General Laws governing the registration of nurses (Sections 74 through 81C). Section 80B provides that "[f] or the purposes of sections seventy-four to eighty-one C, inclusive" "professional nursing" and "practical nursing" shall include, along with performing certain other services, "administering treatment or medication prescribed by a physician or dentist . . ." Section 80B further provides:

"Neither 'professional nursing' nor 'practical nursing' shall mean or be construed to prevent . . . (3) the performance, by any student enrolled in a school for nurses or practical nurses duly approved in accordance with this chapter, of any nursing service incidental to any prescribed course in such school . . ."

The Legislature must be deemed to have had this provision in mind when enacting Chapter 1071 and therefore to have intended that students not be prevented from "administering . . . medication" under the supervision of a registered or licensed practical nurse as part of their nursing training. This intent is further evidenced by the specific reference in Section 1 of the Act to the relevant provisions of Chapter 112 of the General Laws. Furthermore, any other interpretation would be unreasonable because it would mean that no student could be taught through personal application the proper administration of the controlled substances listed in Section 31 of the Act.

In addition, any graduate of any approved school for nurses or practical nurses may practice nursing during the period from graduation until announcement of the results of the first licensing examination for regis-

tered nurses or licensed practical nurses thereafter held in accordance with Chapter 112 (See G. L. Chapter 112, Section 81). The foregoing applies, however, only to persons who have applied for licenses in this Commonwealth. (See Opn. Atty. Gen. Feb. 9, 1966 p. 244).

I trust that the foregoing will answer your question.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 2 July 19, 1972

Dr. Robert Wood, *President*
University of Massachusetts
Office of the President
85 Devonshire Street
Boston, Massachusetts 02109

Dear President Wood:

You have requested my opinion with respect to the following two questions:

> "1. Does the University of Massachusetts have the autonomous authority under Mass. G. L. c. 75 to enter into a lease for a term of years for new office space with rental to be paid from State appropriations, notwithstanding the provisions of Mass. G. L. c. 8, § 10A and St. 1971, c. 719, or any other provisions of law?"
>
> "2. Does the University of Massachusetts have the autonomous authority under Mass. G. L. c. 75 to enter into an oral tenancy-at-will for additional office space with rental to be paid from State appropriations, notwithstanding the provisions of Mass. G. L. c. 8, § 10A and St. 1971, c. 719, or any other provisions of law?"

I proceed first to Question Number 1. G. L. c. 8, § 10A provides, in pertinent part:

> "The commonwealth, acting through the executive or administrative head of a state department, commission or board and with the approval of the superintendent and of the governor and council and of the commissioner of administration, may lease for the use of such department, commission or board, for a term not exceeding five years, premises outside of the state house or other building owned by the commonwealth, if provision for rent of such premises for so much of the term of the lease as falls within the then current fiscal year has been made by appropriation."

"Section 10A was enacted to give authorization to heads of departments, commissions and boards to enter into leases for premises outside State owned buildings." *United States Trust Company* v.

Commonwealth, 348 Mass. 378, 383. "[I]t was believed that the power to lease would result in a saving of rental costs to the Commonwealth." *Id.*, at 383. "The procuring of outside office space . . . is mainly a question of finance . . . This is a budgetary matter and should be handled entirely by the Commission on Administration and Finance." *Id.*, at 383.

The first issue raised by your question is the extent, if any, to which G. L. c. 8, § 10A applies to the Board of Trustees of the University of Massachusetts. Notwithstanding *Opinion of the Attorney General*, July 19, 1965 at 47, 48, I have serious doubts whether the Board of Trustees constitutes a "board" within the intent and purview of G. L. c. 8, § 10A. However, I do not, at present, find it necessary to make such a determination since, in my opinion, even if at one time G. L. c. 8, § 10A did encompass the Board of Trustees of the University of Massachusetts, it has since been impliedly repealed with respect to that body.

As I previously stated in *Opinion of the Attorney General*, December 17, 1969, at 86, "[c]hapter 648 of the Acts of 1962 significantly amended G. L. c. 75 and expanded the authority of the Board of Trustees of the University of Massachusetts." As amended, G. L. c. 75, § 1 provides:

> "There shall be a University of Massachusetts which shall continue as a state institution within the department of education but not under its control and shall be governed solely by the board of trustees established under section twenty of chapter fifteen. In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees shall have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning. In exercising such authority, responsibility, powers and duties *said board shall not in the management of the affairs of the university be subject to, or superseded in any such authority by, any other state board, bureau, department or commission, except as herein provided.*" (Emphasis supplied.)

G. L. c. 75, § 3 provides, in pertinent part:

> "*Notwithstanding any other provision of law to the contrary, except as herein provided*, the trustees may adopt, amend or repeal such rules and regulations for the government of the university, for the management, control and administration of its affairs, for its faculty, students and employees, and for the regulation of their own body, as they may deem necessary . . ." (Emphasis supplied.)

G. L. c. 75, § 8 provides, in pertinent part:

> "*Notwithstanding any other provision of law to the contrary*, the general court shall annually appropriate such sums as it deems necessary for the maintenance, operation and support of the university; and such appropriations shall

be made available by the appropriate state officials for expenditure through allotment, transfer within and among subsidiary accounts, advances from the state treasury in accordance with the provisions of sections twenty-four, twenty-five and twenty-six of chapter twenty-nine, or for disbursement on certification to the state comptroller in accordance with the provisions of section eighteen of said chapter twenty-nine, *as may from time to time be directed by the trustees or an officer of the university designated by the trustees.*" (Emphasis supplied.)

G. L. c. 75, § 11 provides, in pertinent part:

"The trustees shall administer property held in accordance with special trusts, and shall also administer grants or devises of land and gifts or bequests of personal property made to the commonwealth for the use of the university, and execute said trusts, investing the proceeds thereof in notes or bonds secured by sufficient mortgages or other securities. *The trustees shall have the authority* to assent to federal laws designed to benefit the university *and to enter into agreements or contracts* with the federal government or agencies thereof, *as well as into agreements or contracts with agencies of other governments, other colleges and universities, foundations, corporations, interstate compact agencies and individuals where such agreements or contracts, in the judgment of the trustees, will promote the objectives of the university.*" (Emphasis supplied.)

And, G. L. c. 75, § 12 provides, in pertinent part:

"The trustees shall, on behalf of the commonwealth, manage and administer the university and all property, real and personal, belonging to the commonwealth and occupied or used by the university, . . ."

The language of the foregoing provisions specifically and G. L. c. 75 as a whole make it clear that the Legislature intended that the authority of the Board of Trustees be autonomous with respect to the management and administration of the affairs of the University, just as the authority of governing boards of private institutions of higher learning is autonomous with respect to the management and administration of their affairs. In freeing the Board of Trustees from the control or supervision of any state board, bureau, department or commission, the Legislature, in my opinion, necessarily understood that the management and control of University property was fundamental to the function of administration and that instrumental to that function is the authority to enter into a lease, a power customarily and traditionally exercised by governing boards of institutions of higher learning.

With respect to the principle of implied repeal then, the question is whether G. L. c. 8, § 10A is so in conflict with G. L. c. 75 as a whole and with section 1 of c. 75 in particular that both cannot stand. "The

test of the applicability of the principle of implied repeal is whether the prior statute is so repugnant to and inconsistent with the later enactment covering the subject matter that both cannot stand." *Doherty* v. *Commissioner of Administration*, 349 Mass. 687, 690. Thus, " 'the enactment of a statute which seems to have been intended to cover the whole subject to which it relates, impliedly repeals all existing statutes touching the subject . . .' " *Sullivan* v. *Worcester*, 346 Mass. 570, 573. Based upon the language of G. L. c. 8, § 10A and G. L. c. 75, it is my opinion that, insofar as G. L. c. 8, § 10A may have applied, at one time, to the Board of Trustees, it has since been impliedly repealed with respect to that body.

This conclusion is buttressed by reference to the legislative history of G. L. c. 75. A perusal of 1962 House Document No. 3350, *Report of the Special Commission on Budgetary Powers of the University of Massachusetts and Related Matters*, which led to the enactment of Chapter 648 of the Acts of 1962, reveals the Legislature's deep concern that the Board of Trustees not be subjected to the fiscal administrative and management controls exercised by various state agencies, with certain limited exceptions, lest they interfere with the management of the University. In deciding whether the use of appropriated funds should be controlled in detail by the executive agencies of the state or whether the specific use of funds should be left to the discretion of the educators and administrators responsible for the University, the Commission arrived at the conclusion that the University (and Lowell Technological Institute) should operate under four essential controls and that "[b]eyond these reasonable limits, further restrictions on the authority of the trustees can lead to impairment of their ability to manage the institution as the public requires." 1962 House Document No. 3350, at 9. Those four controls left the specific use of public funds to the discretion of the trustees of the University. While reserving the decisions to be made with respect to the use of said funds to the trustees, the Commission did urge, in limitation III, complete management and financial *reporting* to the control agencies of the state to promote public understanding of the manner in which the taxpayers' dollars were being spent and, in limitation IV, a post-audit of all accounts to account for the expenditure of public funds. Thus, while the *level of support* which the University is to receive should be initially determined by the Legislature, and the specific uses to which the funds, once appropriated, shall be put, are to be determined by the Board of Trustees — the financial reporting and post-auditing of accounts provide the Legislature with "a full picture of University operations for the year." 1962 House Document No. 3350, at 11. To those who suggested that the University need be autonomous only in the scholarly phases of its operation, the Commission responded that,

> "[V]irtually every activity on a college campus has academic implications. Imprudent intervention of state agencies in non-academic areas can quickly penetrate to educational policy." 1962 House Document No. 3350, at 11.

Accordingly, it is my opinion that it was the intention of the Legislature to give the Board of Trustees complete discretion in the manage-

ment and administration of the University in both academic and non-academic areas, and that the specific uses to which funds once appropriated are put to be left to the sound discretion of the trustees and educators responsible for the management of the University. This overriding legislative intent embraces, in my opinion, the fiscal controls contained in G. L. c. 8, § 10A.

Turning briefly to c. 719 of the Acts of 1971, the Appropriation Act for fiscal 1971, section 13 provides:

> "*Notwithstanding the provisions of section ten A of chapter eight of the General Laws, no lease negotiated as provided therein nor any agreement providing for a tenancy at will or other space rental shall be signed by the executive or administrative head of a state department, commission or board or approved by the state superintendent of buildings and by the governor and council and by the commissioner of administration* unless it is in accordance with schedules filed by the budget director with the house and senate committees on ways and means prior to the passage of this act; provided, that renewals of leases, tenancies at will and other space rentals may be continued at existing rates pending appropriation if the general court has not provided otherwise; and, further provided, that the commissioner of administration, in order to meet unforeseen circumstances may approve, on a tenancy at will basis, a change in location, new or additional space, or an increase in rate, if funds are available therefor within the appropriation account from which the costs of such space rentals are to be paid; and, further provided, that every such proposed change is filed by the budget director with the house and senate committees on ways and means prior to the final authorization of any such agreement." (Emphasis supplied.)

In my opinion, this statutory provision does not limit the autonomous authority of the Board of Trustees to enter into a lease for a term of years since it is clear that this provision is premised upon the mechanics of G. L. c. 8, § 10A and that it was intended to apply only to those leases or rental agreements subject to the terms of that section. Since it is my conclusion that § 10A has been impliedly repealed with respect to the Trustees (if indeed, it ever applied), it follows *a fortiori* that the Legislature did not intend that § 13 apply to the Trustees. Nor is my opinion affected by the provisions of § 20 of c. 719 of the Acts of 1971 which in substance states that certain sections shall not apply to expenditures from appropriations made for the University, among other named entities, and which does not refer to § 13. Since § 13 does not apply for the reasons hereinbefore stated, the mere omission of a reference to the section in § 20 is neither determinative nor persuasive. In conclusion, with respect to Question No. 1, it is my opinion that the Trustees have the autonomous authority under G. L. c. 75 to enter into

a lease for a term of years for new office space with rental to be paid from State appropriations. My opinion is the same for the Appropriation Act for 1972, c. 514 of the Acts of 1972, since the terms therein are identical in substance to §§ 13 and 20 of the 1971 Appropriations Act.

With respect to Question No. 2, I arrive at the same conclusion. If a department, commission or board has authority, under a special statute or otherwise, to bind the Commonwealth to an oral or other agreement establishing a tenancy at will, G. L. c. 8, § 10A does not apply. *Opinion of Attorney General*, March 25, 1953, at 40, 41. In my opinion such authority is necessarily and logically implied under the terms and scope of G. L. c. 75, as explained *supra*. Therefore, the Comptroller's Division cannot refuse to process properly completed purchase order and standard invoice forms for the payment of rent for tenancies at will entered into by the University on the grounds of either G. L. c. 8, § 10A or c. 719 of the Acts of 1971.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 3 July 20, 1972

Honorable Steven A. Minter
Commissioner of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner Minter:

You have requested my opinion whether the Department of Public Welfare may use funds appropriated for fiscal year 1973 to pay bills incurred in fiscal year 1972 since the funds for the latter year have been exhausted.

St. 1972, c. 514, the appropriations act for fiscal 1973, included funds in the various welfare budget items without setting forth in those items the words "Including prior year expenses" or "Prior appropriation continued" as was the case for the same items in the 1972 fiscal year budget. Section 1 of Chapter 514 provides in part that "the sums set forth in section two . . . are hereby appropriated . . . *for the fiscal year ending June the thirtieth, nineteen hundred and seventy-three . . . or for such period as may be specified.*" [Emphasis added.]

G. L. c. 29, § 12 provides as follows:

> "Appropriations by the general court, unless specifically designated as special shall be for the ordinary maintenance of the several departments, offices, commissions and institutions of the commonwealth and *shall be made for the fiscal year unless otherwise specifically provided therein.*" [Emphasis added.]

Under the provisions of St. 1972, c. 514, § 1 and G. L. c. 29, § 12, the money appropriated by the Legislature pursuant to said c. 514 may only be used to meet expenses incurred during the fiscal year 1973 unless other dates are specified. With respect to the items set forth in your opinion request, namely 4401-1000, 4402-5000, 4403-2000, 4405-2000, 4406-2000 and 4407-2000, the Legislature did not specify in said c. 514 that the amounts in these items may be used to pay prior year expenses. Consequently, without further legislative action, the omission of such language in c. 514 would preclude the Department from paying bills incurred in fiscal year 1972 with money from the fiscal year 1973 budget.

However, St. 1972, c. 647 makes certain additional provisions with respect to items 4402-5000, 4405-2000 and 4407-2000 in the budget. Section 2 of said chapter provides for an appropriation of $9,200,000 for a medical assistance program (item 4402-5000) and for a transfer of $15,000,000 in item 4405-2000 and $5,000,000 in item 4407-2000 from the budget to be used for purposes of this section. Section 2 then provides that such funds may be used to pay expenses incurred in the months of April, May and June, 1972 for each of these items.

Accordingly, in my opinion you can only make payments for provider services incurred prior to July 1, 1972 if they were incurred in the months of April, May and June, 1972 and were for items 4402-5000, 4405-2000 and 4407-2000, and only up to amounts set forth in St. 1972, c. 647, § 2, for each item.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 4 August 9, 1972

Henry Clay, *Esquire*
Executive Secretary
Governor's Council
State House
Boston, Massachusetts 02133

Dear Mr. Clay:

You have requested my opinion concerning a second *pro tanto* award for an eminent domain taking made by the Commonwealth's Department of Public Works. From the facts recited in your letter, it appears that on June 16, 1971 the Department approved a *pro tanto* award for a taking in the City of Peabody. That award, which included apportioned taxes and interest, totalled $55,582.72. On June 24, 1971, the Department's order of taking was recorded with the Essex County Registry of Deeds (Book 5777, page 309), and thereafter, on August 19, 1971 the award was accepted by the property owners.

Because the Massachusetts Department of Community Affairs did not approve the relocation plan for the project for which the taking was made until June 1971 and because the original appraisals were made dur-

ing the period September through November of 1970, the Department of Public Works determined that a review of the original appraisals was in order. That review resulted in two new appraisals, and, on April 12, 1972, the Department of Public Works voted an increase of $11,000.00 over and above the original *pro tanto* award. Payment of that sum is now before the Council for its approval, and you ask, on behalf of the Council, whether the second payment may be made in the light of the provisions of G. L. c. 79, § 6. For the reasons stated hereinafter, I conclude that approval and payment of a second *pro tanto* award would violate section 6, and I answer your question in the negative.

General Laws, c. 79, § 6 provides in part:

> "Such award [a *pro tanto* award] may be amended by said board of officers at any time prior to the payment thereof by reason of a change in ownership or *value* of said property *before* the right to damages therefor has become vested or for other good cause shown." (Emphasis supplied.)

In the instant case, an amendment to the award could have been made by the Department "at any time prior to the payment thereof," which date was August 19, 1971. On that date, the Department's power to amend was lost, and the Department could not at a subsequent time take administrative action based on the evidence of change of value discovered as a result of the two new appraisals on November 18, 1971 and February 2, 1971.

What I have said does not leave the original owners without a remedy should they have a valid claim to additional damages. General Laws, c. 79, § 14 provides that even in the face of an award under section 6, a party

> "may petition for assessment of such damages to the superior court of the county in which the property taken or injured was situated."

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 5 August 21, 1972

Mrs. Helen C. Sullivan
Director of Registration
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mrs. Sullivan:

The State Examiners of Electricians, through you, have requested my opinion whether the inspector of wires appointed by a city or town pursuant to G. L. c. 166, § 32, must be a licensed master or journeyman electrician. For the reasons expressed herein, I answer your question in

the affirmative with respect to individuals appointed by a city and those appointed by towns which have accepted the provisions of G. L. c. 31 relating to civil service. With respect to wire inspectors appointed by towns which have not accepted the provisions of said chapter 31, I answer your question in the negative.

General Laws, c. 141, § 1, provides in part:

> "No person, firm or corporation shall enter into, engage in, or work at the business of *installing wires, conduits, apparatus, fixtures or other appliances for carrying or using electricity for light, heat or power purposes*, unless such person, firm or corporation shall have received a license and a certificate therefor . . ." (Emphasis supplied.)

Said section defines a master electrician as one having a regular place of business who, by the employment of journeymen, learners and apprentices, performs the work of installing wires, conduits, apparatus, fixtures and other appliances for light, heat or power purposes. "Journeyman electrician" is defined as a person qualified to perform electrical work.

Section 3 of c. 141 declares that the master electrician's license shall be known as "Certificate A," and the journeyman's license as "Certificate B." Subdivision (1) of said section provides that Certificate A shall be issued to any person engaging in the business of installing electrical wires or appliances; however, the possession of said certificate does not entitle the holder individually to perform the work, but rather entitles him to conduct business as a master electrician. Subdivision (2) provides that Certificate B shall be issued to any person passing the examination given by the State Examiners of Electricians, and authorizes the holder to engage in the occupation of a journeyman electrician. It appears, therefore, that the Legislature, desiring to preserve and protect the public safety, requires a master's license of one engaging in the electrical business and hiring others to do the work, and a journeyman's license of those hired to do the work.

General Laws, c. 166, § 32, which provides for the appointment of wire inspectors and prescribes their duties, provides in part:

> "A city shall, by ordinance, designate or provide for the appointment of an inspector of wires, and a town shall provide by vote or by by-law for the appointment by its selectmen of such an inspector . . . Such inspector shall *supervise* every wire over or under streets or buildings in such city, town or district and every wire within a building designed to carry an electric light, heat or power current; shall *notify* the person owning or operating any such wire whenever its attachments, insulation, supports or appliances are improper or unsafe, or whenever the tags or marks thereof are insufficient or illegible; shall, at the expense of the city or town, *remove every wire the use of which has been abandoned, and every wire not tagged or marked as hereinabove required, and shall*

see that all laws and regulations relative to wires are strictly enforced . . ." (Emphasis supplied.)

There is no express requirement in section 32 that the individual appointed pursuant to said section be a licensed master or journeyman electrician. It should be noted that it was not until St. 1945, c. 529, that towns were required to appoint wire inspectors. Prior to the enactment of that statute, the words "inspector of wires" were stated to mean "the selectmen" in those towns which did not have a wire inspector.[1] Obviously, a selectman would not necessarily be an individual experienced in electrical matters. Had the Legislature intended to narrow by statute the class of individuals from which a town could appoint a wire inspector, it would have so stated.

Moreover, the duties imposed by c. 166, § 32 upon a wire inspector do not entail the installation of "wires, conduits, apparatus, fixtures or other appliances for carrying or using electricity for light, heat or power purposes." The power of a wire inspector to "remove" abandoned wires or wires not properly tagged or marked does not, in my opinion, constitute that type of electrical work for which a master's or journeyman's license is required.

However, notwithstanding the foregoing, a city or town is required to appoint a master or journeyman electrician as its inspector of wires if said position is subject to the laws of the Commonwealth relating to civil service.

General Laws, c. 31, § 12B provides:

> "No applicant for the position of inspector of wires shall be certified by the director of civil service for such position unless he shall first have had issued to him, under the provisions of section three of chapter one hundred and forty-one, 'Certificate A' or 'Certificate B'."

Thus, the resolution of your question depends upon whether or not the position of inspector of wires is a civil service position. At this point it is necessary to separate your question so as to distinguish between wire inspectors appointed by cities and those appointed by towns.

Paragraph one of G. L. c. 31, § 47, provides:

> "*This chapter shall be in force with respect to the official and labor service in all cities of the commonwealth of one hundred thousand or more inhabitants*, whether or not such cities have accepted this chapter or corresponding provisions of earlier law. *This chapter shall be in force in all cities of the commonwealth of less than one hundred thousand inhabitants with respect to the official service* and shall be in force with respect to the labor service in cities of less than one hundred thousand inhabitants which have accepted the corresponding provisions of earlier laws or accept the pertinent

[1] Similar language appears in existing statutes notwithstanding § 32 which requires wire inspectors. See, e.g., c. 166, § 34.

provisions of this chapter by vote of the city council." (Emphasis supplied.)

It is clear from c. 31, § 47, that with respect to "official service" the provisions of chapter 31 are applicable to all cities of the Commonwealth whether or not said cities have accepted the provisions of the chapter.

"Official service" is defined in c. 31, § 1 as "positions placed in such service under the rules of the commission." I have been advised by the Commission that the position of inspector of wires has been designated as official service.[2] In the light of c. 31, §§ 12B and 47, and the Commission's designation of the position of inspector of wires as "official service," I conclude that wire inspectors appointed by cities must be either licensed master or journeymen electricians.

Whether or not an individual appointed by a town must be a licensed master or journeyman electrician depends upon whether the town has accepted the provisions of chapter 31. On this point, I need only refer you to the second paragraph of c. 31, § 47, which sets forth the manner in which towns accept the provisions of chapter 31.

Finally, with respect to those towns which have not accepted the provisions of chapter 31, I conclude that the individual appointed as wire inspector need not be a licensed master or journeyman electrician. It should be emphasized that this opinion does not authorize a wire inspector to perform electrical work without a license, but rather only indicates my opinion that the duties of a wire inspector as set forth in c. 166, § 32 do not constitute electrical work for which a license must be obtained.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 6 August 22, 1972

Honorable William J. Bicknell, M.D.
Commissioner of Public Health
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner Bicknell:

You have requested my opinion whether the Department of Public Health is required to test every marihuana sample submitted to it by law enforcement officials to determine the percentage of tetrahydrocannabinol which it contains.

General Laws, c. 111, § 12 provides:

> "It [the Department of Public Health] shall make, free of charge, a chemical analysis of any narcotic drug, or any preparation containing the same, or any salt or compound thereof, and of any poison, drug, medicine or chemical, when submit-

[2] Rule 3(3) of the Civil Service Rules provides that a list of all offices or positions designated as official service and any amendments or additions thereto, "shall be on file in the office of the Division of Civil Service, which list shall be open to reasonable inspection by the public . . ."

ted to it by police authorities or by such incorporated charitable organizations in the commonwealth, as the department shall approve for this purpose; provided, that it is satisfied that the analysis is to be used for the enforcement of law."

General Laws, c. 94C (the controlled Substances Act), § 1 defines marihuana as follows:

> "[A]ll parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake of the sterilized seed of the plant which is incapable of germination."

Section 1 also defines tetrahydrocannabinol as follows:

> "[T]etrahydrocannabinol or preparations containing tetrahydrocannabinol excluding marihuana *except when it has been established that the concentration of delta-9 tetrahydrocannabinol in said marihuana exceeds two and one half per cent.*"

Thus, in order to determine whether a particular controlled substance is to be regarded as marihuana or tetrahydrocannabinol, it must be "established that the concentration of delta-9 tetrahydrocannabinol in said marihuana exceeds two and one half per cent." It is my understanding that a quantitative chemical analysis is necessary to establish the correct concentration level.

Therefore, in direct response to your questions, it is my opinion that the Department of Public Health must test every marihuana sample submitted to it by law enforcement officials if said officials expressly request such a test and the Department "is satisfied that the analysis is to be used for the enforcement of law." G. L. c. 111, § 12. In reaching that determination, the Department may require a statement of facts sufficient to establish the purpose of the test.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 7 August 23, 1972

Mr. Martin P. Davis, *Chairman*
Advisory Board of Pardons
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Davis:

You have requested an opinion whether a prisoner serving a sentence containing a minimum sentence, for a crime committed while on parole,

may be paroled when he has served two-thirds of such minimum. For the reasons stated hereinafter, I answer your question in the affirmative.

Your question involves an interpretation of G. L. c. 127, § 133, clause (c). Section 133 provides:

> "Parole permits may be granted by the parole board to prisoners subject to its jurisdiction at such time as the board in each case may determine; provided (a) that no prisoner, convicted for a violation of section thirteen, thirteen B, fourteen, fifteen, fifteen A, fifteen B, sixteen, seventeen, eighteen, eighteen A, nineteen, twenty, twenty-one, twenty-two, twenty-two A, twenty-three, twenty-four, twenty-four B, twenty-five, or twenty-six of chapter two hundred and sixty-five, or section seventeen, thirty-five, or thirty-five A of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said sections, and held under a sentence containing a minimum sentence shall receive a parole permit until he shall have served two thirds of such minimum sentence, but in any event not less than two years or if he has two or more sentences to be served otherwise than concurrently, two thirds of the aggregate of the minimum terms of such several sentences, but in any event not less than two years for each such sentence; provided, further, however, that upon the written recommendation of the superintendent or the director of the prison camp, and the commissioner of correction, and, with the consent and approval of a majority of the full parole board, such a prisoner shall become eligible for parole consideration, and, with like consent and approval, may be given a parole permit before such time, but in any event not sooner than such a parole permit may be granted to other prisoners under clause (*b*) of this section; (*b*) that no other prisoner held under a sentence containing a minimum sentence shall receive a parole permit until he shall have served one third of such minimum sentence, but in any event not less than one year, or, if he has two or more sentences to be served otherwise than concurrently, one third of the aggregate of the minimum terms of such several sentences, but in any event not less than one year for each such sentence; (*c*) that no prisoner held under a sentence containing a minimum sentence for a crime committed while on parole shall receive a parole permit until he shall have served two thirds of such minimum sentence, or, if he has two or more sentences to be served otherwise than concurrently for offenses committed while on parole, two thirds of the aggregate of the minimum terms of such several sentences, but in any event not less than two years for each such sentence. Notwithstanding clauses (*a*), (*b*) and (*c*) of this section, deductions shall be allowed for blood donations as provided in section one hundred and twenty-nine A, and deduc-

> tions shall be allowed for time confined in a prison camp as provided in section one hundred and twenty-nine C, said deductions to reduce the term of imprisonment by computing said additional deductions and subtracting the same from the minimum term of sentence for release on parole as authorized by this section, or for reducing the term of imprisonment by deduction from the maximum term for which he may be held under his sentence or sentences."

The section sets forth the eligibility and requisites for parole permits granted by the Parole Board. Clause (a) appertains to parole requirements following conviction of one or several violent or morally reprehensible crimes. More narrowly, it applies where a convicted person is held under a sentence for such crimes and the sentence provides for a minimum sentence. The provisions of clause (b) relate to non-violent and non-lascivious criminal offenses. Clause (c) focuses on parole eligibility for a person convicted of a crime while on parole. As with clause (a), clauses (b) and (c) apply only to those instances where the sentences contain mandatory minimums.

Clauses (a), (b) and (c) each distinguish, for parole purposes, between detention under single and concurrent sentences on the one hand and multiple sentences on the other. Clauses (a) and (b) expressly provide that a prisoner may not be paroled prior to confinement under single or concurrent sentences for two years and one year respectively, despite the fact that he may have satisfied the two-thirds minimum requirement of clause (a) or its one-third counterpart in clause (b). Clause (c) contains no such qualification on its two-thirds minimum requirement for single or concurrent sentences. Such omission in clause (c) appears purposeful.

Clauses (a), (b) and (c) each contain minimum requirements for parole under multiple sentences. In turn, each provides absolute yearly minimums [two years for each sentence in clause (a), one year for each sentence in clause (b) and two years for each sentence in clause (c)] for parole eligibility, which absolute minimums take precedence over the more general two-thirds aggregate [clause (a)], one-third aggregate [clause (b)] and two-thirds aggregate [clause (c)]. In providing for such absolute yearly minimums for multiple sentences, all three clauses employ the same language and grammatical construction.

In clause (a), the yearly minimum figure is two years for both single or concurrent sentences on the one hand and multiple sentences on the other. Clause (b) employs a one-year yearly minimum figure. However, both clauses (a) and (b) contain separate identical yearly minimum figures immediately following the references to the language concerning single, concurrent and multiple sentences. Clause (c) contains only a single yearly minimum figure and this is annexed to the multiple sentence language.

Consequently, to postulate that in clause (c) the yearly minimum figure which directly follows the multiple sentence provision modifies mul-

tiple as well as single and concurrent sentences is to characterize the separate yearly minimum figure for single and concurrent sentences in Clause (a) and (b) as mere surplusage. If the General Court had intended the yearly minimum figure which follows the multiple sentence language in all three clauses to apply to all three categories of sentences, it would have been unnecessary to insert a separate yearly minimum figure immediately following the single and concurrent sentence language in clauses (a) and (b).

