“Noisome Trades”

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February 25, 2003

THE STATUTE OUTLINED

GENERAL LAWS CHAPTER 111, SECTIONS 143 ~ 150

Section 143. Trade or employment attended with noisome and injurious odors; assignment of places; prohibition; appeal

THE BOARD CAN PROHIBIT CERTAIN BUSINESSES OR CAN ASSIGN THEM TO AN AREA WITHIN TOWN

No trade or employment which:

(1) may result in a nuisance, or
(2) [may] be harmful to the inhabitants, injurious to their estates, dangerous to the public health, or
(3) may be attended by noisome and injurious odors

~shall be established in a city or town
~except in such a location as may be assigned by the board of health ...
~after a public hearing has been held [on the subject],
~subject to [G.L. c. 40A] and ...
~[the] board of health may prohibit the exercise [of the trade or employment] within the ... city or town or in places not so assigned, in any event.

Such assignments shall be entered in the records of the city or town, and may be revoked when the board shall think proper.

DEP Advice

The department of environmental protection shall advise, upon request, the board
of health of a city or town ... [before] the assignment of places for ... [a] trade or employment ... and

Appeal

[A]ny person, including persons in control of any public land, aggrieved by the action of the board of health in assigning ... places for the exercise of any trade or employment ... may, within sixty days, appeal from the assignment of the board of health to the [DEP] [which] may, after a hearing, rescind, modify or amend such assignment.

Notwithstanding [G.L. c. 111, Section 125A], this section shall apply to the operations of piggeries.

Section 144. Revocation of location assignment; judicial enforcement

If a place or building so assigned becomes a nuisance by reason of offensive odors
or exhalations therefrom, or is otherwise hurtful or dangerous to the neighborhood
or to travelers, the superior court may, on complaint of any person, revoke such
assignment, prohibit such further use of such place or building, and cause the
nuisance to be removed or prevented.

Section 145. Damages

Whoever is injured in the comfort or enjoyment of his estate by such nuisance may
recover in tort the damages sustained thereby.

Section 146. Orders of prohibition; service

Orders of prohibition issued under section one hundred and forty-three shall be
served by an officer qualified to serve civil process upon the occupant or person
having charge of the premises where such trade or employment is exercised, and
the board shall take all necessary measures to prevent such exercise. Whoever
refuses or neglects for twenty-four hours thereafter to obey the same shall forfeit
not less than fifty nor more than five hundred dollars.

Section 147. Appeal from order

Right to Appeal

Whoever is aggrieved by an order made under section [143] or [G.L. c.111, Section 152] may, within three days after service of the order upon him,

(1) give written notice of appeal to the board or [DEP], and

(2) file a petition for a jury in the superior court ... and, after [this] notice may have a trial in the same manner as other civil cases are tried by jury.

Extension of 3-Day Limitation

(1) If by mistake of law or fact, or, by accident, he fails within 3 days to [appeal],
and,

(2) if... the court [concludes] that:
(a) [the] failure [to file] was caused by [this] mistake or accident, and (b) that [the appellant] has not, [violated the order since it was served on him],

he may [have] thirty days [to] apply for a jury.

Section 148. Exercise of trade or employment during pendency of proceedings

Prohibition of Work During the Appeal

Such trade or employment shall not be exercised contrary to the order while such
proceedings are pending, unless specially authorized by the board;
and
if so specially authorized all further proceedings by the board shall be stayed while such
proceedings are pending.

Under Penalty of Dismissal

[Unless the board specially authorizes the appellant to conduct the trade or employment...] upon any violation of the [board's] order, the proceedings shall forthwith be dismissed.

Section 149. Verdict

The verdict may alter, affirm or annul the order, and shall be returned to the court
for acceptance; and if accepted, shall have the authority and

effect of a valid order
of the board, and may also be enforced by the court in equity.

Section 150. Damages and costs

If the order is affirmed by the verdict, the board shall recover costs to the use of
the town; if it is annulled and the petitioner has not been specially authorized by
said board to exercise such trade or employment during the proceedings, he shall
recover damages and costs against the town; if it is annulled and the petitioner has
been specially authorized as aforesaid, or if it is altered, he shall not recover
damages, and the court may render judgment for costs in its discretion.

