









The Commonwealth of Massachusetts

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REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1983





COMMONWEALTH OF MASSACHUSETTS

MAY 20 1985

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## **The Commonwealth of Massachusetts**

*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, 1983.

Respectfully submitted,

FRANCIS X. BELLOTTI  
*Attorney General*

## DEPARTMENT OF THE ATTORNEY GENERAL

*Attorney General*  
FRANCIS X. BELLOTTI

*First Assistant Attorney General*  
Thomas R. Kiley

*Assistant Attorneys General*

James Aloisi	Paula Gold <sup>59</sup>
John Amabile <sup>1</sup>	James Gomes <sup>56</sup>
Nicholas Arenella	Paul Good
Donna Arzt	John Graceffa
Thomas Barnico	Alexander Gray
Madeline Becker <sup>5</sup>	Mark Gray <sup>67</sup>
Annette Benedetto	John Grugan
Despena Billings	Catherine Hantzis
Lee Bishop <sup>14</sup>	Michael Hassett
Paul Bishop	F. Timothy Hegarty
Kenneth Bowden	David Hopwood
Stephen Bowen	Marilyn Hotch
Lee Breckenridge <sup>3</sup>	Andra Hotchkiss
Roberta Brown	William Howell
Craig Browne <sup>64</sup>	Edward Hughes
William Carroll	Linda Irvin
Gerald Caruso	Ellen Janos
James Caruso	Michelle Kaczynski <sup>15</sup>
Andrew Cetlin <sup>52</sup>	Richard Kanoff
Francis Chase	Jamie Katz <sup>2</sup>
Paul Cirel	Linda Katz
John Cratsley <sup>6</sup>	Thomas Keaney
Leah Crothers <sup>57</sup>	Sally Kelly
John Curran	Alan Kovaes
Leo Cushing <sup>53</sup>	Steven Kramer
Mary Dacey	Raymond Lamb
Richard Dalton	Paul Lazour
George Dean	Stephen Leonard
Paula DeGiacomo	Martin Levin
Stephen Delinsky <sup>54</sup>	James Lewis
Elaine Denniston	Stephen Limon <sup>55</sup>
Ernest DeSimone	Maxine Lipeles <sup>51</sup>
Vincent DiCianni	Maria Lopez
Carol Dietz	William Luzier
Michael Dingle <sup>4</sup>	Alan Mandl <sup>60</sup>
John Donohue	Bernard Manning <sup>58</sup>
Elizabeth Donovan	Dana Mason
Raymond Dougan	George Matthews
Irene Emerson <sup>50</sup>	Paul Matthews
Joan Entmacher	Edward McLaughlin
Leslie Espinoza	Georgianna McLoughlin
Michael Farrington <sup>7</sup>	William McVey
Peter Flynn	Paul Merry
Harriet Fordham <sup>61</sup>	William Mitchell
John Fox <sup>16</sup>	Paul Muello
Maureen Fox	Mark Muldoon <sup>10</sup>
Susan Frey <sup>68</sup>	Kim Murdock <sup>11</sup>
Robert Gaines	Thomas Norton
Dwight Golann	Henry O'Connell



Carlo Obligato<sup>8</sup>  
 Stephen Ostrach  
 Christopher Palano  
 Howard Palmer  
 William Pardee  
 Charles Peck<sup>15</sup>  
 Richard Rafferty  
 T. David Raftery  
 Frederick Riley  
 John Roddy  
 Ann Rogers  
 James Ross  
 Hilary Rowen  
 Dennis Ryan  
 Bernadette Sabra<sup>63</sup>  
 Anthony Sager  
 JoAnn Shotwell  
 Roger Singer<sup>62</sup>  
 E. Michael Sloman  
 Barbara Smith  
 Carol Sneider<sup>9</sup>  
 Dianne Solomon

Donna Sorgi  
 Joan Stoddard  
 Kevin Suffern  
 Christopher Sullivan<sup>7</sup>  
 Diana Tanaka<sup>12</sup>  
 Terence Troyer<sup>65</sup>  
 Diane Tsoulas<sup>8</sup>  
 Carl Valvo  
 Sarah Wald<sup>66</sup>  
 Charles Walker  
 John Ward  
 John White  
 H. Reed Witherby  
 Carolyn Wood  
 Christopher Worthington  
 Steven Wright  
 Judith Yogman  
 Andrew Zaikis  
 Margaret Zaleski<sup>13</sup>  
 Donald Zerendow  
 Stephen Ziedman

*Assistant Attorneys General Assigned To Division of Employment Security*

Robert Lombard  
 George J. Mahanna

Paul Molloy

*Chief Clerk*  
 Edward J. White

*Assistant Chief Clerk*  
 Marie Grassia

*APPOINTMENT DATE*

1. 7/6/82  
 2. 7/12/82  
 3. 9/27/82  
 4. 1/31/83  
 5. 2/22/83  
 6. 3/8/83  
 7. 4/1/83  
 8. 4/11/83  
 9. 4/18/83  
 10. 5/9/83  
 11. 5/16/83  
 12. 5/20/83  
 13. 5/23/83  
 14. 6/8/83  
 15. 6/20/83  
 16. 6/30/83

*TERMINATION DATE*

50. 8/13/82  
 51. 9/24/82  
 52. 10/22/82  
 53. 12/24/82  
 54. 12/31/82  
 55. 1/7/83  
 56. 1/13/83  
 57. 1/14/83  
 58. 1/18/83  
 59. 1/25/83  
 60. 2/11/83  
 61. 2/18/83  
 62. 2/23/83  
 63. 2/25/83  
 64. 3/4/83  
 65. 3/25/83  
 66. 4/4/83  
 67. 5/20/83  
 68. 6/30/83

DEPARTMENT OF THE ATTORNEY GENERAL  
STATEMENT OF FINANCIAL POSITION  
FOR FISCAL YEAR ENDED  
June 30, 1983

<i>Account Number</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advances</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-0000	Administration	\$ 7,401,955.38	\$6,589,917.00	\$866.38	\$ 80,734.17	\$ 730,437.83
0810-0014	Public Utilities Auth. by Ch. 1224 1973	250,000.00	248,996.14		450.72	553.14
0810-0017	Judicial Proceedings Relevant to Fuel Charge	75,000.00	58,050.00		16,950.00	0.00
0810-0021	Medicaid Fraud Control Unit	1,455,000.00	1,110,640.41		87,258.34	257,101.25
0810-0031	Local Consumer Aid Fund	300,700.00	295,497.71		2,796.44	2,405.85
0810-0032	Local Consumer Aid Fund Deposit	54,917.43	33,052.00		0.00	21,865.43
0810-0035	Antitrust Div. Adm.	362,200.00	296,836.79		23,400.59	41,962.62
0810-0201	Insurance: Auth. by Ch. 266, 1976	200,000.00	183,987.13		15,106.92	905.95
0810-0410	Forfeited Funds	7,583.00	3,000.00		0.00	4,583.00
0810-8771	Capital Outlay Furnishings & Equipment Law Library	2,717.93	2,701.63		16.30	0.00
	TOTALS	<u>\$10,110,073.74</u>	<u>8,822,678.81</u>	<u>866.38</u>	<u>226,713.48</u>	<u>1,059,815.07</u>
Schedule 2	TOTALS	\$ 1,254,845.43	834,668.27	0.00	0.00	420,177.16
	GRAND TOTALS	<u>\$11,364,919.17</u>	<u>\$9,657,347.08</u>	<u>\$866.38</u>	<u>\$226,713.48</u>	<u>\$1,479,992.23</u>

FEDERAL GRANTS  
RECEIPTS AND DISBURSEMENTS  
July 1, 1982 to June 30, 1983

<i>Account Name</i>	<i>Account Number</i>	<i>Balance July 1, 1982</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/83</i>
Attorney General Trust Fund	0810-6610	\$593,774.65	\$189,054.29	\$469,442.16	\$313,406.78
Water Pollution Control Program	0810-6630	84,740.73	120,000.00	156,158.31	48,582.42
Air Pollution Control Program	0810-6631	7,044.77	50,000.00	33,727.70	23,317.07
Department of Justice Anti-Trust Enforcement Unit	0810-6637	26,146.34	0.00	25,678.26	468.08
Anti-trust Enforcement Program	0810-6643	152.17	0.00	0.00	152.17
New England Bid Monitoring Project	0810-6644	25,051.77	83,757.00	108,808.77	0.00
C.A.P.E.S.					
Coastal Zone Management	0810-6661	3,583.62	43,684.09	40,873.07	6,394.64
Program Implementation					
Pesticide Regulation Program					
Enforcement Activities	0810-6662	14,547.00	13,309.00	0.00	27,856.00
TOTALS		<u>\$755,041.05</u>	<u>\$499,804.38</u>	<u>\$834,668.27</u>	<u>\$420,177.16</u>

## SUSPENSE FUNDS

## RECEIPTS AND DISBURSEMENTS

July 1, 1982 to June 30, 1983

<i>Account Name</i>	<i>Account Number</i>	<i>Balance July 1, 1982</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/83</i>
Miami Vacations, Inc. d/b/a Resort Hotel	0810-6703	\$ 869.05	\$ 0.00	\$ 869.05	\$ 0.00
Dante Gregorie d/b/a United Auto Buyers Trust Account	0810-6705	1,100.00	0.00	0.00	1,100.00
Mass. Rentals, Inc. d/b/a City Wide Rentals	0810-6708	380.00	0.00	0.00	380.00
C. Murphy, W. Hartwick, Bird, Inc. Univ.	0810-6712	162.49	0.00	0.00	162.49
Compact Auto, Inc.	0810-6716	1,500.00	0.00	1,500.00	0.00
Thomas C. McMahon v. Nyanza	0810-6732	22,379.98	0.00	18,250.56	4,129.42
G.C. Services	0810-6733	500.00	0.00	500.00	0.00
Brookfield Insurance Agency	0810-6747	290.63	0.00	290.60	.03
Joseph D. Shuman	0810-6751	872.05	0.00	872.05	0.00
*Diamedic Weight Control Ctr., Inc.	0810-6756	5,000.00	0.00	5,000.00	0.00
Frank H. Parks	0810-6760	1,345.00	50.00	0.00	1,395.00
Alfred Zimei d/b/a Dinner Tours Assurance	0810-6762	50.00	0.00	0.00	50.00
Owens Motors	0810-6773	6,750.00	0.00	0.00	6,750.00
King B's Auto Mart	0810-6774	12,000.00	0.00	0.00	12,000.00
John Roche, et al	0810-6775	3,484.84	0.00	0.00	3,484.84
Middlesex Vacuum Cleaners	0810-6777	378.55	0.00	0.00	378.55
General Mass. Markt.	0810-6778	305.00	0.00	305.00	0.00
William Hartwick, et al	0810-6781	2,500.00	8,500.00	8,500.00	2,500.00
Personnel Data Systems	0810-6782	10,000.00	0.00	10,000.00	0.00
Brighton Ins. Agency	0810-6783	255.28	0.00	0.00	255.28
Chrysler Corp.	0810-6784	10,000.00	0.00	0.00	10,000.00
Independence Ins. Agency	0810-6785	3,773.90	0.00	3,773.90	0.00
United Resources, Inc.	0810-6786	1,155.10	0.00	1,155.10	0.00
Belmont Auto Sales	0810-6792	2,075.00	0.00	0.00	2,075.00
Patrick Ciampo & Howard Johnson a/k/a Edward Miller	0810-6793	1,750.00	0.00	0.00	1,750.00
Peterson Ford, Inc.	0810-6795	801.49	0.00	0.00	801.49
Daniel Vassett, et al	0810-6796	3,250.00	3,250.00	3,250.00	0.00
Charles Kasparian AOK Prod.	0810-6798	10,993.37	0.00	0.00	10,993.37
Leander Vlahakis d/b/a Watertown Roofing	0810-6801	2.00	0.00	0.00	2.00
Chet Locke Auto Sales & Serv.	0810-6803	500.00	0.00	0.00	500.00
Frank Lussier d/b/a Wakefield Motors	0810-6804	2,325.00	0.00	0.00	2,325.00

Robert Wilcox d/b/a Robert's Auto Sales	0810-6805	2,000.00	100.00	0.00	2,100.00
Peter F. Scribner d/b/a Peter F. Scribner Agency	0810-6807	2,700.52	0.00	2,698.08	2.44
William H. Johnson III & J&G Auto Salvage	0810-6808	3,541.40	0.00	894.56	2,646.84
Gordon Kalil, Will D. Lagrange, & Will O'Brien	0810-6810	24,500.00	500.00	19,159.00	5,841.00
Steven Sesser Const. Co. Wonder Const. Co.	0810-6811	600.00	1,250.00	0.00	1,250.00
Edward J. Borlem	0810-6812	1,817.71	2,000.00	2,400.00	200.00
Paul Solas, T. William Solas, d/b/a Center Reh.	0810-6813	0.00	0.00	0.00	1,817.71
John Lavalee d/b/a N.E. Auto	0810-6814	25.00	4,200.00	0.00	4,200.00
Peter Skaltsis	0810-6816	5,000.00	125.00	150.00	0.00
Century of Lawrence Inc., John J. Muldoon & Ronald M. Nolan	0810-6818	2,842.63	15,000.00	16,363.62	3,636.38
Allen C. Keene	0810-6819	400.00	0.00	0.00	2,842.63
N.J. McDonald & Son, Inc. & Edward J. McDonald	0810-6820	750.00	1,800.00	1,581.00	619.00
Gould Auto Sales, Inc.	0810-6821	0.00	0.00	750.00	0.00
Lawrence Callahan's Childrens Serv. Inc.	0810-6822	1,500.00	13,340.41	524.60	12,815.81
Abe Kalil & Sons/Auto Sales	0810-6823	0.00	0.00	1,500.00	0.00
Car Corral	0810-6824	0.00	400.00	400.00	0.00
Diamic Weight Control Centers, Inc. John Cipolla & Sandor Feher	0810-6825	0.00	20,610.85	20,090.00	520.85
Regan & Stapler	0810-6826	0.00	1,500.00	0.00	1,500.00
The Word Guild, Inc.	0810-6827	0.00	100.00	100.00	0.00
Las Vegas Exec. Inc. & Richard D. Moultrap a/k/a Richard Madison Ind.	0810-6828	0.00	6,000.00	6,000.00	0.00
Fiorre Depot Motors, Inc.	0810-6829	0.00	24,600.00	0.00	24,600.00
Joseph A. Belluardo d/b/a Bell Motor	0810-6830	0.00	500.00	499.98	.02
Davy Chevrolet, Charles Auto Exch., Inc & Charles R. Russo	0810-6831	0.00	2,250.00	0.00	2,250.00
Ron Coy d/b/a Northern Tree	0810-6832	0.00	1,200.00	0.00	1,200.00
Gerald Greenhalge d/b/a Worcester Roofing Serv.	0810-6833	0.00	1,050.00	1,050.00	0.00
Arlene Homig	0810-6834	0.00	831.00	831.00	0.00
R. B. Freitas Assoc. Inc.	0810-6835	0.00	12,169.04	0.00	12,169.04
Janet Strom Enterprises	0810-6836	0.00	1,000.00	534.00	466.00
Toyota of Boston	0810-6837	0.00	4,000.00	4,000.00	0.00
M. Curtis Dunn d/b/a Turtle Trucking	0810-6838	0.00	125.00	125.00	0.00
Melvin L. Pollock d/b/a Management Assoc.	0810-6839	0.00	338.66	338.66	0.00
Financial Enterprise Corp.	0810-6840	0.00	12,131.56	0.00	12,131.56
Bennett St. Auto Sales, Inc.	0810-6841	0.00	10,000.00	0.00	10,000.00
Dean St. Auto Sales, Inc.	0810-6842	0.00	22,500.00	0.00	22,500.00
TOTALS		\$149,175.99	\$171,421.52	\$134,255.76	\$186,341.75

\*Transferred to #0810-6825

## DEPARTMENT OF THE ATTORNEY GENERAL

## STATEMENT OF INCOME

For Fiscal Year Ended

June 30, 1983

<i>Account Number</i>		\$
0801-40-01-40	Fees, Filing Reports, Charitable Organizations	202,288.00
0801-40-02-40	Fees, Registrations, Charitable Organizations	16,290.00
0801-40-03-40	Fees, Professional Fund Raising Council	790.00
0801-41-02-40	Fines & Penalties, Civil Actions	81,369.58
0801-62-01-40	Reimbursements for Services, Cost of Civil Actions	8,846.50
0801-62-02-40	Reimbursements for Services, Cost of Investigations	24,244.05
0801-62-03-36	Local Consumer Aid Fund-Reimbursement for Service	9,322.05
0801-67-67-40	Reimbursement, Indirect Cost Allowances	180,597.62
0801-67-01-40	Reimbursements, for Service	862,473.38
0801-68-04-36	Forfeitures	1,500.00
0801-69-99-40	Miscellaneous	1,650.14
	TOTAL INCOME	<u>\$1,389,371.32</u>

## Commonwealth of Massachusetts

In accordance with the provisions of section 11 of chapter 12 and of section 32 of chapter 30 of the General Laws, I hereby submit the Annual Report of the Department of the Attorney General for fiscal year 1983. This report is the ninth that I have filed as the Attorney General of the Commonwealth. It chronicles the efforts and accomplishments of a dedicated staff.

When I assumed the office of Attorney General, I made a decision to use the full power and resources of the Department to try to affect and improve the quality of life that we enjoy in this state. I soon learned that as the chief law officer of the Commonwealth, the Attorney General has an extraordinary amount of power. Increasingly citizens are attempting to resolve all their problems with their government through court actions. Cases which were once beyond the imagination of even the most inventive attorney are now brought as a matter of routine. For instance, cases are now brought to challenge welfare benefit rates, to recover damages sustained from patients who were prematurely released from state mental institutions, or even to contest the propriety of gubernatorial appointments. The Attorney General is called upon to represent the state and its officers before the courts in all of these actions. The way in which such litigation is handled has an enormous impact on the course and direction of state government.

But the powers of the Attorney General extend far beyond the walls of the courtroom. Under various statutes the Attorney General has the formal power to issue regulations, and he also informally possesses an influential forum from which he may issue pronouncements, suggestions and directions for government which are generally heeded. Through formal opinions and rulemaking and informal communications, the office possesses all the necessary non-courtroom tools to forge a uniform and consistent legal policy for the numerous and diverse state agencies. These non-litigation tasks are often more effective at improving the quality of life than extended court battles.

During the past fiscal year, for instance, I promulgated regulations governing the phenomenon of charitable gambling. While gambling is basically unlawful in this Commonwealth, charities may utilize Las Vegas nights and other events to raise funds for their activities. In recent years, an industry characterized by sharp practices and large profits has grown up around these events. In fact, prior to the promulgation of our regulations, the states legislative "no gambling" policy was imperilled by a proliferation of charitable gaming events. With the regulations, any real change in that policy will be left to the General Court.

In past years I have utilized this introductory material to highlight the cases we have brought to combat arson for profit. Those cases made the Department's CAPES unit a national model for anti-arson programs. This year we took that effort outside the courtroom with the publication of an Arson Prevention Manual intended to demonstrate to state, county and local officials how they too can fight the costs and devastating effects of arson for profit.

Yet another non-courtroom activity which was spawned by earlier cases involved election practices in the City of Boston. This year I interceded between the Secretary of the Commonwealth and the City to cause them to work cooperatively to improve the conduct of elections in that city. The effort resulted in hiring an elections expert, answerable to me and to the Secretary, and placing her directly in

the Boston Elections Department. Her suggestions and the resulting improvements that were made by the City will have a lasting effect on the conduct of all its future elections.

A final example arises from the many cases we have handled over the years involving consumer protection matters. New England often constitutes a single consumer market, while state consumer protection enforcement efforts historically stopped at state borders. This past fiscal year I was able to bring together the other New England Attorneys General to form a Regional Consumer Protection Committee to collectively work for the protection of consumers so that our efforts need not stop at a state border.

Of all my non-litigation functions, perhaps the most productive is working with the General Court in seeking the enactment of laws advancing goals which emerge from our cases. During the past year we brought the first prosecutions ever under the newly enacted Medicaid False Claim Act. We were also able to press forward with criminal prosecutions under the heightened penalties for illegally dumping hazardous waste and under the recently amended state Civil Rights Act. Similarly, the legislatively initiated computer match system helped produce a series of cases against state employees who were fraudulently collecting welfare benefits while lying about their state employment.

This past year's cases also enable me to suggest the need for new legislation to deal with social problems perhaps manifested to the General Court only through our litigation. The proliferation of child abuse cases, for instance, led me to file bills providing for the flow of information from line agencies such as the Department of Social Services to prosecutors. A rash of newly discovered building construction problems associated with buildings surveyed by the "Ward Commission" caused me to suggest the need for reconsideration of the limitations periods imposed by G.L. c. 260, §2B. Finally the spate of torts actions dealing with negligent treatment of patients and the ever-increasing number of Civil Rights Attorney's Fees Act cases, neither of which has yet resulted in significant adverse judgments against the Commonwealth but which both will undoubtedly have serious future financial consequences for the state, caused me to suggest the need for legislative action of a budgetary nature.

This is obviously not a full accounting of the work of this Department, but rather a brief overview of the many non-litigating ways in which the power of the Department of the Attorney General can be used to better the life we all enjoy. A fuller exposition of the work of this Department, with the more traditional focus on significant cases brought during the reporting period, is set forth in the following pages.



**MONEY RECOVERED AND SAVED  
FOR THE COMMONWEALTH AND ITS CITIZENS**

*I. MONEY RECOVERED FOR THE COMMONWEALTH TREASURY*

A.	Charitable Registrations and Certificate Fees	\$	219,380.00
B.	Escheats		293,243.00
C.	Collections, Rent		97,731.67
D.	Collections, General		150,460.96
E.	Delinquent Unemployment Compensation Claims		2,280,727.70
F.	Fraudulent Unemployment Compensation		226,155.97
G.	Civil Penalties and Costs in Environmental		850,000.00
H.	Criminal Delinquent Tax Recovery		1,150,000.00
	TOTAL	\$	5,267,699.30

*II. MONEY RECOVERED AND SAVED FOR COMMONWEALTH CITIZENS*

A.	Hill-Burton FY 1983	\$1,311,068.00
B.	Antitrust Recoveries	232,843.45
C.	Deposits to Antitrust Enforcement Fund	224,969.02
D.	Judgments, Settlements and Restitution In Consumer Protection Division Court Cases	12,911,756.00
E.	Consumer Recoveries, Non-court Cases	127,000.00
F.	Insurance Rate Savings	190,000,000.00
G.	Utility Rate Savings	135,000,000.00
H.	Medicaid Fraud Restitution	313,000.00
	TOTAL	\$340,120,636.47

TOTAL TABLE I and II..... \$345,388,335.77

**I. CIVIL BUREAU**

**CONTRACTS DIVISION**

The responsibility of the Contracts Division generally involves three areas: (1) litigation involving matters in a contractual setting; (2) advice and counsel to state agencies concerning contractual matters; and (3) contract review.

*A. Litigation*

The Contracts Division represents the Commonwealth, its officers, and agencies, as both party plaintiff and defendant in all civil actions involving contract and contract related disputes.

A majority of the cases handled by the Division concern public building, state highway, and public works construction disputes. Other typical cases in the Division involve claims arising from the interpretation of leases, employment contracts, statutes, rules, regulations, and surety bonds.

In contract actions against the Commonwealth, G.L. c. 258, §12 is, for the most part, the controlling statute.

At the commencement of actions, litigants routinely seek temporary restraining orders and preliminary injunctions against the Commonwealth, its agencies and officers. The granting of such relief would delay the execution of contracts, increase contract costs, and result in additional claims for damages. During the fiscal year, Division attorneys successfully resisted all such attempts for injunctive relief.

Government contract disputes have become more complicated since there has been a tendency for consultant engineers, architects, and subcontractors to be joined as parties. Discovery in contract cases is prolonged, partly due to the volume of documentation and the complexity of the issues, especially in the building construction area.

The impact of new legislation, Omnibus Bill "To Improve the System of Public Construction in the Commonwealth," C. 579, Acts of 1980, sponsored by the Special Commission Concerning State and County Buildings has become increasingly evident during the fiscal year. A number of actions, principally relating to the validity of the "set aside" provisions for minority and women-owned business enterprises, have been initiated.

Contract disputes arising out of the regulations of various state agencies, such as the Department of Mental Health, have also been brought with increasing frequency.

Trials of contract cases are often complex and involve long hearings before court-appointed masters. During the fiscal year, attorneys have successfully resisted references to masters, resulting in an increased frequency of trials before the court.

Three significant appellate decisions relative to contract disputes were also rendered during the fiscal year: (1) *James Welch & Co., Inc. v. Deputy Commissioner of Capital Planning and Operations*, 387 Mass. 662 (1982) (disallowance of expenses and profits arising out of substitution of filed sub-bid); (2) *Manuel F. Spencer & Son, Inc. v. Commonwealth*, 16 Mass. App. Ct. 290 (1983) (direct payment claim, funds dispute between general and subcontractor); (3) *Pelrine's Tree and Landscaping Service v. Commissioner of the Metropolitan District Commission, et al*, 15 Mass. App. Ct. 1101 (1983) (tolling of contract Statute of Limitations).

Sixty-four (64) new actions were commenced during the fiscal year. Forty-four (44) cases were closed. As of June 30, 1983, there were three hundred fifty-two (352) pending cases in the Division.

## B. *Advice and Counsel to State Agencies*

On a daily basis, the Division receives requests for legal assistance from state agencies and officials. Problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and numerous other miscellaneous matters. The most frequent requests received during the fiscal year were related to the interpretation of the language of the new Public Construction Legislation, c. 579.

On a weekly basis, the Contracts Division also receives requests for assistance in purchasing matters. Economic conditions have heightened competition, and bid awards are often bitterly contested. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

The Division also has an equivalent relationship with the Department of Public Works, the Metropolitan District Commission, the Secretary of Transportation, the Board of Regents of Higher Education, the Data Processing Bureau, the Department of Mental Health, the Department of Youth Services, the Department of Environmental Management, the State Lottery Commission, the Department of Public Welfare, and Division of Capital Planning and Operations.

### C. Contract Review

The Division reviews all state contracts, leases, and bonds submitted by state agencies. All contracts are logged in and out, and a detailed status record is maintained. Contracts are assigned to the attorneys on a rotating basis; and the average contract is approved within forty-eight hours of its submission to the Division.

During the fiscal year, the Division received for approval as to form a total of 1,750 contracts. Two hundred and fourteen (214) contracts were rejected and later approved after the deficiencies were corrected.

## EMINENT DOMAIN DIVISION

The major function of the Eminent Domain Division is the representation of the Commonwealth in the defense of petitions for the assessment of damages resulting from land acquisition by eminent domain. The Commonwealth acquires land for a variety of purposes, including rights of way for roads, land for state colleges, land for recreation and park purposes, land for flood control and land for easements. The Division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, various state colleges, the University of Massachusetts, the Armory Commission and the Department of Food and Agriculture.

The Division also provides legal advice to the Real Estate Review Board to assist in settling damage claims on takings of government-owned land for highway purposes. In some instances, the Division is called upon to testify before the Board will approve land damage payments.

Informal advisory services, both written and oral, are rendered to practically every state agency, whether executive or legislative in nature. Every agency with an eminent domain or real estate question or problem either writes or calls the Division for consultation and advice. The Division also appears before legislative committees to give advice on legislation of importance to this office as well as other state agencies.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a *pro tanto*, which makes available to the owners an amount the taking agency feels is fair and reasonable, but reserves to the prior owners the right to proceed, through the courts, to recover more money. In the

event of a finding by the court or jury, the *pro tanto* payment is subtracted from the verdict and the taking agency pays the balance, with interest from the date of the taking to the date of the judgment. In years past, during the road building boom of the sixties and seventies, land damage matters caused congestion in the civil sessions of the Superior Court. Special land damage sessions, including summer sessions, were set up to accommodate the trial of these cases and it was the practice to refer cases to auditors for their findings. The auditor system was not satisfactory because too many cases previously tried to auditors were retried to juries. In 1973, the Legislature passed Section 22 of Chapter 79 which provided for the trial of land damage matters to a judge in the Superior Court, jury-waived in the first instance, and a trial by jury could be had first only if both parties filed waivers, in writing, waiving their right to a jury-waived trial. The statute also required the court to make subsidiary findings of fact when the case was heard. If either party was aggrieved by the finding, he would reserve his right to a jury by so filing, within ten days of the finding.

It had been the practice of the Division to try the great majority of our cases in accord with Section 22 before a justice in a jury-waived session. In many instances, it was not necessary to retry the case because the findings usually contained a clear statement of the subsidiary facts to support the decision. Still the backlog continued as did efforts to make Chapter 79 more expeditious.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants remaining become tenants of the Commonwealth and are obligated to pay rent under a lease agreement or for use and occupancy. The problem of rent collection is handled by a Special Assistant Attorney General who is assigned to the Department of Public Works on a full-time basis. He is under the direct supervision of the Right of Way Division with review supervision from the Eminent Domain Division. His primary function is to represent the Department of Public Works in all matters related to state owned property being leased or rented to the general public. This includes negotiating settlements, closing out uncollectables, suits to enforce the payment of rent, as well as eviction matters. In those cases where rent is owed to the Commonwealth and there is a land damage case pending, the Eminent Domain Division trial attorney assigned handles both matters at the time of trial. During the past fiscal year 1,983 rent cases were closed out and approximately \$100,000.00 was collected and turned over to the State Treasurer.

The Eminent Domain Division also has the responsibility of protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court. In each case, a determination must be made as to whether or not the Commonwealth, or any of its agencies or departments, has an interest which may be affected by the petition. If such a determination is made, no decree issues without the Division being given a full and complete opportunity to be heard. Some of these issues are tried out to a judicial conclusion while others are amicably agreed upon and the rights of the Commonwealth are protected by stipulation.

Land Court matters require the full-time attention of an Assistant Attorney General. Its jurisdiction covers every type of land transaction from foreclosure, tax takings to determination of title absolute and all the equity rights arising therefrom.

More and more, the equity power of the Court is being used along with the temporary restraining order and injunction process. Zoning cases are now being sent to the Land Court from the Superior Court and are also commenced in the Land Court. The Attorney General is involved in all these cases due to the declaratory nature and the constitutional issues involved therein. During fiscal year 1983, there were 302 new Land Court cases opened in the Division.

This Department is involved in almost every petition to confirm or register title. The involvement requires the determination of all interests in state highways, the preservation of the taking lines, the determination of drainage and other easements and the assurance that the decree is entered subject to all of the above.

Further, the Land Court determines so-called "water rights". As indicated in the reports of past years, this is becoming a new problem area as many rivers and streams have been cleaned and improved as a result of federally funded projects, bringing into question the Commonwealth's rights and responsibilities. Also, the tidal areas of the Commonwealth are creating continual litigation, particularly where the Colonial Ordinances are concerned. Litigation is developing whereby the public is asserting adverse possession and prescriptive rights in the flats of the tidelands and access to beaches.

In addition, more claims are being made against the Insurance Fund and local probate courts are having an effect upon the land registration system as their decisions are causing an effect upon the land registration cases.

Also new areas and dimensions are being added to the Land Registration Process. For instance, railroad rights of way are beginning to appear in registration cases. Serious questions are beginning to arise as to whether they have been abandoned and the effect upon the total railroad right of way. The Commonwealth, by way of the Secretary of Transportation, is acquiring railroad rights to be used not only for railroad passenger service but for recreational purposes as well. The reversionary rights and the effects upon Commonwealth title are important issues.

The Commonwealth is becoming more and more involved with problems due to filling and dredging that have taken place along the shores and areas developed by beach associations, especially on the Cape and Islands. Dredging has been done, with the material dredged being put upon the shores, changing private access rights to and from the beaches.

Considering current trends and statistics fiscal year 1984 portends to be even busier in discharging our Land Court responsibilities while protecting the rights of the citizens of the Commonwealth.

All rental agreements, *pro tanto* releases, general releases, deeds of grants and conveyance, and documents relating to land under the control of any of the State's departments or agencies find their way to the Eminent Domain Division to be reviewed and approved as to form.

As reported in past years, this Division is actively assisting the Department of Food and Agriculture to expedite and carry out the mandates of Chapter 780 of the Acts of 1977, known as the Agricultural Preservation Restriction Act.

Fiscal 1984 promises another busy year for the Eminent Domain Division. The Massachusetts Department of Public Works, as well as the Metropolitan District Commission predict a heavy workload for Fiscal Year 1984. The Department of Environmental Management is still deeply committed and involved in the Heritage State Park Projects in Lowell, Lynn, Holyoke, North Andover and Lawrence.

These ambitious undertakings are expected to cost in the vicinity of 100 million dollars and can be expected to result in extensive litigation for this Division.

### INDUSTRIAL ACCIDENT DIVISION

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

There were 13,191 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents, a decrease of 778 from the previous fiscal year. Of the lost time disability cases, the Division reviewed and approved 2,202 new claims for compensation and 168 claims for resumption of compensation. In addition, the Division worked on and disposed of 157 claims by lump sum agreements.

The Division appeared for the Commonwealth on 1,397 formal assignments before the Industrial Accident Board and before the courts on appellate matters. In addition to evaluating new cases, the Division continually reviews the accepted cases, that is, those which require weekly payments of compensation, to bring them up to date medically and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1982, to June 30, 1983, were as follows:

#### *General Appropriation*

*(Appropriated to the Division of Industrial Accidents)*

Incapacity Compensation	\$ 8,281,588.04
Medical Payments	<u>2,457,640.00</u>
<b>TOTAL DISBURSEMENTS</b>	<b>\$10,739,228.04</b>

#### *Metropolitan District Commission*

*(Appropriated to M.D.C.)*

Incapacity Compensation	\$696,921.40
Medical Payments	<u>244,267.79</u>
<b>TOTAL DISBURSEMENTS</b>	<b>\$941,189.19</b>

The Industrial Accident Division also has the responsibility of defending the "Second Injury Fund" set up by G.L. c. 152, §65, against claims for reimbursement made under G.L. c. 152 §§37 and 37A. During the past fiscal year the Division appeared on 184 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1983, the financial status of this fund was:

Unencumbered Balance	\$ 13,183.95
Invested in Securities	247,000.00
TOTAL	<u>\$250,183.95</u>
Payments Made to Fund	\$956,644.21
Payments Made Out of Fund	\$943,460.26

Pursuant to G.L. c.33, App. §§13-11A, the Chief of this Division represents the Attorney General as a sitting member of the Civil Defense Claims Board. This involves reviewing and acting upon claims for compensation to unpaid civil volunteers who were injured while in the course of their volunteer duties.

The Division also represents the Industrial Accident Rehabilitation Board. When an insurer refuses to pay for rehabilitative training for an injured employee, the Division presents the case to the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board.

During the past fiscal year, the attorneys of this Division were called upon numerous times to assist workers in private industry who contacted this Division regarding problems they were having with their compensation claims against private industry and their insurers. Every effort was made to assist these employees in resolving their difficulties or in referring them to appropriate persons or agencies.

## TORTS DIVISION

The main activities of the Torts Division continued unchanged in fiscal year 1983 from the previous year: the bulk of attorneys' time was focused on the defense of tort and civil rights suits brought against the Commonwealth and its employees, though the investigation and preparation of reports from the district court on Petitions for Compensation to Victims of Violent Crime also absorbed significant staff resources. Some general trends noticeable in the Division's work during this year were an increase in the number of cases being tried (35) and a growth in the number of complex cases involving very time-consuming discovery and entailing large expenditures for expert and investigative support. These factors were reflected in a significantly greater burden on attorneys.

The overall caseload of the Division increased steadily over the year, continuing the growth spiral manifested the previous year. New cases totalled 278, while only 66 cases were terminated. Combined with the Fiscal 1982 increase, this meant the accrual of over 420 additional pending cases in two years, many of them involving potentially large damage awards against the Commonwealth. Efforts to cope with the increase included greater use of the investigative staff of the Civil Bureau and the spreading of the load to attorneys from the other divisions in the Bureau. Emphasis was also placed on finding a solution to the problem of the unavailability of funds for settlement of cases.

A statistical breakdown of the new tort cases brought against the Commonwealth or its employees opened in the Torts Division during the year indicates that there were 76 new cases involving civil rights or intentional torts. There were 29 new wrongful death actions, 31 torts involving serious injuries and 54 involving damage to property.

Some of the more significant new cases included several suits involving employment discrimination or wrongful discharge, a suit against members of the insurance commission for actions taken in connection with the prohibition of sale of certain insurance policies, several suits against district attorneys challenging actions taken during investigations, a number of suits claiming injuries or death as a result of negligent placement of clients by the Department of Youth Services and Social Services, more new cases involving a failure to supervise and treat psychiatric patients in state hospitals, several suits challenging the release of dangerous patients from Commonwealth facilities, and an increased number of cases involving alleged defects in highway planning and design.