In my view, had the General Court intended the yearly minimum figure of clause (c) to apply to single and concurrent sentences referred to in that clause, it would either have inserted a separate but identical figure to modify such sentences as was done in clauses (a) and (b) or it would have altered the language and structure of the modifying phrase containing the yearly figure which immediately follows its provisions on multiple sentences. As indicated *supra*, clauses (a), (b) and (c) contain identical language and grammatical construction following their multiple sentence language, and it has been established that in clause (a) and (b) the yearly minimum figure contained in that phrase directly modifies multiple sentences only. It must be assumed that by employing the identical phrase in clause (c), the General Court only intended that the yearly figure contained therein modify multiple sentences.

Thus, it is my opinion that a prisoner serving a sentence or several sentences concurrently containing a minimum sentence, for a crime committed while on parole, may be paroled when he has served two-thirds of such minimum, even if such portion is less than two years.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 8 August 31, 1972

Honorable Daniel P. McGillicuddy
Commissioner of Commerce and Development
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner McGillicuddy:

You have requested my opinion whether operation of a glass container manufacturing plant by The Foster-Forbes Glass Company, an Indiana corporation, in Milford, Massachusetts would be prohibited by the provisions of G. L. c. 136, § 5, or whether the operation falls within the exception contained in section 6 of that chapter. For the reasons stated hereinafter, I conclude that such operation would fall within the exception of section 6.

It is the representation of Foster-Forbes that a glass container factory requires continuous operation, twenty-four hours a day, seven days a

week, with the exception of three holidays, including Christmas. The facts show that a glass furnace contains an average of three hundred fifty tons of molten glass which is kept at a temperature of 2,750 degrees farenheit, fired by what is called a regenerative system. These furnaces remain at such a temperature for their entire life, which approximates five to eight years. Glass is drawn from these furnaces at the ratio of about half the tonnage capacity daily throughout the life of the furnace except for the three holidays mentioned. Shutdowns are extremely costly, because of the high start-up expense, diminish the life of the furnace, and may even cause complete loss of the furnace. Frequent shutdowns would place such a glass container factory at a severe economic disadvantage vis-a-vis similar operations elsewhere.

While I would ordinarily decline to express an opinion as to the application of a criminal statute to a private corporation, it is clear that you, as Commissioner, have supervision and control over a department which has as one of its principal purposes "[p]romoting, developing and expanding the economy, the commerce, [and] the industry . . . of the commonwealth . . ." G. L. c. 23A, § 2. Your department has been active in the negotiations which have led Foster-Forbes to consider the Commonwealth as a site for its plant, and continued activity on the part of the department is dependent upon the answer to the question you pose. I therefore proceed to answer it on that basis.

An analysis of the applicable statutes provides the short answer to your question. General Laws, c. 136, § 5 provides:

> "Whoever on Sunday keeps open his shop, warehouse, factory or other place of business, or sells foodstuffs, goods, wares, merchandise or real estate, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars for a first offense, and a fine of not less than fifty dollars nor more than two hundred dollars for each subsequent offense, and each unlawful act or sale shall constitute a separate offense."

General Laws, c. 136, § 6 provides, in pertinent part:

> "Section five shall not prohibit the following:
>
> * * * * *
>
> (6) . . . [M]anufacturing processes which for technical reasons require continuous operation, . . ."

Based on the facts recited *supra*, it is my opinion that a glass container factory is a manufacturing process "which for technical reasons require[s] continuous operation." I conclude, therefore, that the operation of such a plant falls within the exception of G. L. c. 136, § 6(6).

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 9 September 13, 1972

Henry Clay, Esquire
Executive Secretary
Council Chamber
State House
Boston, Massachusetts 02133

Dear Mr. Clay:

On behalf of the Executive Council, you have requested my opinion on the following question:

> "When a question concerning the Constitution of the United States has been raised in a court of the Commonwealth and a finding against the individual raising the question has been made by the Appeals Court, do the requirements of Section 10 of Chapter 740 of the Acts of 1972 or of any other section of said Act governing the individual's continuing his appeal render the statute or a portion thereof unconstitutional for the reason that it restricts further appeal to the Supreme Judicial Court and may thereby restrict appeal to the United States Supreme Court?"[1]

For the reasons hereinafter set forth, I answer the question in the negative.

General Laws, c. 211A, §§ 10 and 11, inserted by St. 1972, c. 740, § 1, provides as follows:

> "Section 10.
>
> Subject to such further appellate review by the supreme judicial court as may be permitted pursuant to section eleven or otherwise, the appeals court shall have concurrent appellate jurisdiction with the supreme judicial court, to the extent review is otherwise allowable, with respect to a determination made in the superior court, the land court and the probate courts, (*a*) in all civil proceedings at law or in equity without limit as to the subject matter or amount in controversy; (*b*) in proceedings in the superior court for the review of administrative determinations; (*c*) in proceedings in the superior court relating to mandamus, certiorari and all other extraordinary writs; and (*d*) in criminal cases, irrespective of whether sentence has been imposed, except in review of convictions for first degree murder where a sentence of death or life imprisonment has been imposed. A report from the superior, land or probate courts of any case, in whole or in part, or any question of law arising therein shall be deemed within the concurrent appellate jurisdiction of the supreme court and the appeals court.
>
> Without regard to whether review is by appeal, bill of exceptions, report or otherwise, appellate review of decisions made in the superior, land or probate courts, if within the

[1] By "Section 10 of Chapter 740," I take you to refer to G. L. c. 211A, § 10, inserted by § 1 of c. 740.

jurisdiction of the appeals court, shall be in the first instance by the appeals court except in the following cases in which appellate review shall be directly by the supreme judicial court without the necessity of any prior hearing or decision by the appeals court on the merits of the issues sought to be reviewed.

(A) Whenever two justices of the supreme judicial court issue an order for direct review by the supreme judicial court in any case on appeal, either at the request of one of the parties or at the court's own initiative, upon finding that the questions to be decided are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the supreme judicial court; (2) questions of law concerning the Constitution of the commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the commonwealth; (3) questions of such public interest that justice requires a final determination by the supreme judicial court.

(B) Whenever the appeals court as a body or a majority of the justices of the appeals court considering a particular case certifies that direct review by the supreme judicial court is in the public interest.

In each case where appellate review is not within the jurisdiction of the appeals court, appellate review shall be directly by the supreme judicial court, unless such case is transferred by the supreme judicial court to the appeals court for determination in accordance with section twelve of this chapter.

"Section 11.

There shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by the court, except: — (a) where a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interests of justice make desirable a further appellate review, or (b) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice. Upon the written order of a majority of the justices of the appeals court, the decision of a panel of the appeals court may be reviewed and revised by a majority of the justices of the appeals court. Such a review shall not be a condition precedent to obtaining further appellate review by the supreme judicial court."

Experience makes manifest that a great many cases, in which one party or another raises some claim or defense based on the Constitution of the United States, will not be

considered of such legal significance or public importance as to warrant further review by the Supreme Judicial Court after a decision by the Appeals Court. However, the fact that the Supreme Judicial Court has exercised its discretion by refusing further review in such a case in no way affects the right of the litigants to seek further review in the Supreme Court of the United States. Title 28, Section 1257, of the United States Code provides:

"Final judgments or decrees rendered by *the highest court of a State in which a decision could be had*, may be reviewed by the Supreme Court . . ." (Emphasis supplied.)

Under this provision, if the jurisdiction of the Supreme Judicial Court is properly invoked and it declines to review the judgment of the Appeals Court, the Appeals Court is then the highest court in which a decision could be had. A party would then be free to appeal that decision to the United States Supreme Court. *Minneapolis, St. Paul & Sault Ste Marie Ry. Co.* v. *Rock*, 297 U.S. 410; *Prudential Ins. Co. of America* v. *Cheek*, 259 U.S. 530.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 10 October 10, 1972

Professor Howard M. Emmons
Chairman, Massachusetts Science and Technology Foundation
Door 10, Lakeside Office Park
Wakefield, Massachusetts 01880

Dear Professor Emmons:

You have requested my opinion whether individual members of the Board of Governors of the Massachusetts Science and Technology Foundation (the Foundation) are personally liable to reimburse the Commonwealth for monies accepted by Board members for Foundation purposes pursuant to appropriation acts containing so-called "pay back" provisions. Appropriations have been made by the Legislature to the Foundation on the condition that the Foundation reimburse the Commonwealth for the amounts appropriated. For example, Chapter 514, section 2, item 3690-0010, the appropriation act funding the Foundation for fiscal year 1973, provides as follows:

"For the expenses of the Massachusetts Science and Technology Foundation, as authorized by chapter eight hundred and forty-three of the acts of nineteen hundred and sixty-nine; *provided, that the foundation shall reimburse the commonwealth for appropriation made under this item . . .* $100,000." (Emphasis supplied.)

Similar "pay back" provisions are contained in acts funding the Foundation in past years. Chapter 370, section 2, item 1590-0010 of the Acts of 1970; Chapter 1003, section 2, item 1590-0010 of the Acts of 1971. For the reasons hereinafter stated, I am of the opinion that the "pay back" provisions at issue impose no personal liability upon the individual members of the Foundation's Board of Governors to reimburse the Commonwealth for the amounts appropriated.

The Foundation was created and placed in the Department of Commerce and Development pursuant to Chapter 843 of the Acts of 1969. That act manifests an intent on the part of the Legislature to establish the Foundation as an independent corporate body capable of both incurring and meeting monetary obligations.

Section 7 of Chapter 843 of the Acts of 1969 provides:

> "All moneys received by the Foundation under the authority of this act shall be deemed trust funds, to be held and applied solely as provided in this act. The Foundation shall, in any trust agreement, provide for the payment of all revenues to be received to any officer who, or to any agency, bank or trust company which, shall act as trustee of such funds and shall hold and apply the same to the purposes hereof, subject to such regulations as this act and such trust agreement may provide.
>
> "All expenses incurred in carrying out the provisions of this act shall be payable solely from funds provided under the authority of this act, and the Foundation shall have no power to make its obligations payable out of any property or moneys except those of the Foundation. No obligation of the Foundation shall be a debt of the commonwealth and no liability or obligation shall be incurred by the Foundation beyond the extent to which moneys shall have been provided by appropriation or otherwise under the provisions of this act and are available therefor."

In addition, Section 6(c) empowers the Foundation

> "to sue and be sued in its own name and to prosecute and defend all actions relating to its property and affairs. The Foundation shall be liable for its debts and obligations, but the property of the Foundation shall not be subject to attachment nor levied upon by execution or otherwise. Process may be served upon the treasurer of the Foundation or, in the absence of the treasurer, upon any member of the governing board of the Foundation."

Thus, the act provides that the Foundation, as a distinct corporate entity, may incur debts, obligations, and expenses pursuant to its delegated authority. No language in the act, either expressly or by implication, imposes a personal liability on the part of individual Board members to honor any such debts, obligations, and expenses. On the contrary, the monetary obligations of the Foundation are to be met from monies ap-

propriated to it, or from monies otherwise obtained under the provisions of the act.

Similarly, the express language of the "pay back" provisions of the appropriation acts at issue imposes an obligation upon the Foundation as a distinct corporate entity. It is the Foundation that is charged with reimbursing the Commonwealth for amounts appropriated to it, and no such duty is placed upon individual members of its Board of Governors.

A contrary interpretation of the "pay back" provisions of the appropriation acts at issue would conflict with well-established principles of corporation law. In many respects the Foundation is similar to a corporation. The Foundation is designated as a "corporate body" (c. 843, § 1 of the Acts of 1969), and like business corporations established pursuant to G. L. c. 156B, it may enact by-laws (§ 3), hold property (§§ 5b, c, and 6a), adopt a seal (§ 3), and submit by-laws and amendments to the Secretary of State (§ 3). Compare G. L. c. 156B, §§ 9, 17, 6, 74.* Although they are denominated the Foundation's "governing board" by c. 843, § 3 of the Acts of 1969, the members thereof, for all practical purposes, constitute a board of directors of a "corporation." Chapter 843, § 3 provides that the Foundation "shall be governed and its corporate powers exercised by a board of nine members." The Board of Governors is responsible for managing the business of the Foundation in much the same way that a board of directors is required by statute to manage the business of a business corporation. G. L. c. 156B, § 47.

Personal liability may attach to individual corporate directors who violate specific statutory proscriptions. *E.g.*, G. L. c. 156B, §§ 60-63. In addition to liability expressly imposed by statute, a corporate director may be liable for breaches of his fiduciary duty of loyalty to a business corporation, and for failure to reasonably protect and preserve the interests of the corporation. See generally, Fletcher, Cyclopedia Corporations, Vol. 3, § 990 *et seq.*; Yerrall, Common Law Duties of Directors of Corporations and Remedies for Breaches Thereof in Massachusetts, 21 Mass. L. Q. 50 (1936). An interpretation of the "pay back" provisions of the appropriation acts at issue requiring individual members of the Foundation's Board of Governors to reimburse the Commonwealth for amounts appropriated would constitute a departure from these traditional limitations placed upon the individual liability of corporate directors.

My opinion is, of course, limited to appropriation acts containing "pay back" provisions identical to the provision, quoted *supra*, in c. 514, § 2, item 3690-0010, the act funding the Foundation for the current fiscal year. I might add that the Legislature has continued to fund the Foundation despite the fact that the Commonwealth has never been reimbursed for the amounts appropriated. Such continued funding sug-

* Entities possessing corporate powers have been considered by courts to be in fact corporations, although not specifically denominated as such. *Fourth School District in Rumford, v. Wood*, 13 Mass. 158, 162-63; *Hancock v. Louisville R.R. Co.*, 145 U.S. 405, 409, *O'Leary v. Board of Fire and Water Commissioners*, 79 Mich. 281, 44 N.W. 608; *Gross v. Kentucky Board of Managers*, 105 Ky. 840, 49 S.E. 458.

gests that the Legislature is mindful that the Foundation requires state support until such time as it is able to be self-supporting.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 11 November 15, 1972

Mrs. Mabel A. Campbell
Director of Civil Service
294 Washington Street
Boston, Massachusetts 02108

Dear Mrs. Campbell:

You have requested my opinion whether the present statutory and regulatory provisions which require that applicants for civil service employment be United States citizens are constitutional, and, if not, whether you may insert a statement on examination announcements that applicants must reside in the United States. You further ask whether the requirements relating to domicile are constitutional. For the reasons stated hereinafter, I conclude that the statutory and regulatory requirements that applicants for civil service employment be citizens of the Commonwealth or of its cities and towns are unconstitutional.

General Laws, c. 31, § 12, provides, in pertinent part:

> "The director shall not place on any such list [for civil service employment] any person not a citizen of the United States."

Civil Service Rule 4 provides, in pertinent part:

> "An applicant at the time of filing application for any office or position to which these rules apply must be a citizen of the United States who has domiciled in the Commonwealth for one year next preceding the date of filing his application. An applicant for an office or position in the service of a city must also have domiciled in the city in which he seeks service for six months next preceding the date of filing his application. . . ."

General Laws, c. 31, § 19 provides:

> "Except as otherwise provided by law, in all positions, employments and work in any branch of the service of the commonwealth, or of any county, city, town or district therein, persons who are domiciled in the commonwealth shall be given preference; provided, when the director waives domiciliary requirements in accordance with the civil service rules or the provisions of section eight B, any person who does not have a domicile in the commonwealth and who otherwise qualifies shall be placed on the eligible list in accordance with the civil service laws and rules."

Resolution of your questions requires a brief review of recent decisions of the Supreme Court of the United States involving the validity of durational residency and citizenship requirements as they relate to governmental benefits, privileges or rights. In *Shapiro* v. *Thompson*, 394 U.S. 618, the Court held that durational residency requirements are unconstitutional unless the State can demonstrate that such requirements are "necessary to promote a *compelling* governmental interest." *Id.* at 634, emphasis in original. Recently, in *Dunn* v. *Blumstein*, 405 U.S. 330, the Court struck down a Tennessee durational residency requirement for voting and reaffirmed the "compelling governmental interest" standard. The Court stated:

> "It is not sufficient for the State to show that durational residency requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means' . . ." *Id.* at 343.

These principles have been carried out in decisions of the lower Federal courts. For example, in *Stevens* v. *Campbell*, 332 F. Supp. 102 (D. Mass. 1971), the District Court struck down the Massachusetts statute which provided that veterans must satisfy certain domicile or residence requirements in order to obtain veterans' preference for civil service employment. While not expressing any opinion as to Rule 4, since that issue was not before the Court, the Court did state in the course of its opinion that "it would not be constitutionally permissible for Massachusetts to make a right or privilege depend upon the mere fact that the recipient was one of Massachusetts' own people who presumptively had contributed his taxes or services to the Commonwealth. *Shapiro* v. *Thompson*, 394 U.S. 618, 632-633 (1969)." *Id.* at 106.

In *Graham* v. *Richardson*, 403 U.S. 365, a unanimous Supreme Court declared that state statutes which denied welfare benefits to resident aliens or to aliens who had not resided within a state for a specified period are violative of the Equal Protection Clause and interfered with the exclusive control of immigration exercised by the Federal government. Speaking for the Court, Mr. Justice Blackmun stated:

> "State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." *Id.* at 380.

The *Graham* decision has been carried to its logical extension in so far as governmental employment is concerned by a three judge Federal District Court sitting in New York. In *Dougall* v. *Sugarman*, 339 F.

Supp. 906 (S.D. N.Y. 1971), the Court struck down that provision of the New York Civil Service law which required that applicants for civil service employment be United States citizens. Citing *Graham*, the Court concluded that the requirement was not justified on either loyalty or efficiency grounds and that it conflicted with the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause of the Federal Constitution and the provisions of 42 U.S.C. § 1981. While the Supreme Court has noted probable jurisdiction in the case, 407 U.S. 908, it is my view that the decision of the District Court will be affirmed on appeal.

The cases to which I have referred inescapably lead to the conclusion that durational residency and citizenship requirements arbitrarily imposed as a condition of civil service employment are unconstitutional. Referring specifically to your question, it is my opinion that you may not insert any statement on examination announcements that applicants must be citizens of the United States. While it might be desirable to impose a requirement that applicants be residents of the United States at the time of application, I find that no such requirement is imposed at this time either by statute or by rule of the Commission. The Civil Service Commission should promptly amend its Rule 4 in this respect, if such a requirement is to be imposed in the future. In this respect, the Commission should consider whether such a requirement is necessary to promote a compelling governmental interest, and, if it is in some case, what criteria should be employed by the Director in imposing it. Any amendment to the Rule should reflect the criteria to be used.

With respect to your question concerning domicile, it is my opinion that you are prohibited from restricting entrance to any examination on the basis of domicile or from according preference on eligible lists on the basis of domicile on the same bases outlined above.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 12 December 8, 1972

Honorable Miles Mahoney
Commissioner of Community Affairs
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Mahoney:

You have requested my opinion whether the urban renewal plan for the proposed Park Plaza urban renewal project, which has recently been resubmitted to your Department, is properly before your Department without the Mayor and City Council of the City of Boston having taken any further action thereon. You state that in June, 1972 your Depart-

ment determined, after a public hearing, that it was unable to make certain findings required by G. L. c. 121B, § 48 and, therefore, disapproved the Park Plaza urban renewal plan. In making this decision, you inform me that you relied upon and referred to the "Final Project — Urban Renewal Plan," the supporting documentation, the relocation plan, the cooperation agreement, the resolution adopted by the City Council, and the letter of intent between Urban Associates and the BRA. You further state that the "Final Project Report — Urban Renewal Plan" included in the Boston Redevelopment Authority's re-submission for the proposed Park Plaza project is identical to that earlier approved by the Mayor and the City Council, while various of the other documents, previously referred to, differ in certain respects. Since it is not the province of the Attorney General to determine questions of fact, I am required to accept the facts as you state them. Accordingly, relying on your express representation that the "Final Project Report — Urban Renewal Plan" remains identical, I proceed to answer your question. October 16, 1895, Op. Atty. Gen. 275; June 3, 1897, Op. Atty. Gen. 462.

The statute governing approval of urban renewal plans, G. L. c. 121B, § 48, states in pertinent part:

> "A plan which has not been approved by the department when submitted may be again submitted to it with such modifications, supporting data or arguments as are necessary to meet its objections."

It is of course an established principle of statutory construction that a statute must be construed as it is written. *City Council of Peabody* v. *Board of Appeals of Peabody*, 1971 Mass. Adv. Sh. 1881, 1882; *Harvey Alan Gregg, Jr. Foundation* v. *Commissioner of Corporations and Taxation*, 330 Mass. 538, 544.

It appears from your request that once you disapproved the urban renewal plan, the local redevelopment authority took steps to meet your objections to the plan. Those steps included changes in the supporting documents submitted with the original "Final Project Report — Urban Renewal Plan," and those supporting documents, modified and changed in order to meet your objections, have now been submitted along with the "Final Project Report — Urban Renewal Plan" which has, as you have stated, remained unchanged.

Under the circumstances, I find no basis in the statute for requiring any further action by the municipal officers who approved the "Final Project Report — Urban Renewal Plan" in the first instance. To require further municipal action where the plan itself remains unchanged is a result which should not be attributed to the Legislature. *Haines* v. *Town Manager of Mansfield*, 320 Mass. 140, 142; *McCarthy* v. *Woburn Housing Authority*, 341 Mass. 539. Compare September 10, 1957, Op. Atty. Gen. 23. Cf. *Commissioner of the Department of Community Affairs* v. *Boston Redevelopment Authority, and others*, 1972 Mass. Adv. Sh. , , (Slip opinion, p. 18), where the Court stated "[t]hat this silence in the statute was intentional is suggested . . ."

In conclusion, then, accepting the facts as you recite them, it is my opinion that you may proceed to approve or disapprove the resubmission of the Park Plaza urban renewal plan which is now before you without first referring the same to the Mayor and City Council of the City of Boston.

I intimate no opinion whatsoever as to the decision which you should make in your consideration of the resubmitted plan. To do so would be for me to usurp the legislative prerogative and obligation which is yours by virtue of the office you hold, to render proper decisions within the letter and spirit of the Commonwealth's urban renewal statutes.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 13 December 12, 1972

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner:

You have requested my opinion whether St. 1972, c. 684, §§ 59, 60 requires the Department of Public Safety to collect fees from both the Commonwealth and private builders and owners of property for certificates granted pursuant to G. L. c. 143, §§ 15 and 28. Specifically you ask:

> (1) Is the Department required to accept a fee prior to the issuance of a "certificate of approval" or "specification of requirements" by a local "supervisor of plans" for a building or structure under said local supervisor's jurisdiction pursuant to G. L. c. 143, § 15?
>
> (2) Is the Department required to accept a fee prior to the issuance of a "certificate" by a local "inspector of buildings" for a building or structure under said local "inspector's jurisdiction" pursuant to G. L. c. 143, § 28?
>
> (3) Is the Department required to charge a fee for the approval of plans and specifications for buildings owned or occupied by the Commonwealth or any of its political subdivisions pursuant to G. L. c. 143, § 15?
>
> (4) Is the Department required to charge a fee for the inspection of buildings owned or occupied by the Commonwealth or any of its political subdivisions pursuant to G. L. c. 143, § 28?

General Laws, c. 143, § 15 requires the issuance of a "certificate of approval" or "specification of requirements" prior to the erection or alteration of any public building. Similarly, G. L. c. 143, § 28 requires

the periodic issuance of "certificates" by inspectors for all buildings and structures within their jurisdictions. St. 1972, c. 684, §§ 59, 60 provides that both the "certificate of approval or specification of requirements" required by G. L. c. 143, § 15 and the "certificate" required by G. L. c. 143, § 28 "*shall*" not issue unless a prescribed fee is paid to the Commissioner.

In 1939, one of my predecessors rendered an opinion to the then Director of the Board of Registration of Hairdressers, which stated language similar to St. 1972, c. 684, §§ 59, 60 was mandatory and indicated payment of the required fee operated as a condition precedent to issuance of the required certificate. 1938-39 Op. Atty. Gen. 111. Another of my predecessors rendered a further opinion that the nonpayment of a fee will render the issuance of a license void. 6 Op. Atty. Gen. 663. I interpret the provisions of St. 1972, c. 684, §§ 59, 60 in accordance with the views expressed in both of those opinions and am of the opinion that the word "shall" as used in the 1972 amendments renders payment of the prescribed fee mandatory prior to the issuance of a "certificate of approval, specification of requirement" and "certificate" provided in G. L. c. 143, §§ 15, 28. Accordingly, I answer your questions one and two in the affirmative.

Your third and fourth questions ask whether the fees required by St. 1972, c. 684, §§ 59, 60 apply to buildings owned or occupied by the Commonwealth or any of its political subdivisions. In a recent opinion I noted that the regulation and inspection of buildings maintained by the Commonwealth, except the State House, is governed by Chapter 143 of the General Laws. Op. Atty. Gen. 71/72-36. The first sentence of § 2A of said chapter provides:

> "The provisions of this chapter 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." (Emphasis supplied.)

It is well established that the above-quoted section has fashioned an exception to the general principle of law that statutes are not to be interpreted so as to impose a burden upon the sovereign, since a clear legislative mandate exists authorizing the Department to regulate and inspect certain buildings owned and operated by the Commonwealth. See Op. Atty. Gen. 71/72-36; 1967 Op. Atty. Gen. 221 (electrical wiring); 1961 Op. Atty. Gen. 136 (gas fittings); 1962 Op. Atty. Gen. 74 (gas fittings); compare, *Medford* v. *Marinucci Bros, & Co., Inc.*, 344 Mass. 50, 55-56 citing *Teasdale* v. *Newell & Snowling Constr. Co.*, 192 Mass. 440; 1955 Op. Atty. Gen. 100. I note the express language of G. L. c. 143, § 2A

applies the provisions of Chapter 143 to certain buildings under the Commonwealth's control so as to provide for the safety of persons occupying such buildings. Accordingly, opinions of my predecessors and myself have interpreted the scope of section 2A to include a broad variety of inspections of buildings under the Commonwealth's control. See, e.g., Op. Atty. Gen. 71/72-36; 1967 Op. Atty. Gen. 221. However, in my opinion the fees exacted for certificates pursuant to St. 1972, c. 684, §§ 59, 60 do not directly relate to the promotion of public safety, but rather serve to underwrite the normal expenses incidental to a system of registration and inspection and therefore fall outside of the scope of section 2A. It is also my opinion that requiring agencies of the Commonwealth to transfer funds in payment of certificate fees prior to undertaking necessary public projects would constitute the type of burden prohibited in *Teasdale* v. *Newell & Snowling Constr. Co.*, 192 Mass. 440. It is my further opinion that where the Commonwealth is exempt from licensing fee provisions similar to St. 1972, c. 684, §§ 59, 60, an independent contractor, under contract to accomplish a governmental project, is likewise exempt from such a provision. *Medford* v. *Marinucci Bros. & Co., Inc.*, 344 Mass. 50, 57-58; 1967 Op. Atty. Gen. 221; 1955 Op. Atty. Gen. 100. I therefore answer your questions 3 and 4 in the negative.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 14 December 21, 1972

Mr. Gordon A. McGill, *Secretary*
Emergency Finance Board
State House
Boston, Massachusetts 02133

Dear Sir:

You have requested my opinion on the following question:

> "Is . . . [the Emergency Finance] Board required to act upon loan authorizations for approved school projects, under the provisions of Section 8 of Chapter 645 of the Acts of 1948, when the estimated school construction grant — as defined in Section 7 of said Chapter 645 of the Acts of 1948, as amended by Chapter 1010 of the Acts of 1971 — equals or exceeds the amount of the loan authorization?"

It is my opinion, for the reasons stated hereinafter, that your question must be answered in the negative.

Section 8 of Chapter 645 of the Acts of 1948 provides in pertinent part:

> "Any city or town which has received, in accordance with the provisions of the preceding section, notice of approval and an estimate of the amount of school construction grant to

> which such city or town may be entitled, may, during the time this chapter is in effect, borrow from time to time for said approved school project an amount not exceeding said estimated grant, or such larger amount as may be approved by the emergency finance board . . ."

Section 7 of Chapter 645 of the Acts of 1948, as amended by Chapter 1010 of the Acts of 1971, provides, in pertinent part:

> "Any city, town, regional school district or county may apply to the [school building assistance] commission for a school construction grant to meet in part the cost of an approved school project. Such cost shall include interest paid or payable by such city, town, regional school district or county on any bonds or notes to finance such project."

The Emergency Finance Board's responsibility is clearly spelled out in section 8 of Chapter 645 of the Acts of 1948. A city or town that borrows a sum of money less than or equal to the amount of the authorized school construction grant need not request the approval of the Board. The Board is required to act upon a loan authorization only when the authorization exceeds the school construction grant.

This procedure reflects the long standing legislative and judicial concern with respect to municipal finance and indebtedness. Section 10 of c. 44 of the General Laws, the municipal finance law, prohibits a city from authorizing indebtedness in excess of 2½% of its equalized valuation and a town from authorizing indebtedness exceeding 5% of its equalized valuation, without the approval of the Emergency Finance Board. More than half a century ago, the Supreme Judicial Court said: "The manifest purpose of the framers of the [Municipal Finance] act was to set rigid barriers against expenditures in excess of appropriations, . . . and in general to put cities upon a sound financial basis so far as these ends can be achieved by legislation." *Flood* v. *Hodges*, 231 Mass. 252 at 256. *Flood* v. *Hodges* was later cited with approval in *Rich & Son Construction Co., Inc.* v. *Saugus*, 335 Mass. 304, at 307.

Chapter 645 of the Acts of 1948 is not a departure from this policy. Section 8 of that chapter (as amended by St. 1951, c. 447) provides that "[i]ndebtedness incurred under this act shall be in excess of the statutory limit, but shall, except as herein provided, be subject to the applicable provisions of chapter forty-four of the General Laws . . ." Any community incurring indebtedness for school construction is subject to all the requirements of Chapter 44, with one exception. The debt ceiling is not controlled by the inflexible 2½%-5% standard, but the Emergency Finance Board assumes the responsibility of reviewing each community's ability to meet its proposed obligation when the bond issue exceeds the estimated grant.

