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PLANNING COMMISSION, REGIONAL — AUTHORIZED TO ENTER INTO CONTRACT WITH OUTSIDE FIRM AS INDEPENDENT CONTRACTOR—TO MAKE SURVEYS, STUDIES AND REPORTS NECESSARY TO PERFORMANCE OF FUNCTIONS OF REGIONAL PLANNING COMMISSION.

SYLLABUS:

A regional planning commission is authorized to enter into a contract with an outside firm as independent contractor for the making of such surveys, studies and reports as are necessary to the performance of the functions of such regional planning commission.

Columbus, Ohio, December 15, 1953

Hon. Frank H. Kearns, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir :

I have before me your request for my opinion, reading as follows :

“In your Opinion No. 3063, dated September 23, 1953, you gave as your opinion that, ‘Neither the director of the county department of welfare nor the commissioners of the county are authorized by law to contract with a person or organization outside of the staff of the welfare department or of the commissioners, for the purpose of making a survey of the welfare department.’

“At the present time the Franklin County Regional Planning Commission is negotiating a contract with Harland Bartholomew and Associates, of St. Louis, Missouri, to conduct studies and prepare reports in connection with the preparation of a Master Plan for the Planning Commission. I have been advised that the state examiner considers such a contract to be unauthorized, basing his determination upon your opinion above referred to.

“In view of the uncertainty as to whether the principle expressed in that opinion also applies to other county agencies such as the Regional Planning Commission, I hereby request your formal opinion on the following questions :

“(1) Is the Franklin County Regional Planning Commission authorized to enter into a contract with an outside firm to secure services in connection with surveys, studies, and reports?

“(2) If not, does the City of Columbus, which is represented on the Regional Planning Commission and which contributes to the appropriation for such commission, have authority under the ‘home rule’ sections of the Ohio Constitution to enter into such a contract on behalf of the Regional Planning Commission?”

Before attempting to formulate a direct answer to your inquiries, it may be appropriate to summarize some of the salient features of the statutes which provide for municipal, county and regional planning commissions. All statutory references hereafter made are to the Revised Code, unless otherwise stated.

Section 713.01, Revised Code, provides for the establishment of planning commissions in municipalities of varying forms of political organization.

Section 713.02, Revised Code, exhaustively defines the powers and duties of such municipal planning commissions. This section contains a provision with respect to the extra-territorial jurisdiction of such commissions, which has significance in considering your questions, and which is quoted in part as follows:

“The planning commission established under section 713.01 of the Revised Code shall make plans and maps of the whole or any portion of the municipal corporation, and of any land outside thereof, which, in the opinion of the commission, is related to the planning of the municipal corporation, and make changes in such plans or maps when it deems it advisable. * * *.”

Section 713.05, Revised Code, provides for the expenditure of funds for planning purposes, as follows:

“The planning commission may control, appoint, or employ such architects, engineers, and other professional service, and may appoint such clerks, draughtsmen, and other subordinates as are necessary for the performance of its functions. The expenditures for such service and employments shall be within the amounts appropriated for such persons by the legislative authority of the municipal corporation, and such legislative authority shall provide for the expenses and accommodations necessary for the work of the commission.”

Section 713.21, Revised Code, permits the formation of a regional planning commission by cooperation of municipal planning commissions and the county commissioners of a county or contiguous counties; provisions for expenditures of funds are expressly stated as follows:

“* * * Within the amounts thus agreed upon and appropriated, the regional planning commission may employ such engineers, accountants, and any other employees as are necessary.”

Section 713.22, Revised Code, permits, and in one instance requires the formation of a county planning commission. Such commission in the same terms as the regional planning commission has the power to “* * * employ such engineers, accountants, and other employees as are necessary.”

Section 713.23, Revised Code, defines the powers and duties of a regional and county planning commission in the following terms:

“The regional or county planning commission shall make plans and maps of the region or county respectively, showing the

commission's recommendation for systems of transportation, highways, park and recreational facilities, the water supply, sewerage and sewage disposal, garbage disposal, civic centers, and other public improvements which affect the development of the region or county respectively, as a whole or as more than one political unit within the region or county, and which do not begin and terminate within the boundaries of any single municipal corporation."

Sections 713.24 and 713.25, Revised Code, outline the machinery whereby a regional or county plan upon completion, is certified to municipalities having planning commissions, which plan, *if adopted by the municipal planning commission*, has the same force and effect "* * * within such municipal corporation as is provided by law or charter for plans prepared and adopted by the local planning commission." The county commissioners may similarly adopt the plan in so far as it relates to non-municipal territory.

With the foregoing resume of the applicable legislation in mind, it is necessary to determine the effect thereof upon the powers of (a) the municipal planning commission, (b) the regional planning commission, with respect to their authority to contract with outside firms for services incidental and necessary to the mission of the respective commissions.

