COMMENTS

CONSTITUTIONAL LAW — TAX EXEMPTIONS FOR NEW HOUSING — REASONABLE AND PROPORTIONAL PROPERTY TAXES

Judicial decision has eliminated the latest Massachusetts housing plan. Senate document 57 would enable the cities of the Commonwealth to exempt from property tax for five years all residential buildings, except hotels, constructed within one year after enactment of said document into law. House document 1478 would permit the cities to exempt from taxation for five years all housing constructed within five years after enactment for sale to veterans of World War II. Land proper is not involved in either bill. By Massachusetts' method of legislative reference to the Supreme Judicial Court for constitutional determination of proposed new law, the justices advised that no "compelling reasons" were found to bring what in substance had been a key gubernatorial campaign promise within the description of legally allowable exemptions. The avowed purposes of the acts was simply to ease the housing shortage. *Opinion of the Justices.*[1]

It is altogether fitting that Massachusetts should be the testing ground for this controversial legislation as the state has a lengthy and interesting history in the housing field.[2] In 1912 the Massachusetts supreme court, sitting at one of the earliest judicial considerations of the general subject, negatived the use of state funds to sell houses at cost to low income groups since this was thought not primarily a promotion of the public interest.[3] Though it was from no lack of local interest, not

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1. 85 N.E.2d (Mass. 1949).

2. See Robinson and Robinson, *State Aid for Housing*, [1949 WIS. L. REV. 462 and *State Spending for Veteran's Housing, Id.* at 10, John I. Robinson, *Public Housing in Massachusttts*, 18 B. U. L. REV. 83 (1938).

3. Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912). Probably every litigant seeking to overturn a housing authority act has cited this interesting case. As recently as 1938, at least one authoritative source felt that the shade of this opinion had not yet been laid to rest despite constitutional amendment (see note 5, *infra*) designed to effectuate that result. John I. Robinson, *supra* note 2.

This early legislative proposal was discussed at length by a Missouri court: "The act . . . sought to provide homes for all persons regardless of size of income; it made no declaration of urgent necessity, it did not find the existence of conditions inimical to the public health, safety, morals, and welfare and declare that private industry had failed to relieve such

until twenty-seven years later in *Allydonn Realty Corp. v. Holyoke Housing Authority*[4] was the first real housing law successfully litigated in the state. Disregarded were two amendments[5] designed to legalize governmental spending for construction of private dwellings, the case holding in comparison to the 1912 opinion that certain types of housing legislation came within the "public purpose" requirement[6] of the constitution. The *Allydonn* decision involved the constitutionality of an early housing authority, that is, one of the presently common municipal corporations created to act upon the more serious metropolitan housing problems with planned demolition and construction.[7] Massachusetts now has numerous authorities using state and federal funds.[8] Various types of these organ-

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conditions; it did not invoke the police power in clearing of slum districts and the building of sanitary dwellings." Laret Investment Co. v. Dickmann, Mayor, 345 Mo. 449, 456, 134 S.W.2d 65, 69 (1939). This case went ahead to uphold housing legislation in Missouri of the type mentioned in note 7 *infra*. Note the currency of these criticism in regard to the subject matter of this case comment.

As to the "public interest" concept, see note 6 *infra*.

4. 304. Mass. 288, 23 N.E.2d 665 (1939).

5. MASS. CONST. AMEND. 43 and 47. The former provides: the commonwealth may buy land and build upon it houses to be sold to the populace, these houses not to be saleable at less than cost; the latter: during war or exigency, the supply of food, other necessities, and shelter are public functions and legislation may allow the state and its cities to provide them.

6. Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 295, 23 N.E.2d 665, 669 (1939). As to what should be considered in the search for a public purpose see *Allydonn Realty Corp. v. Holyoke, supra Id.* at 293, 23 N.E.2d at 667.

There is no single constitutional expression of need for a public purpose in the expenditure of state money. "It is expressed in various forms. . . . In Art. XI of c. 2, § 1, by restricting the issuing of moneys from the treasury to purposes of 'the necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the General Court [*i.e.*, the state legislature].' In Art. IV of c. 1, § 1, by declaring the purposes, for which the power of taxation, in its various forms, may be exercised by the General Court, to be 'for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof.' The purport and scope of these provisions are made more distinct . . . by reference to . . . Art. X [MASS. CONST. Art. X, pt. 1—this first half of the constitution is called the Declaration of Rights] . . ." Lowell v. Boston, 111 Mass. 454, 461 (1873).

7. The promise of federal aid has played the largest part in stimulating the creation of these housing authorities. Forty or more states have taken advantage of this aid, originally proffered in 42 U.S.C.A. 1410 (U.S. Housing Act of 1937), at least to the extent of passing certain congressionally required measures—of which tax exemption of the authorities themselves is the main one. These requirements do not involve the putting up of any local money at all.

