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1. METROPOLITAN HOUSING AUTHORITY—NO POWER TO CONDUCT DAY NURSERY.
2. NO LEGAL AUTHORITY OR POWER TO RECEIVE MONEYS FROM FEDERAL WORKS ADMINISTRATION AND EXPEND SUCH MONEYS TO OPERATE DAY NURSERY—SECTION 1078-29, ET SEQ., G. C.

SYLLABUS:

1. A metropolitan housing authority created under authority of Section 1078-29, et seq. of the General Code has no power to conduct a day nursery.
2. A metropolitan housing authority created under authority of Section 1078-29, et seq. of the General Code does not have the legal authority or power to receive moneys from the Federal Works Administration and expend such moneys for the purpose of operating a day nursery.

Columbus, Ohio, June 4, 1943.

Hon. Charles L. Sherwood,
 Director, Department of Public Welfare, State Office Building,
 Columbus, Ohio.

Dear Sir :

A recent request for my opinion from the Division of Social Administration in your department reads as follows :

“The Akron Metropolitan Housing Authority has filed an application with the Federal Works Agency for Lanham Act funds with which to operate a day nursery program. This application has been referred to this department for our recommendation.

Will you kindly advise us whether the laws of the State of Ohio give to such agencies as the Metropolitan Housing Authority the right to operate day nursery programs and to expend funds for such purposes?”

I assume, for the purposes of this opinion, that the Akron Metropolitan Housing Authority is one of those “bodies politic and corporate” organized under authority of the “housing authority law” of Ohio (Sections 1078-29 to 1078-50 of the General Code) and whose powers are defined in such law, the “housing cooperation law” (Sections 1078-51 to

1078-58 of the General Code) and further extended by Sections 1078-59 to 1078-61a of the General Code.

Such sections authorize the creation of bodies politic and corporate which, when created, possess the powers therein specified which they may exercise in the performance of the purpose for which such entities are created. It is elemental that when the Legislature by law creates or authorizes the creation of officers, agencies or instrumentalities for certain purposes that they have such powers, and such only, as are granted them by such law and the amendments thereto. Opinion No. 3188, Opinions of the Attorney General for the year 1940, pages 1151, 1163; *Peter v. Parkinson*, *Treas.*, 83 O. S. 36.

We must, therefore, examine the statutes authorizing the creation of metropolitan housing authorities and defining their powers in order to determine whether they have the power to conduct, maintain and operate a day nursery.

Section 1078-31 of the General Code grants authority for the organization of the authority and the power to employ counsel and other employes and officers and to fix their compensation.

Section 1078-34 of the General Code grants additional powers and reads:

“An authority created under this act shall constitute a body corporate and politic, and for the purposes of (1) clearing, planning and rebuilding slum areas within the district wherein the authority is created, or (2) providing safe and sanitary housing accommodations to families of low income within such district, or (3) accomplishing a combination of the foregoing, shall have the following powers in addition to others herein specifically granted:

a. To sue and to be sued, to have a seal, to have corporate succession, to receive grants from state, federal or other governments, or from private sources, to conduct investigations into housing and living conditions, to enter any buildings or property in order to conduct its investigations, to conduct examinations, subpoena and require the attendance of witnesses and the production of books and papers and to issue commissions for the examination of witnesses who are out of the State or unable to attend before the authority or excused from attendance; and in connection with these powers, any member of the authority shall have the power to administer oaths, take affidavits and issue subpoenas;

b. To determine what areas constitute slum areas and to prepare plans for housing projects in such areas; to purchase,

lease, sell, exchange, transfer, assign, or mortgage any property, real or personal, or any interest therein, or acquire the same by gift, bequest or eminent domain; to own, hold, clear and improve property; to engage in, or to contract for, the construction, reconstruction, alteration, and/or repair of any housing project or part thereof; notwithstanding anything to the contrary contained in this act or in any other provision of law, to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project; to lease, and/or operate any project and establish or revise schedules of rents for any projects or part thereof; to arrange with the county and/or municipalities for the planning and replanning of streets, alleys and other public places or facilities in connection with any area or project; to borrow money upon its notes, debentures or other evidences of indebtedness, and to secure the same by mortgages upon property held or to be held by it, or by pledge of its revenues, or in any other manner; to invest any funds held in reserves or sinking funds or not required for immediate disbursements; to execute contracts and all other instruments necessary or convenient to the exercise of the powers granted herein; to make and from time to time amend and repeal by-laws, rules and regulations to carry into effect its powers and purposes under this act.