Chapter 1010 of the Acts of 1971 amended section 7 of Chapter 645 of the Acts of 1948 by including the interest charges on any bond issue in the cost of the school construction. Chapter 1010 also amended section 9 of Chapter 645 of the Acts of 1948 by fixing the grant for all com-

munities, except those within designated depressed areas, at 50% of the final approved cost. Cities and towns within designated depressed areas are allowed a maximum grant of 65% of the school cost.

I note in passing that the Legislature has not been unwilling to modify Chapter 645 of the Acts of 1948 where the same was required. There have been no less than six amendments to Chapter 645 in the last four years and more than a dozen since 1962. Each amendment has given the Legislature ample opportunity to correct any inconsistencies in the Act as previously amended.

Accordingly, it is my opinion that the Emergency Finance Board must continue to follow the unequivocal legislative mandate of Chapter 645 of the Acts of 1948, as most recently amended, and pass only on those school bond issues which exceed the estimated school construction grant.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 15 January 9, 1973

Honorable Robert Q. Crane
Treasurer and Receiver General
Chairman, State Board of Retirement
73 Tremont Street
Boston, Massachusetts 02108

Dear Chairman Crane:

You have requested my opinion whether widows of public employees who had retired under the provisions of G. L. c. 32, §§ 56 and 57 are entitled to the annuities provided for in the recent amendment to G. L. c. 32, § 101, which provides for an annuity to widows of public employees "who had been retired for ordinary disability under provisions of this chapter." St. 1972, c. 793, § 5 (effective January 1, 1973). Upon consideration of the relevant statutory provisions, my answer is in the affirmative.

The receipt of annuities by widows of certain public employees is governed by G. L. c. 32, § 101, as amended, which provides, in pertinent part:

> "In the event of the death of any former employee who had been retired under the provisions of this chapter after having been found to be incapacitated for further duty by reason of injuries sustained while in the performance of his duties, or who had been retired for ordinary disability under provisions of this chapter, under which retirement he was unable to provide for any annual allowance to be paid his widow at the time of his death, there shall be paid to such widow an annual

> allowance in the amount of sixteen hundred and eighty dollars, subject to the provisions of paragraph (e) section 102, for as long as she remains unremarried . . ."

The legislative intent of the 1972 amendment was to assist widows of public employees "who had been retired for ordinary disability under provisions of this chapter." *Cf. Johnson* v. *Milton*, 349 Mass. 736, 740. While G. L. c. 32, § 6 governs the retirement of "incapacitated" public employees generally, §§ 56 and 57 govern the retirement of "incapacitated" public employees who are "veterans" as defined in § 1 of c. 32. As such, the latter provisions, as well as § 6, are provisions of c. 32 pertaining to the retirement of public employees for "ordinary disability." Therefore, widows of public employees retired under §§ 56 and 57 of c. 32 are entitled to the allowances provided for in c. 32, § 101, as amended.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 16 January 9, 1973

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion whether a Detective Lieutenant Inspector, while assigned to the Division of Fire Prevention, is entitled to the benefits of G. L. c. 41, § 108L, as inserted by Chapter 835 of the Acts of 1970. Since it is not clear whether your question refers to temporary or permanent assignments, I must answer your question in two parts.

First, it is my opinion that a Detective Lieutenant Inspector, while permanently assigned to the Division of Fire Prevention, is not entitled to the benefits of G. L. c. 41, § 108L for the reasons hereinafter stated.

General Laws, c. 41, § 108L, the police career incentive pay act, provides, in pertinent part:

> "There is hereby established a career incentive pay program offering base salary increases to regular full-time members of the . . . division of state police in the department of public safety . . . as a reward for furthering their education in the field of police work."

Statutes must be construed as they are enacted and each word or phrase is presumed to have its ordinary meaning. *Davey Bros. Inc.* v. *Stop & Shop, Inc.*, 351 Mass. 59, 63. There can be no doubt that the Legislature intended that the police career incentive program apply only

to policemen. There is also no ambiguity in regard to employees of the Department of Public Safety. General Laws, c. 41, § 108L specifically and exclusively refers to "regular full-time members of . . . the division of state police in the department of public safety." The statute does not refer to any members of the Department of Public Safety who are not assigned to the Division of State Police on a regular full-time basis. Accordingly, regular full-time employees of any other division of the Department of Public Safety, including the Division of Fire Prevention, are not eligible for benefits under c. 41, § 108L.

You have informed me that Detective Lieutenant Inspectors assigned to the Division of Fire Prevention are charged with enforcing all the laws of the Commonwealth and regulations of the Department of Public Safety, but concentrate on fire prevention and investigating arson. It is clear that the Division of State Police does not share the same primary and inclusive responsibility for arson cases but must be concerned in the first instance with the total crime spectrum, including fire prevention. It follows that personnel assigned to the Division of Fire Prevention do not have the same duties and responsibilities as members of the Division of State Police but have limited duties. However, you have also informed me that perhaps 75%-85% of the State Police Detective Lieutenant Inspectors are transferred to the Division of Fire Prevention at some point in their career and cannot refuse such an assignment.

It may appear harsh that the Legislature distinguished between Detective Lieutenant Inspectors assigned to the Division of State Police and Detective Lieutenant Inspectors assigned to the Division of Fire Prevention in enacting G. L. c. 41, § 108L. One arguably anomalous result follows when a Detective Lieutenant Inspector is barred from continuing the police career incentive program by an assignment from the Division of State Police to the Division of Fire Prevention. However, a statute cannot be interpreted to avoid hardship if the statutory language is clear and unambiguous. "To stretch the meaning of a statute so as to adjust an alleged injustice, inequity or hardship could cause a multiplicity of interpretations as each alleged injustice, inequity or hardship arose." *Town of Milton* v. *Metropolitan District Commission*, 342 Mass. 222, 227. Only the Legislature can modify the law.

Secondly, it is my opinion that a Detective Lieutenant Inspector permanently attached to the Division of State Police, who is temporarily assigned to the Division of Fire Prevention, is entitled to the benefits of G. L. c. 41, § 108L.

You have informed me that State Detective Lieutenant Inspectors assigned to the Division of State Police are occasionally temporarily transferred to the Division of Fire Prevention. You have also stated that a Detective Lieutenant Inspector remains on the payroll, and thus under the administrative control, of the Division of State Police. Under those circumstances, it is my opinion that the Detective Lieutenant Inspector

has not lost his status as a regular full-time employee of the Division of State Police and is entitled to the benefits of G. L. c. 41, § 108L.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 17 January 11, 1973

Honorable Charles N. Collatos
Commissioner of Veterans' Services
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Collatos:

You have requested my opinion relative to applications received at local veterans' services offices requesting assistance for the payment of expenses incurred for the care, attendance, and instruction of mentally retarded children of veterans who are in special schools.

Specifically, you ask the following question:

> "May the veterans' agent of a town make payment or may the Commissioner of Veterans' Services, acting under the provisions of Chapter 115 [of the General Laws], authorize payment by a veterans' agent of such sums as are necessary to provide such special care and instruction in a private school or any other place where such care and instruction are furnished?"

Apart from any constitutional questions that arise by implication from your letter, it is my opinion that you may not provide the assistance requested except under the circumstances outlined in the last paragraph of this opinion.

A veteran is entitled to receive "veterans' benefits" in " . . . [o]nly such amounts . . . as [are] necessary to afford him sufficient relief or support . . ." G. L. c. 115, § 5, as amended by St. 1968, c. 402. It is axiomatic that a veteran be in need of "relief or support" before he is eligible to receive "veterans' benefits." In fact, a veteran " . . . who is able to support himself or who is in receipt of income from any source sufficient for his support . . ." is not eligible to receive "veterans' benefits." *Ibid.* It follows that a veteran is not in need of "relief or support" when the relief requested is available to him from another source other than public welfare.*

A review of the statutes relating to education reveals that appropriate relief may be available from other sources. General Laws, c. 71, § 46 (as amended by St. 1968, c. 297) provides that every town and regional school district having five or more mentally retarded children is required to establish special classes for educable and trainable mentally retarded

* The purpose of veterans' benefits is to provide veterans with aid and assistance through a medium other than public welfare. *Op. Atty. Gen.*, Oct. 25, 1948, p. 43.

children. General Laws, c. 76, § 12 provides that if a child resides in a town that has not established such special classes, he may attend special classes in another public school at the expense of his town.

The availability of special classes for the care and instruction of mentally retarded children in the public schools and the attendant statutory authorization for transportation expenses to such classes appears to provide relief to veterans from a source other than veterans' benefits. Accordingly, it is my opinion that the statutory test that veterans be in need of "relief or support" is not met where classes in public schools are available to the children of veterans.

However, I am advised that the statutory authorization for public school classes is not fully implemented in some cases, either from a lack of appropriations or for other reasons. In addition, it appears that public instruction, when offered, may not be on a par with that available from private schools. In those cases, it is my opinion that veterans' benefits may be paid for private school care and instruction where it can be demonstrated either (1) that public classes are not available to the veteran's child or (2) that the public care and instruction is inferior to that offered on a private basis and the child requires the higher level of care and instruction. Such determinations are questions of fact and should be made by the local veteran's agent of the city or town involved. Such a construction of the statute, in my view, fully implements the public policy of this Commonwealth that mentally retarded or emotionally disturbed children be afforded the best possible care and instruction.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 18 March 2, 1973

Honorable Robert Q. Crane
Treasurer and Receiver General
State House
Boston, Massachusetts 02133

Dear Treasurer Crane:

You have asked my opinion as to the constitutionality of the first sentence in section 64 inserted into G. L. c. 29 by St. 1972, c. 807, § 3, which reads:

> "*The state treasurer may contract* with an employee to defer a portion of that employee's income and may subsequently with the consent of the employee, purchase a life insurance or annuity contract, for the purpose of funding a deferred compensation program for the employee, from any life underwriter duly licensed by the commonwealth who represents an insurance company licensed to contract business in the commonwealth . . ." (Emphasis supplied.)

You have further inquired whether, if the answer is that the statute is constitutional, the first sentence means "The State Treasurer may contract for the Commonwealth of Massachusetts with an employee to defer a portion of the employee's income."

In effect, § 64, inserted into G. L. c. 29 by St. 1972, c. 807, § 3, deals with fringe benefits for employees for a life insurance or annuity contract or for deferred compensation, paid for by the employee out of deferred income. This is but an extension of other types of fringe benefits which are clearly contractual in nature, as between the Commonwealth and its employee; cf. pensions (G. L. c. 32, §§ 3(2), 25(5)); life insurance (G. L. c. 32A, §§ 5, 6); and which involve deductions from payroll, e.g. pensions (G. L. c. 32, § 22); life insurance (G. L. c. 32A, § 8(a)). A procedure similar to that in § 64 has been in force in the Commonwealth since 1963. (See St. 1963, c. 466, § 2, which added a sentence to G. L. c. 29, § 31 relating to the payment of premiums for an annuity contract for any employee of the Department of Education or certain educational institutions.

There would seem to be no constitutional limitation on the power of the state to so contract with its employees, and public policy would seem to support it.

With reference to your second question, it would appear that the provision that the "State treasurer may contract" clearly means "on behalf of the commonwealth." Cf. G. L. c. 29, § 35, which impliedly permits a note, bank mortgage or security belonging to the Commonwealth to be made to the State Treasurer by name and, if so made, permits him or any successor in office to assign, transfer or discharge it — obviously for the benefit of the Commonwealth.

I conclude, therefore, that St. 1972, c. 807, § 3 is constitutional, and that the provision therein that "The State treasurer may contract with an employee . . ." means "The state treasurer may contract on behalf of the commonwealth with an employee . . ."

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 19 March 5, 1973

Mr. William F. Daigle, Jr.
Acting Chairman
Retirement Law Commission

15 School Street
Boston, Massachusetts 02108

Dear Mr. Daigle:

Your predecessor requested my review of the ruling incorporated in *Op. Atty. Gen.*, January 10, 1969, pp. 92-93, which addressed itself to

the method to be used in computing the compensation to be paid to former state employees who, while receiving a pension, have returned to active state service. In particular, clarification was sought as to G. L. c. 32, § 91(b) which authorizes the reemployment of former public employees, both state and local, and provides, in pertinent part, that any such employee may be reemployed in public service,

> "for not more than ninety days, in the aggregate, in any calendar year; provided that the earnings therefrom when added to any pension or retirement allowance he is receiving do not exceed the salary that is being paid for the position from which he was retired or in which his employment was terminated."

The question in *Op. Atty. Gen.*, January 10, 1969, pp. 92-93 was whether such a reemployed retiree is entitled to —

> (1) Only that *portion* of the full weekly salary of the position in which he is reemployed which, when added to his pension calculated on a *weekly* basis, will equal the *weekly* salary currently being paid for his former position, or —
>
> (2) The *full* weekly salary of the position in which he is reemployed, until he has received an aggregate amount which, when added to his pension calculated on an *annual* basis, will equal the *annual* salary currently being paid for his former position.

In answering that question, the then Attorney General stated, "I am of the view that the first interpretation, namely, that which requires proration, is the correct one," p. 93, and concluded accordingly, that "the Legislature contemplated that all calculations should be made on the same base as pensions and salaries," p. 93.

In your predecessor's opinion request he informed me, by way of background, that "it appears that the ruling which has been made for the reemployment of State employees is completely different from the ruling that has been reached in all of the cities and towns in the Commonwealth with the exception of one city." He stated, in essence, that when a retired person is reemployed by a city or town his remuneration is calculated on the basis of alternative 2, *supra*, whereas retired persons reemployed by the Commonwealth are remunerated on the basis of alternative 1, *supra*. As a result of this alleged discrepant practice, he observed that "we have a situation where some persons who are reemployed are receiving considerably more for their services than others," and that such a discrepancy was, in his words, "utterly unfair and . . . completely at cross purposes with the intent of the Legislature . . ." when the legislation was enacted. I now proceed to a reconsideration and review of the earlier opinion.

That opinion offered the following three observations in justification of its conclusion:

> (1) "[S]alary . . . is ordinarily fixed on a weekly (or in a few cases a monthly) basis," p. 93;

(2) "Pensions are payable on a monthly basis and cease with the last full monthly payment due prior to a retired employee's death, with a pro rata additional payment allowable for any period of less than a full month," p. 93; and

(3) "[S]ince there is an absolute 90-day working limit, it seems unlikely that the Legislature intended that the earnings limit be based on a full annual period," p. 93."

In my opinion, none of the foregoing is particularly compelling or persuasive. With respect to the first observation, while state salaries are ordinarily *paid* on a weekly, bi-weekly or monthly basis, such a practice is simply one of convenience for state employees and the General Salary Schedule in G. L. c. 30, § 46 merely facilitates an informed and uniform salary *disbursement* procedure. Certainly, G. L. c. 30, § 46, standing alone, does not preclude the interpretation that the term "salary," as contemplated by the Legislature in G. L. c. 32, § 91, was to be calculated on an annual basis. I find the second observation irrelevant. With respect to the third observation offered, I cannot agree with the assertion that there is an absolute 90-day working limit. To the contrary, subsection (a) of § 91 provides for indeterminate reemployment in a "confidential capacity" and for reemployment for "emergency service" for a period of up to one year and, in certain circumstances, for periods up to five years. However, even if, for the sake of argument, I were to find the aforementioned three observations convincing or meritorious, I could not concur in the conclusion reached in that Opinion because of subsection (c) of § 91.

Subsection (c) of § 91 provides, in pertinent part, that each reemployed person shall

> "certify . . . the number of days which he has been employed in any . . . calendar year and the amount of earnings therefrom, and if the number of days exceed ninety in the aggregate, he shall not be employed, or if *the earnings therefrom exceed the amount allowable . . ., he shall return . . . all such earnings as are in excess of* . . . [the] allowable amount." (Emphasis supplied.)

The opinion in question summarily dismisses the foregoing provision by stating that it "may be regarded simply as a safeguard against possible overpayments and does not . . . have any controlling effect on the interpretation to be given to subsection (b)", p. 93. But overpayment is possible only if the employee is receiving the full weekly salary of the position in which he is reemployed. Under that alternative it would be possible for an employee, at some point, depending on how many days he worked, to accumulate enough weekly remuneration to surpass, when added to his annual pension, the present annual salary of his former position. And it is precisely because such a possibility is real and ever-present that the Legislature saw the need for enacting of subsection (c) of § 91. To give the contrary interpretation would be to render that subsection mere surplusage, a result which the Legislature could not

have intended. Every part of a legislative enactment is to be given force and effect, so far as is reasonably practicable, and no part is to be brushed aside as immaterial or superfluous unless no other rational course is open. *Hinckley* v. *Retirement Board of Gloucester*, 316 Mass. 496, 500.

In conclusion, I am of the opinion that, in computing the compensation to be paid to former state employees who while receiving a pension have returned to active state service, the appropriate formula is that which entitles the employee to the *full* weekly salary of the position in which he is reemployed until he has received an aggregate amount which, when added to his *annual* pension, will equal the *annual* salary currently being paid for his former position.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 20 March 6, 1973

Honorable Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

Your predecessor requested my opinion as to the proper interpretation to be accorded G. L. c. 74, § 7. That section provides, in pertinent part:

> "Residents of towns in the commonwealth not maintaining approved independent distributive occupations, industrial, agricultural, household arts and practical nurse training schools offering the type of education desired, . . . may, upon the approval of the commissioner under the direction of the state board, be admitted to a school in another town. In making his decision, the commissioner under the direction of the state board shall take into consideration the opportunities for free vocational training where the applicant resides, the financial status of such place, the age, sex, preparation, aptitude and previous record of the applicant, and other relevant circumstances."

It appears from your predecessor's request that a dispute arose over apprenticeship training programs administered by the Department of Labor and Industries. For many years such programs have kept specially defined groups together at one school, regardless of residence. The programs apparently were administered without incident until 1968, at which time the City of Quincy refused to reimburse the Boston School Department for tuition fees for Quincy residents. Your predecessor advised me that Quincy does provide approved independent in-

dustrial education, maintaining facilities, staff and other necessities, and that where the community (i.e., Quincy) was willing to carry out its training responsibilities, it did not seem equitable to him to make Quincy doubly liable.

Were the statutory scheme the same today as it was when your predecessor requested my opinion, I would be inclined to agree with his interpretation of the statute and to conclude that where the Commissioner of Education has approved facilities for vocational training in a city or town, it was clearly within his discretion to disapprove admission of apprentices to schools in another city or town. However, the General Court in the last session responded to the problems to which I have referred *supra*, and enacted St. 1972, c. 760. That Chapter, which added a new section 7B to chapter 74 of the General Laws, provides:

> "An apprentice, as defined in section eleven H of chapter twenty-three, shall, upon the concurrence of the commissioner of labor and industries, be approved by the commissioner for related vocational training in any city or town regardless of residential qualification under the direction of the state board. Related classes for an approved apprenticeship program shall be conducted in a single school system, unless the commissioner in agreement with the commissioner of labor and industries determines that it would be in the best interests of said program to conduct such classes in more than one such school system."

In my view, the enactment of St. 1972, c. 760 establishes the priority of related classes for an approved apprenticeship program, notwithstanding the fact that there may exist approved programs or classes of instruction in an apprentice's home city or town.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 21 March 6, 1973

His Excellency Francis W. Sargent
Governor of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Governor Sargent:

You have requested my opinion on the proper interpretation of the last paragraph of G. L. c. 32, § 65A, as applied to the pension rights of the widow of the late Judge Samuel E. Levine.

You state that Judge Levine died on July 2, 1972, after having served for over ten years as Justice of the District Court of Williamstown. He was 67 years of age at the time of his death, and his widow was therefore entitled to a pension under G. L. c. 32, § 65C, consisting of a fractional

share of the pension to which Judge Levine would have been entitled under G. L. c. 32, § 65A, if he had retired immediately before his death.

Section 65A would have entitled Judge Levine to a pension of three-fourths of his annual salary as district court judge had he retired immediately before his death. The last paragraph of § 65A entitles a district court judge to an additional pension under certain circumstances. It provides:

> "A justice of a district court who is retired under Article LVIII of the amendments to the constitution or who resigns in accordance with the provisions of this section, and who has served continuously for ten years prior to such retirement or resignation in the appellate division of a district court or in the superior court under the provisions of sections fourteen B to fourteen E of chapter two hundred and twelve, or corresponding provisions of earlier laws, or as a member of the administrative committee of the district courts, shall, in addition to all other amounts received under the provisions of this section, be entitled to receive a pension for life equal to three fourths of the average annual compensation paid him for such service during the ten years next preceding such retirement or resignation."

You further state that Judge Levine was a member of an Appellate Division of the District Courts from October 15, 1962 to September 30, 1971 — a period of slightly less than nine years which ended approximately nine months before his death. In addition, Judge Levine served on the Superior Court for five days in 1961, and for five or more days in 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971 and 1972, the first day of such service having been November 12, 1963, and the last day having been June 16, 1972 (approximately two weeks before his death). Further details on the extent of such service and the compensation received therefor are set out in correspondence from the Treasurer of the County of Hampden and the Administrative Assistant to the Chief Justice of the Superior Court which you attached to your letter to me.

To pinpoint the legal issues more specifically, I should like to rephrase your questions as follows:

> 1. Is the word "continuously" to be read out of the last paragraph of G. L. c. 32, § 65A as surplusage or as being meaningless, or is it to be given effect, and if so, does the clause "served continuously for ten years" mean "actually sat without interruption every court day in each of ten consecutive years," or does it mean "served during each of ten consecutive years, irrespective of the number of days of actual sittings in any year?"
>
> 2. If the last mentioned interpretation of the clause is the correct one, is the word "or" in the sequence of service enumerated in the last paragraph of § 65A, namely, service "in the appellate division of a district court or in the superior

court . . ., or as a member of the administrative committee of the district courts," used disjunctively, or otherwise?

The words "served continuously" appear in several places in §§ 65A and 65C. The Legislature, obviously aware of the usual meaning of the word "continuously," namely, "without interruption," *Petition of Gislason*, 47 Fed. Supp. 46, 50, made special provision in the second paragraph of § 65A, which permits early retirement for a judge who has served in successive judicial offices provided that he served "continuously" in such offices, that he "shall be deemed to have served continuously although a period of thirty days shall have intervened between the holding of one judicial office and another judicial office." See also *Opinion of the Justices*, Mass. Adv. Sh. (1971) 1867. I conclude, therefore, that the Legislature intended the word "continuously" to have meaning, and that therefore, it cannot be read out of the statute. *Commonwealth* v. *McMenimon*, 295 Mass. 467.

I must, then, resolve the remaining issues raised in the first question.

The words "served . . . continuously" also appear in the second and third paragraphs of § 65A, relating to the basic pensions for judges who retire on or before the age of 70 years after having "served . . . continuously," and permitting the tacking of service in one judicial office to another in determining whether the minimum period of continuous service has been served, and appear again in the sixth and seventh paragraphs of § 65C, relating to benefits for widows of judges, and permitting, for the purpose of determining whether a judge has served in any judicial office or offices "at least ten years continuously," the tacking on of a specified portion of wartime or governmental service. It is clear that the words "served continuously" in this context mean merely served during each of ten (or the required number of) consecutive years, and that actual days of sitting as a judge are to be ignored in determining whether there has been service in a particular year. *Op. Atty. Gen.*, Feb. 23, 1955, p. 78. That this is what the Legislature intended is emphasized by its special treatment of special justices for purposes of determining whether service by them as special justices can be tacked on to other judicial offices under the second paragraph of § 65A. Recognizing that special justices, in the nature of things, sit occasionally, the Legislature provided therein that, for the purposes of tacking such service on to service in other full time judicial offices to determine whether the minimum period of continuous service had been met, only 1/300th of the days of actual sittings would be counted. The Legislature, in effect, has recognized that a judge serves every day that he is in office. Therefore, for purposes of early retirement, including the tacking of service in office to determine eligibility for early retirement, the only issue is whether the judge has been in an office or offices for the requisite minimum number of consecutive years.

The last paragraph of § 65A permits a justice of a District Court to earn an additional pension if he is retired or resigns under stated conditions, and if he "has served continuously for ten years prior to such re-

tirement or resignation" (1) in the Appellate Division of a District Court, or (2) in the Superior Court under the provisions of G. L. c. 212, §§ 14B to 14E or corresponding provisions of earlier laws, or (3) as a member of the Administrative Committee of the District Courts. The rationale employed above to determine the meaning of "served continuously" as it applies to early retirement or tacking of service in successive offices, applies to service in said Appellate Division, because under G. L. c. 231, § 108, a justice of the District Court may be assigned for such period of time as the Chief Justice of the Supreme Judicial Court may deem advisable, in practice for one year periods with customary reappointments, and likewise applies to service on the Administrative Committee of the District Courts, where appointments are for a minimum term of two years. G. L. c. 218, § 43C. In other words, service as a member of the Appellate Division or the Administrative Committee continues during the period of the justice's appointment, and the successive years of such service and not the actual days of sitting as such would be counted for the purpose of determining creditable service. However, this rationale breaks down when applied to service in the Superior Court, for, as we shall see, such service does not constitute an "office" or an "appointment" of any specific duration, but is ad hoc and adventitious. A justice of the District Court under G. L. c. 212, § 14B is empowered to "sit in the superior court at the trial or disposition . . . of any motor vehicle tort action, or any offense or crime over which the district court has the original jurisdiction under the provisions of section twenty-six of chapter two hundred and eighteen . . . [but] [n]o justice of the district courts . . . shall so sit in the superior court . . . unless his name appears on a list submitted by the chief justice of the district court." Such sessions under this statute may, by arrangement of the Chief Justice, be held "simultaneously with other sessions or at other times in the discretion of the chief justice." A justice of the District Court remains a justice of the District Court while sitting in the Superior Court. *Commonwealth* v. *Leach*, 246 Mass. 464. Thus, the mere request to a District Court justice to sit in the Superior Court from time to time, whenever the need arises, cannot be deemed to be an "office" or "appointment" which continues for a period of time. Only the days of actual sittings constitute service. Nor does the inclusion of his name in a list prepared by the Chief Justice of the District Courts, which is a prerequisite thereto, constitute such office appointment because the Chief Justice of the Superior Court may never request him to sit. Thus, if the requirement in the last paragraph of § 65A that a justice must have "served continuously for ten years" means that he must actually sit in the Superior Court without interruption every Court day in each of ten consecutive years, it is a practical nullity, because, in the nature of things, it cannot be complied with. However, the Legislature clearly intended that service in the Superior Court should entitle a justice of the District Court to an additional pension if he serves the required period of time. The history of the legislation makes this clear. Prior to 1950, the last paragraph of § 65A made no reference to service in the Superior

Court as a basis for earning an additional pension, and for good reason. It was inserted as a result of an amendment made by St. 1950, c. 747, § 1. Significantly, §§ 14B through 14E were inserted into the General Laws, specifically Chapter 212, by St. 1949, c. 210, § 1. Section 2 of said Chapter 210 provided that said Act was enacted to make the provisions of St. 1923, c. 469, as amended, which contained like provisions, but was temporary legislation, "effective without limitation as to time." Sections 14B and 14E have been extensively amended from time to time since then, to broaden their scope. It is clear then, that in 1950, the Legislature considered that the recurring overloading of the Superior Court from time to time had become a fact of life, and desired to bestow additional benefits upon District Court justices who were requested to sit therein. Inasmuch as the intent of the Legislature is clear, I must ascribe to the words used by it a meaning which is consistent with that intent. The only interpretation of the words "served continuously for ten years" that accomplishes this purpose is "served during each of ten consecutive years, irrespective of the number of days of actual sittings in any year." This is consistent with the meaning of such continuous service used elsewhere in §§ 65A and 65C.

I turn now to the second question, namely, whether "or" is used disjunctively in the last paragraph of § 65A. Ordinarily, the word "or" in a statute is given a disjunctive meaning, unless the context and the main purpose of all the words demand otherwise. *Eastern Massachusetts Street Railway Company* v. *Massachusetts Bay Transportation Authority*, 350 Mass. 340. "But that construction is often discarded in order to effectuate a plain legislative purpose, or to accomplish the intent manifested by the entire act or document." *Central Trust Co.* v. *Howard*, 275 Mass. 153, 158. In my opinion, the word "or" as it is used in the last paragraph of § 65A, is not used in the disjunctive or alternative sense. The Legislature intended to grant additional pension rights to justices of the District Courts who performed certain additional functions. Originally, the last paragraph of § 65A referred only to service in the Appellate Division of the District Courts. St. 1946, c. 525. It was amended by St. 1950, c. 747, § 1 which substituted a new last paragraph which, in effect, merely added the "or" clause referring to service in the Superior Court. It was again amended by St. 1951, c. 575, which substituted for the last paragraph a new paragraph, the purpose of which was to add the "or" clause referring to service as a member of the Administrative Committee of the District Courts. It would appear from this legislative history that the Legislature was intent on adding sources of potential pension benefits. It is to be noted in this connection that under said last paragraph of § 65A the additional pension payable to a justice is based on "three fourths of the average annual compensation paid him for such service during the ten years next preceding such retirement or resignation." However, by § 7 of St. 1963, c. 810, the Legislature substituted a new § 43A for the old § 43A in G. L. c. 218, which previously provided, in the third paragraph thereof, that the members of the Administrative Committee "shall receive such compensation for their serv-

ices actually performed in the work of such committee as the governor and council shall approve" plus necessary expenses, and by § 8 of the 1963 statute inserted a new § 43C into G. L. c. 218, which merely allowed them their necessary expenses. Thus, if the word "or" in the last paragraph of § 65A means that there must be ten continuous years of service in the Appellate Division, or ten continuous years of service in the Superior Court, or ten continuous years of service as a member of the Administrative Committee, all in the alternative, then service on the Administrative Committee after 1963 could not result in additional pension benefits because each member thereof would receive ¾ths of nothing. The Legislature must have been aware of this when it enacted St. 1963, c. 810, §§ 7, 8. *Flanagan* v. *Lowell Housing Authority*, 356 Mass. 18. I must assume that the Legislature did not mean to deprive a justice of the District Court of additional pension benefits which it so carefully provided for by enactment of St. 1951, c. 575. Accordingly, I conclude that the Legislature intended that service in any one or more of three capacities mentioned in the last paragraph of § 65A during the ten years immediately prior to resignation or retirement would be counted as creditable service, and the pension would be based on the average annual compensation for all such service during such ten year period.