WHAT IS A "NOISOME TRADE" ~ THE STATUTORY TEST

Strictly speaking "noisome trades"[1] is a misnomer for the businesses which the board of health may control under Chapter 111. The word "noisome" actually applies only to the odors emanating from the business. The statute actually permits control over trades and occupations which are or may be nuisances, which create threats to the public health or safety or which may cause "noisome and injurious odors." Section 143 permits boards of health to regulate occupations which:

(a) "**may** result in a nuisance," or
(b) "**may** be harmful to people, or property" or "dangerous to the public health," or
(c) "**may** be attended by noisome and injurious odors."

The trade or occupation doesn't have to actually **be** a nuisance, odoriferous, dangerous or harmful before the board's power of prohibition arises. The board can act if it is reasonably conceivable that such a problem may arise. *Tracht v. County Commissioners of Worcester*, 318 Mass. 681 (1945); *City of Waltham v. Mignosa*, 327 Mass. 250 (1951); *Board of Health of Wareham v. Marine By-Products Co.*, 329 Mass. 174 (1952). "The trade or employment need not in fact be a nuisance or attended by noisome and injurious odors before the power of prohibition arises." *City of Waltham v. Mignosa*, *supra.* The board makes this

[1] "'Noisome' derives from Middle English 'noiesom' or 'noysome,' from 'noy,' harm, short for 'anoy,' from Old French, from 'anoier,' to annoy. Usage: *'Noisome, Noxious'.* These words have to a great extent been interchanged; but there is a tendency to make a distinction between them, applying *noxious* to things that inflict evil directly; as, a noxious plant, noxious practices, etc., and *noisome* to things that operate with a remoter influence; as, noisome vapors, a noisome pestilence, etc. Noisome has the additional sense of disgusting. A garden may be free from noxious weeds or animals; but, if recently covered with manure, it may be filled with a noisome smell." Webster's Revised Unabridged Dictionary of the English Language 979 (1913)." *Leominster Materials Corp. v. Town of Lancaster*, 56 Mass. App. Ct. 820, fn.1 (2002).

determination in the first instance by looking at all the circumstances.

The fact that the zoning by-law permits a particular trade or employment does not make the business immune from valid orders and regulations of a board of health. *Building Commissioner of Medford v. C. & H. Co.*, 319 Mass.273, 282, 286 (1946). In other words, the legality of a business under zoning doesn't prevent it from being a business subject to the statute.

Section 143 requires that, before exercising its authority to prohibit or regulate a specific business or an entire occupation, the trade or occupation must meet one of the three statutory criteria. The determination whether a business meets the statutory test is up to the sound discretion of the board. *American Friends Service Committee of Western Massachusetts v. Commissioner of Dept. of Environmental Protection,* 30 Mass.App.Ct. 457 (1991). Of course, the board may not act in a manner that is unreasonable, arbitrary, capricious or whimsical. *Moysenko v. Board of Health of North Andover*, 347 Mass 305 (1964). The character of the trade or activity in question, the predicate for the order of a board of health, is an issue to be determined by the board or on appeal from the board's initial determination.

Because hazardous waste facilities are governed by G.L.c.111, Section 150B for site assignments, Section 143 is inapplicable to them. *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree,* 490 Mass, 834, appeal following remand 415 Mass. 876 (1991).

Once a board determines that a business meets the statutory criteria, it has several choices. It can either make a site assignment limiting the business to one or more places in town or it can issue an order./regulation prohibiting the business from opening in town at all or only with specified limitations or conditions. Section 143. If the board issues an order of prohibition, the order must be served by someone qualified to serve process. The board does not have to hold a hearing to issue such an order.

Hearings Not Required Except for Site Assignment

The board may conduct a hearing to gather information about the business if the board believes this would be helpful. *See American Friends Service Committee of Western Massachusetts v.*

Commissioner of Dept. of Environmental Protection, 30 Mass.App.Ct. 457 (1991). However, the hearing is not required except for a site assignment.[2] *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge*, 395 Mass. 535, 541 (1985). The board cannot assign a business to a particular location(s) without a hearing. If the board makes a site assignment under Section 143, or issues an order of prohibition under Section 147, the aggrieved party has the right to appeal under each of these sections of the statute.