The Division attorneys obtained mixed results, as is to be expected, from cases tried to conclusion during fiscal year 1983. Two serious cases alleging negligent supervision of patients at state hospitals were tried, one resulting in a verdict in favor of the defendants, the other resulting in a judgment of \$50,000 against the Commonwealth. Verdicts for the state were obtained in several serious injury and wrongful death cases; the judgments awarded against the state totalled approximately \$112,000 at the end of the year. Nine cases were settled without trial, while dismissals or summary judgments were obtained against plaintiffs in 50 cases.

There were 506 new Petitions for Compensation to Victims of Violent Crime forwarded to the Torts Division for investigation, and, if necessary, litigation, a number which constituted a slight increase over the previous year's filings. Roughly \$1,008,000 was paid out by the district court during this period, for an average of \$3,985 per claim. Court hearings were required in 75 of the petitions processed by Civil Bureau attorneys. There were 252 violent crime cases closed out by the Division in the course of the year.

The total amount of money collected on debts due to state agencies throughout the Torts Division in Fiscal 1983 was \$150,460.96; 137 claims were processed. Twenty-five new cases seeking damages for tortious injury to Commonwealth property were brought during the year.

## II. CRIMINAL BUREAU

The Criminal Bureau of the Department of the Attorney General is composed of four Divisions: (1) the Trial Division; (2) the Appellate Division; (3) the Criminal Investigations Division; and (4) the Division of Employment Security. Several special task forces also operate within the Bureau: the Tax and Insurance Prosecution Task Force; the Government Integrity Unit; and the Organized Crime Information Section.

During fiscal year 1983, the Bureau continued to prosecute a variety of cases developed by its own Investigations Division, as well as those referred by other government agencies or the offices of the district attorneys. The Bureau also actively carried out the mandate of the Department of the Attorney General to concentrate resources on certain classes of crime, not the least of which are white collar crime, arson-for-profit and the disposal of hazardous waste.



## TRIAL DIVISION

The following cases are a sampling of the criminal litigation in which the Bureau has been involved in pursuit of the goal of keeping the Commonwealth safe for all of its citizens.

Three men were arrested and indicted after a search warrant was executed revealing over one hundred drums of various volatile and dangerous chemicals which had been secreted in a remote area in Worcester County.

The owner of a discotheque was convicted of lighting candles and turning on the gas jets in the cellar of his establishment in an attempt to burn the building and collect the insurance proceeds after the fire. Although the defendant was not successful, he was convicted of attempted arson and sentenced to a substantial jail term.

A landlord and a property manager were indicted for conspiracy to commit arson after an Allston apartment burned, leaving several tenants homeless.

A former insurance agent was convicted of larceny and making false statements on insurance applications resulting in tangible personal gain. As part of the sentence, the Court ordered restitution of the fraudulently obtained funds.

A woman was indicted in two counties on allegations of implication in a complicated insurance fraud scheme involving payment of per diem hospitalization benefits. Ten insurance companies claimed a loss of over \$200,000 as a result of this scheme.

In a continuing effort to protect consumers from unscrupulous business practices, the Bureau obtained convictions of two men for bilking fuel oil consumers by means of an illegal device installed on an oil delivery truck which diverted the oil back into the truck, thus charging the customers for oil they never received.

In a joint effort with the Springfield Bureau, a Chicopee used car dealer was convicted of larceny after allegations were presented showing that the defendant had bought late model, high-mileage automobiles, turned back the odometers, and sold the same autos as low-mileage cars to other dealers. The defendant was given a suspended sentence to Walpole State Prison.

Nine persons were arrested for conspiring to misuse credit cards in a scam in which credit card receipt carbon paper was retrieved from retail outlets and the information on the carbons was used to manufacture counterfeit cards. Those cards were then used to purchase expensive goods and services across the country.

After an investigation of the Chelsea Housing Authority, two landlords were convicted of receiving rent subsidies and simultaneously charging the tenants for the rent being subsidized.

A supervisory accountant for G.T.E. Sylvania was indicted and convicted for embezzlement of \$30,000 from his employer.

Two truck drivers employed by the Cardox corporation were indicted for stealing carbon dioxide, selling it at a discount rate, and keeping the proceeds.

After intensive investigation, a counselor for the Department of Youth Services was arrested for statutory rape, and accused of illicit sexual conduct with a girl who was committed to a detention facility in his charge.

A bookkeeper at the state bookstore was convicted of embezzling \$16,000 from the bookstore receipts, and a data entry clerk working at Boston State College was indicted for stealing \$10,000 from her employer.

In a continuing investigation, at least seven persons, including 3 employees of the Department of Public Welfare, were charged with stealing welfare checks and food stamp vouchers from the Welfare Department.

Mentally ill women living in a halfway house in Franklin County were the victims in a larcenous scheme evolved by a provider to the Department of Mental Health who was convicted of the larceny.

In an ongoing effort to detect instances of government employees illegally collecting welfare payments while remaining on the public payroll, employees of the Department of Public Welfare, the M.B.T.A., Boston City Hospital, Middlesex County Hospital, the Department of Youth Services, the Criminal History Systems Board, the Boston Housing Court and the Department of Environmental Management were indicted for larceny and making false statements to obtain welfare benefits. Additionally, highly paid employees of Gillette and Mary Kay Cosmetics were similarly charged.

Three persons were convicted of attempting to bribe a corporate analyst of the Department of Revenue. The \$3,000 bribe was promptly reported to authorities.

An attorney in the compliance section of the Department of Revenue was indicated on conflict of interest charges after receiving favors from, and acting as an agent for, a tax delinquent whose taxes he was charged with collecting.

The Tax Prosecution Task Force, in cooperation with the Department of Revenue, indicted forty individuals and corporations during the fiscal year and was successful in recovering \$1,150,000 in delinquent taxes from intransigent taxpayers, a substantial increase in convictions over previous years.

## **CRIMINAL INVESTIGATIONS DIVISION**

The Criminal Investigation Division is the investigative arm of the Criminal Bureau. As such, it serves in various capacities. It is a centralized state-wide authority within the Department of the Attorney General that maintains an ongoing coordinated effort with the individual district attorneys' offices and state and local police in the investigation and prosecution of criminal matters. In such capacity, during fiscal year 1983, the Division gathered and disseminated criminal intelligence information to other law enforcement agencies on a carefully screened need-to-know basis, and provided other support services to these agencies in the investigation of criminal activities. The Division supplied photographic and technical expertise to other prosecutorial units and maintained systems for the collection and distribution of computerized information designed to enhance the ability of the police to understand and to protect against the sophistication of criminal schemes and complex unlawful commercial enterprises.

In addition to serving in a coordinating capacity with other law enforcement agencies, the Criminal Investigations Division continues to be fully involved in an investigative capacity in a number of diverse areas of concentration, the most prevalent being: hazardous waste, political corruption, narcotics, and organized and white collar crime activities. In addition, the Division reviews and investigates referrals from the Office of the Inspector General concerning fraud, waste, and abuse in government, and referrals from the state Ethics Commission involving various allegations of violations of the Commonwealth's Conflict of Interest statute.

As an investigative unit, during the past year, the Division utilized statutorily authorized auditory and visual surveillances in a number of investigations. As a result, sufficient evidence was amassed to indict numerous state and local officials for bribery and other violations of the Conflict of Interest statute.

Another area of increased activity in which investigations proved very successful was welfare fraud, where investigative techniques resulted in the arrest of public officials for larceny from the state's welfare system.

Furthermore, the Division's efforts in the investigation of the Commonwealth's Revenue Department resulted in numerous arrests and indictments of individuals and corporations and the collection of hundreds of thousands of dollars owed to the Commonwealth of Massachusetts.

The record of fifty-four (54) arrests by the Division in the past fiscal year, coupled with the assistance and countless referrals to other law enforcement agencies, demonstrates the unqualified success that a unified command within the Department of the Attorney General can have in coordinating and working with other individual law enforcement agencies in the war against crime, and at the same time avoiding costly duplications of efforts and resources which only result in unnecessary waste.

## CRIMINAL APPELLATE DIVISION

The caseload of the Criminal Appellate Division increased slightly over the previous fiscal year. The Division opened 296 new cases, 22 more than the previous year. Approximately 291 cases are presently active. The majority of the cases involve civil litigation arising from underlying criminal convictions. Of the 111 cases filed in the various state courts, 98 constituted inmate suits challenging some aspect of sentences, prison conditions, regulations or treatment.<sup>1</sup> During a marathon one month session held at M.C.I. Walpole, approximately 60 previously dormant inmate civil suits were disposed of.

Thirty-seven new petitions for review of sexually dangerous person status pursuant to G.L. c. 123A were filed. Three unified trial sessions were held during fiscal year 1983 during which 16 of these cases were resolved.

Ninety-seven cases were filed in the Federal District Court, 53 petitions for writ of habeas corpus, 44 civil rights actions or requests for declaratory or injunctive relief.

Twenty-five cases were argued in the Court of Appeals for the First Circuit. Seven cases were argued in the Massachusetts Supreme Judicial Court and 6 in the State Appeals Court.

Eight petitions for writ of certiorari were successfully opposed in the Supreme Court of the United States. Six petitions for writ of certiorari were filed by this division; two were denied, with dissenting opinions; two are still pending. Two petitions were granted: *Commonwealth v. Sheppard* (good faith exception to the exclusionary rule) and *Justices of the Boston Municipal Court v. Lydon* (scope of habeas corpus jurisdiction), and will be argued in January, 1984.

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<sup>1</sup> This figure does not reflect the increasing number of inmate suits referred to the Department of Correction

The Appellate Division also processes the rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and governors of other states are examined, and an opinion is rendered on the legality of each demand. One hundred and sixty-seven such opinions were rendered in fiscal 1983.

## EMPLOYMENT SECURITY DIVISION

The purpose and intent of the Employment Security Division is to provide the Director of Employment Security with whatever legal assistance and representation is necessary to enforce the Employment Security Law, otherwise known as G.L. c.151A.

The Employment Security law is highly complex and its language is technical as well as legal. Under the law, employers with one or more employees become subject to it and are expected to comply with its provisions. The efficient and economical administration of the employment security program in Massachusetts depends in large measure on the co-operation and compliance of well-informed employers throughout the Commonwealth, for it is they who pay the entire costs of its operation. The employment security program also insures individuals who become unemployed through no fault of their own a weekly benefit check paid on a claim filed with the Division of Employment Security.

Whenever an employer fails to comply with the Employment Security Law and does not file the necessary reports or pay the taxes due on his account with the Division of Employment Security, the matter is referred to the Attorney General for criminal prosecution.

The Assistant Attorneys General make every effort to fully inform the employers of their rights and obligations under the law. As a result, a certain percentage of the tax matters are settled immediately, thereby avoiding the expense of prosecuting the offender and collecting the taxes owed through court action, creating a savings to the Commonwealth and its taxpayers.

During the fiscal year 1983, 1,638 employer tax cases were handled by the Division. As of July 1, 1982 1,290 cases were on hand, 348 additional cases were received during the fiscal year, and 40 cases were closed leaving a balance of 1,598 employer tax cases on June 30, 1983.

Criminal complaints were brought in the Boston Municipal Court charging 135 individuals with 1,968 counts of tax delinquencies totaling \$2,156,794.05 in monies owed the Commonwealth's agency by the 103 employer tax accounts. During the fiscal year 1983, \$2,280,727.70 in overdue taxes was collected. Monies collected were deposited to the Massachusetts Unemployment Compensation Fund.

Whenever individuals are found to be collecting unemployment benefits fraudulently on claims they have filed while gainfully employed and earning wages, the fraudulent matters are referred to the Attorney General for prosecution. Criminal complaints are brought only when the facts surrounding the offense have been investigated, reviewed with the individual involved, and criminal intent has been found. The criminal action is brought in the court holding jurisdiction over the offense, for larceny under G.L. c.266, §30 or under G.L. c.151A, §41, in order that monies stolen from the Massachusetts Division of Employment Security may be reclaimed and the criminal punished.

During the fiscal year ending June 30, 1983, 1,154 fraudulent claims of unemployment benefits were handled by this Division. On July 1, 1982, 814 cases were on hand, 340 additional cases were received during the fiscal year, and 26 were closed leaving a balance of 1,128 fraudulent cases as of June 30, 1983. Criminal complaints were brought in various courts of jurisdiction over the offenses involved, charging 39 individuals with larceny of \$69,554.00 in unemployment benefits fraudulently collected from the Commonwealth's agency.

The amount of \$226,155.97 was collected from the fraudulent claimants during the fiscal year ending June 30, 1983, and has been restored to the Unemployment Compensation Fund of the Massachusetts Division of Employment Security.

During the past fiscal year there were 20 additional actions brought against or by the director of the Massachusetts Division of Employment Security.

The Division has also been involved in rendering opinions both formal and informal on various aspects of Chapter 151A and related laws.

The Employment Security Division handled 25 actions in the Supreme Judicial Court during the fiscal year ending June 30, 1983. Six of the cases were argued and closed, reducing the balance on hand to 19.

### **III. MEDICAID FRAUD CONTROL UNIT**

The Medicaid Fraud Control Unit, now in its fifth year of existence, has established itself as a mature and effective prosecutorial agency in the area of white collar crime. Through the investigation and prosecution of cases of provider fraud in the Medicaid program, the Unit has continued to focus public attention in an area that once received scant notice. Identifying fraud and abuse on the part of providers is increasingly seen as an area to which more resources must be allocated to assure the integrity of the ever-increasing Medicaid budget. The Unit can claim a measure of success in helping to make this a priority.

The Unit has also continued to be active in its other major area of responsibility, the investigation and prosecution of physical abuse in long-term care facilities. Three patient abuse cases were successfully prosecuted during the year while scores of others were investigated but resolved short of criminal proceedings. The Unit has sought to make known the fact that allegations of intentional harm visited upon elderly and infirm residents of nursing homes and other long-term facilities will be investigated quickly and, if the facts warrant, prosecuted vigorously.

During fiscal year 1983, the Medicaid Fraud Control Unit opened 137 new cases and closed 276. A total of 213 cases had been carried forward from the previous year. The balance of cases pending as of July 1, 1983 stands at 74.

A total of 34 indictments were returned by the Unit during this fiscal period. The number of convictions secured was 51.<sup>2</sup>

During this year, the unit obtained the conviction of two individuals for a larcenous scheme that netted them over half a million Medicaid dollars in a thirteen month period. A psychologist from Springfield pleaded guilty to charges of larceny, conspiracy and Medicaid false claims for his part as a principal in the theft of \$510,883 between November, 1980, and November 1981. The stolen money

<sup>2</sup> Includes indictments returned in previous fiscal years.

represents payments for psychological testing services that he billed, but never rendered to Hispanic Medicaid patients. The provider was sentenced to concurrent four to five year jail sentences. An accomplice, who had supplied the psychologist with the names and Medicaid identification card numbers of patients to facilitate his phony billings, was convicted as an accessory before the fact and sentenced to serve a period of three to five years.

During fiscal year 1982, an investigation by the Unit into the purchase and sale of used X-ray film and other silver-bearing materials from hospitals across the state culminated in the indictment of 37 persons and two corporations on various charges including larceny, conspiracy and receiving stolen goods. Included in the number of persons indicted were 29 present or former hospital radiology technicians and eight principals of junkyard/refiner corporations who were charged in connection with purchases of silver from the hospitals. The investigation revealed that the technicians who were charged had been selling hospital material containing silver to the refining companies for salvage value and pocketing all or some of the proceeds from those sales without being authorized by the hospitals to do so. The theft of these materials from the hospitals amounted to larcenies of more than \$300,000.

During this fiscal year, all charges brought from this investigation have now been disposed of. Of the 39 cases, 32 were resolved by pleas of guilty offered by the defendants to one or more of the charges brought against them. Suspended jail sentences were imposed in 12 of the cases, ranging from a three to five year sentence in the state prison to lesser sentences in the various Houses of Correction. Those found guilty were placed under the supervision of the Court's Probation Department and most were ordered to pay restitution to the hospital from which the theft occurred. Cumulatively, as a result of the dispositions, over \$200,000 of restitution has been ordered to be repaid and in excess of \$30,000 in court costs and fines assessed. Additionally, some of those convicted were required to perform a period of community service as a condition of their probation. In total, that community service amounted to 2,450 hours.

One noteworthy result of the investigation has been the implementation on the part of many of the hospitals that were victimized by these thefts of more detailed and stringent policies and procedures that will govern the sale of hospital properties in the future. This will undoubtedly have the effect of deterring future diversions of hospital income and in the long run, help to reduce the cost of health care to the public.

During the past fiscal year a principal of a taxi firm providing services to Medicaid recipients was convicted of the crime of Medicaid False Claims for having knowingly submitted bills to the Department of Public Welfare containing false statements. Of significance is the fact that the indictment against this principal was the first ever brought in the Commonwealth under the Medicaid False Claims Act. That statute (G.L. c. 118E, §21A) was drafted by this Department and was enacted by the Legislature in the 1980 session. It punishes as a felony the intentional submission for Medicaid reimbursement of a claim that contains a false statement. This obviates the need to prosecute on common law notions of theft which would require the documentation and authentication of inordinate numbers of false bills to prove a substantial crime.

The provider in this case was assessed a fine of \$5,000 on this charge and as part of a disposition on other charges was ordered to repay the Commonwealth \$100,000 in restitution.

The Unit completed a lengthy undercover operation that investigated Medicaid provider pharmacies in the greater Boston area. The "Shopping Program" as it became known, was designed to detect the practice of generic substitution, that is, filling a prescription calling for a brand-name drug with a lesser-priced generic drug and billing Medicaid the brand-name charge.

With the co-operation of the Department of Public Welfare, a number of recipient Medicaid cards were obtained utilizing various assumed names. Unit investigators using these cards and written prescriptions which had been furnished to them, "shopped" selected pharmacies posing as Medicaid recipients. Drugs which were purchased were inventoried, examined and retained, where necessary, as physical evidence. Comparisons were made in each case between the type of drug that was dispensed and what the provider billed, so as to identify those providers who were routinely engaging in a pattern of substitution.

As a result of that investigation, indictments were returned against eight pharmacy corporations and eight individual pharmacists. To date, six of the eight cases have been disposed of, each resulting in a conviction. While no conviction has yet resulted in jail time being served, four of the six resulted in jail sentences which were later suspended. Five of the six dispositions included fines ranging from \$7,500 to \$13,125. In one instance, \$13,000 of restitution was ordered and collected. The remaining cases are scheduled for trial at a later date. In addition to the eight cases resulting in indictments twenty-five cases were referred to the Department of Public Welfare for appropriate administrative action where billing and/or dispensing irregularities occurred, but without sufficient supporting evidence to warrant charges of criminal fraud.

This type of "Shopping Program" was done with the anticipation that it will receive notice in the pharmacy provider community and that it will make those who are otherwise inclined to engage in some type of deceptive and fraudulent practice aware that their behavior will not go unnoticed. Although the value of deterrence can not be quantified in terms of dollars, it is believed that these highly visible prosecutions will deter future significant dollar losses to the Medicaid system.

The Unit continued to work in concert with other state agencies, primarily the Department of Public Welfare, in attempting to improve the administrative mechanism of the Medicaid Program. Meetings were held with Department personnel on a regular basis to discuss ways in which to upgrade the generation and referral of cases of suspected fraudulent providers.

## **IV. EXECUTIVE BUREAU**

### **ELECTIONS DIVISION**

#### *A. Campaign and Political Finance*

One of the primary functions of the Elections Division is to enforce compliance with the state's campaign finance law by candidates and political committees. (G.L.

c.55). In fiscal year 1983, the Office of Campaign and Political Finance reported 145 individual candidates or treasurers who had failed to file the required financial disclosure reports. Through administrative action taken by the Division, compliance was obtained in 120 instances. The Division brought civil suit against 25 individuals; 8 of whom have since complied with the disclosures statute. In addition, city and town clerks throughout the Commonwealth reported 31 local candidates or political committee treasurers who had not complied with the filing requirements. The Division has obtained compliance with the law in all but four instances by administrative action; civil law suits are pending against those individuals who have yet to comply.

### B. Lobbyists

The Elections Division also enforces the state statute that requires legislative agents and their employees to file financial disclosure statements with the Office of the Secretary of the Commonwealth. (G.L. c.3, §§43, 44, 47). In fiscal year 1983, 56 violations of these sections were reported by the Secretary. As a result of administrative action taken by this Division, the required statements were filed by all reported violators.

### C. Litigation

During fiscal year 1983 the Elections Division was engaged in numerous civil law suits defending decisions of the State Ballot Law Commission and the Secretary of State. Of particular concern were challenges to the operation of G.L. c.53, §§34 and 35 governing what past experience candidates can have printed beside their names on the official ballots. The Division also successfully defended the actions of the Governor in recalling the State Legislature directly into constitutional convention to complete their consideration of a pending constitutional amendment providing for the death penalty. *Backman v. Connolly*.

### D. Administrative Action

During the course of the year, the Elections Division investigated the conduct of local elections in the Town of Dudley after a petition for an election inquest was filed in the District Court alleging that state laws were not being followed. The investigation revealed that there was no deliberate misfeasance, however, a representative from the Secretary of State's office observed the next town election to suggest improvements in the election procedures.

The Division also investigated the manner in which the City of Boston planned for and managed the primary election in 1982. By working directly with city officials and the Secretary of State, many improvements were made enabling the final election to be run in an efficient and appropriate manner. Further cooperation resulted in the unprecedented action of the Secretary and the Attorney General hiring an election expert to work with the City and to monitor preparations for the 1983 municipal election.



## VETERANS DIVISION

The Veterans Division serves primarily as an informational agency referring private citizens to appropriate Federal and State offices for assistance in veterans matters. The Division serves as litigation counsel to the Commissioner of Veterans Services and the Veterans Affairs Division of the Department of the Treasury. The Division handles civil litigation concerning appeals of agency decisions granting or terminating veterans benefits. During fiscal 1983 the division continued efforts to require towns to employ full-time veterans agents in compliance with St. 1972, C.471.

## V. PUBLIC PROTECTION BUREAU

The Public Protection Bureau is the largest of the Bureaus in the Attorney General's Office. Its work is carried out by seven divisions: Antitrust, Civil Rights, Consumer Protection, Environmental Protection, Insurance, Utilities and Public Charities, as well as a Complaint Section (including Local Consumer Groups) and an Investigative Section. The Bureau brings affirmative litigation on behalf of the public, and represents the public in insurance and utility rate hearings. The Bureau also represents several state agencies and boards whose duties involve actions in the public interest. These include the Division of Environmental Quality Engineering, the Outdoor Advertising Board, the Pesticide Control Board, and the Architectural Barriers Board.

The work of the Bureau includes educational programs, conferences and litigation support activities such as mock trial exercises, moot courts, and case critiques. The Bureau staff provided assistance on many cases, including: *Bellotti v. International Marathons, Inc.* (Public Charities Division), *Boston Edison*, "Pilgrim II" case (Utilities Division), *Local Division 589 v. Commonwealth and MBTA* (Consumer Division), and insurance annuity cases (Insurance Division).

Reports of the Bureau's divisions and sections follow.

## COMPLAINT SECTION

During fiscal year 1983, the Public Protection Bureau's Complaint Section opened 4,956 cases and closed 3,242 cases. The section recovered for consumers \$278,440.75 in refunds, savings and the value of goods or services they would not have received but for the intervention of this Department. In addition, 4,676 written complaints were referred to agencies of other states, or other Massachusetts or federal agencies, or to local consumer groups.

The Bureau's information line staff received a total of 116,940 calls during the past year. As a result of these calls, 12,896 citizens were sent Complaint/Inquiry Forms, 18,100 citizens were given information and 85,944 calls were referred to local consumer groups or other state or federal agencies. The staff also received 465 calls concerning civil rights issues. As a result of these calls, 263 citizens were sent Complaint/Inquiry Forms and 202 citizens were given information relating to civil rights inquiries.

In addition to the normal investigating and litigation-generating functions, the Complaint Section staff participated in a civil rights auditing project, in which the staff applied for apartments to determine whether discrimination was being practiced by the landlords and/or realty companies.

Two important changes have occurred in the Complaint Section this year. The Attorney General's telephone bank (727-8400) has been physically relocated to the Complaint Section. A new computer system began in early June. Eventually local consumer groups will be trained and made part of this computer system. The system will track all open customer complaints in the Commonwealth and will provide a variety of historical information. This new system will facilitate the detection of consumer fraud trends and will monitor the impact of various practices.

### INVESTIGATIVE SECTION

In fiscal year 1983, the high quality of the Investigative Section's work resulted in a continued demand for its services. However, federal grant cutbacks and budgeting constraints led to attrition from twenty-four to seventeen investigators requiring that investigations be carefully prioritized.

Investigative personnel produced an Arson Manual which serves as the basis for all related investigations and arson prevention programs throughout the state. Unfortunately, the federal arson grant funds were not renewed and the Section's arson squad was required to disband.

The services of the Investigative Section are now used by all Bureaus of the Department. The investigators have continued to produce considerable impact in many areas. The close interaction of the Antitrust Division attorneys with investigators continued to produce rapid results in an area traditionally viewed as slow moving. One such example would be the investigations in support of a suit involving the state's newly enacted bottle deposit law. *Commonwealth v. Mass. CRINC.*

In the civil rights area, investigations uncovered overt violations against Asian peoples, located violators, and led to successful prosecution of civil and criminal actions.

As the economy produced an increase in the need for used motor vehicles, investigations of "odometer spinning" resulted in legal actions which benefited consumers and most vehicle dealers as well.

To use the reduced number of investigators more effectively, the position of Assistant Chief Investigator was established. In spite of the reduction in staff size the quality of the work has not suffered. The investigators continued to work closely with FBI, Postal and U.S. Attorneys and local police. In one instance, section personnel located a subject who had been sought by the U.S. Attorney and F.B.I.

### LOCAL CONSUMER AID FUND

For the fiscal year 1983, the Massachusetts Legislature appropriated \$300,700 to provide regional consumer groups throughout the Commonwealth with supplemental funding for consumer complaint mediation. These funds are distributed through the Local Consumer Aid Fund and are administrated by the Public Protection Bureau of the Department of the Attorney General.

Through this program, 13,500 consumer complaints from 90% of the cities and towns in the Commonwealth are now handled at the local level. Handling complaints at the local level has proven beneficial to both consumers and businesses because complaints are handled quickly and in a workable manner between the merchants and citizens. Due to their familiarity with local merchants, the groups are able to recognize patterns of unfair and deceptive practices at an early stage. This has resulted in an expedited curbing of these practices.

The 1983 appropriation was distributed among twenty-five agencies in the following manner:

<i>GRANT RECIPIENT</i>	<i>AMOUNT AWARDED</i>
Agawam Consumer Advisory Commission	\$ 4,000
Arlington Office of Consumer Affairs	9,500
Berkshire County Consumer Advocates, Inc.	18,000
Brockton Consumer Advisory Commission	11,500
Cambridge Consumer Council	10,700
Cape Cod Consumer's Assistance Council, Inc.	8,500
Duxbury Consumer Advisors	1,750
Fall River Consumer Service Office	11,500
Greater Lawrence Community Action, Inc.	11,500
Hampshire-Franklin Consumer Protection Agency	10,500
Haverhill Community Action Commission	11,500
Lowell Community Teamwork, Inc.	11,500
Mayor's Office of Consumer Affairs and Licensing (Boston)	21,500
Medford Consumers Council	21,000
Newton Department of Human Services	16,000
North Shore Community Action Program, Inc.	12,700
Quincy Consumers' Council	9,000
Revere Consumer Affairs Office	16,000
Somerville Multi-Service Center	4,000
South Middlesex Consumer Protection Office	19,500
Southeastern Massachusetts Consumer Action Center	11,500
Southeastern Massachusetts Legal Assistance Corporation	13,000
Springfield Consumer Action Center	18,100
Worcester County Consumer Rights Project	21,000

## **ANTITRUST DIVISION**

### *A. Introduction*

During fiscal year 1983, the Antitrust Division continued its vigorous enforcement of state and federal antitrust laws. The Division continues to place priority upon pursuing those violations which most directly impact upon the state, its cities, towns, schools, and consumers, namely bid rigging, price fixing and resale price maintenance.

The Division handled cases in various stages of litigation in both the federal and state court systems including a suit against 37 major producers of chicken in the United States which charged them with conspiring to raise the price of chicken throughout the United States. The suit was brought on behalf of the Commonwealth and its political subdivisions in their proprietary capacities. A settlement, in excess of \$40 million, has been approved by the court. The Department of the Attorney General serves on the Settlement Administration Committee as representative of all states participating in this litigation. During 1983, Massachusetts received a distribution of approximately \$120,000 and an award of attorneys fees and expenses of \$12,722 supplementing a previous award of fees in the amount of \$58,725. Also, along with New Jersey, Massachusetts was responsible for distributing approximately \$1,050,000 to fourteen other states which did not submit their own distribution plans.

### B. *Litigation*

On March 7, 1983, the Antitrust Division charged MASS. CRINC and 13 beer wholesalers with price fixing, boycotting, monopolization and violations of the Massachusetts bottle deposit law in a complaint filed in Suffolk Superior Court.

The suit alleges that the beer wholesalers unlawfully agreed to increase the prices of beer and charge deposits for cardboard containers in which beer is sold, unlawfully agreed as to the handling charge which would be paid to retailers, and unlawfully agreed as to the time when deposits and handling fees would be returned to retailers. It also alleges that the defendants attempted to monopolize the bottle return industry by establishing MASS. CRINC and that they have unlawfully refused to deal with other persons who sought to operate beverage container collection businesses. The complaint further declares that the defendants violated various provisions of the consumer protection act and the bottle deposit law by requiring retailers to deal with MASS. CRINC and not otherwise accept empty cans and bottles.

In addition to requesting preliminary injunctive relief, the complaint asks the Superior Court to: (1) enter civil penalties of \$25,000 against each of the defendants for each violation of the Massachusetts Antitrust Act; (2) award damages to all natural persons residing within the Commonwealth who purchased beer since implementation of the bottle bill; (3) assess civil penalties of \$1,000 against each of the defendants for each violation of the Massachusetts bottle deposit law; (4) enjoin the defendants from other price fixing activities, boycotting, monopolization and violations of the bottle deposit law; and (5) require that the wholesalers divest themselves of all interests in MASS. CRINC.

In April, 1983, a preliminary injunction was granted against all defendants who then appealed to the Appeals Court. The trial judge entered a stay of his preliminary injunction pending the appeal. Thereafter, defendant's motion to dismiss the claims under the Massachusetts Consumer Protection Act were denied. However, their motions to dismiss claims for consumer damages were granted. Cross appeals on the preliminary injunction and the stay will be heard in the Appeals Court in the Fall of 1983.

In April, 1983, the Division was granted leave to intervene in the Stripper Well Exemption litigation in the United States District Court for the District of Kansas. This suit seeks distribution to the Commonwealth of approximately 40 million dollars.

The Stripper Well Exemption litigation involves challenges to regulations issued by the United States Department of Energy with respect to low production oil wells, commonly called stripper wells, and the certification of crude oil from such wells for higher prices. The United States District Court for the District of Kansas issued a number of preliminary injunctions requiring the oil companies to deposit in escrow the difference between stripper and non-stripper well oil prices until the merits of the case are resolved. As of October 31, 1982, the escrow account, including interest, contained in excess of one billion dollars. The issue presently pending before the District Court is how the money in escrow is to be distributed.

During fiscal 1983 the Commonwealth received final distribution in a case against seven sugar refineries alleging a conspiracy to fix prices. Additionally, the Department received an award of \$30,927.45 in fees and expenses in this case.

In 1983, the Commonwealth was awarded and received attorneys fees and expenses in the amount of \$28,244.00 in a case that alleged that 15 major paper manufacturers had conspired to fix the prices of five paper products. The Commonwealth is awaiting award of its share of the total settlement fund to be based on claims submitted.

The Division took over responsibility for coordinating all of the plaintiffs' discovery in the multi-party suit against the four major manufacturers of art supplies in the country.

In May of 1983, the Court granted preliminary approval of a proposed settlement in a case brought against Cuisinarts, Inc. alleging vertical price fixing. The settlement provides that residents of Massachusetts who purchased a Cuisinarts Food Processor between December 31, 1981 and January 1, 1973, will be able to purchase certain other Cuisinarts products at 50% of the suggested retail price. Hearing on final approval of the proposed settlement is scheduled for September, 1983.

The Antitrust Division continued to press its claim that nine companies had engaged in bid rigging and price fixing in Massachusetts in connection with the sale of bituminous concrete and the paving of roads in and around Boston and its northern environs. During fiscal 1983, a federal Magistrate recommended denial of defendants' motion to dismiss the Commonwealth's unitary plaintiff claim, but also recommended the granting of defendants' motion to dismiss the claims for damages incurred more than four years prior to the filing of the action. The Magistrate's recommendations must now be accepted or rejected by the District Court Judge.

In a separate action alleging that four companies had engaged in bid rigging and price fixing in Massachusetts in connection with the sale of bituminous concrete and paving of roads in and around Boston and its southern environs an agreement was reached with one of the defendants, Old Colony Crushed Stone and Construction Company, Inc.. Old Colony agreed to the payment of \$240,000 in full settlement of its liability in the litigation. Furthermore, a Consent Decree was filed in Federal District Court prohibiting Old Colony from entering into an agreement with any other road paving company to establish prices for bituminous concrete or road paving work, to allocate customers, or to rig bids.

A criminal action was transferred by the Middlesex District Attorney's Office to the Antitrust Division in April, 1983. *Commonwealth v. Victor Scoppe, et al.* (Middlesex Superior Court). The indictment charges the defendants, an inspector with the Medford Home Improvement Program and three contractors, with larceny, conspiracy to commit larceny and conspiracy in unreasonable restraint of trade in violation of G.L. c.93. The charges stem from an alleged conspiracy to rig bids submitted to, and contracts awarded by, the Medford Home Improvement Project. One defendant is also charged with bribery.

### *C. Additional Proceedings and Activities*

In addition to the above cases, the Antitrust Division was, during fiscal year 1983, involved in the following proceedings and activities:

On August 2, 1982, the Division filed a consent decree in Suffolk Superior Court concluding its lengthy investigation of the Boston Survey Group.

The Boston Survey Group (BSG) is an unincorporated association which consists of 34 companies operating in and around Boston. Through the BSG these companies had exchanged wage information pertaining to their employees. The information was provided in surveys on a company-by-company basis with each member having available the wage information of all other members. The concern which triggered the investigation was whether this exchange of wage information artificially reduced employee wages and therefore constituted a violation of Massachusetts or federal antitrust laws prohibiting certain joint conduct by competitors.

The consent decree, entered without the finding of any violation, provides among other things, that: (1) surveys will no longer identify the companies to which particular wage information pertains; (2) each company's information will only be reported in the aggregate and will not disclose wage information on an employee-by-employee basis; (3) wages will not be reported for any employee classification for which there are fewer than ten employees among members of the BSG; (4) wage information will not be reported on an "industry-by-industry" basis; (5) BSG's by-laws will require all members to disclose their membership in the BSG upon reasonable request; (6) BSG's by-laws will permit each member to disclose to an employee aggregate weighted average salary data for all reporting companies relating to the pertinent job category.

Additionally, the BSG provided a Letter of Assurance to the Department of the Attorney General which states that it is, and has been, its policy not to exchange future wage or salary intentions where such an exchange would be illegal under the Massachusetts Antitrust Act. The by-laws of the Group have been supplemented to confirm this policy.

On September 21, 1982, the Division entered into a Settlement Agreement with Saxon Theatre Corporation of Boston concluding an investigation of alleged antitrust violations by that company. Saxon operates the Sack Theatre chain.

The investigation focused upon incidents occurring in December 1981 and January 1982 when the Assembly Square Theatre in Somerville exhibited more first-run motion pictures than there were movie screens in the complex. Such overbooking prevented neighborhood theatres in the area from effectively competing with the chains.

A consent judgment filed in Suffolk Superior Court provides that Sack Theatres will not generally exhibit more first-run motion pictures than it has movie screens, and that Sack will not advertise exhibition of motion pictures when it has reason to believe they will not be exhibited at the advertised time. It also stipulates that the firm "will not knowingly communicate false or misleading information to film distributors" and that Sack Theatres will not "move-over" or transfer a motion picture from one theatre to another operated by Saxon before completion of the first week of showing. Sack also agreed to the payment of \$20,000 to the Commonwealth as reimbursement of costs and expenses incurred by the Division in conducting its investigation.

On October 1, 1982, the Division filed consent decrees in Suffolk Superior Court against five Fenway Park parking lots all located on Boylston Street in Boston. The court filing concluded an investigation which focused on allegations that parking lot operators in the Fenway Park area had engaged in unlawful price fixing after the City of Boston issued citations in July to various lot owners for overcrowding their parking lots.

The consent decree prohibits the defendants "from directly or indirectly, entering into any contract, combination or conspiracy to fix, determine, maintain or stabilize the prices" charged for ball park parking and "communicating to or exchanging with any of their competitors any information relating to prices which have been charged, allowed to be charged, or are to be charged for ball park parking." The defendants also agreed to pay the Attorney General \$7,000 to cover costs and expenses, while denying any violation of the law.