Accordingly, it is my opinion that Judge Samuel A. Levine would have been entitled to an additional pension under G. L. c. 32, § 65A, equal to three-fourths of his annual compensation for service by him in the Superior Court and in the Appellate Division during the ten years prior to his death, and his widow is entitled under G. L. c. 32, § 65C to an increment in pension based upon the additional pension to which Judge Levine would have been entitled.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 22 March 21, 1973

Hon. Wallace C. Mills
Clerk of the House of Representatives
State House
Boston, Massachusetts 02133

Dear Sir:

By letter dated January 30, 1973, you have asked my opinion as to whether certain petitions for legislation to exempt the offices of police chief and town accountant "of the town of Methuen" from the provisions of the Civil Service law require the approval of a town meeting of the town "in order for the legislature to act thereon, under the provisions of section 8 of Article LXXXIX of Amendment to, the Constitution, commonly known as the Home Rule Amendment (HRA), or whether the approval of the Council of the Town of Methuen, "and the head administrative official established in accordance with the new char-

ter form of government adopted by the town of Methuen (there apparently being no provision for the election of a mayor)", complies with the provisions of said section.

The voters of the town of Methuen, acting under the provisions of the H.R.A. and of General Laws, Chapter 43B, adopted a new charter on March 6, 1972. The charter establishes a "town council of twenty-one members which shall exercise the legislative powers of the town" (Art. 2, section 1), three members of which are elected at large, and eighteen precinct members, two each from 9 precincts. It also established a Town Administrator, and made no provision for selectmen nor a town meeting.

In my letter of December 6, 1971, acting in accordance with General Laws, Chapter 43B, section 9(b), I stated that in my opinion the proposed Methuen charter established a city form of government, for reasons further stated in that opinion, appended hereto and incorporated herein by reference. I am still of that opinion. Accordingly, a petition for legislation in relation to Methuen may be considered under Article LXXXIX of Amendment, section 8, only if filed or approved by the voters, "or the Mayor and City Council or other legislative body" of the city.

Clearly, the Town Council is the legislative body to be treated as the "City Council" in accordance with General Laws, Chapter 4, section 7. There being no nominal Mayor under the charter the question remains, the signature of what officer, if any, satisfies the constitutional requirement that such a petition be approved by the "Mayor."

The Methuen charter provides for a "Town Administrator who shall be the chief administrative officer of the town" (Art. 3, section 2). In addition to his administrative duties, he is charged with attending meetings of the Town Council, and among other things, "he shall recommend to the Town Council for adoption such measures requiring action by them as he may deem necessary or expedient."

In *Young* v. *Mayor of Brockton*, 346 Mass., 123, the Supreme Judicial Court held that in a city where the city manager, not the mayor, was the chief executive, the requirement of General Laws Chapter 138 that members of the license board be appointed by the "mayor" meant that the appointment should be made by the city's chief executive, in that case the city manager, even though the city had a "mayor," under Plan D. It is clear that the court in that case was following the principle stated in *Opinion of the Justices*, 229 Mass. 601, that "It is the substance of the thing done, and not the name given to it, which controls."

The only other officer who might conceivably be deemed to qualify is the President of the Council. But he is a member of the legislative body, and the Constitution requires the approval of the "The Mayor *and* City Council or other legislative body."

It is therefore my opinion that the petitions referred to in your letter require the approval of the Town Council and the Town Administrator before they can be acted upon by the General Court under the Second

Amendment to the Constitution of the Commonwealth, as amended by Article 89 of the Articles of Amendment.

Respectfully yours,
ROBERT H. QUINN
Attorney General

Number 23 March 23, 1973

Edward C. Starosta, D.M.D.
Chairman
Board of Dental Examiners
Leverett Saltonstall Building
Government Center
100 Cambridge Street
Boston, Massachusetts 02202

Dear Dr. Starosta:

You have requested an opinion whether programs of study permitting students of dental hygiene to "drill and cut hard and soft tissue" would be in violation of the Massachusetts Dental Practice Act, G. L. c. 112, §§ 50, 51 and 53. For the reasons hereinafter stated, I answer your question in the affirmative. G. L. c. 112, § 50 provides in pertinent part:

> "A person shall be deemed to be practicing dentistry if he holds himself out as being able to diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or other condition of the human teeth, alveolar process, gums or jaws, and associated parts, intraorally or extraorally, or if he either offers or undertakes by any method to diagnose, treat, operate or prescribe for any disease, pain, injury, deficiency, deformity or other condition of the same; . . ."

This Section provides for alternate methods of "practicing dentistry." One might either "(hold) himself out as being able to diagnose, treat, operate . . ." or "(offer) or (undertake) by any method to diagnose, treat, operate . . ." certainly, a student of dental hygiene engaged in "drilling and cutting hard and soft tissue" would not be "holding himself out" as registered to practice dentistry in instances where he was working under the supervision of a registered dentist and the patient was fully informed of his status.

However, by "drilling and cutting hard and soft tissues" a hygiene student would be in violation of the alternative provision of section 50, to wit:

> " . . . offers or undertakes by any method to diagnose, treat, operate . . ." Consequently, a proper reading of section 50 would appear to preclude courses of study investing students of dental hygiene with this practical experience.

G. L. c. 112, § 51, as recently amended by St. 1971 c. 620, sets forth qualification requirements for dental hygienists and states in pertinent part:

"Any person of good moral character, nineteen years old or over, who is a graduate of a training school for dental hygienists requiring a course of not less than one academic year and approved by the board, or who is a full time dental student who has satisfactorily completed at least four full semesters in an accredited dental college but who has not graduated from any dental college, may, . . ., if his examination is satisfactory, . . . be registered as a dental hygienist . . ." This section clearly provides that a graduate of an approved dental hygienist training school and a dental student of at least four full semesters qualify to take the examination for registration as a dental hygienist.

G. L. c. 112, § 53 indicates that sections 43 to 52 of Chapter 112, inclusive, will not apply to:

". . . prevent a student of a reputable dental college, incorporated under the laws of this commonwealth and granting degrees in dentistry, from performing operations as part of the regular college course, . . ."

By this provision, a dental student who opts for a license as a dental hygienist upon the completion of four full semesters of dental school, is immune from unauthorized practice violations under section 50 for any "drilling and cutting (of) hard and soft tissue." By contrast, a graduate of a dental hygienist training school assumes the risk of unauthorized practice of dentistry by performing similar operations during his training process.

That some dental hygienists are thereby authorized to perform "drilling and cutting" operations as students while others are not might appear to be arbitrary and inconsistent. However, the immunity granted in section 53 is for dental students and no distinction is made for dental students who later opt for registration as dental hygienists.

Although this imparts an advantage upon dental students who become dental hygienists, there is no practical alternative. Such practical experience is requisite for aspiring dentists and there is no feasible way to determine which dental students will complete their course of study and which will opt for dental hygiene at the termination of four full semesters.

That a special immunity is granted dental students by section 53 for operations performed as part of the regular college course while no similar exemption is granted students of dental hygiene appears to evidence a legislative intent restricting the practical training of dental hygienists.

Section 51 (5) authorizes a registered dental hygienist to "assist a registered dentist in any phase of operative and surgical procedures in dentistry and in anesthesia" but section 50 prevents a student of dental hygiene from performing the most rudimentary "drilling and cutting." Although this creates an apparent gap between expectations and training, the General Court did not elect to exempt dental hygiene students from the rigors of section 50.

Thus, it is my opinion that a course offering to students of dental hygiene allowing them to "drill and cut hard and soft tissue" would be in violation of the Massachusetts Dental Practice Act.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 24 March 23, 1973

Honorable John F. Kehoe, Jr.
Commissioner
Department of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested an opinion whether the State Police Helicopter is subject to tax as a "civil aircraft" under the Internal Revenue Code, the Airport and Airway Revenue Act of 1970, the Federal Aviation Act of 1958, or any Commonwealth Statute or Federal Act.

You have furnished us with a letter dated September 15, 1972 from the Internal Revenue Service in which IRS concludes that the State Police Helicopter is subject to taxation by the Federal government.

There are two questions subsumed in your inquiry:

1. Does the Internal Revenue Code impose a tax upon the use of a helicopter used by the Commonwealth for police work; and
2. If the Internal Revenue Code does impose such a tax, is the attempted imposition of the tax constitutional?

The Code provides in pertinent part as follows:

"4491 (a) A tax is hereby imposed on the use of any taxable civil aircraft . . .

(b) . . . The tax . . . shall be paid —

(1) in the case of a taxable civil aircraft described in section 4492 (a) (1), by the person in whose name the aircraft is, or is required to be, registered, . . ."

"4492 (a) . . . the term 'taxable civil aircraft' means any engine driven aircraft —

(1) registered, or required to be registered, under section 501 (a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401 (a)) . . ."

49 U.S.C. § 1401 provides as follows:

(a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered as provided in this section, or . . . to operate or navigate within the United States any aircraft not eligible for registration: . . .

(b) An aircraft shall be eligible for registration if, but only if —

* * * * *

(2) It is an aircraft of the Federal Government, or of a State, Territory, or possession of the United States or the District of Columbia, or a political subdivision thereof."

It is clear from the foregoing that § 4491 (b) of the Internal Revenue Code imposes a tax on the Commonwealth's helicopter because the Commonwealth is required to register it. The question of the constitutionality of the tax remains to be considered.

I assume that the helicopter is used by the State Police solely for a governmental function. In this respect, Congress possess no power to lay taxes which would obstruct or interfere with the legitimate and efficient working of the state governments. Thus, the Supreme Court has stated:

> "[A] tax upon the instrumentalities of the states is forbidden by the Federal Constitution, the exemption resting upon necessary implication in order to effectively maintain our dual system of government. The familiar aphorism is 'that as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government.' *Amrosini* v. *United States*, 187 U.S. 1, 7. *Willcuts* v. *Bunn*, 282 U.S., 216, 224-225.

Accordingly, it has been held that an excise tax cannot be levied by the United States upon a motorcycle sold by its manufacturer to a municipal corporation of the state for use by such corporation in its police service. *Indian Motorcycle* v. *U.S.*, 283 U.S. 570.

I conclude, therefore, that the tax which the Internal Revenue Service seeks to levy upon the State Police Helicopter is unconstitutional and should not be paid.

Yours very truly,
ROBERT H. QUINN
Attorney General

Number 25 March 27, 1973

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have called my attention to St. 1972, c. 616, entitled "AN ACT PROVIDING THAT CERTAIN ORGANIZATIONS MAY OB-

TAIN A LICENSE TO CONDUCT A GAME COMMONLY CALLED BEANO, AND FURTHER REGULATING THE DAYS IN WHICH SAID GAME MAY BE PLAYED," which amended Chapter 486, Acts of 1971, and have requested my opinion as to,

> "A) whether or not the Commissioner of Public Safety can now approve a BEANO license which would allow the holding or conduct of said game on a Sunday; and, B) in the event that you indicate in your opinion that BEANO could be played on Sundays when licensed under the provisions of Chapter 147, as amended, would the applicant organization be required to have an additional Sunday license, so called, as issued under the provisions of Chapter 136, Section 4, of the so-called Sunday Laws?"

Prior to the enactment of the 1971 statute, "the game commonly known as Skilo or any similar game regardless of name" (which I assume includes the game of Beano) was deemed an illegal lottery. G. L. c. 271, § 6B. The 1971 statute struck out § 6B of c. 271 of the General Laws, and substituted a new section 6B which declared such games illegal "except as provided in section twenty-two B," and also inserted a new § 22B in c. 271, which provided in part:

> "Nothing in this chapter shall authorize the prosecution, arrest or conviction of any person for promoting or playing, or for allowing to be conducted, promoted or played, the game commonly called beano, or substantially the same game under another name in connection with which prizes are offered to be won by chance; *provided, said game is conducted under a license issued by the commissioner of public safety, under the provisions of section fifty-two of chapter one hundred and forty-seven.*" (Emphasis supplied.)

The 1971 statute also inserted §§ 52-55 into Chapter 147 of the General Laws. The first paragraph of § 52 authorized the issuance of licenses to certain enumerated organizations "to operate or conduct the game commonly called beano, or substantially the same game under another name, in connection with which prizes are offered to be won by chance . . ."

The fourth paragraph of § 52 provided:

> "No such license shall be granted to allow the operation, holding or conduct of said game on a Sunday. Each license shall limit the playing of said game to the hours between seven o'clock post-meridian and twelve o'clock midnight. Each such organization licensed hereunder shall be limited to conducting said games *to one night, other than Sunday*, in each calendar week, and said night shall be set forth in the license." (Emphasis supplied.)

Section 1 of c. 616 of the Acts of 1972, referred to above, amended § 52 of c. 147 of the General Laws by substituting a new first paragraph, the only effect of this substitution being to enlarge the list of eligible or-

ganizations, and § 2 of c. 616 provided in part, "The fourth paragraph of said section 52 of said chapter 147 . . . is hereby amended by striking out the first sentence." The first sentence expressly prohibits the issuance of a Sunday license, and its deletion would ordinarily give rise to the conclusion that the Legislature intended thereby that the game could be allowed to be played on Sunday. However, the last sentence of the fourth paragraph was left intact, and that only permits a licensee to play "one night, other than Sunday, in each calendar week, and said night shall be set forth in the license." The literal effect of the 1972 amendment, in so far as Sunday games are concerned, is to continue to permit (under G. L. c. 271, § 22B) the playing of Beano "provided, said game is conducted under a license issued by the commissioner of public safety, under the provisions of section fifty-two of chapter one hundred and forty-seven," but to permit the commissioner to issue a license only for "one night, other than Sunday" under said § 52, as amended.

It was illegal prior to the enactment of the 1971 statute to conduct or play the game of Skilo or Beano, and I must assume that the Legislature continues to declare it illegal for Sunday operation, unless it clearly provides otherwise. It has not done so. The legislation may appear to be nugatory in this respect but even an absurd result must be accepted if clearly required by the statute. Cf. *Johnson* v. *Commissioner of Public Safety*, 355 Mass. 94, 99. Nor can the Title of the Act, which purports to further regulate "The Days On Which Said Game May Be Played" change the unambiguous language of the statute itself. Cf. *Attorney General* v. *Goldberg*, 330 Mass. 291, 293.

Accordingly, it is my opinion that a license to play beano on Sunday cannot be issued. In view of this, it is unnecessary to answer part (B) of your question.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 26 April 4, 1973

Honorable John W. Sears, *Commissioner*
Metropolitan District Commission
20 Somerset Street
Boston, Massachusetts 02108

Dear Commissioner Sears:

You have requested my opinion whether, in view of the provisions of St. 1971, c. 1004, the Metropolitan District Commission should compensate its officers who attend as witnesses for the Commonwealth in criminal cases at times other than during their regular tour of duty, at the rate of one and one-half times the regular hourly rate of compensation for such officers. For the reasons expressed herein, I answer your question in the affirmative.

St. 1971, c. 1004, § 7 amended G. L. c. 149 by inserting section 30C, which provides in part:

> "The service of all members . . . of the metropolitan district police force . . . shall consist of an average of forty hours per week over a period of one or more work weeks not in excess of eight, as determined by the commissioner of the department . . . and shall be restricted to not more than five normal work days, as so determined, in any consecutive seven-day period; provided, however, that all service in excess of the normal work day, as so determined, or in excess of forty hours per week, as so averaged, rendered by any such officer at the request of the commissioner of the department in which he is serving . . . shall be compensated for at the rate of one and one half times the regular hourly rate of such officer for every hour or fraction thereof of such services rendered."

Section 5 of said c. 1004 amended G. L. c. 92, by inserting a new § 62 which provides:

> "The commissioner may in the event of any public emergency, or of any unusual demand for the services of members of said police force, or whenever he deems it necessary in the public interest, require such members to work additional hours of duty and *prevent such members from taking time off when entitled thereto, or assigned therefor;* provided, however, that such members shall be compensated for any additional work in accordance with the provisions of section thirty C of chapter one hundred and forty-nine." (Emphasis supplied.)

Section 6 of Chapter 1004 repealed G. L. c. 92, § 62B which had provided: "Notwithstanding any other provision of law, members of the police force of the commission who perform service beyond their regular hours of service shall be compensated therefor as overtime service."

In construing a statute, the proper objective is to ascertain and effectuate the intent of the Legislature, as shown by the whole act, the law existing before its passage, changes made and the apparent motive for making them. *City of Somerville* v. *Commonwealth*, 225 Mass. 589, 593.

It is clear that the Legislature by the enactment of St. 1971, c. 1004, § 7 intended to standardize the work week of the Commission's police force to an average of forty hours, and not more than five normal work days in any consecutive seven-day period. Services performed in excess of the normal work day or in excess of forty hours are to be compensated for at the rate of one and one-half times the regular hourly rate. The Legislature, however, recognized that there would be instances where the services of the police force will be needed to an extent where it becomes necessary to require a member of the force to work additional hours or to prevent one from taking time off when entitled thereto. Thus, § 5 of said chapter authorizes "forced overtime" but requires that

the officer be compensated for such additional work at the rate of one and one-half times the regular hourly rate for that officer.

It is also clear that the Legislature by repealing G. L. c. 92, § 62B, the prior overtime statute, indicated its intent that St. 1971, c. 1004, §§ 5 and 7 be the applicable statutory provisions for all work performed in excess of the normal work day or work week as so averaged.

The resolution of your question depends upon an examination and analysis of G. L. c. 262, § 53C which provides for certain benefit for police officers testifying for the Commonwealth during nonworking hours, and what effect St. 1971, c. 1004, §§ 5 and 7 have upon said section.

General Laws, c. 262, § 53C, as amended by St. 1970, c. 664, provides in part:

> "Any police officer . . . on duty at night or on vacation, furlough or on a day off, who attends as a witness for the commonwealth in a criminal case . . . *may, in lieu of the witness fee* to which he would otherwise be entitled . . . *be granted such compensatory time off as shall be equal to the time during which he was in attendance at such court,* but in no event shall less than three hours compensatory time off be granted him or, *if such additional time off cannot be given because of personnel shortage or other cause, he shall, in lieu of said witness fee, be entitled to additional pay for the time during which he was in attendance at such court,* but in no event shall he receive less than three hours additional pay." (Emphasis supplied.)

On November 3, 1967, my predecessor rendered an opinion to the then Commissioner of Public Safety which concluded that § 53C did not apply to witness fees for state police officers.[1] Subsequent to that opinion, § 53C was amended so as to specifically include state police officers and a reference to § 53B. However, the 1967 opinion went beyond the specific question asked by the Commissioner and set forth a detailed analysis of § 53C and stated certain conclusions with respect to the proper interpretation of said section. That portion of the opinion was not, in my view, affected by the subsequent amendment to the statute. A copy of the prior opinion is enclosed and I incorporate herein so much of it as is pertinent to the resolution of your question.

As noted in the 1967 opinion, § 53C does not require a police department to grant compensatory time off or additional pay to its officers in lieu of witness fees. The section provides that the officer, "*may*, in lieu of the witness fee . . . be granted such compensatory time off. . . ." The use of the word "may" indicates that the Legislature intended the statute to be permissive rather than mandatory. The latter part of § 53C provides that if the compensatory time off cannot be granted, the officer, "*shall* . . . be entitled to additional pay . . ." The apparent contradiction between the two clauses was resolved in the 1967 opinion by reading the

[1] 1967-1968 Op. Att'y. Gen. p. 129

"shall be entitled" clause as operative only after the department's election to invoke the "may be granted" clause. In other words, *if* the officer qualifies under § 53C and *if* his police department awards compensatory time off, and *if* such time off cannot be given in a particular case, then the officer, "shall . . . be entitled to additional pay . . ."

It should be noted that the permissive aspects of § 53C should not, and, in my opinion, cannot, be interpreted to mean that the Commission or any other department can determine, on a day-to-day basis, whether its officers are entitled to the statutory benefits of § 53C. The provisions of § 53C mean that the Commission or any other department can adopt as a policy the statutory benefits of § 53C, or it could adopt a policy which provided no inducement for an officer to waive his witness fee. This, in my opinion, is the intent of § 53C and is also the conclusion reached by my predecessor in the earlier opinion, wherein it was stated:

> " . . . [I]f an officer qualifying under § 53C has been induced to waive the fee by the existence of a lawful regulation issued by the chief of his police department providing that the statutory benefits are to be granted to an officer so doing, the officer thereby acquires a legal right to time off or additional pay, as the case may be. He is not, however, entitled to choose between compensatory time off and additional pay . . . Any decision that such time off cannot be given must necessarily be made by the police department or by higher authority, rather than by the individual officer." 1967-1968 Op. Att'y Gen., *supra* at 131.

Your letter states that it has been the policy of the Commission to compensate its officers who attend as witnesses for the Commonwealth on a straight time basis. It is apparent, therefore, that the Commission has recognized and has been awarding its officers the statutory benefits of § 53C, but that, because of personnel shortages or other reasons, compensation has been by additional pay rather than compensatory time off.

St. 1971, c. 1004 did not, in my opinion, affect the permissive aspects of G. L. c. 262, § 53C. To interpret c. 1004 as requiring a compensation rate of time and a half whenever a police officer testified on nonworking days, would be tantamount to repealing § 53C which, as noted above, does not require police departments or the Commission to provide any benefits in lieu of the witness fee. Moreover, such an interpretation would take away the choice of those departments which do provide benefits, of providing compensatory time off or additional pay. Repeal of statutes by implication is not favored in this Commonwealth. "Unless the prior statute is so repugnant to and inconsistent with the later enactment that both cannot stand, then the former is not deemed to have been repealed. (citations)." *Haffner* v. *Director of Public Safety of Lawrence*, 329 Mass. 709, 713-14. The provisions of St. 1971, c. 1004 and G. L. c. 262, § 53C should be read together so as to produce a consistent and harmonious body of law. *Assessors of Boston* v. *Lamson*,

316 Mass. 166, 171. Statutes which appear to be inconsistent with each other, in whole or in part, must be so construed as to give reasonable effect to both unless there is some positive repugnancy between them. *School Committee of Gloucester* v. *Gloucester*, 324 Mass. 209, 212.

Reading the two statutes together, it appears that while St. 1971, c. 1004 did not affect the permissive aspects of § 53C, it does compel those departments which have elected to provide their officers with the statutory benefits of § 53C, to do so consistent with the applicable provisions of c. 1004. Having made this election, the Commission has given to those officers who waive their witness fees, a right to time off equal in amount to the time spent in Court or three hours, whichever is greater. When the Commissioner or an appropriate official in the Commission makes the determination that the officer cannot be awarded time off and requires the individual to work, that officer is entitled to compensation equal to one and one-half times his hourly rate for the amount of time he spent in court or three hours, whichever is greater. This conclusion is necessitated by § 5 of c. 1004 in that in such a case the officer is being prevented from "taking time off when entitled thereto" within the meaning of said section.

The fact that § 7 of c. 1004 refers to services rendered "at the request of the commissioner . . .," does not persuade me that the provisions of the chapter are not applicable to officers testifying in Court. Police officers of the Commission or of any other department are expected to appear in Court whenever necessary whether or not a formal subpoena has been issued. The testimony of an officer is often critical to the successful prosecution of the case, and is certainly an essential function of any police officer's duties.

Finally, it should be noted that both the decision whether to invoke the statutory provisions of § 53C, and, if that is done, whether to award compensatory time off or additional pay, rests with the Commission, not the individual officer. The Commission, therefore, has control over the situation and in fact makes the determination whether or not the time spent in Court will become service in excess of the normal work week.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 27 April 11, 1973

Honorable Joseph Leavey
Acting Commissioner
Department of Youth Services
73 Tremont Street
Boston, Massachusetts 02108

Dear Mr. Leavey:

Your predecessor requested my opinion as to the propriety of detaining juveniles who have been bound over to the Superior Court for trial

pursuant to G. L. c. 119, § 75 and c. 218, § 30, in the Charles Street Jail (relating to binding over defendants for trial in the Superior Court).

General Laws, c. 119, § 75 authorizes the Court, if a delinquency complaint against a person is dismissed under §§ 61 or 72A, to issue a criminal complaint, have it sworn to, examine on oath the complainant and witnesses, and either commit him if he appears guilty, or bind him over for trial "according to the usual course of criminal proceedings . . . Section . . . sixty-eight of this chapter shall apply to any person committed under this section for failure to recognize, pending a determination by the court that he appears guilty and pending final disposition in the superior court." Section 61 permits the Court, where an offense is committed by a child while between his 14th and 17th birthday, to dismiss a delinquency complaint if the Court is of the opinion that the interests of the public require that the child should be tried for said offense. Section 72A gives the Court like power in the case of children who have committed an offense prior to their 17th birthday, but where the proceedings are held or instituted after his 17th birthday.

It should be noted in this connection that §§ 53, 66 and 74 provide:

§ 53. (Proceedings Not to Be Deemed Criminal.)

"Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings."

§ 66. (Detention in Police Station, etc., Commitment to Jail, etc.)

"Except as otherwise provided in section sixty-seven and in section twelve of chapter one hundred and twenty, no child under seventeen years of age shall be detained by the police in a lockup, police station or house of detention pending arraignment, examination or trial by the court. Except as otherwise provided in section sixty-eight, no child under seventeen years of age shall be committed by the court to a jail or house of correction or to the state farm, pending further examination or trial by the court or pending any continuance of his case or pending the prosecution of an appeal to the superior court or upon adjudication as a delinquent child."

§ 74 (Proceedings Against Persons Committing Offense Prior to Seventeenth Birthday Limited.)

"Criminal proceedings shall not be begun against any person who prior to his seventeenth birthday commits an offense against the law of the commonwealth or who violates any city ordinance or town by-law, unless proceedings against him as a delinquent child have been begun and dismissed as required by section sixty-one or seventy-two A."

It should also be noted that, of the original §§ 73 through 83, inclusive, only §§ 74 and 75 (referred to above) and § 83 remain in effect. Section 83 relates to trial and conviction of a juvenile in Superior Court in the same manner as if he were an adult, except that the Court has the power to adjudicate the person a delinquent child if he has not attained 18 years of age.

Sections 67 and 68 of Chapter 119 deal respectively with the arrest and detention pending hearing or trial of children between 7 and 17 years of age. Prior to enactment of St. 1969, c. 838, both sections drew a distinction between children under 14 years of age and children 14 to 17 years of age. Thus, § 67, after arrest of a child, required his release to specified persons without bail, except that a child between 14 and 17 years of age could be detained (subject to bail) in "a police station or town lockup, house of detention, or place of temporary custody commonly referred to as a detention home of the division of youth service, or any other home approved by the youth service board pending his appearance in court" but the detention facilities in case of a police station or town lockup must have been approved in writing by the division of youth service, and such children must be kept in a separate and distinct place and must not come in contact with adult prisoners.

Former § 68 provided as follows:

> "A child between seven and fourteen years of age held by the court for further examination, trial or continuance, or for indictment and trial under the provisions of sections seventy-three to eighty-three, or to prosecute an appeal to the superior court, if unable to furnish bail, shall be committed by the court to the care of the youth service board or of a probation officer who shall provide for his safekeeping; provided, however, that the appearance at such examination or trial, or at the prosecution of the appeal of such child, or of any other child between fourteen or seventeen years of age detained with the consent of the youth service board under this section, shall be the responsibility of the court for which he is being held in safekeeping.
>
> A child between fourteen and seventeen years of age so held by the court if unable to furnish bail shall be so committed to the youth service board with its consent, or to a probation officer, unless the court on immediate inquiry shall be of opinion that such child should be committed to jail, in which case said child may be committed to jail.
>
> The youth service board may provide special foster homes, and places of temporary custody commonly referred to as detention homes of the division of youth service for the care, maintenance and safekeeping of such children between seven and seventeen years of age who may be committed by the court to the youth service board under this section; provided, that no more than five such children shall be detained in any such special foster home at any one time.

A child between seven and seventeen years of age so committed by the court to jail or to the youth service board to await further examination or trial by the Boston juvenile court, a district court or the superior court shall be returned thereto within fifteen days after the date of the order of such commitment, and final disposition of the case shall thereupon be made by adjudication or otherwise, unless, in the opinion of the court, the interest of the child and the public otherwise require. If the opinion of the court is that the case should be further continued and the child committed to the youth service board pending such further continuance, then the commitment pending each such further continuance must be with the consent of the youth service board, except where the child was under the age of fourteen years at the time of the original commitment, and provided that, unless hearing, finding or final adjudication is to take place at the expiration of such continuance as herein provided, the child need not be returned to court by the youth service board. In such case the court shall notify the youth service board or the person having custody of the child and the parent that the child need not be present in court for such further continuance.

Any child committed to jail under this section shall, while so confined, be kept in a place separate and apart from all other persons committed thereto who are seventeen years of age or over, and shall not at any time be permitted to associate or communicate with any other such persons committed as aforesaid, except when attending religious exercises or receiving medical attention or treatment.

The provisions of section twenty-four of chapter two hundred and twelve relative to the precedence of cases of persons actually confined in prison and awaiting trial shall apply to children held in jail or detention facilities of the youth service board under this section to prosecute appeals to the superior court, or held for indictment and trial under the provisions of sections seventy-three to eighty-three of this chapter.

Said probation officer shall have all the authority, rights and powers in relation to a child committed to his care under this section, and in relation to a child released to him as provided in section sixty-seven, which he would have if he were surety on the recognizance of such child."