The Board Can Prohibit the Business From Opening Until Site Assignment

The board can issue an order requiring a company not to engage in its trade **until** the board determines whether it is engaging, or about to engage, in an occupation subject to the statute. It can order a business not to construct or operate its proposed plant until it files an application for a site assignment and such an assignment has been made. *Leominster Materials Corp. v. Town of Lancaster*, 56 Mass.App.Ct. 820 (2002).

The Power to Ban, Locate or Regulate

Once a board finds that a business meets the statutory predicate, it can exercise its authority under the statute. The cases establish that the board has the following authority.

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[2] Chapter 111, Section 143, provides: "No trade or employment ... shall be established in a city or town except in such a location as may be assigned by the board of health ... after a public hearing has been held ..." but the board of health "may prohibit the exercise [of the trade or employment] within the ... city or town or in places not so assigned, **in any event**."

(1) The board can **restrict the location** of the business to a particular place or places where such a trade may be carried on by way of a site assignment. *Revere v. Riseman,* 280 Mass. 76, 82 (1932). It cannot locate such a business in violation of the zoning ordinance. The fact that a trade or employment is permitted under the ordinance does not mean that it doesn't have to comply with valid orders and regulations of a board of health. *Building Commissioner of Medford v. C. & H. Co.*, 319 Mass. 273, 282, 286 (1946).

(2) The board can **prohibit** the establishment of a particular occupation entirely or prohibit specific activities. *Revere v. Blaustein*, 315 Mass. 93, 95 (1943); *Board of Health of Wareham v. Marine By-Products Co.*, 329 Mass. 174, 178 (1952); *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge*, 395 Mass. 535 (1985). The board can prohibit an entire occupation if "it is conceivable that there might be circumstances where ... [the exercise of that occupation] might become ... [a nuisance]." *City of Waltham v. Mignosa*, 327 Mass. 250, 252 (1951). The board can refuse to assign any place for such a business within the city. *City of Revere v. Blaustein*, 315 Mass. 93 (1943); *American Friends Service Committee of Western Massachusetts v. Commissioner of Dept. of Environmental Protection,* 30 Mass.App.Ct. 457 (1991).

(3) The board can **regulate** any business which it has authority to prohibit.[3] *Board of Health of Woburn v. Sousa*, 338 Mass. 547 (1959); *Cochis v. Board of Health of Canton,* 332 Mass. 721,725 (1955).The board may regulate the conduct of a business presumably to prevent its becoming injurious or harmful. Its regulations may include a licensing or permitting requirement because that which the board may prohibit absolutely, it can permit subject to reasonable conditions. *Woburn v. Sousa*, 338 Mass., *supra* at 555. In regulating an occupation a board may not act in 'an unreasonable, arbitrary, whimsical, or capricious manner.' *Butler v. East Bridgewater*, 330 Mass. 33, 38, (1953); *Belmont v. New England Brick Co.*, 190 Mass. 442 (1906). The

[3]The board, of course, enjoys other regulatory authority. See, for example, G.L. c. 111, Sections 31, 31B, 31C, 122-125A,127,127A

regulations promulgated by a board of health under Section 143 must not contravene the zoning laws, *Building Commissioner of Medford v. C. & H. Co.*, 319 Mass.273, 282, 286 (1946). However, just because the particular business is authorized under zoning does not make it immune from the orders of the board of health. *Tortorella v. H. Traiser & Co.*, 284 Mass. 497,501 (1933); *City of Waltham v. Mignosa*, 327 Mass. 250 (1951). *Weltshe v. Graf,* 323 Mass. 498, 500 (1948)

When the board issues regulations prohibiting specified conduct, it is not subject to a hearing requirement either under the due process clause or under the statute. ”[A]n order of the board of health, under the Gen.Sts. c. 26, § 52 [a predecessor of Section 143], is not in the nature of an adjudication of a particular case, but of a general regulation of the trade or employment mentioned therein.” *Cochis v. Board of Health of Canton*, *supra*, 332 Mass. 724-725 quoting from *City of Taunton v. Taylor*, 116 Mass. 254, 261. If the board enforces these regulations <u>by issuing an order of prohibition</u>, it must serve the order in compliance with Section 146. Otherwise, regulations do not involve “adjudication” of rights but rather the exercise of rule making authority. Referring to this distinction and using an analogy to the state administrative procedures statute, the Court said:

“An ‘adjudicatory proceeding’ involves a determination of the ‘legal rights, duties or privileges of specifically named persons.’ ... On the other hand, a ‘regulation’ includes ‘every rule, regulation, standard or other requirement of general application and future effect.’” *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge*, 395 Mass. 535, 541 (1985).