On November 30, 1982, the Division filed a consent decree in Suffolk Superior Court against thirteen (13) bowling centers operating in western Massachusetts. The consent decree prohibits the bowling centers from agreeing to fix bowling prices, to interfere with other bowling centers independent setting of bowling prices or to exchange information about bowling prices. The companies also agreed to pay the Commonwealth a total of \$9,750.00.

A consent decree was filed on January 21, 1983 in Suffolk Superior Court concluding an investigation by the Division into the William Bayley Co. and its dealings with Masiello Associates, the Worcester architectural firm. This matter was referred to the Department by the Special Commission ("Ward" Commission). The Division's investigation focused on allegations that certain contracts for security windows on public construction jobs were unlawfully granted to the William Bayley Company by Masiello Associates in exchange for "kickbacks" of funds derived from the contract.

The consent decree prohibits the William Bayley Co. from entering into any agreement with any architect which requires that bid specifications for any Massachusetts public construction project specify that only products manufactured by the William Bayley Company be used to the absolute exclusion of all others. The company also agreed to pay the Department of the Attorney General \$4,200 as reimbursement of costs and expenses.

#### *D. New England Bid Monitoring Project*

In the summer of 1978, the Commonwealth began a pilot program to determine the feasibility of collecting and analyzing masses of bid data from municipalities

in order to determine whether antitrust violations were occurring in the sale of certain specified products. As part of the project the Antitrust Division collected bid data from over 100 towns and cities in Massachusetts and commenced development of computer programs for analysis of the data.

During fiscal 1983, data collection continued to insure that the project remained current. Additionally, software was further improved to permit more efficient management of data collected and analysis of project bids in addition to product bids.

Most importantly, computer analysis generated by the project played a significant part in the investigation leading to the filing of the two road paving cases mentioned earlier.

## CIVIL RIGHTS AND LIBERTIES DIVISION

### A. Introduction

The work of the Civil Rights and Liberties Division during fiscal year 1983 reflects the priority given to combatting racial violence. Creative and effective use of the injunctive provisions of the Massachusetts Civil Rights Act, G.L. c.12, §11H, represents one of the major accomplishments of the Division this year.

Housing was another priority area. The Division challenged patterns and practices of racial discrimination that interfered with access to low and moderate cost housing.

There was continued need for authority to issue a Civil Investigative Demand in civil rights cases. For the second year, a bill which would have given the Division greater investigative powers failed to pass the Legislature.

### B. Major Case Areas

#### 1. Enforcement of the Massachusetts Civil Rights Act

The Division brought the first action for injunctive relief under the Massachusetts Civil Rights Act in *Commonwealth v. Gilligan, et al.*, concerning an alleged interference with fair housing rights through threats, intimidation, and coercion. Following the presentation of the Commonwealth's case, an injunction was entered upon consent, prohibiting the eight defendants from in any way harassing blacks in the Ross Field area of Hyde Park, entering onto their property, or congregating in certain areas. Three days after judgment was entered, one the defendants violated the injunction. Following the criminal contempt trial of *Commonwealth v. Gaine*, the defendant was sentenced to 60 days in jail. Neighbors reported that thereafter, the neighborhood was more peaceful than it had been in years.

In *Commonwealth v. Meagher*, the defendant agreed to the entry of an order prohibiting him from threatening or harassing teachers, students, or administrators at Boston Technical High School on racial, ethnic, or religious grounds. In *Commonwealth v. Silva*, the Division obtained a preliminary injunction against an individual who had harassed, then assaulted, a Vietnamese co-worker because of his national origin.



The criminal case of *Commonwealth v. Williams*, a prosecution for interference with the civil rights of a black family in a Weymouth housing project by breaking windows and shouting racial slurs and threats, was tried before a jury of six following the defendant's appeal. The defendant was convicted of violating the Civil Rights Act, G.L. c.265, §37, and sentenced to the maximum one year term.

Recognizing that effective implementation of the Civil Rights Act requires the coordinated effort of all parts of the legal system, the Division organized a workshop about the Act for assistant district attorneys; participated in several police training sessions; and spoke to the annual conferences of the Justices of the Superior Court, District Court, and District Court Clerk-Magistrates. During the summer of 1982 the Division played a key role in setting up procedures for coordinating the work of local, state, and federal police and prosecutorial agencies in cases involving racial violence.

To create broader public awareness of the Act, the Department of the Attorney General joined with other state, federal, and private agencies in sponsoring a statewide conference on racial and religious violence attended by municipal officials, school officials, and chiefs of police. Following the conference, several communities asked for and received assistance in establishing local human rights commissions. The Division also works closely with a variety of organizations and groups, including representatives of the state's growing Southeast Asian refugee population.

## 2. Housing

Using personnel from the Public Protection Bureau, the Division investigated race discrimination by Boston real estate brokers and agents. By the end of the fiscal year three lawsuits had been settled: *Commonwealth v. New Boston Realty, Inc., et al.*; *Commonwealth v. John A. Forger, d/b/a Old Forge* and *Commonwealth v. Fulton Realty, Inc.* In each case, the defendants agreed to future compliance with fair housing laws, training of agents, advertising in minority newspapers, and payments to either the Commonwealth or housing groups.

Representing the Secretary of the Executive Office of Communities and Development, the Division intervened as a defendant in *Faverman v. Cambridge Housing Authority*, a case brought by a condominium association to prevent a housing authority from purchasing a condo unit to be rented to a low income family. Defenses were raised under the condominium statute, together with a counterclaim seeking implementation of the Commonwealth's scattered site public housing program. The case was pending at the end of the fiscal year.

Litigation was avoided against a city which had passed a resolution restricting the development of subsidized housing in its predominantly Hispanic neighborhoods. The matter was resolved by negotiation, and at the end of the year, the proposed project was moving forward.

### 3. Health Care

The Division continued its enforcement of the Hill-Burton Act, which requires that health care facilities which received funds under the federal Hill-Burton program provide a reasonable volume of free or reduced cost care to persons unable to pay. Agreements were reached with six hospitals, under which they have agreed to provide approximately \$1 million in additional free or reduced cost care. Since the project began, approximately \$3 million has been recovered.

### 4. Education

The Division was involved in a number of cases involving state regulation of private religious schools. Last year, the Supreme Judicial Court held in *Attorney General v. Bailey*, that supervisors of private religious schools must comply with the school attendance reporting provisions of G.L. c.72, §2. Although the United States Supreme Court refused to hear the case, defendants failed to submit the required information, and were found in contempt in *Attorney General v. Willett et al.* Thereafter, the reports were filed, and consent judgments were reached in two similar cases, *Attorney General v. Supervisory Officers of New Life Christian Academy* and *Attorney General v. Supervisory Officers of Braintree Baptist Temple*.

Two actions were filed in state court to enforce the Commonwealth's compulsory school attendance law, G.L. c.76, §1: *Attorney General v. Grace Bible Church Christian School* and *Attorney General v. North Brookfield Christian Academy*. The Division is representing the Department of Education in *Braintree Baptist Temple v. Holbrook*, a federal court challenge to the constitutionality of the compulsory school attendance laws. All three cases were pending at the end of the fiscal year.

The Division represented the Department of Education in several cases arising under the state's special educational laws, including *Brookline School Committee v. Bureau of Special Education Appeals*. In the *Brookline* case, the Supreme Judicial Court upheld the decision of the Bureau of Special Education Appeals requiring Brookline to pay the costs of a private school placement for a special needs child, ruling that any budgetary restrictions caused by "Proposition 2½" did not abrogate a school committee's responsibilities under the special education laws.

The Division also continued to work with the Department of Education in reviewing the City of Lawrence's compliance with the state's transitional bilingual education laws. Monitoring during fiscal year 1983 showed that the city had made significant progress, improving its procedures for identifying and placing students in need of transitional bilingual education, meeting the student/teacher ratios mandated by the regulation, limiting the age spans of children within a class, and locating classes more appropriately.

In *Attorney General v. School Committee of Essex*, the Supreme Judicial Court held that G.L. c.76, §1, which provides private school students with the same transportation rights as public school students, did not violate the Anti-Aid Amendment to the state constitution. However, the Court ruled that the private school transportation entitlement is limited to children of compulsory school age, and that school committees need only provide transportation to private schools which are the same distance as or closer than the public schools the student is entitled to attend.

### 5. *Voting, Assembly and Petition*

The Division participated as *amicus* in the case of *Batchelder v. Allied Stores International*. The Court held in that case that Article 9 of the Declaration of Rights of the Massachusetts Constitution, which concerns the freedom and equality of elections, guaranteed the right of a candidate to solicit signatures for a nominating petition in a reasonable and unobtrusive manner in the common areas of a privately owned shopping center.

In *Bellotti v. Bruynell*, a complaint was filed under the State Equal Rights Amendment against the Town Clerk of Braintree for segregating voters into voting lines and maintaining separate voting lists on the basis of sex. After a preliminary injunction was issued, the Clerk agreed to stop the practice.

Following discussions with the Division, the town of Framingham agreed to stop enforcing an ordinance which prohibited all distribution of pamphlets on the public streets. The matter was brought to our attention by a group which wanted to pamphlet in opposition to a local override of "Proposition 2½."

### 6. *Public Records and Open Meeting*

The Supreme Judicial Court rendered its decision in *Globe Newspaper Co. v. Boston Retirement Board*, in which the Attorney General had intervened. The Court held that medical and personnel files or information were absolutely exempt from mandatory disclosure under the state's public records laws where the files or information are of a personal nature and relate to a particular individual.

A final ruling on summary judgment was sought in *Bellotti v. Board of Zoning Appeals of Milton*, in which the public record status of a letter from town counsel to the defendant Board is at issue. The Division argued that the attorney-client and work-product privileges do not constitute exemptions under the Public Records Law. A decision is pending in Superior Court.

Suit was filed in *Bellotti v. Chief of Police of Amesbury, et al.* against 28 police departments which failed to comply with state regulations governing the amount which government officials may charge for public records. The departments involved had charged excessive amounts, or refused to provide copies by mail. By the end of fiscal year 1983, agreement had been reached with all but one of the defendants.

In *Attorney General v. MBTA*, the Superior Court found that the MBTA had violated the open meeting law when it discussed major service cutbacks and the issuance of bonds in closed sessions. The court held that the litigation exception to the open meeting law did not apply to matters about which litigation was a mere possibility. It also held that a "briefing session" was a "meeting" subject to the open meeting law. The decision was not appealed.

The Division represented the Bristol County District Attorney in *Town of Dartmouth v. Standard Times, Bristol County D. A., et al.* in which the town sought a declaratory judgment that it could hold an executive session to discuss possible litigation. Our motion to dismiss was pending at the end of the fiscal year.

Much of the Open Meeting Law work of the Division does not involve litigation. Complaints were resolved concerning variety of issues, including when the "litigation exemption" could be invoked; when an "emergency" meeting could

be held; what was a "governmental body" subject to the Open Meeting Law; and the use of tape recorders. The Division also plays a coordinating and liaison role on Open Meeting Law issues with the offices of the District Attorneys who have jurisdiction over complaints affecting municipal and county governmental bodies. A workshop for Assistant District Attorneys throughout the state was held during the past year.

### 7. *Privacy*

The Division participated as *amicus* in the discovery aspects of *Town of Brookline v. Bournewood Hospital*, a case in which Brookline alleges that a private psychiatric facility constitutes a public nuisance. The Town sought discovery of diagnostic, therapeutic, and other arguably privileged records concerning individual patients. The Division raised the privacy interests of the patients, proposing that a guardian ad litem be appointed to represent the patients and that a protective order be entered. The parties agreed to the appointment of a guardian ad litem, and protective orders were entered by the court.

### 8. *Employment*

The Commonwealth joined several other states before the United States Supreme Court as *amici* in *Shaw v. Delta Airlines, Inc.*, arguing that the federal Employee Retirement Income Security Act of 1974 did not preempt state laws banning discrimination in employee benefit plans. The Court held that state laws were preempted only to the extent that they prohibited practices that were lawful under federal law.

The Division resolved a complaint of sexual harassment and retaliation against a restaurant after the restaurant agreed to offer reinstatement, back pay, and to adopt, publicize, and follow a policy prohibiting sexual harassment. It also resolved a number of complaints concerning the use of lie detectors by employers.

The Division continued to monitor affirmative action compliance in the Copley Place development. The project contract requires hiring of minority and female workers and use of minority business firms.

### 9. *Equal Credit*

The Federal Reserve Board finally took action on proposals dealing with credit scoring systems on which the Division had commented in 1979 and 1980. The Board adopted most of the Division's recommendations, prohibiting creditors from using generalizations about the reliability of certain types of income, such as alimony; considering the fact that an applicant has multiple sources of unearned income; and requiring more informative disclosure of the reasons for adverse action on credit applications.

## 10. *Guardianships*

The Division participated in several guardianship proceedings, all of which concern whether the Probate Court could make decisions concerning medical treatment for incompetent state patients and inmates.

# CONSUMER PROTECTION DIVISION

## A. *Introduction*

During the past year the Consumer Protection Division expanded its role as an advocate of national consumer issues, largely in response to the federal government's lessened commitment in the field. At the same time, the Division used an increasing variety of remedies to address traditional consumer problems, including deceptive automobile sales practices, mistreatment of elderly patients, abusive landlord-tenant practices, and illegal activities in the sale of goods and services ranging from health spas to new homes.

The Division's work on national consumer problems included both litigation and legislative efforts. Acting as the leader of a coalition of Northeastern states, the Division successfully coordinated multi-state auto defect litigation, described below, against Subaru of America. The Division also represented national coalitions of state Attorneys General in advocacy to the federal government. It sponsored legislation, enacted in June, which substantially expands the Division's authority to sue large interstate corporations over unfair and deceptive practices.

In traditional areas of concern, the Division has placed a new emphasis on the use of attachments to insure that a defendant's assets are not dissipated and remain available to pay consumer claims. Criminal sanctions were sought against perpetrators of egregious frauds in areas such as odometer spinning and home improvements. In fiscal 1983 the Division also pursued contempt actions against repeat violators and obtained the largest penalty award in the history of the Division. And, as a complement to litigation, the Consumer Protection Division sponsored educational programs and conferences both for consumers and for law enforcement personnel, in areas ranging from mobile home law to arson prevention, all designed to prevent consumer injury at its inception.

## B. *Interstate Cooperative Enforcement*

In 1983, the Department joined with the Attorneys General of other Northeastern states to form the Northeast Regional Consumer Protection Committee (N.E.R.C.P.C.). The purpose of the Committee is to share information and to coordinate litigation on issues which transcend state lines. This past year, N.E.R.C.P.C. successfully concluded its first cooperative lawsuit, brought against Subaru of America. The suit alleged that Subaru sold large numbers of 1980 and 1981 automobiles with defective "axle boots", causing a risk of serious damage to the car's drive mechanism. As a result of the litigation, which Massachusetts coordinated and negotiated for the N.E.R.C.P.C. states, Subaru has agreed to replace the defective parts on all affected vehicles, to pay for past repairs, and to offer owners an extended warranty and inspection program to guard against such defects in the future.

The Subaru settlement compares favorably with settlements obtained by federal agencies in the past year against other automakers. Most importantly, the Subaru case shows that the states can join forces to obtain comprehensive relief for their residents and need not depend exclusively on the federal government to address multi-state consumer problems.

In fiscal year 1983 year the Consumer Division also represented a coalition of Attorneys General who advocated that the Federal Trade Commission adopt a nationwide rule barring abusive practices in debt collection. The effort occurred in the context of a special hearing called by the F.T.C. and included briefing and oral argument to the Commissioners and efforts to muster Congressional support for the rule. Recently, a closely divided Commission adopted a Credit Practices Rule, with a number of Commissioners citing the effectiveness of the Division's advocacy.

Because federal agencies have lowered their commitment to consumer protection, the Division has also taken steps to protect the ability of individual states to enforce their laws. In the past year, this issue was argued before the F.T.C. (in the context of credit practices), the Civil Aeronautics Board (with regard to ticket disclosure requirements), congressional staff (amendments to the F.T.C. Act) and the federal courts (*Commonwealth v. Hayes*, concerning exemption from preemption of state hearing aid laws). As a result, pending national legislation and regulations have been modified to avoid federal pre-emption of state credit and other consumer statutes and to prevent new federal legislation from interfering with the interpretation of state consumer protection acts, including G.L. c.93A.

### C. Legislation

This year the Division successfully sponsored amendments to the state Consumer Protection Act, G.L. c.93A, which removed major limitations on the Division's authority to sue interstate businesses. In its prior form, Section 3 of Chapter 93A barred the Attorney General, private persons and local merchants injured by the unfair and deceptive practices of an interstate business from suing under Chapter 93A if (1) the Federal Trade Commission was proceeding against the same company (even if the F.T.C. did not have the authority to obtain prompt or complete relief), or (2) the company's activities took place "primarily and substantially" in another state. These limitations have prevented the Division from bringing several important lawsuits, particularly against car makers concerning automobile defects.

The new legislation removes both of these limitations. Massachusetts businesses will be helped by the amendments, since they will no longer be forced to compete against out-of-state concerns which do not comply with Chapter 93A. Most importantly, the Division will be free to take action against interstate businesses who commit unfair or deceptive practices which injure Massachusetts consumers.

In other legislative developments, the Consumer Division successfully sponsored an anti-arson measure and gave extensive assistance to legislative committees in drafting a Massachusetts "Lemon Law" which would require manufacturers of new vehicles to take back vehicles which experienced repeated and significant operating problems.

#### D. *Statistics*

During the 1983 fiscal year, the Consumer Protection Division maintained an active litigation caseload of 192 lawsuits. The Division obtained 17 preliminary injunctions and temporary restraining orders, 61 judgments, and 21 assurances of discontinuance. The Division also initiated 4 contempt of court proceedings. Finally, the Division obtained approximately \$12,911,756 in judgments, settlements and restitution for Massachusetts consumers and \$127,000 in agreements, assurances and judgments for fines and civil penalties.

#### E. *Subject Areas*

##### 1. *Health Care*

In fiscal year 1983, the Division continued its efforts to prevent the abuse of elderly patients in nursing homes, health quackery, and poor medical practices by diagnostic laboratories.

In *Commonwealth v. Townsend Nursing Home*, for example, the Division obtained emergency court orders and worked closely with the Departments of Public Health and Public Welfare and the State Rate Setting Commission to obtain the appointment of a receiver and the resources needed to phase out the operation of the home and safely transfer its residents.

The Division took similar action on behalf of endangered patients in other parts of the state. For example, as a result of our cooperative efforts with the Department of Public Health, residents of the Big G Rest Home of Templeton were transferred to well-managed and sanitary facilities, the rest home was closed, and its operators were barred from opening any new patient care facility for a period of ten years.

The Division also pursued legal actions against medical laboratories whose poor practices endanger their clients. In the case of *Commonwealth v. Cambridge Diagnostics, Inc.* the Division obtained an injunction which prevented a clinical laboratory from performing any further laboratory tests for consumers until a new laboratory director was in place and the deficient conditions had been corrected.

In 1983, the Division also sued unlicensed health practitioners whose treatments and "miracle cures" were shown to seriously endanger patients and whose sales practices induced consumers to forego proven treatments. In *Commonwealth v. Constance Jones*, for example, we obtained injunctions against three Boston clinics which practiced "colonic irrigation," a form of alleged health care which has caused injuries and death in other states.

##### 2. *Automobiles*

During the past year the Consumer Division continued its enforcement efforts and implemented new strategies in its ongoing effort to prevent unfair business practices in the sale and repair of automobiles. Those strategies included large scale investigations and prosecutions of odometer tampering in selected cities, the use of attachments to freeze assets of dishonest dealers, criminal prosecutions in egregious cases, and litigation over auto defects and unfair sales practices.

### a. *Odometer Tampering*

In the case of *Commonwealth v. Norman LaCasse*, the Division worked with the Department's Criminal Bureau to obtain multiple indictments against a Springfield car dealer for selling vehicles with altered odometers. Prior to trial, LaCasse pled guilty to these charges and received a suspended state prison sentence of three to five years. In the cases of *Commonwealth v. Dean Street Auto Sales* and *Commonwealth v. Bennett Street Auto Sales*, also involving large scale odometer tampering, the Division moved at the start of litigation to attach all available assets of the defendants. By doing so, the Division was quickly able to obtain judgments which provided \$85,000 in restitution to injured consumers. Finally, coordinated programs were begun to investigate dealers suspected of odometer tampering in Lawrence, Springfield and other communities. This effort produced a series of visible and successful prosecutions under the Consumer Protection Act which have a substantial deterrent effect.

### b. *Advertising*

The Division continued to monitor and enforce its automobile advertising regulations in the past year. This effort led to the entry of numerous assurances of discontinuance and judgments against dealers who committed themselves to refrain from illegal practices in the future.

### c. *Sales Practices*

The Division continued to prosecute cases against new car dealers who engage in "option packing," the practice of forcing consumers to purchase unwanted and unnecessary accessories and other equipment as a condition of obtaining popular models of new cars. As a result of this litigation, a number of dealers have agreed to stop the practice, notify buyers of their rights, and pay civil penalties and restitution to consumers.

During fiscal year 1983 the Division also initiated actions on automobile dealers who were selling rebuilt vehicles which had previously been declared total losses as a result of accidents. The sale of these vehicles without prior disclosure to prospective purchasers is specifically prohibited by a regulation of the Attorney General. In several cases, judgments were entered which require these dealers to disclose the true nature of their vehicles to all prospective purchasers.

## 3. *Comprehensive Arson Prevention & Enforcement System (C.A.P.E.S.)*

The C.A.P.E.S. Unit of the Consumer Protection Division was created with federal assistance to implement a preventive, civil approach to arson which would supplement criminal prosecution. In the past three years the Unit has devised creative methods to identify arson-prone buildings and neighborhoods and to prevent fires from occurring. In November 1982, federal funding for C.A.P.E.S. terminated, and the state Legislature failed to provide replacement funds in the Department's budget. Despite this loss of funding, the Consumer Protection Division continued to devote resources in the areas of litigation, education, and legislation to combat the threat of arson.



In December 1982, the C.A.P.E.S. Unit prepared and published the *Arson Prevention Manual*. This booklet details the methodology and strategy developed by the Unit to prevent arson and is intended to be used as a guide by local and state governments and community groups who are interested in establishing similar arson prevention units. Later in the year, the Division sponsored regional conferences, in which local officials and representatives of community groups attended panel discussions led by C.A.P.E.S. staff and other experts in the field of arson prevention.

The C.A.P.E.S. staff also successfully concluded one of the major cases instituted by the Unit. A judgment entered in *Commonwealth, et al v. Second Realty Corp, et al*, requires the defendants to pay the City of Boston \$270,000 in unpaid property taxes, to maintain their residential rental units in compliance with all applicable sanitary and housing codes and to pay taxes and utility charges on time in the future.

In *Commonwealth v. Shadrawy*, the C.A.P.E.S. Unit successfully sued the City of Boston over code violations in properties the City had acquired through tax foreclosures. A settlement of the law suit requires the City to make minimum repairs to its properties to ensure the safety of the occupants while the City is holding the properties for public sale.

During the past year the C.A.P.E.S. Unit also provided advice and assistance to the Boston City Council and the State legislature on issues relating to arson. In the 1982 session of the Legislature, the Unit drafted and successfully sponsored legislation requiring property owners to disclose certain fire insurance information, which will assist officials and tenants to identify likely targets of arson.

Through these and other activities, the unit continues to aggressively pursue arson prevention through both criminal and civil strategies.

#### 4. *Home Construction and Improvement*

The business of home improvement, in which consumers must make large investments of money in reliance on the expertise and good faith of largely unregulated craftsmen, has been of continuing concern to the Division. Problems in the field have become more widespread as high mortgage interest rates and the recession have encouraged homeowners to improve their houses rather than to buy new ones.

The Division has aggressively pursued home improvement frauds, with particular emphasis on repeat violators. In *Commonwealth v. Ward*, for instance, evidence of contemptuous conduct and egregious fraud on elderly consumers led the Division to bring a criminal contempt action and simultaneously to obtain criminal indictments against the defendant contractor. The case is expected to go to trial in the near future. In *Commonwealth v. Anderson Construction Co.*, a civil contempt action against a Boston contractor resulted in a finding of contempt, full restitution to consumers and the payment of \$7,500 in penalties.

In the area of home construction abuses, the Division used a variety of approaches depending on the nature of the problem. In *Commonwealth v. Tri-City Realty*, for example, a \$50,000 attachment was obtained against a Bristol County builder who convinced consumers to advance him large deposits to build new homes by allegedly misrepresenting his ability to secure federal construction assistance. Most consumers have now obtained restitution, and the case is continuing toward trial.

A case which did not lend itself to traditional litigation approaches involved the Agua Corporation, a private Plymouth water company which had failed to maintain water service to a South Shore development. When discovery showed the corporation to be insolvent, a meeting of home owners was called and the Division assisted them in forming a local association to take over the defendant's facilities, and then worked with the association to reach settlements with creditors and to resolve the other legal problems needed to create a viable water supply system.

As part of a long-term approach to construction problems, Division personnel have also met with and spoken to industry trade associations to explain the law and cooperatively discuss its enforcement actions against disreputable builders.

### 5. *Landlord-Tenant and Mobile Homes*

In the past year, the continuing tight rental market has led to expanded activity by "apartment listing services", which for an advance fee offer to supply apartment-seekers with listings of available units. Often, however, such services advertise and sell stale listings of unavailable apartments. To address this problem, the Consumer Protection Division adopted a two-pronged approach. First, the Division sued and obtained preliminary injunctions against two major Boston listing services. Second, it drafted and successfully advocated the adoption of regulations by the Board of Registration of Realtors which place necessary controls on this new industry.

In the field of mobile homes, the Division also employed a combination of approaches. In order to reduce unnecessary disputes between mobile home owners and tenants, a revised version of the Attorney General's Mobile Home Law Guide was published and distributed across the Commonwealth. A series of regional seminars was held to further inform owners and tenants of their rights and responsibilities under the law.

In cases where park owners ignored their obligations, however, the Division did not hesitate to litigate. Thus, in *Commonwealth v. DeCotis* the operators of a mobile home park in Chelmsford were sued for illegally dumping sewage into Chelmsford town waters, concealing their activities from town authorities through the use of illegal devices, and illegally threatening to close their park. State law requires that park closures be made in good faith; the Division alleged that the DeCotis' threat to close the Chelmsford park in retaliation for tenants' efforts to correct the sewage problem and their advocacy of rent control statutes was not made in good faith. As a result of the lawsuit, closure of the park was enjoined and a new sewage system was installed.

### 6. *Banking and Financial Practices*

In the area of financial transactions, the Division continued to protect consumers from unfair practices and dishonest schemes in such areas as debt counseling, investment fraud, mortgage deceptions, and lending disclosures.

In the case of *Commonwealth v. Legal Credit Counselors*, the Division sued a nationwide debt consolidation business for using deceptive practices in purporting to assist and counsel persons with serious debt problems. After a week-long

trial, a Superior Court Judge found that the defendants had misrepresented their fees, had provided little help to their customers and in some cases had actually lessened their clients' ability to pay their debts. Based on the evidence presented by the Division, the Court ordered the defendants to cease doing business and to make refunds to injured consumers.

During the past fiscal year the Division continued to attack fraudulent investment schemes. In *Commonwealth v. Nadine Gan*, for example, the Division had sued an investment counselor for enticing consumers through misrepresentations to pay her more than two million dollars for investments in commodities. In fiscal year 1983, acting on evidence that the defendant had violated a preliminary injunction, the Division sued for contempt and civil penalties. After trial, the court found the defendant in contempt and ordered her to pay a fine of \$100,000, which represents the largest known penalty under G.L. c.93A, §4. In the case of *Commonwealth v. Boston Bullion Group Ltd., et al.*, the Division brought suit against a precious metals firm for fraudulent sales practices which had defrauded consumers of thousands of dollars. The Division was able to bring a quick halt to the operations of this company and has secured injunctions against the individuals involved which prevent them from operating a similar scheme in the future.

Through agreements with Massachusetts banks, including the Plymouth Savings Bank and the Arlington Trust Company, the Division also prevented homeowners from being forced to pay drastically increased interest rates on variable-rate mortgages in cases where bank employees had misrepresented their terms. The Division also continued to enforce the federal Truth-in-Lending Act in such cases as *Commonwealth v. Financial Enterprises, Inc.*

## 7. Miscellaneous Issues

The Division also took initiatives in a variety of other areas which it regulates.

Responding to a widespread pattern of consumer complaints against the furniture industry, the largest dealer in New England, Puritan Furniture Corp., as well as several smaller retailers were sued. In Puritan a settlement was reached in which past and future complainants will have swift access to a company complaint mechanism and then to the Division.

In recent years, intensive competition in the health spa industry has resulted in a series of spa closings. Some spas have deceived consumers by continuing to sell long-term memberships until just before they closed. In the past year, the Division obtained judgments against two operators of health spa chains, Joy of Health and Diamedics, Inc., which require the defendants to make restitution to their members for unused memberships at closed locations and secured an injunction against OKL Health, Inc. on similar grounds.

These specific examples are representative of the many lawsuits brought and judgments obtained this year against a variety of deceptive practices ranging from the use of inaccurate weights and measures to the sale of illegal or fraudulent energy devices. This litigation is indicative of the Division's continuing effort to protect Massachusetts consumers.

## ENVIRONMENTAL PROTECTION DIVISION

General Laws c.12, §11D establishes the Environmental Protection Division. The Division's responsibilities lie in two main areas. It is litigation counsel on environmental issues to all of the agencies of the Commonwealth, principally those within the Executive Office of Environmental Affairs. In this role the Division does all of the Commonwealth's civil environmental enforcement, including air and water pollution, hazardous and solid waste control, wetlands protection and billboard control. In addition, the Division initiates and intervenes in judicial and administrative actions for the purpose of protecting the environment of the Commonwealth. These cases include hearings before federal agencies on the siting of energy generating facilities and participation in state and federal appellate litigation on issues of significance to the environment.

As a result of its role in environmental enforcement the Division is the recipient of substantial grant money from the United States Environmental Protection Agency. In fiscal year 1983 the Division received one hundred and seventy-five thousand dollars (\$175,000) in such funds.

During the year the Division negotiated judgments calling for the payment of penalties and costs totalling nearly eight hundred and fifty thousand dollars (\$850,000) paid to the General Fund of the Commonwealth. In addition, several of the cases described below have resulted in forcing private parties to undertake cleanups which cost in the hundreds of thousands of dollars and which the Commonwealth would otherwise have had to perform.

The work of the Division can be divided into several different categories including air pollution cases which are referred from the Department of Environmental Quality Engineering, Division of Air Quality, and involve violations of the state Air Pollution Regulations. The water pollution cases are generally referred from the Department of Environmental Quality Engineering, Division of Water Pollution Control. Most of these cases involve violations of discharge permits issued jointly by the Division of Water Pollution Control and the United States Environmental Protection Agency. Others seek to recover costs expended in cleaning up oil spills. The Department of Environmental Management, Wetlands Section, or Department of Environmental Quality Engineering, Wetlands Division frequently refer wetlands cases. These cases fall into two categories: (1) those involving the permit program for altering of wetlands under G.L. c.131, § 40; and (2) those challenging the development restrictions the state imposes on inland and coastal wetlands pursuant to G.L. c.130, §105 and G.L. c.131, § 40A. Solid waste cases are referred from the Department of Environmental Quality Engineering, Division of General Environmental Control and involve the manner in which refuse is disposed and the enforcement of the state's sanitary landfill regulations. Cases involving the transport and disposal of hazardous substances in violation of state regulations are referred by the Department of Environmental Quality Engineering, Division of Hazardous Waste. Pesticide cases are referred by the Pesticide Board of the Department of Food and Agriculture. They involve the improper application of pesticides in such a way as to pose a threat to human health. The Outdoor Advertising Board refers a number of billboard cases every year. A majority are defenses to petitions for judicial review of decisions of the Board.

A number of the cases handled by the Division do not fall into any of the above categories. Some of them involve representation of state agencies, for example, the defense, in federal court, of the Massachusetts Executive Office of Environmental Affairs and Executive Office of Transportation and Construction. Others are brought pursuant to the Attorney General's statutory authority to prevent environmental damage. These are frequently in areas of broad concern, such as energy policy, the siting of nuclear facilities and the interpretation of state and federal environmental statutes. They involve the initiation of or intervention in proceedings in a variety of forums, judicial and administrative, state and federal.

The following are significant cases in which the Division was involved during fiscal year 1983.

#### A. Significant Cases

*Commonwealth of Massachusetts v. James G. Watt, Secretary of the Interior, and the United States Department of the Interior*

On March 2, 1983, the Commonwealth of Massachusetts filed suit in U.S. District Court against Secretary of the Interior James Watt, challenging the proposal to hold an oil and gas lease sale of 488 tracts (the largest sale then attempted) in the George's Bank region of the North Atlantic. This area contains one of the richest fishing grounds in the world. Most of those who fish there are from Massachusetts ports such as Gloucester and New Bedford. The lease sale was scheduled for March 29.

Because of the significance of the area, the Massachusetts Coastal Zone Management Office, over the course of two administrations, had sought to have the Interior Department delete a number of tracts important to the fishery. When negotiations on this issue broke down, the suit was filed.

On March 28, 1983, the federal court issued a preliminary injunction halting the lease sale. The Department of the Interior and nine oil companies appealed to the Court of Appeals for the First Circuit. Oral argument was heard on June 6, 1983, and the case is now awaiting decision.

*D.E.Q.E. v. Charles George Land Reclamation Trust*

The Division brought a petition for contempt in November of 1982 because of the defendant's failure to comply with terms of a 1981 Agreement for Judgment, including the performance of a ground water study and proper maintenance of the landfill. After trial was scheduled, negotiations produced an agreed-to judicial order under which the Trust paid \$170,000 into an escrow account administered by the Division for a study, hazardous waste clean-up, and guarantees on drinking water for nearby residents. When it became clear that the defendant was exceeding its daily tonnage-intake limits, the Division returned to court. The defendant then filed a bankruptcy petition. Working with the U.S. Trustee's office, the Division succeeded in having the bankruptcy petition dismissed. Because of the way the defendant operated the landfill during the bankruptcy proceedings, the Division sought and obtained a state court order closing the landfill.

*Commonwealth v. Newtown Refining Corporation, et al.*

As a result of negotiations, the defendants in this action have begun a clean-up of a 3.6 acre site located in Palmer. The first phase of the clean-up includes removal and proper disposal of more than 450,000 gallons of liquid waste, waste oil and sludge contaminated by hazardous substances which are contained in 18 above-ground bulk storage tanks and in dikes surrounding the tank area. Clean-up will also involve decontamination of the tanks, dikes and equipment located on the site. The projected cost of this first phase of the clean-up is approximately \$750,000; the projected completion date is September 15, 1983.

*Commonwealth v. Cannons Engineering Corp.*

The defendant had disposed of hazardous waste at several sites in southeastern Massachusetts. At the beginning of the year, several of its principals had pleaded guilty to crimes arising out of their activities, and the business was in receivership. The Division amended its original complaint to include other land-owners and obtained attachments on a number of pieces of property. At the same time, individual defendants attempted to remove the waste from one of the sites without complying with state laws and regulations. The Division obtained, first, a temporary restraining order preventing the removal, and, second, a preliminary injunction requiring the lawful removal of the waste. Subsequently, an agreement among the Commonwealth, EPA and several responsible parties was reached. It provided for clean up and reimbursement to the Commonwealth of the \$75,000 it had already spent at one of the sites.

*D.E.Q.E. v. Rocco*

The defendant in this case operates a large landfill, which the Department concluded was leaching chemicals into the groundwater. When the Division received that information, a preliminary injunction was obtained shutting the landfill.

*Town of Warren v. The Hazardous Waste Facility Site Safety Council, et al.*

This case, filed by the Town of Warren in January, 1982, was the first attack on the constitutionality of the Commonwealth's Hazardous Waste Facility Siting Act, G.L. c.21D. It also involves several claims of procedural error in connection with the preliminary review of a proposal to site a hazardous waste treatment facility in the Town. The Superior Court decided the case in favor of the defendant state agencies on all counts. The decision upheld the Act against claims that it violates the Home Rule Amendment of the State Constitution and unlawfully delegates legislative power to the Siting Council and private developers and invalidated certain by-laws adopted by the Town of Warren which would have excluded the proposed facility from the Town. The Town appealed the Superior Court's decision and the Supreme Judicial Court has decided to hear the case without intervening review by the Appeals Court. The matter has been briefed and the S.J.C. will hear argument in the fall of 1983.

*Department of Environment Quality  
Engineering v. Town of Hingham*

In 1979 Hingham began to reroute a brook in violation of the Wetlands Protection Act, asserting that it was exempted by a clause excluding from the Act "any project authorized by special act before 1973"; a 1933 special act had authorized the selectmen to improve waterways. The Division filed suit, and the Superior Court held that the work was subject to the Act. Hingham appealed to the Appeals Court, which affirmed the trial court's judgment. The case is important to the Department not only because of the need to protect the particular wetland involved, but also because several other municipalities have asserted that they are exempt from the Act under special acts similar to Hingham's.