In 1969, the Legislature enacted St. 1969, c. 838 for the purpose of "Establishing a Department of Youth Services." The Act also made significant changes in §§ 67 and 68 of c. 119. Thus, § 67 (as amended by St. 1969, c. 838, § 17) omitted reference to a "house of detention" as a permissible place of detention of children between the ages of 14 and 17 and expressly provided that "[n]othing in this section shall permit a

child between fourteen and seventeen years of age being detained in a jail or house of correction." St. 1969, c. 838, § 18 substituted a new § 68 in c. 119, and § 68 was further amended in part by St. 1969, c. 859, § 12. Before considering the new section 68, it would be instructive to analyze the section as it existed prior to the 1969 changes.

It will be noted that the old § 68 authorized the Court to commit a child between the ages of 7 to 17, who is unable to furnish bail, while awaiting examination by the Court or trial or continuance, or for indictment and trial under §§ 73 to 83, or to prosecute an appeal to the Superior Court. The child could only be committed to the care of the Youth Service Board or a probation officer, except that, under the second paragraph of § 68, the Court could commit a child between the ages of 14 and 17 to jail. The fourth paragraph required a final disposition by the Court of the cases of "[a] child between seven and seventeen years of age so committed to jail or the youth service board" within 15 days after commitment "to await further examination by the Boston juvenile court, a district court or the superior court," unless the Court found that the interest of the child or the public otherwise required in which case further continuances could be made under certain conditions. Note that there is no reference in the fourth paragraph to a child "held . . . for indictment and trial" under §§ 73-83, as in the first paragraph. The fifth paragraph required that "[a]ny child committed to jail under this section" is to be kept separate from persons over 17 years of age committed thereto, and the sixth paragraph made the speedy trial provisions of c. 212, § 24 applicable "to children held in a jail or detention facilities of the youth service board under this section to prosecute appeals to the superior court, or held for indictment and trial under the provisions of sections seventy-three to eighty-three of this chapter."

The new § 68, inserted by St. 1969, c. 838, § 18, changed the old § 68 by expanding the list of persons to whom the Court under the first paragraph could commit a child unable to make bail, so as to include "a parent, guardian, or other responsible person." The second paragraph permitting commitment of children of 14 to 17 years of age to jail, and the fourth paragraph relating to special treatment of any child held in jail, were omitted, and the sixth paragraph which previously provided for speedy trial of children "held in jail or detention facilities of the youth service board" was amended so as to apply only to children "held in detention facilities of the department of youth services." The fourth paragraph of the old § 68, relating to final disposition of the case within 15 days, unless extended, became the third paragraph in the new § 68, and, as amended, also omitted any reference to a child held in jail.

As amended through St. 1969, c. 838, §§ 17 and 18, it appears clear that a child between 14 and 17 years of age, arrested as a delinquent, or held in case of failure to furnish bail for examination, trial or appeal as a delinquent or for indictment and trial as an adult under §§ 73-83, could not be committed to jail under G. L. c. 119, §§ 67 or 68. However, St. 1969, c. 859, § 12 further amended § 68 by substituting a new third paragraph (corresponding to the fourth paragraph of the old § 68). The

primary reason for the amendment is that St. 1969, c. 859 was an "Act Providing For The Establishment of Juvenile Courts in the Cities of Worcester and Springfield and Establishing a State Council on Juvenile Behavior," and § 12 of said c. 859 was designed to amend G. L. c. 119, § 68 so that the third paragraph would include references to the Worcester and Springfield Juvenile Courts which had been created by c. 859. However, the third paragraph went beyond this by providing as follows:

> "A child between seven and seventeen years of age so committed by the court to jail or to the youth service board (sic) to await further examination or trial by the Boston juvenile court, the Worcester juvenile court, the Springfield juvenile court, a district court of (sic) the superior court shall be returned thereto within fifteen days after the date of the order of such commitment, and final disposition of the case shall thereupon be made by adjudication or otherwise, unless, in the opinion of the court, the interest of the child and the public otherwise require."

The new third paragraph provides for early disposition of the cases of children between 7 and 17 years of age held for further examination and trial as a delinquent and "so committed . . . *to jail* or to the youth service board . . ." The words "so committed . . . to jail" obviously refer to prior statutory provisions, but c. 119, as amended through St. 1969, c. 859, § 12, no longer contains any express provision for commitment to jail whether of a child held as a delinquent or for indictment and trial as an adult. Section 75, relating to indictment and trial of a child after dismissal of a delinquency complaint, makes § 68 applicable "to any person committed under this section, for failure to recognize." In the absence of an express authorization to the Court to commit such persons to jail, the Court has no power to do so. Cf. *Robinson* v. *Commonwealth*, 242 Mass. 401, 404. The question then remains whether the Legislature, by inserting the reference to "jail" into the third paragraph of the new § 68 (formerly the fourth paragraph of the old § 68), impliedly authorized the Court to commit such persons to jail.

The third paragraph of the new § 68 and the corresponding fourth paragraph of the old § 68 were designed *for the protection* of children, who are detained because they were unable to raise bail, by requiring a speedy disposition of their case. Notably absent from this paragraph under both the old and the new § 68, requiring disposition of the case within 15 days unless the time is extended, was any reference to children 14 to 17 years of age or older held for indictment and trial under §§ 73 to 83; and this would seem to imply that, notwithstanding the provision in § 75 that § 68 would apply in cases of commitment for failure to recognize, such speedy disposition was not required in the case of such older children. Nevertheless, inasmuch as this third paragraph of § 68 deals solely with speedy disposition of the cases of certain children detained in detention facilities because they are unable to furnish bail, and since § 53 provides that §§ 52 to 63 (including § 61 relating to dismissal of a delinquency complaint against a child 14 to 17 years "if the court is of the

opinion that the interests of the public require that he should be tried for said offense or violation") should be liberally construed so that the care, custody and discipline of . . . children . . . shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings . . . under said sections shall not be deemed criminal proceedings" — it would seem that we should not imply an authority in the Court to commit to jail, which the Legislature, in St. 1969, c. 838, § 18, expressly deleted. A contrary interpretation would be absurd, because otherwise, a child 7 years of age could be committed to jail.

I am mindful that this, in effect, renders meaningless the reference to "jail" in the third paragraph of § 68, as inserted by St. 1969, c. 859, § 12, and that ordinarily every word in a statute must be deemed to have been intentionally used and to have meaning. Cf. *Commonwealth* v. *Woods Hole, Martha's Vineyard & Nantucket S.S. Authority*, 352 Mass. 617; *Insurance Rating Board* v. *Commissioner of Insurance*, 356 Mass. 184. But the Supreme Judicial Court has also said that this rule can be dispensed with if no other course appears to be open. *Commonwealth* v. *McMenimon*, 295 Mass. 467. If any other interpretation were adopted, it would run counter to the broad legislative intent to treat a child under 17 years of age differently from an adult, unless and until he is convicted under § 83.

It is my opinion, therefore, that a child who has been bound over for trial pursuant to G. L. c. 119, § 75, and c. 218, § 30, cannot be detained in the Charles Street Jail if unable to furnish bail.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 28 April 11, 1973

Martin P. Davis, *Chairman*
Massachusetts Parole Board
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Davis:

You have requested my opinion regarding Section 4 of Chapter 888 of the Acts of 1970 which replaced Chapter 123 of the General Laws with a new Chapter 123, entitled "Treatment and Commitment of Mentally Ill and Mentally Retarded Persons."

Sections 113 through 124 of the previous c. 123 comprised a subsection entitled, "Defective Delinquents and Drug Addicts"; § 118A and 119 of said subsection set forth parole provisions with respect to the Defective Delinquent classification. More particularly, § 118A conferred

jurisdiction on the Parole Board to parole such defective delinquents and to discharge same upon the completion of five years of satisfactory parole.

In brief, the new c. 123 has completely eliminated the defective delinquent classification as set forth in §§ 113 through 124 of the previous chapter, and more specifically in § 113. The new law has, moreover, abolished all existing defective delinquent departments as provided in § 117 of the previous c. 123. The new chapter, however, remains silent on the general jurisdiction of the Parole Board with respect to the former defective delinquent classification, more specifically: on the status of the paroled defective delinquent presently under parole supervision, and on the defective delinquent who is presently under active consideration for parole release.

The language of the new c. 123 contains no textual reference whatsoever to the defective delinquent classification. Section 11 of c. 888 of the Acts of 1970, however, does expressly refer to the former defective delinquent sections as it sets forth a transitional reclassification procedure relative to the transfer and discharge of incarcerated defective delinquents. But, here, too, there is no textual reference to the paroled defective delinquent; hence, resolution of your questions, presented below, turns on a fair application of the new language, impressed as it is with a clear sense of orderly transition, to the wholly ignored matter of the Parole Board's jurisdiction with respect to the former classification. The general rule is well established that when a general power is given or duty enjoined every particular power necessary for the exercise of the one, or the performance of the other, is given by implication. See *Heard* v. *Pierce*, 62 Mass. 338.

You have specifically asked the following questions in your letter:

"1. What is the general jurisdiction, if any, of the Parole Board in reference to 'Defective Delinquents' as previously so classified in the former Chapter 123 of the General Laws, as of November 1, 1971?

"2. Is the classification of 'Defective Delinquent' to remain and, if so, does the Parole Board have any jurisdiction or responsibility as to parole hearings or parole releases concerning such classification, as of November 1, 1971?

"3. As to 'Defective Delinquent' presently under parole supervision in the community, what will be their status and the Parole Board's jurisdiction and responsibility regarding them, whether such 'Defective Delinquents' have been under parole supervision for five years or more, or for less than five years, as of November 1, 1971?

"4. What action, if any should the Parole Board take as to discharging from parole 'Defective Delinquents', whether they have been under parole supervision for five or more or for less than five years, as of November 1, 1971?

"5. If a 'Defective Delinquent' presently on parole release is considered to have violated parole, what is the Parole Board's jurisdiction and responsibility in such an event, either before or following November 1, 1971?

"6. Does the Attorney General wish to recommend any specific actions to be undertaken by the Parole Board in reference to the matter of 'Defective Delinquents' as so classified in the previous Chapter 123 of the General Laws?"

In light of the above-stated general principles, I now turn to your questions:

Question 1:

The Parole Board's jurisdiction with reference to the former classification of defective delinquents has been abrogated by § 4 of c. 888 of the Acts of 1970, which inserted a new mental health chapter in place of the previous c. 123. The Parole Board, therefore, is without jurisdiction to, in any way, further affect the status of any defective delinquent, except to discharge any such paroled defective delinquent from his commitment as a defective delinquent.

Question 2:

The defective delinquent classification, as set forth in former G. L. c. 123, §§ 113-124, more particularly § 113, has been completely eliminated by § 4 of c. 888 of the Acts of 1970, which strikes out the old chapter and inserts in place thereof a new chapter entitled, "Treatment and Commitment of Mentally Ill and Mentally Retarded Persons." Moreover, all existing defective delinquent departments are abolished by the aforesaid section 4.

Section 11 of c. 888 of the Acts of 1970 provides for the transfer and discharge of all defective delinquents committed to M.C.I. Bridgewater and M.C.I. Framingham prior to the effective date of the new chapter. In brief, the section provides that each defective delinquent shall be examined by a qualified physician who shall make a determination of such person's mental condition. If it be determined that such person is so dangerous by reason of mental illness that strict security is required, the Commissioner of Correction shall act under the new c. 123 to transfer such person, if male, to Bridgewater State Hospital. If it is determined that the person is not so dangerous by reason of mental illness that strict security is necessary, but that further care and treatment is required, the Commissioner of Correction shall act under the new c. 123 to transfer such person to a facility of the Department of Mental Health. If it is determined that such former defective delinquent is no longer in need of care and treatment, the Commissioner of Correction shall notify such person of his right to be discharged from the correctional institution, upon his giving the Commissioner written notice of his intention to leave. The Parole Board will retain no jurisdiction over any former defective delinquent transferred to Bridgewater State Hospital or any other facility of the Department of Mental Health pursuant to said § 11.

Question 3:

It is plain from a reading of § 11 of c. 888 of the Acts of 1970, that the Legislature intended to ease and facilitate the elimination of the defective delinquent classification by imposing an orderly screening and reclassification procedure whereby the new status of each former defective delinquent would be determined on the basis of an assessment of his mental condition within one year of November 1, 1971; such a process has been set forth above. It would seem to follow that the elimination process should affect the paroled defective delinquent in a similar orderly fashion.

As the jurisdiction of the Parole Board to further affect the status of any defective delinquent, except to discharge such person, is repealed, as a starting point, all paroled defective delinquents as of November 1, 1971, regardless of the amount of parole served, should be summarily discharged from their defective delinquent commitment by the Parole Board, irrespective of any language in § 118A of the previous c. 123 or that of G. L. c. 127, § 130A, which conditions the termination of sentence by the Parole Board on the completion of at least one year of satisfactory parole. Pursuant to § 118A of the previous c. 123, each defective delinquent paroled prior to November 1, 1971 was examined by two psychiatrists approved by the Commissioner of Mental Health and adjudged to be a fit person for parole. That such person was so adjudged and subsequently paroled by the Board would seem to adequately satisfy any application of the § 11 reclassification procedure re transfer and discharge of incarcerated defective delinquents, to the area of paroled defective delinquents, provided, however, that the subject's parole officer has no reason to recommend that the defective delinquent's mental condition be reevaluated by the Department of Mental Health. If such reason does exist, said defective delinquent, upon discharge from parole, should be examined according to the procedures set forth in § 11 and treated by the Department of Mental Health in accordance with the new c. 123.

Question 4:

All defective delinquents under parole supervision as of November 1, 1971, should be summarily discharged from their commitments irrespective of any prior statutory language or that of G. L. c. 127, § 130A.

Again, applying the § 11 screening procedure to the paroled defective delinquent, it seems that such discharge by the Parole Board should be final and unconditional, unless there is reason for the former defective delinquent to be examined by the Department of Mental Health and retained for further treatment. All former defective delinquents presently under parole supervision should be notified in writing of their discharge from said commitment.

Question 5:

All paroled defective delinquents adjudged to have been in violation of their parole and who were subsequently recommitted to a defective delinquent department prior to November 1, 1971, should be discharged

from such commitment by the Department of Correction and thereafter subjected to the section 11 screening process or to any further appropriate legal action where such violation involved the commission of a new crime.

As to paroled defective delinquents adjudged to have violated their parole and who evaded arrest prior to November 1, 1971, all ensuing warrants should be withdrawn and such persons discharged from their commitments by the Parole Board: If the commission of a new crime was involved, the former defective delinquent might be subject to a new warrant.

Any former defective delinquent under parole supervision on or after November 1, 1971, who is considered to be in violation of his parole cannot be recommitted as a defective delinquent, as such classification has been eliminated and all former defective delinquent departments abolished. All such persons should be discharged from their defective delinquent status, and subjected to the section 11 reclassification procedure, or if the commission of a new crime is involved, to any further legal action which might be appropriate.

Question 6:

It would seem advisable for the Parole Board to allow an informal relationship between any former paroled defective delinquent and his parole officer to continue under a mutually acceptable arrangement where considered necessary for the parolee's well being.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 29 April 11, 1973

Honorable Bruce Campbell
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Campbell:

You have inquired whether, upon the following facts, a check could properly be issued to "Max Kaufman as assignee of Bertha B. Ripstein."

> "On June 21, 1972, the Commissioners voted an award in the total amount of $15,892.84 to Bertha B. Ripstein.
>
> "Check no. 726998 dated August 30, 1972, in the amount of $15,892.84 was issued payable to Bertha B. Ripstein and State Mutual Life Assurance Company (mortgagee).
>
> "The Department received a discharge of mortgage dated July 24, 1972, and an assignment of the proceeds of the land damage award by Bertha B. Ripstein to Max Kaufman. This assignment was executed on July 25, 1972.

> "Check no. 726998 was submitted for revision requesting that the payee be designated as Max Kaufman for the reason that the mortgage was discharged and the owner had executed an assignment.
>
> "This was returned by the Comptroller with the comment 'the Commonwealth's responsibility in eminent domain payments is to the owner and/or mortgagee and not to an assignee.' "

After the Commissioners made the award on June 21, 1972, her claim against the Commonwealth thereby became a "chose in action." Under G. L. c. 231, § 5, the assignee of a chose in action "which has been assigned in writing, may maintain an action thereunder in his own name . . ." This is so even though the assignee was not the owner of the property at the time of the taking. Cf. *Commonwealth* v. *Market Warehouse Co.*, 250 Mass. 449.

I conclude, therefore, that you can issue a check to the assignee. There is no difference in legal effect between this case and cases involving assignment of relocation payments discussed in my opinion to the Comptroller of the Commonwealth dated May 2, 1972 (No. 71/72-35), copy enclosed.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 30 April 18, 1973

Honorable Frankland W. L. Miles, Jr.
Chairman, Massachusetts State College Building Authority
65 Franklin Street
Boston, Massachusetts 02110

Dear Mr. Miles:

You have requested an interpretation of an opinion wherein I advised the Lowell Technological Institute Building Authority that the Legislature, through the enactment of appropriation acts, could direct that Authority to reimburse the Commonwealth for the cost of utilities furnished by the Commonwealth to the Authority. See, Op. Atty. Gen., 71/72-21. You suggest that a similar direction to the Massachusetts State College Building Authority (the Authority) may render the Authority unable " . . . to provide for the payment of current installments of interest and principal on Authority obligations," and would amount to an amendment of the Authority's Enabling Act (the Act) which states in part:

> "The trustees may, in the name and on behalf of the commonwealth, upon such terms and with or without consideration . . .

(b) Cause . . . water, sewage or drainage facilities and similar improvements and steam service and other utilities and connections for heating and other necessary purposes to be furnished to or in any project carried out by the Authority." St. 1963, c. 703, § 5(b).

Your letter further states the Commonwealth has guaranteed payment of principal and interest on bonds issued by the Authority and that reimbursement to the Commonwealth for utility costs could require the Commonwealth to perform its guaranty of payment.

In view of the foregoing, you request advice as to whether the Authority must reimburse the Commonwealth as directed by St. 1970, c. 833, § 2A and St. 1971, c. 719, § 2A (the appropriation acts).[1] Specific appropriations for the cost of furnishing utilities for projects of the Authority are as follows:

St. 1972, c. 514, § 2A		
Item: 7109-0000	$31,000	(State College at Bridgewater)
Item: 7114-0000	42,000	(State College at Salem)
Item: 7115-0000	34,000	(State College at Westfield)
Item: Total	$107,000	
St. 1971, c. 719, § 2A		
Item: 7109-0000	$25,000	(State College at Bridgewater)
Item: 7114-0000	28,800	(State College at Salem)
Item: 7115-0000	41,500	(State College at Westfield)
Item: Total	$95,300	
St. 1970, c. 833, § 2A		
Item: 7109-0000	$21,000	(State College at Bridgewater)
Item: 7114-0000	19,000	(State College at Salem)
Item: 7115-0000	28,000	(State College at Westfield)
Item: Total	$68,000	

On December 12, 1967, the Commonwealth, Board of Trustees of State Colleges and the Authority, pursuant to section 5 of the Act, entered into a "Contract For Financial Assistance" which provides in the Sixth Article, that fees charged by the Authority:

"[S]hall be so fixed and adjusted in respect of the aggregate of all revenues from the first project and from any other project . . ., (1) *so as to provide revenues sufficient* (a) *to pay the cost of maintaining, repairing and operating* the first project and such other projects . . ., (b) *to pay the principal of and the interest on notes and bonds* issued to finance or refinance the First Project and any such other projects as the same shall become due and payable . . ." (Emphasis supplied.)

[1] I note that subsequent to your request the Legislature enacted another appropriation act, St. 1972, c. 514, § 2A.

I note the above-quoted provision is almost identical to Section 9 of the Act. A further part of the Sixth Article enables the Authority to request that the trustees, acting in the name of the Commonwealth, provide utilities. In an agreement entitled "Management and Services Agreement — First Project" entered into by the trustees acting in the name and on behalf of the Commonwealth, the trustees agreed, in the Second Article, Section 3, to furnish "steam service, electricity, water, gas and other utilities . . ."

In my opinion the above-cited section of the Act and applicable contractual provisions are consistent with the legislative direction to the Authority that it reimburse the Commonwealth for funds expended to provide utilities for projects of the Authority. While section 5 of the Act allows the trustees to provide the Authority with utilities in the name of the Commonwealth, section 9 of the Act requires the Authority to generate revenues sufficient not only to pay the principal and interest on bonds, but additionally to pay the cost of maintaining and operating projects. Undoubtedly utility costs constitute an element of maintaining and operating Authority projects. Since revenue accumulations are authorized to provide for both the management of Authority debt requirements and the maintenance and operation of Authority projects, a direction by the Legislature that the Commonwealth be reimbursed for funds expended to supply the Authority with utilities is, in my opinion, in accord with the scheme of the Act.

It is my further opinion that the reimbursement requirement could not result in an impairment of bondholders' security in derogation of the Act since the real security underlying these obligations is the Commonwealth's guaranty of payment of principal and interest. See, Op. Atty. Gen., 7/72-21 citing, *New Bedford* v. *New Bedford, W. H., M. V. & N. SS. Authy.*, 336 Mass. 651, 657, *appeal dismissed*, 358 U.S. 53.

One additional point remains for clarification. The 1970 appropriation act provided for transfer to the General Fund effective on July 1, 1971 and provided for equal successive payments of $68,000 on the first day of each fiscal year. The 1971 and 1972 appropriation acts both provided for transfers to the General Fund effective on July 1, 1972 and, respectively, called for aggregate payments of $95,300 and $107,000. The 1971 and 1972 acts provided for successive payments the first of each fiscal year. These subsequent enactments are, in my view, superseding, since each appropriation legislates the same object. See, G. L. c. 29, § 15; *Homer* v. *Fall River*, 326 Mass. 673, 679. When the 1970 appropriation act became effective, a debt was created obligating the Authority to pay the Commonwealth $68,000. It is my opinion that enactment of the 1972 appropriation act superseded both the 1970 and 1971 appropriation acts, effective July 1, 1972. Therefore, the Authority's present obligation is to transfer to the Commonwealth $68,000 for the debt created under the 1970 act and $107,000 in accordance with the 1972 appropriation act. The Authority's obligation in the future will be transfer $107,000 to the

Commonwealth the first day of each fiscal year, unless there is a superseding act to the contrary.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 31 April 18, 1973

Honorable William F. McRell
Acting Director
Division of Civil Service
294 Washington Street
Boston, Massachusetts 02108

Dear Mr. McRell:

I have a letter with attachments of correspondence between your office and the Solicitor's Office of the City of Cambridge. Your predecessor asked to be informed "if the position of Deputy City Auditor in the City of Cambridge is subject to the provisions of Chapter 31 of the General Laws."

Chapter 31 of the General Laws regulates the classified Civil Service, vesting authority in the Civil Service Commission. Pertinent portions of applicable sections of that chapter are set forth below:

> "§ 3. Subject to the approval of the governor, the commission . . . shall make and may amend rules which shall regulate the selection and employment of persons to fill positions in the official service and labor service . . . of the cities . . . thereof, which positions are subject to any provision of this chapter.
>
> "Such rules shall . . . include provisions for the following: —
>
> * * * * *
>
> "(b) Including within the civil service offices and positions not otherwise exempted by law and placing said offices and positions in the official or labor service."
>
> "§ 5. No rule made by the commission shall apply to the selection or appointment of any of the following: —
>
> * * * * *
>
> "Officers whose appointment or election is by a city council, or subject to its confirmation, except those expressly made subject to this chapter by statute."
>
> "§ 47. This chapter shall be in force with respect to the official and the labor service in all cities of the commonwealth of one hundred thousand or more inhabitants, whether or not such cities have accepted this chapter or corresponding provisions of earlier law . . ."

The City of Cambridge has more than one hundred thousand inhabitants and c. 31 is in force in that city. The position in question, namely, deputy auditor, was created pursuant to G. L. c. 41, § 49A, which provides, in part:

> "The auditor . . . of a city . . . may in writing appoint, with the approval of the mayor . . . thereof, an assistant . . ."

Your predecessor advised the office of the Solicitor of the City of Cambridge that the office of Deputy Auditor of that city is subject to the Civil Service Law and Rules because the exemption in G. L. c. 31, § 5 relates only to "Officers whose appointment or election is by a city council, or subject to its confirmation," and because appointment of a Deputy Auditor pursuant to G. L. c. 41, § 49A must be made "with the approval of the mayor." However, the City Solicitor has argued that G. L. c. 43, § 95 vests control in the City Council except where it is specifically reserved to the City Manager; that G. L. c. 43, § 103, which spells out the powers of the City Manager, specifically excepts control over the City Auditor; and that therefore "control is then vested by Section 95 of Chapter 43 in the City Council." However, § 95, in delineating the authority of the City Council, specifically provides "except that . . . the city auditor . . . shall have the powers and duties which may be conferred and imposed . . . by law." As we have seen, the City Auditor is empowered to appoint a Deputy Auditor, but only "with the approval of the mayor" and I find nothing in the provisions of law relating to PLAN E. Government which changes that proviso to "approval of the City Council." Indeed, G. L. c. 41, § 49A which requires the approval of the Mayor and was enacted in 1948 and amended in 1964 (St. 1948, c. 211; St. 1964, c. 70) must be deemed to have added that power to the general, though limited, powers of the Mayor, referred to in the earlier statute, G. L. c. 43, § 100, which was enacted in 1938 and amended in 1941 (St. 1938, c. 378, § 15; St. 1941, c. 722, § 5).

I conclude, therefore, that the office of Deputy Auditor of the City of Cambridge is subject to the Civil Service Law and Rules because there is no provision of law which exempts it.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 32 April 5, 1973

Mrs. Mabel A. Campbell
Director of Civil Service
294 Washington Street
Boston, Massachusetts 02108

Dear Mrs. Campbell:

On November 15, 1972, I rendered an opinion to you which stated in pertinent part:

"With respect to your question concerning domicile, it is my opinion that you are prohibited from restricting entrance to any examination on the basis of domicile or from according preference on eligible lists on the basis of domicile on the same bases outlined above."

As a result of that opinion, you now pose the following questions:

"1. What effect does the opinion have on the new police residency law, Chapter 226 of the Acts of 1972, which amends G. L. c. 31, s. 48A, copy attached?

"2. What effect does the opinion have on other provisions of said s. 48A '*** provided, however, that notwithstanding the provisions of any general or special law to the contrary, any person who receives an appointment to the police force of a city or town shall within nine months after his appointment establish his residence within such city or town or at any other place in the commonwealth that is within ten miles of the perimeter of such city or town.***'? (See also, G. L. Chapter 48, s. 58E and G. L. Ch. 41, s. 99A)

"3. Is the opinion retroactive so that we must combine all similar eligible lists now in existence so that we will have only one list for each position in the Official Service and only one list for each position in the Labor Service?

"4. If the answer to question #3 is in the affirmative, a very serious problem arises in combining eligible Labor Service lists for municipalities with the State Labor list in order to have just one eligible list from which to certify. Placement on the Labor Service list is governed by the date the applicant registers at which time he is given a registration number. His name is placed on the list according to that registration number, veterans being placed ahead of non-veterans. In order to combine all municipal Labor Service lists with the State Labor Service list it will be necessary to look at each eligible card to ascertain the date of registration for placement on one combined list. At the present time there are approximately 33,000 names on the State Labor list, approximately 12,000 on the Boston Labor list and approximately 40,000 names on the lists for all other municipalities.

"5. If there is one combined labor list, what method is to be used to certify names for a position in the town of Agawam? Will the certification be made regardless of residence so that in sending out the first one

hundred names (which will be those of veterans) there may not be one person in that one hundred names who will reside in Agawam or in the Agawam area?

"6. What is 'a compelling governmental interest' to which reference is made in the opinion?' For instance, if a position in Agawam requires a person to live in that area for availability to his employment, such as in the Water Department where an emergency may arise, and in police and fire departments where persons should live close to the location of employment in case of emergency, are these compelling governmental interests?

"7. In the case cited in question #5, could the appointing authority pass by persons who do not live within the Agawam area?

"8. Will it be necessary to amend all of our applications, both Official Service and Labor Service, and all of our examination announcements by striking out any reference to United States citizenship?

"9. Do we now have to advertise all of our examinations all over the United States or only on a state-wide basis as we presently do?

"10. Do we now have to advertise our municipal examinations all over the nation, only on a state-wide basis, or only on a municipal basis as we presently do?

"11. On page 5 of the opinion, the third sentence states it might be desirable to impose a requirement that applicants be residents of the United States at time of application. In view of the opinion that durational residency and citizenship requirements arbitrarily imposed are unconstitutional, isn't the suggestion on page 5 unconstitutional?

"12. What happens when there is a language barrier? If the position to be filled requires a working knowledge of English, are we required to examine in any other language?"

With respect to question #1, for the reasons stated in my opinion to you of November 15, 1972, it is my opinion that the following portion of Chapter 226 of the Acts of 1972 is unconstitutional:

"If any person has resided in a city or town for one year immediately prior to filing his application for examination and has the same standing as any person who has not so resided in such city or town, the director of civil service, when establishing the list of eligible applicants, shall place the name of

> the person so residing ahead of the name of the person not so residing, or upon written request of the appointing authority to the director, the director shall place the names of all persons who have resided in a city or town for one year immediately prior to the date of examination ahead of the name of any person not so residing, provided that the request is made prior to establishment of the eligible list."

With respect to question #2, I am of the opinion that the residency requirements therein may rationally be deemed necessary to promote a compelling governmental interest, i.e., the promotion of the safety and welfare of residents of the cities and towns of this Commonwealth. In the same vein, it is my opinion that § 58E of G. L. c. 48, and § 99A of G. L. c. 41 contain constitutionally valid residency provisions. Both of these sections attempt to insure that firemen and policemen responsible for the safety and welfare of a particular community (1) will be sufficiently familiar with local conditions and geography to successfully perform their duties, and (2) after acquiring such familiarity will be residing in sufficient proximity to the particular community so that their services may be promptly rendered in times of emergency.

