

**OPINION NO. 81-074****Syllabus:**

1. In order to qualify for federal funds, a metropolitan housing authority has the power to execute a loan agreement with a federal agency, agreeing to retain a definition of "families of low income" which coincides with the corresponding definition established by the federal agency, even though the agency's definition may change during the life of the loan, and to act, within the limits of its statutory authority, in accordance with that agreement in retaining such definition throughout the life of the loan.
2. The State Board of Housing, in the proper exercise of its discretion, may approve a metropolitan housing authority's determination of "families of low income," made in order to qualify for federal funds, which incorporates the federal determination, as it may be amended.

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**To: Andrew Hutjera, Harrison County Pros. Atty., Cadiz, Ohio**  
**By: William J. Brown, Attorney General, December 2, 1981**

I have before me your request for my opinion concerning the manner in which a metropolitan housing authority may exercise its power to determine who are

"families of low income" for purposes of R.C. 3735.40(D)<sup>1</sup> and R.C. 3735.41(A).<sup>2</sup> The relevant facts set forth in your letter read as follows:

The Harrison Metropolitan Housing Authority proposes to fund certain rural housing programs for low and moderate income tenants through the vehicle of an FmHA grant and/or loan. In order to remain eligible throughout the life of the loan, it is necessary that the recipient. . .Harrison Metropolitan Housing Authority, retain a definition of "families of low income" which coincides with the definition established by FmHA. I have been informed that from time to time the Farmers Home Administration alters its definition of "low and moderate income families." Apparently, Farmers Home Administration refuses to fund any program established by the Harrison Metropolitan Housing Authority unless assurance can be given that it will keep its definition of "families of low income" in coincidence with Farmers Home Administration definition.

You specifically wish to know whether a metropolitan housing authority may agree to maintain its definition of "families of low income" so as to coincide with the corresponding definition established by the Farmers Home Administration (a federal agency)<sup>3</sup> during the life of a loan from the Farmers Home Administration, or whether such an agreement would constitute an unlawful delegation of governmental power by the housing authority. You also wish to know whether the State Board of Housing, which reviews and either approves or disapproves the housing authority's determination of who are "families of low income," pursuant to R.C. 3735.41, may lawfully approve such an agreement between the metropolitan housing authority and the federal agency, or whether such approval would constitute an unlawful delegation of the Board's authority.

As a matter of general background, R.C. 3735.27 provides that whenever the State Board of Housing determines "that there is need for a housing authority in

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<sup>1</sup>R.C. 3735.40(D) defines "families of low income" as "persons or families who lack the amount of income which is necessary, as determined by the metropolitan housing authority undertaking the housing project, to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings, without overcrowding."

<sup>2</sup>R.C. 3735.41 reads in part:

In the operation or management of housing projects a metropolitan housing authority shall observe the following duties with respect to rentals and tenant selection:

(A) It shall not accept any person as a tenant in any dwelling in a housing project if the persons who would occupy the dwelling have an aggregate annual income less such deductions and exemptions therefrom as are authorized by law or the regulations established by the public housing administration which equals or exceeds the amount which the authority determines, which determination shall be subject to review and approval of the state board of housing, to be necessary in order to enable such persons to secure safe, sanitary, and uncongested dwelling accommodations within the area of operation of the authority and to provide an adequate standard of living for themselves.

<sup>3</sup>I note that, while Ohio statutes use the term "families of low income," R.C. 3735.40(D), the corresponding term used in the federal law is "low or moderate income household." 7 C.F.R. §1944.205(d).

any portion of any county that comprises two or more political subdivisions or portions thereof but is less than all the territory within the county," the Board shall declare that a metropolitan housing authority exists, and shall define the territorial limits of the authority. The Board shall determine that there is a need for a housing authority, if it finds that there are either "[u]nsanitary or unsafe inhabited housing accommodations" existing in the area, or "a shortage of safe and sanitary housing accommodations in such area available to persons who lack the amount of income which is necessary, as determined by said board [of housing], to enable them, without financial assistance, to live in decent, safe, and sanitary dwellings without congestion." R.C. 3735.27(A) and (B). R.C. 3735.31 sets out the powers of a metropolitan housing authority, which may be exercised in order "[t]o clear, plan, and rebuild slum areas within the district wherein the authority is created, or to provide safe and sanitary housing accommodations to families of low income within such district, or to accomplish any combination of the foregoing purposes."