8. Note the distinction between housing authorities financed by the Federal Government and the much rarer state-financed authorities. The fed-

izations are found in most jurisdictions today, and despite the considerable litigation encountered there seems little doubt as to their judicial acceptability.[9]

The Massachusetts veteran has been favored recently to the extent of a $200,000,000 housing authority for his exclusive benefit.[10] The court based the validity of this project on the settled bonus principle of reasonable benefits due and owing to ex-military personnel, thus avoiding any constitutional problems previously found in connection with housing authority legislation.[11] Other states have willingly affirmed aid for veterans through schemes for temporary housing (thereby evading the stigma of socialization),[12] but thus far in addition to Massachusetts only a handful of states have provided any real program for construction of permanent units.[13]

With only the briefest review of the precedents, it is easy to understand why the commonwealth has been regarded as having the most extensive and well-balanced public housing aid in the nation. This considered, there can be little explanation of the negative result in *Opinion of the Justices*[14] not covered

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eral method of aid seems the more effective and is copied frequently by those states with locally funded authorities. For direct assistance the former provides annual subsidies to the authority; for indirect aid, guaranty of housing authority notes and bonds. Robinson and Robinson, *State Aid for Housing*, [1949] WIS. L. REV. 462. Of course if the state itself is willing to supply funds, this action may be taken in concert with federal appropriation as in Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939).

9. This is the conclusion of Robinson and Robinson, *State Spending for Veterans' Housing*, [1949] WIS. L. REV. 10, at 18. Perhaps virtually complete acceptability is found only in regard to authorities using no state supplied funds at all; see note 7 and 8 *supra*. At any rate the difficulties of the Massachusetts tax exemption bills are only a sample of the divers types of opposition which the housing authorities have faced and continue to face. For instance, Ohio has denied tax exemption to the authorities because they do not belong exclusively to the state, Columbus Metropolitan Housing Authority v. Thatcher, 140 Ohio 38, 42 N.E.2d 437 (1942); in Maryland only certain taxes are relieved, Pittman v. Housing Authority of Baltimore, 180 Md. 457, 25 A.2d 466 (1942); Wisconsin allows the use of state funds only for housing veterans, (and this but very recently) WIS. CONST. Art. VIII, § 10.

10. Opinion of the Justices, 322 Mass. 745, 78 N.E.2d 197 (1948).

11. See Robinson and Robinson, *State Spending for Veteran's Housing*, [1949] WIS. L. REV. 10, at 20.

12. Griffith v. Los Angeles, 78 Cal.2d 796, 178 P.2d 793 (1947); Hyland v. City of Eugene, 179 Ore. 567, 173 P.2d 464 (1946); City of Columbus v. Columbus Metropolitan Housing Authority, 33 Ohio O. 212, 67 N.E.2d 338 (1946).

13. Robinson and Robinson, *State Spending for Veteran's Housing*, [1949] WIS. L. REV. 10, at 14.

14. 85 N.E.2d (Mass. 1949).

by its text. The opinion finds two constitutional provisions jeopardized by the proposed tax exemption—MASS. CONST. Art. X, pt. I and Art. IV, §1, c. 1., pt. II. These read, respectively: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws . . ." and "[The legislature has the power and authority to] impose and levy proportional and reasonable assements, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth . . ." Probably owing to its more immediate applicability, the latter stipulation is of the two the most discussed in the holding. In essence, this holding is, that the state's relief of certain realty from levy, while not so relieving other realty in the same category, gives rise to disproportional taxation and is therefore unconstitutional. The court enlarges on this to say that while the framers of the proposed bills may not have intended to incorporate into them any concept of disproportionate taxation, the fact is that every tax exemption must always be in derogation of the "proportional" requirement[15] of the constitution.[16]

However, exemptions are germane to any discussion of taxation and assuredly may be created, if only to a limited extent. In point of fact a number of exemptions presently exist by statute in Massachusetts.[17] Despite the justices' distaste for them, they explain the past creation of exemptions on the theory that the general principles set down in the constitution cannot be applied with literal exactness.[18] Further, an earlier *Opinion*

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15. MASS. CONST. Art. IV, § 1, pt. II. This provision for "proportion" in direct taxes has as its *raison d'etre* the fact that as all property must be taxed to defray the expense of government, taxes should be based on benefit derived from the government in its protection of said property. Inasmuch as the amount held under this state-sanctioned ownership ought to determine the share which the proprietor owes to the community, he should be levied upon accordingly. Oliver v. Washington Mills, 93 Mass. (11 Allen) 268, 275 (1865).