As you noted in your letter, I have had the occasion to express an opinion on the authority of certain agencies to contract for such outside services, Opinion No. 3063, Opinions of the Attorney General for 1953. Such question has also been before our courts. *Gorman v. Heuck*, 41 Ohio App., 453; *State ex rel. Manufacturers, etc. v. Sayre*, 15 Ohio C. C., 267; *State ex rel. Stilson etc. v. Ferguson*, 154 Ohio St., 139. The opinion above referred to and the decisions are in unanimous agreement on the principle that no agency, officer, or entity may make such a contract unless the power is expressly granted in, or necessarily implied from the statutes applicable to them. It is apparent, however, that in applying this principle to any given case, precedent is of somewhat less value than analysis of the terminology of the statutes involved.

Revisiting the statutory powers of a municipal planning commission, in this respect, it is quite clear that the authority to engage an outside, or independent contractor, is given. The words, "* * * control, appoint or employ such architects, engineers or other professional service * * *", as used in Section 713.05 *supra*, are corroborative of this viewpoint. If

we were to apply all the common dictionary definitions of the words, "control," "appoint," and "employ", the only reasonable inference is that the legislature intended to run the gamut of all commonly accepted means whereby the work, labor and service of one person or firm might be engaged by another. In this connection the term "other professional service" is likewise significant, since the legislature, here, apparently intended to denominate the service itself as distinct from the performers of the service. This brings the terminology squarely within the recognized legal distinction between the employer-employee relationship on the one hand and the principal-contractor relationship on the other.

"* * * Thus it will be seen, without any extended analysis of any of the various lexical definitions, that the significant element in the relation of an employe and his employer, specifically considered, is personal service, while the significant element in such relation between a contractor and his principal is the work, as an entirety to be performed by him." *Farmer v. St. Croix Power*, 93 N.W. 830, 834, 117 Wis., 76.

It is also noteworthy that in the same sentence wherein the power to "control, appoint or employ" architects and the like is granted, in the engagement of subordinates such as clerks and draughtsmen the term "appoint" is used alone without the broadening influence of the words "control" and "employ." In my opinion this omission is more than accidental and indicates a legislative intent that such subordinates shall be strictly salaried employees in contrast with the "architects, engineers and other professional service" which could be engaged on other contractual bases.

It is considered that this conclusion as applied to a municipal planning commission is in accord with both my previous opinion No. 3063 and the court decisions, cited supra.

In opinion No. 3063 the statute gave the director power to "* * * appoint all necessary assistants, superintendents * * * and all other employees of the department. * * *"

Obviously this grant is restrictive in nature similar to the limitation of a municipal planning commission to appoint "subordinate employees" without the broader power of such commission to "control, appoint or employ architects, engineers and other professional service * * *".

In the Gorman case, supra, it was argued that statutory provisions

authorizing county commissioners to provide “such facilities as will result in expeditious and economical administration of the said county offices” and authorizing the county auditor to “appoint and employ such experts, deputies and clerks, *or other employees*” were broad enough to allow the engagement of an independent corporation for purposes of research and recommendation of procedures for more efficient and economical operation of these county offices. The court rejected these arguments, holding that power to provide facilities and the like did not comprehend the power to contract for such services, and further holding that an appointment by a county auditor of an expert must be of a person who could be deputized, for which deputization a corporation could not qualify. Clearly, the holding in the Gorman case is not in conflict with the conclusions I have previously reached.

In *State, etc. v. Sayre*, supra, the court held that a statute empowering a tax assessor or board of assessors, to “appoint” an “assistant,” or “expert assistants,” did not authorize the engagement of an independent firm. Here, again, the appointment power was restrictive in its terminology and not opposite to the language employed by the legislature with respect to municipal planning commissions.

The holding of *State, etc. v. Ferguson* supra, is best expressed by the following quotation of the second branch of the syllabus, as follows:

“The phrase, ‘employ such assistants,’ as used in Section 1178-17, General Code, does not authorize the director of highways to enter into a contract with a firm of professional engineers, delegating authority to such firm to make surveys, plans and contract specifications for the improvement of a state highway, for which service compensation is to be a fee based upon a specified percentage of the cost of the proposed highway improvement.”

The court, in its opinion based its holding upon the commonly understood meaning of “assistants.” This is likewise readily distinguishable from the broader language used in Section 713.05 supra.