Even if the regulation affects only one business or is actually prompted by one particular business, it is not converted from a rule of general application into an adjudication of the rights of a particular party. The Court stated:

“But the fact that [the company’s] research alone motivated the [regulatory] ban, and served to ‘illustrate the general problems, ... could not have the effect of transforming the

regulatory endeavor into an adjudicatory one.' (Citation omitted). In a similar situation this court has upheld a Section143 regulation prohibiting the painting of trucks within the city limits. *Revere v. Blaustein*, 320 Mass. 81, 83, 67 N.E.2d 665 (1946). We noted that 'no constitutional right of the defendant was impaired **even if he were the only one affected by the regulatory action of the board**.' *Id.* Similarly, in *Milton v. Donnelly*, 306 Mass. 451, 460, 28 N.E.2d 438 (1940), we recognized that even 'if the only billboard that could be affected by the enforcement of the by-law is that of the respondent, that circumstance alone would not render the by-law invalid.'" *Arthur D. Little, Inc.*, *supra*.

Noise, Dust and Odor as Subject to the Statute

As noted above, the statute does not on its face seem to be predicated on the board's finding that a particular trade or occupation is or may be a nuisance. It is written more broadly than this. "[M]ay result in a nuisance" is only one of the indicia at which the board/court should look. To the criterion "may result in a nuisance," the legislature has added "is or may be" "harmful to people, or property" or "dangerous to the public health," or "may be attended by noisome and injurious odors."

The use of these additional criteria ~ may be "harmful to people, or property" and may be "dangerous to the public health" ~ add significantly to the board's authority permitting it to exercise control over occupations which are not necessarily in the "nuisance" category but which in the reasonable judgment of the board may be harmful. For example, the Cambridge Commissioner of Health was authorized to prohibit the testing, storage transportation and disposal of chemical warfare agents within the city under the authority granted by Section 143. *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge*, 395 Mass. 535 (1985).

Because of the historic influences on the development of the law of nuisances, the broader statutory language is helpful. The law of nuisance is steeped in history and confusion. It distinguishes between "public" nuisances and "private" nuisances. Outcomes of nuisance litigation will differ depending on the social utility of the affected activity and whether the plaintiff is seeking monetary damages or an injunctive relief.

COMMON LAW OF NUISANCE

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's

interests is characterized as a ‘nuisance,’ and there is nothing more to be said.” Prosser & Keeton, Law of Torts, 5th Ed. (1984), §§ 86, p. 616-17 (citations omitted).[4]

The limits of tort law which imposes damages in civil litigation between private parties, should not be read wholesale into the statutory “police power” authority of boards of health. The police power of government is As broad as the need of the community for its health and safety. The municipal advocate should argue that the statute by its very language is not limited by the law of nuisance. However, it is helpful to be familiar with nuisance law because the courts will look to these cases for some guidance. One of the key aspects of nuisance law which may be imported is the role of balancing the interests of the public against the interests of the individual and the flexibility of the law See ,e.g., *Escobar v. Continental Baking Co.*, 33 Mass.App.Ct.104, at 108 (1992). This balancing test may surface in the consideration of whether the business is engaging in conduct that is reasonably acceptable in the locale where it is situated.

In *Tortorella v. H. Traiser & Co.*, 284 Mass. 497 (1933), the Court held that a noisy manufacturing plant did not establish a nuisance in the legal sense. The Court said for noise to create a legal nuisance:

> “*it must be a noise which affects injuriously the health or comfort of ordinary people in the vicinity to an unreasonable extent. Injury to a particular person in a peculiar position or of specially sensitive characteristics*

[4]"The term 'nuisance' as a ground of liability usually results in confusion and frequently is a method of avoiding precision in analysis." *Delano v. Mother's Super Market, Inc.,* 340 Mass. 293, 297 (1960).