*Bowers v. Brownwell*

Summary judgment was granted to the defendant Department of Environmental Management in this case, in which the plaintiff challenged a restriction on his property under the Wetlands Restriction Act, G.L. c.131, § 40A. This was the first defense of a restriction of a coastal wetland and required a great deal of time and several court hearings. Because of these factors and because the plaintiff's answers at a deposition directly contradicted the allegations of the complaint, the Division submitted a bill for costs (expert witness fees and the deposition) after the superior court had awarded costs. The plaintiff appealed the award of these costs, and the Appeals Court affirmed the award.

*Department of Environmental Quality  
Engineering (DEQE) v. Town of Marshfield*

The Division brought this suit for injunctive relief against the Town of Marshfield to require restoration of a dune area which was extensively damaged during construction of a Town's sewer project. The Town impleaded its sewer contractor as a third-party defendant. The Division alleged that the Town had violated the terms of an Order of Conditions issued under the Wetlands Protection Act, G.L. c.131 § 40, and had breached the terms of a Grant Agreement with the state which provided funding for the sewer project. Following a trial, the Superior Court on January 7, 1983, ordered the Town and its contractor to restore the dunes to their original conditions. The contractor has appealed the case to the Court of Appeals.

*Pesticide Hearing*

The Division represented the Pesticide Board of the Division of Food and Agriculture in a hearing challenging an administrative order. The applicator, which had placed a rodenticide in an area accessible to the public and where a small child handled and perhaps ingested the rodenticide, presented experts from four states and from its national trade association in an effort to obtain a narrow construction of the terms of the labeling requirements concerning placement of the rodenticide. At the conclusion of the hearing the issue was resolved in a consent order by which the applicator agreed not to place rodenticide in the area. The Board did not narrow its construction of the requirements.

*Commonwealth of Massachusetts v. Banda of Mass., Inc.*

This case alleged that the defendant had, over a nine-year period, periodically discharged concentrated chemical solutions and routinely discharged process water containing toxic metals into the MDC sewerage system in violation of MDC regulations. The Division negotiated an agreement, filed in Suffolk Superior Court, that sets a schedule for design and installation of a wastewater pretreatment system for metals, prohibits the discharge of concentrated chemicals, and calls for payment of a \$20,000 civil penalty.

*Bellotti v. N.R.C.*

In January 1982, the Nuclear Regulatory Commission imposed a large fine on Boston Edison Company because of the company's violation of Commission regulations. The Commission also required revision of the company's management structure to avoid future violations. The Division moved to intervene in the proceeding concerning management changes. The Commission took no action, and the Division sued in the Federal District Court for the District of Columbia to force it to do so. In response, the NRC denied the petition to intervene. The denial was challenged in the Court of Appeals for the District of Columbia circuit on the grounds that it violated public intervention and hearing rights under the Atomic Energy Act. The case has been argued and is under submission.

*Seabrook Operating License Proceeding*

In September 1982, the Nuclear Regulatory Commission's Atomic Safety and Licensing Board denied the Division's petition to intervene in the operating license proceeding for the Seabrook Nuclear Power Station in Seabrook, New Hampshire. The Division had requested an opportunity to participate in the licensing proceeding on questions relating to the feasibility of safely evacuating or otherwise protecting Massachusetts citizens within the zone of danger surrounding the Seabrook site in the event of a radiological emergency, including those citizens who frequent the New Hampshire beaches within five miles of the site. In denying the petition, the Board ruled that these issues could not be raised in the proceeding until off-site emergency plans were prepared and submitted to the NRC. Off-site plans for the State of New Hampshire and New Hampshire communities within ten miles of the site were submitted to the Board during the summer of 1983 and the Division has recently been admitted as a full party to the proceeding in connection with these issues.

In hearings held by the Board relative to the accuracy of an evacuation time study conducted by the Applicants, the Division participated as an "interested state", presenting expert testimony that the evacuation study is inaccurate and fails to provide information essential to both emergency planners and decision-makers. No decision has yet been rendered.



## B. *Billboard Settlements*

During the year the Division reached comprehensive agreements with several outdoor advertising companies, thereby securing the removal of hundreds of billboards and setting the regulatory program on a sound footing for the coming years.

### *Ackerley Communications of Massachusetts, Inc. v. Outdoor Advertising Board*

Ackerley Communications will remove approximately 250 billboards and pay the state \$260,000 as a result of a consent judgment signed by the members of the Outdoor Advertising Board (OAB) and filed in Superior Court on September 2, 1982. The judgment settles all outstanding disputes between the OAB and the billboard firm, including 39 lawsuits and more than 200 administrative hearings. The lawsuits involved billboards in more than 30 cities and towns located in central and eastern Massachusetts.

### *Maurice E. Callahan & Sons, Inc. v. Outdoor Advertising Board*

Within one year Callahan & Sons will remove 34 billboards, waiving compensation of approximately \$200,000 under the Federal Highway Beautification Act, as a result of a consent judgment filed with the Superior Court on February 24, 1983. The judgment resolves six superior court civil actions and approximately 40 administrative hearings pending before the OAB. Callahan & Sons is located in Pittsfield and all of the billboards scheduled for removal are located in Berkshire Country.

### *Finney Outdoor Advertising Corp. v. Outdoor Advertising Board*

Within one year Finney will remove 20 billboards, waiving compensation of approximately \$50,000 under the Federal Highway Beautification Act, as a result of a consent judgment filed with the Superior Court on May 26, 1983. The judgment resolves three superior court civil actions and approximately twenty administrative hearings pending before the OAB. Finney is located in Fall River and all of the billboards scheduled for removal are located in Fall River and Dartmouth.

## **INSURANCE DIVISION**

The Insurance Division represents the interests of Massachusetts citizens who purchase insurance. Division attorneys intervene in administrative hearings relating to insurance companies' requests for rate increases and also brings affirmative litigation on behalf of victims of unfair and deceptive insurance practices, fraud, and other illegal insurance activities. As a result of the Division's reconcentration in both areas, Massachusetts consumers were saved over one hundred ninety million dollars (\$190,000,000) in fiscal year 1983.

## A. *Administrative Hearings*

### 1. *Automobile Insurance*

In the fall of 1982, the Insurance Division intervened in a major administrative hearing relating to a requested 220 million dollar (19.6%) insurance rate request. Although many issues were scrutinized in the protracted hearing, the Division persuaded the Insurance Commissioner to adopt a new method of calculating the after tax investment income of insurance companies. As a result, the decision permitted only a 35 million dollar (3%) rate increase. On appeal, the Supreme Judicial Court upheld the Commissioner's decision which was based in great part upon evidence presented by the Division and its expert witnesses.

### 2. *Blue Cross/Blue Shield (Non-Group)*

The Division intervened in opposition to a 22% rate increase request filed on behalf of Blue Cross/Blue Shield in connection with non-group health insurance subscribers. Following an administrative hearing, the Insurance Commissioner approved a 19.5% rate increase.

### 3. *Blue Cross/Blue Shield - Medex*

Early in 1983, Blue Cross/Blue Shield filed for a 29% insurance rate increase on its Medex coverage. Medex is a supplement to social security's medicare coverage purchased primarily by senior citizens. In the course of the Division's involvement in the discovery and the hearing phases, Blue Cross reduced its rate increase request to 22.3%. Despite continued opposition from the Division, the rate increase request was granted by a hearing officer. Notwithstanding a further appeal of that decision to the Commissioner, the decision was upheld and no further appeal was taken.

### 4. *Automobile Insurance Competition*

The Division intervened in a hearing called by the Insurance Commissioner to review the method of establishing automobile insurance rates for 1984. The Division argued successfully to the Commissioner that the automobile insurance market in the Commonwealth of Massachusetts was not currently suitable for competitively setting insurance premiums. Expert testimony was presented concerning certain reforms which are prerequisites to any change in the current fix and establish system.

During the spring, the Division was involved in extensive negotiations with the industry and representatives from the Commissioner's office concerning the method used to establish territories for automobile insurance rates. Most of the issues were resolved to the Division's satisfaction. The Division participated in a hearing this past summer on the unresolved issues. A decision by the Commissioner is pending.

### 5. *Insurance Premium Finance Board*

The Division requested that the Insurance Premium Finance Board call a hearing to review interest rates charged to insurance consumers who choose to finance the payment of their premiums. Current interest rates charged to many consumers run as high as 21% and the Division has requested a reduction to the 15% level. The hearing is in process at the time this report is being prepared.

### B. *Affirmative Litigation*

#### 1. *Tax-Deferred Annuities*

The Division has continued a major effort undertaken in the past to represent Massachusetts consumers who have invested in certain annuity concepts which have failed for one reason or another. One effort involves litigation against a number of major companies which promised that their annuity products would provide tax deferral when, in fact, the Internal Revenue Service has denied this preferred tax treatment to the purchasers of these annuities.

Another major area of concern involves the employees of the City of Boston who have participated in a municipal deferred compensation plan after being promised various rates of return. An investigation by the Division in cooperation with the City Treasurer's Office revealed that insurance companies failed to invest these funds as promised. Restitution agreements have been reached with several of the companies involved.

The third major annuity matter involves several pending actions which seek damages from securities dealers who failed to properly disclose the risks of purchasing high yielding annuities from the now defunct Baldwin-United Insurance Company.

#### 2. *Group Health Insurance*

Division attorneys have also concentrated their affirmative litigation efforts in the field of group health insurance plans where employers failed to provide the promised insurance coverage as a result of failure to properly remit insurance premiums to the carriers involved. The Division has obtained attachments when necessary to secure restitution and continues to aggressively police this area of the insurance market.

#### 3. *Senior Citizens - Insurance*

In addition to opposing excessive rate increases for Medex (the medicare supplement insurance policy) the Division's litigation emphasizes matters involving abuse of senior citizens. A recently settled case closed down a counseling service operated by a man who misrepresented to senior citizens in Western Massachusetts that he was connected with the American Association of Retired Persons. Further, the Division continues to operate a Senior Citizens Speaker's Bureau wherein Division attorneys and other personnel meet with senior citizens groups to inform them about insurance policies and practices which are important to them.

### C. *Legislation*

The Division continues to actively assist legislators, the public, and administrators in the drafting of legislation involving automobile insurance reform, sex discrimination in insurance and group health insurance.

## PUBLIC CHARITIES DIVISION

The Division of Public Charities was established pursuant to G.L. c.12, §8B. Its activities fall into three main areas: (1) affirmative litigation aimed at protecting the public generally from misapplications of charitable funds and from fraudulent or deceptive solicitation; (2) participation in estates and trusts in which there is a charitable interest; and (3) various administrative functions mandated by G.L. c.12, §8F, and G.L. c.68, §§19, 21 and 23.

### A. *Affirmative Litigation*

#### 1. *Registration and Audit Enforcement*

The Division continues to actively enforce the requirements that public charities register and file periodic financial reports as imposed by G.L. c.12, §8F, and G.L. c.68, §19. In addition, it has expanded its audit enforcement program so that currently every report received by the Division is examined to see whether an audit is included if required. The registration and audit requirements are key elements of the Division's efforts to insure accountability for charitable funds. In connection with these efforts eleven separate lawsuits were brought during the fiscal year.

In addition the Division obtained audits, without the need of litigation from over 500 organizations which had initially failed to provide them.

#### 2. *Boiler Rooms and Ad Books*

In the last few years the Division has received increasing numbers of complaints from the public concerning telephone solicitations. Typically these complaints involve for-profit businesses which solicit small businessmen to purchase advertising in an organization's year book. Violations include failure to register and post bond as required by G.L. c.68, §23, excessive compensation usually in the range of 65-85% and deceptive sales presentations. Certain of these solicitations were made in 1982-83 on behalf of police groups with solicitors suggesting that donations would result in favored treatment from police on parking and traffic violations. In addition the Division has been investigating alleged violations of judgments entered in prior years.

#### 3. *Charitable Gambling*

On August 1, 1982, the Attorney General's Regulations Governing Raffles, 940 CMR 12.00, and Regulations Governing Bazaars, 940 CMR 13.00, became effective. These regulations represented a comprehensive approach to the problems of

charitable gambling sponsored by charitable organizations as fundraising devices under G.L. c.271, §7A. The Regulations were formulated after several years of enforcement experience, a public hearing and an intensive study. The Division disseminated the regulations by mailing copies to all town and city clerks and to all police departments in the Commonwealth. In addition, on September 22, 1982, the Division hosted a Law Enforcement Conference on Charitable Gambling. Over 150 police chiefs and other representatives from police departments were in attendance. Two panels made presentations. The first panel aimed at familiarizing the participants with the charitable gambling regulations. It consisted of representatives from the Massachusetts State Lottery Commission and from the Division. The second panel focused on local and regional law enforcement.

While the Regulations greatly aided the enforcement efforts of the Division in obtaining compliance with the provision of G.L. c.271, §7A, which only permits members to promote or operate the event, there was a need for the Division to continue its enforcement efforts against suppliers of casino equipment who provide paid dealers. In this connection cases were filed against three suppliers of casino equipment. Consent Judgments were obtained in each instance.

In addition the Division has enacted a program of monitoring these judgments and those entered in prior years for compliance. As a result of this program two contempt actions were filed in June of 1983 against casino equipment suppliers for violations of their consent judgments.

The Regulations limited organizations to two Las Vegas type events per year. This limit was imposed in part to address the problem of "standing casinos", i.e., places that were utilized for Las Vegas type activities virtually every night of the week. With the help of Bureau investigators, the Division instituted a program to monitor function facilities and organizations for violations. When a violation of the rule was discovered, a letter of assurance of future compliance was required from the sponsoring organization. In connection with this program there were numerous investigations and eighteen compliance letters were obtained.

The raffle regulations were instrumental in informing sponsoring organizations about how to conduct a raffle and in providing an effective way to approach mis-managed raffles. To obtain enforcement of its regulations the Division negotiated settlements with four organizations to obtain compliance with the regulations and fair treatment for purchasers of raffle tickets.

#### 4. *Constitutional Litigation*

##### *Planned Parenthood League of Mass. v. Bellotti*

In this action the Planned Parenthood League of Massachusetts (PPLM) seeks a declaratory judgment that G.L. c.68, §28 is unconstitutional. The challenged section prohibits charitable organizations from using paid telephone operators to solicit contributions where the operators' principal duties are such solicitation. After a trial based on stipulated facts, the Superior Court declared §28 unconstitutional. An appeal was taken, the Supreme Judicial Court granted direct appellate review, and the issue is being briefed. The Division is defending §28 as a regulation of speech in a private forum aimed at protecting the privacy rights of telephone subscribers.

*Bellotti v. OSC Corporation*

The Division brought an action to enforce compliance with G.L. c.68, §§21 and 23 which require that Professional Solicitors register with the Division, file an annual bond in the amount of \$10,000, submit copies of their contracts with charitable organizations and limit their compensation to 15% of the monies collected on behalf of the charity. OSC Corporation has counterclaimed asserting that these sections are unconstitutional because they burden solicitors and thus burden a charity's ability to solicit funds. The Division has argued that such accountability and limits on compensation serve to protect the charity from overreaching by the solicitor, that such regulation does not affect speech and that limits on percentage compensation are a valid regulation of professional fiduciaries.

*Bellotti v. International Marathons Inc.*

Marshall Medoff, the president and sole shareholder of International Marathons Inc. (IMI), alleged that he had a contract with the Boston Athletic Association to be sole agent for the selling of sponsorship rights for the Boston Marathon. The Division sued IMI for violating G.L. c.68, §21, which limits a solicitor's compensation to 15% of the monies received and G.L. c.68, §23 which requires solicitors to register and become bonded. Medoff countered that §21 is unconstitutional as it limits the speech rights of charities. The case is now before the Supreme Judicial Court on an interlocutory appeal of a preliminary injunction. The appeal raises the issue of the constitutionality of the challenged section.

*Bellotti v. International Marathons, Inc. et al.**Boston Athletic Association v. International Marathons, Inc., and International Marathons, Inc. v. Bellotti*

These related cases arise from a disputed contract for the solicitation of contributions for the Boston Marathon by Marshall Medoff's IMI. After the Director of the Division of Public Charities disapproved the contract between the Boston Athletic Association (BAA) and IMI as violative of the 15% compensation limitation imposed by G.L. c.68, §21, the BAA and the Division filed two lawsuits in Suffolk Superior Court. The contract provided that IMI would remit \$400,000 annually to the BAA and retain the balance of solicited funds as compensation. For 1981 the amount retained exceeded \$300,000. The court imposed a preliminary injunction which effectively froze the funds solicited by IMI. IMI appealed from the entry of the injunction. The appeal is now pending before the Supreme Judicial Court. The Attorney General sought to require Medoff to register and to post a bond in accordance with G.L. c.68, §23. The BAA alleged that the contract was not authorized by the Board of Governors and was void *ab initio* and further alleged that the contract violated the 15% limitation of G.L. c.68, §21. Subsequently, 10 days of administrative hearings were held before the Chief of the Public Protection Bureau, who affirmed the disapproval of the contract. IMI appealed to the Superior Court pursuant to c.30A. The Court upheld the decision rendered in the administrative proceeding. On cross motions for summary judgment, the Superior Court ruled that the contract was void *ab initio* and the issue of damages is now before the court.

### 5. *Dissolutions*

The Division continues its efforts to dissolve inactive charitable organizations. This involves legal proceedings and investigations to discover any corporate assets. In fiscal year 1983 involuntary dissolution petitions were filed against twenty-nine organizations.

In addition, organizations may dissolve voluntarily by filing an action against the Attorney General. While the division assents to most dissolutions, it is necessary in each case to be sure that there has been a proper disposition of assets. During the past year the division has been involved in forty-two separate dissolutions.

### 6. *Miscellaneous*

#### *Commonwealth v. Columbo d/b/a Life Science Church*

The Division sued to enjoin false and deceptive advertisement of mail order ministries which were alleged to reduce tax obligations by 50-100%. We obtained an injunction against further misrepresentations. Defendants filed a motion to dismiss the case based on claims the action could not be maintained without violating their First Amendment rights of free speech and free exercise of religion. The Superior Court denied their motion stating those assertions were "clearly facially fraudulent." Subsequently during depositions, defendants refused to produce documents such as church financial records and lists of consumers who purchased the scheme. A Motion to Compel was argued and the court ordered production. In addition, as a result of the leads supplied to the Internal Revenue Service on the case regarding the organizers, a New England Revenue task force was formed which has recovered over \$1.5 million. Although no trial has yet occurred, the scheme appears to have terminated.

#### *Bellotti v. Silver et al.*

A trial was held to determine whether under Massachusetts law it is legal to sell a charity between private parties. The suit also seeks recovery of the charitable assets diverted to private use as result of the sale. No decision has yet been rendered.

#### *Commonwealth v. Aurora, Inc.*

#### *Commonwealth v. Turning Point Enterprises*

The Division sued the Turning Point Enterprises, and Aurora, Inc., both mental health service providers in separate actions alleging false claims for reimbursement and seeking restitution and registration with the Division of Public Charities. After considerable negotiation the defendants entered into a consent judgment agreeing to the relief requested.

## B. *Participating in Estates and Trusts with Charitable Interests*

By statute, the Attorney General is an interested party in the probate of each estate in which there is a charitable interest. This year, 1,840 new wills were received. Each of these wills was reviewed and it was determined that the Department had an interest in 1,564 of these estates.

In addition, the Division approved 98 petitions for the sale of real estate and 21 petitions for appointment of trustees and was involved in 289 miscellaneous probate legal actions.

The Division has continued its efforts to review old probate matters in order to close files where no further action is required and to investigate estates and trusts where additional accountings are required but have not been received by the Division. In fiscal year 1983, 168 estates had been reviewed and closed. At the completion of this effort only active cases will remain in the files and as a result, the monitoring of such cases by the Division will be more effective.

In addition to these routine matters, the Division handled 255 actions on cases in litigation. The most significant cases in this area are as follows.

### *Estate of Edwin A. Phillips*

The Division initiated court proceedings to determine whether distributions from a \$4,000,000 trust over a 19-year period are improper. The Division alleged self-dealing in that the distributions were paid to the trustees' own institutions. Trial is expected to commence in November 1983.

### *Estate of Enoch Cobb*

This case involves a neglected land trust for the benefit of the Town of Barnstable's educational system. The Division had previously filed a complaint to break the nominal rent leases and obtained the relief requested. A subsequent complaint was filed regarding fair market value leases, which resulted in negotiated settlements so the trust now has over \$500,000 and will ultimately have over \$1,000,000 in cash in addition to land. Distributions are now being made upon application to the trustees for school items cut out of the school budget as a result of Proposition 2½.

## C. *Administrative Functions*

The Division has numerous administrative and routine responsibilities including: (1) Receiving annual financial statements from nearly 12,000 charities operating in Massachusetts and maintaining these as public records; (2) administering the state's charitable solicitation act (G.L. c.68, §§18-33); (3) registering and regulating professional solicitors and professional fund-raising counsel; and (4) representing the State Treasurer in the public administration of estates escheating to the Commonwealth.



### *Annual Registrations under G.L. c.12, §8F*

The Division has completed the process of computerizing registration information. This together with an increased level of enforcement has resulted in a dramatic increase in registrations over fiscal year 1981. This year 1,330 new charitable organizations' Articles of Organization received from the Secretary of State's Office were reviewed, determined to be charitable and entered on the computer. This generated a total of \$202,330 in registration fees.

After many years of effort, the nationwide plan to achieve uniform reporting for charitable organizations has become a reality. All states will now accept the revised Internal Revenue Service form 990 together with certain supplementary schedules. It is hoped that this development will substantially ease the burden on charitable organizations imposed by state reporting requirements.

### *Regulation of Charitable Solicitations*

Under G.L. c.68, §19, every charitable organization soliciting funds from the public in Massachusetts must apply to the Division for a Certificate of Registration. Each such application must be reviewed for compliance with the statutory requirements. For the period from July 1, 1982 to June 30, 1983, 1,625 applications were received. Certificate fees received were \$16,250.

### *Registration of Professional and Fund-Raising Counsel*

Under G.L. c.68, §§21 and 23, all persons acting as solicitors or fund-raising counsel for soliciting organizations in Massachusetts must register with the Division and file a bond. This year a new monitoring program was instituted in coordination with the Form PC filing which requires charitable organizations to list their professional fundraisers. Each registration and each professional solicitation contract must be approved by the Director to determine if it meets statutory requirements. During the fiscal year ending June 30, 1983, 80 registrations were received and approved and total fees were \$800. This was an increase of 36 from the previous year.

### *Public Administration*

The division represents the State Treasurer in the public administration of intestate estates where the decedent had no heirs. Such estates escheat to the Commonwealth. The following table represents activity in this area.

New Estates	118
Estates Closed	146
With Escheat	58
Without Escheat	88
Total Amount of Escheats Received —	\$293,243.03

## UTILITIES DIVISION

### A. *Introduction*

The Public Utilities Division has advocated for consumers in utility matters, pursuant to G.L. c.12, §11E, since 1973 and continues as the major and, in most instances, the only representation of consumer interests in gas, electric and telephone rate cases and related matters affecting Massachusetts residents. These matters are heard and decided by the Department of Public Utilities (D.P.U.) and the Energy Facilities Siting Council (E.F.S.C.). During fiscal year 1983, the budget allocated to the Utilities Division pursuant to G.L. c.6A, §9A remained at \$250,000. This sum reflects an assessment against the utilities necessary to maintain effective consumer advocacy by the Division.<sup>3</sup>

A priority of the Division is to advocate for an increase in this assessment. Given the current funding level, the Division was not able to present expert testimony in most D.P.U. cases, and was able to intervene in only one Federal Energy Regulatory Commission proceeding. It is hoped that the Legislature will grant the increase to \$500,000 as requested and that those funds will be available in fiscal year 1984.

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### B. *Boston Gas Company*

The D.P.U.'s investigation of the gas crisis of 1981 ended in 1982 without any finding of liability. In October of 1982, the D.P.U. found that its twenty-one month investigation showed the need for still further hearings to determine if any gas company (except North Attleboro and Blackstone) acted imprudently and thus incurred costs which should not be the ultimate responsibility of its ratepayers. The Utilities Division intervened in the adjudicatory proceedings of each company. A major commitment of resources was made to the cases of Boston Gas Company and the Cape Cod and Lowell Gas Companies, the three companies which actually had a gas shortage of crisis proportion. By the end of the fiscal year, only the case of Boston Gas Company had reached the end of adjudicatory hearings. The Utilities Division argued that beginning in 1981 and continuing throughout 1982 and 1983 a series of unreasonable and imprudent actions by Boston Gas resulted in the supply crisis experienced in January, 1981. Consequently, the Division urged that none of the \$46 million in emergency gas costs should be paid for by the company's customers. Phase II of the adjudicatory hearings for Cape Cod and Lowell has not yet begun.

<sup>3</sup> It is interesting to note that for rate cases and related matters decided in 1982 the total expenditure by utility companies for legal expenses was \$3,155,137.

### C. *Montaup Electric Company*

In only the second case ever litigated by the Attorney General before the Federal Energy Regulatory Commission (FERC) *Montaup Electric Company*, which sells power to the Eastern Edison Company in southeastern Massachusetts, filed for \$15 million in additional rates. The filing was highly controversial because it requested that "construction work in progress" (CWIP) be included in the rate base and that the company be allowed to recover its total of \$11 million investment in the now-abandoned Pilgrim II Project. The Division has strenuously opposed both proposals.

### D. *Rate Cases*

During the fiscal year, the Utilities Division intervened in each of the 18 gas and electric general base rate cases before the Department of Public Utilities (D.P.U.), and in two wholesale rate increase cases filed with the Federal Energy Regulatory Commission (F.E.R.C.). Approximately \$300 million in rate increases was requested by the companies. In those 12 cases decided at this writing, \$147 million has been granted out of \$282 million requested, resulting in a saving to the consumer of \$135 million from the activities of this Division.

It should be noted that the Department of the Attorney General has no control over the scheduling of rate cases. Companies may file for rate increases annually and many do so. The D.P.U. and F.E.R.C. set the schedule based on the timing of these filings. For the D.P.U. proceedings there is a six-month statutory time limit during which each rate case must be heard and decided; this time limit imposes considerable strain on the limited resources of the Division. The Utilities Division staff reviews requested increases with a critical eye. It examines profit margins, operation and maintenance expenses, property taxes, depreciation, utility plant in service, rate design and quality of service. Though a review of prefiled documents, cross-examination of companies' witnesses and, when funds are available, sponsoring expert witnesses, the Utilities Division is able to formulate independent recommendations for the rate increases which should be granted. In D.P.U. cases, the factual basis for allowing rates less than those requested by a utility is developed almost entirely by the Utilities Division.

A particularly good example of effective rate case work was *Bay State Gas Company*. The company had sought to increase its rates by \$22,948,200. The Division moved to dismiss the case based on the belief that the company had failed to make a *prima facie* case for a rate increase. Although the D.P.U. denied this motion, the Division went on to analyze the company's filing, cross-examined company witnesses, made a detailed study of the proposed rate schedules and recommended that the company receive a decrease of \$1,250,912.

Issues of significance touched on during the hearings and briefing periods were advertising expenses, accounting treatment of non-utility expenses, the effects of non-utility operations' losses on utility operations, treatment of interruptible gas profits and merger expenses.

The D.P.U. issued its rate order on November 30, 1982, allowing *Bay State* a rate increase of only \$4,232,801. The D.P.U. adopted the Division's recommendations in most of the above-mentioned significant areas. After several

recalculation hearings, held at the request of the Division a final order was issued reducing the original award and allowing the Company only \$2,160,847. This final order superseded the earlier orders and illustrates a hard-fought victory for ratepayers.

### *E. Appeals of Rate Cases*

Any appeal of a Department of Public Utilities' rate case decision is heard by the Supreme Judicial Court of Massachusetts. At this writing, three appeals taken by the Utilities Division are pending before the Court.

#### *1. Boston Edison Company*

The Utilities Division appealed this case to oppose the pass-through to ratepayers of the costs of the abandoned Pilgrim II nuclear power plant at Plymouth. The Division has been opposing the construction of this plant since 1977, on the grounds that it was unnecessary to provide power and that it was an undue financial burden on the company. This appeal was briefed and argued in the spring of 1983, and a decision is expected shortly.

#### *2. Fitchburg Gas & Electric Light Company*

The Department of Public Utilities awarded the Company \$2.3 of a requested \$3.4 million rate increase. While the decision was favorable to residential ratepayers on the issues of cost of service and rate design, the rate of return allowance given the Company was higher than the Division believed was merited. More importantly, the Utilities Division believed that the Department failed to distinguish between the gas and electric operations of the Company in determining the cost of equity, to the detriment of the gas consumers of the Fitchburg service territory. This appeal will be briefed and argued in the fall of 1983.

#### *3. Boston Gas Company*

This case has been appealed because the Utilities Division had vigorously opposed the allowance in base rates of the Boston Gas Company's legal fees and advertising expenses associated with the D.P.U.'s investigation of the gas crisis.

### *F. Electric Fuel Clause Intervention*

During the fiscal year, the Utilities Division intervened in all of Boston Edison Company's and Western Massachusetts Electric Company's fuel adjustment clause cases. The Division investigated such issues as the management of a nuclear outage; fuel procurement practices; the obligation of a utility to pay interest to ratepayers on fuel cost overcollection; and other matters to insure that these utilities only pass through to ratepayers the lowest reasonable fuel costs.

The Division also selectively intervened in the fuel adjustment clause cases of other utilities. In one such case, the Division argued that Commonwealth Electric's customers should not have to bear the costs associated with an imprudently prolonged outage at Pilgrim I. The D.P.U. had already disallowed Boston Edison similar costs in another case, but it remained unclear whether a company which did not operate a unit could be penalized for the operating company's mismanagement. The D.P.U. agreed with the Division's argument and ordered that \$555,513 plus interest be refunded to Commonwealth Electric's customers. The order established the important precedent that a company with a minority interest in a unit is not absolved of responsibility for that unit's proper management. The company appealed this decision to the Supreme Judicial Court.

### *G. Performance Programs Standards*

The new law governing electric fuel costs pass throughs allows the Department of Public Utilities and the Attorney General to question the efficiency with which electric plants are run, and to reduce electric utilities' fuel adjustment charges if inefficiency is found.

In G.L. c. 164, § 94G, the Legislature directed the D.P.U. to institute a unit-by-unit performance program for all Massachusetts utilities. The program establishes goals in areas such as heat rate, unit availability and forced outage rates. In these hearings, the Division argued against the use of historical average unit performance as basis for goal-setting since that only encourages utilities to live up to past performance, no matter how inefficient. The D.P.U., at the Division's urging, has begun to order companies to file the type of information which would permit rigorous goal-setting by the use of methodology recommended by the Attorney General. The Division is monitoring the performance of those companies for which the D.P.U. has promulgated standards and will intervene in performance review cases during the upcoming fiscal year.

### *H. Heat Rate Audits*

The fuel clause legislation also requires that each electric company file with the D.P.U. the results of an annual heat rate audit on each of its generator units and that all such audits be certified by the D.P.U. Heat rate audits are intended to measure the efficiency of generating units, and are a major tool to reduce fuel costs. In March of 1983, the D.P.U. issued draft heat rate audit regulations following several months of receiving written and oral comments from the Division and the electric utilities. The Utilities Division retained a consultant to help devise proper heat rate audit test specifications and to review the Department's draft regulations. This work will continue in the next fiscal year.

### I. *NASUCA Electric Fuel Charge Survey*

The Utilities Division compiled and distributed to each member of the National Association of State Utility Consumer Advocates (NASUCA), a state by state survey of the activities of each advocate's office in the area of fuel clause litigation. The survey contains useful information, such as state utility commission and court decisions in this area, expert witness referrals, and unique approaches to advocacy.

### J. *Other Case Activities*

The D.P.U. and the Securities & Exchange Commission (S.E.C.) approved the application for approval of a merger between the Manchester Electric Company and the Massachusetts Electric Company. As a result of the merger, Manchester's rates will drop by an average of approximately 15 percent. The Division supported the proposed merger before the D.P.U. The utility's general rate case was dropped as a result of the merger.

### K. *Commonwealth of Massachusetts v. Fitchburg Gas and Electric Light Company*

The Fitchburg Gas and Electric Light Company was sued under G.L. c.93A, the State Consumer Protection Act, for increasing rates for appliance rentals not authorized by existing rental contract with customers. This action was settled by entry of a judgment by agreement enjoining the company from future rental increases under these contracts, requiring increased management oversight of the rental program, and ordering the Company to seek the Attorney General's approval of future rental increase notices prior to issuance.

### L. *Telecommunications*

American Telephone and Telegraph Company (AT&T) is currently in the process of divesting itself of its local Bell Operating Companies, including New England Telephone. This divestiture is occurring pursuant to a settlement agreement with the United States Justice Department, and will cause substantial changes in the structure of the telecommunications industry and in the rates paid by consumers. In addition, the Federal Communications Commission has issued decisions which (1) shift some cost recovery from long-distance rates to local monthly exchange rates, and (2) attempt to preempt state control over depreciation rates and methods.

Anticipating a dramatic impact on consumers, the Utilities Division has been focusing substantial time and effort preparing itself for the tariff filings which will implement the changes. It is expected that New England Telephone will begin to implement the divestiture, through filings at the D.P.U. and the Federal Communications Commission (F.C.C.), in the fall of 1983. The Division will represent consumers in these cases.

### M. *New England Telephone & Telegraph Company*

Joint action was taken by the Utilities Division and the Consumer Protection Division resulting in an order by the D.P.U. requiring New England Telephone to disclose implied warranty rights to customers who purchase single line telephones and to correct any misinformation regarding warranty rights already conveyed through printed materials used in the advertising and sale of these phones.

### N. *New England Telephone Company v. Public Utilities Commission (P.U.C.) of Maine* (Federal District Court, Portland, Maine)

On June, 8, 1983 the Utilities Division submitted a motion for leave to file an *amicus curiae* brief in the above case. The brief will argue that the Federal Court lacks jurisdiction, under the Johnson Act, to hear what amounts to an appeal of a state utilities commission ruling in an intrastate ratemaking proceeding, and that the Communications Act of 1934 reserves intrastate ratemaking to the states. The Utilities Division has taken the extraordinary step of participating in this case because of the effects throughout New England of a ruling adverse to the Maine P.U.C.'s decision.

## VI. SPRINGFIELD OFFICE

The Springfield Office of the Department of the Attorney General continues to be responsible for matters of concern to the Department in the four Western Counties: Hampden, Hampshire, Franklin and Berkshire. As in the past, the primary function of the office has been to handle referrals and requests for assistance from other divisions. Only consumer protection matters originate in the Springfield Office.

In addition to the usual types of cases referred by the various divisions during the fiscal year, the Springfield office also handled Department of Employment Security and Department of Public Welfare criminal prosecutions relating to recipient fraud. Industrial Accident Board Claims hearings in the four western counties are handled by the Springfield Office, and personnel from the office also serve on the Board of Appeal on Motor Vehicle Liability Policies and Bonds.

In addition to the above cases, attorneys in the Springfield Office responded to 53 requests to make court appearances on behalf of the various divisions in Boston. These court appearances ranged from answering calls of the trial list to filing various pleadings and/or arguing various motions before the court.

Attorneys from the Springfield Office frequently appear in court on particular motions but do not handle the entire case. During the course of the year nearly 100 man-hours were spent in court on such matters. The ability of the Springfield Office to respond on short notice to these requests contributes to the efficiency of the Department as a whole because of the savings that result from not having to send an attorney from the Boston Office.

The Public Protection Section of the Springfield Office continues to actively pursue enforcement of consumer protection statutes and regulations. Additionally, the office provided assistance and information to the local consumer groups in the four western counties, aided individual consumers where no local consumer group existed and attorneys from this office appeared on behalf of the Attorney General at six rate setting hearings before the Department of Public Utilities.

Investigators assigned to the Consumer Protection Section conducted numerous investigations of firms or individuals suspected of unfair and deceptive practices. The investigations covered a wide range of businesses including but not limited to automobile sales and service, career schools, employment services, business franchise sales, rental listing firms, advertising practices, investment schemes and firewood sales.

One of the major areas of concern for the Springfield Office in the consumer protection area during the past fiscal year was that of odometer turnbacks. This appears to be a growing problem in the Western Massachusetts area due to the economy and the fact that there are several out of state auto auctions on our borders which deal in high mileage late model cars. The office conducted reviews of the records of new and used car dealerships throughout the four western counties. The investigations entailed a review of dealer record books, odometer statements, warranties and follow-up with the consumers who purchased the automobiles. These investigations resulted in the arrest of a used car dealer for larceny over \$100.00 based on 11 indictments. Additionally, a civil suit was filed seeking to enjoin the defendant from altering odometers and requesting restitution for consumers who purchased vehicles with altered odometers. Investigations into odometer turnbacks continue with more suits to be filed.