The Massachusetts constitution allows excise taxes to be disproportional; they need be reasonable only. However, in regard to our purposes: "The mere right to own and hold property . . . cannot be made the subject of excise tax." Opinion of the Justices, 195 Mass. 607, 614, 84 N.E. 499, 503 (1908).

16. 85 N.E.2d 222, 226 (Mass. 1949).

17. The Massachusetts tax exemptions are codified under MASS. LAWS ANN., c. 59, § 5. There are some 35 clauses to this section, most of which have undergone considerable amendment.

18. 85 N.E.2d 222, 226 (Mass. 1949), the court adding that, "Some

of the Justices is cited to the effect that it is the duty of the legislature to avoid only insofar as possible any tax mechanism which has a "direct tendency" to create disproportion in its assessments.[19] To these general statements of policy, the 1949 Supreme Judicial Court makes a significant addition. It holds that exemptions—though in fundamental conflict with the constitution—may be allowed where sufficient "compelling reasons" exist.[20] To the misfortune of the instant tax exemption plan, the court fails to find justification for them by way of any "compelling reasons." It is apparent that they felt the benefit to be anticipated was not in the least commensurate with the risk of constitutional perversion involved. The justices further fail to find any distinction in the vital lack of "compelling reasons" between this legislation and that which was struck down[21] in *Inhabitants of Cheshire v. County Commissioners of Berkshire.*[22] The law involved in the latter case allowed reservoirs, dams, and the land under these to be assessed according to the worth of similar land in the vicinity not so improved. It was held that this resulted in an unconstitutional disproportion in local property taxes. That early decision did not speak of exemptions as such, although the law under attack was, similarly to our 1949 house and senate documents, for the encouragement of a particular type of construction. Apparently any number of illegal devices will create disproportion in the direct taxing of property, and the Massachusetts courts will not hesitate to seek them out.[23]

How do the bills in question compare with existing exemption statutes, all of which are presumably based on "compelling reasons"? There are in Massachusetts four broad classifications

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exemptions . . . are permissible" when they do not impair the force of the constitution itself.

19. Opinion of the Justices, 195 Mass. 607, 609, 84 N.E. 499, 502 (1908).

20. 85 N.E.2d 222, 226 (Mass. 1949).

21. Mass. Stat. 1872, c. 306.

22. 118 Mass. 386, 389 (1875): "That provision [MASS. CONST. Art. IV, § 1, c. 1, pt. II] requires that all taxes levied under its authority be 'proportional and reasonable', and forbids their imposition upon one class of persons or property at a different rate from that which is applied to other classes. . . ."

23. *E.g.*, Inhabitants of Cheshire v. County Commissioner of Berkshire, 118 Mass. 386 (1875); Connecticut Mutual Life Ins. Co. v. Commonwealth, 133 Mass. 161 (1882); S. S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. 35, 98 N.E. 1056 (1912); Perkins v. Inhabitants of Westwood, 226 Mass. 268, 115 N.E. 411 (1917); Animal Rescue League of Boston v. Assessors of Bourne, 310 Mass. 330, 37 N.E.2d 1019 (1941).

to which these statutes apply: (1) public and charitable property, and property which tends to relieve the public burden—apparently included here are the veterans' associations, pension plan organizations, and the housing authorities; (2) articles of personal use—furniture and wearing apparel; (3) in closely limited amounts, property of the hardship case—construed as the very poor, handicapped veterans, dependents of deceased veterans; (4) that property which is necessary to reduce or eliminate double taxation.[24] As municipal corporations, the housing authorities themselves are tax exempt under the first classification.[25] However, private builders functioning without state funds or supervision clearly cannot be exempted through the same reasoning, nor can they be considered as having in the alternative any "charitable" qualities or as in sufficient relief of the "public burden." The second and fourth classifications are obviously inapplicable. Some argument could be made as to the proposed laws' constitutionality under number three owing to the great distress in the cities from poor housing conditions. However, it is felt that this argument must fail because the exemption obtainable is limited only by the finances of the builder, and by no means are hardship cases alone specified. Although they chose not to, the justices might have ignored precedent and created a fifth classification to cover the bills in question. This would have been the factual result of an affirmative answer to the legislators, whether the court specifically call it another classification or not.

There is a Massachusetts statute, one more or less common to a number of states, exempting any property of certain classes of veterans and their dependents from $1,000 of assessed value.[26] This particular exemption is cited by the court,[27] but

24. 85 N.E.2d 222, 226 (Mass. 1949). The most questionable exemptions appear to be those which are hopefully tucked in under the concept laid down in Opinion of the Justices, 270 Mass. 593, 595, 170 N.E. 800, 802 (1930): "Exemption from taxation on ground of lack of ability to pay was recognized to a limited extent even as against the constitutional requirement that property taxes must be proportional. . . ." Note that if persons who have been relieved for poverty die with more than a certain sum, the state attaches what was not taken before. MASS. LAWS ANN. c. 59, § 5A.