c. To borrow money or accept grants or other financial assistance from the federal government for or in aid of any housing project within its territorial limits, to take over or lease or manage any building project or undertaking constructed or owned by the federal government, and to these ends, to comply with such conditions and enter into such mortgages, trust indentures, leases or agreements as may be necessary, convenient or desirable; and

d. To do all things necessary or convenient to carry out the powers expressly given in this act."

Section 1078-34a of the General Code grants to such authorities the power to condemn property for slum clearance and for providing low cost housing to families of low income. Section 1078-42 of the General Code enumerates certain rules which must be observed with respect to tenant selection and rental of living quarters. Sections 1078-44, 1078-45, 1078-46 and 1078-61 of the General Code authorizes the issuance of bonds for its corporate purposes.

You will observe that throughout such law there are three main purposes for which metropolitan housing authorities are authorized to be created, viz.: (1) the elimination of slum areas by acquisition of title to the real estate located therein and the clearing and rebuilding of the un-

sanitary dwellings located thereon; (2) the construction of new sanitary dwelling units to be leased to families of low incomes; and (3) the leasing of the same to persons of low income. You will further observe that all the powers granted in such acts to such authorities are such as are or might be thought necessary for the furtherance of one or the other of such purposes.

The powers of a corporation or quasi corporation are usually divided into three groups, viz.: (1) express powers, (2) incidental powers, and (3) implied powers. The implied powers are such as are reasonably necessary to enable them to accomplish the purpose or purposes stated in their charters or articles of incorporation. *Central Ohio Natural Gas and Fuel Co. v. Capital City Dairy*, 60 O. S. 96. The use of the powers of such corporations, whether express, incidental or implied, may be used by the entity only in the furtherance of the purposes as stated in such articles and are limited by such stated purposes.

In the accomplishment of such general purposes the General Assembly has granted to metropolitan housing authorities certain incidental powers, among which are those of preparing plans for "housing projects" in slum areas and the construction and operation of such projects. In Section 1078-49 of the General Code the term "housing project" is defined as follows:

"(c) The term 'housing project' or 'project' shall mean any work or undertaking: (1) to demolish, clear or remove buildings from any slum area; such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreational or community purposes; or (2) to provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities and other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes; or (3) to accomplish a combination of the foregoing. The term 'housing project' also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith; * * *."

It is to be observed that when the above quoted definition of "housing project" is superimposed upon the specification of the incidental powers of a housing authority that, as an aid to the accomplishment of the purpose of slum clearance and construction of low cost housing for persons of

small income, authority is granted to provide real or personal property necessary for community, health, recreational, educational, welfare or other purposes. Yet no mention is made of the operation of either a school or day nursery.

As stated in Greene's *Brice's Ultra Vires*, 88:

"Whatever be the company's legitimate business, the company may foster it by the usual means; but it may not go beyond this; it may not under the pretense of fostering, entangle itself in proceedings with which it has no legitimate concern. In the next place, the courts have, however, determined that such means shall be direct, not indirect; i. e., that a company shall not enter into engagements, as the rendering assistance to other undertakings, from which it anticipates a benefit to itself, not immediately, but mediately, by reaction, as it were, from the success of the operations thus encouraged."