During a review of advertisements in local newspapers it was noted that there were widespread violations of the advertising regulations dealing with the advertising of finance rates on new cars. After contacting the dealers who were in violation, the office received 35 letters of agreement from the dealers stating that they would comply with the provisions of the law.

The consumer protection section proceeded with a petition for contempt filed against Nadine Gan for continuing the operation of her investment club and for failing to make disclosures required by a court order for accounting.

After trial in Superior Court, Nadine Gan, who operated the large fraudulent investment scheme, was held in contempt and fined \$100,000. At the height of activity from the winter of 1978 through the Spring of 1981, records obtained from western Massachusetts banks documented that approximately two million dollars had been deposited and withdrawn from these accounts by the defendant.

The court held that Gan had violated a restraining order entered in July, 1981 by continuing to receive money from investors and disbursing assets belonging to investors, when prohibited from doing so. She was held liable for 10 violations and fined the maximum \$10,000 penalty for each. Gan was also found guilty of violating an order for accounting by failing to provide accurate and complete information regarding members in her investment programs.

Apartment listing services generated a number of complaints during the fiscal year. Because of these complaints, the attorney assigned to the Springfield Office public protection section developed and authored Apartment Listing Regulations which have been promulgated as of June, 1983.



There were 104 individual consumer complaints settled between July 1, 1982 and June 30, 1983 resulting in a savings for consumers in the amount of \$16,904.15.

## VII. GOVERNMENT BUREAU

The Government Bureau has four functions: (1) defense of lawsuits against state officials and agencies concerning the legality of governmental operations; (2) initiation of affirmative litigation on behalf of state agencies and the Commonwealth; (3) preparation of Opinions of the Attorney General; and (4) legal review of all newly-enacted municipal by-laws pursuant to G.L. c.40, §32. A report of activity during fiscal year 1983 in each of these areas follows.

### *Defense of State Agencies*

The Government Bureau defends the Commonwealth and its officials and agencies in litigation in state and federal courts, and, in certain cases, before federal administrative agencies. These proceedings typically involve challenges to the validity of governmental decisions, initiatives, regulations, or statutes, and raise important issues of administrative and constitutional law in diverse subject-matter areas.

During fiscal year 1983, the Bureau opened 529 new cases and closed a total of 384 previously active cases. The time spent representing specific agencies cannot be measured simply by the number of new cases. A substantial amount of time is devoted to litigation commenced in earlier fiscal years. For example, as in previous years, substantial resources were devoted to six cases in which consent decrees had previously been entered seeking improvement in the conditions and treatment of residents of state institutions for the retarded and mentally ill.

Representation of certain agencies often involves a significantly larger commitment of time due to the often intense litigation of complex issues of law or fact, although the total number of lawsuits brought against such agencies was relatively small. Also, a substantial amount of time, not fully reflected in the statistics, was spent advising various agencies, particularly the boards of registration, on legal matters which did not always result in litigation. Finally, a trend established in previous years continued during fiscal year 1983 as claims for attorneys' fees under 42 U.S.C. § 1988 mounted to well over \$3 million and required the expenditure of much attorney time.

In fiscal year 1983, the Supreme Court of the United States decided one Bureau case which had been argued during the previous year and chose not to decide another case after first granting review. The first case, *Larkin v. Grendel's Den, Inc.*, involved the constitutionality of a state statute which permitted churches, synagogues, or other houses of worship, as well as schools, to veto the granting of a liquor license to an entity whose licensed premises fell within a 500-foot radius of a church or school. Although the constitutionality of the statute had been upheld previously by one panel of the federal Court of Appeals in the *Grendel's Den* case and by the Massachusetts Supreme Judicial Court in another case, the Supreme Court held that the statute violated the Establishment Clause of the First Amendment because the law allowed a unilateral decision of a church to require the denial of a liquor license.

The second case, actually three related cases (*Boston Firefighters Union v. Boston Chapter, NAACP*, *Boston Police Patrolmen's Ass'n v. Castro*, and *Beecher v. Boston Chapter, NAACP*), raised important issues concerning affirmative action, the power of states to govern their civil service, and the scope of federal court remedial powers. In 1981, the City of Boston decided to lay off hundreds of firefighters and police officers. By statute, Massachusetts requires that civil service layoffs occur in the order of reverse seniority. Minority members of the fire and police forces who had been recently hired pursuant to certain consent decrees sought and obtained an order preventing layoffs in accordance with the statute. The Court of Appeals upheld the order, and the Legislature then enacted the so-called "Tregor Bill" providing Boston with new revenues, requiring it to reinstate the laid-off police officers and firefighters, and securing those persons against future layoffs for fiscal reasons. After first agreeing to review the decisions of the lower courts, and after full briefing and argument, the Supreme Court vacated the judgments and remanded the cases for consideration of mootness in light of the Tregor legislation. Resolution of the substantive issues raised by the lower court orders is thus deferred until another day.

The Government Bureau also filed an *amicus curiae* brief on behalf of the Commonwealth and 23 other states in *Pennhurst State School and Hospital v. Halderman*, a case involving the power of federal courts to issue orders directed at state officers based on state law. The Supreme Court was unable to resolve the difficult constitutional questions during its 1982-83 term, however, and set the case for reargument in the following term.

Government Bureau lawyers argued many cases before the Court of Appeals for the First Circuit which resulted in reported opinions and many concerned important issues of law.<sup>4</sup> In *Costa v. Markey*, the Bureau represented the Personnel Administrator in a case involving physical requirements for public safety positions. The First Circuit reversed its earlier decision and found that the New Bedford Police Department's use of a height requirement in hiring police officers did not violate the Title VII rights of women competing for positions as police officers. The Bureau represented the State Secretary's Securities Division in *Agency Rent-A-Car, Inc. v. Connolly* which involved an appeal from an injunction against the Secretary from enforcing provisions of the Massachusetts takeover statute, G.L. c. 110C, against a tender offeror. The Court of Appeals vacated the injunction, holding that the one-year ban on a bidder's subsequent purchases of target securities imposed pursuant to the disclosure provision of the statute was not preempted by the federal Williams Act. In *Kudish v. Bradley*, the First Circuit upheld the decision of the Board of Registration in Medicine, and held that the Board did not deny due process to a former physician who resigned from the practice of medicine as a result of a criminal plea bargain. The Court held that no due process rights arose in support of the physician's application for reinstatement because his resignation was final.

<sup>4</sup> The Government Bureau briefs and argues many more appeals in the United States Court of Appeals, the Supreme Judicial Court, and the Massachusetts Appeals Court than result in reported decisions. Although briefing and argument of these cases requires the same professional effort as any others, the issues presented in such cases are relatively insignificant or are already settled and, consequently, are disposed of in unreported summary decisions or by rescript opinion. Such cases are not included in the description of the Government Bureau's appellate decisions for this fiscal year.

The Government Bureau represented the Department of Public Welfare in five separate cases decided by the First Circuit this year. In *Ciampa v. Secretary of Health and Human Services*, the Bureau defended the Commissioner of Welfare's implementation of the so-called "Pickle Amendment" to the Social Security Act. The Court decided that the federal regulations implementing the statutory change — and consequently the Commissioner's actions pursuant to the federal regulations — were invalid. The case of *Drysdale v. Spirito* involved the Welfare Commissioner's benefit calculation made under the Aid to Families with Dependent Children (AFDC) program for dependent children living with non-needy caretaker parents. The court considered whether grants to children with caretaker parents who earn some income and are not themselves needy should be enlarged by an amount equal to a portion of the parent's earned income, as is the case where the caretaker parent himself is needy. The Court of Appeals upheld the Commissioner's interpretation. A conflict between the eligibility provisions of the AFDC Act and the Medicaid Act was the subject of *Mass. Association of Older Americans v. Sharp* where the Court resolved matters in favor of the more generous Medicaid provisions. The case of *Fortin v. Commissioner of the Massachusetts Department of Public Welfare* affirmed a district court determination of non-compliance with certain consent decree obligations concerning the timeliness of welfare eligibility decisions. Finally, in *Coalition for Basic Human Needs v. King*, the Court of Appeals awarded attorneys' fees to lawyers who obtained an interlocutory order to require the payment of welfare benefits in July 1981 despite the absence of an appropriation for AFDC at the time.

A considerable portion of the Government Bureau's resources was dedicated in fiscal year 1983 to the litigation of cases in the United States District Court. Among the more active and significant of the many federal district court cases are those involving the following issues: federal regulation of and monies for state foster care programs (*Lynch v. King*); the effect on levels of AFDC benefits of various sources of income (*Silva v. Spirito*); state work requirements (*Rheault v. Spirito*); the role of parents of handicapped and learning disabled children in the residential or educational placement of their children (*Doe v. Anrig*, *Roe v. Milford School Committee*); implementation of consent decrees concerning the state institutions for the mentally retarded (*Massachusetts Association for Retarded Citizens v. Dukakis* and consolidated cases); the Medicaid eligibility of individuals who are the beneficiaries of a transfer of assets (*Robinson v. Spirito*); payments to an organization which provides laboratory services to a hospital (*Danvers Pathology Associates v. Spirito*); and the ability of the state to regulate health care professionals (*Harvey v. Board of Registration in Nursing*).

During the past fiscal year, Government Bureau attorneys were involved in 28 cases decided by the Massachusetts Supreme Judicial Court (SJC). Among them were several significant cases including *Attorney General v. Laffey*, where the Court held that a gubernatorial appointment to the Massachusetts Port Authority may be rescinded by a subsequent governor, pursuant to St. 1964, c.740, §3. In *Debnam v. Town of Belmont*, the SJC held that the existence of a reserve fund in Belmont for emergency expenses did not preclude the municipality from laying off firefighters in response to Proposition 2½ as long as the layoffs were made in good faith, were not a result of political favoritism, and were not arbitrary or capricious.

Government Bureau attorneys represented the Board of Registration in Medicine in three appeals to the SJC from decisions of the Board. For example, in *Feldstein v. Board of Registration in Medicine*, the Court affirmed the Board's decision to revoke a license to practice medicine based on a guilty plea of ten counts of false representation to the Department of Public Welfare for the purpose of extracting Medicaid payments. During fiscal year 1983, Bureau attorneys argued ten tax cases before the SJC. In *Page v. Commissioner of Revenue*, the SJC upheld the Commissioner of Revenue's judgment, that securities held by a foreign trust company on behalf of a Massachusetts resident are intangible property and therefore subject to an estate tax, and that such tax does not violate the fourteenth amendment to the United States Constitution. In *Walter Kidde Co. v. Commissioner of Revenue*, the Court affirmed the Appellate Tax Board's decision that corporations are entitled to apply the investment tax credit of one subsidiary that had incurred a loss for the tax year against the total excise tax owed under the combined return. In *Andover Savings Bank v. Commissioner of Revenue*, the SJC upheld the constitutionality of the bank excise tax levied by G.L. c.63, §11, stating that the income-based portion of the excise tax meets the reasonableness test of the Massachusetts constitution.

Government Bureau lawyers also participated in 24 cases decided in the state Appeals Court. Nine of these cases involved issues of termination of parental rights (e.g. *Petition of the Department of Social Services to Dispense With Consent to Adoption; Adoption and Visitation of a Minor*). Other cases involved personnel and civil service matters (e.g., *Flynn v. Civil Service Commission; Cahill v. Commonwealth*), suspension of licenses (e.g., *Adams v. Department of Health; Stop & Shop Companies, Inc. v. Board of Registration in Pharmacy*), and appeals from the decisions of the Alcoholic Beverages Control Commission (e.g., *Pastene Wine & Spirits Co. v. Alcoholic Beverages Control Commission; New England Liquor Sales Co. v. Alcoholic Beverages Control Commission*).

## AFFIRMATIVE LITIGATION

The Affirmative Litigation Division was established in the Government Bureau to represent the Commonwealth and its officers and agencies when performance of their official duties or protection of their interests require resort to the state or federal courts.

The affirmative litigation cases which the government bureau brings may be divided into four broad, and sometimes over-lapping, categories: (1) advocacy litigation; (2) federal program litigation; (3) enforcement litigation; and (4) quasi-criminal litigation. The first category includes cases commenced on behalf of a state agency with an advocacy responsibility or in the furtherance of an independent obligation to advance the public interest or to protect the interest of the Commonwealth as a sovereign. The second category, litigation related to federal programs, continues to account for a substantial portion of the bureau's affirmative litigation efforts. These cases also tend to be the most significant ones in terms of financial value since federal government programs involve hundreds of millions of dollars due to the Commonwealth and its citizens. In cases of the third category, the bureau performs the traditional enforcement function of the Attorney General by commencing suit on behalf of state regulatory and licensing agen-

cies. The final category, which is rapidly growing in importance, involves suits for civil recovery of funds criminally obtained from state agencies. It serves as a supplement to normal criminal prosecution. The following paragraphs contain brief descriptions of significant or representative cases litigated during the fiscal year.

In *Zelinsky v. Maccario*, the Bureau intervened on behalf of plaintiffs challenging the City of Malden's refusal to allow more than two unrelated mentally retarded women to live together in a group home. The intervention, on behalf of the Department of Mental Health, was designed to further the public policy of mainstreaming retarded citizens by maximizing their opportunity to participate in ordinary life. The case was later settled. In another example of advocacy litigation, the Government Bureau, together with the Consumer Protection Division, has continued its practice of bringing actions against nursing homes and other health care institutions to obtain appointment of receivers to take over their operation.

An example of federal program litigation is *New Mexico, et al. v. Heckler*, an action commenced by the Government Bureau in concert with several other states against the Secretary of Health and Human Services seeking to restrain her from reducing Massachusetts Medicaid reimbursement because of projected excessive error rates. The Secretary has already reduced the Commonwealth's reimbursement by \$1.8 million and intends to make further reductions. The case is now pending in the United States District Court for the District of Columbia.

A case which represents both advocacy and federal program litigation is *Avery v. Heckler* in which the Bureau intervened in a federal district court action on behalf of the Commonwealth, its disabled citizens, and the Department of Public Welfare. The purpose of that intervention is to halt the federal government's policy of forcing the state to use improperly strict rules for reviewing payments of Social Security disability benefits and to require the federal government to halt its practice of ignoring adverse legal precedents. The impact of these practices is felt by the disabled, many of whom have been improperly denied disability benefits due them, and by the Commonwealth which has to pay General Relief to some of those who have been denied such federal benefits. The United States has opposed intervention and the matter is pending in the district court.

As in past years, the Government Bureau brought several lawsuits to enforce the licensure requirements, regulations, and orders of state agencies. For example in *Barresi v. Somerville Engineering*, the Bureau filed an action in superior court to enforce a subpoena issued by the Inspector General as part of an investigation into MDC contracts. Although the defendant had refused to comply with the Inspector General's subpoena, the Bureau obtained a Superior Court order which the defendant did obey, and thus the Inspector General obtained the material he needed to complete his investigation.

Another example of the Bureau's role in enforcing agency rights is a series of lawsuits filed in the Boston Municipal Court on behalf of the Department of Community Affairs against a number of fuel oil dealers who participated in the Department's fuel assistance program which provided low cost heating oil to the poor and elderly. The defendants had received low cost oil from the Department but had not delivered it to qualifying citizens. The suit seeks to compel the dealers to return the undelivered oil or to pay the difference between the price they paid and the fair market value of the oil they received. The Bureau has also assisted

the Department of Revenue's stepped up tax enforcement program by filing several seizure actions. In those cases, the Department on behalf of the Commissioner of Revenue files actions for seizure of the property of businesses with large unpaid state tax bills who have consistently rebuffed other, less drastic efforts at tax collection.

The Bureau has filed three cases in the new quasi-criminal area. Each involves a physician or health care provider who has already been indicted on criminal charges of Medicaid fraud. These quasi-criminal cases are brought under purely civil law provisions of fraud and contract law and seek to have the provider return the money improperly received from the state. These actions are entirely separate from the criminal actions but complement those actions by ensuring that, if convicted, a provider will not only face criminal sanctions, usually jail, but will also be forced to disgorge the fruits of his crime by repaying the money taken. In the only one of the these cases which has been concluded, over \$75,000 was recovered.

## OPINIONS AND BY-LAWS

### A. *Standards for Issuing Opinions*

Section 3 of Chapter 12 of the General Laws authorizes the Attorney General to render legal advice and opinions to state officers, agencies, and departments on matters relating to their official duties. Following in large part the established practice of previous Attorneys General, opinions have been given only to the officials who head state agencies and departments. Opinions are not rendered to individual employees of a state agency; questions posed by county or municipal officials or by private citizens or organizations are not answered.

The questions considered in legal opinions must have an immediate, concrete relation to the official duties of the state officers requesting the opinion. In other words, hypothetical or abstract questions or questions which ask generally about the meaning of a particular statute, lacking a factual underpinning, are not answered. Opinions are not offered on questions raising legal issues which are or soon will be the subject of litigation or concern collective bargaining. Questions relating to the wisdom of legislation or administrative or executive policies are not addressed. Generally federal statutes are not construed and the constitutionality of proposed state or federal legislation is not determined.

### B. *Procedures for Requesting an Opinion*

In an effort to make the opinion rendering function as effective, helpful, and efficient as possible, a number of procedural guidelines to govern opinion requests have been established.

Opinions requests from the heads of state agencies which come under the jurisdiction of a cabinet or executive office must be first sent to the appropriate executive secretary for his or her consideration. If the secretary believes the question raised by a request is one which requires resolution by the Attorney General, the secretary should then request the opinion on behalf of the agency or send the agency's request with the secretary's approval noted.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, are thoroughly researched and prepared. If a question can be resolved more quickly within the agency or executive office, by agency legal counsel or otherwise, everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for this Department to be placed in the midst of an administrative or even legal dispute between these two entities. The rule, therefore, helps to ensure that the agency and its executive office speak with one voice insofar as Opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should accompany the request.

When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations, the Department solicits the views of such other agencies, individuals, or organizations before the opinion is rendered. In this way, significant and relevant considerations are not overlooked.

The issuance of informal opinions is strongly discouraged. Informal opinions are often relied upon as though they were formal opinions, and in a number of instances, this reliance has been seriously misplaced. As a result, the issuance of informal opinions is strictly limited to situations of absolute necessity.

### *C. Opinions Rendered in Fiscal Year 1983*

Approximately 200 requests for opinions of the Attorney General were received during fiscal year 1983. Most of those requests were declined because they originated from private individuals, municipal officials, and other persons or organizations who are not entitled to an opinion, or because they raised questions that were not appropriate for resolution by a formal opinion. Thirteen formal opinions of the Attorney General were rendered in fiscal year 1983, some of which are summarized below.

Two questions arose at the outset of the new administration concerning gubernatorial appointments. In response to a request from the Governor, an opinion was issued concerning the way that the party affiliations of members of the Massachusetts Port Authority are to be determined for purposes of ensuring that no more than four members of the Authority belong to the same political party. In another opinion, the Secretary of the Commonwealth was advised of his duty to issue commissions to gubernatorial appointees and to record those commissions in the Commonwealth's official records.

Two opinions were issued to the Secretary of the Commonwealth concerning public policy questions and referendum petitions to be placed on the ballot. In one opinion, the standards for determining whether questions are ones of "public policy," were described and the Secretary was advised that certain questions were proper policy questions. That opinion also specified the form in which such questions would appear on the ballot. In another opinion, a petition calling for repeal of a law providing a new salary schedule for executive, legislative, and judicial officials was determined not to be a proper subject for a referendum petition.

In another opinion the Treasurer and Receiver General was advised that the issuance and sale of state bonds for the purpose of financing the operations of the Government Land Bank does not violate the credit clause of the Massachusetts Constitution, which provides that the credit of the Commonwealth shall not be given to aid private individuals and organizations.

Two opinions took restrictive views of the powers of state agencies. The Division of Savings Bank Life Insurance was advised that state savings bank life insurance departments have no authority to reinsure risks on group life insurance policies underwritten by a commercial life insurance company, and the Department of Public Utilities was advised that it has no authority to approve or disapprove local board of health regulations restricting the use of herbicides on utility company rights of way.

In other opinions clarifying the responsibilities of state officials, the Commissioner of Education was advised concerning the extent of the Commonwealth's obligation to reimburse local school committees for the cost of transporting children to private schools; and the Secretary of Economic Affairs was advised on the standards to be applied in certifying the eligibility of certain businesses, located in areas of substantial poverty, for favorable tax treatment.

#### *D. By-Laws Reviewed in Fiscal Year 1983*

Town by-laws and city and town home rule charters and amendments are reviewed and must be approved or disapproved by the Attorney General. There were eight charter actions and about 820 by-law submissions reviewed during fiscal year 1983. The 820 submissions constituted a total of 1,800 individual by-laws. Zoning by-laws constituted more than half the total.

As in the previous year, there was a continuing emphasis on controlling radioactive and hazardous waste disposal and time-sharing by means of zoning enactments. The number of general by-laws regulating the use of pesticides and protecting water supplies from contamination increased.

The most common grounds for disapproval of zoning by-laws were procedural defects that occurred before the town meeting vote. The defects were often caused by the failure of planning boards to follow the requirements of the Zoning Act (G.L. c.40A, §5).



August 16, 1982

Number 1.

Robert Q. Crane  
*Treasurer and Receiver General*  
Commonwealth of Massachusetts  
State House  
Boston, Massachusetts 02133

Dear Treasurer Crane:

You have asked my opinion whether Commonwealth bonds and notes may be issued under chapter 212 of the Acts of 1975, an Act Creating a Government Land Bank (hereafter, "the Act"), without violation of Article 62, §1, of the Amendments to the Massachusetts Constitution. Your request is prompted by your duties as state treasurer to issue and sell bonds of the Commonwealth (pursuant to section 8A of the Act), the proceeds of which are used to finance land acquisition and other activities of the Land Bank. For the reasons and with the restrictions stated below, I answer your question in the affirmative.

The Land Bank was created by the Legislature in 1975 to aid private enterprise or public agencies in the conversion and redevelopment of lands formerly used for military activities for industrial, commercial, and residential uses in order to prevent blight, economic dislocation and unemployment, or to aid private enterprise in the construction of low and moderate-income housing upon such lands to alleviate the housing shortage. St. 1975, c. 212, §1. The Act was later amended to include in its purposes the development and redevelopment of surplus state or federal government property and decadent, substandard or blighted open areas. St. 1979, c. 762, §2. That the purposes of the Land Bank are valid public purposes is unquestionable. *See Opinion of the Justices*, 373 Mass. 904, 907 (1977).

The statute establishes the Land Bank as a public instrumentality, a body corporate and politic, in the Executive Office of Administration and Finance, but not under its administrative supervision or control. St. 1975, c. 212, §2. It is governed by a board of nine directors, eight appointed by the governor. *Id.* It may adopt rules and regulations as it deems desirable for the exercise of its powers and discharge of its duties. St. 1975, c. 212, §6. The Land Bank is authorized to contract and to enter into agreements and transactions with governmental agencies or private persons in connection with its power and duties under the Act. St. 1975, c. 212, §4(d) and (e). Primarily, the Land Bank may take possession of or acquire lands, and dispose of those lands to a public or private entity for redevelopment. Such redevelopment must be in accordance with plans approved by the Land Bank, after public hearing, and in accordance with specific findings that ensure the redevelopment plan is consistent with the public purposes of the Act. St. 1975, c. 212, §6. The Land Bank may also establish by regulation additional requirements for redevelopment plans. *Id.*

The land acquisition activities of the Land Bank are financed in part by the sale of bonds of the Commonwealth. St. 1975, c. 212, §8A. This financing by bond proceeds, in connection with a provision of the Act which allows for the bank to

resell land in exchange for a purchase money mortgage,<sup>1</sup> gives rise to your concern that a specific transaction, *i. e.*, one involving land acquired with funds from bond proceeds and sold to a private party in exchange for a mortgage,<sup>2</sup> might violate article 62, §1, of the Massachusetts Constitution.

Article 62, §1, of the Amendments to the Massachusetts Constitution, known as the “credit clause,” provides:

The credit of the Commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed.

Article 62 was adopted in 1918 following the Constitutional Convention of 1917-1918. Convention debates indicate that the purpose of section 1 was to prevent the loan of the Commonwealth’s credit to enterprises not under public ownership or control, 3 Debates in the Massachusetts Constitutional Convention, 1917-1918, at 1220, 1223, 1234, as well as to force state assistance to public service enterprises to be on a “pay as you go basis,” not involving any absolute or contingent debt obligation on the part of the Commonwealth. *Opinion of the Justices*, 337 Mass. 800, 808 (1958). See also Pinsky, *State Constitutional Limitations on Public Industrial Financing*, 111 U. Pa. Law Rev. 265, 317 (1967) (credit clauses intended to protect taxpayers from heavy future taxes levied to pay for “recklessly incurred past debt”).

From time to time, the question has arisen whether a particular transaction constitutes a lending of credit barred by Article 62. Historically, the lending of the Commonwealth’s credit occurred in the form of a guaranty of another’s obligations. See, *e.g.*, *Opinions of the Justices*, 322 Mass. 745, 751 (1948) (housing authority obligations); 261 Mass. 523, 541-545, and 261 Mass. 556, 564, 602-604 (1927) (Boston Elevated Railway Company bonds or obligations). More recently, the Supreme Judicial Court has considered whether the loan of proceeds of Commonwealth bonds constitutes a lending of credit. In *Opinion of the Justices*, 359 Mass. 769 (1971), the Court found that:

The two steps of (a) borrowing by the State and (b) lending of the borrowed cash to a private borrower, would have essentially the same effect as a State guaranty of a loan to the ultimate borrower. Such a guaranty would be a violation of art. 62.

*Opinion of the Justices*, 359 Mass. at 773.

That opinion involved chapter 746 of the Acts of 1970, which authorized the Department of Commerce and Development to make loans to private businesses from funds derived from the sale of Commonwealth bonds for construction of water pollution waste treatment facilities. The Court held that the issuance of Commonwealth bonds and the use of bonds proceeds for such loans violated the credit clause.

<sup>1</sup> Section 6 of c. 212 of the Acts of 1975, as amended through St. 1977, c. 732, provides, in pertinent part:

Any disposition of lands, or any interest therein, by the bank may be made in such manner whether by sale, lease or otherwise, by parcels which are the same as or different from those by which they were acquired or taken possession of by the bank, and for such price, rental or other consideration payable over such term, which may extend beyond the expiration date of this act, and bearing interest as to deferred payments and secured in such manner, by mortgage or otherwise, all as the bank may determine to be desirable consistent with any applicable provisions of any applicable redevelopment plan.

<sup>2</sup> Your opinion request relates solely to the question whether bonds may be issued without violation of the credit clause. Accordingly, this opinion is confined to that matter and does not address the statutory authority of the Land Bank to enter into particular types of transaction.

The Court noted that the loan, although made for a public purpose, was to private persons and was likely to benefit them and their property substantially.<sup>3</sup>

In 1977 the Court had occasion to apply the two-step analysis to find a lending of credit, but concluded that there was no violation of the credit clause because the "ultimate borrower" was not an individual, a private association or a privately-owned and managed corporation. *Opinion of the Justices*, 373 Mass. 904, 910 (1977). The opinion involved the Community Development Finance Corporation (hereafter, "CDFC") created by G.L. c. 40F. Under chapter 40F, the state treasurer would sell Commonwealth bonds and use the proceeds to purchase all of the common stock of CDFC. CDFC in turn would lend the proceeds to community development corporations to invest in development projects which met detailed standards set forth in the statute. G.L. c. 40F, §4. Analyzing the "substance of the entire statute," *Opinion of the Justices*, 373 Mass. at 909, the fact of CDFC's loan of the borrowed funds to community development corporations had, again, the same effect as a state guaranty of a loan to the ultimate borrower, the community development corporation, and therefore constituted a lending of credit. *Id.* at 909-910. Whether the transaction was constitutionally permissible depended upon whether a community development corporation is a "private association" or "a corporation which is privately owned and managed." *Id.* at 910.

The Court concluded that a community development corporation was not a private borrower. Without articulating the precise composition of a community development corporation,<sup>4</sup> the Court reached its conclusion based upon the following key considerations:

- (1) that CDFC would be publicly owned and managed for a public purpose; and
- (2) the CDFC proceeds could be used only for specific approved projects of public benefit and public purpose; and
- (3) the community development corporations which would use the proceeds had to meet certain criteria designed to insure the public nature and purpose of the use of the funds.

The Court concluded:

We think that a community development corporation which expends funds in accordance with the conditions and limitations of G.L. c. 40F, §4, is not a private borrower and that, therefore, the statutory pattern of G.L. c. 40F does not involve an unconstitutional lending of the credit of the Commonwealth. *Id.* at 910.

Obviously critical to the Court's conclusion was the existence of sufficient standards or "conditions and limitations" which ensure that the bond proceeds were used for public purposes only and that any benefit to a private person or entity is "indirect and incidental and not the purpose of the statute." *Id.*, citing *Allydonn Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288 (1939).

<sup>3</sup> The Court noted further that the statute provided only meager and general standards to guide the Department of Commerce and Development in making loans, leaving much to departmental discretion. *Opinion of the Justices*, 359 Mass. at 773. Under the Court's two-step analysis, because the borrower was private, the loan violated the credit clause. It is unclear whether this further concern that the statute provided only "meager guidelines" and left much to departmental discretion suggests that sufficiently detailed standards in the statute might have avoided a credit clause violation in this issue.

<sup>4</sup> Section 1 of chapter 40F defines a community development corporation as a quasi-public non-profit corporation organized under the General Laws to carry out certain public purposes, with certain specified by-laws provisions as to, *inter alia*, area of operation, membership, and election and make-up of the board of directors. G.L. c. 40F, §1.

Applying the foregoing analysis to the present circumstances, I conclude that the use of bond proceeds by the Land Bank to acquire land which is resold in exchange for a purchase money mortgage would constitute a lending of the Commonwealth's credit to the purchaser of the land. Similarly, if that purchaser is a private person or association or a privately owned and managed corporation, there is almost certainly an unconstitutional lending of credit.

It is my opinion, however, that the Land Bank can avoid a credit clause violation by adhering closely to the CDFC model.<sup>5</sup> In order to do so, the Land Bank, when it resells land which it has acquired with bonds proceeds in exchange for a purchase money mortgage, must effect the transaction under the following restrictions:

1. The land must be resold only to a non-private or quasi-public agency which has the statutory authority to participate in the redevelopment project (hereafter referred to as the "participating agency").<sup>6</sup>
2. The resale must be in accordance with a development plan which the Land Bank has approved only after making the following specific findings: (a) the project is within the scope of the enabling statute and may reasonably be expected to contribute to the redevelopment of the target areas and the economic development of the Commonwealth or will alleviate the shortage of safe, decent and sanitary housing available to persons of low and moderate income; (b) the project plans conform to all applicable environmental, zoning, building, planning, or sanitation laws; (c) the project will be of public benefit for a public purpose; (d) there is a reasonable expectation that the project will be successful; (e) private industry has not provided sufficient capital required for the project or sufficient primary employment opportunities in the project's area; (f) the Land Bank has determined that its participation is necessary to the successful completion of the proposed subject because funding for the project is unavailable in the traditional capital markets, or that credit has been offered on terms that would preclude the success of the project; (g) the participating agency meets certain standards set forth in ¶1 above and appears able to manage its proposed project responsibilities; (h) the plan, or alternatively the mortgage, provides for adequate reporting from the participating agency to the Land Bank. These findings, to the extent they go beyond findings already required by the Land Bank's enabling statute, could be established by regulations. St. 1975, c.212, §6.

<sup>5</sup> Like CDFC, the Land Bank is clearly a public instrumentality, "managed publicly for a public purpose." *Opinion of the Justices*, 373 Mass. at 910.

<sup>6</sup> E.g., a community development corporation or similar "quasi-public nonprofit corporation organized under the General Laws to carry out certain public purposes" with by-laws providing, *inter alia*, for public membership and directors. G.L. c. 40F, §1 (definition of community development corporation).

3. The resale must place conditions and limitations on the participating agency which require that it will maintain sufficient control over the project to ensure that public benefit and public purposes of the redevelopment are maintained. G.L. c. 40F, §4(11).<sup>7</sup>

It is my opinion that these restrictions suffice to preclude the possibility of a credit clause violation. *Opinion of the Justices*, 373 Mass. at 910. Cf. *Opinion of the Justices*, 359 Mass. at 773.

In summary, based upon the analysis of the Supreme Judicial Court of the CDFC model as applied to the Land Bank, I conclude that the resale of land acquired by the Land Bank with bond proceeds to a quasi-public agency in exchange for a purchase money mortgage, subject to the restrictions discussed above, would not constitute a lending of the Commonwealth's credit to any "individual, private association, or corporation which is privately owned and managed." It is therefore my opinion that Commonwealth bonds and notes may be issued under the Act for such projects without violation of the credit clause.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

August 23, 1982

Number 2.

Richard E. McLaughlin  
*Registrar of Motor Vehicles*  
100 Nashua Street  
Boston, Massachusetts 02114

Dear Registrar McLaughlin:

You have requested my opinion whether the payment of a fine for a minor traffic violation under the "pay by mail" procedure of G.L. c. 90, §20F, is a conviction for which you may revoke or suspend a license under c. 90, §20 and §22. For the reasons stated below, it is my opinion that the payment of a fine by this procedure does not constitute a conviction for which you may revoke or suspend a license under G.L. c. 90, §20. However, a person who consistently violates the traffic laws and who has repeatedly been required to pay such fines, may be operating the motor vehicle in such a manner as to be a threat to the public safety and thus may be subject to the discretionary revocation and suspension provisions of G.L. c. 90, §22.

General Laws chapter 90, section 20F, sets forth the current<sup>1</sup> procedures for issuing traffic citations and for the disposition of minor traffic violations. The provision establishes two mechanisms for disposing of these traffic citations.

<sup>7</sup> For example, if the participating agency in turn resells the land to a private entity in exchange for a purchase money mortgage, that mortgage would have to include adequate provision for reporting to the participating agency and that the participating agency must approve all major transactions including but not limited to any sale, merger, dissolution, the sale or issue of substantial amounts of stock, and corporate reorganization. G.L. c. 40F, §4(11) (f).

<sup>1</sup> Chapter 90, section 20F, was inserted into the General Laws by section 41 of what has popularly been called the Court Reorganization Act. St. 1978, c. 478. See generally *Commonwealth v. Germano*, 379 Mass. 268 (1979).

First, the person may "appear before a magistrate of the appropriate district court and confess the offense charged, either personally or through an agent duly authorized in writing, or may mail to such magistrate, with the citation, the maximum statutory fine provided therein." G.L. c. 90, §20F, ¶3.<sup>2</sup> If this procedure is used, then the "appearance shall not be deemed a criminal proceeding for the purposes of [chapter 90]." G.L. c. 90, §20F, ¶4.<sup>3</sup> Thus, under this procedure the Legislature has established a non-criminal, administrative mechanism for conveniently disposing of these traffic violations.

Alternatively, the section also provides a mechanism by which the offender may decline to avail himself of the benefits of the "pay by mail" procedure. Under this procedure the offender may contest the citation through the usual procedures established for criminal cases. *See, e.g., Commonwealth v. Germano*, 379 Mass. 268 (1979); *Commonwealth v. Marder*, 346 Mass. 408 (1963), *appeal dismissed*, 377 U.S. 407 (1964). *Cf. Commonwealth v. Hesser*, 1 Mass. App. 877 (1974).

The legislative history of G.L. c. 90, §20F, indicates that the Legislature intended to treat minor motor vehicle violations governed by that provision in a manner similar to parking violations. *Commonwealth v. Germano*, 379 Mass. at 276. Accordingly, the Legislature sought, through the "pay by mail" mechanism, to provide "a sensible, simple, administrative method of making necessary traffic rules effective, without clogging the courts, causing undue public inconvenience and resentment, or depriving any citizen of full opportunity at his option for a judicial determination of facts." *Commonwealth v. Marder*, 346 Mass. at 411. Because the "pay by mail" procedure is non-criminal, the payment of the statutory fine cannot be considered a conviction.<sup>4</sup>

General Laws chapter 90, section 20, permits you to revoke the license of a person who is convicted three consecutive times in the same year for violating G.L. c. 90, §§16<sup>5</sup> or 17,<sup>6</sup> or a regulation made under §18.<sup>7</sup> Section 20 also prohibits, for at least thirty days after the date of such conviction and only at your discretion, the issuance of a new license to a person whose license has been sanctioned.

The word "conviction" is a technical word which has acquired peculiar meaning in the law. It must therefore be interpreted according to that meaning. G.L. c. 4, §6. A long line of judicial decisions have interpreted the word "conviction" as a "judgment that conclusively establishes guilt after a finding, verdict, or plea of guilty." *Forcier v. Hopkins*, 329 Mass. 668, 670 (1953) (cases cited). A mere verdict or confession of guilt is not enough; "[n]othing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction. . . .'" *Attorney General v. Pelletier*, 240 Mass. 264, 310-11 (1922), *quoting Commonwealth v. Kiley*, 150 Mass. 325 (1889). Under the non-criminal

<sup>2</sup> This section does not apply to violations which have fines exceeding one hundred dollars or which have a penalty of imprisonment. G.L. c. 90, §20F, ¶1. It also does not apply to parking violations. *Id.* *See also* G.L. c. 90, §§20A and 20C.