> *will not render the noise an actionable nuisance. (citation omitted). In the conditions of present living, noise seems inseparable from the conduct of many necessary occupations. Its presence is a nuisance in the popular sense in which that word is used, but in the absence of statute, noise becomes actionable only when it passes the limits of reasonable adjustment to the conditions of the locality and of the needs of the maker to the needs of the listener. What those limits are cannot be fixed by any definite measure of quantity or quality. They depend upon the circumstances of the particular case. They may be affected, but are not controlled, by zoning ordinances. (citations omitted). The delimitation of designated areas to use for manufacturing, industry or general business is not a license to emit every noise profitably attending the conduct of any one of them. (citation omitted). The test is whether rights of property, of health or of comfort are so injuriously affected by the noise in question that the sufferer is subjected to a loss which goes beyond the reasonable limit imposed upon him by the condition of living, or of holding property, in a particular locality in fact devoted to uses which involve the emission of noise although ordinary care is taken to confine it within reasonable bounds; or in the vicinity of property of another owner who though creating a noise is acting with reasonable regard for the rights of those affected by it.*" *Tortorella v. H. Traiser & Co.*, 284 Mass. at 501.

See also *Metropoulos v. Mac Pherson*, 241 Mass. 491 (1922) (loud factory noises); *Kasper v. H.P. Hood & Sons, Inc.,* 291 Mass. 24 (1935) (loading milk during onto trucks in the morning is not a nuisance); *Burnham v. Beverly Airways, Inc*., 311 Mass. 628 (1942) (noise from planes at private airport not a nuisance); *Distasio v. Surrette Storage Battery Co.*, 316 Mass. 133 (1944) (noise, smoke, odors and vibrations from factory a nuisance); *Weltsche v. Graf*, 323 Mass. 498, (1948) (noisy trucking operations adjacent to hotel); *Malm v. Dubrey,* 325 Mass. 63 (1949) (noisy freight terminal is a nuisance); *Proulx v. Basbanes,* 354 Mass. 559 (1968) (noise, fumes and vibration from a laundry); *Escobar v. Continental Baking Co.*, 33 Mass.App.Ct. 104 (1992) (noise from bakery); *Marshall v. Stevens*, 2002 WL 1554492 (Horan, J., sitting by designation as a Superior Court Judge) (noise from race track), remanded to the Templeton Board of

Health for further proceedings.

The First Amendment And Noise

While noise may be a reason to regulate, noise can be protected under the First Amendment. A recent federal case gives pause to municipalities attempting to enforce its wishes against a noisy music establishment. *Casey v. City of Newport, R.I.*, 308 F.3d 106 (1st Cir. (R.I.),2002). In *Casey*, the First Circuit held that the city's prohibition on amplified music was not narrowly tailored to achieve the city's legitimate interest in protecting people from noise because the city could have enforced its noise ordinance which restricted noises by decibel level. The court said:

> "Music, as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism,* 491 U.S. 781, 790, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Expression need not include words to qualify for First Amendment protection. The Supreme Court has said that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (citation omitted). **Thus it is not just Casey's verbal expression, but also the musical sound she and her band produce, that is protected under the First Amendment.**
>
> Nevertheless, "the government may impose reasonable restrictions on the time, place, or manner of protected speech," if those restrictions are (1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communication. *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. We have described our review under this standard as "intermediate scrutiny."
>
> We inquire "whether a regulation 'is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' " *Id.* (quoting *Arkansas Writers' Project Inc. Ragland,* 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209

> (1987). If a regulation of speech is not narrowly tailored to serve a significant governmental interest, it cannot be deemed constitutional. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (vacating district court decision that content-neutral regulation of speech was constitutional because facts in the record failed to establish that narrow-tailoring requirement was met). The burden of proof is on the City to demonstrate that its restrictions on speech are narrowly tailored. *See Board of Trustees v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) ("[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require.") (citation omitted)." (Emphasis added).

Of course, dust and odors and many other noxious effects have also been found to be nuisances under the common law. See, e.g., *Commonwealth v. Kidder*, 107 Mass. 188, 193(1871) where, considering an indictment against an oil refinery (which had been constructed in accordance with statutory safety requirements) as a common law nuisance because it polluted the air, court said:

> "These enactments are manifestly intended to protect the public against dangers arising from the explosive and inflammable nature of petroleum; and, having regulated the whole subject in that aspect, they might well be deemed to protect any establishment, guarded as they direct, from indictment as a nuisance on account of such dangers only. But they contain no provisions for preventing the spread of unwholesome and offensive odors in the course of the manufacture; and if the defendants' position were sustained, the result would be that no limit would be put to such manufacture in the most crowded and populous portions of any town or city. The reasonable, if not the necessary, inference is, that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacture is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law."