25. Presumably if the Massachusetts documents in question were in effect, their benefits would inure to the units constructed under the direction of any of the housing authorities. See [1950] WASH. U. L. Q. 139 as to the status under the 14th Amendment of one type of housing corporation nevertheless tax exempt as engaged in a public purpose.

26. MASS. LAWS ANN. c. 59, § 5, cl. 23.

27. 85 N.E.2d 222, 228 (Mass. 1949)

apparently its legality has never been the subject of litigation even though passed in original form over fifty years ago. It may be one of the exemptions the legality of which the court obliquely refuses to determine.[28] It is probable that this $1,000 relief is valid under "classification three" of Massachusetts' exemptions (see p. 267 *supra*). By the same token and despite the lack of powerful sanction stemming from half a century's acquiescence, a closely restricted tax exemption (which the house and senate documents are not) on new housing conceivably would be susceptible of a favorable reception by the Massachusetts court.

Perhaps such a reception would be received by an exemption which determined the amount to be spent and effectively limited the recipients to those in special need. A strong argument for this type of exemption is that in final result there would be no perceptible disparity with the achievements of housing authorities. Or the exemption concept could be eliminated entirely. For instance, if the house document now applying to housing "constructed for sale to a veteran of World War II"[29] made certain that the beneficiaries were to be veterans actually buying and living in the new houses, a bonus theory could be invoked to save it (see p. 264 *supra*).[30]

In their present form we cannot argue with conviction the legality of the rejected exemptions. There is little to be noted in their favor that is unique in housing acts other than a potential simplicity of administration and retention of private initiative by the house-owner. To the greatest extent private contractors and promoters would be benefited and, practically considered, with the building industry going at near capacity what purpose is served by indiscriminately bidding up the

28. 85 N.E.2d 222, 227 (Mass. 1949). Elsewhere it has been said of the exemption granted in the MASS. LAWS ANN. c, 59, § 5 that while some of them are constitutional, of others this "has not been affirmed, and may be questionable." Opinion of the Justices, 195 Mass. 607, 612, 84 N.E. 499, 502 (1908). Thus, for a long time the status of these exemptions has been indefinite. Has no taxpayer ever complained?

It was suggested in Opinion of the Justices, 270 Mass. 593, 596, 170 N.E. 800, 803 (1903) that the passage of time lends an affirmative quality to the validity of these exemptions.

29. 85 N.E.2d 222, 228 (Mass. 1949).

30. However, the court points out that "the Constitution . . . contains no exemptions in favor of veterans." *Ibid.* Doubtless the framers of the house document were counting on a certain judicial lenience in regard to veterans.

services of these entrepreneurs? Doubtless the court is not inconsiderate of unattractive ancillary aspects to the proposed laws, its attitude being at least the more definite as a consequence. Thus, for the people of Massachusetts to ease the housing shortage by encouraging new building and/or to aid the veteran—it being impossible to determine definitely which, if either, is the primary intent—in the exact manner proposed, leaves them as their first task the formation of a new article of amendment to the constitution as were their predecessors forced to do in a like situation nearly forty years ago.[31]

DIXON F. SPIVY

CONSTITUTIONAL LAW—PARI-MUTUEL BETTING UNDER STATE ANTI-LOTTERY PROVISIONS

In the recent case of *Longstreth v. Cook*,[1] the Supreme Court of Arkansas, in a divided opinion, held that a statute legalizing pari-mutuel betting on horse races does not violate the following provision of the Arkansas Constitution: "No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed."[2]

That the pari-mutuel system of betting on horse races constitutes gambling cannot be questioned. The issue involved in the *Longstreth* case, however, is whether it constitutes that form of gambling known as a lottery. The latter is defined as:

> A scheme for the distribution of prizes by lot or chance; especially, a scheme by which one or more prizes are distributed by chance among persons who have paid or promised a consideration for a chance to win them, usually as determined by the numbers on tickets as drawn from a lottery wheel.[3]

A lottery consists of three essential elements: prize, consideration, and chance.[4] Unquestionably, the first two elements are present in wagering on horse races. It is the last of these requisites, chance, which controls the determination of the issue

31. Following Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912) there proceeded certain amendments to the constitution to allow that which had been declared void. See note 3 *supra*.

1. 220 S.W.2d 433 (Ark. 1949).
2. ARK. CONST. Art. XIX, § 14.
3. WEBSTER'S NEW INT'L DICTIONARY 1461 (2d ed. 1945).
4. 34 C. J. LOTTERIES, § 3, p. 649; 54 C. J. LOTTERIES, § 2, p. 845.