<sup>3</sup> The paragraph further states that the "offender shall not be required to report to any probation officer and no record of the case shall be entered in any probation records."

<sup>4</sup> If, on the other hand, the person decides to challenge the citation through normal criminal procedures, then any judicial determination of guilt will be considered a conviction and the offender will suffer the collateral consequences which accompany a criminal record. *See Commonwealth v. Marder*, 346 Mass. at 411. *See also Commonwealth v. Germano*, 379 Mass. at 274.

<sup>5</sup> Offensive or illegal operation of motor vehicles.

<sup>6</sup> Excessive speed on a street or way which does not have a posted speed limit.

<sup>7</sup> Exceeding the posted speed limit on any street or way.

procedure of G.L. c. 90, §20F, the Legislature has precluded the Court from entering a judgment in these cases. The payment of a fine by these procedures is not, therefore, a conviction as that term is used in G.L. c. 90, §20.<sup>8</sup> I conclude, therefore, that the payment of these fines through the non-criminal procedures of G.L. c. 90, §20F, are not convictions for which you may revoke or suspend a license under section 20.

This conclusion does not mean that you are without authority to revoke or suspend a license for these minor traffic violations. On the contrary, you may well possess such authority under G.L. c. 90, §22. General Laws chapter 90, section 22(a), permits you to suspend or revoke, without a hearing, a license whenever, "the holder thereof has committed a violation of the motor vehicle laws of a nature which would give the registrar reason to believe that continuing operation by such holder is and will be so seriously improper as to constitute an immediate threat to the public safety."

Similarly, under G.L. c. 90, §22(b), you are authorized to "suspend or revoke any certificate of registration or any license issued under this chapter, when (you have) reason to believe the holder thereof is an incompetent person to operate motor vehicles, or is operating a motor vehicle improperly."

These provisions grant you broad authority to suspend or revoke a license when you have reason to believe that a person is operating a motor vehicle improperly or is operating it in such a manner as to endanger the public safety and when a person who has repeatedly violated the motor vehicle laws. A conviction is not necessary to trigger the revocation mechanism set forth in these provisions of section 22.<sup>9</sup> Thus, repeated violations which result in the payment of fines by mail pursuant to G.L. c. 90, §20F, may support a finding that the person is operating improperly under G.L. c. 90, §22(a) or §22(b).

In sum, I conclude that the payment of a traffic violation fine through the non-criminal procedures of G.L. c. 90, §20F, is not a conviction for which you may suspend or revoke a license pursuant to G.L. c. 90, §20. However, the consistent violation of the motor vehicle laws may support a finding that a person is operating a motor vehicle improperly and therefore subject that person to a suspension or revocation under G.L. c. 90, §22(a) and §22(b).

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

<sup>8</sup> This non-criminal disposition is to be compared with the provisions of G.L. c. 90, §4A, as inserted by St. 1964, c. 626, §1, which provides for a waiver of trial, guilty plea and payment of a fine "on a complaint alleging violation of any law relating to the operation of control of motor vehicles . . . for which the punishment is a fine or forfeiture not exceeding . . . fifty dollars and does not include a sentence of imprisonment." This provision for criminal disposition of motor vehicle violations was also amended by the Court Reorganization Act. In such circumstances, it must be presumed that the Legislature was aware of the differing procedures to resolve such cases and that the distinction was intentional. *Harborview Residents' Committee, Inc. v. Quincy Housing Authority*, 368 Mass. 425, 432 (1975).

<sup>9</sup> Subsection (c) of section 22, on the other hand, is triggered by an out-of-state conviction of operating under the influence of narcotics. Again, one can only conclude that the distinctions in the various subsections were intentionally drawn, therefore supporting the conclusion that convictions are not a condition precedent to the exercise of your power under G.L. c. 90, §22(a) or (b).

September 10, 1982

Number 3.

Honorable Michael Joseph Connolly  
*Secretary of the Commonwealth*  
State House  
Boston, Massachusetts 02133

Dear Secretary Connolly:

By letter dated August 6, 1982, you have requested my opinion whether certain questions forwarded to me are ones of public policy within the meaning of G.L. c. 53, §19. You further requested an opinion of what simple, unequivocal and adequate form is best suited for presentation of these questions on the ballot.

As my predecessors, I am of the opinion that the term "public policy" as used in G.L. c. 53, §19, should not be given a restrictive meaning. 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 (1980). Each question must concern an important public matter in which every citizen of the Commonwealth would have an interest. 1980/1981 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 (1980); 1978/79 Op. Atty. Gen. Nos. 8 and 17, Rep. A.G., Pub. Doc. No. 12 at 114 and 121 (1978). Moreover, the instruction contained in each question must be consistent with the powers of the Legislature and the subject matter must be fit for lawmaking. 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 (1980). Even when questions concern a small geographic area, if the problem is one of concern to the Commonwealth in general, then the question may be considered one of public policy. 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109. (1980); 1978/79 Op. Atty. Gen. Doc. Nos. 16, 17, and 18, Rep. A.G., Pub. Doc. No. 12 at 121-123 (1978); 1974/75 Op. Atty. Gen. No. 11, Rep. A.G., Pub. Doc. No. 12 at 54 (1974).

Certain additional requirements, however, must be satisfied before the questions may appear on the ballot. The requirements to which I make reference are contained in G.L. c. 53, §§19, 20, and 21, and involve a number of statutory prohibitions which involve questions of fact. For example, a question which is technically accurate and presents an important public issue may not appear on the ballot if the question is substantially the same as one which has been submitted to the voters within less than three years. G.L. c. 53, §21. As Secretary of the Commonwealth, you have in your possession past election ballots from each of the relevant districts and, therefore, you are in a better position than I to make the factual determination required by the statute.

Consequently, I have made no independent inquiry to determine whether these questions are statutorily defective for any reason other than a failure to qualify as a public policy question in proper form for presentation on the ballot. 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 (1980); see 1958/59 Op. Atty. Gen. No. XII, Rep. A.G., Pub. Doc. No. 12 at 44 (1958).



With these considerations in mind, it is my opinion that the following questions are ones of public policy within the meaning of G.L. c. 53, §19, and should appear on the ballot in the following form:

*Representative District: 5th Essex*

Shall the Representative from this district be instructed to vote in favor of a resolution requesting the United States and the Soviet Union to adopt a mutual freeze on the testing, production, and deployment of nuclear weapons and of missiles and new aircraft designed primarily to deliver nuclear weapons?

*Representative District: 17th Essex*

Shall the Representative from this district be instructed to vote in favor of a resolution requesting the President of the United States to propose to the Soviet Union a mutual freeze on the testing, production and deployment of nuclear weapons and of missiles and new aircraft designed primarily to deliver nuclear weapons, with verification safeguards satisfactory to both countries?

*Senatorial District: 2nd Middlesex*

Shall the Senator from this district be instructed to vote in favor of a resolution requesting the United States and the Soviet Union to stop the nuclear arms race, and specifically to adopt a mutual, verifiable freeze on the testing, production and deployment of nuclear weapons and of missiles and new aircraft designed primarily to deliver nuclear weapons?

*Representative District: 21st Middlesex*

Shall the Representative from this district be instructed to vote in favor of a resolution requesting the President of the United States to propose to the Soviet Union a mutual nuclear weapons freeze immediately halting the testing, production, and deployment of all nuclear warheads, missiles, and delivery systems; and to further propose future reductions in the number of these nuclear warheads, missiles and delivery systems?

*Representative District: 35th Middlesex*

Shall the Representative from this district be instructed to vote in favor of a resolution requesting the United States and the Soviet Union to adopt a mutual freeze on the testing, production, and deployment of nuclear weapons and of missiles, submarines and new aircraft designed primarily to deliver nuclear weapons?

*Representative District: 9th Hampden and four other Representative Districts<sup>1</sup>*

Shall the Representative from this district be instructed to vote in favor of legislation properly before the General Court requiring the city of Springfield to adopt the lowest tax rate for residential property allowed by the property tax classification law?

<sup>1</sup> 10th, 11th, 12th and 13th Hampden.

*Representative District: 18th and 19th Middlesex*

Shall the Representative from this district be instructed to vote in favor of legislation properly before the General Court requiring the city of Lowell to adopt the lowest tax rate for residential property allowed by the property tax classification law?

*Representative District: 13th Worcester and four other Representative Districts<sup>2</sup>*

Shall the Representative from this district be instructed to vote in favor of legislation properly before the General Court requiring the city of Worcester to adopt the lowest tax rate for residential property allowed by the property tax classification law?

*Representative District: 5th Bristol and eight other Representative Districts<sup>3</sup>*

Shall the Representative from this district be instructed to vote in favor of legislation creating a state fund to clean up hazardous waste sites, to be financed through a special tax on businesses which produce wastes and not through general tax revenues?

*Representative Districts: 5th Bristol and 11th Essex*

Shall the Representative from this district be instructed to vote in favor of legislation requiring businesses to disclose to their employees and to residents of adjoining neighborhoods the identity of all toxic chemicals which those businesses use, store, discharge or produce?

*Senatorial Districts: Bristol and Plymouth; Worcester; 1st Worcester and Middlesex; and Fourteen Representative Districts<sup>4</sup>*

Shall the Representative from this district be instructed to vote in favor of a resolution calling upon the United States Congress to make more federal funds available for equal opportunity jobs and programs in education, public transportation, energy efficient housing, health care, and other services, and to obtain those funds by significantly reducing the amount spent on nuclear weapons and programs of foreign military intervention?

*Representative District: 15th Suffolk*

Shall the Representative from this district be instructed to vote in favor of a resolution calling upon the United States Congress to make more federal funds available for jobs and programs in education, public transportation, energy efficient housing, health care, and other services and to obtain those funds by significantly reducing the amount spent on nuclear weapons and programs of foreign military intervention?

<sup>2</sup> 14th, 15th, 16th and 17th Worcester.

<sup>3</sup> 18th and 19th Middlesex; 16th Suffolk; 13th, 14th, 15th, 16th and 17th Worcester.

<sup>4</sup> 8th Bristol, 2nd, 10th, 11th and 13th Hampden; 1st and 3rd Hampshire; 17th, 18th and 19th Middlesex; 12th Norfolk; 9th, 10th, and 11th Plymouth.

*Representative District: 5th Suffolk and four other Representative Districts<sup>5</sup>*

Shall the Representative from this district be instructed to vote in favor of legislation controlling residential rents and evictions, assuring a fair net income to the owner, and exempting owner-occupied two and three family dwellings?

*Representative District: 5th Suffolk and four other Representative Districts<sup>6</sup>*

Shall the Representative from this district be instructed to vote in favor of legislation banning condominium and cooperative conversion of residential rental property for at least the next three years?

*Representative District: 1st Bristol*

Shall the Representative from this district be instructed to vote in favor of legislation promoting, developing and encouraging a greyhound breeders program similar to the program granted both the thoroughbred and harness horse industry in this state?

*Representative District: 9th Hampden and three other Representative Districts<sup>7</sup>*

Shall the Representative from this district be instructed to vote in favor of legislation creating a comprehensive state program to weatherize homes, businesses and public buildings, to be financed through a tax on major oil companies?

*Representative District: 28th Middlesex*

Shall the Representative from this district be instructed to vote in favor of legislation restricting attorneys' fees in workers' compensation cases to no more than 5% of any lump sum settlement awarded to an injured worker?

*Senatorial District: Norfolk & Plymouth*

Shall the Senator from this district be instructed to vote in favor of a constitutional amendment requiring all sales tax revenues to be returned to cities and towns?

*Senatorial District: Norfolk & Plymouth*

Shall the Senator from this district be instructed to vote in favor of legislation repealing the law which requires consumers to pay utility company fuel adjustment charges?

*Representative District: 11th Suffolk*

Shall the Representative from this district be instructed to vote in favor of legislation properly before the General Court requiring the City of Boston to sell portions of the Arnold Arboretum for private development, the proceeds to be earmarked for security patrols and other safety programs in the park?

<sup>5</sup> 9th, 17th, 18th and 19th Suffolk.

<sup>6</sup> 9th, 17th, 18th and 19th Suffolk.

<sup>7</sup> 10th, 11th and 12th Hampden.

*Representative District: 11th Suffolk*

Shall the Representative from this district be instructed to vote in favor of legislation properly before the General Court providing for public review and approval of public safety manning levels, by district, in the City of Boston?

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

December 29, 1982

Number 4.

Michael Joseph Connolly  
*Secretary of State*  
State House  
Boston, Massachusetts 02133

Dear Secretary Connolly:

You have asked my opinion whether chapter 455 of the Acts of 1982 ("chapter 455"), entitled "An Act providing a new salary schedule for the executive and legislative and judicial departments," may be the subject of a referendum petition under Article 48 of the Amendments to the Massachusetts Constitution.

Your opinion request arises because a referendum petition calling for the repeal of this law has been filed with your office in a timely fashion signed by ten qualified voters of the Commonwealth. The particular question presented by your opinion request concerns whether the Act may be the subject of a referendum petition. A law that relates to any matter excluded from the referendum process, including a law that relates to the compensation of judges, may not be the subject of a referendum petition. Amendments, Article 48, The Referendum, Pt. III, §3 ("Article 48"). If the Act does not relate to an excluded matter, you have the constitutional obligation of preparing blank petitions for the use of subsequent signers. The answer to the particular question which you pose is so clearly in the negative that extended discussion is unnecessary.

On November 10, 1982 the Governor signed chapter 455 into law. Section one of this Act makes certain changes in the salaries of the members of the general court and modifies their salary schedule depending upon their positions and duties within the legislature. Sections two through seven increase the salaries of the Governor and the other constitutional officers. Sections eight, nine and ten increase the

compensation provided the justices of the Supreme Judicial Court, the Appeals Court and the Trial Court of the Commonwealth.<sup>1</sup>

Under the provisions of Article 48, "No law that relates to . . . the appointment, qualification, tenure, removal or compensation of judges . . . shall be subject to a referendum petition." Amendments, Article 48, Pt. III, §2. The excluded matters provision has consistently been read to mean that if any portion of a law relates to a matter excluded from the referendum process, the law in its entirety may not be the subject of a referendum petition. 8 Op. Atty. Gen. at 331, 334-335 (1927). This conclusion is supported by an examination of the debates of the constitutional convention<sup>2</sup> and the long established principle that a referendum may be conducted only as to an entire Act of the Legislature as adopted and not as to any of its sections. 1965-66 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 312 (1966).

It is clear that chapter 455 relates to the compensation of judges, as the Act expressly amends the statutory provisions which set the compensation for judges, and as its very title indicates, provides a new salary schedule for the judicial department. Because chapter 455 relates to a matter excluded from the referendum process, it is my opinion that it may not be the subject of a referendum petition. Therefore you should not proceed to provide blank forms for the use of subsequent signers.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

<sup>1</sup> Those sections provide as follows:

Section 8. Section 22 of chapter 211 of the General Laws is hereby amended by striking out the first sentence, as most recently amended by section 4 of chapter 632 of the acts of 1981, and inserting in place thereof the following sentence: — The chief justice of the court shall receive a salary of sixty-five thousand dollars and each associate justice a salary of sixty-two thousand five hundred dollars; and the chief justice and each associate justice shall annually receive from the commonwealth, upon the certificate of the chief justice, the amount of expenses incurred by them in the discharge of their duties.

Section 9. Section 2 of chapter 211 of the General Laws is hereby amended by striking out the first sentence, as most recently amended by section 6 of said chapter 632, and inserting in place thereof the following sentence: — The chief justice shall receive a salary of sixty-two thousand five hundred dollars and each associate justice a salary of sixty-two thousand five hundred dollars; and the chief justice and each associate justice shall annually receive from the commonwealth, upon the certificate of the chief justice, the amount of expenses incurred by them in the discharge of their duties.

Section 10. Section 4 of chapter 211B of the General Laws is hereby amended by striking out the first three paragraphs, as amended by section 10 of said chapter 632, and inserting in place thereof the following three paragraphs: —

The salaries of the justices of the trial court shall be paid by the commonwealth. Each associate justice shall receive as a salary sixty thousand dollars.

The administrative justices of the superior court department, the land court department, the housing court department, the probate and family court department, the Boston municipal court department, the juvenile court department and the district court department shall receive sixty-two thousand five hundred dollars.

The chief administrative justice shall receive as a salary sixty-two thousand five hundred dollars.

<sup>2</sup> The Resolutions as originally considered by the Constitutional Convention provided that a referendum petition could be filed on any law enacted by the General Court which is not an emergency measure or on "any part thereof." 2 Debates in the Constitutional Convention, 3-6 and 674-678 (Wright & Potter Printing, 1917-1918). Upon a Motion by Mr. Lincoln Bryant of Milton, the Convention accepted an amendment striking the provisions allowing for a referenda on parts of Acts. *Id.* at 695-702. Mr. Bryant had explained the rationale of his amendment by stating, "If any part of a law is to be rejected the whole law ought to be considered and it is almost impossible for the voters to take a part of a law without the rest of the law before them and to decide intelligently whether that one particular part ought to come out." *Id.* at 694. As finally adopted by the voters, "Article 48" does not provide a means by which a referendum may be held on a part of a law.

January 7, 1983

Number 5.

Romulus DeNicola, Executive Secretary  
*Board of Registration in Pharmacy*  
100 Cambridge Street  
Boston, Massachusetts 02202

Dear Dr. DeNicola:

On behalf of the Board of Registration in Pharmacy (hereinafter, "the Board"), you have requested an opinion of the Attorney General on questions relating to Chapter 706 of the Acts of 1981 which altered the provisions of G.L. c. 112, §39A, to permit a restricted pharmacy to accept and fill prescriptions by mail.<sup>1</sup> Specifically, you wish to know whether Chapter 706 eliminates the requirement that restricted pharmacies may accept and fill by mail only those prescriptions issued by physicians registered with the Commissioner of Public Health in accordance with G.L. c. 94C, §18(c). You also request a description of the changes made by Chapter 706 in the statutory obligations of restricted pharmacies that wish to accept and fill prescriptions by mail.

After reviewing the legislative history of Chapter 706 and judicial interpretations of the statute as enacted by the Legislature, I have concluded that Chapter 706 eliminates the former requirement which authorized restricted pharmacies to accept and fill by mail only those prescriptions issued by physicians registered with the Commissioner of Public Health in accordance with G.L. c. 94C, §18(c). Before filling a prescription by mail, a restricted pharmacy must still verify in accordance with the Board's regulations that the prescribing physician is licensed to practice in Massachusetts or any other New England state, but the pharmacy no longer must determine whether the physician is registered with the Commissioner of Public Health in accordance with G.L. c. 94C, §18(c).

Chapter 706 originated with the filing of a petition, S. 613,<sup>2</sup> five days after I issued an opinion on May 5, 1981. That opinion reconciled minor inconsistencies between G.L. c. 94C, §18(c), and G.L. c. 112, §39A, and concluded, *inter alia*, that a restricted pharmacy may accept and fill by mail prescriptions issued only by those out-of-state physicians who are registered in accordance with the latter statute. Without doubt, the petition was a response to that Opinion and was filed in order to eliminate the requirement of registration for those physicians. Initially, the petition was referred to the Senate Committee on Health Care and thence reported favorably to the Senate Committee on Ways and Means. Mass. S. Jour. 56A, 575 (1981). The Ways and Means Committee redrafted the provision and recommended to the Senate that the bill as amended (and renumbered as S. 2339)

<sup>1</sup> That amendment inserted the following language:  
notwithstanding the provisions of paragraph (c) of section eighteen of chapter ninety-four C or any other law to the contrary . . .

<sup>2</sup> The original petition provided:

Notwithstanding any laws or regulations to the contrary, nothing shall prohibit a restricted pharmacy from accepting and filling prescriptions written by physicians from the Commonwealth of Massachusetts or any New England state by mail; provided, however, that said prescriptions are authentic, in the reasonable professional judgment of the pharmacist.

ought to pass. Mass. S. Jour. 1326 (1981). The new draft substituted by the Ways and Means Committee provided:

Nothing in this section shall prohibit a restricted pharmacy from accepting and filling prescriptions by mail; provided, however, that, notwithstanding any provisions of section 18(c) of chapter 94C to the contrary, the prescribing physician is verified, according to procedures established by the board, as licensed to practice in the commonwealth or in any New England state.

On October 26, 1981, S. 2339 was ordered to a third reading which resulted in some alterations of the Ways and Means Committee draft. The principal change accomplished by the floor amendments adopted during the third reading was the insertion of the phrase "or any other law" after the reference to "section 18(c) of chapter 94C." The measure passed the Senate and went to the House of Representatives where it was approved without alteration. Mass. S. Jour. 1401 (1981); Mass. H. Jour. 1788, 1794, 1841 (1981). S. 2339 was signed by the Governor on December 24, 1981. Mass H. Jour. 1868 (1981); Mass. S. Jour. 1685 (1981).

This brief review of the legislative history of Chapter 706 reveals that from the outset the measure contained language which would remove the application of G.L. c. 94C, §18(c), to prescriptions filled by mail by restricted pharmacies. The original petition, S. 613, began with the words: "Notwithstanding any laws or regulations to the contrary."<sup>3</sup> Although the revised draft substituted by the Ways and Means Committee, S. 2339, preserved the exemption contained in the original petition, it substantially narrowed the exemptory language by requiring that "notwithstanding any provisions of section eighteen (c) of chapter 94C to the contrary" a restricted pharmacy may fill a prescription by mail provided that it first verifies, in accordance with the Board's regulations, that the prescribing physician is licensed to practice in Massachusetts or any New England state. The final language of the measure, after being amended during the Senate's third reading, excludes the operation of not only G.L. c. 94C, §18(c), but "any other law to the contrary."

The conclusion to be drawn from the legislative process which led to the enactment of Chapter 706 is clear. The purpose for enacting the measure was to eliminate the obligation of restricted pharmacies to ensure that all prescriptions filled by mail were issued by physicians registered with the Commissioner of Public Health in accordance with G.L. c. 94C, §18(c). This objective is firmly established by the language selected by the Legislature explicitly exempting pharmacies from determining whether a physician has complied with G.L. c. 94C, §18(c), before it fills by mail a prescription issued by that physician. The key phrase, "notwithstanding the provisions of paragraph (c) of section eighteen of chapter ninety-four C or any other law to the contrary," leaves no room for doubt that the procedures to be followed by a restricted pharmacy before it fills a prescription by mail are limited to those established by the Board's regulations for verifying that the prescribing physician is licensed to practice in the Commonwealth or any other New England state.

<sup>3</sup> The language of S. 613 was extremely broad and could have been interpreted to exempt restricted pharmacies even from complying with the Board's regulations for verifying that a physician is actually licensed to practice in the Commonwealth or any New England state before filling by mail a prescription issued by that physician.

The term "notwithstanding" means in spite of or without obstruction from any other outside factor. *Missouri Pacific Railroad Company v. Rental Storage and Transit Company*, 524 S.W. 2d 898, 908 (Mo. App. Ct. 1975); *State v. Board of Education of Hardin County*, 170 Ohio St. 415, 165 N.E. 2d 918, 923 (1960). "[N]otwithstanding [the provisions of G.L. c. 94C, §18(c)] or any other laws to the contrary" therefore means that the provisions of G.L. c. 112, §39A, operate in spite of and without prevention or obstruction from G.L. c. 94C, §18(c), or any other statute establishing a different requirement. *Cf. Matter of Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1162 (2d Cir. 1978) *cert. denied*, 440 U.S. 959 (1979); *State v. Superior Court of County of Los Angeles*, 252 Cal. App. 2d 637, 60 Cal Rptr. 653 (1967).

Thus, the plain language, as well as the legislative history of Chapter 706, requires an affirmative answer to your first question. This amendment to G.L. c. 112, §39A, eliminates the requirement discussed by the Attorney General in his earlier opinion that restricted pharmacies may accept and fill by mail only those prescriptions issued by physicians registered with the Commissioner of Public Health in accordance with G.L. c. 94C, §18(c).

Finally, you ask "[w]hat change in law is mandated by this new statute." Chapter 706 makes only one alteration in the pre-existing law governing restricted pharmacies. It eliminates the restrictions formerly imposed by G.L. c. 94C, §18(c), and any other law to the contrary on the privilege of a restricted pharmacy to accept and fill prescriptions by mail. All other requirements and limitations on the operation of the prescription services of restricted pharmacies remain in force.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

February 1, 1983

Number 6.

Francis D. Pizzella  
*Deputy Commissioner*  
Division of Saving Bank Life Insurance  
120 Tremont Street  
Boston, Massachusetts 02108

Dear Mr. Pizzella:

You have requested my opinion regarding the reinsurance<sup>1</sup> powers of Massachusetts saving bank life insurance ("SBLI") departments. Specifically, you ask whether: (1) SBLI departments are authorized to accept reinsurance risks pursuant to the general powers conferred by G.L. c. 178, §6, or any other authority, and (2) if so, whether the requirements of G.L. c. 175, §54G, are applicable to the

<sup>1</sup> "Reinsurance" has been defined as a contract entered into between insurance companies, with an obligation on the part of the reinsurer only to the company insured, and not to those persons whom the latter itself covered. It is, in essence, a contract of indemnity. 1943 Op. Atty. Gen., Rep. A G., Pub. Doc. No. 12 at 83, 86-87, (1943).



reinsurance activities of SBLI departments.<sup>2</sup> For the reasons set forth below, it is my opinion that SBLI departments lack the statutory authority to reinsure risks on group life insurance policies underwritten by a commercial insurance company. As a result of this determination, I need not answer your second question.

SBLI departments have a lengthy history in Massachusetts. Three quarters of a century ago, the legislature enacted the precursor to G.L. c. 178, an "Act to Permit Savings Banks to Establish Life Insurance Departments." The stated purpose of this statute was to make low cost life insurance available to savings bank customers. Consistent with this intent, the legislature placed an original ceiling of five hundred dollars (\$500) on the amount of life insurance that a savings bank may write for any one customer. St. 1907, c. 561, §10. This figure was raised most recently in chapter 276 of the Acts of 1982, to an aggregate maximum coverage totalling one thousand dollars per bank.<sup>3</sup> As a practical matter, this presently allows for approximately \$64,000 total life insurance coverage per bank customer.<sup>4</sup>

As your request correctly suggests, the operative statute is section six of chapter 178,<sup>5</sup> which allows SBLI departments to "make and issue policies" and "grant and sell annuities." The statutory authority vest SBLI departments "with all the rights, powers and privileges and subject to the duties . . . imposed by general laws<sup>6</sup> relating to . . . life insurance companies, *so far as the same are applicable.*" The term "applicable" in this modifying clause must be construed in a manner consistent with the basic principles and purposes of the Act. *Custody of a Minor*, 13 Mass. App. Ct. 66 (1982). It would be inconsistent with these purposes to read section six as authorization for SBLI departments to enjoy *all* of the same rights and privileges of commercial insurance companies since, to do so, would render these words of limitation mere surplusage. *Commonwealth v. Gove*, 366 Mass. 351, 354 (1974); *Commonwealth v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 352 Mass. 617, 618 (1967) (no portion of statutory language may be deemed superfluous). Moreover, SBLI departments were established in a separate chapter of the General Laws, and are subject to vastly different licensing and operational requirements.

<sup>2</sup> You have presented this question in the factual context of a proposed Reinsurance Agreement ("Agreement") between an out-of-state commercial life insurance company, and Massachusetts SBLI departments. You describe this Agreement as having resulted from "a need among savings bank customers for low cost group mortgage life insurance."

Briefly, the Agreement requires that the insurance company underwrite a policy of group mortgage life insurance for savings bank customers holding mortgages. In turn, the SBLI department would reinsure a substantial percentage of the risk involved. The Agreement further provides that no right or legal relation is created between the SBLI department and the policy holders. The maximum life insurance coverage for an individual savings bank customer contemplated by the plan is only limited by the constraints put upon the commercial insurance company—in this case, \$200,000.

As it is not the function of the Attorney General to pass upon questions of fact, policy, or discretion (1962 Op. Atty. Gen., Rep. A.G. Pub. Doc. No. 12 at 199, 200 (1962)), my response to your questions shall be limited to the legality of SBLI departments to reinsure these risks.

<sup>3</sup> In its present form, G.L. c. 178, §10, reads, in pertinent part:

*The aggregate amount of savings bank life insurance which may be issued or in force at any time on any one life, in all savings and insurance banks, shall not exceed an aggregate amount which would be equal to one thousand dollars in each savings and insurance bank, exclusive of group insurance, payor insurance, dividends and profits (emphasis added).*

<sup>4</sup> This figure reflects the fact that there are approximately sixty-four banks across the Commonwealth currently issuing SBLI

<sup>5</sup> G.L. c. 178, §6, reads in full:

*Any savings and insurance bank acting through its insurance department, after the issue of the license provided for in the following section, may make and issue policies upon the lives of persons and grant or sell annuities with all the rights, powers and privileges and subject to all the duties, liabilities and restrictions in respect to the conduct of the business of life insurance conferred or imposed by general laws relating to domestic legal reserve life insurance companies, so far as the same are applicable and except as is otherwise provided herein. The insurance department shall in all respects, except as is otherwise provided herein, be managed as savings banks are managed under general laws relating to savings banks. Such insurance department may decline particular classes of risks or reject any particular application; provided, however, said insurance department may not decline or reject any application for the sole reason of blindness (emphasis added).*

<sup>6</sup> The general insurance laws are codified in G.L. c. 175.

There is nothing in the original Act or subsequent legislation, to suggest that the legislature contemplated the power to engage in all forms of reinsurance<sup>7</sup> to be among those insurance powers generally "applicable" to SBLI departments. Rather, there are only limited circumstances, outlined in the original legislation, under which SBLI departments have statutory powers to reinsure. In particular, c. 178, §7, unchanged in pertinent part since its enactment, gives an SBLI department whose license to write policies has been revoked by the insurance commissioner, the right:

to continue and fulfill its existing contracts, *or the right, with the approval of said commissioner, to reinsure them* or to transfer them to another bank or company holding a license to do insurance business in the commonwealth (emphasis added).

Additionally, section 25 (formerly section 26) allows an SBLI department to "discontinue the issuing of insurance policies and annuity contracts" upon the vote of its board of trustees, and to reinsure the outstanding ones.<sup>8</sup>

It is clear, then, that the legislature contemplated only limited reinsurance powers in SBLI departments under particular circumstances, requiring the approval of the Commissioner of Insurance for reinsuring policies. Had the legislature intended SBLI departments to assume the general reinsurance powers of commercial insurance companies, it would not have included the limiting proviso in G.L. c. 178, §6, and would not have delineated in sections 7 and 25 these particular situations<sup>9</sup> where reinsurance of existing policies is permitted. The specific inclusion of limited reinsurance powers in those sections<sup>10</sup> of the 1907 Act implies an intentional omission of reinsurance powers in related sections. *See First National Bank of Boston v. Judge Baker Guidance Center*, 13 Mass. App. Ct. 144 (1982) (where specific language appears in one part of statute, but not in others that treat same topic, language cannot be implied where not present). An attempt to supply the larger authority for an SBLI department to write reinsurance contracts would be tantamount to adding a meaning not clearly intended by the legislature. *See Boylston Water District v. Tahanto Regional School District*, 353 Mass. 81 (1967) (if statutory omission intentional, no court can supply it; if due to inadvertence, attempt to supply, it adds meaning not intended by legislature).

The 1907 Act was proposed to provide for low cost life insurance to savings bank customers of modest means,<sup>11</sup> and its enactment as a separate chapter in the general laws is but one indication that the legislature intended to keep SBLI departments distinct from commercial insurance companies. Commercial companies are

<sup>7</sup> "Reinsurance" is defined at footnote 1, above.

<sup>8</sup> That statute provides:

A bank which has so voted may reinsure all outstanding policies and annuity contracts in any other savings and insurance bank, or, with the approval of the commissioner of insurance and the commissioner of banks, in any purely mutual legal reserve life insurance company organized under the laws of the commonwealth, if such company does not employ solicitors of insurance or make house to house collection premiums (emphasis added).

<sup>9</sup> Of special note, these apparently isolated instances in G.L. c. 178, §§7 and 25, whereby SBLI departments are empowered to reinsure, concern situations where the SBLI department is giving, or "ceding," its risk on policies written by the SBLI department to another insurance carrier. By contrast, the Agreement proposed in this opinion request requires that the SBLI departments themselves reinsure by accepting a portion of the risk on policies written by the commercial insurance company.

<sup>10</sup> Although subsequent changes have been made in the original 1907 Act, sections 7 and 25 of chapter 178 remain the only statutes in that chapter where a reinsurance power is specifically granted to SBLI departments. Also, General Laws chapter 32A, section 4, and General Laws chapter 32B, section 3, allow SBLI departments to reinsure for certain types of group policies, inapplicable here.

<sup>11</sup> *See* Report of the Joint Special Committee on Insurance, House Doc. No. 1085, at 54-55 (1907).

licensed to underwrite and market policies providing extensive coverage, with greater reinsurance powers. By contrast, SBLI departments may only reinsure life insurance permits pursuant to G.L. c. 178, §§7 and 25.

In light of these specified provisions for reinsurance in G.L. c. 178, it appears that the legislature intended the words "insurance" and "reinsurance," to carry distinct and separate meanings. A savings bank "insurance department" is defined as "the department of a savings and insurance bank in which the business of issuing life insurance and the granting of annuities is conducted" (emphasis added). St. 1907, c.561, §1; G.L. c. 178, §1. By reference, the general insurance chapter, G.L. c. 175, did not define "insurance" to include "reinsurance" until 1921, at which time the blanket authority for a commercial company which could make insurance contracts to reinsure risks was codified.<sup>12</sup>

Words are to be given their usual and ordinary meaning in light of the aim of the legislature, unless there is a clear indication to the contrary. *Purity Supreme, Inc. v. Attorney General*, 1980 Mass. Adv. Sh. 1349; *Commonwealth v. Vickey*, 1980 Mass Adv. Sh 2355; *Prudential Insurance Company of America v. City of Boston*, 369 Mass. 542 (1976); *Randall's Case*, 331 Mass. 383 (1954). Although the power to engage in insurance may include the power to reinsure for commercial insurance companies, the plain meaning of the term "insurance" does not include "reinsurance." Use of the term in G.L. c. 178, §6, must be construed in light of the pre-existing state of the law which defined and treated such contracts differently, as well as the development and purpose of the 1907 Act which established SBLI departments under a separate and distinct chapter from commercial insurance companies. *Murphy v. Bohn*, 377 Mass 544 (1979); *A. Belanger & Sons, Inc. v. Joseph M. Concannon Corp.*, 333 Mass. 22 (1955).

Consistent with the SBLI statute's failure to bestow broad reinsurance powers, the reinsurance statute found in the general insurance chapter does not include SBLI departments among those authorized to reinsure. Chapter 175, §20, which governs reinsurance and enables commercial insurance "companies" to "reinsure" in any other company any part or all of any risks assumed by it, could not apply by definition. The term "company" is defined in section 1 of chapter 175 as "all corporations, associations, partnerships or individuals engaged as principals in the business of insurance . . ." This definition clearly does not include SBLI departments either expressly or by implication, since SBLI departments are not "principals in the business of insurance."

Major differences exist between G.L. c. 175, the general insurance law, and G.L. c. 178, the more specific Act creating SBLI departments. When construing the specific sections of G.L. c. 178, including their applicability to G.L. c. 175, the provisions of the statute must be read as a whole, to provide a harmonious body of law which is consistent, so far as possible, with the legislative intent behind the Act. *Jones v. Town of Wayland*, 1980 Mass. Adv. Sh. 669; *Labor Relations Commission v. Board of Selectmen of Dracut*, 374 Mass. 619 (1978). Chapter 178 establishes and governs only SBLI departments, one part of a savings bank's oper-

<sup>12</sup> General Laws c. 175, §2A, provides:

Contracts of reinsurance shall be deemed contracts of insurance as defined in section two, and authority to make contracts of insurance shall include authority to make contracts of reinsurance covering the same classes of risks, but the hazards under such contracts shall be deemed distinct in nature from the hazard originally insured. No provision of law relative to the form of insurance policies shall apply to contracts of reinsurance unless made specifically applicable thereto.

ation, in contrast to those companies regulated by chapter 175 which are in the sole business of providing insurance.<sup>13</sup>

Viewing the 1907 Act and its subsequent revisions as a whole, and in light of the manifest purpose of establishing SBLI departments, I cannot say that the legislature intended these departments to enjoy all of the rights and privileges of commercial insurance companies. In short, the power to reinsure large risks on policies underwritten by a commercial company is inconsistent with the purposes of the Act, and thus not a power "applicable" to the authority granted SBLI departments to "make and issue policies" and "grant and sell annuities," as provided by G.L. c. 178, §6.