With respect to question #3, this opinion is prospective only in the sense that it is not intended to invalidate past *appointments*. However, in so far as any future appointments are affected no preference may be awarded an applicant because of the place of his residency prior to the time of his appointment to the position. Job-related residency requirements after appointment to the position may be perfectly valid, if, in the particular position, compelling governmental interests are thereby promoted. If, in order to comply with this opinion, all eligible lists now in existence must be combined and scrutinized, then such administrative steps must be taken forthwith.

I decline to comment on question #4 since (1) it is not in question form and (2) it concerns itself with the administrative implementation of the spirit of this opinion, the mechanics of which are more properly within the purview of your Division.

With respect to question #5, I decline to advise you of the specific methodology to be utilized in the certification of names for a position in a particular town, e.g., Agawam, beyond reiterating that the certification and ultimate appointment of any candidate may not be influenced by the place of the candidate's residence without a compelling governmental interest.

With respect to question #6, there is no absolute definition of the phrase "compelling governmental interest." Rather, this criterion is a fluid and flexible "rule of thumb" which approaches concreteness only in the context of a particular fact pattern. As indicated earlier in this opinion, once an applicant has entered the employ of a local police or fire department, then the ubiquitous emergency variable inherent in such service would, in my opinion, fall within the "compelling governmental interest" guideline referred to above. In this connection, I stress that

administrative determinations of a compelling governmental interest will be scrutinized more carefully than a similar determination made by the Legislature. The Commission, and *a fortiori* an appointing authority, should therefore have substantial facts readily available so as to justify any requirement imposed at the administrative level.

With respect to question #7, it is my opinion that absent a compelling governmental interest, the appointing authority may not pass by persons on one combined labor list who do not live in the Agawam area for purpose of certification for an appointment to a civil service position in that area.

With respect to question #8, I refer you to my opinion of November 15, 1972, and hereby inform you that none of your examination announcements may contain any reference to United States citizenship.

With respect to questions #9 and 10, it is my opinion that there is no constitutional requirement that you must advertise any of your examinations on a nation-wide basis, although you must furnish an examination application and application information to any out-of-state person who requests same. With respect to examinations for municipal positions and the question of whether or not they must be advertised on a state-wide basis, it is my opinion that state-wide advertisement is not constitutionally required although it may be desirable if the Division of Civil Service wishes to maximize equality of opportunity for public service employment for all citizens in the Commonwealth. Such a decision may be influenced by the financial and administrative feasibility of such a practice.

With respect to question #11, it is not unconstitutional for your Division to require that applicants be residents of the United States at time of application. Rather, the unconstitutional practice is to require either (1) that the candidate be a United States citizen, or (2) that the candidate prior to *appointment*, be a resident of a particular town, city, or state of the United States.

With respect to question #12, a civil service examination, to be constitutional, must be predictive of successful performance on the job. If in your judgment successful performance in the position to be filled requires a working knowledge of English, then you are not required to examine in any other language. Indeed, where the position to be filled requires a high level of education, e.g., police officers, examination in English is imperative. *Castro, et al.* v. *Beecher, et al.*, United States Court of Appeals for the First Circuit, Nos. 71-1180, 71-1395, 71-1396, April 26, 1972.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 33 April 24, 1973

Honorable Robert Q. Crane
Treasurer and Receiver General
Chairman, State Board of Retirement
73 Tremont Street
Boston, Massachusetts 02108

Dear Mr. Crane:

This is in response to your request for an opinion whether the State Board of Retirement may now entertain an application for accidental disability retirement where the state employee in question was originally retired for ordinary disability retirement under G. L. c. 32, § 6. You advise that the employee has requested that the Board reconsider the original application as one for accidental disability retirement rather than ordinary disability retirement.

The statute of limitations set forth in G. L. c. 32, § 7 with respect to applications for accidental disability retirement is quite strict. Except for applications filed within two years of attaining the maximum age for retirement (which I assume is not in question here) such applications may not be filed "unless such injury was sustained or such hazard was undergone within two years prior to the filing of such application or, if occurring earlier, unless written notice thereof was filed with the board by such member or in his behalf within ninety days after its occurrence." G. L. c. 32, § 7(1).

Unless notice was received as specified in the statute, the Board may not now treat the original application for ordinary disability retirement as amended into one for accidental disability retirement. The employee must be deemed to have made an election when filing his original application, and he cannot now amend it after the statute of limitations has run unless the notice provisions of section 7 were complied with.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 34 April 26, 1973

Honorable Robert Q. Crane, *Chairman*
Massachusetts State Lottery Commission
One Gateway Center
Newton, Massachusetts 02158

Dear Mr. Chairman:

You have requested my opinion whether the Massachusetts Lottery Commission may institute a new type lottery called "The Instant Game." The Commission proposes to implement this new lottery to, *inter alia*, raise added revenue for the cities and towns of the Commonwealth.

You state that a purchaser of an Instant Game ticket can open the ticket and determine instantly whether he is a winner. Game prizes will be in amounts of $2, $10, $100, $1,000. The Commission proposes to authorize each of its licensed, bonded vendors to pay in cash the $2 and $10 prizes, and to authorize instant payment of $100 prizes at each of approximately 60 bonded Claim Centers located throughout the Commonwealth.

Licensed, bonded vendors authorized to pay in cash the $2 and $10 prizes would receive tickets for the Instant Game on consignment. You state that periodically, the vendors would return unsold tickets and pay the Commission for tickets sold less money they had paid as prizes, and less their commission. The winning tickets supporting the amounts paid out as prizes would be returned to the Commission where they would be audited for correctness.

The Commission plans to provide Claim Centers with specially designed checks for $100 signed by either the State Treasurer or the Lottery Director. Claim Center personnel would fill in the winner's name as payee and countersign the checks. They would sign and issue checks only after receiving from the Commission specific telephone authorization for each winner and check. Payment of $100 prizes by Claim Centers will be made from funds in the hands of the State Treasurer.

You state that none of the licensed vendors and few of the Claim Centers are state offices with state employees.

In seeking my opinion regarding the Commission's authority to implement the Instant Game, you are particularly concerned whether non-state employees may countersign checks for $100 prizes, and whether the proposal conflicts with any of the provisions of G. L. c. 29. For the reasons hereinafter stated, I am of the opinion that the Commission has authority to implement the Instant Game as outlined in your opinion request.

Constitutional and statutory provisions pertinent to the state treasury are not applicable to payments of $2 and $10 prizes by licensed, bonded vendors. Such payments are made by vendors from their own funds, and do not involve monies either paid to the Commission or in the control of the State Treasurer.

You state that payment of $100 prizes by Claim Centers will be made from "funds in the hands of the State Treasurer." Proceeds of lottery ticket sales are placed in a State Lottery Fund in the State Treasury:

> "There shall be established and set up on the books of the commonwealth a separate fund, to be known as the State Lottery Fund. Said fund shall consist of all revenues received from the sale of lottery tickets or shares, and all other monies credited or transferred thereto from any other fund or source pursuant to law." G. L. c. 10, § 35.

Monies in the State Lottery Fund only can be expended for certain designated purposes:

> "The state lottery fund shall be expended only for the following purposes; (*a*) for the payment of prizes to the holders of winning lottery tickets or shares; (*b*) for the expenses of the commission in administering and operating the lottery, as certified by the commissioner of administration, and the state treasurer shall transfer said amount to the General Fund; and (*c*) the balance of said fund, as determined by the comptroller, on June thirtieth and December thirtieth of each calendar year, shall be credited to the Local Aid Fund established under the provisions of section two D of chapter twenty-nine, and shall be distributed to the several cities and towns in accordance with the provisions of section eighteen C of chapter fifty-eight." G. L. c. 10, § 35.

Generally, monies received by a private, public or quasi-public corporation are not monies "received on behalf of the commonwealth" which "shall be paid into the treasury thereof." Massachusetts Constitution: Amendments, Art. 63, § 1. See *Opinion of the Justices*, 261 Mass. 523, 550; *Opinion of the Justices*, 334 Mass. 721, 734; *Horton* v. *Attorney General*, 269 Mass. 503, 511-512; and see generally, *Opinion of the Justices*, 309 Mass. 571, 583-587. However, because the State Lottery Commission is an instrumentality of the Commonwealth, monies placed into the State Lottery Fund are Commonwealth monies in the State treasury within the meaning of Art. 63, § 1.

The manner of drawing money from the State treasury is regulated by Massachusetts Constitution, Pt. 2, c. 2, § 1, Art. 11, which provides as follows:

> "XI. No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

Also, G. L. c. 29, § 18 regulates the payment of monies from the treasury of the Commonwealth:

> "Except as otherwise provided, no money shall be paid by the commonwealth without a warrant from the governor *drawn in accordance with an appropriation then in effect*, and after the demand or account to be paid has been certified by the comptroller . . . (Emphasis supplied.)

The Supreme Judicial Court recently described the purposes and scope of Article 63 as follows:

> "Article 63 of the Amendments to the Constitution was adopted following the Constitutional Convention of

1917-1918. The debates in the Convention (hereinafter referred to as the Debates) and various convention documents confirm what the amendment itself shows, that the underlying purpose of the amendment was to centralize, and improve control of, the Commonwealth's funds and to insure careful consideration of their expenditure. See 3 Debates, 1153-1156, 1170, 1175-1178, 1193, 1203-1204, 1206-1207. See Convention Docs. Nos. 57, 275, 276, 277, 280, 325, 411, 420. The participating members of the Convention directed their remarks to appropriations and expenditures of funds held in the treasury of the Commonwealth for the Commonwealth's account. So far as this court or the Justices in advisory opinions have had occasion to consider art. 63, *that article has been recognized as having application to the Commonwealth's budget and expenditures and to appropriations from the Commonwealth's treasury*. *Opinion of the Justices*, 297 Mass. 577, 580-581. *Opinion of the Justices*, 300 Mass. 630, 635-636. *Baker* v. *Commonwealth*, 312 Mass. 490, 493. *Opinion of the Justices*, 334 Mass. 716, 718-720. See *Opinion of the Justices*, 308 Mass. 601, 608-618. *Funds received, or proposed to be received, in part at least, in behalf of subdivisions, agencies, or other instrumentalities of the Commonwealth have been treated* as on a different basis. See *Dane* v. *Treasurer and Recr. Gen.*, 237 Mass. 50, 52; *Knights* v. *Treasurer & Recr. Gen.*, 237 Mass. 493, 496. See also *Opinion of the Justices*, 261 Mass. 523, 550; *Horton* v. *Attorney Gen.*, 269 Mass. 503, 511-512; *Opinion of the Justices*, 334 Mass. 721, 734-735." *Opinion of the Justices*, 349 Mass. 804, 807, 808. (Emphasis supplied.)

Although the Justices did not mention each of the constitutional and statutory provisions regulating payments from the State treasury, the discussion of Article 63 is pertinent to the various constitutional and statutory provisions cited, *supra*. Like Article 63, these provisions have "application to the *Commonwealth's budget and expenditures* and to *appropriations* from the Commonwealth's treasury." *Id.* at 807. (Emphasis supplied.) See *Singleton* v. *Treasurer and Receiver General*, 340 Mass. 646, 649. In the typical case, where payments from the treasury are made pursuant to statutes appropriating funds, the various statutes and constitutional provisions referred to come into play. *Opinion of the Justices*, 309 Mass. 571, 583 ("Authorization for payments out of the treasury 'must, at least ordinarily, be given by statutes making appropriations therefor,' . . .").

In view of the foregoing, it is significant that payments of $100 prizes to Instant Game winners will not come from State appropriations and will not be related to the expenses of the Commonwealth as set forth in the State budget. Instead, payments to such prize winners would come from the proceeds of the sale of lottery tickets, and not from revenues received, for example, through taxation:

> "The apportionment of the total revenues accruing from the sale of lottery tickets or shares and from all other sources shall be as follows: — (*a*) the payment of prizes to the holders of winning tickets or shares which in any case shall be no less than forty-five per cent of the total revenues *accruing from the sale of lottery tickets*. . . ." (Emphasis supplied.) G. L. c. 10, § 25.[1]

I am of the opinion that the procedures outlined in the constitutional and statutory provisions pertaining to disbursements from the State treasury are not controlling where as here that part of the State Lottery Fund dealing with prize money "has no . . . direct connection with the budget of the Commonwealth or with appropriation and expenditure of State funds or State-collected funds . . ." *Opinion of the Justices*, 349 Mass. 804, 810.

Although the statutes pertinent to the State Lottery Commission make no provision for non-state employees to countersign prize checks, the Commission is given broad authority and discretion with regard to all aspects of the operation and administration of a State lottery, including how payments of prizes are to be made:

> "The commission is hereby authorized to conduct a state lottery and shall determine the type of lottery to be conducted, the price, or prices, of tickets or shares in the lottery, the numbers and sizes of the prizes on the winning tickets or shares, the manner of selecting the winning tickets or shares, *the manner of payment of prizes to the holders of winning tickets or shares*, the frequency of the drawings or selections of winning tickets or shares and the type or types of locations at which tickets or shares may be sold, the method to be used in selling tickets or shares, the licensing of agents to sell tickets or shares, provided that no person under the age of twenty-one shall be licensed as an agent, the manner and amount of compensation, if any, to be paid licensed sales agents, and *such other matters necessary or desirable for the efficient and economical operation and administration of the lottery and for the convenience of the purchasers of tickets or shares and the holders of winning tickets or shares*. Each state lottery ticket or share and each coupon or receipt thereof shall have imprinted thereon the state seal, and a serial number. The commission may establish, and from time to time revise, such rules and regulations as it deems necessary or desirable and shall file the same with the office of the state secretary. The commission shall advise and make recommendations to the director regarding the operation and administration of the lottery. The commission shall report monthly to the governor, the attorney general and the general court, the total lottery revenues, prize disbursements and other ex-

[1] State appropriations are involved in the operation of the lottery only with regard to administrative costs. G. L. c. 10, § 25(b).

penses for the preceding month, and shall make an annual report to the same which shall include a full and complete statement of lottery revenues, prize disbursements and other expenses, including such recommendations as it may deem necessary or advisable. The commission shall report immediately to the governor and the general court any matters which require immediate changes in the laws of the commonwealth in order to prevent abuses and evasions of the lottery law or rules and regulations promulgated thereunder or to rectify undesirable conditions in connection with the administration or operation of the state lottery." (Emphasis supplied.) G. L. c. 10, § 24.

The Supreme Judicial Court has advised the Senate and House of Representatives that "it would not be proper to authorize the selection of persons to expend public funds by organizations or groups not themselves public bodies or made up of public officers." *Opinion of the Justices*, 337 Mass. 777, 784; *Opinion of the Justices*, 347 Mass. 797, 799-800. In both opinions the Court was asked for advice with regard to proposed legislation which would permit entities made up of non-public officers to expend appropriated funds. I am of the opinion that these opinions are not controlling where as here the funds (in the form of $100 checks) at issue would neither be received into the public treasury through taxation nor be expended pursuant to an appropriation. The broad language of G. L. c. 10, § 24, quoted *supra*, provides authority for the Commission to establish a procedure of payment of prizes which utilizes non-state employees to countersign $100 prize checks. I would point out, however, that because Claim Centers are in effect custodians of Commonwealth funds entrusted to the State Treasurer, the bond of the Treasurer, G. L. c. 10, § 2, as well as the bonds of licensed Claims Centers, would be applicable to payments not authorized by G. L. c. 10, § 35.

For the aforesaid reasons, I am of the opinion that the Commission has authority to implement the proposed Instant Game.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 35 May 2, 1973

Mrs. Glendora Putnam, *Chairman*
Massachusetts Commission Against Discrimination
120 Tremont Street
Boston, Massachusetts 02108

Dear Mrs. Putnam:

You have requested my opinion concerning the constitutionality of

Chapter 786 of the Acts of 1972,[1] the so-called "anti-blockbusting" statute. In your request, you raise two specific questions:

> "(1) Whether or not the act referred to above is so vague as to be void and unenforceable, particularly with respect to the [sic] Section 1 which requires promulgation of special regulations applicable to neighborhoods threatened by deterioration.
>
> "(2) Whether or not the above referred to act violates the free speech amendment of the Constitution of the United States."

I will answer your second question first.

No cases have been tried under c. 786 but the free speech question has been raised in the context of the federal anti-block-busting statute.[2]

In *United States of America* v. *Bob Lawrence Realty, Inc., et al.*,[3] the statute was upheld against allegations that it violated the First Amendment of the U. S. Constitution. The Court of Appeals affirmed the views of the trial court, below:[4]

> "It is evident that the statute did not make mere speech unlawful. What it does make unlawful is economic exploitation of racial bias and panic selling."

The Appeals Court went on to indicate that § 3604(e) regulated commerce, not speech, and supported its position by agreeing with the analysis of the court in *U. S.* v. *Mintzes*[5] as correctly interpreting the statute.

> "The words 'for profit,'[6] as used in Section 3604(e) include the purchase of property by prohibited means with the hope of selling it for a larger price, but the words are not limited to such a transaction. They were evidently included in § 3604(e) to distinguish and eliminate from the operation of that subsection statements made in social, political or other contexts, as distinguished from a commercial context, where the person

[1] The text of c. 786 is attached as Appendix "A".

[2] § 804. *Discrimination in the sale or rental of housing.* — As made applicable by Section 803 and except as exempted by section 803(b) and 807, it shall be unlawful —

* * * * *

(e) *for profit* to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin." (Emphasis supplied.) § 804(e) of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(e).

[3] F.2d , P-H Eq. Op. in Hous. 13,584 (5th Cir., Feb. 13, 1973).

[4] 313 F. Supp. 870, 872 (N.D. Ga. 1970).

[5] 304 F. Supp. 870, 872 (N.D. Ga. 1970).

[6] 304 F. Supp. 1305, 1312 (D. Md. 1969).

[7] See n. 2, *supra*.

> making the representation hopes to obtain some financial gain as a result of the representations."

The court thereby restricted the applicability of the statute to those who stood to gain financially from violating the Act:

> "If § 3604(e) were to reach a noncommercial statement, a political statement, or a purely informational statement, it would naturally be subject to First Amendment attack."

The 1972 Massachusetts statute raises the questions which were avoided in *Bob Lawrence*. The statute prevents *any person*, not just those motivated by profit, from making (1) implicit or explicit representation regarding the entry of certain persons into the neighborhood;[7] (2) unrequested contact for the purpose of inducing the sale, purchase, or rental with the knowledge that the contact will be associated with the entry of certain persons;[8] (3) implicit or explicit false representations regarding the availability of suitable housing;[9] or (4) false representations regarding the listings or prospective sale of any dwelling.[10] Section 4.13(a) would, for example, on its face, be applicable to any neighbor or resident and create liability against that person for discussing these fears or predictions of changing neighborhoods with others similarly situated. The fact that this statute was designed to protect this homeowner or resident is particularly ironic when he or she might be held liable for damages under it. In *State of Maryland* v. *Wagner*,[11] a statute quite similar to c. 151B, § 4.13(a) was held not to violate the Free Speech Amendment when applied to one who sought to induce a person to transfer an interest in real property by making representations prescribed by the statute without averring that Mrs. Wagner acted for monetary gain. Under *Bob Lawrence* and *Mintzes*, the logic of *Wagner* must fall.

If "anti-blockbusting" legislation is constitutional, then it must surely be limited to those who seek to exploit others and not the victims of that exploitation who verbalize those fears. As the U. S. Court of Appeals recently wrote:

> "[The] First Amendment doesn't provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion."[12]

[7] c. 151B, § 4.13(a).

[8] c. 151B, § 4.13(b).

[9] c. 151B, § 4.13(c).

[10] c. 151B, § 4.13(d).

[11] 291 A.2d 161, P-H Eq. Op. in Housing ¶15,108 (Ct. of Spec. App. of Md., June 1, 1972).

[12] *Whitten* v. *Paddock Pool Builders*, 424 F.2d 25 (1st Cir. 1970).

The Supreme Judicial Court has noted that in a commercial context, the First Amendment cannot be claimed in all relations, at all times, and in all places in support of absolute freedom from reasonable regulation.[13]

It is my opinion, therefore, that only those who are alleged to have violated the statute for profit can be named as respondents under subsection 13 of § 4 of c. 151B. I reach that conclusion in order to remedy the constitutional infirmity in the statute inherent in a broader interpretation. *Thomes* v. *Commonwealth*, 355 Mass. 203, 207 and cases cited. I now turn to your first question.

It is a general rule of statutory construction that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necesssarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[14] I am also guided by the principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[15] In order to determine whether the statute is vague or overbroad we must look to the context of the actions being proscribed. One trial court has examined the transformation of a residential neighborhood and made the following finding:

> "First, a sense of panic and urgency immediately grips the neighborhood and rumors circulate and recirculate about the extent of the intrusion (real or fancied), the effect on property values and the quality of education. Second, there are sales and rumors of sales, some true, some false. Third, the frenzied listing and sale of houses attracts real estate agents like flies to a leaking jug of honey. Fourth, even those owners who do not sell are sorely tempted as their neighbors move away, and hence those who remain are peculiarly vulnerable. Fifth, the names of successful agents are exchanged and recommended between homeowners and frequently the agents are called by the owners themselves, if not to make a listing then at least to get an up-to-date appraisal. Constant solicitation of listings goes on by all agents either by house-to-house calls and/or by mail and/or by telephone, to the point where owners and residents are driven almost to distraction."[16]

Again, by limiting the potential violators of § 4.13 of c. 151B to those motivated by profit, it is my opinion that c. 786 of the Acts of 1972 is not so "vague as to be void and unenforceable." I am confident that the

[13] *Commonwealth* v. *Pascone*, 308 Mass. 591, 596.

[14] *Connolly* v. *General Construction Co.*, 269 U.S. 385, 391. *Commonwealth* v. *Slome*, 321 Mass. 713, 715. *Commonwealth* v. *Carpenter*, 325 Mass. 519, 521. *Hegata* v. *Commonwealth*, 353 Mass. 287, 293.

[15] *Zwickler* v. *Koota*, 389 U.S. 241, 249-250.

[16] *United States* v. *Mitchell*, 335 F. Supp. 1004, 1005-06 (N.D. Ga. 1971).

Commission Against Discrimination and the Department of the Attorney General can, in compliance with § 1 of the Act, "adopt, promulgate, amend, and rescind rules and regulations . . . for the purpose of carrying out the provisions of subsection 13 of section four."

As to other statutes which might conflict with c. 786, I only note in passing that section three states the intent of the General Court that the Act is not to be construed to limit any other law "designed to protect sellers or buyers of residential property or to prevent conduct inimical to the stability, development, or safety of residential areas."

I trust that this opinion sufficiently resolves your constitutional questions to enable you to discharge the duties required of you by law.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 36 May 2, 1973

Honorable William F. McRell
Acting Director
Division of Civil Service
294 Washington Street
Boston, Massachusetts 02108

Dear Mr. McRell:

Your predecessor requested my opinion on three questions relating to civil service employees working in the Division of Employment Security (DES) in the Department of Labor and Industries. Initially, I am asked whether G. L. c. 31, § 15, par. B(2) requires the DES to fill all vacancies in higher positions as promotions.

General Laws, c. 31, § 15, par. B(2) provides, in part:

> "All promotions in the official service of the division of employment security in the department of labor and industries shall be made in accordance with paragraph A or the provisions of this clause."[1]

The statute limits the manner in which the DES may fill vacancies in higher positions by promotions. When filling such a vacancy by promotion, the DES is restricted to the procedures set forth in G. L. c. 31, § 15, pars. A, B(2). However, the statutory provision does not *require* the DES to fill every vacant position by promotion. The provision of § 15, par. B(2) quoted, *supra*, only applies once the decision is made to fill such a position by promotion.

General Laws, c. 31, § 15, par. B(1) provides in part as follows:

> "Except as otherwise provided in section twenty, all promotions in the official service in a department shall be made (*a*) in accordance with paragraph A, (*b*) after a departmental promotional examination subject to this clause or after

[1] Although "this clause" is a somewhat indefinite term, I consider the reference to be to § 15, par. B(2).

> a departmental promotional examination subject to clause (2) of this paragraph, *(c)* after an executive office promotional examination, *(d)* after a competitive promotional examination, *or (e) the position shall be filled as the result of an open competitive examination*, whichever method shall be selected by the appointing authority, with "the approval of the director . . ." (Emphasis supplied.)

Clause (e) of this provision explicitly gives an appointing authority such as the DES discretion to seek to fill a higher vacancy by holding an open competitive examination. Although not defined in G. L. c. 31, § 1, an "open competitive examination" is a separate and distinct method available to an appointing authority whereby he may fill a vacancy in a higher position. This type of examination is to be distinguished from the various types of "promotional" examinations which an appointing authority may propose to utilize. G. L. c. 31, §§ 1, 15, par. B(1).

For the foregoing reasons I am of the opinion that G. L. c. 31, § 15, par. B(2) does not require the DES to fill vacancies in a higher position as promotions, and in no way precludes the DES from holding an open competitive examination.

In addition to the foregoing, my opinion is sought as to whether "an appointing authority requesting an open competitive examination [is] required, in making his determination that there is no one qualified and willing to accept a promotion, to inform each employee in the next lower grade or grades of the existence of the vacancy and that he is being canvassed for the position, and to justify to the Director of Civil Service his statement upon being requested to do so."

This Department has previously advised the Director, by letter dated November 13, 1972, that you may require an appointing authority who requests an open competitive examination (rather than a departmental promotional examination) in order to fill a position above the entrance level of his department or agency to submit a statement to you that there exist no permanent civil service employees in a lower grade who are qualified and willing to accept promotion to the position. You were advised that such a requirement could be imposed in order to enable you to determine whether to approve the appointing authority's request for an open competitive examination. General Laws, c. 31, § 15, par. B(1) requires such examinations to be held "with the approval of the director." I am of the opinion that you have the authority to impose the requirements noted in the opinion request. Whether to impose such requirements in the first instance, and whether there is compliance with such requirements once they are imposed are questions which you must determine in the exercise of your discretion.

Finally, my opinion is sought whether a change in employment which does not involve a change in title and which is within the same governmental organization is a transfer within the meaning of G. L. c. 31, § 16A. You refer specifically to the geographical transfer of district superintendents within DES. It is my opinion, for the reasons hereinaf-

ter stated, that a change in employment which does not involve a change in title and which is within the same governmental organization is a transfer within the meaning of G. L. c. 31, § 16A and subject to all the provisions of that section.

> "Any person who has been permanently appointed in accordance with the civil service law and rules and who has served a probationary period required by section twenty D may, after application in writing to the director by an appointing authority and with the consent of the director, be transferred to another similar position, provided the appointing authority submits sound and sufficient reasons, in the opinion of the director, to show that the transfer will be for the public good and will not impose unreasonable hardship on the employee to be transferred. No position shall be considered similar which is higher in grade or for which there are substantially dissimilar requirements for appointment."
>
> * * * * *
>
> "Any person aggrieved by any such transfer may appeal to the commission in accordance with the provisions of paragraph *(b)* of section two."

"Transfer" is not defined in G. L. c. 31. When the applicable statute does not define a word in question, the intention of the Legislature is considered to be the natural import of the word according to the ordinary and approved usage of the language when applied to the subject matter of the act. *Franki Foundation Co.* v. *State Tax Commission*, 1972 Mass. Adv. Sh. 785. Common sense dictates that a "change" in employment within the same governmental organization is an ordinary and approved use of the word "transfer."

The context in which "transfer" is used in G. L. c. 31, § 16A supports the position that the transfer of an employee within the same government organization was meant to come within that section. General Laws, c. 31, § 16A requires that the transfer be to a similar position. A similar position cannot be one "which is higher in grade or for which there are substantially dissimilar requirements for appointment." A transfer which does not even involve a change in title in the same government organization certainly meets those requirements.

The fact that G. L. c. 31, § 16A does not specify any other restrictions on the permissible method of transfer is significant. All the language in a statute must be given meaning, *Town Crier, Inc.* v. *Chief of Police of Weston*, 1972 Mass. Adv. Sh. 891, but omissions, intentional or unintentional, cannot be added to a statute, *Boylston Water Dist.* v. *Tahanto Regional School Dist.*, 353 Mass. 81. Although "transfer" is not defined in G. L. c. 31 or the Civil Service Rules, the Legislature did not intend that every conceivable type of transfer would be subject to G. L. c. 31, § 16A. Similar positions in a higher grade or which have substantially dissimilar requirements for appointment are excluded. If the Legislature had intended to exclude transfers within the same govern-

mental organization, language to that effect would have been used in G. L. c. 31, § 16A. This is an example of the statutory rule of construction that *expressio unius est exclusio alterius*, or the express mention of one matter in a statute excludes by implication other similar matters not mentioned. Op. Atty. Gen., April 18, 1961, p. 119.

I have considered the provisions of G. L. c. 31, § 3, which concerns the formulation and subject matter of rules, and have concluded that it does not apply to the issue in question.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 37 May 7, 1973

Honorable Michael J. Lombardi
House of Representatives
State House
Boston, Massachusetts 02133

Dear Representative Lombardi:

As Chairman of the subcommittee determining the disposition and use of the property, buildings and equipment of the Middlesex County Training School, you have requested my opinion "whether legislation will be necessary in order that the Middlesex County Commissioners be authorized to either sell or lease the property, buildings, and the equipment of the Middlesex County Training School . . ."

General Laws, c. 77, § 1 provides, with exceptions not important here, that

> "The county commissioners of each county . . . shall maintain either separately or jointly with the commissioners of other counties as hereinafter provided, in a suitable place, remote from a penal institution, a school for the instruction and training of children committed thereto as habitual truants, absentees or school offenders . . ."

General Laws, c. 34, § 14 provides, in pertinent part, that the County Commissioners

> " . . . shall have authority to represent their county, and to have the care of its property and the management of its business and affairs in cases where not otherwise expressly provided; to sell and convey any real estate of the county by deed, sealed with the county seal, signed and acknowledged by them, or to lease any real estate of the county . . ."

Chapter 35 of the General Laws provides for extensive state supervision of county finances.