In analyzing your question, I find it necessary first to characterize the nature of the power being exercised by a metropolitan housing authority when it makes a determination as to who are "families of low income." A metropolitan housing authority is a body corporate and politic, R.C. 3735.31; R.C. 3735.56, and is, at least for some purposes, a political subdivision, R.C. 3735.50. It may not exercise any purely legislative power, as only the General Assembly may exercise the legislative power of the state. Ohio Const. art. II, §1.<sup>4</sup> See Belden v. Union Central Life Insurance Co., 143 Ohio St. 329, 55 N.E.2d 629 (1944). A metropolitan housing authority may, however, exercise that administrative power which the General Assembly has deemed fit to delegate, as long as the General Assembly has established a policy, and fixed standards for the guidance of the metropolitan housing authority. See Belden v. Union Central Life Insurance Co. R.C. 3735.27 and R.C. 3735.31, as set forth above, seem to adequately establish the policies and general guidelines to which a housing authority must conform in exercising its administrative powers.

An administrative power may be quasi-legislative or quasi-judicial in nature. An administrative decision which has general application to large numbers of people, and operates in the future, is considered to be of legislative quality. See In Re Petition of Martins Ferry Metropolitan Housing Authority, 2 Ohio App. 2d 237, 207 N.E.2d 672 (Belmont County 1965). Administrative decisions which affect a limited number of individuals, and which operate on past transactions and circumstances are considered judicial in nature. In Re Petition of Martins Ferry Metropolitan Housing Authority. In this situation, a metropolitan housing authority appears to be acting in a quasi-legislative fashion under R.C. 3735.31(A), in setting the standards for determining who are "families of low income" for purposes of eligibility for residence in a housing project operated and managed by the housing authority. This determination has general application to large numbers of people, and operates upon a future set of events.

By incorporating a federal standard, as such standard may be amended, as its own determination of who are "families of low income," the metropolitan housing authority is, in effect, delegating its authority to make such determination to the federal government. See City of Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 919 (1945). There is, however, no constitutional prohibition against the delegation or redelegation of administrative authority similar to the constitutional prohibition against the delegation of legislative authority. See generally Note, The Constitutionality of Laws Providing for Incorporation of Other Laws, Rules and Regulations in Futuro, 8 U. of Cin. L. Rev. 310 (1934). "In the operation of any public administrative body, subdelegation of authority, impliedly or expressly,

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<sup>4</sup>Municipal legislative authorities, in the exercise of municipal home rule powers, may legislate as to matters of local self-government. A municipality's legislative power, like the General Assembly's, may not be delegated to other bodies, including the federal government. See City of Cleveland v. Piskura, 145 Ohio St. 144, 60 N.E.2d 919 (1945).

exists—and must exist to some degree. The real issue for decision is at what point delegation must stop and the board itself must act."<sup>5</sup> Bell v. Board of Trustees, 34 Ohio St. 2d 70, 74, 296 N.E.2d 276, 278 (1973) (citations omitted). See Stubbs v. Mitchell, 65 Ohio L. Abs. 204, 114 N.E.2d 158 (Franklin County 1952) (holding that a board of health could delegate its administrative power to enforce a regulation to the Humane Society). In Bell, the court examined the relevant statutory provisions setting out the powers of a county hospital board of trustees in order to determine whether the board had the express or implied power to delegate a particular function.