While I am mindful of the benefits which the proposed Agreement may bestow upon potential customers of group mortgage SBLI, the authority for SBLI departments to participate in such reinsurance contracts must come from the legislature.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

February 3, 1983

Number 7.

John W. Lawson, Commissioner  
*Department of Education*  
1385 Hancock Street  
Quincy, Massachusetts 02169

Dear Commissioner Lawson:

You have requested my opinion concerning the scope of a school committee's responsibility for transportation of non-public school students.<sup>1</sup> Specifically, you ask whether General Laws chapter 76, section 1, requires a school committee to provide cash reimbursement to parents of students attending out-of-district private regular day schools for that part of the bus trip that takes place within the district, where the school committee transports no public school students out of district to comparable programs. If so, you ask whether the amount of reimbursement must be in an amount equal to the per pupil transportation cost the school committee expends for district public school transportation.

For the reasons set forth below, it is my conclusion that school committees are not required to provide cash reimbursements to parents of private school students attending out-of-district schools. The Department of Education therefore has no corresponding responsibility to reimburse a school committee which chooses to reimburse parents of private school students for those transportation costs. Since

<sup>13</sup> As an additional note, the general insurance laws place strict limitations upon group life insurance policies underwritten by commercial insurance companies, as well as by SBLI departments. For example, G.L. c. 175, §133C, limits group life insurance to debtors of a bank on maximum bank loans of \$10,000, payable over ten years or less. The proposed Agreement would contravene this statutory provision, since the prospective policy holders would be mortgagors holding home mortgage debts well in excess of \$10,000 and payable over more than ten years.

<sup>1</sup> Your request derives from your responsibilities to advise school committees concerning their legal duties and to ensure that the laws pertaining to education are enforced. See, e.g., G.L. c. 15, §1G. In addition, the Department of Education has the statutory responsibility to reimburse school committees for the costs of transportation which they are required by law to furnish students. See, G.L. c. 71, §7A.

I have answered your first question in the negative, I find no need to address your second question concerning the amount of reimbursement that must be provided to the parents of private school students.

At the outset it should be observed that your question is a narrow one; it focuses on the responsibility of the school committee to reimburse parents of private school students for transportation to those schools. It does not involve a determination of the issue of the extent of the school committee's responsibility to provide transportation to private school students.

This is not a distinction without difference. The Supreme Judicial Court has had occasion to address the issue of the responsibility of school committees to provide transportation to private school students several times since the enactment of G.L. c. 76, §1. See, *Attorney General v. School Committee of Essex*, 387 Mass. 326 (1982); *Murphy v. School Committee of Brimfield*, 378 Mass. 31 (1979); *Quinn v. School Committee of Plymouth*, 332 Mass. 410 (1955).

The decision in those cases would appear to be totally dispositive of your questions. In *Murphy v. School Committee of Brimfield*, for instance, the Supreme Judicial Court held that district lines are the primary consideration in determining a school committee's private school transportation responsibility under G.L. c. 76, §1: "private school students are entitled to receive transportation to schools located outside their district of residence only if, and to the extent that, public school students enrolled in comparable programs receive transportation to schools located outside their district of residence." 378 Mass. at 37. In its most recent decision, the Supreme Judicial Court held that where a school committee provides out-of-district transportation to public school students, General Laws chapter 76, section 1, requires that it provide transportation to private school students under the age of sixteen who attend schools that are the same distance from home or closer than the public school the student is entitled to attend. *Attorney General v. School Committee of Essex*, 387 Mass. at 337.

You inform me that the school committee in question here transports no public school students out of district, but under G.L. c. 76, §1, a school committee is required to provide out-of-district private school transportation only if it transports public school students in comparable programs out of the district. *Murphy v. School Committee of Brimfield*, 378 Mass. at 38 n.8 (1979). Because the case law clearly states that there is no requirement to provide reimbursement to the parents of private school students for out-of-district transportation, the inquiry would appear to be at an end. Because you have indicated that this remains an important question, however, I go beyond the dispositive opinions of the Supreme Judicial Court and analyze further the specific statutory provision to determine if there exist any new arguments, not considered by the Court, requiring cash reimbursement.

In answering the question afresh, I begin with the provision of the statute itself and measure it by the cardinal rule of statutory interpretation succinctly stated by Chief Justice Rugg in *Hanlon v. Rollins*, 286 Mass. 444 (1934):

(T)he general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.

*Id.* at 447.

Thus, the language of the G.L. c. 76, §1, itself must be the starting point for determining its meaning, as well as the principal source of insight into the legislative purpose for its enactment. *Globe Newspaper Co. v. Superior Court*, 379 Mass. 846 (1980); *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977). The language of G.L. c. 76, §1, providing for transportation to private school students is plain and unambiguous. It states, in relevant part that:

Pupils who . . . attend private schools of elementary and high school grades . . . shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools (emphasis supplied).

The express language of this portion of G.L. c. 76, §1, deals with transportation. It does not authorize cash reimbursement. Thus, to answer your question one need go no further than the statutory language itself.

Moreover, no support for cash reimbursement can be discerned from the statute's legislative history or purpose. The purpose of school transportation, articulated in the statute itself, is "to protect children from the hazards of traffic and promote their safety," and it therefore provides that "cities and towns may appropriate money for conveying pupils to and from any schools approved under this section." G.L. c. 76, §1. See also, *Attorney General v. School Committee of Essex*, at 333-334. Indeed, cash reimbursement for school transportation might well be contrary to the public safety purpose of this provision. For example, parents providing their own transportation would necessarily increase traffic on the roads and highways and thereby create more hazards to the safety of children. School buses, on the other hand, operate to decrease extra traffic, making the road travel less hazardous. Furthermore, the operation of school buses is governed by specific statutory safety standards and motor vehicles laws require other vehicles to observe certain rules for the safety of those traveling in school buses. See generally, G.L. c. 90, §§7B, 7C, 7D, 7D-1/2. Mere payment of a cash reimbursement to parents would not necessarily further the stated purpose of G.L. c. 76, §1.

The fact that a town or regional school district may transport some public school students to out-of-district Chapter 766 programs, vocational-educational programs and cosmetology and health care programs does not create an obligation to provide transportation for private school pupils attending regular or private school programs outside the districts. The Supreme Judicial Court has noted that a school committee's transportation of pupils in special needs, vocational and cosmetology programs does not trigger the regular private school transportation obligation under G.L. c. 76, §1, as these school programs are not comparable. *Murphy v. School Committee of Brimfield*, 378 Mass. at 33-34 n.3; *Quinn v. School Committee of Plymouth*, 332 Mass. at 414. Under G.L. c. 76, §1, school committees are only required to transport private school students to educational programs that are comparable to the programs to which it transports public school students.<sup>2</sup>

For all these reasons, it is my opinion that G.L. c. 76, §1, requires that a school committee provide transportation to private school students only to the same extent

<sup>2</sup> As the Supreme Judicial Court has previously observed, this conclusion may operate to impose a disadvantage to those students attending private schools in those school districts where no private school exists and the school committee transports no public school students outside the district. This seeming inequality was raised by the Whitman-Hanson Regional School Committee in *Murphy v. School Committee of Brimfield*, 378 Mass. at 38 n.8. There, the Supreme Judicial Court expressly rejected the claim that this result was problematic under equal protection standards. *Id.*; see also, *Attorney General v. School Committee of Essex*, 387 Mass. at 338 n.5 (1982).

provided to public school students. Where, as in this case, no public school students are transported outside the district and where there is no private school located within the district, there is no requirement that transportation be provided to the private school students. *A fortiori*, there is no corresponding or independent requirements to provide reimbursement to the parents of these private school students. While a school committee may decide to provide such transportation or to reimburse parents of private school students, G.L. c. 76, §1, imposes no requirement on the Department of Education to reimburse school committees for these costs.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

February 14, 1983

Number 8.

His Excellency Michael S. Dukakis  
*Governor of the Commonwealth*  
State House  
Boston, Massachusetts 02133

Dear Governor Dukakis:

In your letter of January 17, you informed me that there were two vacancies on the Massachusetts Port Authority. The statute which created the Authority provides that no more than four of its members shall belong to the same political party. St. 1956, c. 465, §2. In your letter, you informed me that, of the then five members of the Authority, two are unenrolled in any party, two are enrolled as Democrats, and one is enrolled as a Republican.<sup>1</sup> However, four of the members have changed their party affiliations at least once since their appointments, and you have requested my advice concerning the effects of these changes on your future appointments. Specifically, you seek my opinion with respect to the following questions:

1. For the purpose of appointing a new member to the Authority, is the Governor to determine the political affiliations of current members as well as the affiliation of the prospective appointee through application of G.L. c. 4, §12?
2. How is the determination of political affiliation to be made under G.L. c. 4, §12?
3. May the Governor appoint to the Authority a person who is a member of a particular political party when the present membership of the Authority includes three members who belong to the same party as the proposed appointee, and a fourth member who has changed his affiliation to the same party, where the change has not yet taken effect under G.L. c. 4, §12?

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<sup>1</sup> I was informed subsequently that you have filled one vacancy by appointing a person who is presently unenrolled

4. What action, if any, should be taken if a member of the Authority changes his political affiliation and, when the change takes effect pursuant to G.L. c. 4, §12, thereby causes the number of members with the same political affiliation to exceed four?

For reasons which I will set out in the balance of this opinion, my answers to these four questions are as follows:

First, it is my opinion that the provisions of G.L. c. 4, §12, are applicable to sitting members and to the appointee for the purpose of making a proper appointment to the Authority and that the Governor should determine the status of members and the potential appointee by focusing on their party affiliation on the day two years prior to the date he makes an appointment. With respect to the third question, it is my opinion that the Governor may make an appointment which is proper when made, notwithstanding that an imbalance on the Authority may arise in the future by reason of G.L. c. 4, §12. If such an imbalance does arise, it is the Governor's duty to correct the imbalance, if possible, in subsequent appointments. Since St. 1956, c. 465, §2, states a limitation on the Governor's authority, and not a continuing qualification to hold office once an appointment is properly made, no further gubernatorial action need be taken in respect of an imbalance on the Authority.

The Massachusetts Port Authority was established in 1956 to operate the Massachusetts Port, the Logan Airport, and the Mystic River Bridge. St. 1956, c. 465, §§1 *et seq.* Section two of the statute establishes a board of seven individuals to govern the operations of the Authority. Certain provisions concerning the composition of this Board have prompted your letter.

In material part, chapter 465, section 2 of the Acts of 1956 provides that

[t]he Authority shall consist of seven members all of whom shall be appointed by the governor . . . and shall be residents of the commonwealth. *Not more than four of such members shall be of the same political party*, and shall include persons with extensive experience in the fields of engineering, finance and commerce, and shall include a bonafide representative of a national or international labor organization . . . (emphasis supplied).

Similar provisions relating to party membership have been enacted with respect to many other boards, commissions, and authorities. *See, e.g.*, G.L. c. 268B, §2 (Ethics Commission); G.L. c. 161A, §6 (MBTA Board of Directors); G.L. c. 55B, §1 (Ballot Law Commission); G.L. c. 25, §2 (Public Utilities Commission); G.L. c. 23, §15 (Industrial Accident Board); G.L. c. 16, §1 (Public Works Commission); G.L. c. 15, §1H (Council on Education); G.L. c. 10, §23 (Lottery Commission); G.L. c. 7, §4I (Civil Service Commission); G.L. c. 6A, §32 (Rate Setting Commission); G.L. c. 6, §§125 (Health and Welfare Commission), 115 (Consumers Council), 108 (Mobile Homes Commission), 48 (Racing Commission); 43 (Alcoholic Beverages Control Commission); St. 1952, c. 354, §3 (Turnpike Authority); St. 1968, c. 614, §4 (Educational Facilities Authority). *See also* G.L. c. 51, §18 (Board of Registrars to include members from two principal parties);



G.L. c. 51, §16A (Board of Election Commissioners to include members from two principal parties).<sup>2</sup>

At the least, the provision in section 2 means that, when four members of the Authority belong to the same political party on the date of an appointment, the appointee may not also belong to that party. Your first question, then, is in what manner are the political affiliations of the appointee and members of the Authority to be determined for the purpose of an appointment? You draw my attention to G.L. c. 4, §12, which provides

[e]stablishment, cancellation or change of enrollment in a political party shall, for the purpose of any law establishing or limiting the number of members of any board, commission or other body who shall or may be members of any political party or the same political party take effect two years thereafter.

You ask whether this provision is to be applied to the proposed appointee only or to the members of the Authority as well, when you appoint a new member to the Authority.

The answer to this question lies in interpretation of the two statutes "according to the intent of the Legislature ascertained from all [the] words construed by ordinary and approved usage of the language, considered in connection with the cause of [the] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of [the] framers may be effectuated." *Board of Education v. Assessor of Worcester*, 368 Mass. 511, 513 (1975), quoting *Industrial Fin. Corp. v. State Tax Comm.*, 367 Mass. 360, 364 (1975).

The words of chapter 4, section 12, considered by themselves and together with the words of chapter 465, section 2, do not purport to be applicable only to new appointees. To the contrary, section 12 expressly applies "for the purposes of any law . . . limiting the number of *members of any board . . . who shall or may be members of any political party*" (emphasis supplied). Since the statute expressly refers to the composition of the membership of a board, I conclude that it establishes a test which is to be applied to members and potential appointees alike, at least for the purpose of making a proper appointment.<sup>3</sup>

My conclusion is confirmed by examination of the history of St. 1960, c. 295, which inserted G.L. c. 4, §12, and by consideration of its purpose.<sup>4</sup> Section 12 was inserted in chapter 4 of the General Laws by section 1 of the act.<sup>5</sup> Chapter

<sup>2</sup> Similar provisions have also been enacted with respect to federal commissions. *E.g.*, 15 U.S.C. §2053(c) (Consumer Product Safety Commission); 15 U.S.C. §41 (Federal Trade Commission); 2 U.S.C. §437c (Federal Election Commission).

<sup>3</sup> Even though section 12 applies to members as well as appointees, it does not of its own force determine when the test is to be used. Section 12 was designed as a guide in interpreting a variety of statutes establishing boards or commissions. To determine whether the test set up by section 12 is to be used only at the time of an appointment or all times as a test of a board's continuing legality or right to act, one must look to the statute that creates the particular board.

<sup>4</sup> Section 2 of that act provides that "[t]his act shall not affect the tenure of any person who, on the effective date of this act, is a member of any board, commission or other body." I take it that this provision was intended to preclude using the new test to reassess the qualifications at the time of their appointments of sitting members. Arguably, however, the Legislature had in mind the possibility that members could become disqualified because of a change in affiliation during their tenure. If the purpose of section 2 was to avoid that possibility, the section would be clear evidence that, in general, the affiliations of members as well as appointees would be determined by means of the test set forth in section 1, since it cannot be supposed that section 2 was intended to be a useless act. See *Insurance Rating Board v. Commissioner of Insurance*, 356 Mass. 184 (1969).

<sup>5</sup> The original bill would have inserted a new section 17A in chapter 6 of the General Laws. Chapter 6 deals generally with boards and commissions in the Executive Department. As originally proposed, the bill provided as follows:

[f]or the purpose of determining the eligibility of a person for appointment to any board the number of members whereof of the same political party has been limited by law, any person who has changed his party enrollment shall be deemed to be a member of the political party in which he was enrolled prior to such change for a period equal to the term of the office to which he may be appointed.

295 was the product of significant redrafting in the Legislature. Originally proposed as House No. 253, "An Act Regulating the Appointment of Members of Bi-Partisan Boards, So Called," It was amended by substitution of House No. 2616 in accordance with a report of the Committee on Bills in the Third Reading. The substitute bill retained the original caption and provided that

[a]ny person who has changed his party enrollment shall, for a period of two years from the date of such change, be deemed to be a member of the political party in which he was enrolled prior thereto, *for the purpose of determining his eligibility for appointment* to a board whereon the number of members of the same political party has been limited by law (emphasis supplied).

The bill was passed by the House. However, the Senate substituted a new bill, Senate No. 470, which was returned to and passed by the House. As finally enacted, the bill was captioned "An Act Relative to the Effective Date of Establishment, Cancellation or Change of Enrollment in Cases Affecting the Membership of Bi-Partisan Boards, So Called." Comparison of St. 1960, c. 295, §1, with the bill just quoted will show that while House No. 2616 clearly established a rule applicable only to potential appointees, the enacted substitute contains no such limitation. The changes in the captions of the various bills show a similar shift in emphasis from the appointee to the members. It follows that the act applies both to sitting members and to appointees.

The effect, and by inference the purpose, of the drafts and the act seems clear. Under all versions of the act, an applicant for appointment to a bi-partisan board, so called,<sup>6</sup> who was ineligible because of his affiliation could not make himself eligible by changing or cancelling his party enrollment. The enacted version more perfectly accomplishes this result because it also prevents a sitting member from rendering a potential appointee eligible (or ineligible) by changing his own party affiliation.

For these reasons, I conclude that, when making an appointment to the Authority, you are to determine its political composition by applying the provisions of chapter 4, section 12, to each member and to the potential appointee.

The second question is, how is political affiliation to be determined under G.L. c. 4, §12? There are two viable alternative interpretations of section 12. The first would hold that every change in affiliation is simply postponed for two years; or put another way, that potential appointees and members are considered to belong to the political party, if any, in which they were enrolled on the day two years prior to the date of the proposed appointment. The second interpretation would hold that a change in affiliation is to be considered effective if and only if the member or appointee has retained the new affiliation (or has remained unenrolled) continuously for two years. Thus, to determine a person's affiliation, you would be required to search his enrollment record for the most recent two-year period during which he was continuously enrolled in a party or unenrolled.

<sup>6</sup> Since the Authority's statute does not require that members be drawn from the two principal parties, it is not formally accurate to call the Authority bi-partisan. Compare G.L. c. 51, §§16A, 18 (members to be drawn from two principal parties). Moreover, while that term may once have been accurate in practice, it is no longer so. This is because of the ease with which a person may enroll and cancel his enrollment. G.L. c. 53, §§37, 38. It is well known that large numbers of voters enroll only to vote in a party primary, but do not maintain their enrollment. Thus, it is possible and practicable to appoint a board whose members technically comply with the provision that no more than a majority may belong to the same party, but who all share the same political outlook. The phenomenon of short-term enrollment makes application of G.L. c. 4, §12, particularly difficult and may ultimately require a legislative solution. I note that a proposal to amend G.L. c. 4, §12, is now pending in the General Court. See footnote 10, *infra*.

Both interpretations are consistent with the Legislature's purpose to neutralize opportunistic changes in affiliation by members or by the proposed appointee. Beyond that point each view has its advantages and disadvantages. Considerations favoring the first view are that it is consistent with a straightforward reading of section 12, and it is the only conceivable reading of the earlier drafts of the Act. Moreover, it is my understanding that your predecessors have consistently followed this view rather than its alternative. This consistent practice is entitled to considerable weight. *See, e.g., Lowell Gas Co. v. Commissioner of Corporations and Taxation*, 377 Mass. 255 (1979). This principle is especially true where rejection of that practice could cast doubt on the validity of the many appointments to which section 12 applies.

There are certain practical advantages to the second interpretation, however. First, the evolution of section 12 indicates a shift in emphasis by the Legislature. In earlier drafts, affiliation was determined by reference to affiliation prior to any change; in the enacted version, the emphasis is on when a change is to be considered effective. Such a substantial change in emphasis may suggest that the test of affiliation set forth in earlier drafts is not the test finally adopted. Second, this alternative view of section 12 would seem to provide a more reliable test of political affiliation than does the first alternative.<sup>7</sup> Having in mind that section 12 was enacted as an aid in the interpretation of statutes "establishing or limiting the number of members of any board . . . who shall or may be members of . . . the same political party," a test which determines affiliation on the basis of one's enrollment over a period of time may seem more consonant with that function than a test which is based upon the fortuity of affiliation on a single day two years before the appointment.<sup>8</sup> *See generally Lexington v. Bedford*, 378 Mass. 562, 570 (1979) (of two possible constructions, that which leads to a logical and sensible result is to be preferred).

However, since I cannot say that the words of section 12 clearly favor this second interpretation, I am constrained to adopt the first alternative, thus giving due weight to the literal wording of the statute and prior administrative readings of its terms.<sup>9</sup> You will note that the choice which I have outlined is significant because of the ease with which party affiliation can be cancelled or changed. *See G.L. c. 53, §§37, 38*. It seems likely that when the Legislature enacted G.L. c. 4, §12, short-term enrollment, *e.g.*, for the purpose of voting in a party primary, was not the widespread phenomenon that it has become. *See Opinion of the Justices*, 385 Mass. 1201 (1982). Because the difficulty in determining the correct application of sec-

<sup>7</sup> However, while this test might be thought appropriate for statutes limiting the number of members who may belong to the same party, it might be thought inappropriate for those statutes requiring representation from the two principal parties. *E.g.*, G.L. c. 51, §16A, 18. In the latter class of statutes, a stricter test—actual current affiliation—would seem to have been intended.

<sup>8</sup> The use of a probationary period to test the authenticity of an affiliation is by no means unusual. *See, e.g., Storer v. Brown*, 415 U.S. 724 (1974). On the other hand, since a long probationary period is not used for purposes of voting in party primaries or of running for office as a party's candidate, it may seem unlikely that such a test was intended by section 12.

<sup>9</sup> Of course, by the terms of section 12, whichever test you adopt is to be used only for the purpose of making an appointment; it does not affect the right to establish, cancel, or change enrollment for the purposes of voting or running for office. *See G.L. c. 52, §§37, 38, 48*.

tion 12 is largely the result of this recent phenomenon, it may be advisable to propose a legislative resolution in the light of present circumstances.<sup>10</sup>

Your third question asks whether you may appoint a person who belongs to the same party as three members of the Authority, when, because of a change in affiliation by a fourth member which will take effect in the future by virtue of G.L. c. 4, §12, an imbalance in the membership will result.

There are two answers to this question. First, section 12 was enacted in part for the purpose of enabling an appointment to be made despite a recent change in party enrollment by a sitting member. Were the Governor required to take into account the possibility that the change might become effective in the future, thereby imbalancing the Authority, section 12 would have failed in its purpose. Second, as my answer to the last question will demonstrate, the imbalance hypothesized in the question is not inconsistent with the statute and may be remedied in part by future appointments. Accordingly, I answer your third question with a qualified "yes" and turn to consideration of your related fourth inquiry.

This last question asks what action should be taken if a sitting member changes his affiliation and thereby causes the number of members who belong to the same party to exceed four. A short answer to your question is that, under St. 1956, c. 465, §2, the only action which the Governor may take is to redress the imbalance through subsequent appointments. But I will go further, because both your third and fourth questions reflect concern that an imbalance of this sort violates the statute and could therefore cast doubt on the validity of action by the Authority. If this were so, the Governor could not afford to make an appointment that might result in a future imbalance.

The resolution of this problem is to be found, not in G.L. c. 4, §12, which is simply an interpretive aid, but in St. 1956, c. 465, §2, and it turns upon whether the statute sets forth qualifications to hold office, or limitations on the Governor's power to appoint members to the Authority.<sup>11</sup> If the former, then one or more members could be disqualified during their terms by a change in affiliation; if the latter, then as long as the members have been properly appointed, it is of no concern that an imbalance may arise during their tenure.

In my opinion, the question is answered straightforwardly by the words of the statute taken in their context. The statute does not state that each member shall have certain specific qualifications; it describes the Authority as having seven members appointed by the Governor. Among these seven, not more than four shall be of the same party, and the seven "shall include persons with extensive experience" in various fields. Plainly, the statute describes the composition of the Authority. Such qualities as "experience" are not easily viewed as continuing qualifications. If a member has extensive experience in engineering when he is appointed, he will not lose it during his tenure. Furthermore, if the Authority does not conform to

<sup>10</sup> I note that a petition has been filed by the Secretary of the Commonwealth and others for further amendment of section 12. The petition proposes the addition of the following sentence to section 12: "Any enrollment required for appointment to such a board, commission, or other body must have been maintained continuously during the two years immediately preceding appointment."

<sup>11</sup> As I have previously noted, similar provisions are set forth in many statutes. Whether a particular statute with such a provision states a limitation or qualification depends on the words of that statute. I note in particular the variant forms in the following statutes: G.L. c. 268B, §2 ("[a]t no time shall more than three members be from the same political party"); G.L. c. 15, §1 H (similar); G.L. c. 6, §59A (similar); G.L. c. 6, §57 (similar); G.L. c. 7, §41 ("[n]ot more than three . . . shall be members of the same political party, and, of the members . . . who are enrolled as members of a political party on the voting list used at the primaries, not more than a majority of such members shall be of the same political party.")

the criteria set out in St. 1956, c. 465, §2, there is no principle in the statute by which to determine which member is disqualified.<sup>12</sup>

If these provisions are viewed simply as rules limiting the Governor's choice of appointees, these problems are obviated. It is a simple matter to determine with respect to each appointment whether that appointment is consistent with the Authority's composition as it is prescribed by the statute.<sup>13</sup> Moreover, it is fully consistent with the legislative purpose to read these provisions as rules to guide the application of periodic correctives to the Board's composition rather than as conditions of the Authority's continuing validity, or of the right of its members to hold office. Indeed, it seems most unlikely that the Legislature would intend to make the validity of the Authority's acts turn on the hazard that a member would not change his affiliation.<sup>14</sup> Since my interpretation is consistent with the legislative purpose, and since it avoids the serious problems posed by the alternative, it is the preferred construction of the statute. "It is an established rule of statutory construction that allegedly conflicting provisions of a statute should, if possible, be construed in a way that is harmonious and consistent with the legislative design." *Peters v. Michienzi*, 385 Mass. 533, 537 (1982). Accordingly, I conclude that St. 1956, c. 465, §2, is to be read as a limitation on the Governor's power to appoint members to the Authority, and not as a qualification of their continuing right to hold office. See *Harrell v. Sullivan*, 220 Ind. 108, 119, 40 N.E. 2d 115, 119 (1942) (statute of this character imposes limitation on appointment power, not qualification to hold office); *State ex rel. Childs v. Holman*, 58 Minn. 219, 225, 59 N.W. 1006 (1894). Compare *Commonwealth v. Plaisted*, 148 Mass. 375, 387 (1889) (statute providing that members of board of police are to be appointed from the two principal political parties is probably a direction to the Governor rather than "element in the tenure of the office").

From all the foregoing discussion it should be clear, however, that I regard the statutory framework to be imperfect. I therefore close this opinion by reiterating an observation I have made throughout: these statutes require legislative attention.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

<sup>12</sup> It is surely significant in this regard that the Legislature has not provided a distinct remedy when a board or commission becomes imbalanced. Compare G.L. c. 51, §19 (procedure for removing registrar of voters when board of registrars becomes imbalanced).

<sup>13</sup> Thus, it is not significant that the Legislature has not specifically established a means for challenging an appointment to the Authority, an action by the Attorney General in the nature of quo warranto is well-suited to test an appointment.

<sup>14</sup> A rule disqualifying a member who has changed his affiliation during his tenure could conceivably be susceptible to constitutional attack. But see *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (dicta) (where state's election laws require judges to be of different parties, a judge who changes his registration could legitimately be discharged).

February 14, 1984

Number 9.

Honorable Michael Joseph Connolly  
*Secretary of the Commonwealth*  
 State House  
 Boston, Massachusetts 02133

Dear Secretary Connolly:

You have requested my opinion whether you are required to issue commissions for gubernatorial appointments to public offices under G.L. c. 30, §12, and to record those commissions in the Commonwealth's official records, in four particular circumstances.<sup>1</sup> For the reasons discussed below, I conclude that the role of the Secretary of the Commonwealth in the process of gubernatorial appointments is exclusively ministerial and that, in all but one of the instances you describe, you are required to issue commissions and make an appropriate record thereof in the Commonwealth's official records.

Initially, I note that following your request for this opinion, you issued emergency regulations governing precisely the extant questions. See 950 CMR 201.01 *et seq.* (Commissions Regulations). Those regulations became effective on January 28, 1983, and require appointing authorities to follow explicit procedures "[i]n order for a commission to be issued and recorded". 950 CMR 201.05. Implicit in the adoption of those Commissions Regulations is the assumption that no normal procedures existed prior to their promulgation, and that none were required by law. That conclusion would, of course, fully resolve your inquiry. In circumstances where the Attorney General's opinion is not "clearly required", *see, e.g.*, 1973-74 Op. Atty. Gen. No. 31, Rep. A.G., Pub. Doc. No. 12 at p. 76 (November 6, 1974), *quoting* 6 Op. Atty. Gen. 648, 649 (1922), it is appropriate to decline rendering a formal opinion. Your request is unusual, however, because it raises state constitutional and statutory questions of significance, and bears upon the integrity of the terms of office of several public officers. It would be unwise and inappropriate to leave the eligibility of public officers in doubt. Moreover, the Commissions Regulations were issued as a temporary emergency measure, are subject to modification after public hearing, and may not become permanent regulations.<sup>2</sup> Accordingly, I respond to your inquiry.

<sup>1</sup> You have described those circumstances in the following manner:

1. An individual has tendered to the Secretary of State a writing signed by one duly constituted to administer qualifying oaths, c. 30, §11, and which states that the individual has taken the qualifying oath for a specific public office. The Secretary of State has received no other notification or evidence of the appointment from the appointing authority.
2. An individual tenders to the Secretary of State a letter appointing the individual to a specific public office and signed by a duly authorized appointing authority. The Secretary of State has received no other notifications of the appointment from the appointing authority.
3. An individual advises the Secretary of State that he or she has been appointed to a specific public office by a duly authorized appointing authority. The Secretary of State has received no other notification of the appointment from the appointing authority.
4. The Secretary of State receives notice of an appointment to a specific public office by a duly authorized appointing authority after the expiration of the term of office of the appointing authority. The notice of appointment is dated at a time before the expiration of the term of the appointing authority.

<sup>2</sup> Because the circumstances outlined in your request pre-date the Commissions Regulations, they play no role in the following analysis, and I express no view upon their validity.

Your request addresses appointments made by the governor and governed by G.L. c. 30, §12, which provides that:

A person appointed to an office by the governor with or without the advice and consent of the council shall be notified of his appointment by the state secretary and his commission delivered to him, and if he does not, within three months after the date of such appointment, take and subscribe the oaths of office, his appointment shall be void, and the secretary shall forthwith notify him thereof and require him to return his commission, and shall also certify said facts to the governor.

Your constitutional role is consistent with the statute's requirement that the state Secretary inform a duly appointed public officer of his commission. Thus, Mass. Const. Part 2, c. 2, §4, art. 2 provides that "[t]he records of the Commonwealth shall be kept in the office of the secretary . . . and he shall attend the governor and council . . . as they shall respectively require." Mass. Const. Part 2, c. 6, art. 4 provides that "[a]ll commissions shall be in the name of the Commonwealth of Massachusetts, signed by the governor and attested by the secretary or his deputy, and have the great seal of the commonwealth affixed thereto." These are the essential statutory and constitutional provisions governing the conduct of the state Secretary in the process of gubernatorial appointment making.

The relevant statutory and constitutional provisions make plain that the state Secretary functions in a purely ministerial manner with respect to gubernatorial appointments. Thus, commissions are "attested by the Secretary", Mass. Const. Part 2, c. 6, art. 4; records are "kept in the office of the Secretary", Mass. Const. Part 2, c. 2, §4, art. 2; and public officers "shall be notified" of their commissions by the Secretary. G.L. c. 30, §12. Each of these functions is mandatory in nature. 63 Am. Jur. 2d, *Public Officers and Employees*, §118 (1972) (the state Secretary acts "in a ministerial capacity, and the duty imposed on him is generally regarded as a mandatory one, involving from its very nature no exercise of judgment or discretion."). In the absence of any discretion, the state Secretary must act in accord with the explicit directives of the statutory scheme and state constitution.

Dispositive of the nature and extent of the state Secretary's role is the decision of the United States Supreme Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803). In that case, President John Adams appointed several justices of the peace immediately prior to his departure from office, but President Jefferson's Secretary of State, James Madison, refused to deliver commissions to the Adams appointees. Chief Justice Marshall noted the distinction between an appointment and the transmittal of a commission. "The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same," wrote Marshall. *Id.* at 156. Once the executive has taken "the last act required" of him,

[t]he subsequent duty of the Secretary of State is prescribed by law . . . he is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding which may be varied . . . It is a ministerial act which the law enjoins on a particular officer for a particular purpose. *Id.* at 158.

Indeed, if the Secretary fails to record or otherwise process the appointment, his failure to act does not affect the integrity of the appointment. Thus, “[i]n the case of commissions, the law orders the Secretary of State to record them . . . and whether inserted in the book or not, they are in law recorded.” *Id.* at 161.<sup>3</sup> This rule was reaffirmed by the Court in *United States v. LeBaron*, 60 U.S. (19 How.) 73 (1856), when a question arose with regard to an appointment made by President Zachary Taylor but transmitted after his death in office. The Court declared that:

When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide . . . that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; . . . all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

The transmission of the commission to the officer is not essential to his investiture of the office. If, by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but evidence of those acts of appointment and qualification which constitute his title. . . .

*Id.* at 78-79.

Neither the age of these cases, nor their federal origins, detracts from their vitality or applicability to the issues raised by your request.

In Massachusetts, a gubernatorial appointment is complete upon the written or oral appointment of the governor. The only requirement remaining is the “qualification” of the appointee established by the taking of the qualifying oaths prescribed by the laws of the Commonwealth. *See, e.g.,* Mass. Const. Part 2, c. 6, art. 1.<sup>4</sup>

No form is prescribed by law for a gubernatorial appointment. Thus, the appointment may be made by letter, orally, or in some other manner. “[W]here an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions.” *Shapleigh v. San Angelo*, 167 U.S. 646, 658 (1897). *Accord Opinion of the Justices*, 368 Mass. 866, 874 (1975) (governor has broad discretion to select the means he will use in executing a state law duty); 1935 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 129-130 (failure of the governor to take oath precisely as required by the state constitution did not impair his ability to perform in office).

<sup>3</sup> A commission is not necessarily a written document, although it may be. In Massachusetts it appears to be the practice that only notary publics and commissioners authorized to administer oaths are actually presented with a written document, marked with the seal of the Commonwealth, as formal evidence of their appointment. Although G.L. c. 30, §12 appears to require the delivery of a written commission to all gubernatorial appointees, the failure to do so does not undermine the appointment since the commission is only evidence of the appointment, and not the appointment itself. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 160 (1803). *See also United States v. LeBaron*, 60 U.S. (19 How.) 73, 78-79 (1856).

<sup>4</sup> See also G.L. c. 30, §8, which provides, *inter alia*, that “no officer shall enter upon the duties of his office until he is duly qualified as provided by law.”



Once the governor makes an appointment, the appointee is entitled to enter into the office for which he has been chosen. *United States v. LeBaron*, 60 U.S. (19 How.) at 78. However, that entitlement is conditional upon the state statutory and constitutional requirement that the person qualify for his public office. G.L. c. 30, §8. “[T]he appointment and the qualification are distinct and separate things.” 63 Am Jur. 2d, *Public Officers and Employees*, §99 (1972). Thus, a public officer must be both “selected and qualified” before he can “enter on the discharge of the business of his place of office”. See *Opinion of the Justices*, 275 Mass. 575, 579 (1931); Mass. Const. Part 2, c. 6, art. 1.

Against this general backdrop of the law, I turn to your specific inquiry, which is whether you are required by law, under four particular circumstances, to issue and record a commission for a public office.

In order for the state Secretary to perform the tasks required of him by law, he must be informed, in some manner, of an appointment by the appointing authority or his duly authorized agent. The forms of both the appointment and the communication of the appointment to the state Secretary are not prescribed by law. Some evidence of the appointment, however, should be brought to the state Secretary’s attention by the appointing authority or someone authorized to act on his behalf. In the absence of independent verification of an appointment, the Secretary may make inquiry of the appointing authority to confirm the appointment. The third circumstance you describe provides the clearest example of an instance where reasonable doubt might exist about the veracity of an appointment, and where you might make inquiry of the appointing authority prior to issuing and recording a commission.

With respect to the remaining circumstances (numbers 1, 2 and 4), they each appear to be governed by the general rule that a public officer may enter upon his official duties upon his appointment and qualification. In each of those circumstances, it appears that you have received sufficient evidence of an appointment from the appointing authority or his authorized agent, and you are required to issue and record commissions.<sup>5</sup> It is of no consequence that you received notice of an appointment after the expiration of the appointing authority’s term of office, see *United States v. LeBaron*, 60 U.S. (19 How.) at 78, or that the appointee himself transmits his letter of appointment to you. In the situation where an individual tenders to you a writing which is signed by the governor and which indicates that the individual took the qualifying oath for a specific office, that should ordinarily be sufficient evidence for you to perform the tasks required by statute and state constitution.<sup>6</sup>

<sup>5</sup> You must issue and record a commission even if the appointee has not yet taken the qualifying oaths. The commission becomes void, and you must so inform the individual, if the appointee fails to take those oaths within ninety days of his appointment. G.L. c. 30, §12.

