

# SENATE . . . . . No. 3

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## The Commonwealth of Massachusetts

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### SPECIAL REPORT OF THE ATTORNEY GENERAL RELATIVE TO CERTAIN RESTRICTIONS IMPOSED BY THE COMMONWEALTH ON CERTAIN LANDS IN THE BACK BAY DIS- TRICT OF BOSTON.

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NOVEMBER 26, 1928.

*To the General Court of Massachusetts.*

Pursuant to the direction contained in chapter 53 of the Resolves of 1928, I have inquired into the subject-matter of certain restrictions imposed by the Commonwealth on lands in the Back Bay district of Boston, and have the honor to transmit the following report:

By chapter 53 of the Resolves of 1928 I am directed to inquire into the subject-matter of House Document No. 739 and Senate Documents Nos. 234 and 326 of the current year relative to the release by the Commonwealth of any restrictions or stipulations imposed by it or for its benefit which would interfere with the widening by the city of Boston of Newbury Street in said city between Arlington Street and Massachusetts Avenue, or any portion thereof, by setting back the sidewalk on each side thereof a distance not exceeding eight feet and thereby reducing the setback provided for by such restrictions. I am further directed to advise the General Court as to what should be the policy of the Commonwealth relative to said proposed release, both from the

point of view of the Commonwealth and from the point of view of the owners of estates affected by said restrictions. I am further directed to report to the General Court the results of the inquiry, with recommendations and drafts of such legislation as is necessary to carry such recommendations into effect.

In connection with this inquiry a public hearing was held before Gerald J. Callahan, Assistant Attorney General, on the ninth day of October, 1928, due notice of which hearing had been given in accordance with the provisions of said chapter 53.

The Commonwealth, about 1850, undertook to reclaim the Back Bay district, which at that time consisted of tidal flats, for the purpose of removing a nuisance which had arisen because of inadequate drainage. The method adopted was to fill in the land, lay out streets and develop desirable residential lots, which were sold to the public at a large net profit to the Commonwealth. The district in question comprised the Back Bay district, so called, bounded on the north by Beacon Street, on the east by Arlington Street, on the south by Boylston Street, and on the west by an irregular line between Exeter and Fairfield streets. A plan of the district is shown on page 32 of the report of the Harbor and Land Commissioners for the years 1879 to 1885. For the purpose of making the lots attractive to prospective purchasers and of developing "a magnificent system of streets and squares," certain restrictions or stipulations were inserted in the deeds to the lots sold. Among these restrictions was a stipulation that the houses or buildings should set back a certain number of feet from the street lines; the setback on Commonwealth Avenue was twenty feet, while that on the other streets, including Newbury Street, was twenty-two feet. This is the restriction which probably would interfere with the widening of Newbury Street by the city of Boston unless the Commonwealth releases its rights therein. There were other restrictions in some of the deeds, such as those relative to the depth of cellars. It is to be noted that all the deeds to the property in the district con-

tained the restriction or stipulation as to setback above referred to.

It is clear, both from an examination of the deeds and from the decisions of the Supreme Judicial Court relating thereto, that the Commonwealth was engaging in a general scheme of development of the district, and that it was the intent of the Commonwealth to create equitable restrictions which could be enforced by any or all owners of land who held or derived their title through the Commonwealth as common grantor.

The effect of the entire transaction was to confer upon the Commonwealth the right to enforce these restrictions, and at the same time to confer upon the owners a similar right. This latter right clearly cannot be affected by the execution of a release by the Commonwealth, as the owners have a vested property right of which they cannot be deprived except by the exercise of some sovereign power, such as eminent domain. St. 1913, c. 579, released the interest of the Commonwealth in a different type of restriction, but did not purport in any way to affect the rights acquired by the owners. If it had attempted to release the rights of the owners it would have been invalid in so far as such attempt was concerned. See *Allen v. Massachusetts Bonding and Insurance Co.*, 248 Mass. 378.

The Commonwealth itself has a right to enforce these restrictions and to restrain any violation thereof. It may also release its interest in any or all of these restrictions, as was done by St. 1913, c. 579. This should not be done unless it results in substantial and practical advantages.

It is my opinion that it is not advisable at this time to release the restrictions. At the public hearing held on this question the city of Boston was represented by counsel, who stated that the city had no intention at the present time of widening Newbury Street, even if the Commonwealth and the owners released their respective rights in the restrictions.

Further, it appeared that from Hereford Street to Massachusetts Avenue large and expensive buildings

are built out to the sidewalk line on Newbury Street. The expense involved in compensating the owners for the taking of these structures would be very large and is a further consideration militating against the project at this time.

Unless the street were widened all the way to Massachusetts Avenue, the flow of traffic would not be facilitated to any appreciable degree, as the result would be that traffic coming in and out of Newbury Street at Massachusetts Avenue would have to pass through a narrow neck on Newbury Street before entering and after leaving the widened portion.

Several business men and real estate dealers urged the widening of the street on the ground that Newbury Street had lost its character as a residential street and had developed into a business thoroughfare to such an extent that the reason for the restriction in question no longer existed. A petition signed by various owners of property on that street was presented urging the release by the Commonwealth of the restriction. On the other hand, other persons owning property on that street protested against the widening, on the ground that it would ruin their land for residential purposes by bringing the road too near the buildings and by the necessary removal of trees and grass, which add to the desirability for residential purposes.

Newbury Street has materially changed in character from Arlington Street to Dartmouth Street. This portion of the street is devoted chiefly to business of various sorts. From Dartmouth Street to Hereford Street it is, for the most part, devoted to residential purposes. From Hereford Street to Massachusetts Avenue it again assumes a business character. It cannot be said that that portion of Newbury Street included within the district as described above has so utterly changed in character that the reason for the restriction has disappeared. Further, it is to be noted that the remaining portion of the Back Bay district embraced in the general scheme of development, as outlined above, is almost entirely residential in character today. In determining

the question as to the extent of the change in the character of the neighborhood, the entire district must be considered. The original scheme of development was not confined to Newbury Street, but embraced the entire district developed and sold, and persons buying lots on other streets within the district have a right to require Newbury Street owners to comply with such restrictions as were imposed as a part of the general scheme for making the entire district desirable for residential purposes.

Because of the fact that the Back Bay district has not utterly changed its character, it follows that the restrictions are still in force (see *Jackson v. Stevenson*, 156 Mass. 496), and that both the Commonwealth and the owners may enforce the restriction in question. It also follows, for this reason together with those outlined above, that the Commonwealth at this time should not take any steps which would result in permitting the widening of Newbury Street between Arlington Street and Massachusetts Avenue.

For a detailed statement of the history of the development of the Back Bay district reference may be had to the report of the special unpaid commission established by chapter 56 of the Resolves of 1923, filed with the General Court on December 17, 1923, and to the report of the Attorney General, filed with the General Court on November 24, 1926, pursuant to chapter 34 of the Resolves of 1926.

Respectfully submitted,

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*Attorney General.*