The principle set forth in Bell fits neatly with the general principle that, as a creature of statute, a metropolitan housing authority has only those powers expressly granted by statute, and those necessarily implied or incident thereto. See 1941 Op. Att'y Gen. No. 3650, p. 226. See also 1940 Op. Att'y Gen. No. 3188, vol. II, p. 1149. Thus, in order to respond to your question, I must determine whether a metropolitan housing authority has the statutory power (either express or implied) to agree to retain during the life of a loan, a definition of "families of low income" which coincides with the definition established by the Farmers Home Administration, as such definition may be amended from time to time, in order to receive federal funds for housing programs.

As a general principle, a local housing authority is said to have broad discretion in the planning and execution of housing projects. See St. Stephen's Club v. Youngstown Metropolitan Housing Authority, 160 Ohio St. 194, 115 N.E.2d 385 (1953); State ex rel. Ellis v. Sherill, 136 Ohio St. 328, 25 N.E.2d 844 (1940). More specifically, pursuant to R.C. 3735.31(A), a metropolitan housing authority has the power to receive grants from the federal government. R.C. 3735.31(B) empowers a metropolitan housing authority to "execute contracts and all other instruments necessary or convenient to the exercise of the powers granted" by R.C. 3735.31, as well as to "make, amend, and repeal bylaws, rules, and regulations to carry into effect its powers and purposes." R.C. 3735.31(C) provides that a metropolitan housing authority may:

[b]orrow money or accept grants or other financial assistance from the federal government for or in aid of any housing project within its territorial limits; take over or lease or manage any housing project or undertaking constructed or owned by the federal government; comply with such conditions and enter into such mortgages, trust indentures, leases, or agreements as are necessary, convenient, or desirable.  
(Emphasis added.)

From the statutory language set forth above, it is apparent that a metropolitan housing authority has the broad discretion to do whatever is necessary in order to qualify for federal funds, as long as those actions are not prohibited by the Constitution nor in conflict with state statutes. See U.S. Constructors and Consultants Inc. v. Cuyahoga Metropolitan Housing Authority, 35 Ohio App. 2d 159, 300 N.E.2d 452 (Cuyahoga County 1973). See also 1978 Op. Att'y Gen. No. 78-060 (interpreting R.C. 307.85, which grants to counties the power to participate in federal programs). (Of course, the federal funds must be used to carry out the statutory duties of the housing authority—i.e. to clear slums and/or provide safe and sanitary housing to low income families.) More specifically, a metropolitan housing authority has the power to borrow money from the federal government in aid of a housing project. The housing authority may execute contracts and other instruments necessary to the exercise of that power, and may comply with such conditions, and enter into such mortgages and other agreements as are necessary, convenient, and desirable with regard to the exercise of that power.

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<sup>5</sup> See footnote six, infra.

A metropolitan housing authority also has broad discretion to establish the procedure for determining the eligibility of tenants in housing projects, pursuant to R.C. 3735.41(A). See 1955 Op. Att'y Gen. No. 5420, p. 290. This discretion, together with a metropolitan housing authority's discretion to plan and execute housing projects, and the housing authority's statutory power to enter into such contracts and agreements and to comply with the appropriate conditions in order to qualify for federal funds in assistance of a housing project, lead me to the conclusion that, in order to qualify for federal funds, a metropolitan housing authority has the implied statutory power<sup>6</sup> to execute a loan agreement with the federal government, agreeing to retain a definition of "families of low income" which coincides with the definition established by the Farmers Home Administration, even though the federal agency's definition may change during the life of the loan, and to act, within the limits of its statutory authority, in accordance with that agreement in retaining such definition throughout the life of the loan.<sup>7</sup> I am unaware of any constitutional provision which would prohibit the execution of such an agreement.

Other provisions in R.C. Chapter 3735 indicate that the legislature contemplated that a metropolitan housing authority's determination of tenant eligibility could depend on federal law. Pursuant to R.C. 3735.41(A), in determining what income will qualify a person for residence in a housing project, the housing authority must consider the deductions and exemptions from income which are authorized by the public housing administration, a federal agency. More directly on point, R.C. 3735.42 requires a metropolitan housing authority to give preference to families of veterans and servicemen in selecting tenants for housing projects "[e]xcept as provided in any contract for financial assistance with the federal government."