The language used by the legislature with respect to the authority of a regional planning commission in empowering it to “* * * employ such engineers, accountants and other employees as are necessary,” occupies a neutral territory between the broad implications of the corresponding language of Section 713.03 supra, applicable to the municipal

planning commission, and constructions imposed by my previous opinion and the judicial decisions previously summarized. Perhaps the closest in terms of precedent is the Gorman case, *supra*, which construed Section 5548, General Code, now Section 5713.01, Revised Code, with respect to the county auditor's power to "* * * appoint and employ such experts, deputies and clerks, or other employees as he may deem necessary to the performance of such duties as such assessor * * *." As previously noted, however, the court based its finding on the fact that an independent corporation was not capable of deputization stating, in part, at page 461:

"The section (5548, G.C.) refers to the duties of the county auditor in the assessment of real estate, and the reappraisal thereof. The evidence shows that the tax commission of Ohio approved the appointment only of such experts as should be deputized by the auditor. As the bureau was a corporation, it could not be, and was not, deputized, and hence there was not such compliance with this section of the General Code as would authorize the contracts with the bureau upon the premise that **it was an expert capable of employment.**"

It would, accordingly, appear that the above language is strongly susceptible of the implication that had the contractor been an individual capable of deputization, and retained for the purpose of assessing and reappraising real estate, the language of the statute would have been held sufficiently broad so as to allow an engagement on a contractual basis similar to that now under consideration.

The case of *State etc. v. Ferguson*, *supra*, which has also been considered with relation to the powers of a municipal planning commission, dealt with a statute, Section 1178-17 General Code, now Section 5501.10, Revised Code, providing that the highway director "may *employ* such assistants as are necessary to prepare plans and surveys * * *," and also "may *appoint* additional clerks and stenographers, and such other engineers, inspectors and other employees as he may deem necessary * * *." This case is factually distinguishable since the legislative intent is clearly and unmistakably expressed in the same section wherein it is stated that "*all employees and appointees* hereinbefore mentioned in this act shall, *in addition to their salaries*, receive their actual necessary traveling expenses when on official business." Manifestly the legislature contemplated nothing more than the employer-employee relationship denoted by the term "salaries."

Both my previous opinion No. 3063 and the case of *State etc. v. Sayre*, discussed supra, involved statutes using the more restrictive term "appoint" rather than the term "employ" as used in the statute here under consideration, and also referred to "assistants" which term is likewise not used in the enumeration of the employment powers of the regional planning commission.

Lacking then, a precise precedent, some indication of legislative intent may be gleaned from a consideration of the regional planning commission and its relationship to other statutory bodies having kindred functions.

As an offspring of the marriage between the county commissioners and the municipal planning commission it is a reasonable assumption that the regional planning commission was intended to inherit the characteristics of its progenitor in so far as necessary to the performance of its functions. This is particularly so since its duties are fundamentally the same as the municipal planning commission. While it is true that the legal effect of the planning of the regional commission is vastly different from that of the municipal, in that its plans require adoption by the parent municipalities or boards of county commissioners in order to become operative, nevertheless its duties to "make plans and maps of the region * * *" is expressed in precisely the same terms as the duty of the municipal planning commission in this respect. Given this identity in mission it is a reasonable inference that the legislature intended a corresponding identity in the means to be employed in its accomplishment. Although the draftsman of the statutes has employed somewhat different terminology in those provisions dealing with employment, it is worthy of note that Section 713.05 and 713.21 differ in the time of their respective enactments by approximately eight years and may represent differing modes of expression of different draftsmen.

Perhaps it is not amiss to digress into the related field of zoning in order to ascertain a further clue to the probable legislative intent in this regard. Examination of Sections 713.06 to 713.10, Revised Code, discloses that the planning and zoning functions are closely integrated in the planning commission on the municipal level. In like manner there is a similar integrated relationship between the county rural zoning commission and the regional or county planning commission. Section 303.05, Revised Code, after requiring the submission of a zoning plan by the county

rural zoning commission gives the following unmistakable grant of power to contract with independent firms in the following language :

“* * * The zoning commission may, within the limits of the moneys appropriated by the board for the purpose, employ or contract with such planning consultants and executive and clerical assistants as it deems necessary. * * *”

The statute then later provides :

“* * * In any county where there is a county or regional planning commission, the zoning commission may request such planning commission to prepare or make available to the zoning commission a zoning plan. * * *”

The conclusion to be drawn from this latter portion of this statute is that upon request the regional or county planning commission is required to assume this planning aspect of the rural commission's zoning functions. It could hardly be supposed that the legislature, in permitting the rural zoning commission to relieve itself of the duty to prepare a zoning plan must have considered that the successor to that responsibility already possessed in the exercise of its planning functions the same means of discharging such responsibility, i.e., contracting with independent firms.

While no one of the previously discussed indicia of legislative intent is, per se, controlling, their cumulative effect coupled with a lack of evidence of a contrary legislative intent, compels me to conclude that the regional planning commission possesses the necessary power to contract with independent firms.

Having reached this conclusion, it becomes unnecessary to consider your second question.

Accordingly, in specific answer to your inquiry it is my opinion that a regional planning commission is authorized to enter into a contract with an outside firm as independent contractor for the making of such surveys, studies and reports as are necessary to the performance of the functions of such regional planning commission.

Respectfully,

C. WILLIAM O'NEILL
Attorney General