And as further stated with respect to corporations in 6 *Fletcher*, *Cyclopedia Corporations*, Perm. Ed. 197, Section 2487:

"Any particular power sought to be exercised as incidental or auxiliary must be one which is within the scope and purview of the corporate objects and purposes as expressed in the charter or articles. As stated by one court: 'It is a question, therefore, in each case, of the logical relation of the act to the corporate purpose expressed in the charter. If that act is one which is lawful in itself, and not otherwise prohibited, is done for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends, in a substantial, and not in a remote and fanciful sense, it may fairly be considered within charter powers.' (Mr. Justice Beckman in *Steinway v. Steinway & Sons*, 17 Misc. 43, 40 N. Y. Sup. 718.) The test to be applied is whether the act in question is in direct and immediate furtherance of the corporation's business, fairly incident to the express powers and reasonably necessary to their exercise. If so the corporation has the power to do it, otherwise not. For independently of statute or constitutional provision restricting corporations to their charter business, a corporation created for the purpose of carrying on a particular business only can not lawfully engage in an entirely different business."

From the statements by such authors of the rule, it would appear that if a corporation was created for the purpose of the constructing and operating of an apartment house it would have incidental and implied powers to do such acts as directly and immediately contribute to the successful operation thereof, such as keeping it in good condition of repair and attractive to tenants, but would scarcely have the power to operate an interurban or bus line in order to make it more accessible to present or

prospective tenants, to operate a theater for the amusement of the tenants and others or to operate a school or church for the enlightenment of its tenants and others.

From the foregoing analysis of the statutory provisions with reference to the powers of a metropolitan housing authority, it is evident that the General Assembly has not granted to such bodies politic and corporate express authority to operate a day nursery either for the benefit of its tenants or otherwise. The only express authority granted is to provide "housing accommodations to families of low income" within the district controlled by the authority.

In the request it is stated that the Housing Authority has made application to the Federal Works Administration for "Lanham Act funds." By the use of such expression you undoubtedly refer to the moneys which have been made available to the Federal Works Administration for the making of loans or grants of money, with the approval of the President, to "private agencies" for several purposes, by Public Law 137, H. R. 4545, 55 Stat. 361, approved June 28, 1941. For the purposes of such act, the term "private agency" is therein defined (Title 42, U. S. C. 1532) as "Any private agency no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Said act provides that the activities authorized thereunder "shall be devoted primarily to schools, waterworks, sewers, sewage, garbage and refuse disposal facilities, public sanitary facilities, works for the treatment and purification of water, hospitals and other places for the care of the sick, recreational facilities, and streets and access roads." (Title 42, U. S. C. 1531.)

It will be noted that the conducting of day nurseries is not in express terms included in the above enumeration. Therefore, if authority to do so exists, it must be implied. In such case, the only language contained in the above section which in any way might conceivably carry such implication is that authorizing the conducting of schools, since all of the other projects set out therein are wholly unrelated to day nurseries.

Obviously, therefore, if the metropolitan housing authority in question were to receive the funds applied for it would be obliged to use the same for the purpose of conducting a school.

The power granted to the metropolitan housing authority by the state housing authority, as I have above pointed out, is limited to the providing of real and personal property for the enterprises therein enumerated and

not for the operation of such enterprises upon or with property furnished by some other person or agency. Such incidental powers are limited to the carrying out the purposes for which the authority was created, to-wit, slum clearance and low cost housing to persons of small income. Since it is beyond the powers of the authority to conduct a school, and the only theory upon which the moneys in question could be given to the authority is that a day nursery is a school, it is not necessary for me herein to decide whether a day nursery is a school.

Specifically answering your inquiry, it is my opinion that :

1. A metropolitan housing authority created under authority of Section 1078-29, et seq., of the General Code, has no power to conduct a day nursery.

2. A metropolitan housing authority created under authority of Section 1078-29, et seq., of the General Code, does not have the legal authority or power to receive moneys from the Federal Works Administration and expend such moneys for the purpose of operating a day nursery.

Respectfully,

THOMAS J. HERBERT,
Attorney General.