Without examining the complete facts of each transaction, I am of course unable to determine whether particular sales or leases of Middlesex Training School property by the Middlesex County Commission-

ers will comply with the above-mentioned statutes. Moreover, the facts of a particular transaction may suggest that additional rules of law are also relevant.

With the above *caveats* in mind, it is my opinion, as a general proposition, that the statute conferring on the county commissioners the prudential management of county property (G. L. c. 34, § 14) confers sufficient authority to sell or lease the property, buildings and equipment of the training school. However, the commissioners still have the statutory responsibility to "maintain either separately or jointly with the commissioners of other counties" a training school.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 38 May 9, 1973

Miss Victoria Douglass
Secretary to the Commission
Division of Civil Service
294 Washington Street
Boston, Massachusetts

Dear Miss Douglass:

Your predecessor requested an opinion on behalf of the Civil Service Commission whether the provisions of G. L. c. 31, § 2(b) authorizes or requires the Civil Service Commission to adjust the grade of all applicants who were improperly graded on the same question by the Director of Civil Service when it adjusts the grade of a specific applicant who has appealed to the Commission. For reasons hereinafter stated, I answer the question in the negative.

General Laws, c. 31, § 12A sets forth the review powers of the Director of Civil Service and provides in pertinent part:

> "If the director finds that an error was made in failing to grant credit for an applicant's answer to any question in the written examination, he shall make an adjustment for such error in the applicant's grade, and shall also adjust the grade of any other applicant who did not receive credit for the same answer because of such error."

General Laws, c. 31, § 2(b), in setting forth certain duties of the Commission, provides in part:

> "An appeal from a decision determining the results of an examination shall be in writing . . . provided, that no decision of the director relating to an examination mark shall be reversed and no such mark changed unless the commission finds that it was through error, fraud, mistake or in bad faith, and in each case of reversal of such decision or change in marking the specific reason therefor shall be stated in the records of the proceedings of the commission."

Noticeably absent in c. 31, § 2(b) is any requirement that the Commission "adjust the grade of any other applicant" when it adjusts the mark of a specific applicant as is required with respect to the director, by section 12A. I am of the view that the General Court would have expressly provided for uniform adjustment in section 2(b), as it did in section 12A, if it desired the Commission to make corrections in erroneous grading for all applicants. In addition, it is my opinion that the Commission has no implied power to make uniform adjustments for all applicants.

As indicated in section 12A, quoted *supra*, if the director detects an error in an applicant's mark, he "*shall* also adjust the grade of any other applicant . . ." "Shall," as generally used in statutes, is construed in an imperative sense rather than a directory one. Thus, if the director discovers an error in grading, he must adjust the grade of all applicants similarly deprived. The absence of any such statutory direction in section 2(b) with respect to appeals to the Commission, would appear to be conclusive on the question.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 39 May 16, 1973

Honorable Gregory R. Anrig
Commissioner of Education
Chairman, Teachers' Retirement Board
182 Tremont Street
Boston, Massachusetts 02111

Dear Dr. Anrig:

On behalf of the Teachers' Retirement Board, you have requested my opinion whether the Board may authorize reimbursement to a city or town for the payment of a pension under St. 1971, c. 944, § 1. Chapter 944 provides for the payment of pensions to teachers who meet certain qualifications and who are not otherwise entitled to receive any pension or annuity. Section 1 provides:

> "A city or town, notwithstanding the provisions of any general or special law, shall pay an annual pension of twelve hundred dollars to any teacher who otherwise is not entitled to receive an annuity, pension or retirement allowance, under any general or special law on account of his own service, and who upon the attainment of age sixty had completed not less than twenty years of service, in the aggregate, as a teacher in the public schools in Massachusetts; provided, that his first employment as a teacher in said public schools began prior to July the first, nineteen hundred and fourteen, and, provided further, that at no time was he a member of the teachers' retirement system."

Section 2 provides for reimbursement by the Commonwealth, upon certification to the Teachers' Retirement Board of the amounts paid pursuant to section 1.

Your opinion request indicates that the teacher involved (1) was born on October 5, 1891; (2) first became employed in the public schools of Massachusetts on September 1, 1913; (3) terminated service as a public school teacher on September 1, 1944; (4) accordingly, had aggregate service of thirty years and eight months; and (5) at the date of termination of service was fifty-two years old. Thus, the question to be resolved, in the light of the statutory provision, is whether the statute requires that the teacher have been in service upon attaining age sixty or whether it only requires that twenty years of service, at a minimum, have been completed prior to attaining age sixty.

The statutory provision is, admittedly, ambiguous. If it stated "and who upon the attainment of age sixty *and while still in service* had completed not less than twenty years of service," it would be clear that a teacher who retired prior to attaining age sixty was not entitled to a pension under its provisions. Resort to the legislative history of the act offers no material assistance in the resolution of the ambiguity. Chapter 944 was enacted exactly as reported out by the House Committee on Public Service, House No. 5620 of 1970. The Committee had considered several bills relating to pensions for retired teachers, and the draft bill which it reported was later refiled as House No. 1042 of 1971 and became law in that year.

At the time of enactment of chapter 944, the class of persons who would benefit thereby was already determined, as teachers receiving pensions under the chapter must have commenced their service prior to July 1, 1914. Even accepting age eighteen as the minimum age at which some teachers might have commenced service (normal school training being an acceptable prerequisite to a teaching career in 1914), all of the teachers eligible for such pensions would have been 75 years of age or older by the year 1971. Thus, they would all have passed the mandatory age for retirement. In enacting chapter 944, the General Court was necessarily determining eligibility for statutory benefits for persons whose identities could be readily ascertained. Those persons either fulfilled the statutory conditions or they did not, and no person could satisfy the conditions by reason of future events.

These considerations lead me to the conclusion that a more liberal interpretation should be accorded the statute than might be the case if the benefits thereby conferred were to be available for unknown persons by reason of the performance of service subsequent to the effective date of the statute. The statute obviously gave recognition to substantial services rendered by public school teachers who did not or could not, because of the time of their service, join the teachers' retirement system. It is my opinion, therefore, that the statute only requires that at least twenty years of service have been rendered prior to a teacher's sixtieth birthday and does not require that the teacher have been in service on that birthday.

Since, in the case you present, the teacher rendered in excess of thirty years' service prior to his or her sixtieth birthday, he or she, as the case may be, is entitled to the pension provided by St. 1971, c. 944.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 40 May 16, 1973

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion whether G. L. c. 146, § 7 exempts steam boilers on motor vehicles from the yearly inspections required by section 6 of the same chapter. For the reasons hereinafter stated, I am of the opinion that boilers on motor vehicles are exempt from the general inspections of steam boilers authorized by G. L. c. 146, § 6.

General Laws, c. 146, § 6 provides as follows:

> "All steam boilers and their appurtenances except those specified in the following section shall be thoroughly inspected externally and internally at least once a year. Upon written application made to it by the owner or user of a pressure vessel or boiler, the board may, when the public interest and convenience require, extend the time for the making of such inspection for a period not to exceed six months as the board may determine."

Section 7 of c. 146 creates certain exemptions from this general inspection requirement:

> "The preceding section shall not apply to boilers of railroad locomotives, *motor vehicles* or steam fire engines brought into the commonwealth for temporary use in times of emergency, nor to boilers used in private residences, nor to those used for heating purposes which carry pressures not exceeding fifteen pounds to the square inch and have less than four square feet of grate surface, nor to boilers of not more than three horse power. The said section shall not apply to boilers under the jurisdiction of the United States nor to those used exclusively for horticultural or agricultural purposes." (Emphasis supplied.)

Section 7 of c. 146 expressly states that "boilers of . . . motor vehicles" are not subject to G. L. c. 146, § 6. This is consistent with provisions in other sections of the chapter which exempt motor vehicles from certain inspection requirements. G. L. c. 146, § 34 (compressed air tanks attached to motor vehicles); G. L. c. 146, § 45A (refrigeration or

air conditioning systems in motor vehicles). Moreover, inspections appear to apply only to those boilers which are required to be operated by licensed persons. In this regard, it is significant that a boiler must be in the charge of a licensed person except *inter alia* "boilers . . . upon . . . motor vehicles . . ." G. L. c. 146, § 46. Finally, the exemption of boilers on motor vehicles from the requirements of G. L. c. 146, § 6 is consistent with a legislative intent that periodic inspections of motor vehicles be governed by G. L. c. 90, § 7A.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 41 May 18, 1973

Honorable Bruce Campbell
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner:

You have requested my opinion regarding the disposal of vehicles which were towed to and stored upon land of the Commonwealth by Central Tow Co., Inc. (Central Tow), the then lessee of the land. Specifically, you ask:

"1. May the Department conduct an auction sale of the vehicles and send the net proceeds to the Central Tow Co., Inc., because the company has a lien?

"2. May the Department attempt to find the owners by advertising in the newspapers and legally return the vehicles to the owners?

"3. If the Department cannot find the owners or may not legally return the vehicles to the owners, may the Department dispose of the vehicles in any other manner?"

You state that Central Tow towed the vehicles in question pursuant to calls from the Boston Police, Metropolitan District Police and the Registry of Motor Vehicles. You further relate that the vehicles were left unattended on the leased premises by Central Tow; that vandals stripped the vehicles; and that there now exists an unsightly condition and possible fire hazard on the leased premises.

The loci in question are beneath the viaduct of the J. F. Fitzgerald Expressway along Albany Street, Boston and were leased by the Commonwealth acting through the Department of Public Works (the Department) to Central Tow. The Department terminated the leases on November 9, 1972.

You state that automobiles "such as illegally parked vehicles, vehicles in accidents, etc." were among the cars towed. Although initially these

vehicles could not be deemed "abandoned," see *e.g.* G. L. c. 40, § 22D; G. L. c. 85, § 2C, it may well be, as discussed, *infra*, that they now fall within that classification. G. L. c. 90, §§ 22B, 22C. The vehicles have remained on the premises in question at least since the termination of the leases with Central Tow, a period of approximately six months. Apparently, no inquiries have been received by the Department or city officials as to their whereabouts.

The owners of the vehicles in question are responsible for their removal and for costs incidental thereto. An owner may be an individual, or an insurance company that has paid a total loss on any automobile involved. If the Department knows the identity of such an owner, the Department should instruct said owner to remove his vehicle forthwith. If an owner fails to cooperate in this regard, the Department should seek a complaint under G. L. c. 90, § 22B. The Department may endeavor to locate the identities of vehicle owners through public newspaper notice, see *e.g.* G. L. c. 92, § 91; however, since you state that the vehicles are in "deplorable" condition, it is unlikely such owners will respond.

I would advise you that prior to or contemporaneously with the giving of public notice as hereinbefore described, the Department should commence following the procedures set forth in G. L. c. 90, § 22C. That statute provides as follows:

> "If the superintendent of streets or other officer having charge of the public ways in a city or town reasonably deems that any motor vehicle apparently abandoned by its owner and standing for more than seventy-two hours upon a public or private way therein or on any property therein without the permission of the owner or lessee of said property, or if a captain or lieutenant of the metropolitan district commission police force or a captain or lieutenant of the state police reasonably deems that any motor vehicle apparently abandoned by its owner and standing for more than seventy-two hours upon any property under their respective jurisdictions, is worth less than the cost of removal and storage and expenses incident to disposition pursuant to sections seven to eleven, inclusive, of chapter one hundred and thirty-five, sections eighty-nine to ninety-four, inclusive, of chapter ninety-two, or sections six A to six D, inclusive, of chapter one hundred and forty-seven, he may, without incurring liability on his part or on the part of the city, town or the commonwealth, take possession of such motor vehicle and dispose thereof as refuse. Any such superintendent or other officer of a city or town may, likewise, without liability, take possession of any such motor vehicle deemed worth more than the cost and expense as aforesaid, and deliver the same to the officer or member of the police department of the city or town, designated by the rules of said department as custodian of lost property, wherein said motor vehicle was found, who may dispose thereof pursuant to said sections seven to ele-

> ven, inclusive. Any such officer of said commission or of said state police may, likewise, without liability, take possession of any such motor vehicle deemed worth more than the cost and expenses as aforesaid, and dispose thereof pursuant to said sections eighty-nine to ninety-four, inclusive or said sections six A to six D, inclusive."

A determination by the responsible city official or law enforcement officer that the vehicles in question are "abandoned," would obviate the need for the public notice discussed, *supra*. If the responsible official or officer determines that the value of any vehicle "is worth less than the cost of removal and storage and expenses incident to disposition," he has authority "to take possession of such motor vehicle and dispose thereof as refuse." There is no reason why the Department cannot cooperate with any such disposal efforts.

You have not provided me with information sufficient to answer your first question, and I respectfully decline to answer same. My answers as to your second and third questions are as set forth in this opinion. I intimate no opinion as to possible action for breach of lease covenants that either party to the leases in question may have against the other.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 42 May 21, 1973

Honorable Bruce Campbell
Commissioner of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Campbell:

You have requested my opinion with respect to several questions arising from the enactment of Chapter 765 of the Acts of 1972, "An Act Relative to the Accelerated Highway Program." The Act directs the Department of Public Works to expend up to "five hundred and nine million, nine hundred and fifty thousand dollars for the laying out, construction, reconstruction, resurfacing, relocation or improvement of highways, parkways, bridges, grade crossing eliminations and alterations of crossings at other than grade, parking facilities, scenic easements, and for construction of needed improvements on other routes not designated as state highways . . ."

You ask four questions concerning section one of the Act, which provides in pertinent part as follows:

> "The state department of public works . . . is hereby authorized and directed . . . notwithstanding any law to the contrary to relocate persons residing in or carrying on business in, or to replace such dwellings or other structures, and to

pay relocation benefits in amounts equal to levels of benefits provided for by the Uniform Relocation Assistance and Real Property Acquisition Policies of 1970, Public Law 91-646, as amended."

Specifically, you ask:

"1. Because of the phrase 'notwithstanding any law to the contrary' does the provision relating to 'relocation benefits' expand the authorization given to the Department under the provisions of Chapter 81, Section 7J of the General Laws so that the expenditure of funds can be applied to all projects including those projects where there are no Federal reimbursements?

"2. Do the words 'or to replace such dwellings or other structures' permit the Department to take other dwellings outside the project area by eminent domain in order to have replacement dwellings or other structures available for those being displaced by the project?

"3. Do the words 'or to replace such dwellings or other structures' permit the Department to take other vacant land outside the project area by eminent domain in order to construct replacement dwellings or other structures for those being displaced by the project?

"4. If the answers to questions 2 or 3 are in the affirmative, do the words 'or to replace such dwelling or other structures' permit the Department to transfer the title or other interest to dwellings or land taken outside the project area to those displaced by the project?"

1. Your first question concerns an interpretation of the words — "and notwithstanding any law to the contrary . . . to pay relocation benefits in amounts equal to levels of benefits provided for by the Uniform Relocation Assistance and Real Property Acquisition Policies of 1970 [hereinafter referred to as the Federal Relocation Assistance Act], Public Law 91-646, as amended." In substance you ask whether this requires your department to pay relocation benefits according to the levels prescribed by the Federal Relocation Assistance Act to persons displaced by projects that do not qualify for federal assistance.

It is a fundamental principle of legislative interpretation that an enactment must be construed according to the common and approved usage of the language. *Board of Assessors of Amherst* v. *State Tax Commission*, 357 Mass. 505, 507. Furthermore, when the words used in a legislative enactment are clear and explicit — where they convey a thought plainly and adequately — they are to be taken as expressing that thought. *Sampson* v. *Treasurer and Receiver General*, 282 Mass. 119, 122. The language used by the Legislature in Section 1 of Chapter 765 clearly manifests an intent to provide the same relocation benefits for all persons displaced by highway projects regardless of whether these projects receive federal assistance. It must be presumed that the Legislature

was aware of the provisions contained in G. L. c. 81, § 7J, when it enacted Chapter 765. *Selectmen of Topsfield* v. *State Racing Commission*, 324 Mass. 309, 313. The words "notwithstanding any law to the contrary," indicate the Legislature intended that the provisions contained in G. L. c. 81, § 7J should not apply to persons or businesses displaced by projects authorized by Chapter 765. Consequently, it is my opinion that all persons displaced by projects authorized by Chapter 765 of the Acts of 1972 are to receive relocation benefits according to levels prescribed by the Federal Relocation Assistance Act.

I note that the Federal Relocation Assistance Act is referred to "as amended." It is not clear whether this includes amendments subsequent to the effective date of Chapter 765. The former interpretation would render this provision unconstitutional because the Legislature would be attempting to make operative as a statute a rule or standard to be adopted by Congress in the future. *Opinion of the Justices*, 239 Mass. 608, 611-12. Such would be an unlawful delegation of the Legislature's function to enact laws. *Ibid.* The latter interpretation is permissible because the Legislature would be adopting a rule or standard already enacted by Congress. *Ibid.* As was stated in *Colella* v. *State Racing Commission*, 1971 Mass. Adv. Sh. 1317, 1322, a law should not be declared unconstitutional "unless it is impossible by any reasonable construction to interpret its provisions in harmony with the Constitution." Since the latter interpretation is reasonable and in harmony with the Constitution, it is my opinion that persons who are displaced by highway projects which do not qualify for federal assistance are to receive relocation benefits according to the levels prescribed by the Federal Relocation Assistance Act as it was amended on the effective date of Chapter 765.

II. Your second and third questions are answered by referring to the second paragraph of Section 1 of Chapter 765. This paragraph incorporates by reference the first paragraph of Section 6 contained in Chapter 718 of the Acts of 1956, which provides in pertinent part as follows:

> "The department and the commission may, on behalf of the commonwealth, take by eminent domain under chapter seventy-nine of the General Laws, or acquire by purchase or otherwise, such public or private lands, including buildings thereon, cemeteries, public parks or reservations, or parts thereof or rights therein, including buildings thereon, and public ways as it may deem necessary for carrying out the provisions of this act, including such land or rights in land as may be necessary for the construction of any necessary drainage outlets . . ."

It is my opinion that the above provision incorporated in Chapter 765 clearly authorizes your department to take by eminent domain buildings and vacant lots outside the project area for the purpose of replacing dwellings or other structures.

III. Your fourth question concerns the scope of your authority to transfer the title of property taken outside the project area. Your department has been granted broad authority to dispose of land no longer necessary for highway purposes. G. L. c. 81, § 7E, as amended by St. 1971, c. 606. However, the land to which you refer is not being taken for highway purposes. It is being taken for the purpose of relocating families and businesses displaced by a highway project.

Notwithstanding the fact that land is to be taken for purposes which may not be strictly construed as "highway purposes," it is my view that section one of chapter 765 confers authority on your Department which is broad enough to encompass the power to transfer to third persons the title of property taken outside the project area. Section One uses the words "or to replace such dwellings or other structures," language which, in my opinion, encompasses all that is reasonably and necessarily incident to the replacement process, e.g., acquisition, holding, disposal, etc. Certainly, a necessary step in the process of providing comparable replacement sale housing is transfer of the fee interest to the relocatee. I also note that there presently exists no statutory authorization for the Department to act as a property manager if it were unable to transfer interests acquired, a fact which lends support to the conclusion which I reach.

Consequently, it is my opinion that you are authorized to transfer the title of land taken outside a project area to persons displaced by a highway project.

In conclusion, it must be emphasized that the power of eminent domain conferred on the department by chapter 765 is an awesome one, and that power is subject to a finding of reasonable necessity and the exercise of prudent judgment and sound discretion. While I do not intend this opinion to cover all possible situations with which your department may be confronted, I note that the department should, wherever and whenever possible, utilize property already publicly owned or exercise the power of eminent domain over dwellings and/or property similar, if possible, to that formerly occupied by the relocatees in question.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 43 May 24, 1973

Honorable Edward S. Zelazo
Chairman, Division of Industrial Accidents
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Zelazo:

You have requested my opinion as to the type of bond which the Massachusetts Bay Transportation Authority is required to file under the provisions of G. L. c. 152, § 25A(2) (b). That section requires that an employer electing to provide workmen's compensation as a self-insurer may do so "[b]y furnishing annually a bond running to the commonwealth, *with some surety company authorized to transact business in the commonwealth as surety*, in such form as may be approved by the [industrial accidents] division and in such amount not less than twenty thousand dollars as may be required by the division . . ." The subject matter of your request has been dealt with in previous correspondence between the Director of Self-Insurance of your Division and the Chief of my Administrative Division, to which I make reference.

It is my opinion that the requirements of G. L. c. 152, § 25A(2) (b) must be read *in pari materia* with G. L. c. 161A, § 13, which guarantees that the financial obligations of the Massachusetts Bay Transportation Authority will be met by the Commonwealth in those instances where the Authority has insufficient funds to meet expenses, and § 18, which exempts the Authority from taxes, excises, license fees and the like. Read together, those statutes evidence a legislative intent to exempt the Authority from the requirement that it obtain a surety on its bond.

Accordingly, it is my opinion that the Authority need only file a bond which makes reference to the Commonwealth's obligations under G. L. c. 161A, § 13, and no surety is required.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 44 May 24, 1973

Mr. Gordon A. McGill, *Secretary*
Emergency Finance Board
State House
Boston, Massachusetts 02133

Dear Mr. McGill:

You have requested my opinion whether the Emergency Finance Board may approve a borrowing by the City of Brockton in the amount of One Million Five Hundred Thousand Dollars, for an approved school

project, where the amount of the borrowing includes One Hundred Thirty Thousand Dollars for new equipment and furnishings. The approval of the Emergency Finance Board is required by St. 1948, c. 645, § 8. The answer to your question depends upon the construction of the definition of "approved school project" as that term is used in the statutes relating to construction of school buildings.

The term "approved school project" was first defined in St. 1948, c. 645, § 5, but no mention was made in the original definition of equipment or furnishings. The definition was amended by St. 1950, c. 490, so that it read as follows:

> " 'Approved school project' shall mean any project for the construction or enlargement of a regional or consolidated school or of any public schoolhouse in any city or town, *and shall include the original equipment and furnishings*, whether movable or built in, to complete said project, the contract or contracts for which shall have been awarded on or after January first, nineteen hundred and forty-six, by any city, town or regional school building committee, which has been approved by the commission for the purposes of sections seven through nine, inclusive." (Emphasis supplied.)

The definition was again amended in 1968 by St. 1968, c. 754, § 1, to add the following sentence:

> "Approved school project shall also mean any project for the reconstruction, remodeling, rehabilitation and modernization of any schoolhouse in lieu of which, proper utilization of the present educational facilities would require complete structure replacement, the contract or contracts for which shall have been awarded on or after January first, nineteen hundred and sixty-eight, by any city, town or regional school building committee, which has been approved by the commission for the purposes of section seven through nine, inclusive, provided that the amount of money provided from the commonwealth for such reconstruction, remodeling, rehabilitation and modernization shall be limited to one third of the expenditure for new construction for the previous year."

In the light of the amended definition of "approved school project" the question for resolution is whether the Board may approve a borrowing which includes an amount for new equipment and furnishings where such equipment and furnishings are not the original equipment and furnishings. I answer the question in the affirmative.

I am of the opinion that the statute should be liberally construed, in view of its purpose which is to facilitate the reconstruction, remodeling, rehabilitation and modernization of presently existing school buildings. Clearly, "rehabilitation" and "modernization" of schools encompasses replacement of equipment and furnishings, as that step can be as effective as changes to the fabric of a building in promoting the statutory objective. Accordingly, I conclude that the Emergency Finance Board

may grant approval for the City of Brockton to borrow an amount of money which includes a sum allocated for replacement of equipment and furnishings.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 45 June 6, 1973

Honorable David M. Bartley
Speaker of the House of Representatives
State House
Boston, Massachusetts

Dear Speaker Bartley:

The House of Representatives, by H. 6085, has addressed to me several questions regarding Article 97 of the Articles of Amendment to the Constitution of Massachusetts. Establishing the right to a clean environment for the citizens of Massachusetts, Article 97 was submitted to the voters on the November 1972 ballot and was approved. The questions of the House go to the provision in the Article requiring that acts concerning the disposition of, or certain changes in, the use of certain public lands be approved by a two-thirds roll-call vote of each branch of the General Court.

Specifically, your questions are as follows:

1. Do the provisions of the last paragraph of Article XCVII of the Articles of the Amendments to the Constitution requiring a two thirds vote by each branch of the general court, before a change can be made in the use or disposition of land and easements acquired for a purpose described in said Article, apply to all land and easements held for such a purpose regardless of the date of acquisition, or in the alternative, do they apply only to land and easements acquired for such purposes after the effective date of said Article of Amendments?

2. Does the disposition or change of use of land held for park purposes require a two thirds vote, to be taken by the yeas and nays of each branch of the general court, as provided in Article XCVII of the Articles of the Amendments to the Constitution, or would a majority vote of each branch be sufficient for approval?

3. Do the words "natural resources" as used in the first paragraph of Article XCVII of the Articles of the Amendments to the Constitution include ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds; wild mammals and game; sea and fresh water fish of every

description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits, as formerly set out in the definition of the words "natural resources" in paragraph two of section one of chapter twenty-one of the General Laws?

4. Do the provisions of the fourth paragraph of Article XCVII of the Articles of the Amendments to the Constitution apply to any or all of the following means of disposition or change in use of land held for a public purpose: conveyance of land; long-term lease for inconsistent use; short-term lease, two years or less, for an inconsistent use; the granting or giving of an easement for an inconsistent use; or any agency action with regard to land under its control if an inconsistent use?

The proposed amendment to the Constitution was agreed to by the majority of the members of the Senate and the House of Representatives, in joint session, on August 5, 1969 and again on May 12, 1971, and became part of the Constitution by approval by the voters at the state election next following, on November 7, 1972. The full text of Article 97 is as follows:

ART. XCVII. Article XLIX of the Amendments to the Constitution is hereby annulled and the following is adopted in place thereof: — The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

The general court shall have the power to enact legislation necessary or expedient to protect such rights.

In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefor, or for the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.

Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two thirds vote, taken by yeas and nays, of each branch of the general court.

1. The first question of the House of Representatives asks, in effect, whether the two-thirds roll-call vote requirement is retroactive, to be applied to lands and easements acquired prior to the effective date of Article 97, November 7, 1972. For the reasons below, I answer in the affirmative.

The General Court did not propose this Amendment nor was it approved by the voting public without a sense of history nor void of a purpose worthy of a constitutional amendment. Examination of our constitutional history firmly establishes that the two-thirds roll-call vote requirement applies to public lands wherever taken or acquired.

Specifically, Article 97 annuls Article 49, in effect since November 5, 1918. Under that Article the General Court was empowered to provide for the taking or acquisition of lands, easements and interests therein "for the purpose of securing and promoting the proper conservation, development, utilization and control" [of] "agricultural, mineral, forest, water and other natural resources of the commonwealth." Although inclusion of the word "air" in this catalogue as it appears in Article 97 may make this new article slightly broader than the supplanted Article 49 as to purposes for which the General Court may provide for the taking or acquisition of land, it is clear that land taken or acquired under the earlier Article over nearly fifty years is now to be subjected to the two-thirds vote requirement for changes in use or other dispositions. Indeed all land whenever taken or acquired is now subject to the new voting requirement. The original draftsmen of our Constitution prudently included in Article 10 of the Declaration of Rights a broad constitutional basis for the taking of private land to be applied to public uses, without limitation on what are "public uses." By way of acts of the Legislature as well as through generous gifts of many of our citizens, the Commonwealth and our cities and towns have acquired parkland and reservations of which we can be justly proud. To claim that new Article 97 does not give the same care and protection for all these existing public lands as for lands acquired by the foresight of future legislators or the generosity of future citizens would ignore public purposes deemed important in our laws since the beginning of our Commonwealth.

Moreover, if this amendment were only prospective in effect, it would be virtually meaningless. In our Commonwealth, with a life commencing in the early 1600s and already cramped for land, it is most unlikely that the General Court and the voters would choose to protect only those acres hereafter added to the many thousands already held for public purposes. The comment of our Supreme Judicial Court concerning the earlier Article 49 is here applicable: "It must be presumed that the convention proposed and the people approved and ratified the Forty-ninth Amendment with reference to the practical affairs of mankind and not as a mere theoretical announcement." *Opinion of the Justices*, 237 Mass. 598, 608.

2. In its second question the House asks, in effect, whether the two-thirds roll-call vote requirement applies to land held for park purposes, as the term "park" is generally understood. My answer is in the affirmative, for the reasons below.

One major purpose of Article 97 is to secure that the people shall have "the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of

their environment." The fulfillment of these rights is uniquely carried out by parkland acquisition. As the Supreme Judicial Court has declared,

> "The healthful and civilizing influence of parks in or near congested areas of population is of more than local interest and becomes a concern of the State under modern conditions. It relates not only to the public health in its narrow sense, but to broader considerations of exercise, refreshment, and enjoyment." *Higginson* v. *Treasurer and School House Commissioners of Boston*, 212 Mass. 583, 590; see also *Higginson* v. *Inhabitants of Nahant*, 11 Allen 530, 536.

A second major purpose of Article 97 is "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources." Parkland protection can afford not only the conservation of forests, water and air but also a means of utilizing these resources in harmony with their conservation. Parkland can undeniably be said to be acquired for the purposes in Article 97 and is thus subject to the two-thirds roll-call requirement.

This question as to parks raises a further practical matter in regard to implementing Article 97 which warrants further discussion. The reasons the Legislature employs to explain its actions can be of countless levels of specificity or generality and land might conceivably be acquired for general recreation purposes or for very explicit uses such as the playing of baseball, the flying of kites, for evening strolls or for Sunday afternoon concerts. Undoubtedly, to the average man, such land would serve as a park but at even a more legalistic level it clearly can also be observed that such land was acquired, in the language of Article 97, because it was a "resource" which could best be "utilized" and "developed" by being "conserved" within a park. But it is not surprising that most land taken or acquired for public use is acquired under the specific terms of statutes which may not match verbatim the more general terms found in Article 10 of the Declaration of Rights of the Constitution or in Articles 39, 43, 49, 51 and 97 of the Amendments. Land originally acquired for limited or specified public purposes is thus not to be excluded from the operation of the two-thirds roll-call vote requirement for lack of express invocation of the more general purposes of Article 97. Rather the scope of the Amendment is to be very broadly construed, not only because of the greater broadness in "public purpose," changed from "public uses" appearing in Article 49, but also because Article 97 establishes that the protection to be afforded by the Amendment is not only of public uses but of certain express rights of the people.