See Metropoulos v. MacPherson, 241 Mass. 491 (1922) (odors); *Pendoley v. Ferreira*, 345 Mass. 309 (1963) (smell from a piggery); *Distasio v. Surrette Storage Battery Co.*, 316 Mass. 133 (1944) (noise, smoke, odors and vibrations from factory a nuisance); *Loosian v. Goudreault, 325 Mass.253, 255;* See also

Joyal v. Marlborough, 3 Mass.L.Rptr. 379, 1995 WL 809017 (1995). In *Joyal*, the court granted injunctive relief to thirty-eight residents of Marlborough on their claims arising under both G.L. c. 214, §7A (damage to the environment) and the common law of nuisance and enjoined the operation of a sewage sludge composting facility*; Sheppard Envelope Co. v. Arcade Malleable Iron Co.*, 335 Mass. 180 (1956) ("cinders and other gritty substances" in this case did not create a nuisance but did establish a trespass).

Other Applicable Statutes

Other statutes have a direct application to the same issues as arise under Sections 143-150. See *Board of Health of Woburn v. Sousa*, 338 Mass. 547 (1959).

Under G.L. c.111, Section 31C, a board of health has authority to "regulate and control atmospheric pollution" "including, but not limited to, the emission of smoke, particulate matter, soot, cinders, ashes, toxic and radioactive substances, fumes, vapors, gases, industrial odors and dusts as may arise within its bounds and which constitutes a nuisance, a danger to the public health, or impair the public comfort and convenience. "

Subject to the approval of the DEP and the procedural requirements of the statute, the board can adopt reasonable regulations to control atmospheric pollution. Violations of the statute have more severe fines than the fines for other municipal regulations. "Whoever violates any order, rule or regulation promulgated or adopted under the provisions of this section shall be punished, for the first offense, by a fine of not less than one thousand nor more than five thousand dollars and for a subsequent offense, by a fine of not less than five thousand nor more than ten thousand dollars. For the purpose of this paragraph each day or part thereof of violation of such an order, rule or regulation whether such violation be continuous or intermittent, shall be construed as a separate and succeeding offense.

The regulations of the city of Boston, restricting off-street commercial parking spaces in designated portions of city were authorized under this statute. The operator of the parking lot did not have absolute right to the number of parking spaces operated by it as of effective date of parking freeze. *Fitz-Inn Auto Parks, Inc. v. City of Boston*, 389 Mass. 79 (1983).

G.L. c. 111, Section 122 provides: "The board of health

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

Under the statute the board may remove the nuisance. G.L. c. 111, Section 125

Appellate Remedies Under Section 147

Persons aggrieved by orders of the board can appeal to the DEP or to the Superior Court within 3 days after service of the order. This statute of limitations can be extended if the would be plaintiff convinces the court that (1) the failure to meet the deadline was because of an error of law or fact; AND (2) that the plaintiff hasn't violated the order since it had been served upon him. If the plaintiff succeeds on both counts, he can have up to 30 days within which to appeal.

The appeal to Superior Court is to a jury which can affirm, annul or alter the board's order. The plaintiff is specifically prohibited from engaging in his business during the appeal, unless the board grants him permission to continue, on penalty of dismissal of his case. Section 148. If the order is annulled and the plaintiff has not been authorized by the board to continue his business during the appeal, the plaintiff may be awarded damages. These statutory damages are broadly construed to encompass any damages necessary to meet constitutional requirements for just compensation for wrongful deprivation of property interests. *Board of Health of Franklin v. Haas*, 342 Mass. 421 (1961).

This article is only a summary about one aspect of the law. The summary presents information about the law through the date of its publication. Legislatures amend statutes. Courts interpret the law and statutes and by doing so affect legal rights and duties. This article is not intended as, and cannot be substituted for, legal advice which always must be tailored to

each unique circumstance. Therefore, you should always consult a lawyer before simple relying on opinions or statements in this summary.