The statutes of Ohio contain other examples of instances in which the exercise of administrative discretion is affected by considerations of federal law.

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<sup>6</sup>In 1979 Op. Att'y Gen. No. 79-067, I opined that a public body needs express authority to delegate statutory duties requiring the exercise of judgment and discretion, while the authority to delegate ministerial duties may be implied. A metropolitan housing authority's duty to determine who are "families of low income" obviously requires the exercise of judgment and discretion. However, as explained more fully below, while a metropolitan housing authority has no express power of delegation, there is authority for a housing authority to do what is necessary in order to qualify for federal funds, which is broad enough to encompass the power to delegate this particular decision-making function.

<sup>7</sup>I note that while a metropolitan housing authority has the power to agree to retain a definition of "families of low income" which coincides with the definition promulgated by the federal agency, as it may be amended, the housing authority is still bound by the standard set forth in R.C. 3735.40(D) and R.C. 3735.41(A). The housing authority has no statutory authority to adopt or retain a definition of "families of low income" which will allow people who have the means, without assistance, to live in decent, safe, sanitary, and uncongested dwellings, to qualify for residence in a housing project. The Farmers Home Administration uses a definition of "low or moderate income households," which is based on standards for maximum adjusted income, 7 C.F.R. §1944.205(d), while the definition set forth in R.C. 3735.40(D) is "families of low income." Certainly, it is within the discretion of a housing authority to determine that those people who fall within the federal definition also qualify for housing under the standard set forth in R.C. 3735.40(D) and R.C. 3735.41(A). However, a metropolitan housing authority has the continuing responsibility to determine that the federal definition, as it is amended, will qualify for project housing only those people who cannot afford decent, safe, sanitary, and uncongested dwellings.

For instance, R.C. 5101.18(A) requires the Director of Public Welfare to determine what payments to an individual applying for or receiving aid to dependent children or poor relief shall be considered income. Division (A) sets out four factors to be taken into account in making this determination. Division (B) of R.C. 5101.18 reads in part: "The director shall also take into consideration whether. . .such determination would jeopardize the receipt of any federal grant or payment by the state. . . ." Although the metropolitan housing authority's power to consider the effect of its determination on federal funding is implied and permissive, rather than express and mandatory as in R.C. 5101.18(B), this section demonstrates that an administrator's statutory determinations may properly be dependent on considerations of federal funding.

You have also inquired about whether the State Board of Housing's approval of a metropolitan housing authority's incorporation of federal standards would constitute an unlawful delegation of authority. The metropolitan housing authority's determination of "families of low income" is subject to review and approval by the State Board of Housing pursuant to R.C. 3735.41(A). It is clear that the State Board of Housing has no statutory authority to delegate this power of review (a quasi-judicial power) to any other body. However, there is nothing to prevent the Board, in the proper exercise of its discretion, from approving any determination of "families of low income" by a housing authority, including the determination contemplated in the instant situation, if the Board feels such approval is warranted. By considering and approving such a determination pursuant to statute, it cannot be said that the Board is delegating its reviewing function in any way. Of course, the Board also has the discretion to disapprove the housing authority's determination. I note that decisions of the State Board of Housing are appealable to a court of appeals by any person directly affected and aggrieved by the decision. R.C. 3735.22.

In conclusion, it is my opinion, and you are so advised, that:

1. In order to qualify for federal funds, a metropolitan housing authority has the power to execute a loan agreement with a federal agency, agreeing to retain a definition of "families of low income" which coincides with the definition established by the federal agency, even though the agency's definition may change during the life of the loan, and to act, within the limits of its statutory authority, in accordance with that agreement in retaining such definition throughout the life of the loan.
2. The State Board of Housing, in the proper exercise of its discretion, may approve a metropolitan housing authority's determination of "families of low income," made in order to qualify for federal funds, which incorporates the federal determination, as it may be amended.