<sup>6</sup> I do not understand your request to inquire about the veracity of the governor’s signature on any document. I understand that in some instances, the governor may make use of a facsimile signature to carry out certain duties. If you had reason to believe the governor’s facsimile signature was unauthorized, you would be warranted in seeking independent verification of the appointment from the governor or his duly appointed agent. Doubt about the integrity of a facsimile signature does not interfere with the appointee’s ability to carry out the duties of his office. However, if you determine that the facsimile signature was not authorized, the appointment is null and void and you should so notify the individual.

In sum, you are obligated to issue and record commissions for individuals whose appointments are the subject of your request, with the exception of the third circumstance you describe.<sup>7</sup> In that instance, your duty to issue and record a commission becomes mandatory upon receipt of some verification by the appointing authority or his authorized agent that an appointment was made during his term in office.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

March 23, 1983

Number 10.

Evelyn B. Murphy  
*Secretary Office of Economic Affairs*  
Room 2101  
One Ashburton Place  
Boston, Massachusetts 02108

Dear Secretary Murphy:

Your predecessor requested my opinion concerning the proper construction of G.L. c. 23B, §§11-15, relating to the Urban Job Incentive Bureau (the "Bureau"). The questions concern the Bureau's responsibility, under those statutory provisions, to certify the eligibility of certain business facilities for favorable tax treatment. Specifically, the following questions are posed:

1. Is the Bureau required to determine, before exercising its authority to renew or extend a certificate of eligibility for a particular business facility pursuant to section 15 of chapter 23B, that said facility meets each of the requirements for certification established by section 13 of said chapter for the taxable year for which such renewal or extension has been requested?
2. If the answer to the first question is in the affirmative, can the Bureau nonetheless renew or extend the certificate of eligibility for a particular business facility for a taxable year during which said facility was no longer located in an "eligible section of substantial poverty," as required by section 13(1), solely because, in the intervening period since the facility was initially certified or last had its certificate renewed or extended, the area in which the facility is located has ceased to qualify as an "eligible section of substantial poverty" as that term is defined in section 11(a) of chapter 23B?

<sup>7</sup> As noted above, this opinion is rendered independently of your recent Commissions Regulations, 950 CMR 201.01 *et seq.*, the finality and validity of which remain pending.

3. Where must a facility be located to satisfy the location requirement for an "eligible business facility" established by chapter 23B?
4. Where must an eligible business facility draw its employees from, thereby creating or maintaining at least twenty per cent of its employees, but not less than five jobs, as required by section 13(2) of chapter 23B?

I will respond to these inquiries in the order posed.

In response to the first question, it is my opinion that before renewing or extending a certificate of eligibility under G.L. c. 23B, §15, the Bureau must determine that the facility in question continues to meet all the requirements set forth in G.L. c. 23B, §13. This conclusion is based on the language of the statute as well as its legislative intent.

Under G.L. c. 63B, §§38E and 38F, favorable tax treatment is made available for an "eligible business facility, as defined in section eleven of chapter twenty-three E." General Laws chapter 23B, section 11(c), defines "eligible business facility" as follows:

a place of business . . . located in a city or town containing one or more eligible sections of substantial poverty or in a city or town contiguous thereto and for which a certificate of eligibility has been issued by the bureau . . . . *A facility for which such a certificate is issued shall be deemed an eligible business facility only during the taxable year or as of the taxable status date to which such certificate relates, as provided in this chapter.* (Emphasis added.)

Thus, in order for a business facility to be "eligible," it must have been issued a *current* certificate of eligibility by the Bureau. This requirement is reiterated in section 15(b), which makes it clear that the initial certificate issued by the Bureau with respect to a particular eligible business facility may not extend beyond one taxable year. Thus, while section 15(c) permits eligibility to be certified for a cumulative total of up to ten years, periodic renewal or extension is nevertheless required.

Furthermore, section 13 itself is phrased in terms of continuing requirements. To be eligible, a facility must, generally speaking: (1) serve an area larger than the eligible section of substantial poverty which satisfies its location requirement; (2) create or retain in that section at least twenty percent of its employees, but not less than five; (3) provide an approved training or assistance program, as long as the Bureau determines this to be feasible, and assure employed residents of poverty areas opportunities for job upgrading and for entry into supervisory positions; (4) represent an expansion of employment opportunities for the relevant area. St. 1982, c. 658, added a fifth limiting factor based upon the date of acquisition of the property.

My conclusion that these requirements must be met with respect to each year for which a renewal or extension is sought is underscored by the language in section 13(3), permitting a relaxation of the training or assistance requirements of that paragraph if the Bureau determines that continuation of such a program is no longer feasible. By negative implication, this exemption contemplates that without

the proviso the discontinuance of such a program would require the rejection of an application for a renewal or extension. Furthermore, the Bureau is authorized, by section 15(f), to revoke certificates "if there has been a material change" in the facts relevant to the requirements of section 13. This provision is a further indication that a facility must, for continued eligibility, remain in compliance with the requirements of section 13.

This interpretation is also consistent with the legislative intent underlying the Act. As a familiar general rule, a "statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Commonwealth v. Galvin*, 388 Mass. 326, 328 (1983), quoting *Board of Education v. Assessor of Worcester*, 368 Mass. 511, 513 (1975). Considering the essential purpose of the Act, providing employment opportunities and job improvement to residents of areas of substantial poverty within the Commonwealth, see G.L. c. 23B, §12, it would make little sense to suggest that a corporation may satisfy the requirements of section 13 for one year only, but remain eligible for nine further years of favorable tax treatment in disregard of those requirements. Rather, the Act as a whole clearly appears to be directed at providing tax advantages only in exchange for continuing benefits to the Commonwealth. Therefore, it is my opinion that before renewing or extending a certificate of eligibility, the Bureau must determine that the facility continues to meet the requirements of G.L. c. 23B, §13.

One of the requirements set forth in section 13 is that a facility be located in or contiguous to an eligible section of substantial poverty. See G.L. c. 23B, §13(1). In response to the second question, it is my opinion that this particular requirement must be satisfied at the time of each renewal or extension.

That question arises from the observation that the economic conditions in the area in which the facility is located may change after the initial certification and thereby preclude eligibility in later years. Although such a change may occur for reasons beyond the control of the affected business, it is "a salient principle of statutory construction" that "the statutory language itself is the principal source of insight into the legislative purpose." *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 37 (1977). A statute cannot be extended by construction or enlargement beyond its fair import, although a hardship or unintentional omission results. *Mitchell v. Mitchell*, 312 Mass. 154, 161 (1942). Although it might have been a stronger incentive to impose the location requirement for only the initial year, the Legislature has not done so.

Furthermore, the location requirement is contained not only in section 13(1), but also in each of the other paragraphs of section 13. "Eligible business facility" is expressly defined as a place of business which "is located in a city or town containing one or more eligible sections of substantial poverty or in a city or town contiguous thereto." G.L. c. 23B, §11(c) (emphasis added). It would run contrary to that definition to conclude that a facility could remain an "eligible business facility," due to once having been located in an area so defined, even though it is no longer so located. Significantly, the references to the facility location requirement in section 13 also are in the present tense. Therefore, it is my opinion that the Bureau may not renew or extend the certificate of a facility which does not continue to meet the location requirement of the statute.

The third question asks what, precisely, is that location requirement. This question arises because each statutory reference to the location requirement contains a slightly different phrasing.<sup>1</sup> Thus, this statute, like the one at issue in *Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance Company*, 371 Mass. 186 (1976), "in certain respects lacks precision and verbal consistency," *id.* at 190, and therefore must be given a "reasonable construction," consistent with the legislative intent. *American Family Life Assurance Company v. Commissioner of Insurance*, 388 Mass. 468, 473 (1983). Such a construction, in my opinion, leads to the conclusion that, in order to be eligible, a facility must be located in a city or town containing one or more eligible sections of poverty or in a city or town contiguous to such a municipality.

Tax benefits, which are the reason a business entity seeks eligibility, are available only with respect to "an eligible business facility, as defined in section eleven of chapter twenty-three B." G.L. c. 63, §§ 38E and 38F. Section 11(c) of c. 23B, in turn, defines the location requirement with clarity and precision: the facility must be located "in a city or town containing one or more eligible sections of substantial poverty or in a city or town contiguous thereto."

The other references to location, by contrast, appear to be more in the nature of shorthand references to the definition set forth in section 11(c). None of the paragraphs of section 13 appears to be intended to substitute a different definition; they are, rather, each primarily directed to different requirements for certification. Thus, for example, section 13(1) primarily requires that the area served by the facility be larger than the eligible section of substantial poverty. Section 13(2), similarly, is not directed at defining the facility's location but, rather, to requiring the creation or retention of jobs within a particular area. Sections 13(3) and 13(4) are further variations on this theme; section 13(3) establishes the necessity of a training or assistance program and of opportunities for upgrading, and section 13(4) is directed principally to requiring that the facility constitute an expansion of employment opportunities rather than a replacement of an existing business. The references to location in each of those sections are secondary to the primary purposes of those sections and therefore are not intended to supersede the precise definition of the term "eligible business facility" contained in section 11(c). Therefore, I conclude that in order to satisfy the location requirement, a facility seeking certification must be located in a city or town containing one or more eligible sections of substantial poverty or in a city or town contiguous to such a municipality.

The fourth question concerns section 13(2), which provides that a facility may not become an "eligible business facility" unless it

creates or retains in the eligible section of substantial poverty in which it is located at least twenty per cent of its employees, but not less than five jobs.

The question is whether such employees must be drawn from the eligible section of poverty itself or whether they may be drawn from some larger area.

As discussed in response to the preceding question, I have concluded that the facility itself need not be located in an eligible section of substantial poverty.

<sup>1</sup> Section 11(c) provides that an eligible business facility must be "located in a city or town containing one or more eligible sections of substantial poverty or in a city or town contiguous thereto." G.L. c. 23B, §11(c). However, section 13(1) refers to the "eligible section of substantial poverty in which [the facility] is located or contiguous to"; section 13(2) refers to "the eligible section of substantial poverty in which [the facility] is located"; section 13(3) requires training of residents of "the eligible section of substantial poverty in which such facility is located or contiguous to"; and section 13(4) refers to "the eligible city or town in which the facility is located."

However, in response to the fourth question, it is my opinion that this provision expressly requires that "twenty per cent of [a facility's] employees, but not less than five jobs" must be created or retained from the eligible section of substantial poverty itself.

This conclusion is based on a literal reading of section 13(2). I also consider it significant that section 13(3) refers to the necessity that the employed persons be "residents"—defined in section 11(d) as domiciliaries of an eligible section of substantial poverty.<sup>2</sup> In short, the statute draws a distinction between the area in which a facility may be located and the area from which a minimum number of employees must be drawn. The statutory language, which is the primary basis for construction, *Hoffman v. Howmedica, Inc.*, *supra*, provides clearly that the employees in question must be drawn from the eligible section of substantial poverty itself. G.L. c. 23B, §§13(2), 13(3).

A broader interpretation of this requirement, which would permit such employees to be drawn from the entire city or town containing an eligible section of substantial poverty, would arguably serve the Bureau's purpose "to enlarge and improve the skills of the work force, especially those within urban areas containing sections of substantial poverty." G.L. c. 23B, §12. However, although a statute should be construed to enable achievement of its purposes, *United States Trust Company v. Commonwealth*, 348 Mass. 378, 383 (1965), the legislative intent is to be ascertained primarily from the statutory language. *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 1981 Mass. Adv. Sh. 415, 420. In my opinion, such an interpretation would conflict with the statutory language. To the extent that the statutory language limits the practical scope of the Act, such a limitation must be taken as part of the expression of the Legislature's intent. *Commonwealth v. Galvin*, *supra*; *Mitchell v. Mitchell*, *supra*.

Furthermore, although this requirement may limit the applicability of the Act with respect to facilities of substantial size, a looser construction could undercut the purposes of the Act by permitting eligibility even though residents of depressed areas were not being employed, trained, or offered opportunities for advancement by the facility. It is unlikely that the Legislature intended to permit a business facility, in order to enjoy the tax advantages of the Act, to locate near an area of poverty but draw its necessary twenty percent of employees from those who were not residents of that section.

I therefore conclude that the twenty per cent requirement is met only by employing residents of the eligible section of substantial poverty near or in which the facility is located.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

<sup>2</sup> Moreover, the tax deduction provided by G.L. c. 63, §38F, applies only to the wages paid to "individuals domiciled in an eligible section of substantial poverty." This indicates a statutory purpose to confine that tax incentive to correspond to the benefit to the populace of the particularly poor sections themselves, rather than to the broader urban areas containing such sections.

Number 11.

April 11, 1983

William M. Shippo, Commissioner  
*Department of Labor and Industries*  
 100 Cambridge Street  
 Boston, Massachusetts 02202

Dear Commissioner Shippo:

You have requested my opinion as to whether there presently exists a right of appeal from your wage determinations under G.L. c. 149, §27A. For the reasons discussed below, I conclude that such a right of appeal does exist.

The facts which gave rise to your request are as follows: On February 9, 1983, the Board of Selectmen of the Town of Rowe appealed, pursuant to G.L. c. 149, §27A, from a determination of minimum wage rates made by you on January 11, 1983, for construction of a fire station in that town.<sup>1</sup> Section 27A provides, in pertinent part, that certain interested parties "may appeal to the associate commissioners from a wage determination . . . made by the commissioner, by serving on the commissioner a written notice to that effect. Thereupon the commissioner shall immediately cause the associate commissioners to hold a public hearing on the commissioner's action appealed from." However, you have informed me that you can no longer follow this appeal procedure because St. 1981, c. 351, §230, abolished the positions of "associate commissioner."<sup>2</sup>

Under these circumstances, you have asked whether you are required to hold a public hearing on the Town of Rowe's appeal and, if so, before whom such a hearing should be held. Essentially, your question is whether, by abolishing the positions of associate commissioner, the Legislature, in effect, eliminated the right to appeal wage determinations contained in G.L. c. 149, §27A. As a matter of statutory construction, I have concluded that the right of appeal contained in section 27A continues in effect, despite the abolition of the positions of associate commissioner.

This conclusion is based, first of all, on the fact that St. 1981, c. 351, §230, amended only G.L. c. 23, §1, and did not directly amend G.L. c. 149, §27A, in any manner.<sup>3</sup> Thus the appeal procedure set forth in G.L. c. 149, §27A, remains literally in place, including all references to "associate commissioners." Since G.L. c. 149, §27A, has not been expressly amended or repealed, each word should be given full effect if at all possible. *See In the Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 358 (1977); *Commonwealth v. Brooks*, 366 Mass. 423, 428 (1974). Furthermore, the provision as a whole must be construed to be an effective piece of legislation. *See Commonwealth v. Mercy Hospital*, 364 Mass. 515, 521 (1974). Conversely, an interpretation rendering a statute meaningless is to be avoided. *See Insurance Rating Board v. Commissioner of Insurance*, 356 Mass. 184, 189 (1969); *O'Shea v. Holyoke*, 345 Mass. 175, 179 (1962).

<sup>1</sup> The Commissioner of Labor and Industries is required to set the minimum wage rate paid in the construction of public works. G.L. c. 149, §26.

<sup>2</sup> St. 1981, c. 351, §230 provides:

Section 1 of chapter 23 of the General Laws, as most recently amended by section 8 of chapter 864 of the acts of 1977, is hereby further amended by striking out, in lines 4 to 6, inclusive, the words:—, and three associate commissioners, one of whom shall be a representative of labor and one a representative of employers of labor.

<sup>3</sup> It is notable that St. 1981, c. 351, §231, also amended G.L. c. 23, §2, by abolishing each reference to "associate commissioner" contained therein.

Another principle of statutory construction which is applicable here relates to repeal by implication. Since G.L. c. 149, §27A, has not been expressly repealed, any repeal would necessarily be by implication. Such repeals are strongly disfavored. *T.J. Hartnett Beverage Co. v. Alcoholic Beverages Control Commission*, 350 Mass. 619, 622 (1966); *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 1981 Mass. Adv. Sh. 415, 420-21. In addition, it is also significant that St. 1981, c. 351, §230, was an outside section of a general appropriation bill.<sup>4</sup> The policy disfavoring repeals by implication is even stronger when the act from which a repeal is inferred is an appropriation act. *TVA v. Hill*, 437 U.S. 153, 190 (1978); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 131, 134 (1st Cir. 1979).

Given these principles, an analysis of G.L. c. 149, §27A, in conjunction with St. 1981, c. 351, §230, leads to the conclusion that the appeal procedure contained in section 27A remains effective. First, G.L. c. 149, §27A, is presumed to be effective and not meaningless. *Commonwealth v. Mercy Hospital*, *supra* at 521. Second, no express repeal exists here. Third, the presumption against repeal by implication has not been overcome. *T.J. Hartnett Beverage Co. v. Alcoholic Beverages Control Commission*, *supra*. Section 230 of chapter 351 of the Acts of 1981 did only one thing: it abolished the positions of "associate commissioner" in the Department of Labor and Industries. Nothing in section 230 (or in its companion section 231) indicates in any direct or indirect manner that the Legislature intended to eliminate the appeal mechanism of G.L. c. 149, §27A. Rather, the legislative history of that section indicates that its purpose, along with other outside sections of the same act, was to reorganize several departments and divisions (including the Department of Labor and Industries) into a "logical and more efficient structure." Mass. S. Doc. No. 2222 at 29-21 (1981). More fundamentally, the elimination of "associate commissioner" does not bear upon the principal thrust of G.L. c. 149, §27A, that is, to provide for review of minimum wage determinations. The fact that the "associate commissioners" are named as the hearing functionaries in section 27A is secondary to the principal purpose of that provision. In sum, St. 1981, c. 351, §230, does not repeal G.L. c. 149, §27A, either expressly or by clear implication.

In addition, it is significant that G.L. c. 149, §27A, can be given full effect even though there are no longer any associate commissioners. One means of doing so would be to request the use of a hearing officer from the Division of Hearing Officers within the Executive Office for Administration and Finance to conduct hearings on wage determination appeals.<sup>5</sup> Another means of effectuating G.L. c.

<sup>4</sup> Such outside sections to the general budget are now prohibited. G.L. c. 29, §7L, as amended by St. 1981, c. 690. Compare *Opinion of the Justices to the House of Representatives*, 1981 Mass. Adv. Sh. 2071, 2077.

<sup>5</sup> General Laws chapter 7, section 4H, provides in pertinent part:  
Any officer or agency of the commonwealth authorized to conduct adjudicatory proceedings may, subject to the approval of the secretary of the executive office within which such officers is employed or such agency is located, request the division to conduct one or more classes of such proceedings or appeals on behalf of the officer or agency. The chief hearing officer may, subject to the approval of the secretary of administration and finance, grant any such request but shall, when necessary, promulgate regulations governing the additional class or classes of proceedings or appeals to be so conducted or heard prior to conducting or hearing any such proceedings or appeals.



149, §27A, would be to designate alternative hearing officers from within the Department of Labor and Industries.<sup>6</sup> Such a designee should be someone who was not involved in the wage determination appealed from. *See* 4 B. Mezines, *Administrative Law*, §§36.01 and 36.02 (5th ed. 1982). Alternatively, individuals could be hired from outside the Department to perform this function.<sup>7</sup>

In sum, it is my opinion that the right of appeal contained in G.L. c. 149, §27A, remains in effect.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

May 11, 1983

Number 12.

Paul Levy, Chairman  
*Department of Public Utilities*  
1210 Leverett Saltonstall Building  
100 Cambridge Street  
Boston, Massachusetts 02202

Dear Mr. Levy:

Your predecessor requested my opinion on several questions relating to recent efforts by some Massachusetts municipalities to restrict the use of herbicides on utility company rights of way in their communities through regulations promulgated by municipal boards of health or similar local agencies. The first question posed by your predecessor is whether such local regulations are preempted by the Massachusetts Pesticide Control Act, G.L. c. 132B. In the event that such local herbicide control regulations are not preempted by the provisions of G.L. c. 132B, your predecessor asked whether G.L. c. 166, § 27, gives the Department of Public Utilities (DPU) authority to approve or disapprove local regulations that restrict the use of herbicides along the rights of way of utility companies and, if so, whether such local regulations may be enforced by municipalities prior to being reviewed and approved by the DPU. Finally, if the DPU has authority under G.L. c. 166, § 27, to review and approve or disapprove such local regulations governing the use of herbicides, your predecessor asked for guidance concerning the interplay between the DPU, the Pesticide Board and the Department of Environmental Quality Engineering regarding each agency's authority to regulate the use of herbicides by utilities along their rights of way.

For the reasons set forth in the balance of this opinion, I must respectfully decline to answer the first and last questions. My response to the second and third questions

<sup>6</sup> General Laws chapter 23, section 3, provides in pertinent part:

The commissioner shall be the executive and administrative head of the department. Except as otherwise provided, he shall have charge of the administration and enforcement of all laws and may assign the officers and employees of the department to the several divisions thereof.

<sup>7</sup> General Laws chapter 23, section 4, provides in pertinent part:

The commissioner may employ, for periods not exceeding ninety days, such experts as may be necessary to assist the department in the performance of any duty imposed upon it by law.

is that the DPU has no authority under G.L. c. 166, § 27, to approve or disapprove local board of health regulations affecting utility company rights of way and that such regulations may therefore be enforced by municipalities without DPU approval.

I must decline to answer the first question — whether local regulations restricting the use of herbicides on utility company rights of way are preempted by the Massachusetts Pesticide Control Act — for several reasons. First, under the standards set forth by the Supreme Judicial Court, the question of whether local regulations are preempted by state law<sup>1</sup> involves a determination of whether the regulations in question actually conflict with state law or, rather, are consistent with, although possibly more stringent than, state law. *See, e.g. Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7, 15 (1979); *Beard v. Salisbury* 378 Mass. 435, 440 (1979); *Bloom v. Worcester*, 363 Mass. 136, 155-156 (1973). Such a determination must be made on a case-by-case basis depending on the particular subject matter, scope, and effect of the regulation in question. Since the regulations promulgated by various cities and towns may differ in those respects, I am unable to render a general pronouncement on the issue of preemption.

A second reason why I must decline to answer the first question is that it relates more to the authority of municipal officials than to your own official duties. The Attorney General is authorized by G.L. c. 12, § 3, to render opinions to state officials only on “matters relating to their official duties.” It would therefore be beyond the scope of my authority to issue an opinion on this issue.

Third, it is my understanding that the issues raised by the first question are currently the subject of litigation in the state courts. In such circumstances, the Attorney General traditionally declines to issue opinions but rather defers to judicial resolution of such matters.

The second question raised by your predecessor is whether G.L. c. 166, § 27,<sup>2</sup> gives the DPU authority to approve or disapprove regulations prohibiting or restricting herbicide use along utility company rights of way. For the following reasons, I conclude that G.L. c. 166, § 27, empowers the DPU to review only regulations adopted by local authorities pursuant to G.L. c. 166, § 25.<sup>3</sup>

The outer limits of the DPU’s authority to review local regulations affecting the “erection, maintenance or operation of a line for the transmission of electricity” were demarcated by the Supreme Judicial Court in *Boston Edison Co. v. Sudbury*, 356 Mass. 406, 418-20 (1969). In that case, the court was asked to determine whether certain local building code by-laws applied to the construction of

<sup>1</sup> Your predecessor did not ask and I express no opinion as to whether such regulations are preempted by federal law, in particular the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* The Attorney General traditionally declines to render opinions on the issue of federal preemption of state or local law but rather advises state officials of their duty to enforce and comply with state statutes until such time as such statutes are held to be preempted by a court of competent jurisdiction. *See* 1979-1980 Op. Atty. Gen. No. 10, Rep. A.G.; Pub. Doc. No. 12 at 119 n. 6 (1980); 1978-1979 Op. Atty. Gen. No. 6, Rep. A.G.; Pub. Doc. No. 12 at 109, 111 (1979).

<sup>2</sup> General Laws chapter 166, section 27, provides:

No ordinance or regulation of a city or town, or regulation or restriction imposed in a grant of location, affecting the erection, maintenance or operation of a line for the transmission of electricity for light, heat or power extending or intended to extend from some point in one city or town through or to some point in another city or town, shall take effect until approved by the department of public utilities.

<sup>3</sup> The selectmen may, within their towns, permit telegraph, telephone or television lines to be laid under any public way or place and may establish reasonable regulations for the erection and maintenance of all lines for the transmission of intelligence by telegraph, telephone or television, or for the transmission of electricity for light, or for heat or power except for the use of street railway companies, by every person having authority to place such structures in or under public ways or places, including all lines owned or used by said towns. Regulations established by a city hereunder shall be made by ordinance.

a proposed electrical transmission line through Sudbury and several neighboring communities. Before reaching its conclusion that the local building code by-laws at issue did not apply to the proposed construction of an electrical transmission line, the court made a preliminary determination that the DPU lacked authority under G.L. c. 166, § 27, to review and approve or disapprove a building code by-law even if such by-law could have some application to the erection or maintenance of electrical transmission lines. The court observed that G.L. c. 166, § 25, empowers town selectmen to establish “reasonable regulations for the erection and maintenance of all lines . . . for the transmission of electricity.” *Boston Edison Co. v. Sudbury*, 356 Mass at 419. The statute also directs that similar regulations may be established by cities as ordinances. The court then noted that sections 25 and 27 had “originally appeared in one section as St. 1914, c. 742, § 132. The sections, without explanation, were separated in the 1921 recodification of the General Laws.” *Boston Edison Co. v. Sudbury*, 356 Mass. at 419. This intimate alignment of sections 25 and 27 led the court to conclude that:

the word “ordinance” in the first line of § 27, in the light of the language of § 25 (originally the first sentence of the 1914 statute, § 132), can refer only to action by a city under § 25, that “regulation” in that line refers only to regulations of selectmen made under § 25, and that the word “regulation” and the word “ordinance” in § 27 are not broad enough to include a town building by-law which must be adopted by the town in meeting and not merely by the selectmen.

*Boston Edison Co. v. Sudbury*, 356 Mass. at 419 (emphasis added).

The Supreme Judicial Court’s decision in the *Sudbury* case delimits the DPU’s authority under section 27. When a city or town acts under section 25 to regulate “the erection and maintenance of all lines for the transmission . . . of electricity,” it must obtain approval from the DPU in accordance with section 27 before the regulation may become effective. If, however, the city or town issues ordinances or regulations under authority granted to it by the Legislature in provisions other than section 25, such ordinances or regulations become effective without the prior approval of the DPU even if the local measures may have some indirect application to the property or rights of way of utility companies located in the community. Therefore, only when municipal officials adopt regulations pursuant to their authority under section 25 is the DPU empowered by section 27 to review and approve or disapprove local regulations.

Applying these principles to the particular regulations that have been adopted by the boards of health of the towns of Brewster, Wellfleet, and Barnstable (copies of which were attached to your predecessor’s request), I conclude that since those regulations were established by boards of health rather than by the town selectmen, they do not fall within the scope of G.L. c. 166, § 25, and therefore not subject to review and approval or disapproval by the DPU pursuant to G.L. c. 166, § 27.

The answer to your predecessor’s third question — whether local regulations governing the use of herbicides on utility company rights of way may be enforced prior to DPU approval — also follows directly from the language of G.L. c. 166, § 27, as construed by the Supreme Judicial Court in the *Sudbury* case. Section 27 expressly provides that “[n]o ordinance or regulation of a city or town . . . affecting

the erection, maintenance or operation of [an electrical transmission] line . . . shall take effect until approved by the department of public utilities." Since the words "ordinance" and "regulation" have been construed to apply only to ordinances or regulations established pursuant to section 25, *Boston Edison Co. v. Sudbury*, 356 Mass. at 419, it follows that local regulations enacted pursuant to section 25 may not be enforced prior to DPU approval. If, however, local regulations or ordinances are not adopted under the authority granted to local governments by section 25, such regulations may become effective without the prior approval of the DPU despite any indirect effect the regulations may have on utility company property or rights of way.<sup>4</sup>

I must decline to provide the guidance requested in the fourth question, concerning the interplay among the DPU, the State Pesticide Board, and the Department of Environmental Quality Engineering with respect to herbicide regulation, for several reasons. First, your predecessor has not alluded to any actual conflict among these agencies with respect to herbicide regulation; and, moreover, although municipalities may be subject to regulation by all three agencies, it does not necessarily follow that a conflict would arise. Therefore, this question is too speculative to form the basis for an opinion at this time. Second, if such an administrative dispute among state agencies should arise, it would be more appropriately resolved by the Governor, pursuant to G.L. c. 30, § 5, than by an opinion of the Attorney General.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

June 15, 1983

Number 13.

James Gutensohn, Commissioner  
*Department of Environmental Management*  
100 Cambridge Street  
Boston, Massachusetts 02202

Dear Commissioner Gutensohn:

Your predecessor requested my opinion with respect to whether the Department of Environmental Management may, consistent with the provisions of chapter 79 of the General Laws, settle a land damages claim pursuant to G.L. c. 79, §39,

<sup>4</sup> Apart from the issue of DPU approval, however, general municipal health regulations (such as those established by the boards of health of Brewster, Wellfleet and Barnstable), purporting to prohibit or restrict the use of herbicides on utility company rights of way, might be unenforceable on other grounds which are beyond the scope of this opinion. *Cf. Boston Edison Co. v. Sudbury*, 356 Mass. at 420 (general building code by-laws are applicable to electrical transmission lines and supporting structures, as opposed to buildings of a type usually subject to building codes); *cf. also New England Power Co. v. Board of Selectmen of Amesbury*, 389 Mass. 69 (1983) (municipal board of selectmen's authority to revoke a prior grant of street crossing locations for overhead transmission lines is preempted by Legislature's delegation to DPU of broad authority to regulate construction and use of transmission lines); *New England Telephone and Telegraph Company v. City of Lowell*, 369 Mass. 831 (1976) (city ordinance requiring that all construction plans calling for open trenches in or near public ways must be approved by a Registered Land Surveyor or Registered Professional Engineer was invalid as applied to a utility company subject to DPU jurisdiction because the utility's surveyors and engineers are exempt from registration requirements).

after a pro tanto payment has been made to the landowner. For the reasons set forth below, I conclude that the Department's conduct, as your predecessor described it, constitutes an appropriate attempt to settle a land damages claim and is consistent with the applicable statutory scheme.

Your predecessor informed me that the Department approved an award for the taking of 22.4 acres of land in Northbridge. That award was based upon the lower of two appraisals for the land in question, which were obtained by the Department pursuant to G.L. c. 79, §7A. The award was accepted by the landowner as a pro tanto payment, without prejudice to the right to claim a larger sum in proceedings before the appropriate tribunal. G.L. c. 79, §8A. The Department sought to avoid the anticipated litigation of the damages claim by making a settlement pursuant to G.L. c. 79, §39. The amount of that settlement offer was less than the Department's second appraisal of the property. That offer has been accepted by the landowner in full satisfaction of all claims against the Commonwealth.

Your predecessor informed me that the Comptroller has not authorized payment of the settlement because of his view that the agreement may be inconsistent with the statutory scheme, in that after a payment pro tanto, the remedy available to a landowner is a petition for the assessment of damages as provided in G.L. c. 79, §14. The Comptroller's reluctance to act until this issue is resolved has prompted this opinion request.

I begin with a review of the comprehensive statutory scheme which governs eminent domain takings by agencies of the Commonwealth and which provides remedies to aggrieved landowners. For purposes of this review, I have in mind that statutes must be interpreted by ascertaining legislative intent from the ordinary and approved meaning of the language used, "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, Mass. Adv. Sh. (1981) 415, 420 (quoting *Board of Education v. Assessor of Worcester*, 368 Mass. 511, 513 (1975)). "Furthermore, where two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole consistent with the legislative purpose." *Id.*

Section 3 of chapter 79 provides that upon recording of the order of taking, title to the property taken vests in the "body politic or corporate on behalf of which the taking was made," and the right to damages vests in the former owner of the property. Section 8A requires the Department, within sixty days of the taking, to offer a reasonable amount as an award of damages to the former owner "either in settlement under section thirty-nine of all damages for such taking with interest thereon . . . or as a payment pro tanto." If the former owner elects to accept the award as a pro tanto payment, "such election shall be without prejudice to or waiver or surrender of any right to claim a larger sum by proceeding before an appropriate tribunal." *Id.*

A pro tanto payment and a settlement pursuant to section 39 are distinct remedial measures intended to provide just compensation for the governmental taking of private property. A pro tanto award is a partial payment made by the government upon a taking, without prejudice to the landowner's right to bring legal action for the full amount he believes is due. G.L. c. 79, §8A. A settlement under section

39, unlike a pro tanto payment, conclusively disposes of a landowner's entitlement to reasonable compensation without litigation. G.L. c. 79, §39. The distinction between these two approaches is longstanding.

Prior to the enactment of G.L. c. 79, §8A, in 1959, section 39 provided that an agency, upon exercising its taking power, "may after the right to such damages has become vested offer in writing to pay [damages] to the person entitled to receive the same . . . . Acceptance thereof may be either in full satisfaction of all damages so sustained, or as a payment pro tanto without prejudice to any right to have the remainder thereof assessed by the appropriate tribunal." That version of section 39 was interpreted to furnish

a means by which either a settlement may be effected without a trial or an offer made which will reduce the liability for interest. We think that when the Legislature gave to the department power to take land by eminent domain "under chapter seventy-nine" it intended to give to the department full and complete power to carry the necessary proceedings through to a final termination, with all the incidents and alternatives set forth in c. 79.

*Willar v. Commonwealth*, 297 Mass. 527, 528 (1937).

Amendments to the statutory scheme have not altered the availability of settlement without a trial as a way of conclusively resolving an eminent domain claim. In 1957 and 1958, the Judicial Council of Massachusetts recommended amendments to section 39 which would "provide for a mandatory, formal, reasonable offer . . . and a mandatory pro tanto payment of the amount of the offer . . . ." Thirty-third Report of the Judicial Council of Massachusetts, P.D. 144 (1957) at 72-73 (Thirty-third Report). See also Thirty-fourth Report of the Judicial Council of Massachusetts, P.D. 144 (1958) at 93; Mass. H. Jour. 354-55 (1959). The addition of section 8A, and subsequent amendments thereto and to section 39, implemented the Judicial Council's recommendations. The discretionary authority to offer a pro tanto payment was eliminated from section 39 and made mandatory in section 8A.<sup>1</sup> However, the discretionary authority to settle damages claims was left intact in section 39. See Thirty-third Report at 72 ("[O]f all the land-taking cases few are tried to a jury. Most cases are settled."). As the statutory scheme now stands, section 8A requires the offer and payment of a reasonable pro tanto award within 60 days of the recording of the order of taking. Section 39 provides that:

Whenever damages may be recovered under this chapter, the body politic or corporate liable for such damages may after the right to such damages has become vested effect such settlement of the damages with the person entitled thereto as it may deem to be for its best interest . . . . Every settlement under this section shall be in writing and in full satisfaction of all damages for such taking with interest thereon and taxable costs, if any.

<sup>1</sup> The mandatory pro tanto of section 8A was designed "to stop interest on [the amount of the offer to the landowner], thus protecting taxpayers, and to enable the landowner, whose life, business and financial condition may be seriously interfered with, to get *some* payment with reasonable promptness without waiving his claim for more, if he wishes to submit his claim to a judge or jury." Thirty-third Report at 72-73 (emphasis in original).

There is nothing in the interplay of section 39 and section 8A which suggests that agencies do not have the authority to enter into a settlement agreement following a pro tanto payment and conclusively dispose of a damages claim. Indeed, section 8A makes plain that an agency may offer either a section 39 settlement "of any damages" or a payment pro tanto without prejudice to a claim for damages. It would be an unreasonable construction of the statutory scheme to suggest that once a partial payment has been made and accepted pro tanto, a damages claim can be disposed of only by an action against the agency. Moreover, "[i]t would be strange if a department which has authority to take the land and to make the initial award required by §6 of c. 79 should be powerless when it becomes advisable to effect a settlement under §39 of that chapter." *Willar v. Commonwealth*, 297 Mass. at 528.

In this case, the Department made an award and, pursuant to section 8A, it was accepted. Subsequent to its acceptance, the Department and the landowner agreed to a settlement which would conclusively dispose of all damages claims. There was no attempt to amend the pro tanto award or to make a second pro tanto award.<sup>2</sup> Compare 1972-73 Op. Atty. Gen. No. 4, Rep. A.G., Pub. Doc. No. 12 at 46-47 (1972). Because the Department has the authority under section 39 to conclusively settle a damages claim outside the context of litigation, it is my opinion that the Comptroller may act favorably on the Department's request for release of the funds necessary to implement its settlement agreement.

Very truly yours,  
FRANCIS X. BELLOTTI  
*Attorney General*

<sup>2</sup> A second pro tanto award could not have been made because the statutory time restrictions prohibited it. See G.L.c. 79, §6. Moreover, a second pro tanto payment would frustrate the ultimate purpose of the statutory scheme—the conclusive resolution of a landowner's claims against the Commonwealth. See Thirty-third Report at 72-73.

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