Thus, all land, easements and interests therein are covered by Article 97 if taken or acquired for "the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources" as these terms are

broadly construed. While small greens remaining as the result of constructing public highways may be excluded, it is suggested that parks, monuments, reservations, athletic fields, concert areas and playgrounds clearly qualify. Given the spirit of the Amendment and the duty of the General Court, it would seem prudent to classify lands and easements taken or acquired for specific purposes not found verbatim in Article 97 as nevertheless subject to Article 97 if reasonable doubt exists concerning their actual status.

3. The third question of the House asks, in effect, how the words "natural resources," as appearing in Article 97, are to be defined.

Several statutes offer assistance to the General Court, all without limiting what are "natural resources." General Laws c. 21, § 1 defines "natural resources," for the purposes of Department of Natural Resources jurisdiction, as including

> "ocean, shellfish and inland fisheries; wild birds, including song and insectivorous birds, wild mammals and game; sea and fresh water fish of every description; forests and all uncultivated flora, together with public shade and ornamental trees and shrubs; land, soil and soil resources, lakes, ponds, streams, coastal, underground and surface waters; minerals and natural deposits."

In addition, G. L. c. 12, § 11D, establishing a Division of Environmental Protection in my Department, uses the words "natural resources" in such a way as to include air, water, "rivers, streams, flood plains, lakes, ponds or other surface or subsurface water resources" and "seashores, dunes, marine resources, wetlands, open spaces, natural areas, parks or historic districts or sites." General Laws c. 214, § 10A, the so-called citizen-suit statute, contains a recitation substantially identical. To these lists Article 97 would add only "agricultural" resources.

It is safe to say, as a consequence, that the term "natural resources" should be taken to signify at least these catalogued items, as a minimum. Public lands taken or acquired to conserve, develop or utilize any of these resources are thus subject to Article 97.

It is apparent that the General Court has never sought to apply any limitation to the term "natural resources" but instead has viewed the term as an evolving one which should be expanded according to the needs of the time and the term was originally inserted in our Constitution for just that reason. See *Debate of the Constitutional Convention* – 1917-1918, p. 595. The resources enumerated above should, therefore, be regarded as examples of and not delimiting what are "natural resources."

4. The fourth question of the House requires a determination of the scope of activities which is intended by the words: "shall not be used for other purposes or otherwise disposed of."

The term "disposed" has never developed a precise legal meaning. As the Supreme Court has noted, "The word is *nomen generalissimum*, and standing by itself, without qualification, has no technical significa-

tion." *Phelps* v. *Harris*, 101 U.S. 370, 381 (1880). The Supreme Court has indicated however, that "disposition" may include a lease. *U.S.* v. *Gratiot*, 39 U.S. 526 (1840). Other cases on unrelated subjects suggest that in Massachusetts the word "dispose" can include all forms of transfer no matter how complete or incomplete. *Rogers* v. *Goodwin*, 2 Mass. 475; *Woodbridge* v. *Jones*, 183 Mass. 549; *Lord* v. *Smith*, 293 Mass. 555.

In this absence of precise legal meaning, *Webster's Third New International Dictionary* is helpful. "Dispose of" is defined as "to transfer into new hands or to the control of someone else." A change in physical or legal control would thus prove to be controlling.

I therefore conclude that the "dispositions" for which a two-thirds roll-call vote of each branch of the General Court is required include: transfers of legal or physical control between agencies of government, between political subdivisions, and between levels of government, of lands, easements and interests therein originally taken or acquired for the purposes stated in Article 97, and transfers from public ownership to private. Outright conveyance, takings by eminent domain, long-term and short-term leases of whatever length, the granting or taking of easements and all means of transfer or change of legal or physical control are thereby covered, without limitation and without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes.

This interpretation affords a more objective test, and is more easily applied, than "used for other purposes." Under Article 97 that standard must be applied by the Legislature, however, in circumstances which cannot be characterized as a disposition — that is, when a transfer or change in physical or legal control does not occur. A change of use *within* a governmental agency or within a political subdivision would serve as an apt example. Within any agency or political subdivision any land, easement or interest therein, if originally taken or acquired for the purposes stated in Article 97, may not be "used for other purposes" without the requisite two-thirds roll-call vote of each branch of the General Court.

It may be helpful to note how Article 97 is to be read with the so-called doctrine of "prior public use," application of which also turns on changes in use. That doctrine holds that

> "public lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the diversion." *Robbins* v. *Department of Public Works*, 355 Mass. 328, 330 and cases there cited.

The doctrine of "prior public use" is derived from many early cases which establish its applicability to transfers between corporations granted limited powers of the Commonwealth, such as eminent domain and authority over water and railroad easements. *E.g.*, *Old Colony Railroad Company* v. *Framingham Water Company*, 153 Mass. 561; *Boston Water Power Company* v. *Boston and Worcester Railroad Corporation*,

23 Pick. 360; *Boston and Maine Railroad* v. *Lowell and Lawrence Railroad Company*, 124 Mass. 368; *Eastern Railroad Company* v. *Boston and Maine Railroad*, 111 Mass. 125, and *Housatonic Railroad Company* v. *Lee and Hudson Railroad Company*, 118 Mass. 391. The doctrine was also applied at an early date to transfers between such corporations and municipalities and counties. *E.g.*, *Boston and Albany Railroad Company* v. *City Council of Cambridge*, 166 Mass. 224 (eminent domain taking of railroad land); *Eldredge* v. *County Commissioners of Norfolk*, 185 Mass. 186 (eminent domain taking of railroad easement); *West Boston Bridge* v. *County Commissioners of Middlesex*, 10 Pick. 270 (eminent domain taking of turnpike land), and *Inhabitants of Springfield* v. *Connecticut River Railroad Co.*, 4 Cush. 63 (eminent domain taking of a public way).

The doctrine of "prior public use" has in more modern times been applied to the following transfers between governmental agencies or political subdivisions: a) a transfer between state agencies, *Robbins* v. *Department of Public Works*, 355 Mass. 328 (eminent domain taking of Metropolitan District Commission wetlands), b) transfers between a state agency and a special state authority, *Commonwealth* v. *Massachusetts Turnpike Authority*, 346 Mass. 250 (eminent domain taking of MDC land) and see *Loschi* v. *Massachusetts Port Authority*, 354 Mass. 53 (eminent domain taking of parkland), c) a transfer between a special state commission and special state authority, *Gould* v. *Greylock Reservation Commission*, 350 Mass. 410 (lease of portions of Mount Greylock), d) transfers between municipalities, *City of Boston* v. *Inhabitants of Brookline*, 156 Mass. 172 (eminent domain taking of a water easement) and *Inhabitants of Quincy* v. *City of Boston*, 148 Mass. 389 (eminent domain taking of a public way), e) transfers between state agencies and municipalities, *Town of Brookline* v. *Metropolitan District Commission*, 357 Mass. 435 (eminent domain taking of parkland) and *City of Boston* v. *Massachusetts Port Authority*, 356 Mass. 741 (eminent domain taking of a park), f) a transfer between a special state authority and a municipality, *Appleton* v. *Massachusetts Parking Authority*, 340 Mass. 303 (1960) (eminent domain, Boston Common), g) a transfer between a state agency and a county, *Abbot* v. *Commissioners of the County of Dukes County*, 357 Mass. 784 (Department of Natural Resources grant of avigation easement), and h) transfers between counties and municipalities, *Town of Needham* v. *County Commissioners of Norfolk*, 324 Mass. 293 (eminent domain taking of common and park lands) and *Inhabitants of Easthampton* v. *County Commissioners of Hampshire*, 154 Mass. 424 (eminent domain taking of school lot).

The doctrine has also been applied to the following changes of use of public lands within governmental agencies or within political subdivisions: a) intra-agency uses, *Sacco* v. *Department of Public Works*, 352 Mass. 670 (filling a portion of a Great Pond), b) intramunicipality uses, *Higginson* v. *Treasurer and School House Commissioners of Boston*, 212 Mass. 583 (erecting a building on a public park), and see *Kean* v. *Stetson*, 5 Pick. 492 (road built adjoining a river), and c) intracounty

uses, *Bauer* v. *Mitchell*, 247 Mass. 522 (discharging sewage upon school land). The doctrine may also possibly reach *de facto* changes in use, *e.g.*, *Pilgrim Real Estate Inc.* v. *Superintendent of Police of Boston*, 330 Mass. 250 (parking of cars on park area) and may be available to protect reservation land held by charitable corporations, *e.g.*, *Trustees of Reservations* v. *Town of Stockbridge*, 348 Mass. 511 (eminent domain).

In addition to these extensions of the doctrine, special statutory protections, codifying the doctrine of "prior public use," are afforded local parkland and commons by G. L. c. 45 and public cemeteries by G. L. c. 114, §§ 17, 41. As to changes in use of public lands held by municipalities or counties, generally, see G. L. c. 40, § 15A and G. L. c. 214, § 3(11).

This is the background against which Article 97 was approved. The doctrine of "prior public use" requires legislative action, by majority vote, to divert land from one public use to another inconsistent public use. As the cases discussed above indicate, the doctrine requires an act of the Legislature regardless whether the land in question is held by the Commonwealth, its agencies, special authorities and commissions, political subdivisions or certain corporations granted powers of the sovereign. And the doctrine applies regardless whether the public use for which the land in question is held is a conservation purpose.

As to all such changes in use previously covered by the doctrine of "prior public use" the new Article 97 will only change the requisite vote of the Legislature from majority to two thirds. Article 97 is designed to supplement, not supplant, the doctrine of "prior public use."

Article 97 will be of special significance, though, where the doctrine of "prior public use" has not yet been applied. For instance, legislation and a two-thirds roll-call vote of the Legislature will now for the first time be required even where a transfer of land or easement between governmental agencies, between political subdivisions, or between levels of government is made with no change in the use of the land, and even where a transfer is from public control to private.

Whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, it is recommended that the legislation meet the high standard of specificity set by the Supreme Judicial Court in a case involving the doctrine of "prior public use":

> "We think it is essential to the expression of plain and explicit authority to divert [public lands] to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use." (Footnote omitted.) *Robbins* v. *Department of Public Works*, 355 Mass. 328, 331.

Each piece of legislation which may be subject to Article 97 should, in addition, be drawn so as to identify the parties to any planned disposition of the land.

CONCLUSIONS

Article 97 of the Amendments to the Massachusetts Constitution establishes the right of the people to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and esthetic qualities of their environment. The protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is declared to be a public purpose. Lands, easements and interests therein taken or acquired for such public purposes are not to be disposed of or used for other purposes except by two-thirds roll-call vote of both the Massachusetts Senate and House of Representatives.

Answering the questions of the House of Representatives I advise that the two-thirds roll-call vote requirement of Article 97 applies to all lands, easements and interests therein *whenever* taken or acquired for Article 97 conservation, development or utilization purposes, even prior to the effective date of Article 97, November 7, 1972. The Amendment applies to land, easements and interests therein held by the Commonwealth, or any of its agencies or political subdivisions, such as cities, towns and counties.

I advise that "natural resources" given protection under Article 97 would include at the very least, without limitation: air, water, wetlands, rivers, streams, lakes, ponds, coastal, underground and surface waters, flood plains, seashores, dunes, marine resources, ocean, shellfish and inland fisheries, wild birds including song and insectivorous birds, wild mammals and game, sea and fresh water fish of every description, forests and all uncultivated flora, together with public shade and ornamental trees and shrubs, land, soil and soil resources, minerals and natural deposits, agricultural resources, open spaces, natural areas, and parks and historic districts or sites.

I advise that Article 97 requires a two-thirds roll-call vote of the Massachusetts Senate and House of Representatives for all transfers between agencies of government and between political subdivisions of lands, easements or interests therein originally taken or acquired for Article 97 purposes, and transfers of such land, easements or interests therein from one level of government to another, or from public ownership to private. This is so without regard to whether the transfer be for the same or different uses or consistent or inconsistent purposes. I so advise because such transfers are "dispositions" under the terms of the new Amendment, and because "disposition" includes any change of legal or physical control, including but not limited to outright conveyance, eminent domain takings, long and short-term leases of whatever length and the granting or taking of easements.

I also advise that *intra*-agency changes in uses of land from Article 97 purposes, although they are not "dispositions," are similarly subject to the two-thirds roll-call vote requirement.

Read against the background of the existing doctrine of "prior public use," Article 97 will thus for the first time require legislation and a special vote of the Legislature even where a transfer of land between governmental agencies, between political subdivisions or between levels of government results in no change in the use of land, and even where a transfer is made from public control to private. I suggest that whether legislation pending before the General Court is subject to Article 97, or the doctrine of "prior public use," or both, the very highest standard of specificity should be required of the draftsmen to assure that legislation clearly identifies the locus, the present public uses of the land, the new uses contemplated, if any, and the parties to any contemplated "disposition" of the land.

In short, Article 97 seeks to prevent government from ill-considered misuse or other disposition of public lands and interests held for conservation, development or utilization of natural resources. If land is misused a portion of the public's natural resources may be forever lost, and no less so than by outright transfer. Article 97 thus provides a new range of protection for public lands far beyond existing law and much to the benefit of our natural resources and to the credit of our citizens.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 46 June 20, 1973

Honorable John F. Kehoe, Jr.
Commissioner of Public Safety
1010 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Commissioner Kehoe:

You have requested my opinion on two questions relating to continued approval by you of Sunday licenses for certain games known as Skill Right, Fascination, Skill Light, Bing-O-Reno and Light A Line. You have advised me that the game Skill Right has been licensed by the Department of Public Safety since 1949, and the other games to which you refer were given temporary approval as Sunday games by the then Commissioner of Public Safety in 1962. You question whether you may continue to approve such Sunday licenses in view of the enactment of St. 1971, c. 486, entitled "An Act Authorizing the Licensing of a Game Commonly Called Beano."

I proceed first to a consideration of the pertinent statutory provisions. The power of the Commissioner of Public Safety to approve Sunday licenses is derived from G. L. c. 136, § 4, which provides in pertinent part:

> "(1) The mayor of a city or the selectmen of a town, upon written application describing the proposed dancing or game,

sport, fair, exposition, play, entertainment or public diversion, except as provided in section one hundred and five of chapter one hundred and forty-nine, may grant, upon such reasonable terms and conditions as they may prescribe, a license to hold on Sunday, dancing or any game, sport, fair, exposition, play, entertainment or public diversion for which a charge in the form of payment or collection of money or other valuable consideration is made for the privilege of being present thereat or engaging therein, except horse racing, dog racing, boxing, wrestling and hunting with firearms; provided, however, that no such license shall be issued for dancing for which a charge in the form of the payment or collection of money or other valuable consideration is made for the privilege of engaging therein; and provided further, however, that no license issued under this paragraph shall be granted to permit such activities before one o'clock in the afternoon; and provided further, that such application, except an application to conduct an athletic game or sport, shall be approved by the commissioner of public safety and shall be accompanied by a fee of two dollars, or in the case of an application for the approval of an annual license by a fee of fifty dollars."

St. 1971, c. 486, § 2 inserts a new section 22B in Chapter 271 of the General Laws so as to legalize, under certain express conditions, "the game commonly called beano, or substantially the same game under another name in connection with which prizes are offered to be won by chance . . ." St. 1971, c. 486, § 3 (inserting G. L. c. 271, § 52) provides, in part, that "[n]o such license shall be granted to allow the operation, holding or conduct of [the game referred to in G. L. c. 271, § 22B] on a Sunday."

Thus, the question for resolution is whether the games to which you refer come within the language of G. L. c. 271, § 22B, i.e., "substantially the same game under another name," so as to prevent the licensing of such games on Sundays. For the reasons stated hereinafter, I beg to be excused from answering the question.

It is well settled that the Attorney General does not resolve factual questions. As early as 1897, the then Attorney General ruled that "[h]is [the Attorney General's] business is to deal with questions of law only." 1 Op. Atty. Gen'l 461, 462. The principle has been affirmed by my predecessors on many occasions. Whether the games to which you refer are so similar to beano as to come within the language of the beano statute involves factual determinations which are more appropriately made by you, as Commissioner. A comparison of the games, the way they are played, and the degree of skill involved in playing them are not legal questions within my province.

You should be advised, however, that before passage of St. 1971, c. 486, Beano, or substantially the same game under another name, was

prohibited under all circumstances all days of the week. If licenses have been issued for certain games since 1949, it would appear that the Department has made a judgment that those games were not such as offered prizes to be won by chance but rather involved an element of skill sufficient to satisfy the Department that they came within the purview of G. L. c. 136, § 4. St. 1971, c. 486 has not in any way affected games covered by § 4 of c. 136.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 47 June 21, 1973

Honorable Wallace C. Mills
Clerk of the House of Representatives
State House
Boston, Massachusetts 02133

Dear Sir:

I have the honor to reply as follows to the Order of the House of Representatives, H. 6874, requesting the Attorney General of the Commonwealth to render an opinion on the following question:

> "Whether the Department of Correction, through its Commissioner, John O. Boone, was in violation of Chapter 777 of the Acts of 1972, the Prison Reform Act, on the matter of granting and administering a furlough to inmate Joseph W. Subilosky on March 25, 1973, under the provision of Chapter 777, '(*f*) For any other reason consistent with the reintegration of a committed offender into the community'? Specifically, the furlough papers for Mr. Subilosky stated the reason and purpose of his release was 'to visit with niece and children'."

H. 6874 states:

> "Recently, Commissioner John Boone authorized the release on furlough of one Joseph W. Subilosky — 30785, of M.C.I. Walpole, who later escaped, and was recaptured 40 days after his release.
>
> "Mr. Subilosky was sentenced on April 29, 1966 to life imprisonment for first degree murder and has also been convicted for armed robbery 15-25 years concurrently; and larceny as well as a record of other charges.
>
> "Mr. Subilosky was an offender committed for life with no possibility of parole."

Chapter 777 of the Acts of 1972, entitled "An Act Relative to the Administration and Operation of Correctional Institutions and Facilities

in the Commonwealth," made changes in various chapters of the General Laws. Section 18 of c. 777 amended G. L. c. 127 by striking out § 90A and inserting the following section:

> "The commissioner may extend the limits of the place of confinement of a committed offender at any state correctional facility by authorizing such committed offender under prescribed conditions to be away from such correctional facility but within the commonwealth for a specified period of time, not to exceed fourteen days during any twelve month period nor more than seven days at any one time; provided that no committed offender who is serving a life sentence or a sentence in a state correctional facility for violation of [certain sections of G. L. c. 265 and 272 relating to manslaughter and various serious crimes] or for an attempt to commit any crime referred to in said sections shall be eligible for temporary release under the provisions of this section except on the recommendation of the superintendent on behalf of a particular committed offender and upon the approval of the commissioner . . . Such authorization may be granted for any of the following purposes: *(a)* to attend the funeral of a relative; *(b)* to visit a critically ill relative; *(c)* to obtain medical, psychiatric, psychological or other social services when adequate services are not available at the facility and cannot be obtained by temporary placement in a hospital under sections one hundred and seventeen, one hundred and seventeen A, and one hundred and eighteen; *(d)* to contact prospective employers; *(e)* to secure a suitable residence for use upon release on parole or discharge; *(f)* for any other reason consistent with the reintegration of a committed offender into the community . . ."

Thus the new § 90A authorizes the Commissioner of Correction to "extend the limits of the place of confinement of a committed offender at any state correctional institution by authorizing such committed offender under prescribed conditions to be away from such correctional facility . . ." but only in the enumerated cases, including that specified in clause (*f*), namely, "for any other reason consistent with the reintegration of a committed offender into the community." H. 6874 recites that Joseph W. Subilosky was sentenced to life imprisonment for first degree murder. Under G. L. c. 265, § 2, "[n]o person shall be eligible for parole . . . while he is serving a life sentence for murder in the first degree; but if his sentence is commuted by the governor and council under the provisions of section one hundred and fifty-two of said chapter, he shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offenses."

A committed offender not eligible for parole cannot be reintegrated into the community so long as his ineligibility remains in effect, and therefore, is not entitled to be away from the correctional institution

under clause (*f*). Moreover, the indicated reason for Subilosky's temporary release, namely, "to visit with nieces and children," does not fall within the purview of clauses (*a*)-(*f*), and we cannot read into the statute any other purpose which would sanction a temporary release for that reason because the list of reasons specified in clauses (*a*) through (*f*) is exclusive.

Accordingly, a temporary release of a committed offender serving a life sentence and not eligible for parole "to visit with nieces and children" is not authorized by clause (*f*) of c. 90A, inserted into G. L. c. 127 by St. 1972, c. 777, § 18.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 48 June 22, 1973

Honorable Robert L. Meade
Chairman, Department of Public Utilities
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Meade:

You have requested my opinion relative to the application of Western Massachusetts Electric Company (WMECO), an electric company as defined by c. 164 of the General Laws, for approval in writing by your Department pursuant to § 17A of c. 164 of the General Laws of its guaranty of the payment of principal and interest to the extent of 15% of $15 million principal amount of 30-year notes which its wholly-owned subsidiary, The Rocky River Realty Company, proposes to issue and sell to institutional investors.

Section 17A of c. 164, as most recently amended by c. 340 of the Acts of 1966, reads as follows:

> "No gas or electric company shall, except in accordance with such rules and regulations as the department shall from time to time prescribe, loan its funds to, guarantee or endorse the indebtedness of, or invest its funds in the stock, bonds, certificates of participation or other securities of, any corporation, association or trust unless the said loan, guaranty or endorsement, or investment is approved in writing by the department. A director, treasurer or other officer or agent of a gas or electric company who makes such loan, guaranty or endorsement or purchases such securities or votes to authorize such loan, guaranty or endorsement or such purchase in violation of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not

more than one year, or both. Any company supplying electricity in bulk which is authorized by special act to engage in manufacture or to construct mills or factory buildings, or to otherwise construct or develop real estate for industrial purposes, shall be exempt from the provisions of this section."

You have advised me that your Department has not promulgated any rules or regulations pursuant to the quoted section.

You further advise that the electric company contends that the purpose of rules and regulations under § 17A would be to specify those occurrences or transactions which need not be specifically approved in writing by your Department. In all other instances, it believes written approval would be necessary.

You indicate that another possible interpretation is that your Department's written approval always is needed and that such approval must be in accordance with prescribed rules and regulations, and therefore, you pose the following questions:

"1. Is the adoption of rules and regulations pursuant to Section 17A a prerequisite for Department of Public Utilities approval of a guaranty by an electric company of notes of its subsidiary?

"2. Does the language of Section 17A mean that the rules and regulations mentioned therein merely specify those transactions which need not be approved in writing by the Department of Public Utilities?"

The ambiguity arises by reason of the fact that the prohibition against loans, guaranties, etc. is qualified by the "except" clause and the "unless" clause. In this context the word "unless" would appear to have the same meaning as the word "except." *Sullivan* v. *Ward*, 304 Mass. 614, 615, 616. The question naturally arises whether the prohibition does not apply if the conditions expressed in both exceptions are complied with, or whether the exceptions are alternative conditions, either of which may be complied with.

Section 17A is a penal statute, and as such, exceptions therein should be construed liberally in favor of a person charged with a violation of the statute. It would follow, therefore, that the contention of WMECO is correct, and that in the absence of rules and regulations under § 17A, it need merely obtain your Department's written approval.

Accordingly, I answer your questions as follows:

1. No.

2. In my opinion, the General Court intended that, if your Department saw fit to adopt applicable rules and regulations, they would specify the conditions and requirements which would have to be complied with in order to validate a proposed loan or guaranty without the necessity of Department approval.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 49 June 22, 1973

Honorable Charles C. Cabot, Jr.
Chairman, Outdoor Advertising Board
80 Boylston Street
Boston, Massachusetts 02116

Dear Mr. Cabot:

In your letter dated May 18, 1973 you state:

> "The Board respectfully requests you to answer the following question of law: Is the sign painted on the Penn Central railroad bridge over Parker Street (Route 21) in Springfield subject to the jurisdiction of this Board under Sections 29-31 and Section 33 of Chapter 93 of the General Laws?"
>
> * * * * *
>
> "The sign faces on and is displayed within view of said Parker Street (Route 21), a public way. The sign advertises and is maintained by the Ludlow Savings Bank.
>
> "Ludlow Savings Bank has filed application #47772 for a State permit for this sign. The City of Springfield has objected to approval of this application and has requested a hearing pursuant to Section 29A of Chapter 93 of the General Laws."

General Laws, c. 93, § 29 authorizes the Outdoor Advertising Board to make, amend or repeal rules and regulations for the proper control and restriction of billboards, signs and other advertising devices, except as provided in section thirty-two, on public ways or on private property within public view of any highway, public park or reservation," and § 29A directs the Board to hold a public hearing on applications for a state permit within its jurisdiction where the city or town objects and desires to appear in opposition.

General Laws, c. 93, § 32 provides:

> "Sections twenty-nine to thirty-one, inclusive, and section thirty-three shall not apply to signs or other devices on or in the rolling stock of any common carrier, nor shall said sections apply to signs or other devices on or in stations, subways or structures of or used by any common carrier unless such signs or devices are displayed within view of a public way."

Section 32, prior to its amendment by St. 1964, c. 466, read as follows in the Tercentenary Edition of the General Laws:

> "Sections twenty-nine to thirty-one, inclusive, and thirty-three shall not apply to signs or other devices on or in the rolling stock, stations, subways, or structures of or used by common carriers, except advertising signs or other advertising devices on bridges or viaducts, or abutments thereof."

As used in the Tercentenary Edition, the word "structures" clearly included "bridges or viaducts, or abutments thereof," since these words were carved out as an exception from the word "structures." St. 1964, c. 466, which substituted the present § 32, clearly includes all structures having signs "displayed within a view of a public way," and therefore includes the Penn Central railroad bridge over Parker Street which is a public way.

I conclude that the Ludlow Savings Bank sign painted on the Penn Central railroad bridge over Parker Street is a sign displayed within view of a public way; that §§ 29-31 and 33 of G. L. c. 93, apply to it; and that your Board has jurisdiction over it and may schedule a hearing on the application for a permit.

Very truly yours,
ROBERT H. QUINN
Attorney General

Number 50 June 29, 1973

Honorable Wallace C. Mills
Clerk of the House of Representatives
State House
Boston, Massachusetts 02133

Dear Sir:

I have the honor to reply to the Order of the House (H. 6836) which provides as follows:

> "*Ordered*, That pursuant to Section 9 of Chapter 12 of the General Laws of the Commonwealth of Massachusetts, the House of Representatives hereby respectfully requests the Attorney General of the Commonwealth to render opinions on the following important questions of law, to wit: —
>
> 1. Can a majority of a special commission, duly appointed, organize to do business?
>
> 2. Is it necessary that *all* appointments be made and said appointees duly sworn, before a special commission can organize to do business?
>
> 3. Can the Governor of the Commonwealth, the President of the Massachusetts State Senate, or the Speaker of the Massachusetts House of Representatives by their failure to appoint members to a special commission duly established (i.e. see Chapter 8 of the Resolves of 1973) cause said commission to be unable to function and, in fact, hold individual veto power with relation to such a commission which has been established under due process of law?"

The first sentence of Chapter 8 of the Resolves of 1973 provides:

> "RESOLVED, That a special commission, *to consist of*

three members of the senate, five members of the house of representatives, and three persons to be appointed by the governor, is hereby established for the purpose of making an investigation and study of all matters pertaining to the enforceability of the provisions of law restricting the weights of vehicles upon public ways." (Emphasis supplied.)

The underlined words appearing in the above sentence from Chapter 8 of the Resolves of 1973 is the usual language in Resolves creating Special Commissions for the purpose of making an investigation and study, and the inquiry of the House and my reply will therefore be applicable to Special Commissions created by the same or substantially the same language.

Implicit in the questions posed by the House in H. 6836 is the assumption that appointments must be made by the House and the Senate *and* the Governor as a condition precedent to the organization of the Special Commission established by Chapter 8 of the Resolves of 1973. I do not think that that is a correct interpretation.

General Laws, c. 4, § 2A provides in part as follows:

"In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

* * * * *

"Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

* * * * *

"Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons."

The words "to consist of three members of the senate, five members of the house of representatives, and three persons to be appointed by the governor," as they appear in the Resolve, merely indicate that a commission of eleven members, consisting of members appointed as indicated, is established. The words "to consist of," in short, do not import a mandate that the three appointing authorities must make the appointments. I turn then to the question of whether a lesser number than eleven can organize the Special Commission.

Clause Fifth of G. L. c. 4, § 6, quoted above, makes clear that a majority of the eleven members of the Special Commission can act, for such a construction would not be "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute." I believe that this rule of construction applies to the act of organi-

zation. The Special Commission is an agent of the General Court performing an investigatory function. *Commonwealth* v. *Favulli*, 352 Mass. 95, 100. It would seem that the Legislature, in the absence of any express provision to the contrary, would intend that the rules applicable to its organization apply to Special Commissions. Am. 33 of the Articles of Amendment of the Constitution of the Commonwealth provides in part that "[a] majority of the members of each branch of the general court shall constitute a quorum for the transaction of business." This has been interpreted as requiring a majority of the entire body for permanent organization. 1 Op. Atty. Gen. 1892, p. 36. This is consistent with the usual practice in legislatures in other states. "A majority of the elected members of either legislative body may convene and organize it in the absence of any constitutional restriction." 89 C.J.S. § 30.

Accordingly, if an eleven-man commission is established, as in the case of Chapter 8 of the Resolves of 1973, six members when appointed and qualified could organize the Special Commission, and it would be immaterial whether the unappointed members are those to be designated by a particular appointing authority, namely, the Speaker of the House, the President of the Senate, or the Governor.

Therefore, the answers to the questions put by the House in H. 6836 are as follows:

1. Yes
2. No
3. No

Very truly yours,
ROBERT H. QUINN
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